

# CONSTITUTION (AMENDMENT) ACT, 2005

No. 9



of 2005

## ARRANGEMENT OF SECTIONS

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### **An Act to amend the Constitution**

*Date of Assent:* 8th August, 2005

*Date of Commencement:* On Notice

ENACTED by the Parliament of Botswana.

1. (1) This Act may be cited as the Constitution (Amendment) Act, 2005, and shall come into operation on such date as the Minister may, by statutory order, appoint.

Short title and commencement

(2) Different dates may be appointed for the commencement of different provisions of this Act.

2. The Constitution is amended by substituting —

(a) for the words “House of Chiefs” and “the House”, wherever they appear therein, the words “*Ntlo ya Dikgosi*”;

General amendment of the Constitution

(b) for the word “he”, wherever it appears therein, the words “he or she”;

(c) for the word “his”, wherever it appears therein, the words “his or her”; and

(d) for the word “him”, wherever it appears therein, the words “him or her”.

Amendment of section 14 of the Constitution

3. Section 14 of the Constitution is amended by deleting paragraph (c) of subsection (3) thereof.

Amendment of section 15 of the Constitution

4. Section 15 of the Constitution is amended by substituting for the words “colour or creed” which appear in subsection (3) thereof, the words “colour, creed or sex”.

Amendment of section 35 of the Constitution

5. Section 35 of the Constitution is amended in paragraph (c) of subsection (5) thereof by deleting the words “and the Attorney-General”.

Substitution of section 51 of the Constitution

6. The Constitution is amended by substituting, for section 51 thereof, the following new section —

Attorney-General

51. (1) There shall be an Attorney-General appointed by the President whose office shall be a public office.

(2) A person shall not be qualified to be appointed to the Office of Attorney-General unless he or she is qualified to be appointed to the Office of a Judge of the High Court.

(3) The Attorney-General shall be the principal legal adviser to the Government.

(4) A person holding the Office of Attorney-General shall vacate his or her office when he or she attains the age of 60 years or such other age as may be prescribed by Parliament.

Insertion of new section 51A into the Constitution

7. The Constitution is amended by inserting, immediately after section 51 thereof, the following new section —

Director of Public Prosecutions

51A. (1) There shall be a Director of Public Prosecutions appointed by the President whose office shall be a public office and who shall be subject to the administrative supervision of the Attorney-General.

(2) A person shall not be qualified to be appointed to the Office of Director of Public Prosecutions unless he or she is qualified to be appointed to the Office of a Judge of the High Court.

(3) The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable to do so —

(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

- (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
- (c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him or her in person or by officers subordinate to him or her acting in accordance with his or her general or special authority.

(5) For the purposes of this section any appeal from any judgment in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings, to any other court shall be deemed to be part of those proceedings:

Provided that the power conferred on the Director of Public Prosecutions by subsection (3) (c) of this section shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such person.

(6) In the exercise of the functions vested in him or her by subsection (3) of this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority:

Provided that —

- (a) where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority, and with the leave of the court; and
- (b) before exercising his or her powers in relation to cases considered by the Attorney-General to be of national importance, the Director of Public Prosecutions shall consult the Attorney-General.

8. Section 58 of the Constitution is amended by substituting, for subsection (2) thereof, the following new subsection —

Amendment  
of section 58  
of the  
Constitution

“(2) In addition to the President the National Assembly shall consist of —

- (a) 57 Elected Members who shall be elected in accordance with the provisions of this Constitution and subject thereto in accordance with the provisions of any Act of Parliament; and
- (b) four Specially Elected Members who shall be elected in accordance with the First Schedule to this Constitution and subject thereto in accordance with the provisions of any Act of Parliament.”.

Amendment of section 74 of the Constitution

9. Section 74 of the Constitution is amended by deleting subsection (2) thereof.

Substitution of heading of Part III of Chapter V of the Constitution

10. The Constitution is amended by substituting, for the heading of Part III of Chapter V thereof, the following new heading —

**“PART III**  
*Ntlo ya Dikgosi” (ss 77-85)*

Substitution of section 77 of the Constitution

11. The Constitution is amended by substituting, for section 77 thereof, the following new section —

“Establishment and composition of *Ntlo ya Dikgosi*”

77. (1) There shall be an *Ntlo ya Dikgosi* for Botswana which shall consist of not less than 33 nor more than 35 Members which shall be constituted as follows —

(a) one person from each of the following areas, which person for the time being performs the functions of the office of *Kgosi* in respect of such areas —

- (i) Barolong Farms in the Southern District,
- (ii) Chobe in the North West District,
- (iii) Ga Malete in the South East District,
- (iv) Ga Mmangwato in the Central District,
- (v) Ghanzi District,
- (vi) Goo Tawana in the North West District,
- (vii) Kgalagadi District,
- (viii) Kgatleng District,
- (ix) Kweneng District,
- (x) Ngwaketse in the Southern District,
- (xi) North East District, and
- (xii) Tlokweng in the South East District;

(b) 5 persons who shall be appointed by the President; and

(c) such number of persons, not being more than 20, as may be selected under section 78 (4) (c) of this Constitution.

