

RESEARCH ARTICLE

Community Based Natural Resources Management in Botswana

Emma Chitsove^{1*} and Tinashe Madebwe^{2**}

¹University of Botswana, Gaborone, Botswana and ²Robert Gordon University, Aberdeen, Scotland
Corresponding author: Tinashe Madebwe, Email: t.madebwe@rgu.ac.uk

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Abstract

Since the mid-1980s, Botswana has relied on community based natural resources management (CBNRM) to incentivize communities to choose environmentally beneficial behaviour to advance conservation efforts. This approach has had some success, although it has not been as successful as had been hoped. Nevertheless, it is well acknowledged that CBNRM can play an important role in advancing conservation efforts. The state is therefore working to revamp the CBNRM framework so that it consistently yields beneficial results for communities and conservation. This article relies on regulatory theory and experience with CBNRM in Botswana to identify what it would take to establish an effective CBNRM regulatory framework there. It establishes that Botswana has failed to secure effective CBNRM consistently, due to the lack of a dedicated CBNRM law and inadequately resourced institutions. It recommends the promulgation of a CBNRM law with a community-centred and / or rights-based approach, and the establishment of an adequately resourced institution, charged with regulating CBNRM in Botswana.

Keywords: Community based natural resources management; sustainable development; conservation; regulation; enforcement

Introduction

Botswana has an abundance of some of the world's most unique natural resources. Notably, these resources are commonly found in and around areas where communities live and thus play a prominent role in people's lives. These resources also attract a significant amount of tourism revenue.¹ Recognizing the relationship between people and natural resources, since the 1980s² the government has looked to advance environmental protection efforts by relying on links between the conservation of natural resources and community development to incentivize communities to choose environmentally beneficial behaviour consistently.³ This culminated in the turn to the Community Based Natural Resources Management (CBNRM) Policy, which has effectively become the ad hoc basis of

* Law lecturer, University of Botswana.

** Law lecturer, Robert Gordon University. Corresponding author.

1 Wildlife Policy 2013. Botswana Tourism Organisation Act 2009. O Yasukawa and K Pisa "In Botswana, ecotourism and conservation draw travellers" (13 June 2016) *CNN Travel*, available at: <<https://edition.cnn.com/travel/article/botswana-ecotourism-mpa-feat/index.html>> (last accessed 10 October 2023). JE Mbaiwa "Poverty or riches: Who benefits from the booming tourism industry in Botswana?" (2017) 35/1 *Journal of Contemporary African Studies* 93. J Turpie et al "Economic value of the Okavango Delta, Botswana and implications for management" (2006, IUCN).

2 CBNRM initiatives started in the late 1980s through the USAID-funded Natural Resource Management Project.

3 D Roe, F Nelson and C Sandbrook (eds) *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (2009, International Institute for Environment and Development) 1 at 4 and 8–9. BA Nkhata, C

CBNRM in the country (CBNRM Policy).⁴ Over time, as communities in Botswana have grown, and their interaction with the resources around them has grown with them, it has become even more apparent that communities need to play a greater role in conservation efforts if conservation goals are to be attained. It has also become apparent that the ad hoc CBNRM framework based on the policy is deficient, in that it does not consistently yield positive results. This has prompted the state to take stock and explore how to craft a CBNRM framework that can attain positive results more consistently.

Against this backdrop, this article looks to contribute to discourse on what it will take to craft a consistently effective CBNRM framework in Botswana. It does this first by drawing from regulatory theory to identify what it takes to craft an effective environmental protection regulatory framework that incorporates CBNRM. Secondly, and following from this, the article identifies that a regulatory framework that incorporates CBNRM must feature a CBNRM law if it is to achieve consistently effective results. It must also feature an institutional framework led by a regulator that: is well resourced; communicates effectively; is empowered; and can be held accountable. Thirdly, the article draws from this discussion to analyse the experience with Botswana's ad hoc CBNRM framework and identify why the framework has failed to yield positive results consistently. The article then makes recommendations on what it would take to achieve effective CBNRM more consistently in Botswana.

CBNRM in law

To understand when CBNRM is effective in regulation, it is important to note that the primary aim of environmental protection efforts is the prevention of harm. Such prevention must be pursued while accounting for the fact that the environment features extensive interlinkages and that various environmental phenomena (such as air, water bodies and different species) are interconnected.⁵ As such, the effective environmental protection of one aspect of the environment in isolation could result in the transfer of the problem to other phenomena. For instance, a regulatory framework that caters extensively for water pollution but not land pollution is flawed.⁶ Similarly, protecting

Breen and A Mosimane "Engaging common property theory: Implications for benefit sharing research in developing countries" (2012) 6/1 *International Journal of the Commons* 52.

- 4 The CBNRM Policy (government paper 2 of 2007) recognizes that all members of a community share an interest in improving their livelihoods through the sustainable management and equitable utilization of natural resources in their environs. In addition, several statutes and policies make general provision for greater community involvement in wildlife use and management. These include: the Wildlife Conservation Policy (1986), which introduced wildlife management areas; the Wildlife Policy (2013); the Tourism Policy (1990); the Revised Tourism Policy of 2021, which introduced tourism concessions that could be tendered; the Revised Rural Development Policy (2002 and currently under review), which identifies areas for private commercial development as well as areas for community-based developments, be they subsistence or commercially oriented; the CBNRM Policy; the Eco-Tourism Development Strategy (2002), which provides support for community based natural resources management and development; the Botswana National Development Plan 11 (2017–23), which also alludes to community based natural resources harvesting; the Wildlife Conservation and National Parks (Hunting and Licensing) Regulations; and the Controlled Hunting Areas (Fees) Order (SI No 16 of 1995).
- 5 BH Desai "Mapping the future of international environmental governance" in G Ulfstein and J Werksman (eds) *Yearbook of International Environmental Law* (2002, Oxford University Press) 13 at 43. K Raustiala "The participatory revolution in international environmental law" (1997) 21/2 *Harvard Environmental Law Review* 537. EJ Ringquist and T Kostadinova "Assessing the effectiveness of international environmental agreements: The case of the 1985 Helsinki Protocol" (2005) 49/1 *American Journal of Political Science* 87. SC Schreck "The role of nongovernmental organizations in international environmental law" (2006) 10/1 *Gonzaga Journal of International Law* 252 at 252–53. A Hurrell and B Kingsbury *The International Politics of the Environment* (1992, Clarendon Press) at 2. UJ Wagner "The design of stable international environmental agreements: Economic theory and political economy" (2002) 15/3 *Journal of Economic Surveys* 377. EB Weiss "International environmental law: Contemporary issues and the emergence of a new world order" (1993) 81/1 *Georgetown Law Journal* 690.
- 6 DJ Dudek, RB Stewart and JB Wiener "Technology-based approaches versus market-based approaches" in P Sands *Greening International Law* (1993, Earthscan Publications) 182 at 190–91.

