



INDUSTRY REGULATION IN BOTSWANA

edited by

GAPE KABOYAKGOSI
MARGARET SENGWAKETSE
TACHILISA BALULE

June 2013



Has shifting the primary responsibilities for policy implementation from government departments to regulation affected public policy, and how? What effect has this had on policy formulation, implementation, and accountability? What does it mean to be accountable for policy when regulation is the primary policy instrument? What is the significance of regulation on political accountability?

These case studies on the media, the legal profession, retirement funds and construction industries reveal insights about using regulation. In Botswana, regulation is highly state centred, largely mimics competition, engenders multiple accountability measures, and emphasises consensus more than punishment.

The result is a very complex, often confusing, policy environment. There is more interdependence between government, regulators and industry, as policy resources like finance, formal-legal authority, information, technical know-how, and political connections are fragmented between government and industry.

Academics, industry professionals and students of government, the economy, law and business will all find this a very useful volume for understanding an increasingly important approach to the management of Botswana's public policy.



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Botswana Institute for Development Policy Analysis

INDUSTRY REGULATION IN BOTSWANA

Case Studies in Industry Governance, Implementation and Public Accountability

Edited by:

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FOREWORD AND ACKNOWLEDGEMENTS

The growing complexity of our economy places demands on policymakers, business people, citizens, researchers and academics alike, to respond appropriately. Changes due to globalisation, privatisation and the increased use of the market have meant that new policy instruments such as regulation are needed to manage our economy.

This book represents part of BIDPA's attempt at understanding these important reforms. Only two decades ago, most implementation occurred inside government departments – giving the state a measure of control over implementation processes.

The expanded use of regulation to manage public policy leads to government creating new rules, and then setting up regulatory agencies to manage these policy areas. The direct responsibility for implementation then falls to non-state actors, particularly in the business sector, which are not under the direct control of state ministries. The implications for the management of public affairs are immense, and they affect policy performance and accountability, as well as increasing fragmentation and complexity in implementation. It is our hope that this book will trigger debates in the policy processes of our country including implications of these reforms and how they can be mediated. The book will thus be of use to tertiary level students, policymakers and practitioners trying to understand systemic implications of these reforms.

On behalf of the editors, the authors and BIDPA, I would like to thank a number of reviewers for their efforts. These reviewers, industry practitioners in the sectors of interest gave a critique of earlier versions of these works to provide the accuracy, authenticity and precision it needs. Whereas the project was conceived here at BIDPA, an innovation in the research process was to request frank critiques of earlier drafts of the chapters from industry practitioners. The authors, however, remain responsible for any mistakes!

I thank you.

Tebogo B. Seleka, PhD
Executive Director, BIDPA

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ABBREVIATIONS

ARC	Architects Registration Council
AAB	Architects Association of Botswana
ABCON	Association of Botswana Building and Civil Engineering Contractors
AEMCB	Association of Electrical and Mechanical Contractors of Botswana
ARC	Architects Registration Council
BHPC	Botswana Health Professionals Council
BIDPA	Botswana Institute for Development Policy Analysis
BICA	Botswana Institute for Chartered Accountants
BIE	Botswana Institute of Engineers
Bifm	Botswana Insurance Fund Management
BoB	Bank of Botswana
BOCCIM	Botswana Chamber of Commerce, Industry and Manpower
BOCRA	Botswana Communications Regulatory Authority
BOTA	Botswana Training Authority
BPOPF	Botswana Public Officers Pension Fund
BSE	Botswana Stock Exchange
BTA	Botswana Telecommunications Authority
BTv	Botswana Television
BTC	Botswana Telecommunications Corporation
CEO	Chief Executive Officer
CISNA	(SADC) Committee on Insurance, Securities and Non-Banking Financial
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
CITF	Construction Industry Trust Fund
EDD	Economic Diversification Drive
ERB	Engineers Registration Board
FDI	Foreign Direct Investment
FIDIC	International Federation of Consulting Engineer
ICT	Information and Communications Technology
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GoB	Government of Botswana
IOSCO	International Organisations of Securities Commissions
LAPAD	Local Authorities Procurement and Asset Disposal
LSB	Law Society of Botswana
MIST	Ministry of Infrastructure, Science and Technology
MCST	Ministry of Communications, Science and Technology
MoU	Memorandum of Understanding
NBB	National Broadcasting Board

NBFI	Non Banking Financial Institution(s)
NBFIRA	Non Banking Financial Regulatory Authority
NDP	National Development Plan
OAG	Office of the Auditor General
OC	Opportunity Class
OECD	Organisation for Economic Cooperation and Development
PCB	Press Council of Botswana
PEEPA	Public Enterprises Evaluation and Privatisation Agency
PPADB	Public Procurement and Asset Disposal Board
PPP	Public-Private Partnerships
NDP	National Development Plan
SADC	Southern African Development Community
SOE	State Owned Enterprise
SRA	Self-Regulatory Agency
TBBA	Tshipidi Badiri Builders Association
TEC	Tertiary Education Council
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation
WUC	Water Utilities Corporation

INTRODUCTION: REGULATION AS A MODE OF GOVERNANCE

Gape Kaboyakgosi, Margaret Sengwaketse and Tachilisa Balule

In recent years, the Government of Botswana (GoB), like many governments around the world, has retreated in some form from direct production and provision of many goods and services in favour of achieving various policy goals through regulation. Whether it is managing telecommunications, the media, taxation, the non-banking financial sector, banks or education providers; regulation is increasingly GoB's policy tool of choice (see Appendix A below).

Whereas the American government has been the global leader in the use of independent regulatory agencies for the management of public policy, this is a relatively new practice in Botswana, as is indeed in many other countries. Regulation is becoming ubiquitous. Countries where regulation is increasingly adopted as a policy management tool include the United Kingdom, which began this following the massive privatisation exercises of the late 1980s, New Zealand and Australia, 1990s, and South Africa in the late 1990s following the privatisation processes in those countries. Regulation is a policy choice. Governments choose to specifically adopt it for the management of policy problems. As in all policy choices, it has consequences for accountability, equity, democracy, efficiency and effectiveness in application.

This book takes the view of regulation as a form of governance. It is a study of regulation in a particular legal, cultural, economic and political context. It is both descriptive of, and analytical of the effects on Botswana's public policy due to the widespread use of regulation. It assesses the way that regulatory reforms have taken effect and how they affect implementation. The governance approach thus takes an instrumentalist perspective. In this conception, regulation is a policy instrument – a tool that government chooses to address policy problems in a specific setting (Salamon 2002). A governance-based perspective on regulation thus includes assessments of the following:

- (a) Actors and their interests;
- (b) How rules and standards of regulation are made, including who makes them;
- (c) The accountability of regulators to the public and its political representatives;
- (d) The effect of regulation on policy performance; and
- (e) The assessment of institutional imperatives (such as law, organisation, and political culture) on regulation.

The governance approach is distinct from other conceptions of regulation. For example, regulation can be taken as a form of policy transfer (i.e., the way regulation is adopted from international organisations or other jurisdictions and domesticated); or as an advancement of global business ethos (see Braithwaite and Drahos 2000); regulatory impact assessment through calculating the financial, legal, political or social cost of regulation on participants, and many others (FIAS 2002).

DEFINITIONS

Defining regulation, a contestable concept, is difficult (Levi-Faur and Jordana 2004; Dubnick and Gielson cited in Reagan 1984) or (Baldwin et al. 1997 cited in Levi-Faur and Jordana 2004). In general however, there are three broad usages usually deployed in relation to regulation. These are regulation in the 'widest sense', where the term encompasses 'all mechanisms of social control'; regulation as 'governance in a general sense' where regulation refers to 'aggregate efforts by the state to steer the economy', and regulation as a specific form of governance – which is a set of authoritative rules, often accompanied by some administrative agency, for monitoring and enforcing compliance' (Jordana and Levi-Faur 2004).

As a specific form of governance, one may further clarify the definitional difficulties of the subject by taking the view that regulation is a policy instrument (Salamon 2002). Adopting this meaning connotes an instrumental end. Regulation is used to manage specific aspects of the economy and society.

In further defining regulation, distinctions are often made between social and economic regulation. Economic regulation is 'a specialised bureaucratic process that combines aspects of both courts and legislatures to control prices, outputs, and, or, the entry/exit of firms in an industry' (Salamon 2002b, p. 118). Social regulation on the other hand is:

Aimed at restricting behaviours that directly threaten public health, safety, and well-being. These include environmental pollution, unsafe working environments, unhealthy living conditions, and social exclusion (May 2002, p. 157).

ECONOMIC REGULATION

Economic regulation entails several dimensions such as price control, competition regulation, imposing standards and production controls.

Price controls

Price controls are used when regulation is used as a substitute for competition. Price controls aim to prevent the abuse of monopoly while also enabling corporations to earn profits on their investments, and facilitating competition among firms. Price control can also be used to oblige firms to provide 'universal service' to ensure that all classes of consumers have some access to a regulated service (such as potable water for household use).

Control of entry

Entry control is carried out through licensing new entrants, stipulating the quality of goods or services the entrant may produce, or ensuring that new entrants fully understand their licence commitments (sometimes a combination of all these three is used).

Production control

Production control can take either controlling outputs or specifying a product or service. As price regulation may act as a disincentive to regulated entities to produce either goods or services in large quantities, regulators often circumvent that problem by specifying the required quantities. Alternatively, regulators can oblige firms to serve sections of society even if it is uneconomic. In this way, regulation will ensure that marginal social groups or remote geographical locations are provided specific goods or services.

Imposing standards

Standardisation is used mostly on network industries where products from different manufacturers must be compatible to enable wider usage of the product. For example, buyers of a kettle must be able to plug the kettle into the same socket that they use to iron laundry. In this case, standardising the design of the socket is essential to allow the consumer maximum use of their products (Salamon 2002b, pp. 117-155).

SOCIAL REGULATION

Social regulation focuses on the protection of society through the control of behaviour or activities that may harm society. Social regulatory challenges for regulators are to set rules that stipulate the minimum acceptable behaviour and standards that clarify the rules. The final task for social regulation is the enforcement of set standards to gain compliance. Below are some of the components of social regulation.

Rule-making

Rules are used to state what is expected of regulated entities. The major difference between rules and norms of social interaction is that rules are written or codified.

Standards

As rules are complex, standards are often used to simplify them. Three common types of standards exist: design/specification standards; performance standards; and reference standards:

- (a) design standards specify the use of materials or means needed to attain compliance;
- (b) performance standards specify expected levels of performance. For example, the amount of weight that can be carried by a vehicle; and
- (c) reference standards are those designed by private standard-setting organisations to guide manufacturers and service providers (May 2002, pp. 164-171).

Penalties or rewards

The goal of social regulation is to obtain compliance with the rules or standards of the regulated activity. Usually, a mixture of rewards and penalties is used to ensure compliance in the context of the fragmentation of regulatory resources between regulators and those they regulate (Ayres and Braithwaite 1992; Gunningham and Grabosky 1998).

Penalties are necessary where the regulated entities would not willingly comply without coercion. As regulation can be costly or even counterproductive, it is important to design penalties that would sufficiently deter wrongdoing without removing the incentive to engage in it. Beyond a certain level, regulation can become too expensive to society, as the costs associated with monitoring may outweigh the benefits (Gunningham and Grabosky 1998).

The range of activities included under the catchphrase 'social regulation' is wide. These include management of morality, e.g., the control of pornography (Daynes 1998), abortion (Strickland 1998), or gun control (Spitzer 1998). A newer brand of social regulation or 'new social regulation' aims at guarding against the ill effects of business activity on societies. It includes the management of advertising standards (Harker 1996), environmental regulation (Breyer 1992), or consumer protection.

Case selection

Four case studies are used in this volume to analyse the deployment of regulation in Botswana. The case studies demonstrate that regulators are now the major agencies at the core of policy implementation – they manage the conduct of core implementers in the public, private and non-governmental sectors. These changes have consequences for public action. The term commonly used to connote these changes is governance; which means governing where the centrality of state institutions is not assumed. Government, though important, is only one of the players. Governance thus carries a number of assumptions:

- (a) implementation and the authority that goes with it is shared between government and non-state actors;
- (b) resources required for policy implementation (i.e., technical know-how; finance; formal-legal authority; political connections, and information) are divided variously between stakeholders;
- (c) the policy process is characterised by complexity. Solutions to policy problems have multiple causes and are not linear; solving such challenges entails answering questions that transcend legal, social, political and economic boundaries;
- (d) the use of markets to implement policy grows as public functions grow; and
- (e) government departments retain policy-making functions.

These case studies have a reformist outlook. The descriptions and analyses of the cases is done with a view to suggesting possibilities for improvement where warranted.

JUSTIFICATION FOR THE BOOK: GOVERNANCE AND PUBLIC POLICY

The governance approach is suitable in this instance as it explains the regulatory reforms in a specific context, explaining how the laws, politics, economics, and culture interact to bring about particular outcomes. It differs from other conceptions of regulation in that it is a dynamic way of explaining reform, particularly in a constantly changing environment.

There are three major imperatives for explaining regulation in this manner:

- (a) the growth in the use of regulation presents a number of paradoxes that need inquiry;
- (b) regulation is an important instrument of implementation. Understanding what makes regulation successful or not may help better understand some of Botswana's implementation challenges; and
- (c) regulation is delegated authority; it has an impact on democracy and governance. How it is made accountable to the public, industry, the media and other players needs to be understood.

THE PARADOXES AND CONTROVERSIES OF REGULATION

Government's increased adoption of 'regulation' (see Appendix A), occurs along with several calls for 'deregulation'. The Botswana Confederation of Commerce, Industry and Manpower (BOCCIM), and the Botswana Economic Advisory Council have variously called for 'deregulation' of the economy. Why government is so keen on a policy direction contrary to popular calls for an alternative view is of interest.

Traditionally, government has exercised regulation through state ownership, directly producing and providing water, telecommunications, education, health and other services. Government, not the private the sector, used, through state owned enterprises, to own the means to set the price, and quality standards and deliver services. Now government uses regulation to manage policy sectors with more players in contrast to monopolies.

Thirdly, the implications for government's selection of some institutional forms are unclear. Why does government prefer certain sectors and not others to self-regulate? How does regulation affect sector performance?

REGULATION AND DEMOCRACY

Another set of matters of interest relate to the impact of regulatory forms of governance on democracy. As delegated authority, regulation provides a layer of bureaucracy between elected representatives and citizens. The anti-democratic tendencies of regulation arise as regulators have greater autonomy with regard to legislative control. Day-to-day, they are under the direct control of unelected boards of directors who supervise unelected technocrats. Yet regulators wield discretion over matters of national interest, allocating costs and benefits between different sections of the society. How regulation is made accountable is of interest.

Furthermore, government tends to import binding regulatory measures that often constrain it, and its citizens. Many of these are matters that citizens did not necessarily vote for. Organisations such as the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) have a measure of control over Botswana's management of her elephant population; through the Kimberly Process, Botswana's diamonds are regulated; either of Moodies and Standard and Poors (both international credit rating agencies) wields influence on Botswana's domestic fiscal policy. How regulation intercedes, moderates or otherwise influences these domestically, affects democratic outcomes.

REGULATION IS IMPLEMENTATION

Regulation affects implementation. Debates on implementation have gained momentum in Botswana in recent years; it was the theme of Botswana's National Business Conference for the year 2012 (BOCCIM 2012). While it is generally agreed that Botswana has good policies and poor implementation (Khama 2012); studying regulation and its influence on public policy may provide insights into implementation challenges. As regulatory failure could lead to failures in the regulated sectors, regulatory success in these sectors may, equally, be expected to replicate.

OBJECTIVES OF THE BOOK

Using case studies on how regulation is used to manage four policy sectors, the Media, Pensions, the Legal Fraternity, and Construction, this study describes and analyses the effect of regulation on public policy in Botswana. The study has three specific objectives:

- (a) to document how regulation is applied in Botswana, by describing the laws, policies, and organisations, and how they interact;
- (b) to assess the consequences of regulation on policy performance; and
- (c) to analyse how accountability under regulation is carried out.

With government departments retreating from direct production of goods and services, regulation assumes an important role in the implementation process. Government's major role is to design policies, laws and incentives with which it manages implementation (Osborne and Gambler, 1991). Appendix A shows the growth in the number of regulatory agencies in Botswana. The oldest of these, the Bank of Botswana, is the only one that existed prior to the 1980s. Thereafter from the 1990s to date led to the proliferation of many regulations.

TYPES OF REGULATORY INSTITUTIONS

Traditionally, several types of regulatory institution exist: Parliament, local councils, the police and courts of law (Baldwin and Cave 1999, p. 63). However, three broad forms of institutional type exist: regulatory commissions, self-regulators, and government departments (Ogus 2002).

Regulation by government department

One form of regulatory design is to assign regulatory duties to government departments or agencies. For example, the Botswana Police perform this type of function through ensuring motor vehicle safety by enforcing speed limits and the use of safety belts. Internationally, the regulation of air, noise, water and other pollution in the United States of America as carried out by the Environmental Protection Agency (EPA) is a common example (Breyer 1992).

Regulation by commission

Regulation by commission is when government sets up a regulatory agency that is autonomous of government in its decision-making, and imposes few controls on it. Government then appoints members of the Commission and approves budgets. In making decisions or determinations, the Commission is independent of government interference (Ogus 2001). The Communications and Regulatory Authority and the Competition Authority are examples of this type of agency.

Self-regulation

Self-regulation exists when a group of firms, individuals, associations or clubs exercise control over their members (Baldwin and Cave 1999, p. 125), or when a corporation regulates its own business conduct (Parker 2002). Self-regulation can either be voluntary or anchored in public law. Voluntary self-regulation is when an industry on its own decides to regulate itself. Examples of voluntary self-regulatory regimes in Botswana include the Botswana Press Council, the Architects Association of Botswana, and the Botswana Institute for Engineers. Self regulation anchored in public law could be referred to as co-regulation and is a self-regulatory framework that is anchored in public authority in one of the following ways:

- (a) the public authority either lays down a legal basis for self-regulation framework so that it begins to function; or
- (b) integrates an existing self-regulatory system into a public authority framework (Jakubowicz, 2009).

Examples of self-regulatory regimes anchored on public law include the Law Society of Botswana, the Botswana Health Professionals Council and the Engineers Registration Board.

JUSTIFICATIONS FOR REGULATORY INTERVENTION

A number of justifications or theories are used to explain why governments choose to intervene through regulation. They explain the development or decline of regulation and prescriptions of how regulation should be organised (Baldwin and Cave 1999, p. 18). Better-known theories of regulation are the public interest, economic and principal-agent.

Public interest theory

The basic premise of the public interest theory is that government intervention through regulation is an attempt to redress market imbalances. Natural monopolies, externalities, information asymmetries and the provision of public goods are some examples of why government intervention is necessary through regulation. Examples follow.

- (a) For natural monopoly, regulators seek to ensure that monopolists provide fairness of price and good quality output (Gelhorn and Pierce 1987, p. 44). For externalities, regulators seek to ensure that parties affected by activities they are not party to get appropriate redress (Reagan 1987, p. 38);
- (b) In the provision of public goods, regulation is needed to ensure that goods needed by all in society are provided equitably; and
- (c) For information asymmetry, the aim of regulation is to ensure that information that is expensive to produce but important to the public is availed to interested parties (Baldwin and Cave 1999, pp. 13-14; Reagan 1987, p.38; Gelhorn and Pierce 1987, p. 44).

The public interest theory of regulation is too general to be useful in describing why regulation occurs. Further, it does not describe the role played by institutions in administering regulation, and thus the major governance concern of the theory is 'how to bring in an active role for regulators?'. The theory tends to be susceptible to attributing reasons for past actions by public officials, and is thus too limited when it comes to explaining dynamic regulatory decisions.

Economic theory of regulation

The economic theory of regulation has three core theorems, as below.

- (a) Governments do not deploy regulation for the good of society;
- (b) Regulation is desired by businesses to advance their own interests or 'capture' the regulator (Stigler 1971);
- (c) Politicians thereby give regulators the right to dispose of monopolies, giving the regulated industry an incentive to capture the regulator (Baldwin and Cave 1999, p.30; Majone, 1996a, p. 30).

In this conception, the most organised interests in society stand to benefit the most from regulation.

The major governance concerns of the economic theory of regulation are how to ensure that the best organised interests in society do not 'capture' the regulator. Such capture means that the regulator ends up running its business in the favour of the most organised interests. 'Executive' capture of the regulator may also occur if the wishes of cabinet end up being the primary interests being favoured by the regulator.

Principal-agent theory

In principal-agent theory, regulation is viewed as delegated authority. Such authority is

delegated by Parliaments elected by citizens, to regulatory agencies run by unelected officials. Parliaments readily delegate their authority to third parties for reasons that include expertise, reduction of decision-making costs, blame avoidance, and resolution of commitment problems.

- (a) The expertise logic suggests that as politicians lack the know-how to design or implement policies; they cede their power to regulatory agencies.
- (b) To reduce decision-making costs it is suggested that legislatures delegate their powers to regulators as they are specialist agencies. Parliament may then focus on selected policy issues.
- (c) Parliaments may also delegate their authority to signal policy commitment. As regulators outlive the legislature which is subject to electoral cycles, setting up regulators signals government's commitment to a selected policy course.
- (d) It is also suggested that parliaments delegate their authority so that they can shift the blame to regulators when things go wrong (Majone, 1999; Thatcher and Stone-Sweet, 2001).

Where principal-agent theory is concerned, the major governance issues that arise concern how to ensure that employees of regulatory agencies do not tend towards corrupt activity or low productivity. Where the agency is concerned, the major concerns of principal agent theory focus on ensuring that the agency stays committed to the mandate given to it by the legislature.

INTRODUCTION OF THE CASE STUDIES

Below is a summary of the four case studies in this volume.

The case study on media regulation demonstrates a number of issues on the use of regulation in Botswana. Central to these is that regulation can be vigorously contested between state and industry. The case study makes apparent the idea that the state is not a neutral player in policy. The media is a rigorously contested sphere as it facilitates the management of public perceptions; controlling it is thus of paramount importance. While media regulation is ideal for self-regulation, there is inherent tension between the state and practitioners, with one side preferring self-regulation and the other statutory regulation. The government as owner of the most powerful media organisation refuses to allow the public media to be regulated by the media regulator; strengthening government's capacity against the regulator, and weakening the regulator's capacity to discipline the entire media fraternity. The case study also shows that media regulation is difficult to classify in terms of traditional regulatory form. Consequently the term 'co-regulation' best captures the essence of media regulation: government has as much regulatory discretion as the regulator does.

The case study on regulation of pensions demonstrates the growing importance of the sector as a contributor to the national economy. The regulatory reforms in the sector

led to changes including the growth of the industry. Indeed the very idea that an ‘industry’ was born captures the impact of the regulatory reforms. The case also shows that domestic regulation can be directly impacted by the global economy. The importance of corporate governance as a regulatory form is also demonstrated. In their need for their space to be observed by regulators, fund managers are willing to train, retain and allow trustees the space to function. The accountability of the regulator is shown to be multifarious, upward to the legislature, sideways to other regulators, and downwards to the media, fund managers and the public.

