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Tinashe Madebwe

COMMENT



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COMMENT

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1

INTRODUCTION

Presumably in recognition of the fact that Botswana is, in some respects, one of the most highly polluted countries,¹ and the fact that the country has not fared as well as would have been preferable,² the Botswana government made the claim in 2017 that it intended to enhance environmental performance by 2023. Certainly, if this were to be achieved, it would be a very welcome development considering that the country is home to some of the world's most impressive, and threatened, species of fauna and flora.³ However, it is quite questionable whether environmental performance can be enhanced by 2023 considering that since 2017, little has been done by the Botswana government to reform the decades-old approach to regulating environmental protection. This same approach, which, by the state's own admission has not driven environmental performance forward in any compelling way thus far, is what is currently relied on to drive environmental protection efforts.⁴

This Comment explores how, in light of the state's claim to enhance environmental performance by 2023, this objective can actually be realised. It does so by first, establishing an objective measure of states' commitment to environmental performance. Following this, the Comment uses the measure established to determine Botswana's commitment to advancing environmental performance. And, by way of concluding the discussion, the paper relies on the levels of commitment to environmental protection exhibited by the state to identify ways in which this commitment can be enhanced so that environmental performance is indeed enhanced by 2023.

2

AN OBJECTIVE MEASURE

It is obviously difficult to measure anyone's commitment to doing anything, let alone states' commitment to environmental performance. However, various developments over the years have ensured that measuring such commitment to environmental performance is not impossible.⁵ Most notably in this regard, the formal turn by states to crafting regulatory frameworks based on sustainable development, which is defined as the pursuit of development in order to meet the needs of the present generation without compromising the ability of future generations to meet their needs,⁶ has made it possible to identify whether a state's regulatory framework is framed to pursue environmental protection, social development, or economic development.⁷ Once this is apparent, it becomes possible to identify with a marked degree of certainty, states' commitment levels to environmental performance in an objective manner.

To illustrate, in the sustainable development era, states frequently lay claim to pursuing environmental protection, social development, and economic development simultaneously.⁸ Practically, however, experience has shown that even the most developed

1 M Wiston, 'Commentary: Status of Air Pollution in Botswana and Significance to Air Quality and Human Health' (2017) 15 *Journal of Health and Pollution* 8, 10.

2 Ministry of Finance and Development Planning 'Republic of Botswana, National Development Plan 11 (April 2017 – March 2023)' (2016) part 7.4.-7.6.

3 O Yasukawa and KPisa, 'In Botswana, Ecotourism and Conservation Draw Travellers' *CNN Travel* (13 June 2016) <<https://edition.cnn.com/travel/article/botswana-ecotourism-mpa-feat/index.html>>.

4 Ministry of Finance n (2) part 7.4.

5 eg AM Burley, 'International Law and International Relations Theory' (1993) 87 *American Journal of International Law* 205; JL Dunoff, 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 243; RN Gardner, 'The Role of the United Nations in Environmental Problems' (1972) 26 *International Organization* 237.

6 eg World Commission on Environment and Development *Our Common Future* (OUP 1987); DB Magraw and LD Hawke, 'Sustainable Development' in D Bodansky, J Brunnee and E Hey, *The Oxford Handbook of International Environmental Law* (OUP 2007) 613, 623; J Martens and K Schilder 'Sustainable Development' in J Krieger and others, *Oxford Companion to World Politics* (2nd edn OUP 2001) 813, 814.

7 eg T Scovazzi, 'State Responsibility for Environmental Harm' in G Ulfstein and J Werksman (eds), *Yearbook of International Environmental Law* (Oxford University Press 2001) 43, 47.

8 World Commission on Environment and Development n (6) Chapter 2 part 1..

states do not really pursue advancement of all three simultaneously. Instead, states most commonly pursue economic development in the first instance.⁹ And, where this is done, the state's commitment to advancing environmental performance is apparent where the state invests some of the proceeds from the pursuit of economic development into environmental protection.¹⁰ With the exception of those instances common in the developed world states in which green development is often pursued,¹¹ in most developing world states such as Botswana, such commitment to advancing environmental performance is absent where the state does not invest some of the proceeds from the pursuit of economic development into environmental protection.¹²