one species may encourage its growth while causing harm to another.⁷ In addition, it is important to account for the fact that several aspects of the environment are of common interest, regardless of the territory within which they may be found.⁸ Thus, there is a common interest in migratory and non-migratory species. There is also often a common interest in the conservation of some resources, habitats and watercourses. Further, it is also important to account for the fact that environmental harm often results from people making choices that they consider will lead to their socioeconomic development. A central part of tackling environmental deterioration, therefore, is affording people opportunities to develop socioeconomically while sustainably using the environment and educating them on how to utilize the environment sustainably. Once scientists determine that an intervention is needed to protect the environment in which communities live, it becomes important to determine standards that reflect conduct that is acceptable to conserve the environment. Importantly, being based on science means that these standards would be strict, and possibly unattainable where communities exploit the environment in pursuit of socioeconomic development. To insist on them may be futile. Regulatory theory holds that a preferable response is to rely on these science-based standards as a starting point and use them to engage with communities through “sustainable development analyses”. These are analyses that determine the right standard to apply, based on consideration of the science and the socioeconomic needs of the communities living around resources and utilizing them.⁹ Involving communities in the determination of acceptable conduct will ensure greater compliance as communities become involved in determining levels of acceptable conduct that they consider attainable. It may also lead to communities that are well informed and agree to commit to standards that may even be more demanding than those prescribed by science. Participation also means communities living in resource-rich areas have the opportunity to discuss and express the extent of their dependence on resources.¹⁰ This can help determine if certain communities deserve preferential treatment for reasons of equity.¹¹ In this way, regulatory efforts will not alienate people and actors living and operating in the area.¹²

For all the benefits that this command-and-control approach based on sustainable development analyses may offer, however, the wide use of command-and-control across different jurisdictions over time has revealed that this approach has notable limitations.¹³ For instance, this approach is often prescriptive and rigid because it does not allow people and any actors significant room for innovation as they look to meet environmental protection standards prescribed by law. In addition, the command-and-control approach often focuses on, and is more effective when, regulating the

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- 7 D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007, Oxford University Press) at 6.
- 8 M Koskenniemi “The future of statehood” (1991) 32/1 *Harvard International Law Journal* 397 at 408. M Mason “Citizenship entitlements beyond borders? Identifying mechanisms of access and redress for affected publics in international environmental law” (2006) 12/1 *Global Governance* 283 at 288. AS Timoshenko “Ecological security: Global change paradigm” (1990) 1/1 *Colorado Journal of International Environmental Law and Policy* 127 at 136–37. AE Utton “International environmental law and consultation mechanisms” (1973) 12/1 *Columbia Journal of Transnational Law* 56 at 57. Weiss “International environmental law”, above at note 5 at 691. Hurrell and Kingsbury *The International Politics*, above at note 5 at 45. PH Sand “The evolution of international environmental law” (2001) at 6, available at: <https://www.researchgate.net/publication/288662385_The_Evolution_of_International_Environmental_Law> (last accessed 10 October 2023). P Sands *Principles of International Environmental Law* (2nd ed, 2003, Cambridge University Press) at 184. P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd ed, 2009, Oxford University Press) at 128–29.
- 9 S Bell, D McGillivray and O Pedersen *Environmental Law* (2013, Oxford University Press) at 236.
- 10 Mbaiwa “Poverty or riches”, above at note 1 at 99.
- 11 JF McEldowney and S McEldowney *Environmental Law and Regulation* (2001, Blackstone Press) at 3, 10, 12, 36–38 and 41–42.
- 12 J Newig “Does public participation in environmental decisions lead to improved environmental quality? Towards an analytical framework” (2007) 1/1 *International Journal of Sustainability Communication* 51.
- 13 For a detailed discussion on limitations, see Bell, McGillivray and Pedersen *Environmental Law*, above at note 9 at 245–47.

activities of businesses and not the actions of individuals.¹⁴ Further, the success of the command-and-control framework often depends on several unreliable variables, including the regulator's willpower and the degree of investment of capital resources.¹⁵ Due to reasons such as these, various alternatives to the command-and-control approach have emerged that seek to address its limitations.¹⁶ Most alternatives are designed to put businesses in a position to comply with laws in a non-confrontational manner. For instance, economic instruments such as subsidies and taxes can positively impact environmental performance by business actors. The same is true of an alternative approach, such as reporting by businesses. This can positively impact environmental protection efforts. In the same vein, CBNRM has emerged as the most appropriate alternative in conservation efforts that involve people going about their lives in their communities. It tackles the rigidity and lack of innovation exhibited in a command-and-control framework by relying on links between conservation of natural resources and individuals as well as community development to incentivize communities to choose environmentally beneficial behaviours in innovative ways that resonate with them.¹⁷ In doing so, CBNRM places business and individuals at the centre of environmental protection efforts in a manner that a command-and-control approach to regulation does not. By empowering all actors, CBNRM also ensures that businesses and individuals can act in furtherance of environmental protection objectives in a manner that command-and-control cannot guarantee, even when they are confronted by unwilling regulators and limited capital resources.

