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Bill No. 14 of 2025

CONSTITUTION (AMENDMENT) BILL, 2025

(Published on 4th July, 2025)

MEMORANDUM

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

2. The object of the Bill is to amend the Constitution to establish the Constitutional Court as part of the judicial system of Botswana and dress it with the necessary powers to carry out the mandate of being the special court for all questions Constitutional.

3. To this end, the Constitution is amended as follows —

3.1 clause 1 provides for the short title and commencement;

3.2 clause 2 amends section 8. Section 8 provides for protecting people from deprivation of property where there is any compulsory acquisition of property. The Constitutional Court will now be the competent court for any contests against such transactions;

3.3 clause 3 amends section 18 so that the Constitutional Court, instead of the High Court, is now the competent court to determine challenges on the fundamental human rights protected under sections 3 to 16 of the Constitution;

3.4 clause 4 amends section 69 so that determination of questions of validity of election of Members of the National Assembly or the Speaker of the National Assembly be matters for the Constitutional Court;

3.5 clause 5 amends section 75 so that the action for recovering from any person who sits and votes in the National Assembly knowing or with reasonable knowledge it is wrong, now lies with the Constitutional Court;

3.6 clause 6 inserts introductory sections under Chapter VI on the Judicature to set out clearly the judicial authority of the courts of Botswana, appointment and position of the Chief Justice as the head of the judiciary and conferring him or her with the relevant powers for that role and to establish the new position of the Deputy Chief Justice. It also establishes the ranking of the Constitutional Court of Botswana.

3.7 clause 7 amends section 95 (1) and (4) to limit the jurisdiction of the High Court so that it may handle only those matters it is prescribed to handle and so that in addition to determining places where the High Court may sit, the Chief Justice is also charged with establishing the Divisions of the High Court as he or she may determine necessary;

3.8 clause 8 amends section 96 now to empower the Chief Justice to appoint Judge Presidents to head divisions of the High Court;

3.9 clauses 9 and 10 amend sections 99 and 100 to remove the Chief Justice as part of the panel of the Court of Appeal;

3.10 clause 11 introduces a new section 102A and other clauses that set up the Constitutional Court, its composition and jurisdiction, qualifications and tenure of the judges of the Constitutional Court, as well as the oaths the judges ought to take;

3.11 clause 12 amends section 103 (1) to expand the membership of the Judicial Services Commission. A retired judge will substitute the Chief Justice as Chairman of the Judicial Service Commission. The Chief Justice will remain a member of the Judicial Service Commission. This is to enhance transparency and independence of the Judicial Service Commission. The Deputy Chief Justice will also be a member of the Judicial Service Commission;

3.12 clause 13 amends section 104 to provide for the office of the Registrar of the Constitutional Court;

3.13 clause 14 amends section 105 to charge the Constitutional Court with the sole mandate to deal with the interpretation of any questions of law as to the interpretation of the Constitution and such decisions shall suffice to dispose of the cases where such questions arose;

3.14 clause 15 amends section 106 of the Constitution so that appeals lie as of right to the Constitutional Court from any decisions of any other court which involves the interpretation of the Constitution;

3.15 clauses 16 to 19 to include a judge of the Constitutional Court where judges of the Court of Appeal and the High Court are included in sections 110, 116, 122 and 127; and

3.16 clause 20 provides transitional arrangements to allow courts that are seized with cases to continue handling them to finality notwithstanding that this Act takes away their jurisdiction.

MOETI C. MOHWASA,
Minister for State President.

ARRANGEMENT OF SECTIONS

A Bill
— entitled —

An Act to amend the Constitution.

Date of Assent:
Date of Commencement:
ENACTED by the Parliament of Botswana.

Short title and commencement

1. This Act may be cited as the Constitution (Amendment) Act, 2025 and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Amendment of section 8 of the Constitution

2. Section 8 (1) (*b*) (ii) of the Constitution is amended by substituting for the words "High Court", the words "Constitutional Court."

