

**THE AFRICAN COURTS (AMENDMENT AND SUPPLEMENTARY PROVISIONS)  
ACT, 1968**

No. 57



of 1968

**AN ACT TO AMEND THE AFRICAN COURTS PROCLAMATION, 1961, AND TO  
MAKE PROVISION SUPPLEMENTARY THERETO**

Date of Assent: 30.12.68.

Date of Commencement: On a date to be appointed.

ENACTED by the Parliament of Botswana.

**Short Title**

1. This Act may be cited as the African Courts (Amendment and Supplementary Provisions) Act, 1968, and shall come into operation on a day to be appointed by the Minister by notice in the *Gazette*.

**Amendment of Proclamation No. 19 of 1961**

2. The African Courts Proclamation, 1961 (hereinafter referred to as the principal law) is amended —

- (a) by the deletion of "African Court", "an African Court" and "African Courts" wherever they appear and the substitution of "Customary Court", "(a) Customary Court" and "Customary Courts" respectively;
- (b) by the deletion of "Tswana law and custom" wherever it appears and the substitution of "customary law";
- (c) by the deletion of "African Authority" wherever it appears and the substitution of "Chief".

**Amendment of Section 2 of Proclamation No. 19 of 1961**

3. The principal law is amended in section 2 —

(a) by renumbering the existing section as subsection (1);

(b) in subsection (1) by —

(i) the deletion of the definition of "customary law" and the substitution of —

"Customary law" means in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice;

(ii) by the addition of the following definitions —

"tribesman" means any member of a tribe or tribal community of Botswana or of any other country in Africa prescribed by the Minister by notice in the *Gazette* for the purposes of this Proclamation;

"tribal community" means any community which is living outside a tribal territory but is organized in a tribal manner;

(c) by the addition of the following subsections —

"(2) For the purposes of this Proclamation a person who has at any time claimed to be a tribesman for the purpose of enjoying any right or privilege thereof shall be deemed to be a tribesman unless it is proved to the contrary.

(3) Where in the course of any proceedings in a customary court, any person claims that he is not a tribesman, the court shall refer the matter to the Customary Courts Commissioner and the Customary Courts Commissioner, after making such enquiries as he thinks necessary, shall decide whether such person is or is not a tribesman and shall thereupon send to the court a certificate accordingly which for the purposes of such proceedings shall be conclusive and final."

**Insertion of Section 2A, 2B & 2C into Proclamation No. 19 of 1961**

4. The principal law is amended by the insertion, after section 2, of the following sections —

**"Application of the Proclamation**

2A. The provisions of this Proclamation shall not extend to informal proceedings of an arbitral nature before a body (not established or recognized as a customary court under this Proclamation) constituted under customary law, where such body does not purport to exercise any power to enforce its decisions or compel attendance before it.

### **Appointment and Functions of the Customary Courts Commissioner**

2B. (1) The Minister may by notice in the *Gazette* appoint an officer in the public service to be Customary Courts Commissioner for the purposes of this Proclamation.

(2) The functions of the Customary Courts Commissioner shall include

- (a) the advising of the Minister in respect of the constitution, jurisdiction and membership of Customary Courts;
- (b) subject to the general and special directions of the Minister, the guidance and supervision of Customary Courts;
- (c) such other powers and duties as may from time to time be assigned to him by the Minister.

(3) Where under the Proclamation any function is vested in a Subordinate Court that function may be discharged by the Customary Courts Commissioner.

(4) The jurisdiction of the Customary Courts Commissioner under subsection (3) shall extend to the whole of Botswana.

(5) For the purposes of this Proclamation, any judgment, sentence, decision or order, given, passed or made by the Customary Courts Commissioner in accordance with the jurisdiction conferred by subsection (3), shall be deemed to be the judgment, sentence, decision or order of the Subordinate Court having jurisdiction in the matter.

### **Assistant Customary Courts Commissioner**

2C. (1) The Minister may by notice in the *Gazette* appoint an officer in the Public Service to be Assistant Customary Courts Commissioner for the purposes of this Proclamation.

(2) The Assistant Customary Courts Commissioner shall discharge such of the functions of the Customary Courts Commissioner under this Proclamation as the Customary Courts Commissioner may, from time to time by writing under his hand, direct, and references in this Proclamation to the Customary Courts Commissioner shall be construed to include the Assistant Customary Courts Commissioner when acting in accordance with such direction."

### **Amendment of Section 3 of Proclamation No. 19 of 1961**

5. Section 3 of the principal law is amended —

- (a) in subsection (3) by the insertion after "the President may" of "by order in the *Gazette*";
- (b) by the addition of the following subsection —

" (4) A summary of every warrant shall be published in the *Gazette*."