Weaving CBNRM into the legal framework

To incorporate CBNRM successfully into an environmental protection regulatory framework, it is important to accommodate the fact that, as part of the environmental protection regulatory framework, a CBNRM framework must incorporate fines and stringent sanctions to be applied following catastrophic, or continued, non-compliance.¹⁸ However, it is also important to accommodate the fact that, as an alternative to command-and-control regulation intended to incentivize communities to choose environmentally beneficial behaviours consistently, it is important for a framework incorporating CBNRM to provide clearly for compelling benefit sharing.¹⁹ To achieve all this, a

14 S Elworthy and J Holder *Environmental Protection: Text and Materials* (1997, Butterworths) at 299. J Dikgang and M Visser "Behavioural response to plastic bag legislation in Botswana" (paper presented to Environment for Development discussion paper series, May 2010) at 8–10. "Botswana" in *SADC Environmental Legislation Handbook* (2012, Southern African Institute for Environmental Assessment) 67 at 71, available at: <<https://irp-cdn.multiscreensite.com/2eb50196/files/uploaded/SADC%20Handbook.pdf>> (last accessed 19 October 2023).

15 Elworthy and Holder *Environmental Protection*, above at note 14. Dikgang and Visser "Behavioural response", above at note 14. "Botswana", above at note 14.

16 DH Cole and PZ Grossman "When is command and control efficient? Institutions, technology, and the comparative efficiency of alternative regulatory regimes for environmental protection" (1999) 1/1 *Wisconsin Law Review* 887. E Fisher, P Pascual and W Wagner "Understanding environmental models in their legal and regulatory context" (2010) 22/2 *Journal of Environmental Law* 251. A Ogus "Nudging and rectifying: The use of fiscal instruments for regulatory purposes" (2006) 19/2 *Legal Studies* 245. R Macrory "Regulating in a risky environment" (2001) 54/1 *Current Legal Problems* 619. N Gunningham and D Sinclair "Designing smart regulation" (1998), available at: <<http://www.oecd.org/environment/outrach/33947759.pdf>> (last accessed 10 October 2023). Elworthy and Holder *Environmental Protection*, above at note 14 at 3 and 299. McEldowney and McEldowney *Environmental Law and Regulation*, above at note 11 at 7–9 and 18–19. R Baldwin, M Cave and M Lodge *Understanding Regulation* (2nd ed, 2013, Oxford University Press) at 106.

17 Cole and Grossman "When is command and control efficient?", above at note 16. Fisher, Pascual and Wagner "Understanding environmental models", above at note 16. Ogus "Nudging and rectifying", above at note 16. Macrory "Regulating in a risky environment", above at note 16. Gunningham and Sinclair "Designing smart regulation", above at note 16. Elworthy and Holder *Environmental Protection*, above at note 14 at 3 and 299. McEldowney and McEldowney *Environmental Law and Regulation*, above at note 11 at 7–9 and 18–19. Baldwin, Cave and Lodge *Understanding Regulation*, above at note 16 at 106.

18 I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992, Oxford University Press).

19 M Leach, R Mearns and I Scoones "Environmental entitlements: Dynamics and institutions in community-based natural resource management" (1999) 27/2 *World Development* 225. H Ceballos-Lascurain *Tourism, Ecotourism and Protected Areas* (1996, IUCN Publication) 230.

CBNRM framework will need to allow deviation from national law through turning to responsive implementation and enforcement.²⁰ To accommodate all this effectively, the first step to weaving CBNRM into the regulatory framework is, therefore, to craft a national law dedicated to CBNRM. This law should accommodate the application of laws in the command-and-control framework. However, because CBNRM is an alternative, the CBNRM law should be on a similar footing to other national laws and able to affect provisions in national laws so that a responsive approach to enforcement can be taken, in which regulators have room to opt for the most effective approaches to enforcement. There are several benefits associated with CBNRM as an alternative to the command-and-control approach.²¹ Among these benefits is that this approach allows for the engagement of communities in the sustainable management of natural resources. By being at the centre of this initiative, communities become active decision-makers in the conversation and use of natural resources. The bottom-up approach presented by CBNRM responds to the needs of local communities and promotes the collective ownership of decisions, in contrast to the command-and-control approach that dictates what communities must do, mostly without giving due consideration to, and understanding of, the local contexts in which the resources are based. In CBNRM, which is based on incentivizing communities to choose environmentally beneficial behaviour consistently, it is also important for the law to provide for an accessible approach to benefit sharing.

Importantly, legal provisions alone do not secure CBNRM unless they are implemented. Thus, an effective CBNRM law must provide for its legal implementation.²² Regulatory theorists contend that implementation of law in general is best done through regulatory institutions. Theorists have different views on the qualities that regulatory institutions must exhibit. However, it is possible to discern from the several theories that, for CBNRM to work, the regulator must exhibit four qualities.

First, regulatory theorists consider that effective institutional frameworks have sufficient financial and human resources at their disposal.²³ Thus, to attain successful CBNRM, it is critical that a

20 McEldowney and McEldowney *Environmental Law and Regulation*, above at note 11 at 5 and 11. W Howarth “The progression towards ecological quality standards” (2006) 18/1 *Journal of Environmental Law* 3. Bell, McGillivray and Pedersen *Environmental Law*, above at note 9. M Ehrmann “Procedures of compliance control in international environmental treaties” (2002) 13/2 *Colorado Journal of International Environmental Law* 377 at 380–81. M Fitzmaurice and C Redgwell “Environmental non-compliance procedures and international law” in J Brunnee and E Hey *Yearbook of International Environmental Law* (2000, Oxford University Press) 31 at 41. D Freestone “The road from Rio: International environmental law after the earth summit” (1994) 6/2 *Journal of Environmental Law* 193 at 195–96. FFL Kirgis “Editorial comment: Standing to challenge human endeavours that could change the climate” (1990) 84/2 *American Journal of International Law* 525 at 528. Schreck “The role of nongovernmental organizations”, above at note 5 at 257. D Zaelke and J Cameron “Global warming and climate change: An overview of the international legal process” (1990) 5/2 *American University Journal of International Law and Policy* 249 at 250–51. M Koskenniemi “Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol” in G Handl (ed) *Yearbook of International Environmental Law* (1992, Oxford University Press) 126. K Sachariew “Promoting compliance with international environmental legal standards: Reflections on monitoring and reporting mechanisms” in G Handl (ed) *Yearbook of International Environmental Law* (1991, Oxford University Press) 31 at 32. CD Stone “Defending the global commons” in P Sands (ed) *Greening International Law* (1993, Earthscan Publications) 38. J Gupta “Legitimacy in the real world: A case study of the developing countries, non-governmental organizations and climate change” in JM Coicaud and V Heiskanen (eds) *The Legitimacy of International Organizations* (2001, United Nations University Press) 482 at 487. IFI Shihata “Implementation, enforcement and compliance with international environmental agreements: Practical suggestions in the light of the World Bank’s experience” (1996) 9/1 *Georgetown International Environmental Law Review* 37 at 40.

