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Bill No. 4 of 2024

CONSTITUTION (AMENDMENT) BILL, 2024
(Published on 12th March, 2024)

MEMORANDUM

1. A draft of the above Bill, which it is intended to be presented to the National Assembly, is set out below.

2. The object of the Bill is to amend the Constitution of the Republic of Botswana following the approval by Government of the Recommendations of the Presidential Commission of Inquiry into the Review of the Constitution of Botswana as agreed to and varied by Government Paper No. 1 of 2023. To this end —

- (a) Clause 2 of the Bill incorporates, in section 3, the changes agreed to under Recommendation 10 (a) which call for the rights to health, education and work to be enshrined in the Constitution. The insertion of sections 7A, 7B and 7C in clause 3 of the Bill ensures that the State respects, protects and fulfils the right to health, education and work and further ensures that the enjoyment of such rights is subject to measures reasonably required to achieve the progressive realisation of such rights and are reasonably justifiable in a democratic society;
- (b) Clause 4 enshrines, in section 13, the right to collectively bargain and strike as agreed to under Recommendation 12;
- (c) Clauses 5 and 6 of the Bill insert section 14A and amend section 15 to incorporate the changes agreed to under Recommendation 11 which call for the inclusion of ‘intersex’ and ‘disability’ among the grounds for protection from discrimination (that is to protect and prohibit the discrimination of ‘intersex’ persons and persons with a ‘disability’). The clauses further incorporate the changes agreed to under Recommendations 65 and 67 to enshrine the protection against discrimination of persons with disabilities;
- (d) Clause 7 of the Bill incorporates the changes agreed to under Recommendation 23 which call for disqualification of a person who has held the office of the President for an aggregate period of 10 years from being President, Vice President, Cabinet Minister, Member of Parliament or Speaker. The changes are effected by —
 - i. inserting section 33 (1A) under clause 7 (in relation to the President),
 - ii. amending section 59 (2) under clause 12 (in relation to the Speaker), and
 - iii. inserting section 62 (1) (h) under clause 14 (in relation to membership of the National Assembly);
- (e) Clauses 8, 12 and 14 of the Bill incorporate, in sections 34 (4) and (5), 59 (2) and 62 (1) (h) respectively, the changes agreed to (with variation) under Recommendation 22 to ensure that a retired President who has served an aggregate period of 10 years is not eligible for election in any political office. Clause 14 further incorporates, in section 62 (1) (aa) the changes agreed to under Recommendation 82 with respect to limiting membership of the National Assembly only to citizens, including in the case of dual citizenship persons who have renounced the citizenship of the other country. Clause 31 also incorporates, in section 126, consequential amendments to the changes agreed to under Recommendation 22;