The case study on the Law Society of Botswana demonstrates the complexities of a relatively new, but growing form of regulatory approach; *self-regulation*. The case demonstrates the implicit challenges facing this approach, particularly the potential for accountability loss, which occurs when a body of self-interested professionals are allowed to regulate themselves and how it is managed. The case also demonstrates the end result of a bargaining process between the legal professionals and the legislature which leads to self-regulation. In order to gain their desire for self-management, the attorneys (and other professionals who may wish to do so) end up performing duties that would normally be carried out by government departments, at their own expense.

The case study on construction demonstrates the use of regulation in a complex environment. Construction is a very fragmented sector, with neither a policy nor a law to act as a coordinating mechanism. Regulating construction is thus about managing many professions (e.g., architecture, engineering, and quantity surveying), business and other concerns (labour and the environment). To that extent, the sector has multiple regulators. Construction mixes statutory regulation, with government departments, and self-regulation. Without an overarching sector regulator, regulating construction is about the management of disparate, uncoordinated business imperatives.

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APPENDIX A: REGULATORY INSTITUTIONS IN BOTSWANA, 1975 TO DATE

Name of Regulator	Sector	Year	Type of Regulatory Institution
Civil Aviation Authority	Air Transport	2004	Independent Regulator
Law Society of Botswana	The Legal Fraternity	1996	Self regulator
Botswana Bureau of Standards	Various	1990	Standards Authority
Botswana Training Authority	Education	2002	Independent regulator
Financial Intelligence Agency	Financial	2009	Semi autonomous government department
Botswana Press Council	Print media	2002	Self regulatory authority
Botswana Health Professions Council	The health professions	2001	Self-regulatory
Engineers Registration Board	The Engineering Profession	1997	Self regulatory agency
Botswana Examinations Council	Schools examinations	2002	Independent regulator
Department of Environmental Affairs	Environmental regulation	2005	Government department
National Broadcasting Board**	The media	1999	Independent regulator
Tertiary Education Council	Tertiary education	1999	Independent regulator
NBFIRA ¹	Non bank financial institutions	2008	Independent regulator
Bank of Botswana	Monetary policy	1975	Independent regulator
Botswana Telecommunications Authority*	Telecommunications	1996	Independent Regulator

* and **: Since April 1st 2013, the Botswana Telecommunications Authority and the National Broadcasting Board were merged to become the Botswana Communications Regulatory Authority, BOCRA

1. Non Bank Financial Institutions Regulatory Authority

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MEDIA REGULATION IN BOTSWANA – MANAGING CONTESTED POLICY SPACES

Tachilisa Balule¹

This chapter examines regulation of the media in Botswana. It explores the rationales underpinning regulation of the media in the country, and the institutional actors involved in the regulation of the industry. It is now widely acknowledged that the mass media constitutes one of the cornerstones of a democratic society. The central role that the media plays in democratic societies has been succinctly defined by the Ghana Supreme Court, that:

...the media serves as a vehicle for self-expression, as a reflection of public opinion, as an informer of the public, as a participant in the formation of public opinion, and as a watchdog of the government (*The National Media Commission v Attorney General*, 2000, p.10 – unreported).

The media in a democracy is expected to promote the free flow of information and ideas, thereby guaranteeing the right of the public to be informed on matters of public concern. The media is also expected to exercise scrutiny over public and political affairs, as well as ensuring the accountability of political bodies and public authorities necessary in a democratic society (*Observer and Guardian v The United Kingdom* (1991) 14 EHRR 153 and *National Media Limited v Bogosbi* (1998) (4) SA 1196 at 1209). The media serves two important public interests in democratic societies:

- (a) it facilitates the free flow of information; and
- (b) it plays a watchdog role.

DEFINING ‘MEDIA’ AND AN OVERVIEW OF THE MEDIA SECTOR IN BOTSWANA

Before addressing the above issues, it is important to discuss two preliminary points. First, is to define the term media. A definition of this term will assist in the demarcation of the scope of the discussion in view of the evolving character of the media. Second, will be an overview of the media sector in Botswana. This will enable the reader to have an appreciation of the size and nature of the sector.

1 The editors would like to thank one anonymous reviewer for comments.

DEFINING THE TERM 'MEDIA'

Traditionally, 'the media' was understood to include the print media, broadcasting, film and recorded music. This chapter will, however, focus on the news media. The news media are those organisations or institutions 'performing a sequence of activities to obtain, select and process content, then assemble it into a media product and disseminate it, or have it disseminated, to the audience' (Jakubowicz 2009, p.9). The advent of new technology, especially digitisation, together with social and cultural changes, has had a tremendous impact on the media as traditionally understood or defined. Due to these changes, we now have media content as well as media-like content emanating from a variety of sources and on new platforms.

The emergence of these new media platforms, such as the blog, questions the traditional concept of journalism where the concept was associated with what the professional media publishes. Today, media content and media-like content is disseminated by non-professional content creators such as journalistic weblogs written by the public outside the media. Furthermore, content is disseminated by new intermediaries who are not the media in the traditional sense, such as internet service providers and content aggregators. However, not all of the new platforms involved in the creation of media or media-like content and its dissemination can be defined as news media because some lack the essential requirements for these institutions. The essential elements of news media institutions have been identified to include (Jakubowicz, 2009; Council of Europe, 2009, p.9):

- (a) Purpose: to exercise, and enable the public to exercise freedom of expression and information;
- (b) Editorial policy and process: produce and obtain content and select, edit, structure and package it to serve the purposes of the given media organisation, and assume editorial responsibility;
- (c) Management of journalists and other content creators and technical sectors of the organisation;
- (d) Periodic dissemination;
- (e) Public nature of communication via different delivery and distribution platforms; and
- (f) Conformity with normative, ethical, professional and legal standards relevant in the case of media operation.

The Council of Europe in its Recommendation CM/Rec 5 recommends to its member states to adopt the following definition of the media;

The term 'media' refers to those responsible for the periodic creation of information and content and its dissemination over which there is editorial responsibility, irrespective of the means of technology used for the delivery, which are intended to have a clear impact on, a significant proportion of the general public. (CM/Rec 2007)

This chapter adopts this definition of the media as it is platform neutral and embraces most of the essential elements of the news media discussed above.

Overview of the media sector in Botswana

The media sector in Botswana is relatively small, but growing. This is especially relevant in the case of the print media. The country has just over a dozen newspapers in circulation, which arguably is a reasonable number given the country’s population of just about two million.

The broadcast sector has not grown satisfactorily since the liberalisation of the airwaves. The sector is still dominated by state-owned broadcasters. Tables 1 and 2 show the major players in the broadcast and print sectors in the country.

Table 1: Broadcasters

Radio/TV Station	Owner	Classification	Coverage
Radio Botswana 1	Government	Public service	National
Radio Botswana 2	Government	Public service	National
Botswana Television	Government	State broadcaster	National
Ya Rona FM	Toyen (Pty) Ltd and others	Private	National
Gabz FM	Your Friend (Pty) Ltd	Private	National
Duma FM	Duma FM (Pty) Ltd	Private	National
E-Botswana Television	Gaborone Broadcasting Corporation (Pty) Ltd	Private	Gaborone
Multichoice	Multichoice Botswana (Pty) Ltd	Private	Pan African

Adopted from Sebina (2008)

Table 2: Main Newspapers

Newspaper	Publisher	Circulation	Distribution	Frequency
Botswana Gazette	News Company Botswana (Pty) Ltd	23 000	National	Weekly
Botswana Guardian	CBET (Pty) Ltd	19 000	National	Weekly
Daily News	Government	65 000	National	Daily
Echo	Echo (Pty) Ltd	15 000	National	Weekly
Midweek Sun	CBET (Pty) Ltd	15 000	National	Weekly
Mmegi	Dikgang Publishing Co. (Pty) Ltd	Tue-Thurs: 11 000 Fri: 22 400	National	4 times weekly
Monitor	Dikgang Publishing Co. (Pty) Ltd	16 000	National	Weekly
Ngami Times	Ngami Times Publishing Co. (Pty) Ltd	10 000	National	Weekly
Sunday Standard	Tsodilo Services (Pty) Ltd	17 000	National	Weekly
Sunday Tribune	Bukinemo Enterprising	8 000	National	Weekly
Telegraph	Tsodilo Services (Pty) Ltd	10 000	National	Weekly
Tswana Times	Tsolohi Communications	5 000	National	Fortnightly
Voice	The Francistowner (Pty) Ltd	30 000	National	Weekly
Weekend Post	ATD Media Corp. (Pty) Ltd	10 000	National	Weekly

Adopted from Sebina (2008)

Media that is based on digital technology is also available in those places that have internet connection and telephony coverage. Internet connection is available in all urban centres and big villages and is expanding to small villages and rural areas. There is one fixed and three mobile telephone service providers, which cover most parts of the country. Most of the newspapers in circulation in the country, and some radio stations, are available on-line.

WHY REGULATE THE MEDIA?

Regulation of the media across the world has been shaped by the social and political importance accorded to freedom of expression, which is not only valued for its own sake, but also as a means to achieve certain objectives. There are three traditional theories that underpin the protection of freedom of expression; the argument from truth, the argument for democracy and the argument for self-fulfilment.

The argument from truth

The argument from truth stipulates that freedom of expression guarantees an abundant supply of facts and arguments about facts, thus cultivating the habit of questioning and correcting opinions and ensuring the victory of truth over falsehood (Mill, 1992). It is argued that suppression of opinion is wrong because it is only by the 'collision of adverse opinions' that truth is discovered or confirmed. This argument for the protection of freedom of expression posits that freedom is not an end in itself, but a means of identifying and accepting truth.

The argument for democracy

According to this argument, since democracy means popular sovereignty, citizens, as the ultimate decision-makers need extensive information to make intelligent political choices (Meiklejohn, 1960). It stresses two functions of freedom of expression and the press in a democracy: firstly, the informative function, i.e., free speech permits the flow of information necessary for citizens to make informed decisions, and for leaders to stay abreast of the interests of their constituents. In relation to the watchdog function, the media in particular serves citizens through ensuring independent criticism and evaluation of the established power of government or other institutions that may usurp democratic power.

The argument for self-fulfilment

While the arguments from the aspects of truth and democracy justify the protection of freedom of expression as a means to an end, the argument for self-fulfilment justifies the freedom as an end in itself. This theory justifies the protection of freedom of expression in order to enlarge the prospects for individual self-fulfilment, or to allow personal growth and self-realisation. The argument recognises the overriding importance of a person being able to think for themselves, and that whatever their outer condition, they should not be intellectually or psychologically subjugated to another's will. In the famous words of Justice Marshall Thurgood of the US Supreme Court, 'freedom of ex-

pression serves not only the needs of the polity, but also those of the human spirit – a spirit that demands self-expression’ (see *Procurier v Martinez* 416 US 396, p.427 1974).

The right to freedom of expression is intimately connected with the media because expression through the media is one way of exercising the right. A free media is essential to ensure the full enjoyment of freedom of expression by facilitating the free flow of information and ideas. While the media is expected to foster freedom of expression, at times the media has a tendency of stifling the free flow of information. Media institutions operate in a field of social, political and economic pressure which may determine how they disseminate information. It has been argued that the media in their modern form (mass media in mass society) works not only to enhance the flow of ideas and information but also to inhibit it. Nothing guarantees that all valuable information, ideas, theories, explanations and points of view will find expression in the public fora. Which views get covered, and in what way depends on the economic, political structure and context of media institutions, and on the characteristics of the media themselves (Lichtenberg 1990, pp. 102-103; Barendt 1990, p. 29, 50). News media institutions are neither neutral nor reflective of what the audience wants, but have values and choices that shape social preferences. They are therefore selective in their dissemination of news and information.

Constraints within news media institutions which cause them to stifle the dissemination of information instead of promoting it justify regulation of the media. Four rationales are advanced to justify regulation of the media in order to ensure that they promote freedom of expression (Craufurd-Smith 1998, p 64; Goldberg, Prosser and Verhurst, 1999, p. 15). These are regulation for competition, regulation for internal pluralism, regulation for access, and regulation for social considerations, as below.

- (a) Regulation for competition involves structural and behavioural forms. *Structural* regulation focuses on the corporate structure, with the aim of avoiding the anti-competitive consequences of media markets being dominated by one or a few major players. *Behavioural* regulation, on the other hand, aims at limiting how property can be used in relation to its impact on actual or potential competitors. It seeks to prohibit market-distorting practices or abuse of a dominant position. Regulating the media for competition is aimed at promoting external pluralism, i.e., promoting a diversity of independent media outlets thereby maximising the dissemination of diverse information and ideas.
- (b) Regulating for internal pluralism focuses on promoting diversity and plurality of media content to ensure that media content as a whole covers a wide range of information and ideas that cater for a diverse audience.
- (c) Regulation for access recognises the idea that in democratic societies, the enjoyment of the right to freedom of expression depends, to a large extent, upon access to the mass media. Diverse media outlets should be available to all members of the society to avoid having a society that is divided between ‘information haves’ and ‘information have-nots’ resulting in social division. This type of regulation is generally geared towards ensuring universal access to media services to citizens and is more relevant to the broadcast media.

- (d) The fourth rationale for regulating the media is based on social grounds. While freedom of expression is an important right, it is not an absolute right. Its enjoyment must be reconciled with other equally important interests that are recognised and protected by the legal system. The media are thus regulated to ensure that they do not harm other values protected by the legal system such as individual rights and freedoms, and the public interest.

These arguments as advanced to justify media regulation apply to the media in general. In practice, however, the broadcast media are subjected to a significantly greater degree of regulation than that applied to newspapers. The basis for this double standard in the regulation of the media is controversial and has been a subject of vigorous debate. Four arguments are advanced for the strict regulation of the broadcast media:

- (a) Firstly, it is said that airwaves are a public resource and that governments are entitled to license their use on terms that they see fit.
- (b) Secondly, regulation is justified by the scarcity of broadcast frequencies. Since it is not possible for everyone to acquire licences to broadcast, governments may reasonably require licensees to share their privilege with other representative members of the public. Licensees may be compelled to present a balanced range of programmes in the interests of listeners and viewers.
- (c) Thirdly, regulation of broadcasting is justified on the basis of its character. Television and radio are said to be more influential on public opinion, as they intrude into the home, are more pervasive, and difficult to control than the print media.
- (d) Fourthly, the double standard is further justified on the ground that society is entitled to remedy the deficiencies of an unregulated press with a regulated broadcast system. It is therefore posited that since regulation poses the danger of government control, the risk is reduced if one branch of the media is left free (Barendt 1993, p4; Bollinger 1999 cited in Goldberg *et al.* 1999, p. 365).

The arguments for the double standard in the regulation of the media have been subjected to criticism (Barendt 1993; Hoffman-Riem 1996). These criticisms arguably demonstrate that the double standard is largely based upon historical circumstances rather than clearly defined principles. Carufurd-Smith (1999) argues that in Britain and continental Europe, regulatory choices had little to do with concerns for human rights or fundamental freedoms, but were motivated more by a desire to further the national electronics industry or by concerns over radio's social and political influence.

Regulation of any industry is therefore about shaping and guiding it to achieve ends that are thought desirable (Gibbons, 1998). There are various normative sources that can be used to regulate the media. Besides the general criminal and civil law, there are some forms of regulation that supplement the general law. This chapter focuses on the latter.

There are a number of strategies that can be employed in the regulation of an industry. One is the traditional command and control strategy that centres on the state. This is where the government sets standards for an industry backed by legal enforcement for

non-compliance (Lunt and Livingstone 2012). Another strategy is self-regulation, where a group of persons or bodies acting together, perform a regulating function in respect of themselves and others who accept their authority (Black 1996). This is a non-state regulatory system established to achieve public policy goals. The other regulatory model is co-regulation which is based on a self-regulatory framework but is anchored in public authority in one of the following ways:

- (a) the public authority either lays down a legal basis for a self-regulation framework such that it begins to function; or
- (b) it integrates an existing self-regulatory system into a public authority framework (Jakubowicz 2009).

This chapter looks at regulation of the media in Botswana to determine which of the above strategies are used. The focus will be on the normative, ethical and legal standards set for the operation of news media institutions.

REGULATORY FRAMEWORK FOR THE PRINT MEDIA

The double standard in the regulation of the media that is common globally also manifests itself in the regulation of the media in Botswana. Similarly the observation about the print media being subject to a more liberal regulatory regime in comparison to the broadcast media is highly relevant in Botswana. The main laws regulating the print media are the Printed Publications Act, 1968 and the Media Practitioners Act, 2008.

In terms of section 5(1) of the Printed Publications Act, no newspaper shall be printed or published in Botswana unless it has been registered at the General Post Office with the Registrar of Newspapers. The Act, at section 5(2) stipulates the necessary information that any newspaper seeking registration must furnish to the Registrar of Newspapers. There is no discretion to refuse registration when this information has been given. Registration is intended to provide a source of information on a newspaper's owners and not as a means of censorship. The law does not impose any content obligations on newspapers. Content obligations on newspapers are indirectly imposed by section 10 of the Media Practitioners Act, 2008, which obliges any newspaper that has published a statement about or against a person, to give the affected person a right of reply at his request.

The laws regulating the print media do not address competition aspects of the sector. This failure has given rise to the emergence of monopolies in the sector. For example, CBET (Pty) Ltd, which publishes two newspapers, is wholly-owned by Dikgang Publishing Company (Pty) Ltd, which also publishes two papers. The combined circulation figures of papers published by the two associated companies is around 115 000 copies per week, or 37% of the total market share, which makes them dominant in a sector that has just over a dozen publications with a total circulation of about 308 000 copies per week.

The cost of newspapers in the country is affordable as they average P6.00, which is the cost of a loaf of bread, the standard generally used to determine the affordabil-

ity of newspapers. Save for the state-owned *Daily News* and privately owned *Mmegi*, which have some sections written in the Setswana language, all papers are published in English. This means that the majority of newspapers are not accessible to a significant portion of the public who are illiterate or not competent to read and comprehend the English language.

The normative and ethical aspects of the operation of the print media are governed by the self-regulatory and co-regulatory regimes that co-exist in the sector. The Press Council of Botswana (PCB) was established in October 2002 (Press Council of Botswana 2002). It is a voluntary self-regulatory body whose main objective is the promotion and protection of the development of a free, ethical, pluralistic news media. Membership of the PCB is open to all publishers of news in the print, broadcast and electronic media, and any individual or organisation having a legitimate interest in the development of the local media. The PCB is governed by a Board of Trustees, which is elected by the members in a general meeting. The Board of Trustees is entrusted with the responsibility of managing the PCB to ensure that it delivers on its mandate.

The PCB has adopted a code of practice aimed at promoting the observance of media ethics by its members. The implementation of this code of practice has been delegated to a Complaints Committee and an Appeals Committee. The Complaints Committee is appointed by the Board of Trustees and consists of a chairperson, who must be a member of the public; four representatives of the media, who must have practical editorial and journalistic experience; and four representatives of the public who must have neither material financial interest in the media nor be in the employ of a media entity. The Committee is empowered to receive complaints from the public about the performance or conduct of the media, adjudicate on such matters, and apply such remedies as it sees appropriate. Such remedies include: a dismissal of a complaint; criticism of the conduct of a media respondent; reprimand; or direct that a correction or the findings of the Committee be published by the respondent in such a manner as may be determined by the Committee. Decisions of the Complaints Committee can be appealed to the Appeals Committee, which is also appointed by the Board of Trustees. The latter committee consists of an individual with a legal background, who acts as chairperson, one individual representing civil society and a third person representing the media.

The PCB is accountable to its members and the public through its Board of Trustees. The chairperson of the Board of Trustees is required under the notarial deed of trust to prepare and present a report of activities undertaken by, and the performance of, the PCB at the annual general meeting. Organs of the PCB, the Complaints Committee and the Appeals Committee, are required under the notarial deed to have their decisions in writing and to furnish full reasons for their decisions. This is another way of ensuring the accountability of the PCB to the public.

The PCB has not been successful in effectively regulating the media in the country due to a number of challenges. Some of these challenges include that, since it is a voluntary organisation, not all publishers are members, and therefore it does not have jurisdiction over all publishers of news in the country. The PCB also lacks effective enforcement mechanisms as it depends on the willingness of members to abide by its

decisions. In particular, the PCB's lack of penal sanctions against members that violate its code of practice is considered a main weakness by its critics.

The concerns about the PCB led to Parliament enacting the Media Practitioners Act, 2008, which establishes a co-regulatory framework. Section 3 of the Act establishes a Media Council, which is a body corporate with perpetual succession. The objects of the Council include, among others: to preserve media freedom, uphold standards of professional conduct and promote good ethical standards and discipline among media practitioners; and promote the observance of a media code of ethics. Section 9 of the Act prescribes in general terms what the media code of ethics should address. All publishers of news and information in both the private and public sector are obliged to be members of the Media Council. Section 7 of the Act points out that failure by any publisher to be a member of the Council constitutes an offence punishable by a fine not exceeding P5000, an imprisonment term not exceeding three years, or both. The Media Council's governing body is the Executive Committee, which consists of seven members elected by members of the Council in a general meeting. Section 4 of the Act provides that 'the Council shall operate without any political or other bias or interference, and shall be wholly independent and separate from the government, any political party or any other body'. This provision is aimed at guaranteeing the administrative independence of the Media Council.

The Act also establishes a Complaints Committee, which adjudicates complaints against media practitioners. Section 11 empowers the Minister to appoint the Complaints Committee. The powers of this committee in dealing with complaints are similar to those of the PCB. The committee has additional powers to impose penal sanctions. Section 14(2) lists these sanctions, which include imposing fines, suspension, and de-registration of media practitioners. Another weakness of the Act is that it does not lay down the procedure that the Minister must follow in the appointment of members of this committee. In order to ensure the independence and credibility of the Media Council, it is crucial that members of its organs are appointed in an open and democratic manner so that the public must have confidence in the appointment process and in the institution.

The involvement of the Minister in the appointment of the Complaints Committee compromises the Council's administrative independence. Added to that, the Act does not lay down a transparent process for the appointment of members of this committee, and there is therefore the danger that the Minister's appointments may be motivated by political considerations that may seriously undermine the independence and the integrity of the Media Council. There is, however, stark contrast when it comes to the appointment of members of the Appeals Committee. Section 15(1) of the Act mandates that two members of this committee, being the legal practitioner (also the chairperson), and a media representative, are appointed by the Minister on the recommendations of the Law Society of Botswana and the Media Council, respectively. The third member of the committee, representing the public, is however appointed by the Minister alone.

The Media Council is made accountable to its members and the Minister. The Executive Council is required to present to its members in a general meeting a full re-

port of its activities. Section 34 requires the Executive Council to submit to the Minister, an annual report indicating the activities and operations of the Council for the year. At section 14(1), the accountability of the Media Council is bolstered through the requirement that decisions of the Complaints Committee shall be in writing and give full reasons thereof. The minister has general supervisory powers over the activities of the Media Council. Section 38 of the Act outlines these powers, and they include: dissolution of the Council's governing body; making regulations on any matter intended to safeguard the interests of the public and promote professional standards in the media; and giving effect to the code of ethics issued by the Council.

At the time of writing the Media Council was not yet operational. The delay in its operations has been caused by the private media's dissatisfaction with the law establishing the Council and they have since filed a case with the High Court challenging the law.

REGULATORY FRAMEWORK FOR THE BROADCAST MEDIA

The broadcast media is subjected to a more rigorous regulatory regime than the print media. The justification for this is that broadcasting is a national asset, which needs to be managed properly and in the best interest of the nation as a whole, and that the radio spectrum is a finite resource (MCST 2006, p.5).