21 M Melinda et al “Community based natural resource management: Exploring the benefits and challenges” (2020) 5/3 *International Journal of Humanities, Art and Social Studies* 33 at 38.

22 C Coglianese “The challenge of regulatory excellence” (26 June 2020, University of Pennsylvania Carey Law School: Legal Scholarship Repository), available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3187&context=faculty_scholarship> (last accessed 10 October 2023). Bell, McGillivray and Pedersen *Environmental Law*, above at note 9 at 234.

23 SH Metzbaum and G Vasish “What makes a regulator excellent? Mission, funding, information, and judgment” (paper prepared for the Penn Program on Regulation’s Best-in-Class Regulator Initiative, June 2015) at 1, available at:

regulator is well-funded, with funding processes being transparent, efficient and simple.²⁴ In addition, the regulator should be staffed by people who are qualified, knowledgeable, manage well and resolve conflicts efficiently and effectively.²⁵ It is also important for people working with the regulator to foster and reinforce humility, openness, empathy and a steadfast commitment to public service.²⁶ Once such people are recruited, they should be empowered to co-operate and co-ordinate with other relevant bodies to advance the agenda.²⁷

Secondly, regulatory theorists argue that an effective regulator must communicate well. The regulator must have clear objectives and functions, clearly articulated in a mission statement that is easily understood.²⁸ CBNRM is typically based on a licensing and permit framework, with licences and permits issued upon an applicant's demonstration that the criteria specified in the applicable rules have been satisfied. It is, therefore, particularly important for the regulator to communicate requirements, options and choices efficiently.²⁹ Efficient communication is also important in CBNRM because benefit sharing is central to the whole effort.³⁰ It is important to communicate to communities what benefits they can expect. It is also important to explain that stakeholders directly involved in CBNRM efforts may be entitled to a greater share of the benefits. It is similarly important to ensure that those directly involved in a project are aware that parties further afield and not directly involved in CBNRM projects may be entitled to some of the benefits. Thus, it will be important for regulators to communicate to stakeholders what the returns on their participation will be.³¹ In light of the fact that stakeholders are at different levels of capacity, effective communication may also require educating people so that they can participate effectively in decision-making.³² Effective communication may also call for the regulator to ensure that there is consistent publication of information through public registers. Those interested in regulatory decisions should also be granted the opportunity to participate.³³

Thirdly, regulatory theorists argue that effective regulation is attained when the regulator is empowered to implement and enforce the law in a responsive way.³⁴ In CBNRM therefore, regulators should be able to determine the most appropriate way to secure compliance, including exempting stakeholders from the strict application of law where this is warranted. To do this successfully and without conflict, an effective regulator must be independent from the state while still acting within national strategic priorities.³⁵ In addition, the regulator should also regularly and purposefully engage with stakeholders to enhance public and stakeholder confidence in the institution and acceptance of its role.³⁶

Fourthly, regulatory theorists argue that a regulator should be accountable. In CBNRM, this is particularly important because CBNRM stakeholders are typically a diverse set of actors who often have interests at odds with each other. Separately, stakeholders' interests are often at odds

<https://www.volckeralliance.org/sites/default/files/attachments/What%20Makes%20a%20Regulator%20Excellent%20-%20The%20Volcker%20Alliance.pdf> (last accessed 10 October 2023).

24 "OECD best practice principles on the governance of regulators" (2022), available at: <https://www.oecd.org/gov/regulatory-policy/governance-regulators.htm> (last accessed 10 October 2023). Metzenbaum and Vasisht "What makes a regulator excellent?", above at note 23 at 1.

25 Coglianesi "The challenge of regulatory excellence", above at note 22 at 8 and 9.

26 Id at 8–10.

27 OECD "Best practice principles", above at note 24. Coglianesi, id at 8.

28 Coglianesi, id at 4.

29 Metzenbaum and Vasisht "What makes a regulator excellent?", above at note 23 at 1.

30 Mbaiwa "Poverty or riches", above at note 1 at 99.

31 Coglianesi "The challenge of regulatory excellence", above at note 22 at 3–4.

32 Newig "Does public participation", above at note 12.

33 Bell, McGillivray and Pedersen *Environmental Law*, above at note 9 at 237. OECD "Best practice principles", above at note 24.

34 Metzenbaum and Vasisht "What makes a regulator excellent?", above at note 23 at 1.

35 OECD "Best practice principles", above at note 24.

36 Coglianesi "The challenge of regulatory excellence", above at note 22 at 9. OECD, *ibid*.

with those of the regulator or of the laws.³⁷ Theorists consider that accountability is secured where a regulator is receptive to stakeholder input and is respectful and empathetic to stakeholders adversely affected by decisions.³⁸ Accountability is also found in situations where a regulator's decisions and functions are conducted with utmost integrity. Accountability also follows when regulators consistently assess their decisions, actions and interventions. This creates awareness and understanding of the impact of the regulator's actions and helps to communicate and demonstrate to stakeholders the added value the regulator brings.³⁹ Importantly, these techniques can fail and so it remains critical for regulators to remain publicly accountable in adjudicatory fora.⁴⁰

Reviewing the CBNRM experience in Botswana

This discussion has highlighted where CBNRM falls in regulation and has identified important elements of the CBNRM legal and institutional framework that are needed to attain a CBNRM framework that can achieve positive results more consistently. Drawing from that discussion, it is possible to analyse Botswana's ad hoc CBNRM efforts to date and determine why these efforts have not yielded consistently positive results.