Amendment of section 18 of the Constitution

3. Section 18 of the Constitution is amended by substituting for the words "High Court", the words "Constitutional Court" wherever they appear in that section.

Amendment of section 69 of the Constitution

4. Section 69 of the Constitution is amended by substituting for the words "High Court", the words "Constitutional Court" wherever they appear in that section.

Amendment of section 75 of the Constitution

5. Section 75 of the Constitution is amended by substituting for the words "High Court", the words "Constitutional Court".

Insertion of section 94A, 94B, etc. in the Constitution

6. The Constitution is amended in Chapter VI by inserting the following new sections, immediately before the words "Part I" —

"Judicial authority

94A. Subject to this Constitution, the judicial authority of Botswana shall vest in the courts.

Ranking of Constitutional Court

94B. The Constitutional Court shall be the highest court and rank above all other courts.

Appointment of Chief Justice as head of judiciary

94C. (1) There shall continue to be a Chief Justic who shall be appointed by the President.

(2) The Chief Justice shall be the head of the judiciary.

(3) In the exercise of the functions conferred upon him or her by this Constitution or any other law, the Chief Justice shall exercise responsibility over the judicial function of all courts.

(4) The powers conferred on the Chief Justice by subsection (3) shall include —

(*a*) the establishment of standards to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts;

(*b*) the establishment of norms and standards for the exercise of judicial functions by the courts; and

(*c*) the monitoring of norms and standards mentioned under paragraphs (*a*) and (*b*).

Deputy Chief Justice

94D. (1) There shall be a Deputy Chief Justice who shall be appointed by the President.

(2) The Deputy Chief Justice shall —

(*a*) perform the functions of the Chief Justice, when the Chief Justice is absent or there is a vacancy in the office of the Chief Justice;

(*b*) assist the Chief Justice in the administration of the judiciary; and

(*c*) perform the functions assigned by the Chief Justice, this Constitution or any other law.".

Amendment of section 95 of the Constitution

7. Section 95 of the Constitution is amended by —

(*a*) substituting for subsection (1) the following new subsection —

"(1) There shall be for Botswana a High Court which shall have original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law:

Provided that the High Court shall not have jurisdiction to hear and determine any application or question arising out of a matter involving the enforcement or securing the enforcement of fundamental rights as contained in sections 3 to 16 of the Constitution or in any other law."; and

(*b*) substituting for subsection (4), the following new subsection —

"(4) The High Court shall sit in such places as the Chief Justice may appoint and shall have such divisions as the Chief Justice may determine.".

8. Section 96 of the Constitution is amended —

Amendment of section 96 of the Constitution

(*a*) by substituting for subsection (1), the following new subsection —

"(1) The Chief Justice shall appoint a Judge President from amongst any judges of the High Court to head a division of the High Court.";

(*b*) by deleting subsection (5); and

(*c*) by substituting for subsection (6), the following new subsection —

"(6) If the office of any judge of the High Court is vacant, or if any such judge is for any reason unable to perform the functions of his or her office, or if the President, acting after consultation with the Chief Justice, is satisfied that the state of business in the High Court requires that the number of judges of the court should be temporarily increased, the President, acting in accordance with the advice of the Judicial Service Commission, may appoint a person qualified for appointment as a judge of the High Court to act as a judge of that court:

Provided that a person may be so appointed notwithstanding that he or she has attained the age of 70 years or such other age as may be prescribed for the purposes of section 97 of this Constitution.".

9. Section 99 (2) of the Constitution is amended by —

Amendment of section 99 of the Constitution

(*a*) substituting for paragraph (*c*), the following new paragraph —

"(*c*) other judges of the High Court."; and

(*b*) deleting the proviso to the subsection.

10. Section 100 of the Constitution is amended by substituting for subsection (1), the following new subsection —

Amendment of section 100 of the Constitution

"(1) The President of the Court of Appeal shall be appointed by the President.".