However, identifying such commitment is more complicated where a state which is pursuing economic development does not use some of the proceeds generated to invest in environmental protection.¹³ Where this happens it is difficult to determine that a state lacks commitment to advance environmental performance because a state may wish to advance such performance but may not have adequate resources to do so.¹⁴ Separately, it is equally difficult to determine a state's commitment to advancing environmental

performance where a state looks to develop economically through exploitation of natural resources as in those instances where states look to develop economically through ecotourism.¹⁵ This is most commonly because the commitment to environmental protection so that the environment is kept in a state in which it can continue to generate tourist revenue will often make it appear as if a state is committed to advancing environmental performance generally.¹⁶

Importantly, under both circumstances, that is, where there is no re-investment in environmental protection and where there is a commitment to environmental regulation in order to protect the pursuit of economic development through ecotourism, the best measure of a state's commitment to advancing environmental performance is the quality of that state's environmental protection regulatory framework as a whole. Certainly, it must be conceded that it is difficult to determine the quality of a regulatory framework generally.¹⁷ However, insofar as environmental protection is concerned, it is worth noting that over time it has become apparent that there are some reliable indicators of a quality regulatory framework with the capacity to secure environmental protection.¹⁸

To this end, quality environmental protection regulatory frameworks that succeed at securing environmental protection usually feature laws which are crafted on the basis of numerical quality standards

9 OECD 'Environmental Country Reviews' (2019) <<http://www.oecd.org/environment/country-reviews/find-a-review.htm>>.

10 eg OECD, 'Environmental Performance Reviews: In-depth chapters' (2019) <http://www.oecd.org/environment/country-reviews/chapters.htm#innovation>.

11 OECD, Green Growth Indicators 2017 (Paris: OECD).

12 J Werksman, 'Consolidating Governance of the Global Commons: Insights from the Global Environmental Facility' (1995) 6 *Yearbook of International Law* 47.

13 Recognition of this salient fact explains the turn to solidarity in environmental protection. On solidarity, R St J Macdonald, 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8 *Pace International Law Review* 259; U Beyerlin and T Marauhn, *International Environmental Law* (Hart Publishing 2011) 35.

14 Recognition of this very fact is the justification behind common but differentiated responsibility. Rio Declaration on Environment and Development, 14 June 1992, UN Doc A/CONF.151/26/Rev.1 (Vol. I), Annex II (1992), principle 7; Scovazzi n (7) 47; G Handl, 'Transboundary Impacts' in Bodansky, Brunnee and Heyn (6) 531, 532-5; Y Matsui, 'The Principle of "Common but Differentiated Responsibilities"' in N Schrijver and F Weiss, *International Law and Sustainable Development* (Martinus Nijhoff 2004) 73.

15 eg H Ceballos-Lascurain *Tourism, Ecotourism, and Protected Areas: The State of Nature-Based Tourism Around the World and Guidelines for Its Development* (IUCN Press 1996); M Honey, *Ecotourism and Sustainable Development: Who Owns Paradise?* (Island Press 2008); L Wang and others, 'Ecotourism Environmental Protection Measures and Their Effects on Protected Areas in China' (2014) 10 *Sustainability* 6781.

16 I Christie and others, 'Tourism in Africa Harnessing Tourism for Growth and Improved Livelihoods' (Washington, DC: World Bank 2014) 134-5.

17 JF McEldowney and S McEldowney, *Environmental Law and Regulation* (Blackstone Press 2001) 6; R Baldwin, M Cave and M Lodge, *Understanding Regulation* (2nd ed, OUP 2012) 40-9.

18 A Underdal, 'One Question, Two Answers' in E Miles and others (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT Press 2002) 3, 15; F Giner, Regulation and Standards, Monitoring, Inspection, Compliance, and Enforcement <<http://siteresources.worldbank.org/INTRANET/ENVIRONMENT/Resources/GuidanceNoteonEnvironmentalRegulationandStandardsupdate.pdf>>.

that are arrived at based on sustainable development analyses conducted with the public's participation.¹⁹ In addition, environmental protection regulatory frameworks that succeed at securing environmental protection are also commonly based on a command and control approach complemented by context sensitive alternatives which address or account for the limitations with the command and control approach.²⁰ Further, experience has shown that environmental protection regulatory frameworks that succeed at securing environmental protection consistently feature a credible enforcement mechanism.²¹ And, environmental protection regulatory frameworks that succeed at securing environmental protection commonly rely on an empowered environmental management agency, rather than a piecemeal approach that is not integrated, to spearhead environmental protection efforts in a state.²² Lastly, it goes without saying that by now it has been established that successful environmental protection regulatory frameworks encourage, and make abundant provision for, public participation across all facets of regulation.²³