The legal framework

Botswana's legal framework is not based on baselines or quality standards that determine the right standard to apply based on consideration of the science and the socioeconomic needs of the communities living around resources and utilizing them.⁴¹ This is because laws on phenomena are not crafted on the basis of sustainable development analyses in the manner discussed above. This holds true for most of Botswana's air, land and water laws, such as the Atmospheric Pollution (Prevention) Act,⁴² Waste Management Act⁴³ and Forest Act.⁴⁴

Furthermore, Botswana's legislative framework is primarily based on a command-and-control approach.⁴⁵ Laws that form an important part of the environmental protection framework, such as the Wildlife Conservation and National Parks Act⁴⁶ and Tribal Land Act,⁴⁷ carry provisions styled as commands, with controls provided where commands are not followed.⁴⁸ As is to be expected in a command-and-control based environmental protection framework, laws are based on strict liability and typically require actors to obtain prior authorization from regulators before conducting any activities that may cause environmental harm.⁴⁹ These laws also grant regulators extensive inspection powers and, under these laws, it is a criminal offence to obstruct an official

37 Coglianesi, id at 4.

38 Id at 9.

39 OECD "Best practice principles", above at note 24.

40 Coglianesi "The challenge of regulatory excellence", above at note 22 at 4, 6 and 8.

41 McEldowney and McEldowney *Environmental Law and Regulation*, above at note 11 at 5 and 11. Howarth "The progression towards", above at note 20. Bell, McGillivray and Pedersen *Environmental Law*, above at note 9.

42 Atmospheric Pollution (Prevention) Act 1971, sec 15.

43 Waste Management Act 1998, sec 6(1); see also Basel Convention, art 10(2), which is domesticated in sched 1 of the act.

44 Forest Act 1968, sec 11.

45 NM Moleele and T Ntsabane "Environmental issues and management in Botswana: Have the national conservation plans worked?" (2002, Organisation for Social Science Research in Eastern and Southern Africa Environmental Forum Publications Series no 5), available at: <<http://www.ossrea.net/publications/images/stories/ossrea/env-bots-part-1.pdf>> (last accessed 10 October 2023).

46 Wildlife Conservation and National Parks Act 1992, sec 11.

47 Tribal Land Act 1 of 2018.

48 Wildlife Conservation and National Parks Act, sec 79.

49 See: Waste Management Act, sec 13; Environmental Assessment Act 2011, sec 4; and Wildlife Conservation and National Parks Act, part VII.

performing their duties or deny them entry.⁵⁰ Laws also afford regulators the opportunity to use a mix of criminal and / or civil penalties to bring parties into compliance with the law,⁵¹ with regulators often empowered to compel an infringing party to clean up any harm caused.⁵²

It is in this context that the ad hoc CBNRM framework was introduced as an alternative to the command-and-control approach. The CBNRM framework is not based on a CBNRM law. Instead, it is based on a policy. The policy seeks to create a foundation for conservation-based development in which the need to protect biodiversity and the ecosystem is balanced with the need to improve rural livelihoods and reduce poverty. This is intended to be achieved by providing communities with diversified livelihoods, economic opportunities and incentives, and by managing and using the country's natural resources in a sustainable manner.⁵³ It promotes the involvement of communities in the sustainable use and management of natural resources, such as wildlife, and lays down mechanisms for achieving this objective. To be eligible to participate, communities must form a registered accountable legal entity or a community-based organization (CBO).⁵⁴ The CBNRM Policy notes that CBOs retain a 35 per cent share of the income from hunting and tourism activities.⁵⁵ CBOs can carry out hunting and tourism activities in their specified areas or sub-lease these activities to safari operators. When assessing the performance of the CBNRM framework, it is striking that, in the hierarchy of laws, the policy occupies a lower tier to statutory laws. It cannot therefore alter those laws to accommodate alternative enforcement that accommodates community efforts to achieve conservation in non-traditional ways. For instance, while it may be beneficial to turn to CBNRM in wildlife conservation, such efforts will remain subject to section 93 of the Wildlife Conservation and National Parks Act. This section provides that the minister may recommend that any revenue derived from fees for licences or permits to hunt, capture, sell or farm any animals or in respect of any other wildlife activity in its area, other than a national park or game reserve, be paid to the district council concerned. Therefore, to the extent that this status pits the CBNRM Policy against ministerial discretion, it potentially disincentivizes local communities from partaking in CBNRM wildlife activities.

The institutional framework

In the absence of a dedicated CBNRM law, no institution has been created through that avenue that is dedicated to regulating CBNRM. Neither has a regulatory institution dedicated to CBNRM been created through other national laws. Instead, regulation has been approached in an ad hoc manner, led by successive departments of the Ministry of Environment, Natural Resources, Conservation and Tourism. This ad hoc arrangement has often meant that successive regulators have suffered from predictable deficiencies when looking to implement the CBNRM framework.

First, because regulators are part of a general ministry with a broader budget, funding the regulation of CBNRM efforts in Botswana has not been straightforward. Instead, funds are often drawn from a pool of communal resources.⁵⁶ This situation is far from ideal, as dedicated funding is critical to regulatory success that can culminate in consistently effective CBNRM efforts.⁵⁷ Efforts to broaden the funding base have been made through the establishment of the National Environmental Fund. Under the CBNRM Policy, 65 per cent of the proceeds from the sale by communities of hunting quotas and concessions are to be deposited into this fund. These funds are to

50 See: Atmospheric Pollution (Prevention) Act, sec 4; Waste Management Act, sec 41; Mines and Minerals Act 1999, sec 6; and Environmental Assessment Act, secs 3 and 4.

51 Waste Management Act, sec 42 and Wildlife Conservation and National Parks Act, sec 23.

52 For example: Atmospheric Pollution (Prevention) Act, sec 16 and Waste Management Act, sec 44.

53 See CBNRM Policy, para 3.1.

54 See *id*, para 5.

55 See *id*, para 10.3.

56 Metzbaum and Vasisht "What makes a regulator excellent", above at note 23.

57 OECD "Best practice principles", above at note 24.

finance the development and implementation of CBNRM activities.⁵⁸ However, the National Environmental Fund is a common pool to finance and promote activities designed to conserve, protect and manage Botswana's environment. Funding to support CBNRM efforts is only one of many uses of the fund and history has shown that the yearly thematic uses of the fund do not always coincide with communities' priorities and their CBNRM efforts. For instance, under the Fifth National Environmental Fund Call for Proposals, successful proposals for funding had to fall within the following thematic areas: veldt product conservation and sustainable utilization; protection of the urban environment; climate change mitigation and adaptation; and waste management and pollution control.⁵⁹

Related to this, the fact that there is no dedicated institution means that regulators are employed to fill ministry or department roles. This means that they may not be CBNRM specialists and, even if they are, they may be asked to take on other responsibilities.⁶⁰ In addition, while they may be well placed to co-operate and co-ordinate with other relevant bodies, they are not always knowledgeable enough to do so while advancing CBNRM or they may not have sufficient time to devote to CBNRM.⁶¹ These deficiencies in economic and human resources mean the framework will struggle to convince communities to make environmentally beneficial choices, with the result that CBNRM efforts do not yield consistently effective results.

