



Theme 1

Introduction to the law

Study objectives (9)

1. Explain the basis of the SA Law
2. Discuss the development of the Roman Law
3. Discuss the development of the Roman- Dutch law
4. Discuss the development of SA law
5. Discuss the historical development of the SA law
6. Distinguish between objective and subjective law
7. Discuss Divisions of objective law
8. Distinguish between peremptory and regulatory rules of law
9. Discuss the 4 categories of subjective rights

History of the South African Law

- ⊠ The South African Law is based on Roman-Dutch law (common law), but is not limited thereto. Other sources include court decisions, legislation and English Law.
- ⊠ Roman-Dutch Law (on which our law is based) consists of 2 systems:
 - Roman Law
 - Dutch Law

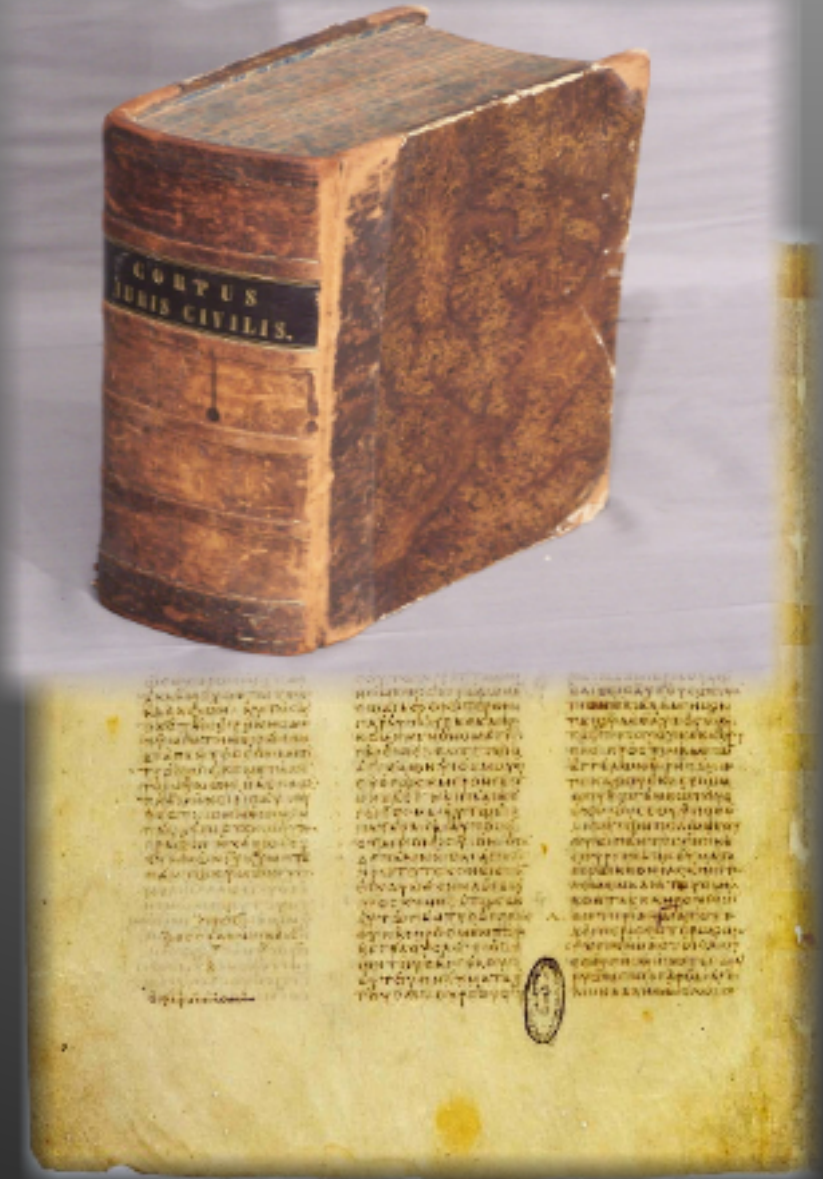
Roman Law

- ⊠ Development of the Roman Law during the Roman empire:
 - **The Period of Kings** Rome is relatively un-developed and the law consists of customs.
 - **Republican Period** Roman Law is systematised for the first time and put into writing in the Twelve Tables.
 - **The Period of the Emperors** The law developed into a sophisticated system due to works of the jurists.
 - **The Dominate** Absolute monarchy. The legal system stagnates and declines.

❖ After the Germanic tribes conquered the Western Roman empire, the Roman Law started to decline.