3

BOTSWANA'S COMMITMENT TO ADVANCING ENVIRONMENTAL PERFORMANCE

Having established that measuring a state's commitment to environmental performance is possible where that state's approach to environmental protection is based on sustainable development, it is important to note that Botswana's environmental protection regulatory framework is based on sustainable development.²⁴ Indeed, Botswana's National Development Plan notes that it is based on four principles, that is, sustainable development, sustainable environment, rapid economic growth, economic independence and social justice.²⁵ This fact means that it is possible to rely on the measure of states' commitment to environmental performance established above to measure Botswana's commitment to advancing environmental performance by 2023.

To this end, perhaps the first point to note when measuring Botswana's commitment to enhancing environmental performance by 2023 is that this framework, like other frameworks based on sustainable development, aspires to secure the pursuit of economic development in the first instance.²⁶ The state has put in place measures that seem to suggest that once such development is secured, attention will subsequently be given to advancing social development and environmental protection using the gains made from pursuing economic development.²⁷ For instance, the Wildlife Conservation and National Parks Act provides that 'where the Minister so recommends, any revenue

19 McEldowney n (17) 6;

20 S Elworthy and J Holder, *Environmental Protection: Text and Materials* (Butterworths 1997) 3, 299. NM Moleele and T Ntsabane, 'Environmental Issues and Management in Botswana: Have the National Conservation Plans Worked?' (2002) 5 *OSSREA* 1, 12-7; J Dikgang and M Visser, 'Behavioural Response to Plastic Bag Legislation in Botswana' *Environment for Development Discussion Paper Series* (2010) <<http://www.rff.org/files/sharepoint/WorkImages/Download/EFDDP-10-13.pdf>>; The Southern African Institute for Environmental Assessment SADC Environmental Legislation Handbook 2012 'Botswana' (2012) 67 <http://saiea.com/dbsa_handbook_update09/pdf/4Botswana09.pdf>.

21 Institute for Environmental Assessment n (20) 33, 56, 92, 117, 143. MC Kalikawe, Botswana: Integrating Biodiversity into the Tourism Sector (Presentation made to the UNEP International Workshop on Best practices and Country Case Studies, March 2001) <[https://www.cbd.int/doc/nbsap/tourism/BOTSWANA\(Tourism\).pdf](https://www.cbd.int/doc/nbsap/tourism/BOTSWANA(Tourism).pdf)>; Moleele and Ntsabane (20)12-7. Ministry of Finance n (2) 7.23; Wiston n(1)10; Baldwin, Cave and Lodge n (17) 43-45, 107.

22 V Cistulli, *Environment in Decentralized Development - Economic and Institutional Issues* (2002) <<http://www.fao.org/docrep/005/y4256e/y4256e05.htm>>. JA Lofton, 'The Impact of Cultural Values and Attitudes on Social Regulation' (2001) *Environmental Liability* 167.

23 S Eden, 'Public Participation in Environmental Policy: Considering Scientific, Counter-scientific and Non-scientific Contributions' (1996) 5 *Public Understanding of Science* 183, 187-8; J Ebbeson, 'The Notion of Public Participation in International Environmental Law' (1997)

24 Government of Botswana and United Nations Sustainable Development Framework (UNSDF) for 2017-2021 <http://www.bw.undp.org/content/dam/botswana/docs/Publications/BW_UNSDF%202017.pdf>; Ministry of Finance n(2) 7.1.

25 Institute for Environmental Assessment n(20) 49. Sustainable Development Goals Knowledge Platform 'Botswana' Voluntary National Review (2017) <<https://sustainabledevelopment.un.org/memberstates/botswana>>.

26 Ministry of Finance n(2) 7.1.

27 Ministry of Finance n(2) Chapter 3.

deriving from the payment of 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 in a national park or game reserve, shall be paid to the district council concerned'.²⁸ Similarly, the Finance and Audit Subsidiary Legislation: National Environmental Fund Order notes that proceeds from the sale of hunting quota should be paid into the Fund and these can be used to finance and promote activities designed to conserve, protect and manage Botswana environment.²⁹ Now, it is obviously difficult to argue with certainty that resources do not get redirected to environmental protection. However, it is quite clear that the country has one of the fastest developing economies.³⁰ It is also clear that, despite this fact and the fact that there are the provisions above, tailored to ensure reinvestment in environmental protection, there is continued land degradation, loss of biodiversity, the fragmentation of ecosystems, uncontrolled pollution coupled with poor waste management practices, illegal mining, unfriendly environmental construction practices, and unsustainable extraction of natural resources.³¹ So, it is not unreasonable to come to the conclusion that it does not appear as if enough resources get redirected to environmental protection.