B.14

- (f) Clause 10 of the Bill inserts section 45A which provides for transitional arrangements for the orderly transfer of executive power following the dissolution of Parliament and on expiration of the term of office of the President;
- (g) Clause 11 of the Bill incorporates, in section 58 (2), the changes agreed to (with variation) under Recommendation 26 to increase the number of Specially Elected Members of the National Assembly from 6 to 10;
- (h) Clause 13 of the Bill amends section 61 by revising the qualification for membership of the National Assembly to include taking active part in the proceedings of Parliament;
- (i) Clause 15 of the Bill incorporates, in section 66 (2), the changes agreed to under Recommendation 36 to make provision for the President to submit three nominees for the position of Secretary to the Independent Electoral Commission to Parliament for assessment and interview prior to appointing one of them to the position of Secretary;
- (j) Clause 16 of the Bill amends section 68 by disqualifying a Specially Elected Member from holding the seat if they resign from the political party they were a member of at the time they were so elected, and where they were not a member of a political party at the time they were so elected, if they become a member of a political party while holding the seat;
- (k) Clauses 17, 18 and 19 incorporate, in sections 77, 78 and 79 (1), the changes agreed to (with variation) under Recommendation 45 to enable the Constitution to provide a *vires* for Parliament to enact the necessary legislation which will determine the criteria used to select Members of *Ntlo ya Dikgosi* in a more neutral manner and not along tribal lines;
- (l) Clause 20 of the Bill incorporates, in section 89 (3), the changes agreed to under Recommendation 13 to specially entrench section 1 which makes provision for the name of the country;
- (m) Clause 21 of the Bill incorporates, in section 90, the changes agreed to (with variation) to migrate to the Constitution the provision in the Electoral Act that empowers the President to set the date of the general election, subject to the provisions of the Electoral Act;
- (n) Clauses 22 and 25 of the Bill amend sections 95 and 99 to provide for the Chief Justice as the head of the judiciary and the President of the Court of Appeal as the deputy head of the judiciary;
- (o) Clauses 23, 26 and 28 of the Bill incorporate, in sections 96 (1), 100 and 103A, the changes agreed to (with variation) under Recommendation 28 to provide for the President to submit three nominees for the position of Chief Justice and the President of the Court of Appeal to a Judicial Committee for assessment and interview. The composition of the Judicial Committee is provided for under section 103A. This ensures transparency and credibility in the appointment of the Chief Justice and the President of the Court of Appeal. Clause 23 also amends subsections 96 (2), (6) and (7) to incorporate the changes agreed to (with variation) under Recommendation 29 to afford the President the discretion to appoint judges;
- (p) Clauses 24 and 26 further incorporate, in sections 97, 100, 101, 104 and 110, consequential amendments to the changes agreed to (with variation) under Recommendation 29;

- (q) Clause 27 of the Bill incorporates, in section 103 (1) (g), (h) and (i), the changes agreed to (with variation) under Recommendation 29 by amending the composition of the Judicial Service Commission to include the Permanent Secretary in the Ministry responsible for justice, a qualified auditor and legal practitioner;
- (r) Clauses 29 and 30 of the Bill incorporate, in section 116 (4) and 122 respectively, consequential amendments to the changes agreed to under Recommendation 28 (as explained in paragraph (o) above);
- (s) Clause 32 of the Bill incorporates, in the First Schedule, consequential amendments to the changes agreed to under Recommendation 26 as explained in paragraph (g) above; and
- (t) The deletion of the Second Schedule in clause 33 is consequential to the amendments under section 78 as explained in paragraph (k) above.

KABO N. S. MORWAENG,
Minister for State President.

ARRANGEMENT OF SECTIONS

SECTION

1. Short title and commencement
2. Amendment of section 3 of the Constitution
3. Insertion of sections 7A, 7B and 7C in the Constitution
4. Amendment of section 13 of the Constitution
5. Insertion of section 14A in the Constitution
6. Amendment of section 15 of the Constitution
7. Amendment of section 33 of the Constitution
8. Amendment of section 34 of the Constitution
9. General amendment to sections 35, 42, 43, 45, 50, 60, 72 and 127 of the Constitution
10. Insertion of section 45A in the Constitution
11. Amendment of section 58 of the Constitution
12. Amendment of section 59 of the Constitution
13. Amendment of section 61 of the Constitution
14. Amendment of section 62 of the Constitution
15. Amendment of section 66 of the Constitution
16. Amendment of section 68 of the Constitution
17. Amendment of section 77 of the Constitution
18. Amendment of section 78 of the Constitution
19. Amendment of section 79 of the Constitution
20. Amendment of section 89 of the Constitution
21. Amendment of section 90 of the Constitution
22. Amendment of section 95 of the Constitution
23. Amendment of section 96 of the Constitution
24. General amendment to sections 97, 101, 104 and 110 of the Constitution
25. Amendment of section 99 of the Constitution
26. Amendment of section 100 of the Constitution
27. Amendment of section 103 of the Constitution
28. Insertion of section 103A in the Constitution
29. Amendment section 116 of the Constitution
30. Amendment of section 122 of the Constitution
31. Amendment of section 126 of the Constitution
32. Amendment of the First Schedule to the Constitution
33. Deletion of the Second Schedule to the Constitution

A Bill
— entitled —

An Act to amend the Constitution.