❖ In the Eastern Roman empire Justinian ruled. He instructed a commission to codify (put in writing) the legal system. This codification was called the *Corpus Iuris Civilis* and consisted of 4 parts:

- ***Digest*** Opinions and writings of Roman jurists.
- ***Institutes*** Textbook for students.
- ***Codex*** Collection of current legislation.
- ***Novellae*** Collection of legislation enacted after the above mentioned works



Roman-Dutch Law

- ❏ By the end of the Middle Ages there was an increasing need for a developed legal system, this was also the position in Holland (province of the Netherlands).
- ❏ Holland applied the principles of the Roman Law adjacent to the indigenous law. This led to the adoption of the Roman Law.
- ❏ Various jurists produced writings on Roman and Dutch law. Their opinions are still today accepted as authoritative by South African courts. Examples are Hugo de Groot, Johannes Voet, Simon van Leeuwen, ect. They are known as “old writers”.



South-African Law

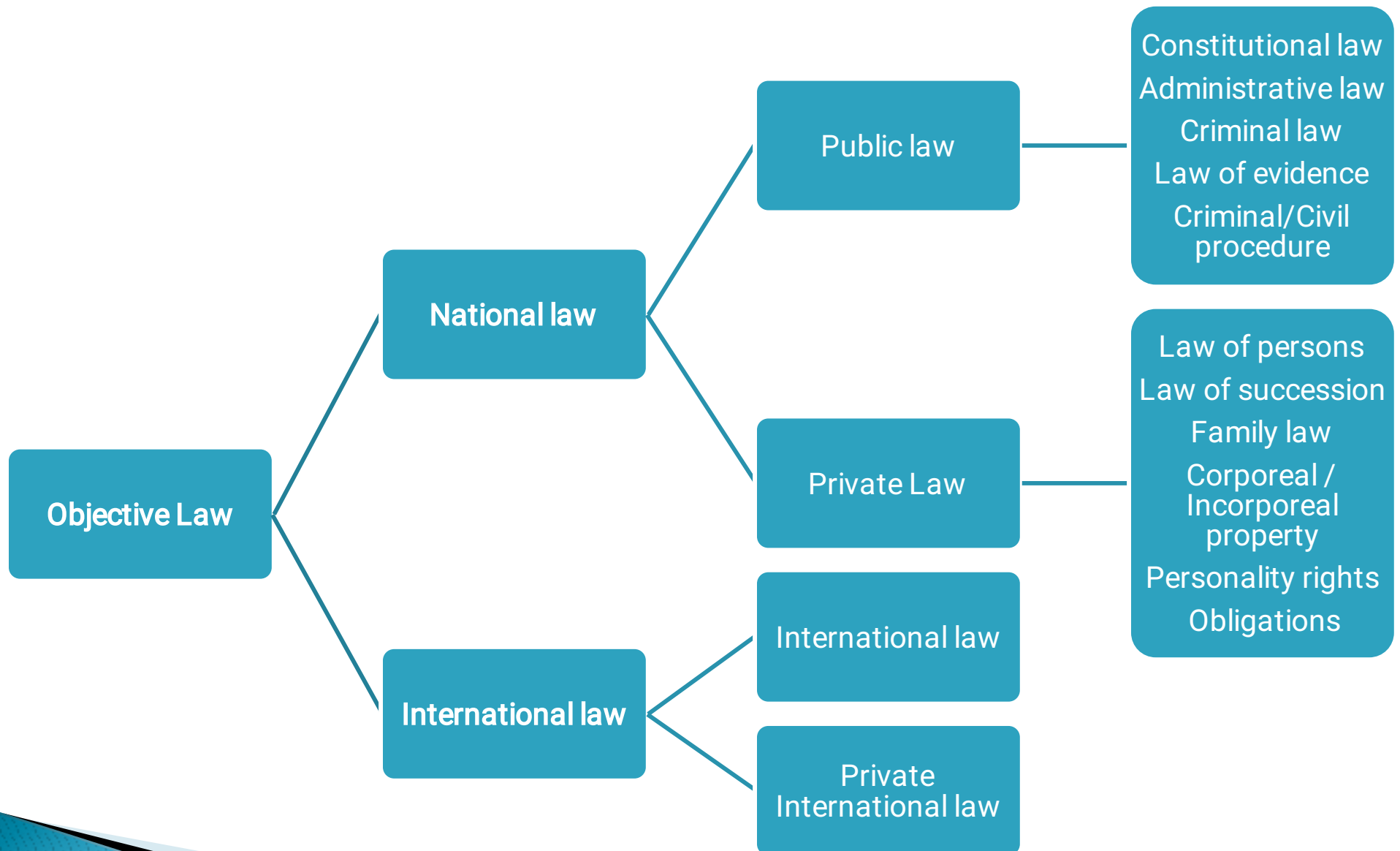
- ⌘ Jan van Riebeeck brought the Roman-Dutch law to South Africa in 1652. Despite the English occupation in 1806 – this system remained in force.
- ⌘ The South African law was also strongly influenced by English law due to the following factors:
 - Judges and Magistrates were imported from England.
 - Local jurists studied in England.
 - English court decisions were often referred to.
 - Many SA Acts were based on corresponding English Acts.
 - Final court of appeal was the Privy Council in England.
- ⌘ **The South African system is therefore a “mixed” system consisting of the Roman-Dutch law influenced by local customs and legislation and English**