(2) Notwithstanding the provisions of subsection (1) (a), the number of persons referred to in that subsection may, by virtue of section 78 (5), be less than 12, but not less than 10.”

12. The Constitution is amended by substituting, for section 78 thereof, the following new section —

Designation  
and  
selection of  
Members to  
*Ntlo ya  
Dikgosi*

“78. (1) Except for the areas of Ghanzi, Chobe, Kgalagadi and North East, the Members for the areas referred to in section 77 (1) (a) shall be designated to *Ntlo ya Dikgosi* according to the established norms and practices of those areas.

(2) The Members for the Ghanzi, Chobe, Kgalagadi and North-East areas referred to in section 77 (1) (a) shall be selected, from their own number, to *Ntlo ya Dikgosi* by persons for the time being performing the functions of the office of *Kgosi* within each of those areas.

(3) For the purpose of selecting the Members under section 77 (1) (c), there shall be 20 regions, as listed in the Second Schedule to this Constitution, the boundaries of which shall be defined by an Act of Parliament.

(4) There shall be a Regional Electoral College for each region composed of Paid Dikgosana from that region up to and including a *Kgosi*, which shall —

(a) when necessary, meet at a *Kgotla* or other suitable venue;

(b) be chaired by a senior government official appointed by the Minister responsible for local government; and

(c) select a Member to *Ntlo ya Dikgosi* for that region by election or in such other manner as the Regional Electoral College may agree.

(5) Notwithstanding the provisions of section 77 (1) (a) and subsections (2) and (4) (c) of this section, the areas of Ghanzi and Kgalagadi shall each have the option of either selecting one Member under subsection (2) of this section or of each selecting two regional Members under subsection (4) (c) of this section, but may not select Members under both subsections.”.

13. The Constitution is amended by substituting, for section 79 thereof, the following new section —

“Qualifications  
for  
membership of  
*Ntlo ya Dikgosi*

79. (1) A person shall be qualified to be appointed under section 77 (1) (b) as a Member of *Ntlo ya Dikgosi* if he or she —

(a) is a citizen of Botswana; and

(b) has attained the age of 21 years.

(2) No person shall be qualified to be appointed, selected or designated as a Member of *Ntlo ya Dikgosi* if he or she —

(a) is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state;

Substitution  
of section 78  
of the  
Constitution

Substitution  
of section 79  
of the  
Constitution

- (b) has been declared insolvent or adjudged or otherwise declared bankrupt under any law in force in any part of the Commonwealth or any country with a comparable legal system and has not been discharged, or has made a composition with his or her creditors and has not paid his or her debts in full;
- (c) is certified insane or otherwise adjudged or declared to be of unsound mind under any law for the time being in force in Botswana;
- (d) subject to such exceptions as may be prescribed by Parliament, holds any public office, or is acting in any public office by virtue of a contract of service expressed to continue for a period exceeding six months;
- (e) is under sentence of death imposed on him or her by a court in any part of the Commonwealth or any country with a comparable legal system, or is under a sentence of imprisonment (by whatever name called) exceeding six months imposed on him or her by such a court or substituted by a competent authority for some other sentence imposed on him or her by such a court;
- (f) holds, or is acting in, any office the functions of which involve any responsibility for, or in connection with, the conduct of any elections to the National Assembly or the compilation or revision of any electoral register for the purposes of such elections; or
- (g) is disqualified for election to the National Assembly by virtue of provision made in pursuance of section 62 (2) of this Constitution.

(3) For the purposes of this section, two or more terms of imprisonment that are required to be served consecutively shall be regarded as a single term of imprisonment for the aggregate period of those terms, and no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

(4) A Member of *Ntlo ya Dikgosi* shall not, while he or she is such a Member, participate in party politics, but active participation in politics prior to being a Member of *Ntlo ya Dikgosi* shall not bar any person from being such a Member.”.