Date of Assent:

Date of Commencement:

ENACTED by the Parliament of Botswana.

| | |
|---|---|
| <p>1. This Act may be cited as the Constitution (Amendment) Act, 2024 and shall come into operation on such date as the Minister may, by Order published in the <i>Gazette</i>, appoint.</p> | <p>Short title and commencement</p> |
| <p>2. The Constitution of Botswana (hereinafter referred to as “the Constitution”) is amended in section 3 by inserting immediately after paragraph (c) appearing therein, the following new paragraph — “(d) health, education and work.”.</p> | <p>Amendment of section 3 of the Constitution</p> |
| <p>3. The Constitution is amended by inserting immediately after section 7, the following new sections —</p> | <p>Insertion of sections 7A, 7B and 7C in the Constitution</p> |
| <p>“Protection of the right to health</p> | <p>7A. (1) Every person shall have the right to health and access to medical care. (2) Subject to such limitations as are contained in the provisions of this Chapter, the Government shall respect, protect, promote and fulfil the right to health and access to medical care. (3) Nothing contained in or done under the authority of any law or policy shall be held to be inconsistent with or in contravention of subsection (2) to the extent that the law or policy in question makes provision for measures that are reasonably required to achieve the progressive realisation of the right under subsection (1) and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.</p> |
| <p>Protection of the right to education</p> | <p>7B. (1) Every person shall have the right to education. (2) Subject to such limitations as are contained in the provisions of this Chapter, the Government shall respect, protect, promote and fulfil the right to education. (3) Nothing contained in or done under the authority of any law or policy shall be held to be inconsistent with or in contravention of subsection (2) to the extent that the law or policy in question makes provision for measures that are reasonably required to achieve the progressive realisation of the right under subsection (1) and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.</p> |
| <p>Protection of the right to work</p> | <p>7C. (1) Every person shall have the right to work. (2) Subject to such limitations as are contained in the provisions of this Chapter, the Government shall respect, protect, promote and fulfil the right to work. (3) Nothing contained in or done under the authority of any law or policy shall be held to be inconsistent with or in contravention of subsection (2) to the extent that the law or policy in question makes provision for measures that are reasonably required to achieve the progressive realisation of the right under subsection (1) and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”.</p> |

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Amendment of section 13 of the Constitution

4. Section 13 of the Constitution is amended by substituting for subsection (1), the following new subsection —

“(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say his or her right to assemble freely and associate with other persons and in particular —

- (a) to form or belong to trade unions or other associations for the protection of his or her interests;
- (b) his or her right to strike; and
- (c) his or her right to collectively bargain.”.

Insertion of section 14A in the Constitution

5. The Constitution is amended by inserting immediately after section 14, the following new section —

“Protection of persons with disability from discrimination 14A. (1) No person shall be treated in a discriminatory manner, attributable wholly or mainly to the person’s disability, by any person, public office or public authority.

(2) Subject to such limitations as are contained in the provisions of this Chapter, the Government shall respect, protect, promote and fulfil the right under subsection (1), including in particular recognising and promoting the right of persons with disabilities to —

- (a) be treated with dignity and respect;
- (b) reasonably access educational institutions and facilities; and
- (c) reasonably access all places, public transport and information.

(3) Nothing contained in or done under the authority of any law or policy shall be held to be inconsistent with or in contravention of subsection (2) to the extent that the law or policy in question makes provision for measures that are reasonably required to achieve the progressive realisation of the right under subsection (1) and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) In this section, the expression “disability” shall be construed in such manner as may be prescribed by or under an Act of Parliament.”.