South African Legal System

- ⊠ The function of the law is a set of behavioural rules to regulate society in a peaceful manner. The State exercises its authority in this regard. Other rules of conduct not under the authority of the State include ethics, morality, religion, etc.
- ⊠ Thus 2 terms can be distinguished:
 - A system of rules applicable to the community
 - ⊠ **(objective law)**
 - A right which a person has to something
 - ⊠ **(subjective law)**

Divisions of the objective law




Subjective rights

- ⌘ A subjective right is a protectable interest which a legal subject (eg. a person / company) has to a particular legal object (eg. A thing).
- ⌘ Subjective rights are divided into 4 categories:
 - **Real rights** Rights to a thing, eg. Land.
 - **Immaterial / Intellectual Property rights** Right in relation to the products of his creativity, eg. Copyright.
 - **Personality rights** Right as objects of a person's personality, eg. Good name.
 - **Personal rights** Rights to claim against another to perform in terms of an obligation, eg. Contract.



***CREATION OF LEGAL RULES AND THE
ADMINISTRATION OF JUSTICE***

Distinguish

- ⊠ **Sources of law** Sources where the law can be found. (Common law, statutory law, court decisions, custom)
 - ⊠ **Sources for creation of law** Sources through which new rules are created. (Legislation, court decisions, custom)
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Custom as a Source of Law

- ⊠ Custom plays a less important role in modern societies. However custom can be so forceful that an unwritten rule is thereby created.
- ⊠ To qualify as a legal rule, a custom must meet the following requirements:
 - It must be reasonable.
 - It must have existed for a reasonable period.
 - It must generally have been observed by the community.
 - Content must be certain and clear.
- ⊠ Legal rules can be created by custom or they can be abrogated by disuse or the development of a custom to the contrary. Legislation however can only be repealed by a body which passes legislation.

Legislation as Source of Law

Acts of Parliament

- ⊠ Historically the South African Parliament was sovereign. (Courts could not declare an Act of Parliament void.)
- ⊠ Constitution (Act 108/1996) radically changed this situation.
- ⊠ Parliament passes legislation on national level. Parliament consists of the National Assembly and the National Council of Provinces. Legislation is usually passed by an ordinary majority. There are however exceptions eg. Bill of Rights can only be amended by $\frac{2}{3}$ majority.
- ⊠ Courts now have the power to test legislation against the provisions of the Constitution and declare it invalid if found in conflict therewith.

Provincial legislation

- ⊠ 9 provinces each with its own legislature.
- ⊠ Provincial legislature pass legislation on eg. Local government, roads, traffic, ect.

Subordinate legislation

- ⊠ Legislative powers have also been delegated to a number of bodies eg. University councils, health bodies and Ministers.
- ⊠ Regulations and proclamations are passed by them, this is known as subordinate legislation.
- ⊠ Requirements for valid subordinate legislation:
 - It must be reasonable.
 - It must be impartial.
 - It must be certain and clear.
 - It must be promulgated.
 - It may not be *ultra vires*.
- ⊠ Constitutional Court can declare an Act of Parliament, a provincial Act, or conduct of the President invalid if found in conflict with the Constitution.

Court Decisions as Source of Law

- ⊠ **High courts** Supreme Court of Appeal in Bloemfontein is the highest court in all matters, except constitutional issues. Provincial divisions of the high court are found in every province.
- ⊠ **Lower courts** Divided into magistrate's courts (civil and criminal matters) and regional courts (criminal matters).
- ⊠ **Special courts** Examples: Labour court, Land Claims court, etc.

Jurisdiction of the courts

- ⊠ **Lower courts** Civil jurisdiction limited to R100 000 and certain cases like sequestration are excluded. Criminal jurisdiction limited to R60 000 or 3 years imprisonment (murder, rape and treason excluded). Regional court jurisdiction limited to R300 000 and 15 jaar imprisonment (treason excluded).
- ⊠ **High court** Few limitations.

Doctrine of Judicial Precedent (Rule of *Stare Decisis*)

- ⊠ In terms of the doctrine a court's decision creates a precedent and should be followed by:
 - Judges of the same court;
 - Courts of a lower order which are subordinate to that court.
- ⊠ Court is only bound by the *ratio decidendi* (the legal principle laid down) and not the *obiter dictum* (opinion on a legal principle 'in passing').

Application of the doctrine

The Court of Appeal is only bound by its own previous decisions.

A high court is bound by the decisions of the Supreme Court of Appeal and by its own previous decisions.
(Not other divisions)

Lower court is bound by a decision of a higher court, but its own decisions create no precedent.

Criminal and Civil Cases

⊠ Civil cases

- 2 parties litigate in order to resolve a dispute.
- Prove case on a preponderance of probabilities.

⊠ Criminal cases

- State prosecutes a subject for commission of a crime.
- Prove case beyond reasonable doubt.

⊠ Parties

- Civil: Plaintiff v Defendant
- Criminal: State v Accused

END