**Amendment of Section 4 of Proclamation No. 19 of 1961**

6. Section 4 of the principal law is amended in subsection (2) by the insertion after "he may" of "in the warrant establishing or recognizing the court".

**Amendment of Section 7 of Proclamation No. 19 of 1961**

7. Section 7 of the principal law is amended by the deletion of "President" and the substitution of "Minister".

**Amendment of Section 8 of Proclamation No. 19 of 1961**

8. Section 8 of the principal law is amended —

(a) in subsection (1) by the deletion of paragraph (a) and the substitution of —

“(a) the matter is justiciable under any law administered by the Court under section 12, and —

(i) all the parties are tribesmen; or

(ii) the defendant consents in writing to the jurisdiction of the Court.”

(b) by the deletion of subsection (2) and the substitution of —

“(2) Notwithstanding the provisions of subsection (1), a Customary Court shall have jurisdiction to hear and determine suits for the recovery of liquid civil debts due to the State or any Town or District Council in which the defendant is a tribesman or consents in writing to the jurisdiction of the Court.”

**Amendment of Section 9 of Proclamation No. 19 of 1961**

9. Section 9 of the principal law is amended —

(a) by renumbering the existing section as subsection (1);

(b) in subsection (1) by the deletion of paragraph (a) and the substitution of —

“(a) the accused is a tribesman or consents in writing to the jurisdiction of the Court; and”;

(c) by the addition of the following subsections —

“(2) Notwithstanding the provisions of subsection (1) no Lower Customary Court may sentence any person for any one offence to a period of imprisonment in excess of six months, and no Higher Customary Court may so sentence a person to a period of imprisonment in excess of one year.

“(3) In the exercise of their jurisdiction under the provisions of this section Customary Courts may be guided by the provisions of the Penal Code.

“(4) In any prosecution in a customary court the prosecutor may be either the person who has a right to bring such prosecutions under customary law

or the Attorney-General or any person authorized thereto by the Attorney-General.

(5) The President may, by order under his hand, authorize an increased jurisdiction in criminal cases to be exercised by the customary court to the extent specified in the order;

Provided that no such order shall authorize a customary court to award a sentence of imprisonment in excess of 2 years."

#### **Amendment of Section 10 of Proclamation No. 19 of 1961**

10. Section 10 of the principal law is amended by the deletion of paragraph (a) and the substitution of —

“(a) cases in which the accused is charged with —

- (i) treason, riot or any offence involving the security or safety of the State;
- (ii) an offence in consequence of which death is alleged to have occurred;
- (iii) bigamy;
- (iv) any offence under Chapter X (Corruption and the Abuse of Office) or Chapter XI (Offences Relating to the Administration of Justice) of the Penal Code;
- (v) bribery, perjury or subornation of perjury or conspiring to defeat the course of justice;
- (vi) an offence concerning counterfeit currency;
- (vii) robbery, where the person accused is of or above the age of twenty-one years;
- (viii) extortion by means of threats or by abuse of authority;
- (ix) an offence against insolvency law or company law;
- (x) rape;
- (xi) contravention of prohibitions relating to precious stones, gold and other precious metals;
- (xii) such other offences as may be prescribed;”;

(b) by the deletion of paragraph (d) and the substitution of —

“(d) cases relating to witchcraft without the general or special consent of the Customary Courts Commissioner;”;

(c) by the deletion of paragraph (e).

#### **Replacement of Section 12 of Proclamation No. 19 of 1961**

11. Section 12 of the principal law is repealed and replaced as follows —

**"Laws to be Administered**

12. Subject to the provisions of this Proclamation and any other written law a Customary Court shall administer —

- (a) customary law;
- (b) the provisions of any written law which the Court may be authorized to administer by any written law (including an Order under section 13); and in so doing shall give effect to the provisions of section 10 of the Constitution of Botswana read however with section 24 of this Proclamation."

**Replacement of Section 13 of Proclamation No. 19 of 1961**

12. Section 13 of the principal law is repealed and replaced as follows —

**"President May Empower Customary Courts to Enforce Specified Laws**

13. The President may by Order in the *Gazette* authorize any Customary Court to administer any written law specified in the Order."