Secondly, the absence of a CBNRM law creating the implementing institution has compromised the regulator's ability to communicate effectively. In a most basic sense, because the regulator is housed in the ministry and department, its objectives are informed by broader ministerial and departmental objectives.⁶² Specific CBNRM objectives that regulators may have will have been adapted from those in the CBNRM Policy. These are not necessarily sufficient as the regulator's objectives. In any event, the state's reliance on a command-and-control approach when it comes to conservation means that most of the objectives of the governmental institutions may not be informed by CBNRM considerations, but by command-and-control reasoning. Furthermore, communication has also been compromised in other ways. This is evident from the fact that regulators and public servants regularly assume that benefit-sharing follows the model used in diamond mining, with most government officers being of the view that natural resources are resources of "national interest" despite there being no law to this effect.⁶³ In some ways, this assumption is rooted in the fact that the CBNRM Policy provides that the formula relied on to share benefits derived from all CBNRM projects requires that 65 per cent of returns shall be deposited with the National Environment Fund to finance community based environmental management and eco-tourism projects throughout the country.⁶⁴ The remaining 35 per cent of proceeds from the sale of natural resource concessions and hunting quotas may be retained by CBOs, albeit subject to taxation.⁶⁵

Regulators have succeeded in making communities appreciate that, to gain value, they are better served creating CBOs that partner with members of the private sector through joint venture agreements to generate value.⁶⁶ Communities also seem to understand that joint venture agreements

58 National Environmental Fund Order 2010, sec 4(2)(b).

59 "Fifth call for proposals: The National Environmental Fund (NEF)" (September 2022, Ministry of Environment and Tourism), available at: <www.facebook.com/DEABotswana/> (last accessed 10 October 2023).

60 OECD "Best practice principles", above at note 24.

61 Coglianesi "The challenge of regulatory excellence", above at note 22 at 8. OECD, *ibid*.

62 Coglianesi, *id* at 4.

63 L Cassidy et al "Indigenous knowledge, livelihoods and government policy in the Okavango Delta, Botswana" in D Kgathi, B Ngwenya and M Darkoh *Rural Livelihoods, Risk and Political Economy of Access to Natural Resources in the Okavango Delta, Botswana* (2011, Nova Publishers) 75.

64 CBNRM Policy, para 10.3.

65 *Id*, para 5.2 describes a CBO as a legally constituted entity established by a community to "manage the natural resources base within the defined geographic area, manage the use and beneficiation of any natural resources, manage the benefits derived from any use...".

66 For example, in 2010, Chobe Enclave Community Conservation Trust entered into a new joint venture agreement with Ngoma Management Company to manage a 5-star lodge in the Chobe Enclave concession area. See: JE Mbaiwa and TE

entail any one of the following: the CBO subleasing entire resources to a safari company or companies that pay an annual rental fee to the village/s organization; the CBO subleasing specific areas to one or more safari companies for the development of tourism infrastructure; the CBO managing the natural resources of the remaining area and benefitting from the income derived from hunting, fishing, wildlife viewing and other activities, while safari operators profit from tourist lodge or camp income; and the safari company or companies subleasing the land from the community organization and providing their services at an agreed daily rate per tourist. The remainder of the daily rate income (gross profit) would then be equally divided between the partners.⁶⁷ Importantly though, successive regulators have not educated communities on the fact that benefits for them can be limited. For instance, the Okavango Community Trust (NG 22/23 joint venture) revenue in 2004 was BWP 1.57 million. Despite the magnitude of the total CBO revenue, its allocation per annum to each community resident would be a mere BWP 202 if the trust distributed 100 per cent of its revenue, since the CBO had 7,779 members.⁶⁸ Related to this, CBOs commonly lose out on revenue to third parties who are often better placed to benefit more from dealings with the operators. Mbaiwa notes, for example, that in the Okavango Delta a CBO sells a single elephant to a safari operator at BWP 40,000 (USD 8,000). The same elephant is sold to an overseas safari hunter by the operator at BWP 400,000 (USD 80,000).⁶⁹ CBOs turning to the joint venture approach have commonly had the expectation that collaboration with the private sector would facilitate skills transfer and on-the-job training for their members.⁷⁰ Indeed, in some CBOs (such as Chobe Enclave Conservation Trust), attempts to facilitate skills transfer and build expertise within the community are on-going through the job-shadowing initiative that will eventually allow locals to take over financial and operational lodge management responsibilities.

Further, where hunting safari outfits employ local staff, this tends to be as assistant managers.⁷¹ In most cases, assistant managers are only partially responsible for sales and reservations, with the actual management of the business (especially marketing and handling accounts) done by the private companies, with business accounts held outside the country.⁷² In other instances, community members are effectively labourers and landlords, who participate passively in environmental protection efforts in the hope that they will make some money, with the regulatory framework offering them no relief. Instances such as this, characterized by a lack of effective communication and education, have led to the growing perception that CBNRM carries no real incentive to support community socioeconomic development.⁷³ This deficiency in communication and education has left communities less inclined to make environmentally beneficial choices, with the result that CBNRM efforts do not yield consistently effective results.

Tshamekang "Developing a viable community-based tourism project in Botswana: The case of the Chobe Enclave Conservation Trust" (2012) *World Sustainable Development Outlook* 519; and T Gjadhur "Joint venture options for communities and safari operators in Botswana" (2001, CBNRM Support Programme occasional paper 6), available at: <<http://the-eis.com/elibrary/sites/default/files/downloads/literature/CBNRM%20Support%20Programme%20paper%206.pdf>> (last accessed 10 October 2023).