11. The Constitution is amended by inserting immediately after Part II of Chapter VI, the following new Part —

Insertion of section 102A, 102B etc. in the Constitution

"PART IIA — *Constitutional Court*

Constitutional Court

102A. There shall be for Botswana, a Constitutional Court which shall have jurisdiction as may be conferred on it by this Constitution or any other law.

Jurisdiction of the Constitutional Court

102B. (1) The Constitutional Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.

(2) The Constitutional Court shall sit in such places as the Chief Justice may appoint.

(3) The Constitutional Court shall —

(*a*) be the highest court in all constitutional matters and its decisions on those constitutional matters bind all other courts;

(*b*) decide on constitutional matters and issues connected with decisions on constitutional matters;

(*c*) make a final determination on whether a matter is a constitutional matter or whether an issue is connected with a constitutional matter;

(*d*) have original and final jurisdiction to hear and determine any application or question arising out of a matter involving the enforcement or securing the enforcement of fundamental rights as contained in sections 3 to 16 of the Constitution or in any other law;

(*e*) determine questions as to membership of the National Assembly, including whether a person is qualified to sit or vote in the National Assembly;

(*f*) decide disputes concerning the constitutional status of any entity, including any powers or functions of those entities;

(*g*) make a final decision on whether an Act of Parliament is constitutional and confirm any order of invalidity made by the High Court in respect of that Act before that order has any force in such manner as may be prescribed by Parliament;

(*h*) making a final decision on any matter declared unconstitutional by the High Court and confirm any order that the High Court may have made before that order has any force in such manner as may be prescribed by Parliament; and

(*i*) decide on any other matter, if it grants leave to appeal, on the ground that the matter raises a point of law of general public importance which ought to be considered by the Court.

(4) An Act of Parliament may prescribe for the exercise of jurisdiction by the Constitutional Court.

(5) The Chief Justice may make rules with respect to the practice and procedure of the Constitutional Court in relation to jurisdiction and powers conferred on it by this Constitution.

(6) The Chief Justice may appoint a Rules of Constitutional Court Advisory Committee to assist him or her in reviewing and overhauling the rules made under subsection (5) and to advise on proposals to update and amend such rules.

(7) Rules of court shall allow for a person, when it is in the interest of justice and with or without leave of the Constitutional Court —

(*a*) to bring a constitutional matter directly to the Constitutional Court;
(*b*) to appeal directly to the Constitutional Court from any other court; or
(*c*) to appear as a friend of the court.

Judges of Constitutional Court

102C. (1) The judges of the Constitutional Court shall be —
(*a*) the Chief Justice;
(*b*) the Deputy Chief Justice;
(*c*) such number, of Justices of Constitutional Court as may be prescribed by Parliament; and
(*d*) such other judges as the President acting with the advice of the Judicial Service Commission may appoint for a limited period as required.

(2) A person shall not be qualified to be appointed as a judge of the Constitutional Court unless —
(*a*) he or she is a citizen of Botswana; and
(*b*) he or she is qualified to be appointed as a judge and has been so qualified for not less than 15 years.

Tenure of office of judges of Constitutional Court

102D. (1) Subject to the provisions of this section, a person holding the office of a judge of the Constitutional Court shall vacate office upon attaining the age of 70 years or such other age as may be prescribed by Parliament.

(2) Notwithstanding subsection (1), the President, acting in accordance with the advice of the Judicial Service Commission, may permit a judge who has attained that age to continue in office for such period as may be necessary to enable him or her to deliver judgment or to do any other thing in relation to proceedings that were commenced before him or her before he or she attained that age.

(3) A judge of the Constitutional Court appointed under section 102C (1) (*c*) may continue to sit as a judge of the Constitutional Court after his or her period of appointment has expired for the purpose of dealing with cases commenced before him or her before expiry of his or her term.