Amendment of section 15 of the Constitution

6. Section 15 of the Constitution is amended —

(a) by substituting for subsection (3), the following new subsection —

“(3) In this section, the expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed, disability or sex (including intersex) whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”;

- (b) by inserting immediately after subsection (3), the following new subsection —
 “(3A) For the purposes of the provisions of subsection (3) of this section, the expression “intersex” means a person born with any of several sex characteristics, including chromosome patterns, gonads and genitals that do not fit typical binary notions of male or female bodies.”;
- (c) in subsection (4) by —
- (i) inserting immediately after paragraph (a), the following new paragraph —
 “(aa) whereby persons who are citizens of Botswana by birth, descent or naturalisation, or a class of citizens of Botswana may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regards to its nature or special circumstances pertaining to those citizens or class of citizens is reasonably justifiable in a democratic society;”, and
 - (ii) substituting for paragraph (b), the following new paragraph —
 “(b) with respect to persons who are not citizens of Botswana or persons who are both citizens of Botswana and citizens of another country;”; and
- (d) inserting in subsection (7), immediately after the word —
- (i) “sections” appearing therein, the words “7A, 7B, 7C, 14A” in their chronological order, and
 - (ii) “section” appearing therein, the words “7A(3), 7B(3), 7C(3), 14A(3)” in their chronological order.
- 7.** Section 33 of the Constitution is amended by inserting immediately after subsection (1), the following new subsection —
 “(1A) For purposes of subsection (1), a person who has held the office of President for the period prescribed under section 34 (1) of this Constitution shall not qualify for election as President.”.
- 8.** Section 34 of the Constitution is amended by inserting immediately after subsection (3), the following new subsections —
 “(4) For purposes of subsection (3), a person who ceases to hold the office of President at the expiry of the period prescribed under subsection (1) of this section shall not actively engage in politics.
 (5) For purposes of subsection (4), section 64 (5) of this Constitution shall apply with the necessary modifications to a person who ceases to hold the office of President at the expiry of the period prescribed under subsection (1) of this section.”.
- 9.** The Constitution is amended by substituting for the words “Assistant Minister” wherever they appear in sections 35, 42, 43, 45, 50, 60, 72 and 127, the words “Deputy Minister”.
- 10.** The Constitution is amended by inserting immediately after section 45, the following new section —

Amendment of
section 33 of
the Constitution

Amendment
of section 34 of
the Constitution

General
amendment to
sections 35,
42, 43, 45, 50,
60, 72 and 127
of the Constitution
Insertion of
section 45A in
the Constitution

B.20

- “Transitional arrangements 45A. Parliament may make provision for the orderly transfer of executive power in connection with the dissolution of Parliament and the expiration of the term of office of the President, Ministers or Deputy Ministers.”.
- Amendment of section 58 of the Constitution
11. Section 58 (2) of the Constitution is amended by substituting for the word “six” appearing in paragraph (b), the figure “10”.
- Amendment of section 59 of the Constitution
12. Section 59 of the Constitution is amended by substituting for subsection (2), the following new subsection —
“(2) The following persons shall not be qualified to be elected as Speaker —
(a) the President, the Vice-President, a Minister, a Deputy Minister or a public officer;
(b) a person who has held the office of President for the period prescribed under section 34 (1) of this Constitution; or
(c) a person who is both a citizen of Botswana and a citizen of another country.”.
- Amendment of section 61 of the Constitution
13. Section 61 of the Constitution is amended by substituting for paragraph (d), the following new paragraph —
“(d) he or she is able to take an active part in the proceedings of the Assembly.”.
- Amendment of section 62 of the Constitution
14. Section 62 (1) of the Constitution is amended by inserting immediately after —
(a) paragraph (a), the following new paragraph —
“(aa) is both a citizen of Botswana and a citizen of another country;”; and
(b) paragraph (g), the following new paragraph —
“(h) has held the office of President for the period prescribed under section 34 (1) of this Constitution.”.
- Amendment of section 66 of the Constitution
15. Section 66 of the Constitution is amended by —
(a) substituting for subsection (2), the following new subsection —
“(2) The Secretary shall be appointed by the President:
Provided that whenever a Secretary is appointed —
(i) the President shall, prior to the appointment of the Secretary, submit three nominees for the position of Secretary to a select committee as may be prescribed in the rules of procedure of the Assembly; and
(ii) the select committee shall assess and interview the three nominees under paragraph (i) and recommend two nominees to the President, one of which shall be appointed Secretary.”; and
(b) inserting immediately after subsection (5), the following new subsection —
“(5A) For purposes of the performance of the duties under subsection (3) of this section, there shall be such other officers in the office of the Secretary to the Independent Electoral Commission as may be prescribed by or under an Act of Parliament.”.