<p><b>14.</b> The Constitution is amended by substituting, for section 82 thereof, the following new section —</p> <p>“Tenure of office of Members of <i>Ntlo ya Dikgosi</i></p>	<p><b>82.</b> (1) A Member of <i>Ntlo ya Dikgosi</i> shall vacate his or her seat in <i>Ntlo ya Dikgosi</i> —</p> <p>(a) upon expiration of a period of 5 years from the date upon which he or she takes the oath of allegiance under section 80 of this Constitution;</p> <p>(b) if, having been designated or selected to <i>Ntlo ya Dikgosi</i> as such, he or she ceases to be a person for the time being performing the functions of the office of <i>Kgosi</i>;</p> <p>(c) if he or she ceases to be qualified for membership of <i>Ntlo ya Dikgosi</i> in terms of section 79;</p> <p>(d) if he or she participates in party politics; or</p> <p>(e) upon the dissolution of Parliament, whichever occurs first.</p> <p>(2) A member of <i>Ntlo ya Dikgosi</i> shall be eligible for reselection, redesignation or reappointment, as the case may be, to <i>Ntlo ya Dikgosi</i>.”</p>	<p>Substitution of section 82 of the Constitution</p>
<p><b>15.</b> Section 83 of the Constitution is amended by deleting paragraph (e) thereof.</p>		<p>Amendment of section 83 of the Constitution</p>
<p><b>16.</b> Section 88 of the Constitution is amended in subsection (2) thereof by substituting, for paragraph (a) thereof, the following new paragraph —</p> <p>“(a) the designation, recognition, removal or powers of <i>Dikgosi</i> or <i>Dikgosana</i>.”</p>		<p>Amendment of section 88 of the Constitution</p>
<p><b>17.</b> Section 94 of the Constitution is amended by deleting the words “and the Attorney-General”.</p>		<p>Amendment of section 94 of the Constitution</p>
<p><b>18.</b> Section 112 of the Constitution is amended in subsection (2) thereof by inserting, immediately after paragraph (c) thereof, the following new paragraph —</p> <p>“(cA) Director of Public Prosecutions;”</p>		<p>Amendment of section 112 of the Constitution</p>
<p><b>19.</b> Section 113 of the Constitution is amended —</p> <p>(a) by substituting, for subsection (1) thereof, the following new subsection —</p> <p>“(1) Subject to the provisions of this section, a person appointed as Director of Public Prosecutions shall hold office for a 5 year renewable term or until he or she attains the age of 60 years, whichever is the earlier.”</p> <p>(b) by inserting, immediately after the word “misbehaviour” wherever it appears therein, the words “or for incompetence”; and</p> <p>(c) by substituting, for the words “Attorney-General”, wherever they appear in subsections (2), (3), (4), (5) and in the side note thereto, the words “Director of Public Prosecutions”.</p>		<p>Amendment of section 113 of the Constitution</p>

Amendment  
of section 116  
of the  
Constitution

20. The Constitution is amended in section 116 thereof by substituting, for the words "Attorney-General" which appear in subsection (3) thereof, the words "Director of Public Prosecutions".

Amendment  
of section 119  
of the  
Constitution

21. The Constitution is amended in section 119 thereof by substituting, for the words "head" and "heads" which appear therein, the words "organisation" and "organisations", respectively.

Amendment  
of section 122  
of the  
Constitution

22. Section 122 of the Constitution is amended in subsection (5) thereof by inserting, immediately after the words " Auditor-General" the words " , Director of Public Prosecutions".

Amendment  
of section 127  
of the  
Constitution

23. Section 127 of the Constitution is amended —

(a) in subsection (1) thereof by —

(i) deleting the definitions of "Chief and Sub-Chief" and substituting therefor, in their correct alphabetical order, the following new definitions —

Cap. 41:01 "Kgosi (pl. *Dikgosi*)" means Chief or Sub-Chief as defined in the Chieftainship Act;

"Kgosana (pl. *Dikgosana*)" means Headman;"; and

(ii) deleting the definition of "the House".

(b) by substituting, for the words " Attorney-General", which appear in the proviso to subsection (7) thereof, the words "Director of Public Prosecutions".

Addition of  
Second  
Schedule to  
the Constitu-  
tion

24. The Constitution is amended by —

(a) renumbering the Schedule thereto as the First Schedule to the Constitution; and

(b) adding, immediately after the said First Schedule to the Constitution, the following new Schedule —

## "SECOND SCHEDULE TO THE CONSTITUTION

(Section 78 (3))

### DIVISION OF DISTRICTS INTO REGIONS FOR THE PURPOSE OF SELECTING MEMBERS OF *NTLO YA DIKGOSI*

THE CENTRAL  
DISTRICT

- (1) Bobirwa Region
- (2) Boteti region
- (3) Mahalapye Region
- (4) Serowe Region
- (5) Tonota Region
- (6) Tswapong Region
- (7) Tutume Region

THE GHANZI  
DISTRICT

- (8) Ghanzi East Region
- (9) Ghanzi West Region

<b>THE K GALAGADI DISTRICT</b>	(10)	<b>Kgalagadi North Region</b>
	(11)	<b>Kgalagadi South Region</b>
<b>THE KWENENG DISTRICT</b>	(12)	<b>Letlhakeng Region</b>
	(13)	<b>Molepolole Region</b>
	(14)	<b>Thamaga Region</b>
<b>THE NORTH WEST DISTRICT</b>	(15)	<b>Maun Region</b>
	(16)	<b>Ngami Region</b>
	(17)	<b>Okavango Region</b>
<b>THE SOUTHERN DISTRICT</b>	(18)	<b>Kanye Region</b>
	(19)	<b>Moshupa Region</b>
	(20)	<b>Ngwaketse West Region.”.</b>

**PASSED** by the National Assembly this 28th day of July, 2005.

**A. MATLHAKU,**  
*Clerk of the National Assembly.*