**Amendment of Section 14 of Proclamation No. 19 of 1961**

13. Section 14 of the principal law is amended —

- (a) in subsection (1) by the deletion of "or inflict" and the substitution of "inflict corporal punishment or";
- (b) by the deletion of subsection (2) and the substitution of —

" (2) No Customary Court shall subject any person to torture or to inhuman or degrading punishment or other treatment or to any punishment which is not in proportion to the nature and circumstances of the offence and the circumstances of the offender;

(3) No Customary Court shall sentence any female, or any person who, in the opinion of the Court, is over the age of forty years, to corporal punishment."

**Substitution of Section 15 of Proclamation No. 19 of 1961**

14. Section 15 of the principal law is repealed and the following section is substituted —

**"Imprisonment**

15. (1) Subject to the provisions of this Proclamation, no person who has been sentenced by a Customary Court to imprisonment shall be detained in consequence of such sentence except upon the authority of a warrant in the prescribed form.

(2) No person shall be detained in accordance with the provisions of subsection (1) in any place other than a prison except while his removal to a prison is being arranged or effected.

(3) No person may be detained for a period in excess of forty-eight hours in any prison in accordance with the provisions of this section unless the warrant authorizing his detention has been countersigned by the Administrative Officer, and no warrant shall be so countersigned unless the Administrative Officer has satisfied himself that the sentence imposed is within the jurisdiction of the court which imposed it.

(4) An Administrative Officer shall within fourteen days of the presentation to him of a warrant for endorsement under the provisions of subsection (3) review the proceedings of the Customary Court in the matter and shall have, for that purpose, the powers vested in an Administrative Officer under the provisions of section 31:

Provided that the provisions of this subsection shall not apply in a case where the proceedings are reviewable as of course in accordance with the provisions of section 37, but in such a case the Administrative Officer shall within the period specified notify the Customary Courts Commissioner of the name of the person convicted and of the nature of the sentence imposed.

(5) For the purposes of this section "prison" means a prison established under Part II of the Prisons Law, 1964 (No. 41 of 1964)."

#### **Amendment of Section 16 of Proclamation No. 19 of 1961**

15. Section 16 of the principal law is amended —

(a) by the deletion of subsection (1) and the substitution of —

“(1) A Customary Court shall direct that any fine, damages or other payment which it imposes or awards shall be paid within such time as it thinks just:

Provided that nothing in this subsection shall preclude a Customary Court from authorizing the payment of any fine, damages or other payment in instalments if the time within which such instalments shall be paid is specified.”.

(b) in subsection (3) by the deletion of “President” and the substitution of “Minister”;

(c) in subsection (4) by the deletion of “the offender” and the substitution of “that person”.

#### **Amendment of Section 19 of Proclamation No. 19 of 1961**

16. Section 19 of the principal law is amended by the deletion of “Any African” and the substitution of “Any person”.

#### **Replacement of Section 20 of Proclamation No. 19 of 1961**

17. Section 20 of the principal law is repealed and replaced as follows —

### **"Power to Summon Persons"**

20. (1) Subject to the provisions of this section, every Customary Court shall have power to summon any person before the Court as a defendant or accused or for the purpose of giving evidence.

(2) Every such summons shall be in the prescribed form and served in the prescribed manner and in the case of a summons to any person other than a tribesman living within the local limits of jurisdiction of the Court shall not be deemed to be valid within the meaning of this section unless it is endorsed by an administrative officer.

(3) An administrative officer shall not so endorse a summons to a defendant or accused unless he is satisfied that that defendant or accused is subject to the jurisdiction of the Court in the matter in question and shall not so endorse a summons to a witness unless he is satisfied that the attendance of the person summoned is necessary for the proper decision of the matter and that the reasonable expenses of the person summoned in accordance with any tariff prescribed by the Minister have been or will be tendered to him by the party desirous to call him.

(4) Any person who without reasonable excuse fails to obey a valid summons served on him under this section shall be guilty of an offence and liable on conviction to a fine not exceeding R50, or, in default of payment thereof to imprisonment not exceeding one month, or to such imprisonment without the option of a fine, or to both such fine and imprisonment.

(5) Nothing in this section shall be deemed to affect the power of a Customary Court to warn persons to attend Court."

### **Repeal of Section 21 of Proclamation No. 19 of 1961**

18. Section 21 of the principal law is repealed.

### **Amendment of Section 23 of Proclamation No. 19 of 1961**

19. Section 23 of the principal law is amended —

- (a) by the deletion of "President" where it appears for the first time, and the substitution of "Minister";
- (b) by the deletion of "President" where it appears for the second time, and the substitution of "Customary Courts Commissioner".

### **Amendment of Section 25 of Proclamation No. 19 of 1961**

20. Section 25 of the principal law is amended by the deletion of "Any" at the commencement thereof and the substitution of "Subject to the provisions of section 2A, any".

