

Introduction to Criminal Law

Study Guide notes

1.1 History of South African Criminal Law

The term "the criminal law of South Africa" refers to those rules of law not contained in an Act of parliament or in legislation by some other (subordinate) legislative body.

The rules of substantive criminal law are, for the most part, not contained in any Act of parliament. Stated differently, we can say that our criminal law – including the general principles of our criminal law – is not codified (i.e. summarised in a "code"). (Our criminal procedure, on the other hand, i.e. those rules stipulating how an accused must be brought to trial and how the trial must proceed, is codified in Criminal Procedure Act 51 of 1977).

The common law of South Africa is Roman-Dutch law. By Roman-Dutch law, we mean that system of law that originated in Rome about 2 500 years ago, then spread to Western Europe during and after the Middle Ages, was received in the Netherland from the late thirteenth century up to the end of the sixteenth century, was applied in Cape by the officials of the Dutch East India Company after 1652, and was later accepted and applied in all those colonies and regions of Southern Africa that formed the Union of South Africa in 1910. After the annexation of the Cape by England, Dutch criminal law was also considerably influenced by English criminal law. Our common law was further amended and supplemented by legislation.

1.2 The sources of our criminal law

(1) Legislation. If there is an Act (legislation) dealing with a specific crime or other topic relevant to criminal law, the courts must apply such Act.

As far as legislation is concerned, there is one piece of legislation that towers above all other importance, namely the **Constitution of the Republic of South Africa 1996**. Chapter 2 of the Constitution contains a **Bill of Rights**.

- All rules of law, irrespective of whether they are contained in legislation or in common law, must be compatible with this Bill of Rights.
- If a rule is incompatible with the Bill of Rights, it may be declared null and void.
- Among the rules set out in the Bill of Rights are the following:
 - The right to equality before the law (s9)
 - The right to life (s11)
 - The right to privacy (s14)
 - The right to freedom of expression (s16)
 - The right to freedom of movement (s21)
 - The right to a fair trial (s35)

(2) Common law. The contents of the common law can first of all be found in the primary sources of the common law, that is, **the writings of the Roman-**

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