

# **Chapter 2**

## **The Law**



# 1 Sources of Law

There are 5 sources of law in Kiribati. They are:

- the *Constitution*;
- every Ordinance and every Act and all subsidiary legislation made under an Ordinance or Act;
- customary law;
- the common law of Kiribati;
- every applied law: *s2 Laws of Kiribati Act*.

## 1.1 The Constitution

The *Constitution* is the supreme law of Kiribati: *s2 Constitution; s4(1) Laws of Kiribati Act*.

Any law inconsistent with the *Constitution* is void to the extent of the inconsistency: *s2 Constitution*.

Among other things, the *Constitution*:

- sets out the basic structure of government;
- outlines requirements of citizenship;
- protects fundamental rights and freedoms;
- provides protection and representation for Banabans.

Procedures for amending the *Constitution* are different than for other Acts. See *ss69, 124 Constitution*.

## 1.2 Legislation

The legislation of Kiribati is made up of all Acts and Ordinances (also known as Statutes and enactments) made by the Maneaba ni Maungatabu, as well as any subsidiary legislation created under the Acts or Ordinances.

For example, several sections in the *Magistrates' Courts Ordinance* provide for the creation of subsidiary legislation in the form of Schedules or Rules.

Schedules and other Rules are valid legislation and must be followed.

### 1.3 Customary Law

Customary law is recognised in Kiribati by the *Laws of Kiribati Act*.

Customary law is made up of the customs and usages, existing from time to time, of the natives of Kiribati: *s5(1) Laws of Kiribati Act*.

The rules for determining and recognising customary law are governed by *Schedule 1, Laws of Kiribati Act*.

#### Civil Cases

The rules for dealing with customary law in civil cases can be found in *s4 Schedule 1, Laws of Kiribati Act*.

#### Land Cases

The rules for dealing with customary law in civil cases can be found in decisions of the High Court and Court of Appeal on appeal from the Magistrate's Courts.

#### Criminal cases

Customary law may only be taken into account in criminal cases to:

- ascertain the existence of a state of mind of a person;
- decide the reasonableness of an act, default or omission of a person;
- decide the reasonableness of an excuse;
- decide, in accordance with any other enactment, whether to convict a guilty party; or
- determine the penalty (if any) to be imposed on a guilty party: *s3 Schedule 1, Laws of Kiribati Act*.

#### Inquiring into Questions on Customary Law

All questions regarding the existence, application or relevance of customary law are questions of law and you may raise them yourself, even if no party has raised them: *s1(1) Schedule 1, Laws of Kiribati Act*.

If such a question arises you should:

- ask the parties or their counsel to make submissions, and consider the submissions;
- consult reported cases, legal text books or other similar sources; if a doubt still remains
- conduct an inquiry as part of the proceedings in the manner you consider expedient if doubt still remains: *ss1(2),(3) Schedule 1, Laws of Kiribati Act*.

In conducting such an inquiry, you:

- do not have to follow strict legal procedure or technical rules of evidence;

- may call such evidence or require the opinions of people you think fit;
- must admit and consider available evidence (including hearsay and opinion evidence);
- must otherwise inform yourself as you think fit;
- must consider submissions on the question made on behalf of the parties;
- may consult reported cases, books, treaties, works of reference, official reports or statements made by local government councils;
- may accept any matter or thing stated in such sources as evidence on the question: *s1(4) Schedule 1 Laws of Kiribati Act.*

## 1.4 Common Law

Common law is law made and developed by Judges and Magistrates through their decisions. Under common law, each Court is bound by the decisions of superior Courts through the doctrine of judicial precedent.

### Judicial Precedent

All Courts in Kiribati must follow any decision of the Judicial Committee of the Privy Council on questions of law in relation to appeals from Kiribati. If decisions are made in other countries, these are of persuasive authority only: *s13(1) Laws of Kiribati Act.*

All Courts in Kiribati must follow any decision on a question of law of a Court which is superior Court in relation to it: *s13(3) Laws of Kiribati Act.* The Magistrates' Court must follow the decisions of the High Court, Court of Appeal and Privy Council.

### Common Law of Kiribati

The common law of Kiribati is made up of the rules comprised in the common law of England, (including the doctrines of equity) as applied in the circumstances in Kiribati: *s6(1) Laws of Kiribati Act.* These rules are known as "inherited rules".

Kiribati has taken the inherited rules and now adds to them through legislation and its own Court decisions. For this reason, many of the inherited rules do not apply in Kiribati. Because of this:

- rules that were made for England that are not appropriate to Kiribati do not apply as part of the inherited rules;
- laws of England made after 1 January 1961 are not applicable to Kiribati, unless Kiribati chooses to adopt them: *s6(2) Laws of Kiribati Act.*

The common law of Kiribati has full effect, except if it is inconsistent with:

- the *Constitution*;
- an enactment or applied law; or
- the application of customary law in respect of that matter: *s6(3) Laws of Kiribati Act*.