Separately, when looking to measure Botswana's commitment to advancing environmental performance by 2023, it is also useful to note that the country exhibits a strong commitment to pursuing economic development through promoting ecotourism.³² To this end, the Botswana Tourism Organisation Act makes explicit reference to the need to enhance ecotourism.³³ Equally illustrative of this is the fact that the state has noted that the Okavango Delta should be relied on to contribute to the growth of the domestic economy through the contribution to the growth of the tourism sector and improved livelihoods for the communities residing in the

Delta.³⁴ In addition, government has committed to continuing to designate more heritage sites in order to promote the tourism sector.³⁵ Importantly for the present purpose, the success of all these ventures depends on the attainment of basic minimum standards of environmental protection.³⁶ And so, in looking to measure Botswana's commitment to advancing environmental performance based on the measure established above, the fact that these circumstances subsist means that the state's commitment to environmental performance is ideally measured on the basis of the quality of its environmental protection regulatory framework. Further, as noted above, such quality is measurable based on qualities such as, the numerical standards on which the environmental protection regulatory framework is based, the regulatory approach applied in the state, an enforcement mechanism ideally complemented by the provision of an empowered environmental management agency, and the provision of opportunities for public participation.

3.1 Numerical Standards

In this sustainable development era it is inevitable that in developing states especially, environmental protection concessions will have to be made in order to facilitate development. However, because of the threat that the unfettered pursuit of development can pose to the environment and humanity in the long run, sustainability requires that limits should be established on the extent to which the pursuit of development can be considered justifiable. Arriving at these limits is best achieved through conducting holistic and sustainable development analyses at a central state level after all considerations relevant to attaining sustainability have been accounted for. When this is done, it forms the basis of the formulation of numerical quality standards.³⁷ These are standards

²⁸ Cap 38:01, s 93.

²⁹ Cap 54:01, s 7.

³⁰ Ministry of Finance n (2) iii.

³¹ Ministry of Finance n (2) 7.54.

³² Republic of Botswana, Government Paper: Ministry of Environment, Wildlife and Tourism, Wildlife Policy, 2013; Yasukawa and Pisa n (3) 1.

³³ Botswana Tourism Organisation Act, 2009, s 4.

³⁴ Mbaiwa n(15) 447. JE Mbaiwa, 'Poverty or Riches: Who Benefits from the Booming Tourism Industry in Botswana?' (2017) 35 *Journal of Contemporary African Studies* 93; J Turpie and others, 'Economic Value of the Okavango Delta, Botswana and Implications for Management' (2006) <<http://www.the-eis.com/data/literature/Okavango%20Delta%20Valuation%20Study.pdf>>.

³⁵ Ministry of Finance n (2) 7.75.

³⁶ Wildlife Policy n (32) 6; 10; 13, Botswana Tourism Organisation Act, 2009, s 4.

³⁷ McEldowney n (17) 4, 3-6, 36-8, 41-2.

which identify the basic acceptable levels of quality for core environmental media such as air, water, land, and also, sustainable numbers or 'quantities' of particular species of fauna and flora.³⁸ It is also on the basis of these holistic standards that more specialised and complementary numerical standards, such as process, emission, or product standards, which are critical to regulation on a day to day basis, can be established.³⁹

With this backdrop in mind, it is worth reiterating that Botswana has adopted sustainable development as a foundational principle. Despite this, it is quite apparent that there have been none of the typical directives to a central institution such as the Ministry of Environment to conduct sustainable development analyses.⁴⁰ As a consequence, pivotal environmental protection laws devoted to the protection of core environmental media such as air, water, land, and particular species of fauna and flora are based on such analyses or numerical quality standards. At the very best, some of these laws make reference to such standards. For instance, the Waste Management Act recognizes the need for quality standards in waste management to the extent that Schedule 1 of the Act incorporates the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal which makes reference to standards.⁴¹ In the same mould, the Atmospheric Pollution (Prevention) Control Act even directs the Minister to make regulations prescribing or providing for standards of quality or purity of air to be employed in testing.⁴² Certainly, it is unusual for primary legislation to carry numerical quality standards as this is often left to subsidiary legislation. However, in Botswana law there is no subsidiary legislation dedicated to the protection of core environmental media such as air, water, land, and particular species of fauna and flora which is based on numerical quality standards. This only makes sense since there have been no relevant sustainable development analyses which would form the basis of the formulation of such numerical standards.