The Broadcasting Act, 1998 was the principal law regulating the broadcast media until its repeal in April 2013. The main law now regulating broadcasting is the Communications Regulatory Authority Act, 2012. The law also regulates telecommunications and postal services sectors. The latter Act is supplemented by the Broadcasting Regulations, 2004 which were promulgated under the Broadcasting Act, 1998 in the regulation of broadcasting. Although the Broadcasting Act, 1998 has been repealed, section 3 of the Broadcasting (Repeal) Act, 2011 provides that any subsidiary legislation made under the Act shall continue to be of force and effect as if made under the provisions of the Communications Regulatory Authority Act, 2012, to the extent that it is not inconsistent with such provisions, until revoked or amended. The broadcast sector adopts a co-regulatory approach. The legislative framework addresses competition issues, sets normative and ethical standards and monitoring mechanisms for the sector.

Section 6(2)(c) of the Communications Regulatory Authority Act, 2012 requires the Communications Regulatory Authority (CRA) to protect and promote the interests of consumers and other users of the services in the regulated sectors through the availability of quality and variety of services throughout the country, such as will satisfy all reasonable demands for those services. In the broadcast sector, the Act expressly recognises two types of broadcasters, commercial and state broadcasters, which would arguably satisfy the informational demands of the public. The minister is also given powers under section 31(4)(d) to make regulations for the classification of other broadcasting licences. The CRA is required to monitor competition in the broadcast sector and to refer all competition issues arising in the course of the discharge of its functions to the Competition Authority (section 89). The Act does not impose any explicit limitations on ownership of commercial broadcasting licences. However, Regulation 3 bars a person

from holding both a radio and television licence serving the same local market.

Cross-media ownership between the broadcast and print media is not addressed in the law. This is a serious loophole that may undermine diversity and pluralism in the provision of information by allowing a single player to dominate both sectors. There are few players in the broadcast sector and it is dominated by the state-owned broadcasters. Growth in the sector has been impeded by the absence of a policy which clearly outlines the objectives underpinning broadcast regulation.

The broadcast media have content obligations imposed on them to promote internal pluralism in their programmes. Pluralism in broadcasters' programmes is promoted through imposing local content obligations on those programmes. Regulation 10 requires television broadcasters to broadcast programmes with a minimum local content of 20%, while for radio the minimum is 40%. Regulation 13 obliges broadcasters to report news and information accurately, fairly and impartially. Through Regulation 16, when reporting on controversial issues, broadcasters must ensure that a wide range of views and opinions are reported, and that any person who has been criticised in a programme is given a right of reply. The effect of all these obligations imposed on broadcasters under these regulations is to promote internal pluralism in their cumulative effect, and ensure that programming covers a wide range of information and ideas that cater for a diverse audience. Unfortunately, it would appear that these regulations will not be applicable to state broadcasters, as in terms of section 31(2) of the Communications Regulatory Authority Act 2012, they are exempted from requiring a licence to operate. This therefore means that the CRA will have no or just a limited supervisory role over these broadcasters.

Programming by broadcasters in the country is perhaps not as diverse as it should be. This can be attributed to a number of factors. These include, among others, that there are no clear content obligations on commercial broadcasters who are in operation, and state broadcasters do not have editorial independence. The government has made it clear that it expects state-owned broadcasters to act as its mouthpieces by purveying official information rather than as independent sources of information for the public.

The Communications Regulatory Authority Act 2012 does not have elaborate provisions dealing with the question of access to broadcast services. The CRA is however required to promote the availability of quality and variety of services throughout the country. Further access obligations can be inferred from section 32(2) of the Act which empowers the regulator to issue licences 'subject to such conditions and restrictions, including geographical restrictions, as the board may consider necessary'. In issuing licences, the regulator can use this provision to impose conditions on geographic coverage and language, which are aimed at promoting the accessibility of the services. The National Broadcasting Board, which has now been replaced by the CRA, used a similar provision in the repealed Broadcasting Act of 1998 to impose access obligations on licensees. All licensees were required to provide their services to the entire country. However, save for the state-owned broadcasters, which cover the entire country, commercial broadcasters are still to extend their coverage to the whole country. All broadcasters provide their services in the official language, English, and the national

language, Setswana. The use of the latter arguably makes broadcast services accessible to the greater majority of the public in the country.

The NBB had developed a code of practice that sets the normative and ethical standards that guide all licensees. This Code, in terms of the Broadcasting (Repeal) Act, is still applicable to broadcasters. The code of practice addresses among others: community standards that broadcasters must adhere to; protection of children; fairness, accuracy and impartiality in news and information programmes; prohibition on party-political broadcasts; and coverage of elections. The mandate of the regulator extends to receiving complaints from the public against broadcasters and adjudicates on them in terms of the broadcasting code of practice.

The Communications Regulatory Authority Act 2012 establishes a CRA whose main mandate is to ensure the effective regulation of the telecommunications, broadcasting and postal services sectors. The Act does not, however, guarantee the administrative independence of the CRA. This omission is a serious indictment regarding the independence of the regulator. Further support for the view that the CRA is not an independent body is the fact that section 6(2)(h) of the Act requires that, prior to the issuance of any broadcasting licence, the regulator must first notify the minister. This requirement suggests that the issuance of broadcasting licences must first have the approval of the minister, which means the regulator does not have exclusive jurisdiction on licensing matters. The minister is further given the power under section 91 to rescind a decision of the CRA which, in the minister's opinion, may adversely affect the security of the country or relations with a foreign government. These very wide discretionary powers given to the minister may be easily abused to frustrate the CRA in the performance of its mandate. The CRA can not, therefore, be said to be a regulator independent of the government.

The CRA is composed of seven members who are appointed by a government minister. The Act does not prescribe any procedure that must be followed in the appointment of the members of the regulator in order to ensure that the process is open and democratic. The African Commission on Human and Peoples' Rights recommends that the appointment process for members of public authorities that regulate broadcasting should be open and transparent, involve the participation of civil society, and should not be controlled by any particular political party (African Commission 2002). Members of the CRA hold office for a period not exceeding three years and are eligible at the expiry of their first term for re-appointment for one further term. Once appointed, members enjoy security of tenure and can only be removed from office by the appointing authority on grounds set out in the Act. The grounds upon which a member of the CRA may be removed from office broadly include: bankruptcy, conflict of interest – real or perceived, conviction of a criminal offence, and appointment to a political office.

Accountability of a regulator is critical for its independence as it ensures that it is both answerable for its actions or omissions, and is insulated from improper political or industry influence in its decision-making. The CRA is made accountable under section 28 to a government minister through submission of annual reports that cover its operations, and these reports are available to members of the public upon payment of a pre-

scribed fee. In addition, the CRA is obliged to make its decisions in an open, transparent and accountable manner. These obligations ensure that the CRA is accountable to the public for its activities. It is, however, objectionable that the CRA is made accountable to a government minister and not to a multi-party body. It would have been ideal to have the CRA account to Parliament, as it does for financial accountability where it is required to submit its annual audited reports to the National Assembly.

The CRA is funded from different sources, which include fees levied in respect of licensing, annual fees paid by regulated suppliers, and loans granted by Parliament (section 24). The funding arrangement for the CRA is sufficiently open and transparent, and would arguably insulate it from threats from the executive to use budget cuts to undermine it in the performance of its mandate. The funding model of the Authority is also commendable as it should be able to allow the Authority to raise enough funds to enable it to carry out its functions without undue pressure from both the executive and industry.

REGULATORY FRAMEWORK FOR THE ‘NEW’ MEDIA

New media that are delivered on platforms that depend on telecommunication services are regulated under the Communications Regulatory Act, 2012. This Act establishes the Communications Regulatory Authority, a regulator whose function is, among others, to supervise and promote the provision of efficient telecommunication services in the country. The mandate of the CRA, in this regard, is guided by the country’s national ICT policy (Government Printer 2004).

The Communications Regulatory Act requires the licensing of all telecommunication services (section 39(1)). The ICT policy aims at creating a favourable climate that would encourage communities, organisations and individuals to invest and use ICTs. This addresses the competition aspects of the sector. The development of a regulatory framework setting the normative and ethical standards for the new media in the country is still at its infancy. The ICT policy recommends the use of an appropriate mix of criminal law, regulation and co-regulation through use of industry codes of conduct to deal with cyber-crime and inappropriate content to regulate the new media (Government Printer, 2004, p.46). Efforts are currently on-going to revise criminal laws so that they are able to address challenges posed by the new media. In addition, there are consultations on regulatory and co-regulatory structures that will suit the sector. This does not mean that the new media is not regulated at all in the country. New media hosted by news media institutions are still required to abide by the general journalistic ethics and most service providers have terms and codes that are designed to deal with inappropriate content and also provide complaints procedures in the event of publication of inappropriate content.

CONCLUSION

The regulatory framework for the media in Botswana, like in most democracies around the world, is shaped by the social and political value accorded to freedom of expression in these societies. The media is seen as an aspect of the greater right of freedom

of expression, and is therefore expected to foster the values of the latter right. A free, pluralistic, independent and responsible media is essential in a democratic society. The discussion above demonstrates that the regulatory framework for the media in Botswana is generally aimed at achieving these attributes in the media sector. There are, however, some loopholes that need to be addressed.

The emerging monopolies in the print media are a source of concern. The country now has a Competition Authority but the question is whether it will be able to tackle the problem. There are doubts over the ability of competition law to promote competition in media markets on democratic grounds. In many countries around the world that rely on competition law alone to promote a plurality of independent players in the media, a dramatic increase in concentration of ownership over the last two decades has been noted. This may call for special ownership rules in the media to address the special needs of the sector that general competition law often overlooks, as in countries such as the United Kingdom and Germany.

The lack of a policy to guide the regulation of the broadcast media is a serious anomaly. It has stagnated growth of the sector as there is nothing to guide the regulator. A policy in this sector is long overdue.

The provisions of the Communications Regulatory Authority Act 2013 which regulate the broadcast media are regressive as they go against emerging international norms. Doing away with the three-tier system of broadcasters established in the Broadcasting Act of 1998 to a two-tier system will have a negative impact on external pluralism, especially inasmuch as community broadcasters will be excluded. The conversion of public broadcasters to state broadcasters will also impact negatively on the quality of programmes. Public broadcasters by their nature are expected to serve the public interest whereas state broadcasters may be used to serve the state's interests.

The trend in most democracies is to allow the print media to self-regulate. Self-regulation is an alternative to direct state regulation. While state regulation may be generally aimed at achieving legitimate public interest goals, it often becomes a tool for suppressing critical voices, hence the preference for self-regulation. The co-regulatory regime established for the print media in Botswana lacks sufficient independence from the state. There is need to revisit the law to strengthen the independence of the regulator.

The government of Botswana is in the process of creating a single regulator for the communications sector. The envisaged regulator will oversee telecommunications, information communications technology, broadcasting and postal services. This is a welcome development which is necessitated by convergence in these sectors that makes separate regulation obsolete. However the concern is that the new regulator will not be guaranteed sufficient administrative independence from political authorities.

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RETIREMENT FUNDS REGULATION IN BOTSWANA – MANAGING RISKS

Gape Kaboyakgosi² & Masedi M. Motswapong³

This chapter examines regulation of retirement funds in Botswana. It explores the rationales underpinning the regulation of these funds (which consist of pensions and provident funds) in the country, and the institutional actors involved in the regulation of the industry. Since 2007, with the advent of regulatory changes in the retirement funds industry, pension funds have rapidly grown as one of the most important tools for managing both economic and social policy in Botswana. Prior to 2007, the Registrar of Pension and Provident Funds regulated retirement funds in Botswana. Since 2007, the Non Bank Financial Institutions Regulatory Authority (NBFIRA) regulates them.

From an economic policy perspective, retirement funds form a sizeable portion of the Gross Domestic Product (GDP), and are therefore an integral part of mobilising resources from which government and other actors can borrow. Where social policy is concerned, they are used to cater for the needs of retirees. Upon ceasing active employment, contributors to the various pension schemes in the country use the proceeds of those schemes to cater for their post-employment needs.

Another change that came about through the reforms is that retirement funds shifted from being managed from a ‘defined benefit’ approach; they are now managed from a ‘defined contribution’ perspective. The former means that members would expect a certain level of benefit upon retirement, irrespective of the performance of the funds. On the other hand, the latter approach means that benefits that members ultimately enjoy are subject to the performance of their funds in the open financial markets.

Another result of the pension funds regulatory reforms is that institutions other than the designated regulator have significant roles in the regulation of the pension industry. Among others, the Botswana Stock Exchange, the Competition Authority, and the Bank of Botswana all play important roles in regulating the industry.

2 Earlier iterations of the paper were presented during the Botswana Annual Pensions Conference 2011, by Kaboyakgosi on behalf of Bifm.

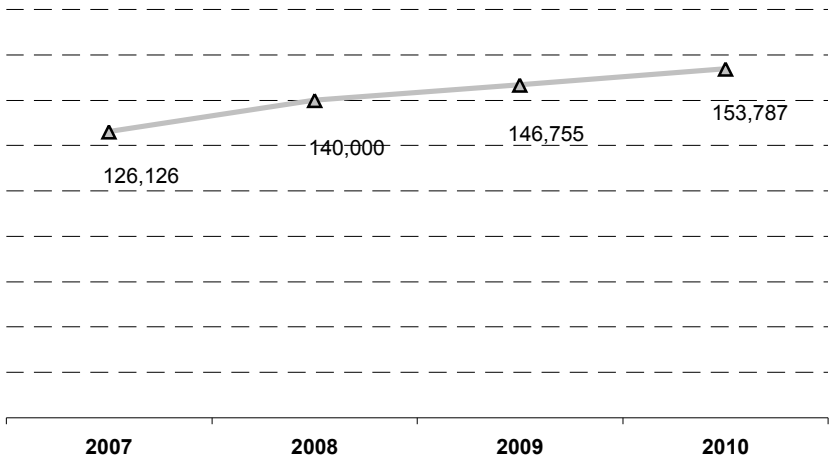
3 The authors would like to acknowledge comments and documentary assistance from the Non-Bank Institutions Financial Regulatory Authority, and Glen T. Lekoma of the Botswana Insurance Fund Management (Bifm) on earlier drafts of the paper. All acts and omissions are those of the authors and not of BIDPA, NBFIRA or Bifm.

OVERVIEW OF THE PENSIONS INDUSTRY IN BOTSWANA

Membership of pension funds

Pension funds have experienced growth in members (Figure 1).

Figure 1: Total Members: 2007–2010



Source: NBFIRA, Annual reports, 2008-2011

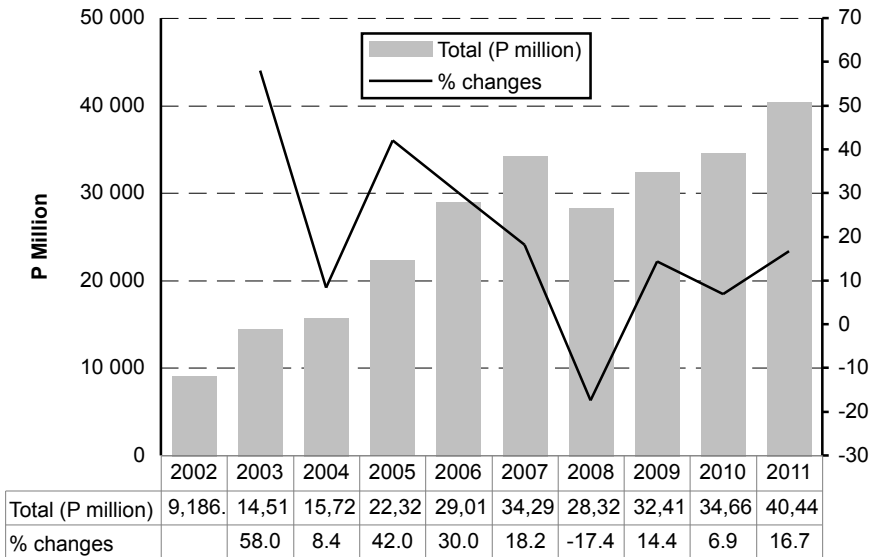
From Figure 1 above, it is clear that since 2007, at the onset of the regulatory changes that ushered in independent regulation of the pensions industry, until 2009, the number of subscribers to pension funds has not declined in any year for the years under review. Thus, even though Botswana's economic performance declined in 2008, the number of members of pension funds continued to grow. However, what is also notable is that since 2009, the numbers of pension funds have stagnated. Two conclusions may be drawn from this:

- (a) Government, the main employer in Botswana is no longer absorbing new employees at the rate it used to; only the most important posts are being hired, leading to a near zero growth in government employment figures; and
- (b) in response to the requirements of the Labour Act, smaller umbrella funds are joining pensions schemes under existing umbrella funds to basically cancel out the government employees who exit without being replaced; while these funds do not signal new employment *per se*, they do show that more employees in the private sector are taking up pensions.

Contributions of pensions to GDP

Figure 2 below shows the portion of GDP formed by pension schemes. It shows that the assets of pension funds have enjoyed continued growth in recent years, though experiencing a sharp decline due to the onset of the recession in 2008.

Figure 2: Pensions as a Percentage of GDP



Source: BoB Annual Report, 2011 and Authors' calculations

What may also be noted from Figure 2 is that Botswana’s pension schemes are highly responsive to developments in the world financial markets. Thus, when the world experienced a recession in 2008, and the pension funds performed poorly, those who are concerned with the management of pensions had to take heed of changes in the global economy.

Market participants in the pensions industry: 2008 – 11

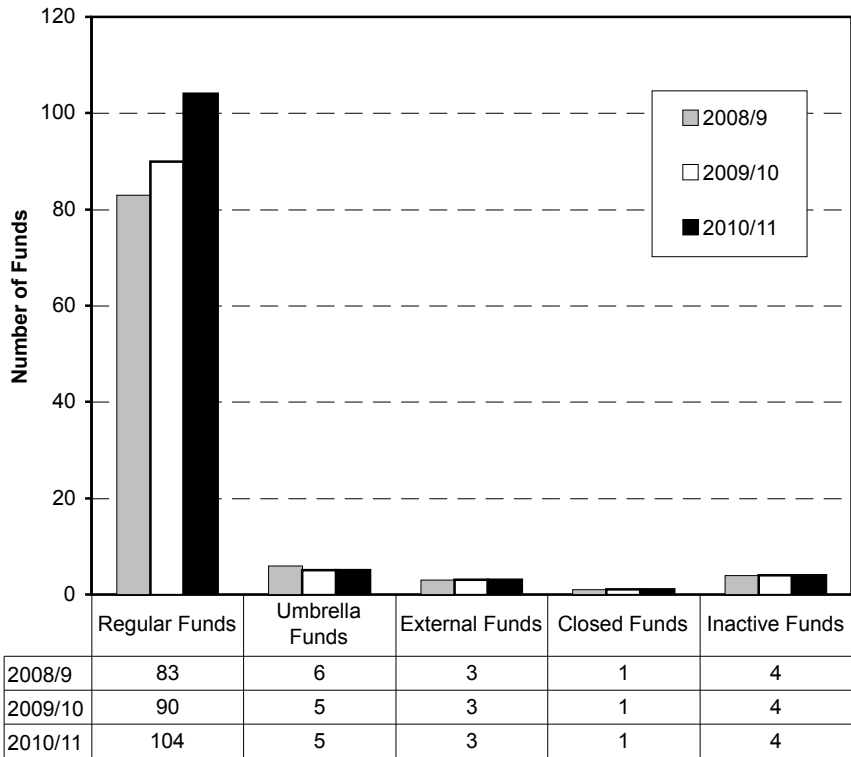
Figure 3 below shows the continual change in the presence of pension funds in Botswana. From Figure 3 overleaf, it can be deduced that there is an annual growth in the number of pension funds in Botswana. This means that employers are continually heeding the message to set up retirement schemes for their employees.

THE RATIONALE FOR REGULATING RETIREMENT FUNDS

Provident funds and pension funds or retirement funds, are a way of investing pooled resources collected from sponsors and their beneficiaries over an extended period of time, usually 20-35 years. Whereas a pension fund is ‘any principal fund the objective of which is to provide for the payment of a pension to a person who has been a member of the fund on his retirement’, a provident fund is ‘any fund which is not a pension fund where a lump sum payment is made at retirement’ (NBFIRA 2013, p. 7).

Pensions represent a significant amount of savings for many people. Three general justifications are used for regulating retirement funds. These justifications are neither unique to Botswana nor novel to the pensions industry; rather ‘the same general objectives of

Figure 3: Pension Funds Types: 2008 – 11



Source: NBFIRA Annual Reports: 2009 – 2011

regulation in other segments of the financial sector – the promotion of resource mobilisation and allocation through a framework that ensures transparency, security and stability, minimises costs, and promotes sound investment decisions' (Rocha *et al.* 1999).

A primary reason for regulating retirement funds is that they represent a significant portion of household income for members, and to some are the only means for future consumption. By investing their money in pension schemes, employees defer consumption of the same to later years. Failure to regulate retirement funds and therefore realise the objectives of mobilising sufficient savings to cater for the retirement of members could lead to poverty and other social ills (Rocha *et al.* 1999).

The importance of pensions as a major source of future income by retirees and their families means that failure to optimally regulate pensions presents the possibility that the retirees could be impoverished. Sharp declines in income can be realised, leading to over-dependence on the public to finance the livelihoods of these retirees. Regulatory failure and its consequent effects can also lead to social ills attendant to declines in living standards, including poor health, depression and possibly, crime.

Another important reason for regulating pension funds is that the pensions industry represents an important source of resource mobilisation for any country (Rocha *et*

al. 1999). These resources can later be leveraged for use in the wider economy. Due to this importance of pension funds, governments, including that of Botswana find it necessary to regulate the industry. Government may borrow money for developmental imperatives such as the design and construction of roads, schools and other public infrastructure. Other actors such as local banks may also borrow from pension funds.

A third justification for regulation of pensions is equity. Regulation is needed since pension contributions, particularly for state employees, are subsidised or given ‘tax free’ treatment in order to encourage retirement savings (Rocha *et al.* 1999). Government employees for instance, are expected to invest 5% of their own salaries in pensions, while government contributes the other 15%. These subsidies are ‘public finance’ *par-excellence*. Government, through deliberate policy choices subsidises the future consumption sections of society at the expense of expenditures elsewhere. Government thus contributes a percentage of public money to the retirement of its employees, and makes those contributions tax exempt. Consequently, regulation is required to ensure equity and the accountability of these funds.

THE LEGAL FRAMEWORK OF PENSION FUNDS REGULATION

The regulation of the Botswana pensions industry rests primarily on two laws; the Non Bank Financial Institutions Regulatory Authority Act and the Pensions and Provident Funds Act. However, pensions are also subject to regulation by the Companies Act, Competition Act, Botswana Stock Exchange Act and a raft of other statutes. This section reviews some of these.

Non Bank Financial Institutions Regulatory (NBFIRA) Act, 2006

The Non Bank Financial Institutions Regulatory Authority Act establishes an agency in charge of regulating the sector, NBFIRA. However the Act has other functions in relation to the regulation of the pensions industry, including the enhancement of safety and soundness of the non banking financial sub-sector, and promoting fairness, efficiency and orderliness in the sector. The Act also sets out mechanisms for inspections and investigations, the management of self-regulatory organisations in the sector, appeals procedures and processes, and other incidental matters to the regulation of the sector.

