

# 1 Introduction

The *Constitution* sets out numerous fundamental rights and freedoms that are guaranteed to all persons in Kiribati. This chapter focuses on the particular rights which have bearing on the criminal law.

It is the responsibility of all Judges and Magistrates to ensure that these rights are respected in the administration of justice.

Some of the rights particularly important to your role as a Magistrate are:

- the right to personal liberty;
- protection from inhuman treatment;
- protection from deprivation of property;
- protection for privacy of home and other property; and
- right to secure protection of law: *ss5, 7, 8, 9 and 10 Constitution*.

## 2 Right to Personal Liberty

No person in Kiribati may be deprived of his or her personal liberty, except:

- as a result of his or her unfitness to plead to a criminal charge;
- in execution of the sentence or order of a Court in Kiribati or some other country in respect of a conviction for a criminal offence;
- in execution of a Court order punishing him or her for contempt of Court;
- in execution of a Court order made to secure the fulfilment of that person's obligations under the law;
- for the purposes of bringing the person before a Court in execution of a Court order;
- upon reasonable suspicion of the person having committed or being about to commit a criminal offence under the law of Kiribati;
- in the case of a person under 18 years, with the consent of a parent or guardian or under Court order for the purpose of his or her education or welfare;
- for preventing the spread of infectious or contagious disease;
- for the purpose of treatment or protection of the community in the case of a person who is reasonably suspected of being of unsound mind, addicted to alcohol or drugs or is a vagrant;

- for the purpose of preventing unlawful entry of persons into Kiribati or for effecting removal of that person or restricting movement while being conveyed through Kiribati; or
- to such extent as may be necessary in the execution of a lawful order for restricting movement as may be reasonably justifiable where his or her presence would otherwise be unlawful: *s5(1) Constitution*.

## 2.1 Procedure on Arrest

The very strong protections of personal liberty in Kiribati require certain procedural steps to be followed during arrest or detention. You should make yourself aware of these so that you can ensure that all Police and Court procedures obey the *Constitution*.

Any person who is arrested or detained must be informed as soon as reasonably practicable of the reasons for his or her arrest or detention, in a language he or she understands: *s5(2) Constitution*.

Any person arrested or detained in execution of a Court order or on reasonable suspicion of having committed or being about to commit a criminal offence who is not released, must be brought without undue delay before a Court: *s5(3) Constitution*.

After being brought before a Court on suspicion of having committed or being about to commit an offence, if not tried within a reasonable time, then he or she must be released unconditionally or upon reasonable conditions to ensure that he or she appears at a later date for trial: *s5(3) Constitution*.

Any person unlawfully arrested or detained is entitled to compensation from that other person: *s5(4) Constitution*.

## 3 Protection from Inhuman Treatment

No person may be subject to torture or to inhuman or degrading punishment or other treatment: *s7(1) Constitution*.

This does not extend to any punishment (such as whipping) which was lawful at the time immediately before Independence: *s7(2) Constitution*.

It is a good idea to keep this particular right in mind so that you can ensure that Police and prisons officers treat all persons in accordance with the *Constitution*.

## 4 Protection from Deprivation of Property

For the purposes of criminal law, exceptions to the protection from deprivation of property mostly arises:

- in situations which concern public safety, public order, public morality or public health;
  - ⇒ this includes confiscating illegal weapons, obscene materials, etc; and
- in situations which concern payment of Court ordered penalties;
  - ⇒ this includes fines, compensation, or warrants for distress to pay fines on default, etc: *s8 Constitution*.

For the full range of protections and exceptions from the protection from deprivation of property, see *s8 Constitution*.

## 5 Protection for Privacy of Home and Other Property

For the purposes of criminal law, no person is subject to the search of his or person or property or the entry by others on his or her premises without consent, except:

- in the interests of public safety, public order, public morality;
- for the purpose of protecting the rights and freedoms of others;
- for the purpose of authorising entry onto premises in pursuance of a Court order for enforcing a judgment or Court order; or
- for the purpose of authorising entry onto premises for preventing or detecting criminal offences: *s9 Constitution*.

For the full list of exceptions to the right of privacy of home and property, see *s9 Constitution*.

The right of individuals to the protection for privacy of home and other property will most commonly arise when dealing with search warrants.

Because constitutional protection of this right is so strong, you should be mindful when granting search warrants. Demand a high level of professionalism from the Police in applying for and executing search warrants and ensure all proper procedures are followed.

## 6 Right to Secure Protection of Law

The right to secure protection of law in *s10 Constitution* has within it a number of rights which are crucial to ensuring justice in all criminal cases. For this reason you should become very familiar with *s10* and the important rights it confers. These relate to:

- the presumption of innocence;
- the right to be informed of the nature of the offence charged;
- the right to adequate preparation of a defence;
- the right to present a defence, either personally or through an advocate;
- the right to call and examine witnesses;
- the right to an interpreter, if necessary;
- the right to be present during trial;
- the right to a copy of the proceedings;
- protection against retrospective laws;
- the right not to be tried twice for the same offence;
- the right against self-incrimination;
- the right to an independent and impartial adjudicator; and
- the right to a public hearing: *s10 Constitution*.