3.2 Regulatory Framework

In regulation there has grown to be an established link between numerical quality standards and the approach to regulation. This is because, once standards are formulated, it becomes possible to determine sustainable activities in a regulated area. Once this is done, the standards can be the basis on which commands to act in certain ways can be formulated.⁴³ In addition, it becomes possible for the regulator to rely on these standards to craft a framework for prior authorisation before undertaking actions with predictable environmental impacts. It also becomes important to empower regulators extensive inspection powers of entry without warrant to perform their duties and for the prevention of this to be criminalized. Further, it becomes important for the regulator to be empowered to use a mix of criminal and/or civil liability penalties as controls for bringing actors into compliance with the law. This is essentially the famed command and control approach to regulation.⁴⁴

For all the benefits that attach to this command and control approach however, weaknesses with this approach have been recognized. These include the fact that the approach is often rigid and not flexible, that it is prescriptive and does not allow sufficient room for innovation in looking to meet environmental protection standards, and that it often focuses more on the activities of business and not individuals.⁴⁵ As a reaction to this, alternatives to the command and control approach have emerged.⁴⁶ Notable examples include economic incentives, environmental

43 *ibid* 3.

44 Lofton n (20) 167.

45 Elworthy and Holder n (20) 299. Dikgang and Visser n (20) 1; 8-10. Institute for Environmental Assessment n (20) 61-62.

46 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) *Wisconsin Law Review* 887. E Fisher, P Pascual, and W Wagner, 'Understanding Environmental Models in Their Legal and Regulatory Context' (2010) 22 *Journal of Environmental Law* 251. A Ogus, 'Nudging and Rectifying: The Use of Fiscal Instruments for Regulatory Purposes' (2006) *Legal Studies* 245. R Macrory, 'Regulating in a Risky Environment' (2001) 54 *Current Legal Problems* 619. N Gunningham and D Sinclair, 'Designing Smart Regulation' (1998) <<http://www.oecd.org/environment/outreach/33947759.pdf>>.

38 *ibid*.

39 *ibid* 5, 11.

40 *ibid* 6-7.

41 Cap 65:06.

42 McEldowney n (17) 6. Ministry of Finance n (2) 7.68; 7.73; 7.80.

agreements, self-regulation, and reporting. Importantly, most alternatives are intended to complement the use of the command and control approach by affording regulated parties opportunities through which to act within the objectives of the regulatory framework in innovative ways or, ways that are preferable to them, without worrying about the regulator looking to enforce sanctions at every turn as the regulator focuses on the attainment of objectives.⁴⁷

Against this backdrop it is interesting to note that while the regulatory approach in Botswana is based on the command and control approach, there are not too many alternatives in place to account for, and mitigate, the well-known weaknesses that attach to this approach. The closest 'alternative' has been the Community Based Natural Resource Management Policy⁴⁸ which recognises that all members of a community share an interest in improving their livelihoods through sustainable management and equitable utilization of natural resources in their environs.⁴⁹ Importantly, the Policy has motivated communities to look for alternative ways of securing environmental objectives consistent with those pursued in terms of the command and control approach.⁵⁰ However, its value as an alternative to the command and control approach has seemingly been compromised by the fact that it originates in a Policy which the state has sometimes disregarded in a manner that has derailed community efforts.⁵¹ This is certainly not to discount its value as an alternative. What is more noteworthy for the present purpose is that beyond this alternative, which is prone to being compromised by state action, there has been no apparent effort to complement the use of the command and control approach with other alternatives.