Pensions and Provident Funds Act, 1996

The Pensions and Provident Funds Act of 1996 governs the regulation of the pensions industry. It ‘provides for the licensing, incorporation, regulation and dissolution of pension funds and for matters incidental to or connected with the foregoing’. In that manner, the Act’s mandate, unlike for instance the NBFIRA Act, is more specific to pension funds. The Pensions and Provident Funds Act is quite dated as it precedes even the NBFIRA Act. As a result it has a number of out of date provisions which need revision.

Bank of Botswana Act, 1996

The Bank of Botswana (BoB) Act provides for the establishment of Botswana’s central bank. Where the pensions industry is concerned, the relevance of the BoB is in rela-

tion to its regulation of custodians. Such custodians, primarily banks which hold the assets of pension funds, fall under the regulation of BoB as its primary function is to regulate banks.

Botswana Stock Exchange (BSE) Act, 1994

The Botswana Stock Exchange Act was enacted with the aim of providing for the establishment of the Botswana Stock Exchange as well as enforcing other regulatory matters related to that. The Act 'makes provisions relating to the carrying on of the exchange and other matters connected therewith'. Where pensions regulation is concerned, the BSE Act is applicable in the instance where a fund or a fund manager listed on the exchange changes ownership.

Competition Act, 2009

Among others, the Competition Act establishes the Competition Authority, whose function is to administer the Act. Plans are underway for the Competition Authority of Botswana to sign an MOU with NBFIRA. The other objectives of the Act are to regulate competition and related matters in the Botswana economy. Included in this objective are the control of mergers, investigations of horizontal and vertical agreements, control of restrictive agreements and dominant position and determination of cases, penalties and remedies where these are necessary. Where retirement funds are concerned, mergers of fund managers and administrators or acquisitions of the same would be of direct interest to the Competition Authority.

STAKEHOLDERS OF THE PENSIONS INDUSTRY

The following section describes some of the stakeholders in the retirement industry.

NBFIRA

Section 6 of the NBFIRA Act establishes NBFIRA as a body corporate with perpetual succession. The board of directors as established by section 11 of the Act is responsible for policy direction and the general administration of the regulator. The Minister appoints five of the seven members of the board of directors of NBFIRA, including the chairperson of the board of directors. The other two members of the board comprise the Governor of the Central Bank, and the permanent secretary in the Ministry of Finance and Development Planning.

Section 12 provides for the chief executive officer of the regulator to be appointed by the Minister on the board's advice. The CEO is responsible for the day-to-day running of the regulator. The CEO may hold a position of board member in other organisations which are not under the purview of the regulator, subject to approval by the board

The mandate of NBFIRA includes overseeing asset management companies: insurance, reinsurance, and micro-lenders, as well as collective investment undertakings. According to section 8 of the NBFIRA Act, the primary duty of NBFIRA is to regulate the pensions industry, with the overall intention of fostering the safety and soundness of the non-bank finance institutions, in particular: the highest standards of conduct of

business by non-bank finance institutions; fairness, efficiency and orderliness of non-bank finance institutions; stability of the financial system; and reduction and deterrence of financial crime.

NBFIRA also has the duty of vetting people proposed to be trustees of funds. Other vetting is undertaken by the Botswana Police Services and Directorate of Intelligence Services. While NBFIRA may be expected to scrutinise the fitness of such persons by scrutinising their *curriculum vitae* and other relevant documentation, the intelligence services and the Botswana Police Services may assess the criminal records of such persons to assist NBFIRA in coming to conclusions on the appropriateness of the would-be trustees to hold such positions. NBFIRA is planning to sign a Memorandum of Agreement (MoU) with the Competition Authority of Botswana, while one already exists with the Botswana Police. These MoUs are meant to facilitate information exchange on issues of mutual concern.

NBFIRA is a member of both the International Organisation of Securities Commissions (IOSCO) and the CISNA – the SADC Committee on Insurance, Securities and Non-Banking Financial Authorities. CISNA is a regional initiative that also attempts to streamline rules in the region to enable ease of operation across the different jurisdictions in SADC. NBFIRA has a MoU with the Financial Services Board of the Johannesburg Stock Exchange. This relationship facilitates information exchanges on an ongoing basis, including tip-offs when someone known to the FSB applies for registration in Botswana. Other MOUs exist with competent authorities in Zambia and Namibia, while a working relationship exists with the competent authority in Zimbabwe.

Botswana Pensions Society (BPS)

The Botswana Pensions Society was formed in 1994 and is a member-driven organisation, with a secretariat that runs the Society's affairs. The objectives of the Society include the promotion of member education and awareness, providing a lobbying platform for all pension funds and their members, provision of technical support to the regulator, and promoting pension funds service providers. The BPS is governed by the Societies Act, and is thus a not for profit organisation and has a MoU with NBFIRA. The Society is an umbrella body of organisations involved in the pensions industry, including trustee organisations, fund managers and administrators. The annual conferences held by the Society facilitate open and frank dialogue between stakeholders; it brings together trustees, fund administrators, fund managers, and the regulator to discuss matters pertaining to the industry. It also facilitates an exchange of views between local and international stakeholders in the pensions industry as some of the speakers are often from pensions industries abroad.

Bank of Botswana

By virtue of it being the regulator for banks in Botswana, Botswana's central bank regulates custodians. Custodians are defined by NBFIRA as 'a person who holds the property of another person for safekeeping' (NBFIRA; 2012, p.7). Such assets include bank certificates, bonds, gold, etc, held on behalf of pension funds by the banks. As banks

are custodians, this brings in the role of the BoB into retirement fund regulation. Both Standard Chartered Bank of Botswana and First National Bank of Botswana (FNBB) are custodians.

The Botswana Stock Exchange (BSE)

The BSE is a body corporate founded under the Botswana Stock Exchange Act, 1984. The BSE has the duty to regulate and operate the equities market in Botswana. Whilst, like the Competition Authority of Botswana, it does not have a day-to-day role in the running of the pensions industry, instances where a fund manager/administrator listed on the exchange undergoes takeovers or mergers would interest the BSE. Presently however, Bifm is the only fund manager listed in the BSE, which is through its parent company the Botswana Insurance Holdings Limited, BIHL.

Asset managers

An important group of actors in the pensions industry are fund managers or asset managers. Fund managers are regulated under the 'Capital Markets' section of the NBFIRA Act. Save for a few, the entry of fund managers into Botswana's financial markets is mainly as a direct result of the regulatory changes in the pensions industry. Upon the onset of the current regulatory reforms, fund managers were needed to administer the growing assets in the country; calling for new skills, and also leading to new employment opportunities. Fund managers include: Botswana Insurance Fund Management (Bifm); Investec Asset Managers; Fleming Asset Management; African Alliance (Botswana) (Pty) Ltd; Stanlib Asset Managers; Coronation Fund Managers; Afena Capital; and Allan Gray ;

Fund administrators

Another important set of actors provides advice to the sponsors of the fund, and acting on behalf of trustees, is responsible for advice leading to the procurement of auditors and the day-to-day running of the fund. NBFIRA defines a fund administrator as 'a person who provides administration or similar services to the fund' (NBFIRA 2013, p.7). Whereas fund administrators are not currently licensed under the NBFIRA Act, most of them are insurance brokers, and are therefore registered under relevant insurance laws. Some of the fund administrators currently in operation include Alexander Forbes Financial Services; AON (Botswana) (Pty) Ltd; Marsh (Pty) Ltd; and GlenRand MIB. Plans are underway to amend the law to enable registration of fund administrators.

Botswana Public Officer Pensions Fund (BPOPF)

The Botswana Public Officers Pension Fund, BPOPF was established in 2001 when government changed the management of pension funds from defined benefits to defined contribution. The Fund grew tremendously as public officers joined. A notable aspect of the BPOPF is the composition of its board of trustees. BPOPF has a board of trustees which is the major governance structure for ensuring the successful attainment of the objectives of the BPOPF. The board comprises:

- (a) nine Employer Trustees

- (b) nine Employees Trustees
- (c) one Pensioner Trustee, and
- (c) one Independent Trustee appointed by the Board of Trustees (*Source: www.bpopf.co.bw*).

In total, there are 21 trustees including the Principal Officer. Being the fund for the largest employer in Botswana, the public sector, the fund is the biggest in the country. It caters for the civil service, the Botswana Defence Force, Prison Services, and local authorities, among others. While the size of the BPOPF demonstrates the importance of the public sector as the biggest employer in Botswana, there are some potential challenges to the way it is structured.

- (a) The relevance of the BPOPF to the needs of all its constituencies needs reassessment. The BPOPF represents many organisations with different risk profiles and thus different investment needs;
- (b) The BPOPF board composition suggests it is based more on a constituency model (representing as many of their employer organisations as possible) than the competency model (having as many capable trustees as possible); and
- (c) With its size (assets about 80% of the industry), there is the risk that were it to experience problems, the majority of the sector will be affected as the majority of the assets are concentrated in one fund.

The BPOPF is a pension fund for all of Botswana's public services, and, undoubtedly the largest pension fund in Botswana. A potential challenge with the way the BPOPF is structured is that there are various different 'constituencies' comprising the public sector in Botswana, and these constituencies may need potentially different investment approaches, with different levels of risk. For instance, it is possible that the majority of the members of the disciplined forces such as the Botswana Defence Force, the Botswana Police and the Prison Service, join these institutions relatively younger than the other professions, such as teaching, and also leave the services, relatively younger than the other services under the BPOPF umbrella. Such demographic differences call for different investment strategies: these could be provided for under a separate fund from the BPOPF.

HOW PENSION FUNDS ARE REGULATED

There are many approaches used for regulating pension funds. Section 50(2) of the NBFIRA Act spell out a number of these. They include fit and proper person requirements for controllers and managers of prudentially regulated non-bank financial institutions; the governance of non-bank prudentially regulated financial institutions; capital and liquidity requirements; valuation requirements and methods; standards of business conduct; requirements for controllers of non-bank financial institutions; outsourcing; how prudentially regulated non-bank financial institutions manage risks associated with their businesses; insurance; and in the case of insurers, re-insurance arrangements; including derivatives, and off balance sheet transactions.

Risk-based regulation

NBFIRA's enforcement of its mandate is based on the risk-based model. The risk-based enforcement model is a proactive approach to enforcement whereby regulated entities are assessed for risk prior to such risks leading to bad outcomes. Risk-based questionnaires, based on Prudential Rules (NBFIRA undated), are administered to the regulated entities, giving the regulator a diagnostic capability to anticipate difficulties. What is important to note about the prudential rules is that as they derive from the NBFIRA Act, they have full legal force. Risk-based regulation safeguards the integrity of the financial system. IOSCO advocates risk-based regulation as opposed to its opposite, the compliance-based approach. In the compliance-based approach, regulators await regulated entities to submit requisite information, based on a checklist. It is therefore easier for regulated entities to submit wrong information to the regulator. Hence one of the major challenges with the compliance-based approach to enforcement is that problems may go unnoticed by the regulator for far too long and become intractable.

Licensing

One of the instruments used by NBFIRA is licensing of entrants into the industry. A number of criteria are set to ensure the suitability of potential entrants. Licensing criteria are used prior to allowing a company to set up. 'Fit and proper' criteria include satisfying the regulator that the professional credentials of the applicant are sufficient; that the applicant has sufficient capital and is not a flight risk, that their trustees are of sufficiently good standing, and that the business plans as supplied by the applicant company are sound enough. NBFIRA reports on such new licensees as are registered on an annual basis.

Limitations on foreign investments

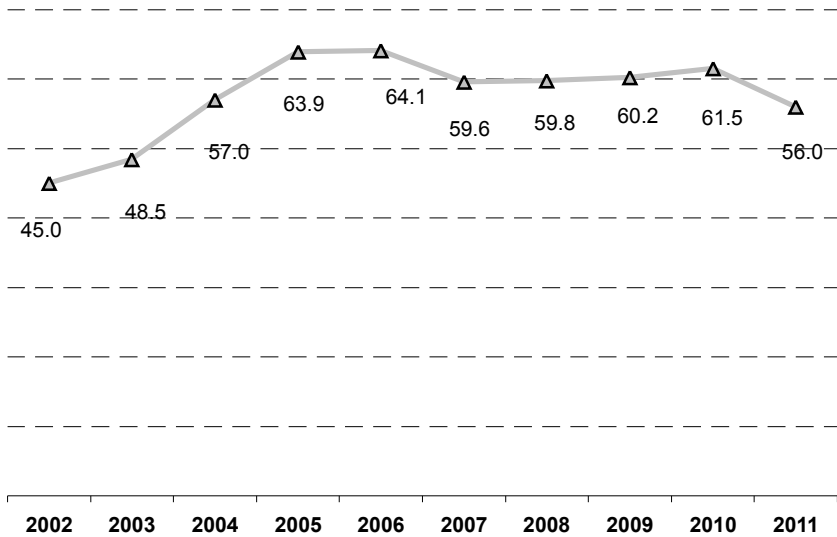
Based on the Pensions Prudential Rules (in Terms of section 50 of the NBFIRA Act), another instrument used by NBFIRA is the determination of how much of the funds in the care of pension funds may be invested offshore or locally. In terms of section 4.7 (at para 33) of the Pensions and Prudential Rules:

No registered pension fund shall in respect of its pension fund investment strategy, invest more than 30% of its total assets inside Botswana (NBFIRA undated, p.14).

In terms of paragraph 33 above, pension funds may hold up to 70% of their assets offshore (BIDPA 1998). The Botswana Financial Sector Review explains that such a stance is due to several reasons, which include the need to avoid asset price bubbles as well as affording fund managers space to invest in a wider range of assets (Capital Resources 2011).

Figure 4 shows that the percentage of pension funds invested offshore has grown from 2002, reaching its peak around 2006 before beginning a steady decline. What Figure 4 basically shows is that with the new regulatory arrangements, and the advent of

Figure 4: Percentage of Funds Invested Offshore: 2002–2010



Source: Bank of Botswana Annual Report, 2011

fund managers based in Botswana, avenues are continually being found for the utilization of these funds in the domestic market.

As an illustration, Bifm’s strategy includes investing some of the retirement funds in local shopping centres such as the Airport Junction Mall, a regional shopping centre in Gaborone, a development that cost P 460 million. The Airport Junction Mall’s spin-offs in a developmental sense include creating employment for local residents and bringing shopping closer to residents (Bifm 2010, p. 69). However, the centre is essentially built to create wealth for beneficiaries of Bifm’s investments.

Similarly, Bifm also has arrangements for partnering with government or other state agencies in public-private partnerships (PPPs). Examples in this regard include the Rail Park Mall which Bifm built in partnership with Botswana Railways and the SADC Headquarters in Gaborone Central Business District, which was financed by a consortium made up of Bifm, Stocks and Stocks, ABSA, Barclays Bank of Botswana and Outsourcing Botswana. The end-result is that returns realised from these investments will benefit the members of these funds (Kgatlwane 2010, p.66).

Corporate governance requirements

Reflecting what is becoming a global norm, the use of corporate governance is increasing as part of the regulatory continuum in Botswana’s pensions industry. Corporate governance of pension funds entails ‘the managerial control of the organisations and how they are regulated, including the accountability of management and how they are supervised’ (Stewart and Yermo 2008, p. 5). Optimally deployed, corporate governance

can be an effective instrument of risk management. Central to this requirement is the formation of boards of trustees for the various pension funds. Board members ought to be persons with impeccable character who also understand the pensions industry sufficiently to provide guidance to fund managers on how to manage pensions.

Such trustees hold fiduciary responsibility for the performance of the funds, which means that 'they are legally appointed to hold assets for another person, rather than for his own benefit' (*Money Matters* 2011, p.1). A trustee is defined as:

An individual who holds or manages assets for the benefit of another. Trustees make decisions based on due diligence and in the best interest of the beneficiary, and can be held personally liable for their actions if the beneficiary deems there was a breach of trust (*ibid.*).

The duties of a board of trustees in relation to the management of a pension fund include the following: to adopt and monitor policies of the funds; to review and evaluate performance; to review and evaluate administrative operations; to meet in executive sessions with the CEO, and to evaluate its own effectiveness (Ambachtsheer, 1997, p.4).

Trustees are thus very important stakeholders in the management of pensions in Botswana. Their role in representing the interests of members of pension funds means that it is on their capability, dedication, know-how and self-application that the performance of pensions stands. The primary duties of trustees are to advance the interests of beneficiaries. Such roles of the trustee ought to be in accordance with the wishes of the beneficiaries, as stated in the investment plan agreed to by beneficiaries or their representatives.

In a sharp contrast with most corporate governance practices in Botswana, the pensions industry *places greater personal responsibility and accountability on trustees*; thus increasing the incentive for trustees to take their jobs seriously. For instance section 6(c)(2) of the Pensions and Provident Funds Act makes the requirement that:

Every director, manager, controller and principal officer of a fund shall be under the same *civil liability*, in relation to the administration of the affairs of the fund, *as if he had been a trustee under a trust for the administration of the fund and as if the members of the fund had been beneficiaries of such a trust* (author emphasis added).

The application of these principles assists in promoting a culture of accountability at all levels of the industry. The four cornerstones of being a trustee in the pensions industry are as below.

- (a) 'Duty of care' emphasises the need for trustees to NOT take undue risk with investments;
- (b) 'Duty to act personally' which means that each trustee takes the ultimate responsibility of decisions made in relation to the pension fund . . . and will not delegate such decision making unless such is expressly permitted in the rules governing the Fund.
- (c) Duty to avoid conflict of interest. Trustees are expected to place the benefits of the

beneficiaries above any else, including those of the Trustee.

- (d) Duty to maintain an even hand: is the obligation to treat beneficiaries equally or impartially. Two or more beneficiaries in a similar status regarding the trust must benefit equally: (*Money Matters* 2011, pp. 2-3).

Corporate governance is not without challenges. One of these challenges is that Botswana does not have sufficient numbers of properly trained people to act as trustees and give sufficient guidance to the management of the fund. To comply, fund managers have to train their own trustees at their own costs. As stated by the regulator ‘...qualifications and value addition remain a challenge ... In addition, finding suitable, qualified trustees to serve on the boards remains a challenge’ (NBFIRA, 2012, p. 22).

For reasons of transparency, such training is carried out in the presence of interested parties such as the Botswana Public Officers Pension Funds (BPOPF) to ensure that the training is in line with their own ethos of how to manage the funds. Another potential challenge to optimising the potential of corporate governance rules is that applied without due consideration to the size of some of the fund administrators; the requirements might burden them. There are possibilities that recruiting, training and retaining trustees might impose very big costs on smaller fund managers, and possibly affect fund performance.

SUPERVISION OF THE PENSIONS INDUSTRY

Another approach to the regulation of pensions is through the supervision of the industry. NBFIRA has three approaches to its supervisory function over the management of pension funds. These are the ex-ante licensing requirements, ongoing monitoring and inspections and remedial or punitive resolutions.

Monitoring and inspections include both on- and off-site scrutiny of performance of funds. What differentiates this exercise from licensing is that it is ongoing, and continually applied to market participants, whereas licensing occurs prior to entry. Monitoring and inspections entail the regulator reviewing the performance of the pension funds through scrutiny of such documents as financial reports of the funds. This provides the regulator with information about compliance or risk. NBFIRA describes inspections as:

...proactive ways of identifying potential situations that could pose a threat to the capital markets. Typically the regulator carries out pre-operation inspections (before license is awarded) and off-site inspections (NBFIRA 2011, p. 24).

While in theory, NBFIRA may revoke the license of a transgressing fund manager, in reality this is hardly ever so. In practice, the regulator would hold consultations with the regulated entity to assist them in complying. This approach emphasises the need to maintain a credible financial regulatory system. License revocation would not only alarm the market, it carries implications for the livelihoods of the members of a given fund and job losses for those employed. Averting such circumstances goes to the heart of fostering a credible financial system. Compliance thus takes on a more involved role

by the regulator in order to ensure that assets are more protected. Whereas NBFIRA continually laments instances of non-compliance in its annual reports such as this below:

...lack of knowledge by industry participants on the requirements of the NBFIRA Act, Pensions and Provident Funds Act and its regulations which lead to issues of non-compliance which is of high concern (NBFIRA 2011, p. 22).

To date, none of the fund managers have had their licenses revoked. Rather the regulator urges training and other forms of assisted compliance to ensure that fund managers comply with the law.

CONSEQUENCES OF NEW REGULATORY REFORMS

It is rare that such policy changes occur without consequence. In the case of the management of retirement funds in Botswana, the shift of regulatory authority from a government department to a statutory regulator has brought a number of policy consequences. These include fragmentation and complexity, accountability challenges, the need for an investment policy and other challenges.

A new industry

An important spin-off of these regulatory reforms is the generation of a pensions management industry in Botswana. The industry, consisting of regulators and fund managers, has led to the creation of a whole new profession in the country, provision of new employment and creation of value beyond the limits that were possible under the initial regulatory arrangements. That there is a pensions industry also means a set of rules, laws, institutions, cultures, professions and employment structures have been developed as a consequence of the regulatory changes in the industry.

A complex, fragmented regulatory regime

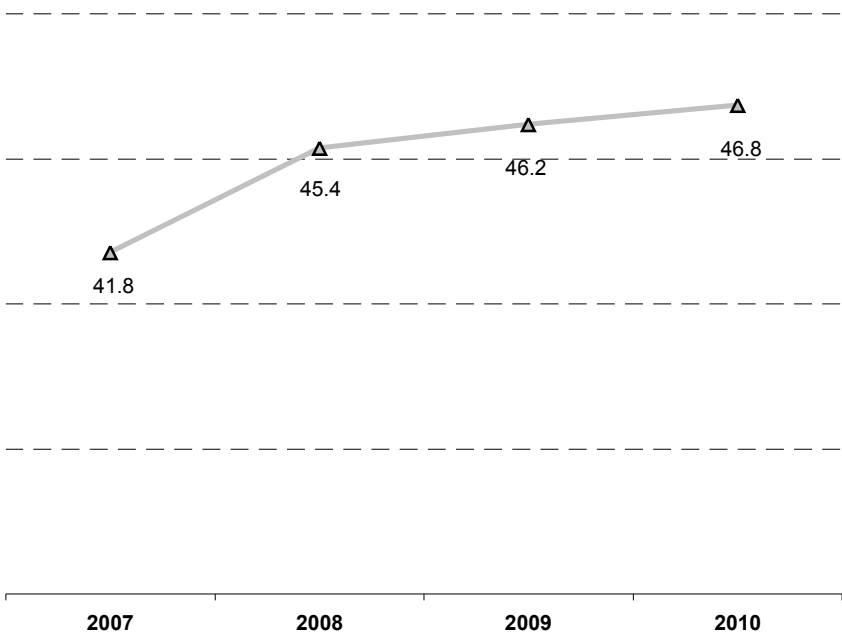
Another consequence of the new regulatory regime is complexity and fragmentation in policy implementation. Whereas complexity refers to the multi-causality of challenges that occur in a sector, fragmentation refers to the multiplicity of actors involved. Either condition leads to regulatory challenges and thus calls for better coordination. Policy resources, such as technical skills, finance, information, and formal-legal authority are not only scarce, but are divided among the many actors involved, clearly fragmenting the sector, and likely to lead to sub-optimal outcomes in some instances.