### 6.1 The Presumption of Innocence

Every person who is charged with a criminal offence is presumed innocent until he or she is proved or pleads guilty: *s10(2)(a) Constitution*.

While all accused persons are innocent until proved guilty, the law may still impose on an accused the burden of proving particular facts: *s11(a) Constitution*.

### 6.2 The Right to be Informed of the Nature of the Offence Charged

Every person who is charged with a criminal offence must be informed as soon as reasonably practicable of the nature of the offence charged in detail and in a language he or she understands: *s10(2)(b) Constitution*.

This is an important right because only by knowing and understanding the offence with which he or she is charged may an accused be able to properly provide a defence.

### **6.3 The Right to Adequate Preparation of a Defence**

Every person who is charged with a criminal offence must be given adequate time and facilities for the preparation of his or her defence: *s10(2)(c) Constitution*.

Allowing adequate time and facilities acts as a counterbalance to the power of the State (which has resources to investigate and prosecute criminal offences) and gives an accused the chance to present their best case. What facilities and how much time are necessary will depend on the circumstances, including the complexity of the case, the need to consult with an advocate and the quality of the evidence.

### **6.4 The Right to Present a Defence Personally or Through an Advocate**

Every person who is charged with a criminal offence must be permitted to defend himself or herself before the Court in person or, at his or her own expense, by a chosen representative: *s10(2)(d) Constitution*.

For serious cases, advise the accused of his or her right to an advocate and encourage him or her to seek assistance from the People's Lawyer.

### **6.5 The Right to Call and Examine Witnesses**

Every person who is charged with a criminal offence must be afforded facilities to examine all witnesses called by the prosecution in Court in person or through a representative. Any person charged must also be permitted to obtain and carry out examination of his or her own witnesses on the same conditions as those of prosecution witnesses: *s10(2)(e) Constitution*.

The adversarial system is based on each side having the opportunity to present its evidence and to question the evidence of the other side through cross-examination. To maintain this balance, the accused has the right to call and examine witnesses on the same terms as the prosecution. To do otherwise would disadvantage the accused and would disrupt justice.

### **6.6 The Right to an Interpreter**

Every person who is charged with a criminal offence must be provided a free interpreter if he or she cannot understand the language used at the trial: *s10(2)(f) Constitution*.

The right to an interpreter is very important because, without the ability to understand the proceedings, the accused will be unable to mount a proper defence. If you believe that an accused does not sufficiently understand the proceedings, stop the proceedings and use the clerk, or find another interpreter to help the accused.

## **6.7 The Right to be Present During Trial**

Except with the accused's consent, the trial of a criminal offence must not take place in his or her absence unless:

- the accused's conduct renders the continuance of the proceedings in his or her presence impracticable; and
- the Court has ordered his or her removal and the trial to proceed in the accused's absence: *s10(2) Constitution.*

## **6.8 The Right to a Copy of the Proceedings**

When a person is tried for any criminal offence, the accused or anyone authorised by the accused must be given, upon payment of a reasonable fee, a copy of any record of the Court proceedings: *s10(3) Constitution.*

The Court is a public place and so are the proceedings unless the Court has been closed for exceptional reasons, which are rare. As a consequence the Court record should be available for examination.

## **6.9 Protection against Retrospective Laws**

No person may be found guilty of any criminal offence that did not, at the time of the act or omission, constitute an offence: *s10(4) Constitution.*

This rule against retrospective laws prevents a person from being held criminally liable for an act which was not criminal at the time the act was done.

No penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed at the time the offence was committed: *s10(4) Constitution.*

Justice demands that individuals know or be able to find out the penalty for an offence beforehand. For this reason, if legislation increases the penalty for a particular offence between the time it was committed and the time of sentencing, the earlier lesser penalty must be applied to the offender.

## **6.10 The Right Not to be Tried Twice for Same Offence**

No person who shows that he or she has been tried for a criminal offence by a competent Court, and either convicted or acquitted, may be tried again for that offence or for any other offence of which he or she could have been convicted at trial.

There are only two exceptions:

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## **The Law**





- the order of a new trial by a superior Court in the course of appeal or review proceedings of the conviction or acquittal: *s10(5) Constitution*.
- a Court may try a member of a disciplined force for a criminal offence although the accused has already been tried under the disciplinary law of that force, but the Court must take into account any sentence given under the disciplinary law when sentencing upon conviction: *s11(c) Constitution*.

No person may be tried for a criminal offence if he or she shows that he or she has been pardoned for that offence: *s10(6) Constitution*.

Often referred to as the “rule against double jeopardy”, a person convicted or acquitted of a criminal offence must normally not be tried again for the same offence.

If several charges stem from the same set of facts or form part of the same series of offences, a person may be tried for one offence after being convicted or acquitted of one of the other offences: *ss118(1), 122 Criminal Procedure Code*.

## **6.11 The Right against Self-Incrimination**

No person being tried for a criminal offence may be compelled to give evidence at the trial: *s10(7) Constitution*.

It is a long-standing principle of the adversarial system of criminal justice that no person can be compelled to testify against himself or herself at trial. This is because it is up to the prosecution to prove all elements of the offence.

Of course, if an accused chooses to testify at trial, the prosecution is allowed to cross-examine the accused as with any other witness.