67 I Blackie "The impact of wildlife hunting prohibition on the rural livelihoods of local communities in Ngamiland and Chobe District Areas, Botswana" (2019) 5/1 *Cogent Social Sciences*, available at: <<https://www.tandfonline.com/doi/pdf/10.1080/23311886.2018.1558716?needAccess=true>> (last accessed 10 October 2023).

68 See CM Lepper and JS Goebel "Community-based natural resource management, poverty alleviation and livelihood diversification: A case study from northern Botswana" (2010) 27/5 *Development Southern Africa* 725 at 734–35.

69 JE Mbaiwa "The socio-economic and environmental impacts of tourism development on the Okavango Delta, north-western Botswana" (2003) 54/2 *Journal of Arid Environments* 452.

70 Blackie "The impact of wildlife hunting", above at note 67. Mbaiwa "Poverty or riches", above note 1 at 99–100.

71 Blackie, *ibid.*

72 *Ibid.*

73 JE Mbaiwa "Community-based natural resource management in Botswana" (2015), available at: <https://library.wur.nl/ojs/index.php/Botswana_documents/article/view/16057> (last accessed 10 October 2023).

Thirdly, while CBNRM depends on responsive enforcement by empowered regulators, regulators in Botswana are not sufficiently empowered to be responsive, because there is no dedicated CBNRM law, and the actions they take will be subject to the strict application of laws. Importantly, regulators cannot even turn to the customary law that communities have traditionally trusted for alternative enforcement.⁷⁴ This is because, under Botswana law, protection and conservation, and the commercial use of natural resources are considered non-traditional and therefore bound by common law. Customary law is restricted to subsistence use of resources and, by the same token, traditional leaders do not have jurisdiction over issues arising in the management of natural resources.⁷⁵ In these circumstances, CBNRM enforcement is often strictly applied based on national law.⁷⁶ This limits the opportunities for regulators to incentivize communities to make environmentally beneficial choices in return for favourable, or considerate, enforcement. The result is that CBNRM efforts do not yield consistently effective results.

Fourthly, the accountability of regulators in Botswana is limited, in large part because, with the CBNRM framework not being based on a national law, there has not been much commitment to informing and educating communities on their rights and options.⁷⁷ Without this, communities do not participate in regulation and are not able to hold regulators to account. Regulators can make decisions that are impactful, and they go unchallenged.⁷⁸ For instance, in 2001, a directive from the permanent secretary of the Ministry of Local Government unilaterally declared that funds earned from CBNRM projects should be managed in trust by district councils and that decisions regarding their use should be made in consultation with the affected communities. Certainly, there were several justifications for these proposed changes. It was argued that the funds generated were earned from natural resources and as such should benefit the whole nation, as with resources generated from trade in diamonds and other revenue-earning natural resources. However, this is far from ideal. Of course, there are opportunities to hold regulators to account through adjudicatory fora.⁷⁹ However, that avenue is expensive and only available to those with capacity.⁸⁰ In this environment, the CBNRM framework has struggled to yield consistently effective results.

Fifthly, the value of CBNRM in Botswana has been compromised by a lack of research. While all ministries have applied research units tasked with collecting and analysing data and assisting with the formulation and implementation of evidence-based policies that directly address the needs of citizens, there is apparent undervaluing and underutilization of indigenous skills, knowledge, resources and materials in Botswana.⁸¹ Due to a lack of funding and a failure to attract and retain senior research professionals, Botswana has failed to research important issues such as indigenous knowledge. In cases where research relevant to advancing CBNRM has been carried out, most of it has been undertaken by foreign researchers and international organizations. Experience suggests that this poses problems, because the interventions may be incompatible with local conditions.⁸² Equally importantly, the results that are generated by such research initiatives are seen as being informed by and reflective of the opinions of outsiders. Even if government-led initiatives are undertaken based on these results, therefore, these efforts are seen as being driven, and even

74 Cassidy et al “Indigenous knowledge”, above at note 63.

75 Customary Court Act 1961, sec 13.

76 Metzenbaum and Vasisht “What makes a regulator excellent”, above at note 23 at 1. Coglianese “The challenge of regulatory excellence”, above at note 22 at 3 and 9.

77 Coglianese, id at 9.

78 OECD “Best practice principles”, above at note 24.

79 T Madebwe “State accountability in Botswana” (2021) 26/1 *University of Botswana Law Journal* 43.

80 Coglianese “The challenge of regulatory excellence”, above at note 22 at 4, 6 and 8.

81 “The big governance issues in Botswana: A civil society submission to the African peer review mechanism” (March 2021) *Africa Portal* at 116, available at: <<https://www.africaportal.org/publications/big-governance-issues-botswana-civil-society-submission-african-peer-review-mechanism/>> (last accessed 10 October 2023).

82 Cassidy et al “Indigenous knowledge”, above at note 63.

imposed, by outsiders. The result is that communities do not willingly embrace these initiatives and efforts. All this works together to compromise the value of CBNRM in the state.

CBNRM experience in other countries

CBNRM has been implemented in southern Africa for more than 25 years.⁸³ The Communal Areas Management Program for Indigenous Resources (CAMPFIRE) in Zimbabwe is considered the flagship programme. In Zimbabwe, wildlife legislation devolves authority only as far as the rural district councils, while the Communal Lands Forest Produce Act 1987 permits rural district councils to grant permits to local communities for the commercial use of natural resources. Separately, the Zambia Wildlife Act 2015 provides for the creation of community resources boards whose functions include managing wildlife under their jurisdiction within quotas specified by the National Parks and Wildlife Department and negotiating management agreements with hunting outfitters and photographic tour operators.⁸⁴ The community resources boards also have rights to a share of the revenue generated by wildlife utilization. Alternatively, in Namibia laws grant local communities the right to set up conservancies for the sustainable management and utilization of some species of game. Communities also retain all the income derived from the management of the game.⁸⁵ Similarly, in Mozambique the Forest and Wildlife Law 1999 provides rights to local communities to obtain logging licences and timber concessions, thereby assuming the role of private operators.⁸⁶ Also, local communities are granted the right to participate in the granting of licences to logging companies and to receive a share of the public revenues from those licences.⁸⁷

