

**THE CUSTOMARY LAW (APPLICATION AND ASCERTAINMENT)  
ACT, 1969**

No. 51



of 1969

**AN ACT TO PROVIDE FOR THE APPLICATION OF CUSTOMARY LAW IN CERTAIN ACTIONS BEFORE THE COURTS OF BOTSWANA, TO FACILITATE THE ASCERTAINMENT OF CUSTOMARY LAW AND TO PROVIDE FOR MATTERS ANCILLARY THERETO.**

Date of Assent : 22.8.69

Date of Commencement : 22.8.69

ENACTED by the Parliament of Botswana.

**Short Title**

1. This Bill may be cited as the Customary Law (Application and Ascertainment) Act, 1969.

**Interpretation**

2. In this Act, unless the context otherwise requires —

“common law” means any law, whether written or unwritten, in force in Botswana, other than customary law;

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

“tribe” includes a section of a tribe;

“tribesman” means member of a tribe or tribal Community of Botswana or member of a tribe or similar group of any other country in Africa prescribed by the Minister by notice in the *Gazette* for the purposes of the Customary Courts Proclamation, 1961, and includes the legal personal representative of such member;

“tribal community” means any community which is living outside a tribal territory but is organized in a tribal manner.

#### **Customary Law to be applied in Proper Cases**

3. The courts of Botswana shall within the limits of their jurisdiction, apply customary law in all cases and proceedings in which, by virtue of the provisions of this Act, or any other law, customary law is properly applied and where it is not properly applied such courts shall apply the common law.

#### **Customary Law to be Applied in Certain Civil Cases and Proceedings Between Tribesmen.**

4. Save as is otherwise provided under this Act or any other law, customary law shall be applicable in all civil cases and proceedings where the parties thereto are tribesmen unless —

- (a) it shall appear either from express agreement, or from all relevant circumstances, that each intended or may reasonably be deemed to have intended the matter to be regulated according to the common law; or
- (b) the transaction out of which the case or proceedings arose in one unknown to customary law; or
- (c) the parties express to the court their consent to the Common Law being applicable; and any consent referred to in this paragraph shall be recorded in writing and attached to the court record of the case and shall be irrevocable.

#### **Application of Customary Law in Accordance with an Agreement**

5. Subject to any written law, where in any cases or proceedings between tribesmen and non-tribesmen —

- (a) it shall appear either from express agreement, or from all relevant circumstances, that each intended or may reasonably be deemed to have intended the matter to be regulated according to customary law; or
- (b) the parties express to the court their consent to any customary law being applicable;

that law shall be applied accordingly, and any consent referred to in paragraph (b) shall be recorded in writing and attached to the court record of the case and shall be irrevocable.

### **Special Provision Relating to Custody of Children**

6. Notwithstanding anything to the contrary in this Act, in any case relating to the custody of children the welfare of the children concerned shall be the paramount consideration irrespective of which law or principle is applied.

### **Special Provision in Relation to Intestate Succession**

7. Notwithstanding the provisions of section 4, customary law shall be applicable in determining the intestate heirs of a tribesman and the nature and extent of their inheritances.

### **Special Provision in Relation to Claims Arising Out of Personal Injuries and Death**

8. (1) Nothing in section 4 shall prevent the application of the common law where the claim arises out of personal injury to, or the death of, any person.

(2) Proceedings in which damages are claimed arising out of personal injury or death to any person may be instituted notwithstanding that the claim has already been determined under customary law ; but in assessing damages the court shall take into account any such previous determination.

(3) Any person entitled under customary law to support from any other person shall be entitled to claim damages under the common law for loss of support from any person who unlawfully causes the death of or personal injury to that other person or who is liable in law in respect thereof.

### **Legal Capacity of Tribesmen**

9. (1) Where the existence or extent of any right held or alleged to be held by a tribesman or of any obligation vesting or alleged to be vesting in any tribesman depends upon or is governed by the customary law, the capacity of the tribesman concerned in relation to any matter affecting that right or obligation shall be governed by customary law.

(2) In any case other than such a case as is referred to in subsection (1) the capacity of any tribesman to enter in any transaction or to enforce or defend any rights in a court of law shall, subject to any written law affecting any such capacity, be determined in accordance with the common law.

### **Conflict of Customary Laws**

10. (1) In any case where customary law is applicable and the question arises as to which system of customary law is applicable —

- (a) in land matters the applicable customary law shall be the customary law of the place where the land is situate ;
- (b) in cases and proceedings arising from inheritance the appropriate customary law shall, subject to the provisions of paragraph (a), be the customary law applying to the deceased ;

- (c) subject to the provisions of paragraphs (a) and (b) the court shall apply the customary law which the parties intended or may reasonably be deemed to have intended should regulate their obligations in the matter or, in the absence of such actual or deemed intention, the customary law of the place where the action arose.

(2) If the system of customary law cannot be ascertained in accordance with subsection (1) or if the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity and good conscience.

#### **Ascertainment of Customary Law**

11. If any court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made by or on behalf of the parties, it may consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing to enable it to arrive at a decision in the matter:

Provided that —

- (i) the decision as to the persons whose opinions are to be consulted shall be one for the court, after hearing such submissions thereon as may be made by or on behalf of the parties ;
- (ii) any cases, text books, sources and opinions consulted by the courts shall be made available to the parties ;
- (iii) any such oral opinion shall be given to the court in the same manner as oral evidence.

#### **Certain Statements to be Prima Facie Evidence of the Customary Law**

12. The President may, by order in the *Gazette* declare that any statement of customary law shall be *prima facie* evidence of the customary law to the extent stated in the order, and in such event, such statement shall, to such extent, be admissible in any court of law (including a customary court) as *prima facie* evidence of the customary law.

#### **Saving**

13. Nothing in this Act shall affect the operation of any written law in force immediately prior to the commencement hereof.

Passed by the National Assembly this day, the 19th August, 1969.

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

## CERTIFICATE

I, GAEFALALE GAOLEBALE SEBESO, Deputy Speaker of the National Assembly, hereby certify that the National Assembly did not proceed on the Customary Law (Application and Ascertainment) Bill until a copy had been referred to the House Chiefs after the Bill had been introduced in the National Assembly and a period of thirty days elapsed from the date when the Bill was referred to the House of Chiefs before the National Assembly proceeded on the Bill.

Date: 20th August, 1969.

G.G. SEBESO,  
Deputy Speaker.