For the pensions industry, regulation includes harnessing competition law, the stock exchange, taxation law, business law, and corporate governance. As each of these laws holds a portion of the regulatory business of the pensions industry, it leads to a highly complex and fragmented sector. The consequences of this inevitability are more expense and a greater need for coordination.

A liberal pensions law

One of the challenges with the current pension funds however is that Botswana’s pension’s regime is liberal in its application as it does not oblige employers and employees to invest in pensions. Mandatory pension investments are particularly advisable when the system is developing such as in Botswana so as to ensure that large investments are placed in the system. The non-mandatory enforcements of the system mean that a significant portion of the labour force that would otherwise do so, are currently not investing for their retirement. See Figure 5 below.

Figure 5: Percentage of the Labour Force with Pensions



Source: BoB Annual Report, 2011

In terms of Figure 5, less than 50% of Botswana’s labour force has a retirement plan. While the overall picture since the onset of the regulatory reforms has been a lot of growth in the number of members of pension schemes, the majority are not subscribed. Indeed after 2010 the number of new entrants appears to be levelling off. By implication, these numbers represent the potential lost to mobilise more financial resources to relieve the state of looking after these future retirees and for boosting the growth of Botswana’s capital market.

ACCOUNTABILITY

Many forms of accountability occur in the pensions sector. For example, fund managers are accountable to the trustees of the funds for the performance of the pensions. There is also an expectation that fund managers are audited by independent audit firms to ensure good practice. Fund managers are also accountable to members of pension funds for the performance of their funds through trustees. NBFIRA on the other hand is accountable to the National Assembly for both performance and financial management. At the beginning of every financial year, the legislature allocates funds to NBFIRA for which NBFIRA is accountable to Parliament. To date however, it is not clear whether Parliament will in future strengthen accountability measures for pension funds through calling in fund managers for a hearing, for administrators and trustees to account publicly. Conducting hearings for private actors is important for three reasons, as below

- (a) They hold information crucial to the functioning of the industry without which regulators cannot function properly. Parliamentary inquiries posed directly to fund managers can aid in the discovery of such information.
- (b) Though they are private sector bodies, fund managers hold important discretionary powers akin to those of public organisations, with implications on public finance and welfare of pensions and their dependents. They manage important public assets, some of which have been agreed to by Parliament (for instance the tax-exempt status of pensions). Their voice needs to be heard on how the industry can be managed.
- (c) Fund managers and administrators hold technical insights into the industry, and through alliances with similar entities globally, they are better placed to lead in public policy innovations.

By regulating pensions through NBFIRA, an independent regulator then the expectation that accountability will be provided upward to the regulator by the regulated entities, does not hold. The regulator only holds part of the information necessary to do the job, and thus industry players are essentially co-regulators – by virtue of their holding some of the information needed by the regulator to execute their function. Their views and other resources are important to the success of the process. Other resources such as technical know-how, finance, and authority are also fragmented. Parliament is one national entity with the formal-legal authority to assist uncover this information.

The role of an investment policy in strengthening accountability

Another consequence of the new regime is the lack of enforcement of a requirement for investment policy. While pensions are long term undertakings with important implications for social welfare and capital markets development, in Botswana there is very little attention paid to the investment policies as a guiding instrument of these pensions. Without giving figures, indicators are that the majority of pension funds are run without investment policies. They rely almost entirely on fund managers to run their plans, while there is no attention paid to issues that policies normally do. An investment policy is a statement that defines the goals, philosophy, success, and purpose, of a pension

fund. It sets the parameters for action which guide both the members of the pension fund, and either the fund manager or the administrator. It usually includes the following (Bailey 1997):

- (a) fund's mission;
- (b) risk tolerance;
- (c) investment objectives;
- (d) policy asset mix; and
- (e) performance evaluation.

The lack of specification of the above not only leaves room for conflict, as neither the sponsors nor the fund managers share views on the fundamentals of their investments. Leaving such responsibilities to the fund manager means that trustees who are the most important role players in the performance of the fund create room for blame shifting – they shirk their responsibility.

To close this gap, trustees ought to be more proactive in the designing of investment policies.

CONCLUSIONS

The following are conclusions about the regulation of pension funds in Botswana:

1. Botswana's retirement funds have been growing, as is evident in the number of employees subscribing to pension schemes, and the proportion of retirement funds to total GDP.
2. Pension funds are responsive to global economic performance. The decline in performance of the pension funds in 2008 proves the vulnerability of pensions to global economic challenges.
3. Over half of Botswana's labour force do not subscribe to pensions. The implications are that Botswana is losing out on potential resources from which government, the private sector and other actors may borrow for investments.
4. Many legal instruments have an impact in the regulation of pensions, including the Botswana Stock Exchange Act, Bank of Botswana Act, Competition Act and others, which results in a fragmented and complex regulatory regime.
5. The BPOPF trustee structure appears exceedingly large and unwieldy.
6. At 80%, the BPOPF proportion of the retirement funds assets industry ought to be a matter of concern. It presents the risk that in the event of something wrong occurring to the fund, the entire financial markets in Botswana will suffer, including fund managers and fund administrators not to mention hundreds of thousands of serving and former public sector employees.
7. The appropriateness of the BPOPF to the Botswana Defence Force is contentious. The majority of the members of the army enter the job market very young, at 18 years of age, making them eligible for retirement relatively earlier than most public servants. At 18, on modest salaries that may be expected of new entrants, they are less likely to build sufficient funds to finance their

retirement, unlike for instance, teachers who may work until 60. Different investment strategies are clearly required for different classes of employee with different age groups and risk outlook.

8. The job of trustees, crucial to the functioning of the retirement industry, is highly specialised, onerous and requires appropriate financial recognition. Serving public officers who also function as trustees are not paid any allowances. With the position of trustee carrying responsibilities for the welfare of thousands of others, this would appear to reduce the importance of being a trustee.
9. The BPOPF trustee structure appears to be based on the constituency model, and needs to investigate changing to the competency-based model of board selection.
10. There appears to be little importance attached to the use of investment policies in the Botswana pensions industry. Such policies, statements which detail the philosophy of a portfolio, the expectations attached to it, and the performance levels expected of a fund manager, are a strong instrument for accountability in the industry.

RECOMMENDATIONS

Below are recommendations concerning the regulation of pension funds in Botswana:

1. In order to improve the performance of pension funds overall, and that of the fund managers and administrators specifically, investment in the education of trustees is of paramount importance. The costs incurred in this undertaking will, in the long term, lead to a more stable, secure, better performing industry.
2. To strengthen the accountability of industry stakeholders including trustees, fund administrators and fund managers, the regulator must both educate trustees about the importance of investment policy, and be stricter in enforcing the use of investment policy by industry stakeholders.
3. In order to decrease the possibilities of any future challenges faced by the BPOPF extending to the entire retirement funds industry in Botswana, there is need to unbundle the BPOPF.
4. Further, in order to increase the relevance of the BPOPF to its many stakeholders, there is need to consider unbundling the BPOPF. Teachers could have their own funds, as could local government employees, the Police and the Botswana Defence Force.
5. To improve accountability in the pensions industry, these need to be considered:
 - (a) regulatory authorities need to enforce the requirement for fund sponsors and managers to produce investment policies; and
 - (b) in order to further improve political accountability in the pensions industry, Parliament ought to call on private sector actors such as fund managers to account to Parliament to make information available.

6. In order to alleviate the fragmentation of retirement funds management, there is need to come up with mechanisms for sharing information, and standardising reporting formats.
7. In order to foster a culture of saving for retirement, thereby generating more savings in the economy, and promoting the financial markets, Botswana must consider making contributions to pension funds mandatory.

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SELF-REGULATION AT THE LAW SOCIETY OF BOTSWANA: PRIVATE MANAGEMENT OF PUBLIC AFFAIRS?

Keneilwe S. Mooketsane⁴

This chapter examines regulation of the legal profession in Botswana. It explores the rationales underpinning regulation of the sector, the institutional actors involved in the regulation of the profession and the consequences of recent regulatory reforms for the management of the profession and its performance. In organisational terms, self-regulation is a fairly new development in Botswana. At independence, and until the late 1980s, the civil service was the unquestioned core instrument for development. Many reforms led to transformations in the structure, duty and functions of the public sector. Such changes were due to privatisation, decentralization, performance management systems, work improvement teams, competition and regulation (Kaunda 2004).

A consequence of these reforms is that, in recent times, Botswana's government is increasingly withdrawing from the direct provision and delivery of certain goods or services, in favour of regulation, including the more controversial self-regulation. In the management of the legal profession, government allows attorneys to carry out the task of managing their own profession, including inducing and maintaining discipline, and professional standards in the profession.

SELF-REGULATION

Self-regulation is among the changes that have occurred in recent years. Self-regulatory organisations have increased in Botswana's public policy management, to manage many sectors including construction (the Engineers Registration Board, the Real Estate Advisory Council and the Architectural Registration Council); health (the Botswana Health Professionals Council); and the media (Botswana Press Council).

But what is self-regulation? 'Self-regulation' occurs when a group of firms or individuals exert control over its own membership and their behaviour (Baldwin, 1999). Two contrasts with other forms of reform involving the transfer of duties from govern-

⁴ The author acknowledges the review process by the Law Society of Botswana as well as their generous assistance with materials. We also thank Ms. Patience Mokgadi (Attorney at Law) for comments on earlier versions of the draft. Dr(s) Tachilisa Balule and Gape Kaboyakgosi provided earlier comments on the paper. All acts and omissions are, however, those of the author.

ments to third parties might assist in further clarifying the definition of self-regulation.

- (a) While almost mirroring 'decentralisation', self-regulation differs in that with decentralization, governments cede power to other government entities such as local councils. Thus in Botswana, agencies of decentralization such as district or town councils differ from self-regulatory agencies (SRA) in that, ideally, self-regulatory agencies are not funded by taxpayer's money. Though some of the latest ostensible self-regulators are publicly funded, the ideal is that with self-regulation, common practice is for governments to cede their duties to professionals who both fund the administration of the function and manage it. Some of the organisations with an appearance of self-regulatory agencies but funded by government include the Botswana Institute for Chartered Accountants (BICA). Section 51(a) of the Accountants Act of 2000, which Act establishes the Botswana Institute for Chartered Accountants establishes that 'the revenues of the Institute shall consist of such money as may be appropriated by the National Assembly'. A similar observation applies to the Engineers Registration Board, ERB. In exchange, the professionals finance their own regulatory organisations and carry out duties that would ordinarily be the mandate of public organisations.
- (b) Another contrast can be made between SRAs and state-owned enterprises (SOE). Parastatals such as the Botswana Power Corporation (BPC), Botswana Telecommunications Corporation (BTC) and the Water Utilities Corporation (WUC) are business entities wholly owned by government, but legally distinct from the rest of government (Staunton and Moe, 2002). SOEs run their affairs at the behest of government, and on public funds, and are expected to cede their profits to government as their shareholder. By contrast, SRAs are run through membership subscription fees, in the interest of their members. In terms of ownership, while governments own SOEs, they do not own SRAs which are member-driven organisations.

Self-regulation can be viewed as a way of relieving government of some of its responsibilities. It is also a way of letting industry members take charge of their own profession. The Law Society of Botswana (LSB) discharges the important responsibility of regulating the legal profession, a duty that used to be performed by the Legal Practitioners Committee which was a joint committee made up of the Attorney General and the Master of the High Court. The change brought about by the creation of the LSB is fundamental. Government goes beyond its own agencies, including local government, to engage self-interested private entities to manage their affairs and presumably protect the public interest in the process.

Advantages of self-regulation

Arguments used in support of self-regulation are as below.

- (a) SRAs command more expertise of their business and are therefore better placed to regulate it than appointed outsiders.

- (b) Self-regulators have easy access to regulatory information, making regulation cheaper and more efficient.
- (c) Self-regulation imposes few economic costs on public finances since it is private actors who bear the costs of running the profession (Parker 2002).

Disadvantages of self-regulation

There are several criticisms of self regulation, as follow.

One criticism is that self-regulation does not necessarily serve the public interest as private businesses or professional associations cannot be expected to robustly police their own infractions of the law. The unlikelihood of the idea of self-interested individuals being made to control the activities of their own members in 'the public interest' was raised through Parliamentary debates in Botswana that led to the adoption of the Legal Practitioners Act of 1996. One Member of Parliament in Botswana put it thus:

...we must be very careful ... because we are talking about a self-interest group and if we are going to expect that even the Council itself will respect the public very fairly, we may miss the point because all attorneys will be protecting their own kind (Rantao 1996, p. 10).

Further arguments against self regulation follow.

- (a) It lacks visibility, credibility, accountability, and compulsory application to all. There is a higher likelihood of underdevelopment of rigorous standards, growth of costs, and lack of availability of a range of sanctions (Baldwin and Cave 1999).
- (b) It might also lead to blame shifting and accountability losses.
- (c) Top managers can deflect blame to junior staff since self-regulation places the liability of compliance on employees (Gunningham and Grabosky 1998, pp. 52-54; Parker 2002, p. 145).
- (d) More established business entities can use regulation to keep out new market entrants.
- (e) SRAs lack enforcement mechanisms, and thus compliance may be insufficiently monitored; SRAs may also choose to give only moderate sanctions.

THE LAW SOCIETY OF BOTSWANA

For long, there was no professional body or organization representing the interests of the legal practitioners in Botswana. The management of the ethical conduct of attorneys, which had been a delegated function of the Legal Practitioners Committee made up of the Attorney General and the Registrar of the High Court, both public servants, was becoming problematic. As a response to the growing numbers of attorneys defrauding their clients, the Law Society of Botswana was formed in 1996 (Quansah, 2007). As stated in the memorandum of the bill establishing the LSB, professionalism was a major challenge for the conduct of attorneys in Botswana:

It is considered not only desirable but attractive to have a self-regulating body which will be responsible for overseeing the activities of the legal practitioners and to ensure the maintenance of high professional standards (Government of Botswana 1996).

The society is established through the Act with a dual mandate: to regulate the legal profession and advance the interests of its members (Boko 2007, p. 6). Advancing the interests or welfare of its members is a broad objective that means ensuring that the profession maintains high standards of professionalism and therefore fosters trust amongst the citizenry.

The Legal Practitioners Act deals with admission, enrolment and practice of legal practitioners in Botswana and related matters. The formation of the LSB was met with optimism, because, the image of Botswana's legal profession had been dented a great deal because:

A few unscrupulous attorneys took full advantage of this freedom [of lack of a self regulatory organ] to perpetuate blatant dishonesty and embezzlement of client's funds to the utter abhorrence of the general public (Quansah 1997, p. 141).

The LSB is run by a Council of seven legal practitioners elected by members. The Society discharges its duties through committees overseeing priority areas of the LSB. Two of these, the Disciplinary Committee and the board overseeing the management of the Fidelity Guarantee Fund are mandated by the Act. The rest can be reconstituted at the pleasure of the Council. Through the years the LSB has had committees overseeing: Human Rights, Advocacy and Education; Law and Reform Ethics; Social and Welfare matters; Young Attorneys Forum; Newsletter; High Court liaison and Continuing Education. The chief administrator of the Society is an Executive Secretary, an attorney whose deputy is also an attorney. In running the secretariat, they are assisted by a number of administrators.

Section 47 of the Act establishes the Disciplinary Committee, which is made up of five members of the LSB, selected by the Council. While the Council may remove any member of the Committee, section 47(2) of the Act forbids such action being imposed on a member who is participating in a disciplinary matter. The Disciplinary Committee's pronouncements on its mandate are binding. It can issue a writ to have members interdicted if they do not observe its judgments.

While the Society was established by an Act of Parliament, and essentially carries out public functions, it does not get any funding from the government. Though in their 2007 annual report, the LSB stated that current fundraising approaches are inadequate, the LSB 2009/10 Chairman's report indicates that since the increase of annual subscriptions in 2009 the Society experienced a marked improvement of its financial position.

Internationally, the LSB is a member of the International Bar Association (which has membership of over 200 bar associations worldwide) and the Commonwealth Bar Association which is made up of bar associations of former colonies, protectorates and dominions of the United Kingdom.

LSB ROLE IN MANAGING PUBLIC POLICY IN BOTSWANA

Since it was established, the LSB has, in many ways, assumed roles similar to those of government departments. It exercises discretion that would be appropriate in a public bureau, such as registering attorneys and ensuring that they conduct their business ethically 'to protect the public interest'. It manages the arrangements for pupillage, runs the Fidelity Guarantee Fund, disciplines errant members, and advocates the needs of the legal profession in Botswana. The role of the LSB as overseer of the conduct of attorneys has the potential for conflict of interest.

The society is charged with what appear to be two opposed sets of interests; the welfare of attorneys and the interest of members of the public who engage those attorneys. Inappropriate behaviour by attorneys including misappropriation of trust accounts puts the duty to discipline those errant attorneys on the LSB. In this function, the society is brought into potential confrontation with its members. On the other hand, government and the general public have a direct interest in the discipline of legal professionals. The LSB therefore plays a delicate balancing act maintaining ethical conduct of attorneys while not compromising the interests of its members. This is important in order to maintain a good reputation for the legal profession. Such a positive reputation is important for developing trust between the profession and stakeholders.

Managing the fidelity guarantee fund

The Fidelity Guarantee Fund is a creation of the Legal Practitioners Act through which members of the public defrauded by their legal representatives can be compensated. Section 33 (1) of the Act provides that:

There shall be established and maintained by the Society a fund to be known as the Fidelity Guarantee Fund ... to be administered in accordance with the provisions of this part. (GoB 1996)

The Fidelity Guarantee Fund is needed because attorneys in private practice, due to their positions, are put in charge of money belonging to their clients. (Note that government attorneys do not manage trust accounts.) Private attorneys manage such funds on the basis of impersonal trust. However, instances of attorneys breaking this trust were becoming too frequent in Botswana prior to the setting up of the LSB (Quannah 1997, National Assembly 1996). The Fund is therefore designed to be run by the Society on behalf of clients. Where a legal practitioner's dishonest actions financially disadvantage his or her clients, section 34 of the Legal Practitioners Act facilitates for the LSB, through the Fund, to protect the interests of those clients. The objective of the Fund is for:

...reimbursing any person who has sustained loss or hardship in consequence of dishonesty on the part of a legal practitioner, or of any employee of a legal practitioner, in connexion with that legal practitioner's practice (section 34). This Fund is administered by a Board of Trustees which comprises of three members, two of whom are private legal practitioners and the other an accountant (LSB 2006; section 35).

However, section 44(1) of the Legal Practitioners Act also makes the point that where it is proven to the satisfaction of the LSB that a client has been defrauded by their attorney, the Board 'may make a grant to that person out of the Fund for the purpose of relieving or mitigating that loss or hardship'. What this means is that clients will not necessarily obtain the exact amounts that they lost due to the dishonesty of attorneys as referred to in section 34 of the Act. The Board will grant such remedies based on the sustainability and affordability of the Fund. A transparent formula has been established for such a purpose.

Section 57 of the Legal Practitioners Act stipulates that each practicing attorney in private practice is annually required to contribute a sum determined by the LSB to the Fidelity Guarantee Fund. Those that do not pay subscriptions are barred from practicing as attorneys. The administration of the Fund is carried out by a board of trustees made up of three persons, being two attorneys and a qualified chartered accountant. The Executive Secretary of the LSB acts as the secretary of the Fund's board of directors. The members of the Fund's board hold their positions for four years (LSB 2007). The chartered accountant who administers the Fund with the two attorneys is subject to both the Accountants Act and international norms and standards of accounting practice. It can thus be concluded that the accountant being subject to both national law and international norms of practice is thus representing the 'public interest'.

It might appear that the manner in which the Fund is run excludes 'members of the public', including that the proceedings of the Fund are not revealed to outsiders. The presence of an accountant with obligations under the Accountants Act and international norms may however be taken as alleviating that apparent difficulty.

It is the opinion of some commentators, however, that the Act should provide for the appointment of a member of the public, whose qualifications would be determined by law. Such an appointee could be proposed by a Committee comprising an umbrella organisation of civil society, the LSB, the Attorney General and the Registrar of the High Court, which can make recommendations that bind the Minister to select from a list presented to him. Currently, there are no such requirements for appointing members of the public to the Fidelity Fund.

Legal aid and *pro-deo* services

Another of the LSB's functions is the administration of legal aid and *pro-deo* services (LSB 2007). The LSB often assigns some of its members to act as legal representatives of an accused person who lacks the financial wherewithal to pursue a matter through the courts. Lack of access to legal services is recognized even in the Office of the President where Botswana's President, Ian Khama, once expressed concern about the poor:

... delivery of legal services, especially basic information about the law, how it works and where the general public can get legal assistance when they need it. By the general public I refer especially to the less privileged, and those citizens who live in the more remote parts of our vast country (Khama 2008).

Poor access to legal services is partially alleviated by the LSB, which in conjunction

with like-minded bodies, notably the Legal Clinic of the University of Botswana and the Ditshwanelo Centre for Human Rights, provides legal assistance to needy people (LSB 2007, p. 31). Noteworthy in this instance is that the provision of both *pro-bono* and *pro-deo* services by attorneys is legally mandated. Section 56(a) of the Legal Practitioners' Act makes the carrying out of *pro-deo* and *pro-bono* work an essential part of membership of the LSB, along with the holding of a practising certificate. What may be questioned is the robustness with which the LSB enforces this provision. In its annual report for 2007, the LSB noted that most of its senior members are reluctant to engage in legal assistance cases. It attributes such reluctance to a possible lack of affinity with criminal law by many senior attorneys (LSB 2007, p. 31). According to the 2012 Law Society of Botswana quarterly report, the Society had received 225 matters from Legal Aid Botswana, which is a pilot project currently run by the Attorney General's Chambers, with the objective of providing legal services to citizens who cannot afford the fees. While the project began in 2010, and ended in 2013, it is hoped that a bill will be passed, to transform the pilot into a permanent, independent fund, which will assist citizens who cannot afford to do so, to fight their legal cases. The LSB however decries the low participation of attorneys in the legal aid project, as according to the Society, only 80 of 350 private practitioners had registered to carry out *pro-bono* work despite the obligation to do so (LSB 2012).

Pupillage

Part II of the Legal Practitioners Act facilitates for another function of the LSB – the induction of new attorneys into legal practice, through a process known as pupillage. Pupillage is when an admitted attorney serves in a law firm for a year to prepare for professional legal practise. The pupil master, usually an attorney with seven years or more practising law, either in partnership or alone, bears the costs of the pupillage. (Note that the Attorney General is also recognised as a pupil-master.)

Pupillage affords law graduates the opportunity of learning legal principles in practice, professional requirements and other necessary skills. Through pupillage new attorneys also learn the ethos, the ethics and professionalism, required to properly represent their clients. Thus, the LSB carries out what is essentially a 'public' duty because it is the LSB's members who instil in the new inductees the required ethos.

One challenge facing pupillage is the lack of equality between the pupil-master and the pupil. The Legal Practitioners Act appears to leave the power of allowing the pupil to start practicing law in the hands of the pupil master, as it does not require the pupil master to report to the LSB at the end of the twelve months duration of pupillage. Further, the Act does not require the LSB to follow any set guidelines on how to manage a pupil.