3.3 Enforcement

It has become apparent over time that successful environmental protection regulatory frameworks commonly feature potent enforcement mechanisms

administered by the enforcement branch of centralized environmental protection agencies.⁵² Centralisation allows the agencies to determine, in a flexible manner, the best way in which to enforce laws consistently.⁵³ This is particularly important because complexities encountered in regulating environmental deterioration, such as evidential burdens, prosecution problems and views of environmental crimes, mean that enforcement works best when it is responsive.⁵⁴ This is a reference to an approach to enforcement whereby enforcement efforts are based on a range of sanctions which extend from persuasion and warnings at the onset, to civil penalties, criminal penalties, license suspensions, and then license revocations following as appropriate.⁵⁵ In addition to this, it is well recognised that enforcement is more effective when the public has opportunities to participate in regulation.⁵⁶ This is because a public that is empowered to participate in regulation can aid in enforcement by alerting authorities to harmful activity. The public can also enforce laws by exercising their right of access to justice. In addition, the provision of opportunities for public participation means that the public can leverage the threat of bringing adjudicatory action against an actor causing harm to get that actor to comply with laws.⁵⁷

⁴⁷ Cole and Grossman n (20) 887.

⁴⁸ Government of Botswana, Community Based Natural Resource Management Policy Government Paper 2 of 2007.

⁴⁹ *ibid.*

⁵⁰ Wildlife Policy n (32) 5.5.

⁵¹ J Mbaiwa quoted by K Kgosikebatho, 'Enclave Tourism Kills Community Trusts', *The Patriot on Sunday* (2017) <<http://www.thepatriot.co.bw/news/item/3749-enclave-tourism-kills-community-trusts.html>>.

⁵² Lofton n (20) 167. Baldwin, Cave and Lodge n (17) 227-95; A Ogus and C Abbott, 'Sanctions for Pollution: Do We Have the Right Regime' (2002) 14 *Journal of Environmental Law* 281; E Couzens, 'Enforcement of Environmental Law: Good Practices from Africa, Central Asia, ASEAN Countries and China' (2014) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/9968/enforcement-environmental-laws.pdf?sequence=1&isAllowed=y>>.

⁵³ Baldwin, Cave and Lodge n (17) 43-5, 107.

⁵⁴ I Ayres and J Braithwaite, *Responsive Regulation* (OUP 1992) 25. Baldwin, Cave and Lodge n (17) 259.

⁵⁵ Baldwin, Cave and Lodge n (17) 259.

⁵⁶ J Newig, 'Does Public Participation in Environmental Decisions Lead to Improved Environmental Quality? Towards An Analytical Framework Communication, Cooperation, Participation' (2007) 1 *International Journal of Sustainability Communication* 51-71 <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-431965>>. However, the utility of participation to enforcement has been questioned by RA Irvin and J Stansbury, 'Citizen Participation in Decision Making: Is It Worth the Effort?' (2004) 64 *Public Administration Review* 55.

⁵⁷ B Maripe, 'Development and the Balancing of Interests in Environmental Law: The Case of Botswana' in M Faure and W du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (PULP2011) 49, 63-6.

Importantly, enforcement in Botswana is not based on a systematic responsive approach directed by a centralised agency. Instead, enforcement is predominantly left to traditional state enforcement machinery using a punitive approach.⁵⁸ In addition to this, the law identifies how different state agencies, such as the Ministry of Environment, Wildlife and Tourism which has supervisory authority over departments such as the Departments of, Environmental Affairs, Waste Management and Pollution Control, Forestry and Range Resources, Wildlife and National Parks, Tourism, the Botswana Tourism Organisation, and the Department of Meteorology, should contribute to enforcement efforts.⁵⁹ Often, this is through record-keeping and the provision of information when requested by state enforcement machinery. In addition to this, legislation such as the Wildlife Conservation and National Parks Act and the Atmospheric Pollution (Prevention) Act⁶⁰ has empowered relevant Ministers to appoint Officers who have the power to enforce the law.⁶¹

Separately, insofar as the potential for members of the public to enforce the law is concerned, it is worth noting that Botswana laws do not empower citizens to prosecute environmental offences.⁶² In addition to this, there is no provision for a constitutional or statutory environmental right to a clean environment. At most, such a right to a clean environment can certainly be inferred from the common law.⁶³ However, in light of the fact that such rights have not been recognised in the Constitution, Botswana's courts have not looked

positively on inferring socioeconomic rights, including the right to a clean environment, from other existing parts of the law.⁶⁴ All this is important because, in the absence of such a right, the public find it nearly impossible to enforce the law through civil or rights based actions. Effectively then, the two scenarios in which citizens can enforce the law in Botswana are first, when the state fails or refuses to prosecute enabling them to prosecute,⁶⁵ or second, when a member, or members, of the public suffers some sort of delictual harm which entitles the victim, or victims, to enforce laws in civil court.⁶⁶ Reflective of the inadequate attention paid to matters of enforcement at the state level however, both scenarios require citizens to be willing, and able, to bear the costs of litigation that attach to enforcing the law. These are not costs that the average citizen can bear.