(4) A judge of the Constitutional Court may be removed from office only for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(5) If the President considers that the question of removing a judge of the Constitutional Court under this section ought to be investigated then —
(*a*) he or she shall appoint a tribunal which shall consist of a chairperson and not less than two other members, who hold or have held high judicial office; and

(*b*) the tribunal shall enquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from the office under this section for inability as aforesaid or for misbehaviour.

(6) Where a tribunal appointed under subsection (5) advises the President that a judge of the Constitutional Court ought to be removed from office, the President shall remove such judge from office.

(7) If the question of removing a judge of the Constitutional Court from office has been referred to a tribunal under subsection (5) of this section, the President may suspend the judge from performing the function of his or her office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the judge ought not to be removed from office.

Oaths to be taken by judges of Constitutional Court

102E. A judge of the Constitutional Court shall not enter upon the duties of his or her office unless he or she has taken and subscribed such oath for the due execution of his or her office as may be prescribed by Parliament.".

Amendment of section 103 of the Constitution

12. Section 103 (1) of the Constitution is amended by substituting for that subsection the following new subsection —

"(1) There shall be a Judicial Service Commission for Botswana which shall consist of —

(*a*) a retired Judge of the High Court who shall be Chairman;
(*b*) the Chief Justice;
(*c*) the Deputy Chief Justice;
(*d*) the President of the Court of Appeal;
(*e*) the Attorney General;
(*f*) the Chairman of the Public Service Commission;
(*g*) a member of the Law Society nominated by the Law Society; and
(*h*) a person of intergrity and experience not being a legal practitioner appointed by the President.".

Amendment of section 104 of the Constitution

13. Section 104 (2) of the Constitution is amended in paragraph (*a*) by inserting the words 'Constitutional Court,' immediately before the words "Court of Appeal".

Amendment of section 105 of the Constitution

14. The Constitution is amended by substituting for section 105, the following new section —

"Reference to High Court or Constitutional Court of cases involving interpretation of Constitution

105. (1) Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court, the court shall refer the question to the High Court or the Constitutional Court.

(2) Where any question is referred to the High Court or Constitutional Court in pursuance of this section, the High Court or the Constitutional Court shall give its decision upon the question and the court in which the question arose shall, subject to any appeal, dispose of the case in accordance with that decision.".

Amendment of section 106 of the Constitution

15. The Constitution is amended by substituting for section 106, the following new section —

"Appeal to Constitutional Court

106. (1) An appeal shall lie as of right to the Constitutional Court from any decision of the High Court which involves the interpretation of this Constitution.

(2) No appeal shall lie from a determination of any other court under this section dismissing an application on the ground that it is frivolous or vexatious.".

Amendment of section 110 of the Act

16. Section 110 (2) (*a*) of the Constitution is amended by inserting the words "Constitutional Court," immediately after the words "office of judge of the" appearing in that paragraph.

Amendment of section 116 of the Constitution

17. Section 116 (3) of the Constitution is amended by inserting the words "Constitutional Court," immediately after the words "office of a judge of the" appearing in that subsection.

Amendment of section 122 of the Constitution

18. Section 122 (5) of the Constitution is amended by inserting the words "Constitutional Court," immediately after the words "offices of judge of the' appearing in that subsection.

Amendment of section 127 of the Constitution

19. Section 127 of the Constitution is amended —

(*a*) in subsection (1), by substituting for the definition of the words "subordinate court", the following new definition —

"subordinate court" means any court established for Botswana other than —

(*a*) the Constitutional Court;
(*b*) the Court of Appeal;
(*c*) the High Court
(*d*) a court martial; or
(*e*) the Industrial Court.";

(*b*) in subsection (2), by inserting immediately after the words "references to the offices of," the words "judges of the Constitutional Court,"; and

(*c*) in subsection (7) by inserting immediately after the words "require a judge of the" appearing in the proviso, the words "Constitutional Court,".

Transitional provision

20. Any matters which, at the commencement of this Act were before any court shall be concluded by such court notwithstanding that such court no longer has jurisdiction as a result of this Act.

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