Pupillage may be contrasted with the University of Botswana's Legal Clinic, which is run by the Department of Law of the University of Botswana. The Legal Clinic enables law students to conduct research and give legal advice in real cases, in the process assisting members of the public who do not have the means of obtaining legal representation. The Legal Clinic is headed by a lecturer at the University of Botswana. However such lecturers may not have practiced law as they may be strictly law academics who earn a living from teaching at the university.

Enforcement

The LSB has a 'gradualist' approach to enforcing its mandate. The Society escalates punitive measures upon repeated infractions by an attorney. Such 'responsive regulation', is an approach to enforcement which allows regulated entities the possibility of correcting errant behaviour (Braithwaite and Ayres, 1995). According to the Legal Practitioners Act, "If the Disciplinary Committee, after considering the complaint, is of the opinion that professional misconduct has been established, it may:

- (a) warn or reprimand the practitioner;
- (b) impose a fine not exceeding P10 000 on the legal practitioner."

However, punitive action rises with the level of transgression, and the Act provides that:

- (a) if the Disciplinary Committee considers that the professional misconduct established under subsection (3) is so serious as to warrant the suspension of the legal practitioner or the removal of his name from the roll, it shall recommend to the Council to apply to the court;
- (b) to suspend him from practicing for a specified period; or
- (c) to have his name removed from the roll.

The LSB is just one avenue through which ethical conduct in the legal profession can be enhanced. Attorneys are also subject to legal provisions that forbid fraud. As stated by former Minister of Education and a qualified attorney, during a Parliamentary debate):

Let it be borne in mind that the bill does not exclude attorneys from being dealt with in the normal way under the Penal Code or the Criminal and Evidence Procedure Act where they have acted fraudulently or dishonestly against their clients or any other person (Nkate 1996, p. 11).

Resorting to the legal system however might be problematic if it means the loss of one of the supposed advantages of running public policy through a self-regulatory agency – efficiency in terms of time and monetary cost. However, the ability of the LSB to refer matters to public authorities also bolsters the Society's capacity to enforce discipline, and hence enhance public trust in the legal profession.

Another strategy for punishing errant attorneys in Botswana is for the LSB to publish the names of offending firms or individual attorneys. Publishing names of offenders serves the purpose of protecting the public from a potentially fraudulent attorney. Their reputations being the major currency for attracting clients, the assumption is that attorneys would minimise bad publicity.

The potential effect of publicising the names of wrongdoers could, however, have less effect with government attorneys who are subjected to different standards of treatment. Government attorneys are not required to pay annual subscriptions to the LSB; they are governed by their contractual obligations to government. Added to that, government attorneys do not contribute towards the Fidelity Guarantee Fund nor manage

trust funds. The consequence of this non-membership of government attorneys means the LSB's capacity to discipline all attorneys in Botswana is reduced. It further means that the LSB foregoes some of the money it might get from these professionals as fees. Such money would potentially strengthen its operations.

The unequal treatment of the two sets of attorneys, public and private, appears to many as inequitable. While government attorneys are exempt from annual contributions to the Fidelity Guarantee Fund and annual application for practising certificates, they are, by virtue of being attorneys employed by the Attorney General, members of the LSB. As per section 60(3) of the Legal Practitioners Act, this membership of the society even makes them eligible for election to the Council of the LSB.

OTHER PUBLIC POLICY INTERVENTIONS BY THE LSB

The Botswana Law Society has intervened in and continues to intervene in a number of issues of public interest relating to the rule of law, law reforms and good governance, including among others, the appointment of judges, extra-judicial killings, the pardon of accused military officers in a murder case, and the review of the constitution.

Presidential pardon

While section 53 of the Constitution of Botswana empowers the President to grant pardon to a person convicted of any offence, the LSB questioned the President's pardon of army officers convicted for murder. The LSB claimed that the pardon amounted to lack of confidence in the judicial system and casts doubts on belief in rule of law and separation of powers. The Society thus questioned what it deemed as the power given to the State President to singularly change the results of transparent judicial processes.

The appointment of high court judges

Another public intervention by the LSB in matters of rule of law is when the Society expressed displeasure at what it termed inconsistencies in the appointment of High Court judges. The LSB questioned appointments that were done without advertisements and interviews as required by the Judicial Service Commission. The LSB emphasised that all appointments should be done procedurally in an open and transparent manner. The President's refusal to appoint recommended judges, as is the norm, was also an issue of contention. The LSB's interpretation of the statement "in accordance with the advice of the Judicial Service Commission" contained in section 96(2) of the Constitution is that the President does not have discretion in the appointment of judges but is required to act on recommendations by the Judicial Service Commission. As stated in the Chairman's report:

...there is a growing unease on the part of a majority of our members as to whether section 96(2) of the constitution is being applied according to the intention of the law makers and even whether the judicial appointment provisions in the constitution meet the standards required of a modern representation democracy LSB (2009).

Extra-judicial killings

In the Chairman's Report of 2009, the LSB expressed concern on escalating extra judicial killings and torture involving alleged state security agents. The LSB also threatened to report the Government of Botswana to the International Criminal Court on the issue of extra-judicial killings for investigations under the category of 'crimes against humanity' (LSB 2009, p. 3).

Constitutional reforms

The LSB also has scope to proactively influence the improvement of good governance, the rule of law and the legal profession in Botswana. Constitutional reform is one of the recurring subjects of debate in Botswana's public policy realm. In 2012, the LSB held a conference on Constitutional Reforms in Botswana with the intention to inform the terms of the debate and advocate reforms. The conference concluded that there was need for an overhaul of the constitution, and not a piecemeal approach in order to ensure and promote accountability, participation, transparency and predictability. (Law Society 2012, p. 3).

Through interventions such as the ones mentioned above, the LSB, periodically brings matters of public interest to the fore. Such interventions therefore serve to shed light into matters of national importance, and raise awareness amongst observers of the policy process (Sunday Standard Online, accessed 7 June-2012), and the public in general.

PUBLIC ACCOUNTABILITY AND THE LSB

The LSB is a new organisational form in Botswana's public policy and administration. While government may have delegated the function in order to ensure the public's access to justice to private actors, such delegation of responsibilities does not mean that government is absolved from its responsibility of protecting its citizens. The accountability of the LSB is not only for ensuring that attorneys act honourably, but also that public trust in the legal profession is both nurtured and upheld.

The accountability of LSB is ensured at a number of instances: before attorneys come into contact with members of the public, or their funds; through requiring licensing before admission to practice as professionals; during practice (for example through media scrutiny of suspended members); and after they carry out errant acts for which the Disciplinary Committee may review their actions.

Another measure of ensuring accountability of the LSB is the requirement that the Legal Practitioners Act makes for publication of important information by the LSB, specifically the presentation of annual reports. Annual reports are a means of making the internal business of the LSB available to the public, and a way for the Council to account to members. These reports consist of all minutes of meetings of the Council, audited statements of the Society; and the chairman's report. Once the reports are published, any member of the public may peruse them. Rather than the glossy usual type of annual reports, the LSB's reports are presented before the annual gathering of members. (A question that applies not only to the LSB, is how widely available such reports are.)

The accountability of the LSB is increased by reporting to the Minister responsible for justice, who may in turn, when so required, inform Parliament of matters concerning the LSB. What remains to question is whether there are queries from either Parliament or the Executive about this. In order to strengthen the accountability of the LSB, it is best that the Society tables its annual reports to the National Assembly, which is Botswana's major arm of government that provides oversight to statutory bodies.

CONCLUSIONS

The following are conclusions on self-regulation from the perspective of the Law Society of Botswana.

1. The number of self-regulatory organisations in Botswana is growing.
2. While run through member contributions, and not public finance, the LSB carries out a number of public functions. It is mandated to protect the interests of both the attorneys and the public, manages the ethical conduct of attorneys, and facilitates financial redress to members of the public who have incurred losses due to the imprudence of their attorneys.
3. LSB's mandate carries potential for conflict of interest and lack of accountability. As an association of self-interested professionals, the LSB is expected to both advance the interests of the attorneys and also protect those of the public. This makes the public accountability of the LSB to be of paramount importance. However enforcing accountability has not been encouraging in that Parliament seems to play an insignificant oversight role over the LSB.
4. Government attorneys are not obliged to contribute to the Fidelity Guarantee Fund or apply annually for practising certificates depriving the Society of membership fees. By taking away the LSB's capacity to discipline some members through withdrawing their right to practice, the Legal Practitioners Act also reduces the LSB's capacity to raise standards of practice.
5. A potential shortcoming on the running of the LSB is that appointments to the Board of Directors of the Fidelity Guarantee Fund are all determined by the LSB. Nevertheless, the presence on the Board, of an accountant means that he/she acts under the constraints of legislatively approved codes of conduct which abates the risk inherent in these appointments. There is thus public accountability in this manner.
6. The LSB manages pupillage which inducts law graduates into legal practice. Through pupillage, new attorneys gain experience in the running of a law firm. However there are no guidelines to standardise how the law firms ought to handle law school graduates.
7. A positive aspect of self-regulation for developing countries, as learned from the LSB is that self-regulators can engender public trust by taking up the course of needy members of society through providing legal aid by its members.
8. The LSB serves as a lesson in reducing public expenditures, by allowing professionals to spend time and effort on managing their own affairs where public agencies might be expected to do so. Another lesson is self regulatory agen-

cies increase the chances for members to participate in governance beyond periodic elections. This also facilitates access to services without the long, expensive legal process that might arise if courts are used.

9. While the LSB, like other self-regulators, are not public agencies *per se*, they still perform public functions. The legislature ought to increase its oversight role in the activities of self-regulatory authorities through public appearance and scrutinising annual reports.

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CONSTRUCTION SECTOR REGULATION

— MANAGING FRAGMENTATION AND COMPLEXITY

*Margaret Sengwaketse*⁵

This chapter examines regulation of the construction sector in Botswana. It explores the rationales underpinning regulation of the sector, the institutional actors involved in the regulation of the industry, and the consequences of recent regulatory reforms for the management of sector performance.

The chapter assesses the regulatory arrangements for managing the construction industry in Botswana and how they function. The section on the Performance Review of the sector is mainly an update of an earlier study, 'Construction and Related Services' by Kaboyakgosi and Sengwaketse (2004). This study is, however, distinct from the previous study in that it conducts a detailed analysis of regulation in the construction sector, whereas the previous study focused on the trading of 'construction' services.

The construction sector is one of the main engines of economic growth. In developing countries, the sector is even more important because of its link to the development of basic infrastructure for all other sectors, training of local personnel, technology transfer and improved access to information. Its close association with public works and hence the implementation of a country's development programme makes construction an important sector in creating employment opportunities for both skilled and unskilled labour. Its linkages to social and economic infrastructure makes the sector an integral part of economic diversification initiatives of the Botswana economy.

In this study, the construction sector is defined according to the WTO classification list.⁶ This definition includes general construction work for buildings, general construction work for civil engineering, installation and assembly work, building completion and finishing work, repairs, renting of construction or demolition equipment with operator and exterior cleaning work of buildings. This study also covers architectural and engineering services. The General Agreement on Trade in Services (GATS) has listed

5 The author acknowledges the support of the Southern African Trade Research Network (SATRN) on facilitating the earlier research on Construction and Related Services (2002). I also acknowledge the comments of Gape Kaboyakgosi on earlier versions of this draft. All acts and commissions are those of the author and not of SATRN or BIDPA.

6 See http://www.wto.org/english/tratop_e/serv_e/construction_e/construction_e.htm

Table 3: Value Added in Construction and Other Sectors: 2003-2010 in Pula Million (% share)

	2003	2004	2005	2006	2007	2008	2009	2010
Agriculture	462 (2.2)	421 (1.9)	401 (1.8)	397 (1.7)	433 (1.7)	454 (1.8)	481 (2.0)	557 (2.1)
Mining	8800 (42.2)	8962 (40.5)	9134 (40.6)	9856 (41.7)	9660 (39.0)	9291 (36.5)	7344 (30.3)	7857 (30.3)
Manufacturing	698 (3.3)	740 (3.3)	785 (3.5)	811 (3.4)	953 (3.8)	972 (3.8)	926 (3.8)	987 (3.8)
Water and Electricity	454 (2.2)	489 (2.2)	491 (2.2)	520 (2.2)	545 (2.2)	574 (2.3)	579 (2.4)	611 (2.4)
Construction	990 (4.7)	1075 (4.9)	1009 (4.5)	1033 (4.4)	1183 (4.8)	1150 (4.5)	1248 (5.2)	1441 (5.5)
Trade, hotels and Restaurants	2080 (10.0)	2156 (9.7)	2052 (9.1)	2245 (9.5)	2488 (10.0)	2642 (10.4)	2728 (11.3)	2973 (11.4)
Transport, Posts and Telecommunications	631 (3.0)	659 (3.0)	743 (3.3)	820 (3.5)	912 (3.7)	1046 (4.1)	1171 (4.8)	1213 (4.7)
Banks, Insurance and Business Services	1987 (9.5)	2051 (9.3)	2239 (10.0)	2405 (10.2)	2606 (10.5)	2997 (11.8)	3112 (12.8)	3250 (12.5)
General Government	3299 (15.8)	3557 (16.1)	3740 (16.6)	3693 (15.6)	3848 (15.5)	4147 (16.3)	4300 (17.7)	4317 (16.6)
Total	20132	20930	21496	22702	23598	24298	23019	24376

Source: Central Statistics Office, 2010

architectural and engineering services as professional services.⁷ However, Architectural and Engineering services are important components of construction work hence their inclusion in this study.

THE CONSTRUCTION SECTOR IN THE BOTSWANA ECONOMY

This section provides a brief account of how construction contributes to Botswana's economic development. The importance of the sector to the economy can be measured by its contribution to GDP, employment and its share in investment.

Although the mining sector is the most important sector in terms of its contribution to GDP, construction accounts for a respectable share of Botswana GDP. With the exception of 2005 and 2008, the sector's 'value added' increased between the period 2003 to 2010 (Table 3). The sector's share of GDP depicted a small but insignificant fluctuation as the sector's contribution to GDP ranged from 4.4% to 5.5%. The sector's contribution to GDP is thus comparable to that in the OECD – according to Grosso *et al.*, (2008) in the OECD countries, the construction sector's contribution to GDP ranges between 4% and 6%.

As in the OECD, demand in the construction sector in Botswana is largely driven by the government's investment in infrastructure. As a result, growth in the industry has been closely linked to, and influenced by, government's investment in physical infrastructure. For example, in 2006/07, 2007/08 and 2008/09 the construction sector recorded strong growth due to an increase in government spending, particularly, development spending (Bank of Botswana, 2007, 2008, 2009). Likewise, the construction sector contracted in 2004/05, 2005/06 and 2009/2010 as growth in government development spending slowed (Bank of Botswana 2004, 2006, 2010).

The dependence of Botswana's construction sector on government's physical infrastructure development programme as a source of growth is not a recent phenomenon. Bank of Botswana (1999) indicated that government's physical infrastructure development programme and investments in the mining sector have been the main determinants of growth in the construction sector in Botswana.

Trends in employment

Construction is relatively labour intensive for both skilled and unskilled personnel (Grosso *et al.*, 2008). It is one of the largest providers of formal sector jobs in Botswana as reflected in higher share of the sector in employment than in GDP. In 2003, the sector's share in employment was highest at 15.5%. Although this share in employment declined between 2003 and 2010, on average, the construction sector contributed 8.5% to paid employment. Just as in the indicator for contribution to GDP above, the sector's average share in employment is comparable to the OECD, where Grosso *et al.* (2008) indicated that the share of construction in total employment ranges from 6% to 9%.

As was the case with output growth, trends in employment have, to a large extent, followed national economic growth patterns in general and government development

7 See http://www.wto.org/english/tratop_e/serv_e/serv_sectors_e.htm

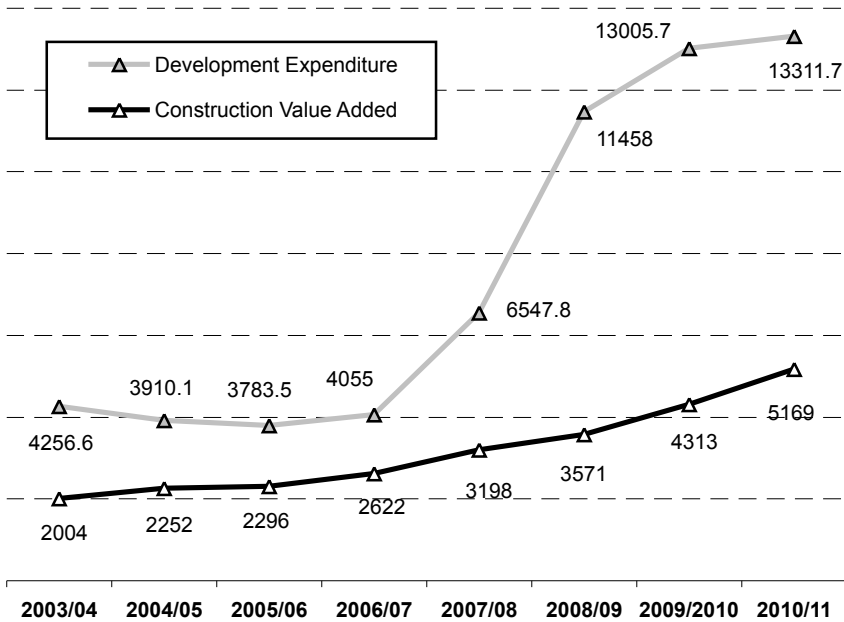
Table 4: Trends in Employment in Construction and Other Sectors (% Share)

	2003	2004	2005	2006	2007	2008	2009	2010
Agriculture	6464 (3.4)	5598 (1.9)	5554 (1.9)	5460 (1.9)	5479 (1.8)	5563 (1.8)	5906 (1.5)	6236 (1.7)
Mining and Quarrying	7961 (4.2)	8681 (3.0)	9290 (3.1)	10502 (3.6)	11736 (3.9)	11973 (3.9)	10592 (2.8)	10801 (3.0)
Manufacturing	30164 (16.1)	32771 (11.3)	32396 (10.8)	33598 (11.4)	35204 (11.7)	35888 (11.6)	35704 (9.3)	35932 (9.9)
Water and Electricity	2839 (1.5)	2742 (0.9)	2430 (0.8)	2411 (0.8)	2835 (0.9)	2800 (0.9)	2894 (0.8)	3248 (0.9)
Construction	29023 (15.5)	28771 (9.9)	24364 (8.2)	24903 (8.4)	21789 (7.2)	21910 (7.1)	22062 (5.7)	22933 (6.3)
Commerce	54951 (29.3)	51570 (17.7)	55979 (18.7)	56736 (19.2)	44126 (14.6)	59759 (19.4)	61892 (16.1)	63813 (17.7)
Transport and Communications	10141 (5.4)	13147 (4.5)	12608 (4.2)	13257 (4.5)	27567 (9.1)	12294 (4.0)	12474 (3.2)	12668 (3.5)
Finance and Business Services	18987 (10.1)	21056 (7.2)	21763 (7.3)	22865 (7.8)	24755 (8.2)	25353 (8.2)	25959 (6.7)	26842 (7.4)
Community and Personal Services	5609 (3.0)	4264 (1.5)	5137 (1.7)	5413 (1.8)	5309 (1.8)	5643 (1.8)	6281 (1.6)	6811 (1.9)
Education	7039 (3.8)	8405 (2.9)	7850 (2.6)	8039 (2.7)	8789 (2.9)	9366 (3.0)	9736 (2.5)	9838 (2.7)
Central Government	46990 (25.1)	91249 (31.4)	96702 (32.4)	86555 (29.4)	88521 (29.3)	91455 (29.6)	96167 (25.0)	100097 (27.7)
Local Government	13053 (7.0)	22460 (7.7)	24662 (8.3)	25152 (8.5)	25869 (8.6)	27014 (8.8)	94968 (24.7)	62049 (17.2)
Total	187528	290715	298715	294891	301978	308617	384633	361267

Source: CSO various years

expenditure in particular, though the 2003/2004 and 2005/2006 financial years were exceptions. In 2003/2004, employment growth contracted by 0.9% while output growth stood at 4.9% (Bank of Botswana, 2004). In 2005/06, output in the construction sector declined by 3.3% while employment grew by 2.2 % (Bank of Botswana, 2006). In all the other years, growth in output was associated with growth in employment in the sector. In 2004/2005, sector employment recorded a significant decline as output contracted by 15%.

Figure 6: Development Expenditure and Construction Sector Value Added (P million)



Source: Bank of Botswana, 2010

Foreign direct investment

The importance of construction to the economy can also be measured by its contribution to investment. Foreign direct investment (FDI) in construction has remained very low relative to other sectors. Trends in FDI indicate that the share of the construction sector to total FDI has been consistently less than 1% during the 1997 to 2000 period (Kaboyakgosi and Sengwaketse, 2004). This pattern has not changed. Calculations based on Bank of Botswana data on investment indicate that the share of construction in foreign direct investment has remained at less than 1% between 2000 and 2009. The exception occurred in 2004 where the sector recorded the highest share in FDI, which coincided with a 4.9% increase in output in 2004.

Construction is prone to cyclical swings as demand is determined by the investment needs of other sectors. The fluctuations in output in the sector have made profitability in the sector unreliable. As a result, the sector may not be very attractive with respect to

foreign investors. Additionally, the nature of the sector is such that equipment can be moved from one location to another, even across international borders, to undertake projects. As a result, foreign contractors do not necessarily have to establish any commercial presence in the country where a project is located.

REGULATION OF THE CONSTRUCTION SECTOR

The Botswana government plays three major roles in the construction sector: as promoter, as consumer and as regulator (MIST 2012). As promoter, government designs laws, policies and other incentives aimed at facilitating the growth of the sector. As consumer, government departments, ministries, agencies, and councils procure the services of the sector when it undertakes the construction of infrastructure projects. For regulation government uses laws, rules and codes of practice to manage the conduct of actors in the sector.

Such regulation of the construction sector is aimed at ensuring that projects take into consideration the health and the safety of consumers, meets land planning requirements and protect the environment. Some laws in Botswana regulate the commercial establishment of foreign companies and movement of foreign personnel while others focus on the regulation of government procurement.

Regulating the professions of the construction sector

There are many professions in the built environment. In any given construction project, these professions interact to produce an output. In order to manage these professions, the Ministry of Infrastructure, Science and Technology, with some input from professional associations is setting up construction sector self-regulatory organisations whose primary objective is to register, discipline and provide monitoring of professionals in specific professions. These self-regulators include:

- (a) the Engineers Registration Board (founded through the Engineers Registration Act);
- (b) the Botswana Real Estate Advisory Council; and
- (c) the Architects Registration Council (founded through the Architects Registration Act).

Other similar agencies are planned for legislation, including the Botswana Institute for Quantity Surveyors (to manage the quantity surveyors profession). The Engineers Registration Act, 1998, (as amended in 2008) provides for the Minister to appoint three members of the seven-member Engineers Registration Board, whereas the professionals also appoint three members and the President of the Botswana Institute of Engineers is also a member. Furthermore, the ERB is currently funded through government subventions. Either of these means that the ERB is not a fully self-regulating agency as members do not fund its operations and, crucially, the Minister influences its decision-making structures through appointments. Like appointments, funding provides an important instrument through which the Minister can exercise control over the agency. Added to

the fact that the Act gives the Minister the authority to override the technical decisions of the boards, these challenges need to be overcome for advantages of self-regulation to be fully realised in the management of the professionals of the construction industry. Again as the Act does not establish the means to coordinate with other laws managing the sector, it adds to the fragmentation that afflicts construction.