3.4 Public Participation

Public participation, broadly defined, means participation of non-governmental actors in governmental affairs.⁶⁷ It is generally recognised that there are three interdependent pillars of public participation, namely, access to information, participation in decision-making, and access to justice.⁶⁸ Allowing participation enhances the legitimacy and thus, acceptance levels of decisions taken.⁶⁹ Driesen has argued that public opinion has always driven environmental improvement, so dissemination of good and understandable information and opportunities to act on that information are extremely important.⁷⁰ Similarly, Newig and Fritsch consider that public participation leads to more ecologically rational decisions than in top-down approaches. They note further that,

58 Environmental Assessment Act Cap 65:07, s 22. Institute for Environmental Assessment n (20) 56.

59 Institute for Environmental Assessment n (20) 53. Kalikawe n (21) 1.3; 2.1; 2.2. Moleele and Ntsabane n (20) 12-17. Ministry of Finance n (2) 7.23. Wiston n (1) 10. Baldwin, Cave and Lodge n (17) 43-45, 107; SE Fink, 'Environmental Law in a Developing Country: Botswana' (2000, LL.M Dissertation) 5 <http://uir.unisa.ac.za/bitstream/handle/10500/16784/dissertation_fink_se.pdf?sequence=1&isAllowed=y>.

60 Cap: 65:03.

61 Wildlife Conservation and National Parks Act, Cap 38:01, s 2-3; Atmospheric Pollution (Prevention) Act, Cap 65:03, s 3-4.

62 *Attorney General v Muzila* (2003) 1 BLR 471.

63 T Madebwe, 'A Rights-based Approach to Environmental Protection: The Zimbabwean Experience' (2015) 15 *African Human Rights Law Journal* 110-28. T Madebwe, 'Carving Out a Greater Role for Civil Litigation as an Environmental Law Enforcement Tool in Zimbabwe's 2013 Constitution' (2015) 11 *LEAD Journal* 108-19.

64 *Attorney General v Mwale* (CACGB-096-14, CACGB-076-15) [2015] BWCA 1 (26 August 2015) para 73.

65 *ibid*.

66 Waste Management Act, Cap 65:06, s 42; O Tshosa, *International Encyclopaedia of Laws, Environmental Law, Botswana* (2005); CM Fombad and J Pfumrodze, *The Law of Delict in Botswana* (Kluwer International 2019).

67 Beyerlin and Marauhn n (13) 234.

68 *ibid* 234. Ebbeson n (23) 58.

69 J Ebbeson, 'Public Participation in Environmental Matters' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (2009) para 3.

70 DM Driesen, 'Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration' (2003) 30 *Syracuse Journal of International Law and Commerce* 353, 366.

participation leads to improved compliance with decisions and thus, better outcomes and impacts in ecological terms than top-down models of governance.⁷¹

With this backdrop in mind, it is worth noting that, while the impression is created in Botswana that participation is encouraged, as in the Community Based Natural Resource Management Policy which indicates that it looks to promote partnerships in wildlife management through participation of communities,⁷² it is difficult to participate in environmental protection in the country for three broad reasons. First, participation is difficult because it is difficult to get access to environmental information in Botswana.⁷³ Certainly, some legislation seems to make provision for participation. For instance, section 7 of the Environmental Assessment Act makes reference to *inter alia*, the publication of information on effects and benefits of activities in the mass media using the official languages for a period of not less than 21 days and holding meetings with people or communities affected by intended activities to explain the nature of the activities and their effects.⁷⁴ Importantly though, in this Act as in other legislation, information is only published under strict circumstances that are not frequently occurring. Second, actual participation in decision-making is difficult in Botswana despite the fact that some laws appear to make provision for opportunities the public to participate in the regulation of environmental protection. As an example, the Wildlife Conservation and National Parks Act suggests that The Director may, after consultation with the appropriate local authorities and land boards, determine the number of animals of each species, or of a particular sex, that may be hunted during any season in any specified controlled hunting area.⁷⁵ Importantly