These experiences reflect a rights-based approach that is granted through legislation and supported by policies. This is in contrast with Botswana's current CBNRM framework, where access to resources by local communities is only through policy directives. Also, in other jurisdictions, local communities have the right to retain all or a substantial portion of benefits accrued from managing the resources. However, Botswana's CBNRM Policy directs communities to return 65 per cent of income to the National Environmental Fund. This severs the key link between benefit output and management input, as local communities benefit less from management, contradicting the logic of CBNRM.⁸⁸

While the rights-based approaches exhibited in Mozambique and Namibia are most likely to lead to long-term CBNRM success, legislation itself is not a guarantee to successful CBNRM. For instance, in Mozambique, the lack of compliance with legislation and shortage of technical skills at the community level have impacted the success of CBNRM.⁸⁹ However, experience in the region demonstrates the importance of entrenching community rights in legislation and clearly defining these rights. Strong legal rights are a crucial foundation for CBNRM sustainability, as communities can demand these rights according to legislation. The lack of legislation in Botswana has the effect of disempowering communities, as the principles set out in the CBNRM are not justiciable.

83 BTB Jones and TK Erdmann "Community-based natural resource management in southern Africa: A decision-makers' guide" (March 2013, USAID) at 33, available at: <https://pdf.usaid.gov/pdf_docs/PA00JRSE.pdf> (last accessed 10 October 2023).

84 Zambia Wildlife Act 2015, secs 32 and 33.

85 Namibia Nature Conservation Amendment Act 5 of 1996, sec 24A.

86 Mozambique Forest and Wildlife Law 1999, art 16(1).

87 Id, arts 31 and 35(5). Decree No 12/2002 approving the Regulation on Forestry and Wildlife, arts 35, 36 and 95–98; and the Regulation on Forestry and Wildlife, art 101(1).

88 AR Poteete "Defining political community and rights to natural resources in Botswana" (2009) 40/2 *Development and Change* 281.

89 R Brouwer "Mozambique CBNRM country profile" (April 2011, USAID) at 45, available at: <https://pdf.usaid.gov/pdf_docs/PBAAF669.pdf> (last accessed 10 October 2023).

Way forward

This discussion has indicated the flaws in the existing framework. This article offers three core recommendations to remedy the flaws and create an effective and beneficial CBNRM framework.

First, it recommends the promulgation of a CBNRM law with a community-centred and / or rights-based approach. The main objective of such a law would be to empower local communities to participate actively, and formally, in CBNRM by granting them rights to manage natural resources and profit commercially from the management of natural resources, whether these fall in the areas where they live or further afield. With respect to the formulation of the law, there is value in drawing guidance from, and building on, the efforts made in establishing the Kavango Zambezi Trans-frontier Conservation Area. This experience, while ongoing, has explored what it will take to “sustainably manage the Kavango Zambezi ecosystem, its heritage and cultural resources based on best conservation and tourism models for the socio-economic wellbeing of the communities and other stakeholders in and around the eco-region through harmonization of policies, strategies and practices”.⁹⁰ A CBNRM law must, equally, look to craft laws that recognize the important role played by communities in sustainably managing resources for their well-being. For the law to have value, it must be rooted in public participation. The law must also be drafted with due regard to the socioeconomic needs of communities. Further, the law must empower communities to enforce the law in the first instance. This would be supported by national level enforcement efforts that are responsive and designed to promote compliance with laws and, thus, promote conservation in a manner led by communities and in a manner that accommodates and promotes the turn to community-based management of resources.

Secondly, the article recommends the creation of a government institution solely responsible for CBNRM in Botswana. The function of the institution and its objectives would be centred on CBNRM. A separate institution would also need to have a funding structure with resources dedicated to CBNRM at the state level. An institution of that nature would also possibly draw donor funding. Further, creating a stand-alone institution would mean that personnel hired to work for, and with, the institution would be knowledgeable of, and have expertise in, CBNRM. Also, the institution could educate communities on the command-and-control approach and on CBNRM, and help communities appreciate how to participate in governance so that their views are heard. This would be likely to lead to greater success in CBNRM. It is also important for the institution to be empowered to enforce laws. In particular, the institution should be empowered to adopt a responsive approach to enforcement, capable of harnessing community-led enforcement in the broader enforcement effort.

Thirdly, regulators need to promote research and development. This is particularly important in Botswana where extensive knowledge of conserving natural resources can be found among the older generations and the communities in which they live. Such research should ideally be conducted by the various applied research units, with all ministries encouraged to participate. This should be done in conjunction with the efforts of a CBNRM institution tasked with conducting research on conservation and the potential for CBNRM in Botswana. This research should form the basis for evidence-based policies and laws that respond to the direct needs of communities. Once policies are formulated, it will also be important to educate communities on CBNRM in Botswana.

Conclusion

This discussion has established that Botswana’s ad hoc CBNRM framework has consistently failed to secure effective CBNRM because the country does not have laws based on sustainable development analyses that form the foundation on which a CBNRM framework is built. In addition, there is

90 “Kavango Zambezi Trans-frontier Conservation Area (KAZA TFCA)” (2022), available at: <<https://www.kavangozambezi.org/en/about/about-kaza>> (last accessed 10 October 2023).

no dedicated CBNRM law intentionally crafted as a legal alternative to the command-and-control approach found in national conservation laws. There is also no adequately resourced institution charged with regulating CBNRM that communicates well, is empowered and responsive, as well as accountable. It stands to reason that, if an effective framework is to be realized, it will need to address these issues and deficiencies.

Encouragingly, there are reports that a CBNRM law is being drafted. There is, however, limited chatter about laws being revised based on sustainable development analyses to craft standards that reflect community sentiments. The likely reason is that this would be exceptionally expensive and time consuming. Perhaps the intent is to address this in a piecemeal manner through subsidiary legislation. Only time will tell. Nevertheless, it is an issue that must be addressed if successful CBNRM is to be attained. In addition, the attainment of successful CBNRM hinges on a CBNRM law creating an institution that is adequately resourced and charged with regulating CBNRM, which communicates well, is empowered and responsive, as well as accountable.

Competing interests. None.