Professional associations

Professional associations are member-driven organisations organised around the various professions of the industry. They have a long history of development in the industry and exist to provide advocacy and promote the integrity of their members (MIST 2012). They include those below:

- (a) Botswana Institute of Engineers (BIE) – the engineering profession;
- (b) Architects Association of Botswana (AAB) – the architectural profession;
- (c) Association of Electrical and Mechanical Contractors of Botswana (AEMCB) – contractors;
- (d) Tshipidi Badiri Builders Association (TBBA) – contractors; and
- (e) Association of Botswana Building and Civil Engineering Contractors (ABCON) – contractors.

While these are voluntary associations and not designated regulators *per-se*, they have, for a long time provided voluntary regulatory services to their specific sectors, which were basically self-regulatory services without state or statutory backing. They registered members and exercised some discipline on them. However, lack of legal force meant they had low regulatory capacity and influence. Yet their role in the development of the construction sector in Botswana cannot be overstated. For example, through their membership of the International Federation of Consulting Engineers (FIDIC), the Botswana Institute for Engineers, (BIE) was able to advocate for the use of FIDIC model contracts in procurement in Botswana (MIST 2012). ABCON, as another example, constantly provides an instrument in the form of a forum whereby government and industry can exchange ideas.

Health, safety, environmental and land planning

In both developed and developing countries, the construction sector is subjected to a wide range of rules for health and safety considerations of both workers and users of buildings. Regulation of the construction industry involves several professions since such regulation follows on the complexity of construction projects. These include engineering, design, ecological, health, business and other imperatives. Currently Botswana's construction sector lacks robust coordinating mechanisms such as a whole of sector policy or an Act of law encompassing the entire sector, and thus most of the regulators carry out these other functions as secondary duties, in isolation, and at times without the full support from other authorities in charge of construction.

The Building Control Act, the Town and Country Planning Act and the Environmental Impact Assessment Act govern aspects of the construction sector. The Building Control

Act authorises the Minister to make building regulations. These regulations regulate the nature of building structures. According to the regulations, the assessment of building plans, inspection work during construction and prior to occupation of the building is the responsibility of the building authority. The Act also empowers the Minister to establish the Building Regulations Board. The board considers appeals for building plans that have been rejected by a building authority.

The Town and Country Planning Act regulates the use and development of land. The Act provides for a systematic and progressive development of land in both urban and rural areas and facilitates the preservation and improvement of land. It also provides for the establishment of the Town and Country Planning Board. The Board assesses applications for permission to develop land.

The Environmental Impact Assessment Act regulates activities likely to cause adverse impact on the environment. Where a competent authority determines that the proposed activity is likely to have a significant adverse impact on the ecology, it subjects such an activity to an environmental impact assessment. The cost of the environmental impact assessment is borne by the developer.

The Tribal Land Act establishes tribal land boards and empowers them to allocate tribal land while the State Land Act regulates the allocation of state land.

The State Land Act empowers the State President to allocate state land and the President, may by publication in the Government Gazette authorize any person to execute that responsibility on his behalf.

While these pieces of legislation do not regulate the activities and enforce standards in the construction sector, they play a significant role in regulating the use and development of land, including land use for building projects. A review of regulations discussed above indicates that the objective of these regulations is: to ensure that construction projects are safe: that urban and land use plans are implemented; and that the environment is preserved. None of these regulations discriminate against foreign construction firms.

The main limitation of the regulatory environment on safety, health and planning is that while the laws have a direct effect on the construction sector, each addresses a specific aspect of the construction sector with very little coordination between them. For example, it is not clear whether it is mandatory for institutions dealing with central and local government procurement to use architects and engineers registers when considering tenders. The laws also operate in isolation as there is little done to relate the intention of each statute to the other. A further challenge with the laws is that each one, being implemented under the purview of a different ministry, often leads to a lack of clarity on what occurs if the intents clash. Again by invariably giving the Minister the authority to override technical authorities, these laws allow for political interference or executive capture of regulatory processes (MIST 2012).

The existence of multiple laws regulating construction could probably be a contributory factor to Botswana being consistently ranked among the worst performing countries in dealing with construction permits indicator of the World Bank Doing Business report despite having a relatively favourable environment for doing business

Table 5: Dealing with Construction Permits-Botswana and Selected Countries

Indicators	Botswana	Mauritius	South Africa	Singapore
Doing Business Rank	52	21	36	1
Rank (out of 183)	133	54	31	3
Procedures (number)	21	16	12	11
Time (days)	115	136	127	102
Cost (% of income per capita)	234.0	14.7	37.5	23.1
	228.5	32.3	24.5	19.9
	203.0	30.6	21.2	18.1

Source: World Bank (various years)

(see Table 5). In other words, it is a possible cause for suboptimal implementation.

The existence of multiple laws dealing with construction in Botswana is in stark contrast with the experience in South Africa, where one independent regulator, the Council for the Built Environment, is responsible for coordination of regulation of professional bodies and another institution, the Construction Industry Development Board regulates contractors dealing with public sector projects. To address the uncoordinated nature of land-related legislation and create an environment that facilitates land use and development, the government plans to harmonise land-related Acts during NDP 10.

Another limitation in relation to construction sector regulation is that the Architects' Registration Act, the Engineers Registration Act and the Town and Country Planning Act give the Minister extensive power over other stakeholders. The Minister appoints some members of the Architects Registration Council and the Engineers Registration Board and is responsible for policy control relating to the development of architects and engineers. Given the power vested with the Minister to appoint members of professional bodies, there is the potential threat of political influence over the regulation of these professions. This in turn might undermine efforts to develop ethical conduct and raise standards in the construction sector.

Citizens and non-citizens enjoy equal treatment with regard to common law leases of tribal land since both can make applications for such leases to Land Boards (USAID, 2009). The only exception is with respect to the allocation of agricultural land and the conversion of tribal land to commercial use. Foreign firms and majority-owned foreign firms seeking to transfer agricultural land must seek approval from the Minister. Foreign investors that desire to use tribal land for commercial purposes also have to seek approval from the Minister. According to

BIDPA and World Bank (2006), the process for converting tribal land to commercial use is lengthy and acts as a disincentive to foreign investors including those in the construction industry. The delay in conversion of agricultural land to commercial and industrial use is a significant impediment to sectors such as construction that are intensive users of land. BIDPA and World Bank (2006) also highlighted that the delays in conversion of land are particularly acute around Gaborone, due to increasing demand for land.

Regulating commercial presence and the movement of people

Trade in construction and architectural and engineering services is primarily through commercial presence and movement of people. Foreign firms wishing to set up in another country may be subjected to ownership or equity restrictions. In other cases, restrictions may be in the form of local incorporation requirements or prohibitions on the establishment of branches. These restrictions are often not sector specific but may apply to the construction sector as part of the general regime on investment.

Foreign firms contracted to undertake a project in another country might require their professional and managerial staff to visit the site and monitor project implementation. In addition to professional and managerial staff, construction firms employ artisans (for example, bricklayers, plumbers, and carpenters) and labourers who are directly involved in actual construction. Supply of construction services by foreign firms therefore involves the movement of unskilled, semi-skilled, and skilled employees as well as professionals such as engineers and architects. Local firms might import skills unavailable locally to undertake construction contracts. Regulations restricting movement of persons are often not sector specific but apply to the construction sector as part of general legislation on labour. These restrictions could be in the form of economic needs tests, non-recognition of qualifications, visas and entry permits.

The most important pieces of legislation regulating commercial presence of foreign firms including construction firms are the Companies Act and the Trade and Liquor Act. The principal function of the Trade and Liquor Act is to protect the public. The Act empowers the Minister to grant licences related to the implementation of an activity. The granting of licences is administered by the National Licensing Authority and local licensing authorities. The Trade and Liquor Act imposes restrictions on foreign ownership on very few activities. These include small village type restaurants and bars (other than those related to hotel establishments). For unreserved sectors, there are no ownership and equity restrictions, including in the construction sector. In addition, the government does not impose conditions on the geographical location on investments or local content requirements.

The Employment Act and Employment of Non-citizens Act regulate the use of labour including foreign labour. Schedule IV of the Employment Act sets a minimum wage for building construction, exploration and quarrying. The main objective of rules on minimum wages is to empower citizens or facilitate their participation in economic activities. However, literature (e.g., Grosso *et al.*, 2008) suggests that minimum wage regulations may reduce the cost advantage of firms including foreign firms. The Employment of Non-Citizens Act, has set an application fee for a new work permit for employees and

self-employed at P500 and P1000 respectively. Renewals of work permits for employees and self-employed, are subject to a P300 and P600 application fee, respectively. According to the Act, the approval of work permit applications is the responsibility of Regional Immigration Boards. Appeals on decisions made by National Immigration Boards are made to the National Immigrants Board and further appeals are made to the Minister.

Past studies such as BIDPA and World Bank (2006), and successive National Development Plans (e.g., NDP 9 and 10) have indicated shortage of skills as one of the major concerns in Botswana. According to World Bank (2011), the availability of engineers was problematic in Botswana, Mauritius, Mozambique and South Africa. The Employment of Non-Citizens Act provides for the use of expatriate labour in Botswana. Work permits for employees are granted subject to a labour market test, i.e., only if there are no suitable local candidates, and, upon submission of citizen training programmes to replace the non-citizens. Work permit applications for the self-employed must also satisfy the labour market test but are not subjected to localisation and training requirements.

The requirements regarding the employment of foreign labour in Botswana are similar to those found in some SADC countries. According to UNCTAD (2009), in South Africa, Tanzania and Zambia both local and foreign companies can employ a foreigner on condition that there is no one available locally with appropriate skills. While the Employment of Non-Citizens Act provides for the use of expatriate labour to complement local skills, BIDPA and World Bank (2006) found that in Botswana, the process for applying for work permits is cumbersome, slow and investors considered the cost of obtaining a work permit significant. To deal with the delays in granting work permits, both foreign and local investors can use temporary work permit waivers. Temporary permit waivers have to be renewed every three months. This creates an administrative burden to firms, are costly, create an environment of uncertainty for both investors and employees, and therefore undermine efforts to use skilled expatriates to address skills shortage in Botswana.

Professional, particularly engineering, skills are not only in short supply in Botswana; they are also very expensive. The World Bank (2011) found that engineers, accountants and legal practitioners earned higher real wages, relative to other professionals in southern Africa. The same study compared real wages of 31 countries including OECD, Southern and Eastern countries and found that engineers in Botswana earned the second highest in real wage terms after the United States of America, probably reflecting the scarcity of engineers in Botswana.

The combined effect of administrative delays and costs involved in importing foreign labour, scarcity and high real wages of engineers in Botswana are likely to impede the development of a competitive construction sector in the country. As trade in services depends on the ability to move across borders to offer a service, restrictions on the movement of people and delays in issuing visas have the potential to undermine strategies to develop trade in services in Botswana, including trade in construction and related engineering services. A key policy reform issue is to reduce delays associated with issuing work permits and visas.

Regulation dealing with government procurement and subsidies

Regulations adopted in public procurement can have a significant effect on trade in construction services. Restrictions can be in the form of discrimination towards foreign construction firms, inadequate procurement procedures (e.g., criteria for opening and awarding tenders) and lack of transparency in the procurement process. Governments often introduce subsidies and other incentives to encourage the development of the construction industry. Such subsidies and incentives are granted to local construction firms and discriminate against foreign providers.

In Botswana, the regulation of public procurement is through the Public Procurement and Asset Disposal (PPAD) Act and the Local Authorities Procurement and Asset Disposal (LAPAD) Act. The PPAD Act provides for the establishment of the Public Procurement and Asset Disposal Board (PPADB) and its sub-committees. The PPADB is responsible for the provision of procurement of works, supplies and services for the disposal of public assets. Specifically, the PPADB manages and supervises public procurement; adjudicates and award of tenders; registers contractors; and advises on aspects of the PPADB Act. For purposes of procurement, PPADB classifies contractors into Opportunity Class (OC), A, B, C, D and E. This classification criterion is based on the maximum value of a project that a contractor can undertake as shown in Table 6.

Table 6: Classification of Contractors

Class	Civil Contractors		Building Contractors		Electrical/Mechanical	
	Maximum Contract Value (P)	Enterprise Size	Maximum Contract Value (P)	Enterprise Size	Maximum Contract Value (P)	Enterprise Size
OC	600,000	Micro	300,000	Micro	40,000	Micro
A	2,000,000	Small	800,000	Small	100,000	Small
B	10,000,000	Small	2,000,000	Small	250,000	Small
C	20,000,000	Medium	4,000,000	Medium	500,000	Medium
D	40,000,000	Medium	8,000,000	Medium	1,000,000	Medium
E	Unlimited	Large	Unlimited	Large	Unlimited	Large

Source: DBES (2005), Department of Roads (2005) (Cited in Ssegawa-Kaggwa 2008)

Locally established companies registering with the PPADB must fulfil the following requirements;

- (a) Be incorporated or licensed in accordance with the laws of Botswana;
- (b) Complete application forms meant to determine financial standing, plant and equipment, previous capacity, and capacity of permanent staff; and
- (c) Provide supporting information in the form of certified copies of CVs for permanent staff, certificate of incorporation, share certificate, bank statements, and other relevant information.

One hundred per cent-foreign owned firms are restricted to register in the E category. As shown in Table 6, the contract value of this category differs between sub-sectors of the construction sector. For example, for civil projects and construction work for buildings and electrical and mechanical projects, grade E category is for projects over P40 million and P8 million respectively. In relation to electrical and mechanical projects, the grade E category is for projects with a contract value of over P1 million. Firms that are 100% foreign-owned can only register with the PPADB at grade E. However, where citizen capacity is inadequate or unavailable, it is possible for foreign firms to undertake projects in categories reserved for 100% citizen-owned firms. Additionally, government has resolved that projects over P50 million are open for international competitive bidding. All capable firms, be they local or foreign can tender for such projects whether or not they are registered with the procurement authority.

The LAPAD Act empowers local authorities to manage all procurement and disposal of assets within local authorities. The Act also provides for the appointment of committees responsible for procurement and disposal of services and assets and the adjudication of tender awards. The LAPAD Act authorises the establishment of performance monitoring committees. These committees monitor procurement and disposal plans as well as project implementation.

CONCLUSIONS

The following conclusions are drawn from the discussions above.

1. Public procurement is a significant driver of construction sector output. Inadequate capacity is, however, a major impediment to citizen contractors to effectively participate in government construction projects.
2. Regulation of the construction industry is subject to many laws, codes of practice and policies which are administered by different organisations.
3. The construction sector lacks a law or policy which works to treat the sector as a single entity.
4. Lack of skills, particularly engineering, is a major constraint in construction sector performance.
5. The share of the construction sector in total foreign direct investment has consistently been very small. As construction equipment can be moved between projects and countries without the need to establish commercial presence, the low FDI figure could partly reflect this characteristic feature of the construction industry.
6. With the exception of regulation on land use, Botswana does not discriminate against foreign construction firms. There are no limitations on the establishment and operation of foreign firms. Both local and foreign firms can import foreign labour. Delays and costs involved in obtaining work permits could, however, be an impediment to investment in the construction sector as it undermines efforts to use foreign labour to complement local skills shortages.
7. To meet social and economic objectives, Botswana provides preferences to

local contractors. This is not peculiar to Botswana since all the SADC countries surveyed offered preferences to local firms.

8. Restrictions on foreign ownership are limited in SADC. In almost all countries, however, contractors require licences to operate.

RECOMMENDATIONS

1. The processing of work and residence permits should be reviewed with a view to streamlining and expediting the process. While the permit issue is a problem across all sectors, it is particularly an impediment to the construction sector where projects have to be completed within a specified time and cost schedule.
2. The regulatory structures should be consolidated and strengthened. Regulation in the construction sector is fragmented and spread between several departments and professional institutions. A more streamlined and coordinated regulatory framework will reduce the administrative burden associated with meeting construction requirements.

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REGULATORY ACCOUNTABILITY: WHO GUARDS THE GUARDIANS, AND HOW?

Gape Kaboyakgosi

This chapter examines the accountability of the regulators in Botswana. It explores the rationales for regulatory accountability in the foregoing case studies; media, the legal profession, retirement funds and construction. It also assesses the institutional actors involved in the regulatory accountability, their methods for ensuring accountability and the consequences of these.

Accountability means the obligation to answer for one's actions or omissions; 'the obligation to explain and justify conduct to some other party' (Lodge and Stirton 2010, p. 349). In relation to regulation, accountability is mainly justified on two grounds:

- (a) the need to insulate regulatory decision-making from 'improper' political or industry influence; and
- (b) the *essential* plurality of regulation with the variety of its forms and venues, and the actors which shape regulatory decisions and are affected by them (Lodge and Stirton 2010 (emphasis added)).

Keeping regulators accountable is important in democracies. The removal of the primary implementation duties from direct ministerial control means that ministers have less control over those functions. The responsibility for producing and delivering such services is invariably taken over by a private sector body or a non-governmental organisation as a result of privatisation, globalisation, contracting out, or using vouchers or other market-based instruments (Mulgan 1997, 2007). Ministers lose control of implementation because the private sector and non-governmental organisations responsible for implementation are accountable not to the Minister only, but to their shareholders and boards of directors.

Regulation and other 'new' instruments of market governance such as contracting make for very complex accountability relationships (Mulgan 2000; Posner 2002). *Regulators, who are not elected officials, exercise important discretionary powers on public expenditure affecting economic, political, social, legal and financial affairs, equity, and entire sectors of nation states.* It is thus important that mechanisms are put in place to limit such discretion without hampering the agencies in achieving public aims.

TYPES OF ACCOUNTABILITY

Regulatory accountability covers the three areas listed below.

- (a) *financial accountability*, which emphasises the need for audit mechanisms to ensure that regulators spend public funds within the limits set by the legislature;
- (b) *procedural accountability*, which enjoins regulators to follow principles of natural justice in their activities such as licensing, consultation, educating stakeholders, and publishing the reasons for their decisions – are also recommended procedures; and
- (c) *substantive accountability*, which obliges regulators to implement the objectives for which they were set. Judicial review and cost benefit analysis of certain decisions are some of the strategies employed to ensure substantive accountability (Ogus 2001, pp. 17-19).

Legislative oversight is a way of increasing accountability. An important step in strengthening such oversight is one that the government took in 2010, when Parliament, through the Public Accounts Committee, undertook to have publicly owned organisations directly account to the legislature. Prior to this change, legislative accountability was exercised indirectly as these bodies accounted to the Minister who in turn was meant to account to Parliament, potentially diluting accountability (Mulgan 2002). As a supervisor of the agencies, the Minister had potential for conflict of interest since the Minister's performance could also be judged by that of the same agencies he is supposed to hold accountable.

The regulatory reforms currently unfolding in Botswana have caused more complex accountability approaches. Regulators are made accountable to more actors, and for different outputs and outcomes. In some instances, accountability is made to flow from the regulators to industry; as well as in the opposite directions – horizontally and vertically.

However, until legislative changes or amendments are made to existing laws on public enterprises and regulators, such indirect accountability may continue since some of these detail that the Minister will table reports. Indeed, it is notable that even in the new Act for the communications sector, accountability is still indirectly applied. Again, since the Public Accounts Committee for Statutory Bodies is still in infancy, how effective it will be in enhancing legislative oversight, including its ability to enforce the decisions of Parliament, is open to question, just as the Public Accounts Committee is (see Kaboyakgosi 2011).

APPLYING ACCOUNTABILITY IN A GOVERNANCE ENVIRONMENT

In a 'governance' environment, three basic questions are normally posed of accounting organisations. These are, for what do they account and to whom, and how do accounting organisations provide that accountability?

- (a) Procedural, financial and performance or substantive outputs are usually the subject of the 'for what' are regulators accountable? In terms of procedure, regulators

- may be expected to provide the regulated entities with a hearing prior to making decisions. It is often enough that a regulator did not follow procedural rules that his or her findings are considered nullified. In terms of substantial accountability, lack of intended results by the law may mean there has been lack of accountability;
- (b) In terms of the question 'to who' are the organisations accountable, the question is in effect asking about a multitude of interested and affected parties who are affected by the actions of accounting organisations. It can be expected that the persons to whom the accounting organisations must answer may include the legislature (as the designers of the law and the representatives of the delegating authorities – or the voter/taxpayer). However, the extensive accountability expectations also create an environment in which the media is a legitimate player in the calling to account as are industry. This picture thus is one of multiple accountabilities – regulators account to Parliament, and thereby the citizens, to the executive, the media, other regulators and industry.
 - (c) The question of 'how' such accountability is applied sets out the mechanisms which accounting institutions or persons use to provide the accountability. Such mechanisms include annual reports, appearance before legislature, annual general meetings, provision of audited financial statements, labelling of food items, naming and shaming of wrongdoers, and so forth.

A later innovation in conceptualising accountability is offered by Mulgan (2003). He divides accountability into four dimensions, the 'by who', 'to whom', 'for what', and 'how'. The 'who' are those being held to account; the 'to whom' being those seeking the account (the account holders), the 'for what' being the function being scrutinised, and 'how' being the mechanisms through which accountability is obtained (Mulgan 2003). It is along this continuum that accountability in the four case studies will be analysed (see Tables 8 to 10 in this chapter).

WHEN DO REGULATORS ACCOUNT? THE ACCOUNTABILITY CONTINUUM

An important aspect of accountability under regulatory forms of governance is the attempt to provide accountability virtually during all stages of implementation. Any of the three approaches named above (for what, to who and how) occur at two major points in times *ex-ante* (before the fact), and *ex-post* (after the fact). However, even during stages in between, there are measures such as supervision through which accountability for implementation is also enforced. The overall objective of these questions is to make the regulators answerable to an external authority so as to improve decision making by regulators (Lodge 2004).

Ex-ante accountability

With *ex-ante* accountability, accountability is enforced prior to a regulator making any decisions. This is particularly helpful where regulatory staff may negatively influence decision making. One approach for *ex-ante* accountability is through appointments of the chief executive officer, and the board of directors. At NBFIRA, the Minister appoints

Table 7: *Ex-Ante Accountability Approaches – the four case studies*

Agency	Giving Reasons for Decisions?	Appointments of Board or CEO	Budget Allocation (Who funds the Regulator?)
NBFIRA	No	Yes (by the Minister)	The Legislature
LSB	Yes	Voting by members Possibility for recall by members. 25% members have to demand a meeting first.	No. Member fees finance the LSB
Engineers Registration Board	No	Minister appoints the Registrar of the Board (S 4, s1) and some board members	Through government subvention
The Media Council	Yes	Media Council appoints Executive Committee. However Minister appoints members of the Media Complaints Committee	Government subvention

Source: Author compiled

five members of the board of directors and the CEO. The other two, the Central Bank Governor and the Permanent Secretary are *ex-officio*, as provided by the NBFIRA Act.