- 16.** Section 68 of the Constitution is amended —
- (a) in subsection (1) by inserting immediately after paragraph (d), the following new paragraph —
- “(e) in the case of a Specially Elected Member, if he or she —
- (i) resigns from the political party he or she was a member of at the time he or she was so elected, or
- (ii) not having been a member of a political party at the time he or she was so elected, becomes a member of a political party.”; and
- (b) by inserting immediately after subsection (1), the following new subsection —
- “(1A) An Elected Member or a Specially Elected Member of the National Assembly may be removed from office for misbehaviour in such a manner as may be prescribed in the rules of procedure of the Assembly.”.
- 17.** The Constitution is amended by substituting for section 77, the following new section —
- “Establishment of *Ntlo ya Dikgosi* composition of *Ntlo ya Dikgosi* 77. There shall continue to be a *Ntlo ya Dikgosi* for Botswana which shall consist of —
- (a) two persons from each administrative district, which persons for the time being perform the functions of the office of *Kgosi* in respect of any area within such administrative district; and
- (b) 10 persons who shall be appointed by the President.”.
- 18.** The Constitution is amended by substituting for section 78, the following new section —
- “Selection of Members to *Ntlo ya Dikgosi* 78. The two persons for the administrative districts referred to in section 77 (a) may be selected —
- (a) according to the established norms and practices of those administrative districts; or
- (b) in accordance with the provisions of any Act of Parliament.”.
- 19.** Section 79 (1) of the Constitution is amended by substituting for the words “section 77 (1) (b)” appearing therein, the words “section 77 (b)”.
- 20.** Section 89 (3) of the Constitution is amended by inserting immediately after the word “sections” appearing in paragraph (b), the figure “1”.
- 21.** Section 90 of the Constitution is amended by inserting immediately after subsection (3), the following new subsection —
- “(4) For the purposes of subsection (3), the President may, subject to the provisions of any Act of Parliament and after consultation with the Secretary to the Electoral Commission, appoint the date for the general election.”.

Amendment
of section 68
of the
Constitution

Amendment
of section 77
of the
Constitution

Amendment of
section 78 of
the Constitution

Amendment of
section 79 of
the Constitution

Amendment of
section 89 of
the Constitution

Amendment
of section 90
of the
Constitution

B.22

Amendment of section 95 of the Constitution

22. Section 95 (2) of the Constitution is amended by inserting after the words “Chief Justice” appearing therein, the words “who shall be the head of the judiciary”.

Amendment of section 96 of the Constitution

23. Section 96 of the Constitution is amended by —

- (a) substituting for subsection (1), the following new subsection —
“(1) The Chief Justice shall be appointed by the President acting in accordance with the provisions of section 103A of this Constitution.”; and
- (b) substituting for the words “acting in accordance with the advice” appearing in subsections (2), (6) and (7), the words “on the recommendation”.

General amendment to sections 97, 101, 104 and 110 of the Constitution

24. The Constitution is amended by substituting for the words “acting in accordance with the advice” appearing in sections 97 (1), 101 (1) (i), 104 (1) and 110 (3) , the words “on the recommendation”.