### **Replacement of Section 29 of Proclamation No. 19 of 1961**

21. Section 29 of the principal law is repealed and the following section is substituted —

### **“Transfer of Cases**

29. (1) Where in any proceedings before a Customary Court any party thereof demands that the case be transferred to some other court the proceedings shall be suspended forthwith and the matter reported to the Customary Courts Commissioner.

(2) If any person who is a party to a dispute which would ordinarily be heard by a Customary Court considers that such court —

(a) is unreasonably delaying the adjudication of that dispute; or

(b) has unreasonably refused to hear and adjudicate upon that dispute;

he may report the matter to the Customary Courts Commissioner.

(3) If the Customary Courts Commissioner receives a report under subsection (1) or subsection (2) of this section he shall make such enquiry as he may deem necessary and —

(a) if he considers that it would be in the interests of justice to do so, transfer the case for hearing and determination by some other Customary Court or a subordinate court of competent jurisdiction or otherwise;

(b) notify the party and Court concerned that he declines to exercise his powers under this section in relation to that case, whereupon any suspension of proceedings under subsection (1) shall cease.

(4) If proceedings are transferred from a Customary Court to another Customary Court under the provisions of this section that other Court shall commence proceedings *de novo*.

(5) If any Court exercises or attempts to exercise judicial authority contrary to subsection (1) of this section, the person presiding over such Court and every person sitting as a member thereof shall be guilty of an offence and liable on conviction to the penalties prescribed in section 25.”

### **Amendment of Section 31 of Proclamation No. 19 of 1961**

22. Section 31 of the principal law is amended —

(a) in the headnote by the insertion after ‘of’ of ‘the Customary Courts Commissioner and’;

(b) by the deletion of ‘Any’ at the commencement thereof and the substitution of ‘The Customary Courts Commissioner or any’

(c) in paragraph (a) by the insertion prior to ‘an Administrative Officer’ in the first proviso thereof, of ‘the Customary Courts Commissioner or’.

### **Amendment of Section 34 of Proclamation No. 19 of 1961**

23. Section 34 of the principal law is amended —

- (a) in subsection (3) in the first proviso thereof by the insertion after "in cases where" of "the status of any person is at issue or where";
- (b) in subsection (4) by the insertion after "in cases where" of "the status of any person is at issue or where";

**Substitution of Section 37 of Proclamation No. 19 of 1961**

24. Section 37 of the principal law is repealed and the following is substituted —

**"Review as of Course**

37. (1) All sentences in criminal cases tried in the Customary Courts in which the punishment awarded is imprisonment exceeding six months or a fine exceeding R200 shall be subject in the ordinary course to review by the Customary Courts Commissioner; but without prejudice to any right of appeal which may exist under the provisions of this Proclamation.

(2) Whenever a Customary Court imposes upon any person convicted of an offence any sentence which is reviewable under the provisions of subsection (1), it shall transmit to the Customary Courts Commissioner within two weeks after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the Court President may desire to append thereto, and any written statements or arguments which the accused may within three days after the sentence supply to the Court President.

(3) In the exercise of his powers under the provisions of this section, the Customary Courts Commissioner shall have the powers specified in section 31."

**Repeal of Section 40 of Proclamation No. 19 of 1961**

25. Section 40 of the principal law is repealed.

**Substitution of Section 42 of Proclamation No. 19 of 1961**

26. Section 42 of the principal law is repealed and the following is substituted —

**"Power to Make Rules**

42. The Minister may make rules —

- (a) prescribing anything which under this Proclamation is to, or may be prescribed;
- (b) prescribing the Fees to be charged in Customary Courts;
- (c) prescribing fees or expenses payable to persons giving evidence under this Proclamation;
- (d) regulating the disposal and application of fines and fees received by Customary Courts;

- (e) regulating the practice and procedure of Customary Courts;
- (f) relating to the employment of messengers in Customary Courts and providing for the payment to messengers by persons requiring the service of process and the performance of other functions in connection with civil proceedings and civil appeal proceedings therein of fees;
- (g) regulating the infliction of corporal punishment;
- (h) regulating the detention of persons pending their trial in a Customary Court;
- (i) generally for the carrying into effect of the provisions of this Proclamation.”.

**Construction of Laws**

27. Where in any written law the expressions “African Court” or “African Courts” appear, such expressions shall be construed as a reference to a Customary Court or Customary Courts, as the case may be.

Passed by the National Assembly this day, the 12th December, 1968.

G.T. MATENGE,  
Clerk of the National Assembly.