though, in this law as in other similar laws, the Director is given the choice to determine whether to invite participation or not. This is hardly consistent with the global trend which has seen states' provision of opportunities for public participation regarded as a compulsory obligation.⁷⁶ Third, public participation in Botswana is difficult because there is no real access to justice. Here, it is important to note that Botswana law secures access to justice in those instances where a person is aggrieved by the refusal of a licensing officer or the Director to grant a permit, or by any terms and conditions imposed by them.⁷⁷ Access to justice is also assured in those instances where a person has suffered delictual harm and looks to bring the matter to court as a victim of the harm.⁷⁸ However, the provision of access to justice is poor overall because, where people do get access to justice, they must bear the same extensive costs that attach to bringing matters to court that were noted earlier. In addition, this restrictive approach to standing which grants access to justice to victims means that there is no access to justice for people who are not directly affected by environmentally harmful activities who wish to act in the public interest.⁷⁹ This is despite the fact that it is increasingly accepted in different parts of the world that allowing such people access to justice is critical to the advancement of environmental protection objectives.⁸⁰

4 CONCLUSION

The government of Botswana has, thus far, said and seemingly done all the right things insofar as environmental protection is concerned. When

71 J Newig and O Fritsch, 'Environmental Governance: Participatory, Multi-Level and Effective?' (2009) 19 *Environmental Policy and Governance* 197, 200, 205-206.

72 See part, 3.2.3; Wildlife Policy n (32) 5.5.

73 eg Constitution of Botswana, 1966, s 12(b) which allows the withholding of information held in confidence. See also the conditions attached to the disclosure of information under the Atmospheric Pollution (Prevention) Act, Cap 65:03, s 13; Maripe n (58) 63-6.

74 Also see Environmental Assessment Act Cap 65:07, sections 7, 10, 11; Environmental Assessment Regulations, 2012, s 9.

75 Wildlife Conservation and National Parks Act, Cap 38:01, s32(2).

76 eg Rio Declaration on Environment and Development, 14 June 1992, UN Doc A/CONF.151/26/Rev. 1 (Vol. I), Annex II (1992) principle 10.

77 eg Waste Management Act, Cap 65:06, s 42.

78 Wildlife Conservation and National Parks Act, Cap 38:01, s 42; Waste Management Act, Cap 65:06, s 27; Fish Protection Regulations, 2016, s 15; Fombad and Pfumorodze n (62) 151.

79 *Botswana National Front v Attorney General* (1994) BLR 385; *Attorney General v Unity Dow* (1992) BLR 119; *Tsogang Investments (Pty) Ltd v Phoenix Investments* (1989) BLR 512.

80 Madebwe n (64) 112.

thoroughly assessed however, their actions tell a different story. There is extensive investment in development which is not mirrored in the pursuit of environmental protection. This is not a fatal flaw, it would be a reasonable stance to assume if the regulatory framework was based on numerical quality standards, incorporated alternatives to the command and control approach, carried a credible enforcement mechanism, and secured opportunities for effective public participation. The preceding discussion has established that the framework does not do these things. And so, if, environmental performance is to be enhanced by 2023 as the government has claimed it intends to do, significant steps will have to be taken to ensure that environmental protection is pursued in earnest.

The most basic, and attainable, step that could be taken towards this goal will have to be the drafting of framework environmental protection legislation which, in the absence of an environmental right, would provide such a right and mandate the creation of an environmental protection agency. This agency would be tasked with formulating numerical standards for the regulation of all environmental protection. The agency would also be charged with formulating and advocating the turn to appropriate alternatives to the command and control approach. The agency would also enforce the law in a centralised and responsive manner while encouraging public participation.

In order for all this to happen however, an emerging network of environmentalists, environmental lawyers, and all other stakeholders will need to work together to educate the public on environmental protection and deficiencies in the environmental protection regulatory framework.⁸¹ This is important since national elections will be held in 2019, well before the 2023 deadline for enhancing environmental performance. Elections afford these environmentalists, environmental lawyers, and all other stakeholders with the opportunity to educate the voting public on environmental protection and getting them to care about environmental protection. This will, hopefully get the people to demand that politicians commit to

enhancing environmental performance by 2023 if they are to receive people's votes.

⁸¹ M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887; HP Schmitz & K Sikkink, 'International Human Rights' in W Carlsnaes, T Risse and BA Simmons (eds), *Handbook of International Relations* (Sage 2007) 517.

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