Amendment of section 99 of the Constitution

25. The Constitution is amended in section 99 by substituting for subsection (2), the following new subsection —

- “(2) The judges of the Court of Appeal shall be —
 - (a) the Chief Justice, being the head of the judiciary;
 - (b) the President of the Court of Appeal, who shall be the deputy head of the judiciary;
 - (c) such number, if any, of Justices of Appeal as may be prescribed by Parliament; and
 - (d) the other judges of the High Court:

Provided that Parliament may make provision for the office of President of the Court of Appeal to be held by the Chief Justice *ex-officio*.”.

Amendment of section 100 of the Constitution

26. Section 100 of the Constitution is amended by —

- (a) substituting for subsection (1), the following new subsection —
“(1) The President of the Court of Appeal, shall, unless that office is held *ex-officio* by the Chief Justice, be appointed by the President acting in accordance with the provisions of section 103A of this Constitution.”; and
- (b) substituting for the words “acting in accordance with the advice” appearing in subsections (2), (6) and (7), the words “on the recommendation”.

Amendment of section 103 of the Constitution

27. Section 103 (1) of the Constitution is amended by inserting immediately after paragraph (f), the following new paragraphs —

- “(g) the Permanent Secretary in the Ministry responsible for justice;
- (h) a person qualified to act as an auditor as may be prescribed by Act of Parliament appointed by the President; and
- (i) a legal practitioner qualified to be appointed as a judge of the High Court appointed by the President.”.

Insertion of section 103A in the Constitution

28. The Constitution is amended by inserting immediately after section 103, the following new section —

“Judicial
Committee

“103A. (1) For the purposes of the provisions of sections 96 (1) and 100 (1), whenever a Chief Justice or the President of the Court of Appeal is appointed, the —

- (a) President shall, prior to the appointment, submit three nominees for the position of Chief Justice or President of the Court of Appeal to the Judicial Committee; and
- (b) Judicial Committee shall assess and interview the three nominees under paragraph (a) and thereafter recommend two nominees to the President, one of which shall be appointed Chief Justice or President of the Court of Appeal, as the case may be.

(2) The Judicial Committee under subsection (1) shall consist of —

- (a) a Chairperson, being a person who holds or has held a high judicial office, appointed by the President;
- (b) a dean, professor of law or law lecturer appointed by the President;
- (c) the Attorney General, Deputy Attorney General or a person who has held the office of Attorney General, as the President may appoint;
- (d) the Permanent Secretary in the Ministry responsible for justice; and
- (e) the Director for the Directorate of Public Service Management.

(3) The tenure of office and procedure prescribed in section 103 of this Constitution shall apply with the necessary modifications to the Judicial Committee.”.

29. Section 116 (4) of the Constitution is amended by inserting immediately after the words “Judicial Service Commission” wherever they appear in paragraph (a), the words “or Judicial Committee”.

Amendment of section 116 of the Constitution

30. Section 122 of the Constitution is amended by inserting immediately after the words “Public Service Commission,” appearing in subsection (5), the words “member of the Judicial Committee,”.

Amendment of section 122 of the Constitution
Amendment of section 126 of the Constitution

31. Section 126 of the Constitution is amended by inserting immediately after subsection (1), the following new subsection —

“(1A) Subsection (1) shall not apply to a person who has held the office of President for the period prescribed under section 34 (1) of this Constitution.”.

32. The First Schedule to the Constitution is amended —

- (a) by substituting for the words “Assistant Minister” wherever they appear in the Schedule, the words “Deputy Minister”; and
- (b) in paragraph 4 by substituting for the word “six” wherever it appears in the paragraph, the figure “10”.

Amendment of the First Schedule to the Constitution

33. The Constitution is amended by deleting the Second Schedule.

Deletion of the Second Schedule to the Constitution