## 1.5 Applied Law

Applied law in Kiribati is made up of the English law existing in Kiribati at the time of independence. Such laws continued in force after independence, with all necessary modifications to make them applicable: *s5 The Kiribati Independence Order 1979*.

In order to patriate the legislation, the Attorney-General may make any changes necessary to ensure the legislation is appropriate to the circumstances in Kiribati and not in conflict with the *Constitution*, any other enactment or customary law: *s8 Laws of Kiribati Act*.

Once the process of adapting the legislation is complete, the transcript is presented to the Maneaba ni Maungatabu for approval. Once all changes are made and approved by the Maneaba it is published and becomes part of the law of Kiribati.

## 2 Interpreting Legislation

It is your job to interpret and apply the legislation. Generally, a Statute contains a section at the start which defines the meaning of certain words and phrases. If the word or phrase is not defined, then it may be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- any relevant definitions in the *Interpretation Act*;
- a dictionary;
- how it has been used in the particular Act and section (i.e. the context it has been used in);
- what purpose Parliament had in passing the law.

When an Act says the Court “may” do something, that means the power may be exercised or not, at your discretion.

When an Act says you “shall” do something, this means you must. You have no choice.

If you have any doubt about the meaning of any section or words in these Acts, contact the Chief Registrar, who can provide guidance. You may also seek help from a member of the Judiciary or a lawyer appearing before you.

### 3 Legal Terms

<b>Term</b>	<b>Meaning</b>
Adjournment	When a case is put off to another date.
Balance of probabilities	The standard of proof required in civil and family cases. The person bringing the claim has to prove it on the balance of probabilities. This means “more likely than not”.
Beyond reasonable doubt	The standard of proof required in criminal cases. The prosecution has to prove all the elements of the offence beyond reasonable doubt. This means you are left in no real doubt at all that the person is guilty.
Burden of proof	This means, who has the responsibility to prove something? In a criminal case, the prosecution has the burden of proving the accused is guilty, beyond reasonable doubt. In a civil case, it is the person bringing a claim who must prove it, on the balance of probabilities.
Cause of action	In civil cases, the type of claim brought by a person against another person, and which explains why that other person should pay money or do something.
Charge	In a criminal case, this is the allegation which the Police make against the accused.
Civil wrong	An act or omission which gives rise to a dispute between individuals or companies. Not a crime.

Common law	Law developed by the Courts through their decisions.
Contested or defended hearing	<p>In a criminal case, a hearing in front of Magistrate(s), where the prosecution tries to prove the accused is guilty. A defended hearing follows on from a not guilty plea.</p> <p>In a civil case, a hearing in front of Magistrate(s), where the applicant tries to prove their claim. It follows on from the other party not admitting the claim.</p>
Contract	An agreement between two or more people. It can be oral or written.
Crime	An act forbidden by the laws of Kiribati.
Customary law	Cultural practice which is relevant to an issue before you.
Decision	The formal process of saying, at the end of the case, what the result is, and what your reasons are.
Discharge	When someone is guilty of a charge, but you do not want to enter a conviction.
Fine	A sum of money you may order an offender to pay in a criminal case, and this must not be more than \$500 on a particular charge.
Hearsay evidence	Indirect, usually second hand evidence.



Identification	The formal process of showing that the person before the Court is the correct person.
Impartial/Impartiality	Being free of any interest or bias in a case.
Jurisdiction	The lawful power to hear a case, and act.
Lawful justification or excuse	A defence to having done a crime, which is allowed for in Statute or the common law.
Legislation	Law passed by the Maneaba ni Maungatabu, called statutory law, Acts, Ordinances, enactments or Statutes.
Litigant	A person who is involved as a party to the case before you.
Plea	In a criminal case, the formal statement as to whether the person admits or denies the charge. Will be either guilty or not guilty.
Plea in mitigation	The speech given before sentence, by an offender, or by the offender's lawyer, in which they will give reasons to try to justify a lesser sentence.
Precedent	Previous decisions of the higher Courts which are binding.
Previous convictions	When, at an earlier time, an offender has been found guilty <b>and</b> been convicted of a charge.
Right of appeal	In any case you hear, and after your decision has been given, the right a person has to come before a higher Court and have the matter reconsidered.

Sentence, and sentencing	The penalty that an offender must pay or do. You pass sentence after you have either found someone guilty, or that person has pleaded guilty. Usually a fine or imprisonment.
Standard of proof	In criminal cases, the standard of proof is beyond reasonable doubt.  In civil cases, the standard of proof is on the balance of probabilities (more likely than not).
Summary offences	Lower type of offences, usually heard by the Magistrates' Courts.
Summons	A formal document advising someone to come to Court.
To convict	The formal process of recording the guilt of the accused after either a guilty plea or decision of guilt by you.