In contrast, members of the Law Society of Botswana (LSB) elect all the seven members of its Council of the LSB. The Minister appoints none. As a way of fostering accountability in the legal professions, the LSB membership may recall members of Committee through a special general meeting, which can be convened when 25% of the members demand for it. The LSB also increases *ex-ante* accountability through appointments of, and the protection of tenure of members of the Disciplinary Committee. The Legal Practitioners Act decrees that members of the Disciplinary Committee cannot be removed while they are conducting a disciplinary matter.

Another approach to *ex-ante* accountability, budget allocations, places the legislature in the special position of approving funds that finance the operations of the regulator. The capacity to withhold funding gives the legislature leverage for making regulators account. In the case of NBFIRA, the legislature approves all of the operational expenditures of the agency. The agency then answers to the legislature at the end of the financial year to show that its expenditures were in line with the legislature's approvals. In the case of the LSB, which raises its funding through member subscriptions, matters are different. As a self-regulator, this is to be expected. However, the LSB still has to present audited accounts to members.

While the way the LSB is funded is in line with global best practices, and presents a model that government could follow, government seems to be reversing this through funding the newer self-regulators such as the Botswana Institute for Chartered Accountants (BICA) and the Engineers Registration Board (ERB). At the same time,

government appears to weaken the LSB financially in that that the Legal Practitioners Act exempts state attorneys from annual applications for practising certificates and contributions to the Fidelity Guarantee Fund. As the biggest employer, government most likely has many professionals on its payroll, and these exemptions take away the potential for strengthening the funding of the LSB.

Another approach to ensuring *ex-ante* accountability is through requiring regulators to give reasons for taking certain decisions. Such requirements put the duty on regulators to mix technical soundness and equity in their decision making. It also ensures that anyone interested in the said matter(s) may scrutinise it.

NBFIRA is not required to publicly give reasons for any of their decisions. In contrast, the Competition Authority and the Communications Regulatory Authority are explicitly required to give reasons for their decisions. The LSB is also expected to, and does publish lists of attorneys who have been struck off the roll, or suspended. Such ‘shaming’ of wrongdoers has the effect of ensuring better behaviour from professionals as reputations are an important currency in the legal profession.

Ex-post accountability

In *ex-post* accountability, principals want to ensure that decisions that had been made in their names were made appropriately. *Ex-post* accountability gives principals the chance to review the decisions that have been made and, where appropriate, demand rectification. *Ex-post* accountability has become more difficult under the new regulatory reforms. Accountability now tends to emphasize a stakeholder being accountable to more than just one principal, for multiple outcomes or output, and through multiple methods of accountability. This new reality is caused by the growing influence of actors who are not under the Minister’s influence. An important disadvantage of this approach is that often, when regulators act, it is too late; a lot of damage can already have been done. The three tables below show to whom, for what, and how regulators are made accountable *ex-post*.

NBFIRA’s accountability map

In Table 8 overleaf, NBFIRA is made to account to Parliament for its finances and general performance. The agency is also expected to account to the Botswana Unified Revenue Services, the Botswana Police, the Botswana Stock Exchange, the Bank of Botswana and others as and when there is a new entrant to be admitted, or the law has been contravened, there are mergers and acquisitions, etc. The media keep the agency accountable by reporting on its performance, thus opening the agency’s actions to public scrutiny. Similarly, NBFIRA may collaborate with the Competition Authority of Botswana where a company involved in pensions may be looking to merge with another one. The Competition Authority of Botswana may request for data or other information from the agency.

Table 8 demonstrates how the accountability expectations have increased, rather than decreased with the onset of new regulatory arrangements. NBFIRA accounts downwards to industry and society; upwards to Parliament; and sideways to other regulators

Table 8: NBFIRA's Accountability Map

Who accounts?	To who?	For what?	How?
NBFIRA	National Assembly	Financial management Industry Performance	Annual reports Appearing before PAC
	Botswana Unified Revenue Service	Notification of registration of new fund manager	Ensure new entrant has registered
	Botswana Stock Exchange	When a BSE listed company files for merger	Lodge relevant paperwork
	Fund managers	Charges and fees	Annual reports Supervision
	Members of pension funds	Performance of funds	Informal means, e.g., annual Pensions Society conference
	The media	Decisions made and any other issue the media may inquire about	Questionnaires or other means

Source: Author compiled

such as the Competition Authority. Each of these accountability measures is for different outputs or outcomes.

LSB's accountability map

The Law Society of Botswana is also accountable to multiple actors for many types of

Table 9: LSB's Accountability Map

Who accounts?	To who?	For what?	How?
LSB	Members	Financial management of LSB funds The performance of the Fidelity Guarantee Fund	Audited financial reports
	The Media	Deeds or misdeeds of members Society's acts or omissions	Shaming or publicising the names of wrongdoers
	The High Court	proper registration of attorneys Discipline/conduct of attorneys	Writing of relevant reports and submitting affidavits detailing disciplinary hearings of attorneys
	Members of the public	Conduct of attorneys Discipline <i>Pro-deo</i> services Law reform matters	LSB annual report. Shaming or publicising the names of wrongdoers

Source: Author compiled

outcomes. Annually, the Society presents audited accounts to its members who scrutinise them. The media also has an interest in the LSB's undertakings, and usually report on these. The expectation to publish the names of all legal practitioners who may be either suspended or expelled means the LSB is accountable to the public as it has to reveal those names to the public. Yet to actually suspend or expel a member, the LSB has to apply to the High Court to have the court regularise this action, and so the Society is also accountable to the High Court.

The accountability map for the LSB as shown in Table 9 strongly suggests that self-regulators are held accountable in many ways; upwards to the Registrar of the High Court, to whom they pass on reports on their members; downwards to their members for the management of the Fidelity Guarantee Fund and the management of registration fees.

Interestingly, a criticism of the LSB could be that as its Council are *all* attorneys, this closes out the public and other actors. However, Table 9 shows that the LSB publishes its annual reports as well as the chairman's report. Added to that, the Society's strategy of shaming errant members means that the public is actually brought into the accountability strategies of the society.

The media's accountability map

Accountability occurs in a number of ways to a number of actors. The media is no different in that regard. Once operational, the Media Council of Botswana is expected to account to society for the conduct of its members and to the Minister.

Table 10: Media Council's Accountability Map

Who Accounts?	To Whom?	For What?	How?
Media Council of Botswana	Members of the Media Council	Performance of the media	Present full report of activities Submit annual report to the Minister
	Members of the Public	Conduct of media practitioners	Shaming or publicising the names of wrongdoers Requirement to print an apology for acknowledged wrongdoing
	Media fraternity, the public and the Minister	Conduct of the industry members	Furnish reasons for decisions
	The Minister	Conduct of the media	Present written explanation of all decisions Submit Annual Report

Source: Author compiled

Whereas accountability is demanded and supplied on an ongoing basis, and is increasingly demanded for a number of issues (such as financial and procedural), this has made it even more attenuated as more actors have to account for more items, and to more people who demand accountability.

What Tables 8 to 10 demonstrate is the multiplicity of stakeholders that regulators have to account to. They also demonstrate the plurality of outcomes that regulators are accountable for, and the numerous strategies available for accountability. What can be concluded out of these is that while legislators have willingly delegated their authority, they have put in place many strategies to 'control' the agencies.

CONSEQUENCES TO ACCOUNTABILITY OF REGULATORY REFORMS

The four case studies in this book demonstrate two major consequences of the practise of accountability in Botswana, as below, and discussed thereafter.

- (a) Accountability now is as confusing as it is complex. It involves webs of reporting to multiple stakeholders for a number of outcomes and outputs.
- (b) The capacity of ministers to account for actions or omissions in their portfolios has been reduced.

Complexity of accountability as a consequence of regulation

Regulation attenuates accountability. Regulatory accountability differs from the traditional views on the matter. Traditionally, accountability requires that one person or organisation is responsible for the doing of any governmental function to avoid accountability loss.

As a general rule every executive function, whether superior or subordinate, should be the appointed duty of some given individual. It should be apparent to the entire world who did what, and through whose fault anything was left undone. (Mill 1861 as cited in (Mulgan 2003, p. 189).

Traditionally, accountability assumes the primacy of legislatures and other elective bodies in calling public authorities to account. The case studies in this book showcase approaches to accountability as occurs under regulatory forms of governance. The essence of these is *that no single actor is directly responsible for the delivery of all policy activities*. The consequences of these matters are explored in detail in the following sections.

Interlocking webs of accountability

Regulation imposes new ways of being accountable, and creates webs of accountabilities. Regulators have to account to multiple 'principals' and the accountability is multi-directional. It is difficult to find a stakeholder who is not accountable to another. In the pensions industry, the fund administrator is accountable to the trustees, who are accountable to beneficiaries for the performance of the pensions. The regulator on the other hand, accounts to Parliament and to the minister. The fund manager is account-

able to the trustees for the performance of their assets, while s/he is also accountable to the board of directors and shareholders for the performance of what is essentially a business operation.

The Law Society of Botswana is accountable to its members for the performance of the Fidelity Guarantee Fund and the management of registration fees. On the other hand, individual attorneys are accountable to the LSB, for paying their annual subscriptions to the Fidelity Guarantee Fund and for obtaining their licenses. For their conduct, attorneys are accountable to the Disciplinary Committee. They are also accountable to the media, each in their own individual capacity or as part of their law firms – the media reports on matters of interest arising from the conduct of these professionals.

What the foregoing analyses mean is that accountability measures are attenuated. It is important for stakeholders to hold each other to account. For example, as government ministries are shorn of some of the responsibility for operational details for pensions, the Minister must be more active in informing himself of what is happening in the sector. Similarly, for the LSB, the Minister ought to demand regular reports, set identifiable targets and meet regularly with the regulators to ascertain adherence to these. The challenge for accountability in this instance is not to wait until problems become insurmountable.

Declining direct ministerial accountability

A direct implication for ministerial accountability is that it is reduced. Regulation leads to certain duties and functions of the state being performed by a non-governmental organisation, independent of the Minister as it has its own board of directors, and shareholders. In contrast, when government produces and delivers goods or services through its departments, the departmental staff are under the direct control of the minister, and the minister, through various directors, permanent secretaries and their deputies, has direct access and control of what happens in the department and thereby the ministry.

Many calls for 'more' accountability including resignations from ministers, often imply the idea that the minister must be held directly accountable for acts or omissions for some of these third parties. For instance, as a parallel, a fund administrator who defrauds members of a pension fund that it administers ought to answer for that. The Minister may, after investigation inform himself and the legislature for what occurred. Fundamentally though, Botswana needs to define accountability parameters.

What further complicates political accountability is that the Office of the Auditor General (OAG) is not legally empowered to audit private sector organisations such as the various fund managers or administrators. The OAG does not have access to the trustee organisations either. In this manner, the possibilities of private organisations pursuing goals other than those prioritised by political authorities are increased, to levels greater than when a government department was directly responsible for the management of pensions. Private sector staff are not accountable to the OAG, the Accountant General, or the Ombudsman, offices which have the primary responsibility for enforcing accountability on behalf of political authorities; thus compromising the capacity of the legislature to keep these offices accountable.

As in the case of the Minister, the role of Parliament in this new accountability structure is as equally attenuated. While Parliament has the authority to call on anyone to account, Parliamentary enquiries cannot be used as a substitute for regulatory supervision. Indeed, Parliament has direct oversight of the regulator, and indirectly the other stakeholders of the industry, and ought to rigorously apply these. As private sector organisations do not owe their primary accountability to politicians, direct accountability by political authorities is reduced.

The reduction of direct accountability by the Minister does not mean that there is no political accountability at all. Ministers are still expected to answer for what occurs in their ministries or sectors, particularly to Parliament. Instigating investigations, commissions of enquiry and judicial reviews, though time consuming, expensive and indirect, still allow ministers to account. Usually though, it takes something going extremely wrong for this to happen.

As a result, *ex-ante* measures of accountability need to supplement *ex-post* means. Continuing accountability such as the supervision of pension funds, and constant 'regulatory conversations' will assist in preventing accountability loss, and its dire consequences.

CONCLUSIONS

1. The legislature can carry out accountability by appointments, reasons giving requirements, and funding for regulators.
2. As regulation entails the regulator enforcing rules on private actors, it has the effect of reducing the Minister's ability to control what goes on in his or her Ministry. Subsequently, the Minister's capacity for accountability in this regard is reduced.
3. Accountability under regulation leads to stakeholders accounting for many outcomes or outputs, and to many other stakeholders. As a result accountability resembles webs of accounting, between multiple principals and agents.

RECOMMENDATIONS

1. In order to abate the accountability loss that may result due to regulation, using both *ex-ante* and *ex-post* accountability measures is required.
2. Given the complex webs of accountability which may lead to accountability loss, stakeholders must continually inform themselves of developments in their various sectors, and hold each other accountable.

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CONCLUSIONS: REGULATION AND BOTSWANA'S FUTURE

Gape Kaboyakgosi, Tachilisa Balule & Margaret Sengwaketse

The four case studies in this book were used to describe and analyse how regulation is deployed in Botswana, and the consequences of that policy choice. The growing use of regulation to manage public policy in Botswana is evidenced through the promulgation of regulatory acts, and setting up of regulators for enforcement.

The two decades up to 2010 witnessed the mushrooming of these types of agencies in Botswana. Self-regulators, independent regulatory agencies, and co-regulatory arrangements (where regulation is clearly shared by more than one agency) are now common. The case studies sought to understand the effect regulators have on policy performance and the consequences of that. As regulation is an instrument of implementation, the case studies also sought to find out the issues that regulation confronts. Furthermore, as regulation is delegated authority, the case studies sought to find out how regulatory authorities are made accountable. This concluding chapter re-states some of the major findings from the case studies, and collates emerging themes therefrom, before making generic recommendations on how to reform the various aspects of the regulatory process. Specific recommendations pertaining to each sector are to be found at the end of each case study.

THE ROLE OF PUBLIC POLICY IN REGULATION

An emerging theme from the case studies is on the relationship between policy and regulation. An effective regulatory regime must have three conditions: what the regulatory regime should do; how it should be structured to achieve that; and the rules that are put in place to attain those objectives (Leveson Enquiry Report, 2012, p. 1583). A policy document is therefore fundamental to this. Policy documents usually outline the objectives and goals of regulation, and the means of attaining them. While it is assumed that when regulators go about their business, they are, in effect carrying out policy implementation, none of the four sectors studied in this book have clearly written policy documents specific to the intents of the regulation. While legal instruments such as the Legal Practitioners Act, the Engineers Registration Act, the NBFIRA Act and the Pensions and Provident Funds Act, enable regulation in their respective activities, policy statements are meant to provide a general framework of the intents of government.

Law and policy are complimentary regulatory instruments. Law outlines thresholds

for action and consequences for non-action by actors, and policies provide a broad framework. The four case studies however show general lack of policy development accompanying regulatory reform. None of the four sectors providing the case studies has a policy document to detail the wider policy aims, objectives and regulatory arrangements of the sector. Regulation is carried out without clear statements of intention by government. Without the government stating those broad objectives, it is hard to assess the success or failure of the regulators.

A possible explanation of the absence of policies to guide implementation in these sectors is that policy statements are not a necessary component for implementation and thus government gives policy development little priority. The non-essentiality of policies in Botswana's jurisprudence has been buttressed by the Court of Appeal (see *Botswana Building Society vs. Rapula Jimson*, Court of Appeal, No 37 of 2003 (unreported); as per Judge President Tebutt and *Kealotswe & Others vs. The Attorney General* 2003 BLR (1) 509 (HC): per Justice Chatikobo at p.511).

Whereas the principle that policies do not legally bind actors is established, policies are required for the sake of good governance. That they are not absolutely necessary for regulation must not be misconstrued to mean they have no value. Policies tend to set the objectives of public action, define coordination mechanisms, and set goals to which actors may aspire. They facilitate better implementation. By defining the broad goals of public action, public policies also have the function of facilitating wider understanding among the public in terms of what they may expect of policymakers.

DEFINITIONS OF SECTORS

Another important finding from the four case studies is the complexity and fluidity of the sectors being studied. For instance, the construction industry is highly differentiated and complex, with varying regulatory imperatives, such as the professions (architects, quantity surveyors, brick layers, engineers), the environment, labour and procurement. Each of these has its own special regulatory imperatives.

Similarly, regulating the media entails practically managing different types of media. The homogeneity in the term media is lost once parts of the industry such as print, electronic, and new media are unpacked. Within these categories, there are also further distinctions; for example, electronic media includes both television and radio. Other values such as competition are also at play. For example, the print media can also be analysed by ownership or differences between state-owned and privately-owned enterprises. Just as in construction, regulating the media is therefore a matter of regulating complex and fragmented entities.

A question of policy interest that arises is which types of activities are allowed to self-regulate and which are not? To this extent, it is easier for the professions, such as engineering or law to self-regulate, as their members share a common training background which instils values and ethics that may act as the basis for self-regulation. Nevertheless, this exercise has left us none-the-wiser as to why government readily allows the legal profession to self-regulate and prohibits the media from doing so.

With the media, the reluctance of government to allow journalists to self-regulate (clearly government prefers co-regulation), may be justified on the basis that journalists, unlike engineers or lawyers do not share a common training background. Indeed, anyone can be a journalist or act as one at any point in time. However, the inverse of this argument is that journalism is part and parcel of the right to freedom of expression – a fundamental freedom which cannot be justified strictly in terms of professional background.

Another policy question that arises is how to coordinate these seemingly disparate parts of a whole as the various policy sectors are hardly homogenous. They have many actors including business interests, government, professional associations and others, all who have a claim to one aspect of the regulatory mandate or other; either because they are affected by it or they may need to influence it.

REGULATION AS A PLATFORM FOR INTERDEPENDENT IMPLEMENTATION

Regulation, as it is deployed in Botswana, provides a platform for exchange; bargaining and negotiation between stakeholders. In essence, policy resources, of which there are five main groups are more scattered under regulatory forms of government than when government agencies are singularly or predominantly responsible for implementation. These resources are finance, political connections, formal-legal authority, information and technical know-how. From member-driven organisations advocating on behalf of industry, such as the Botswana Pensions Society, or the various professional associations in the construction industry, regulation, more so than regular government departments allows for open, transparent exchange of ideas and other resources between regulators and industry. It facilitates the participation in public policy by private entities.

In the case of lawyers, individual firms influence the success of regulation through pupillage at their own cost, seemingly as part of what needs to be done in order for government to allow attorneys to self regulate. Similarly, the capacity of media houses in both the print or electronic media to internally enforce codes of conduct in that profession, ensuring both fairness and rigour in reportage, mean that enforcement of regulation is a shared responsibility between the regulators and the regulated. Regulation thus entails a lot of interdependence between regulators and regulated entities. It is not hierarchical as in practice, regulation entails constant exchange of resources between different stakeholders. The very notion of 'information asymmetry' strongly suggests that information necessary for regulation to succeed is fragmented among actors. Also fragmented are technical skills, finance, and formal legal-authority. However, more resources than just information are scattered. Regulation therefore, we argue, facilitates an exchange of these resources better than when only regular government departments are at the helm of implementation.

Central to these exchange relationships are myriads of resource interdependencies. Whereas regulators have the authority to enforce an Act, those that are regulated hold information crucial to the regulator's cause, as they do the skills and the finance. Similarly, other regulatory institutions might hold some of these policy resources, as

well as the formal-legal authority empowering them to have a portion of the regulatory mandate. They also hold technical know-how needed to ensure beneficial outcomes, such as in the example of the pension funds which influence the success of regulation by training, at their expense, trustees who may lack knowledge of their duties.

INTERNATIONALISATION THROUGH REGULATION

Regulation also provides a less controversial platform for the infusion of international ideas, ethics, norms and values into domestic Botswana public policy. It provides an interface between domestic law and policy, with international law and policy. In this way, regulation may be seen as advancing globalisation of ideas (policy learning), and controversially, it could be seen as a way of challenging ideas of the concept of national sovereignty as government and non-state actors may 'smuggle' into Botswana some measures that citizens did not vote for under the guise of regulation.

In the LSB case study, for example, internationalisation is ensured by the membership of the LSB in the International Bar Society and the Commonwealth Bar Society. Both provide the means for the LSB to both improve its systems and to push for its members to aspire to such standards. Similarly, in the construction sector, FIDIC rules are used to guide contracting processes between government and engineering consultants. This makes the domestication of such processes easier than would have been. Similarly NBFIRA is a member of the International Organisations of Securities Commissions (IOSCO) and the (SADC) Committee on Insurance, Securities and Non-Banking Financial Authorities (CISNA), giving either organisation an entry point to influence domestic policy.

WHAT TYPE OF REGULATORY STATE IS BOTSWANA?

A question of wide scholarly interest in general, and in particular the role of regulation in public policy, is the one related to the 'character' of the regulatory state. The importance of this question is two-fold.

- (a) Firstly, it questions the approaches to enforcement of regulation, whether they seek cooperation or are coercive and whether government uses regulation for the intentions stated or perhaps for others such as the promotion of industry, blame shifting or unstated political ends.
- (b) Secondly, it reveals the consistency or lack thereof between regulation and other policy measures. For instance, is regulation coercive? Does it promote participation or not? Is it pro-democratic or not? Is it pro-poor?

Assessing the character of the regulatory state thus queries the political deployment of regulation. The way Botswana deploys regulation can be described in the following three terms:

- (a) it is primarily built to promote consensus; enforcement emphasises cooperation over punishment;

- (b) it is overly state-centred; Government retains significant residual regulatory power; and
- (c) it is pluralistic and deployed as a substitute for competition.

These matters are explored further below.

Regulation is state centred

The case studies demonstrate state bias in the way that Botswana deploys regulatory authority. An example of this is the lack of competitive neutrality in the way that regulation is deployed. Competitive neutrality is a concept that suggests that all industry players, state or non-state, should be similarly exposed to the rigours of regulatory or competition rules. Lack of competitive neutrality makes it difficult for regulators to impose discipline on state-owned actors; and as government is the main player in many of these sectors, its exemption lessens the impact of regulation. Government retains regulatory discretion through the strategies that follow.

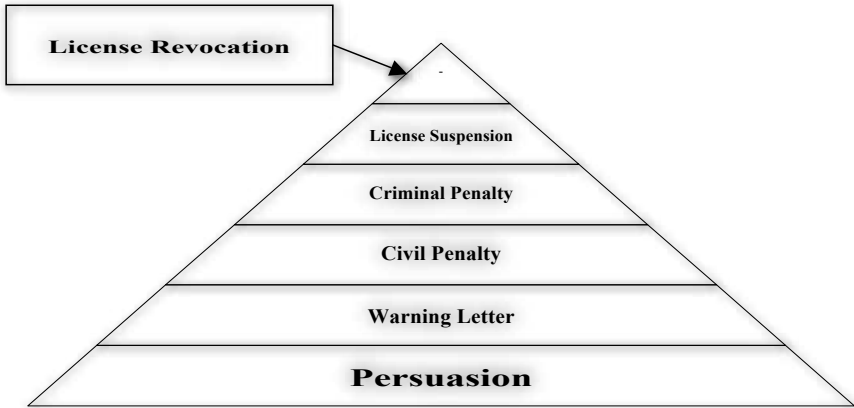
- (a) In media regulation, state broadcasters are exempted from regulation by the Regulator. Exempting the dominant player implies that the sector is virtually unregulated;
- (b) In the case of the LSB, government attorneys are made exempt from certain provisions of the Legal Practitioners Act. Three conclusions may be drawn from this, as follow.
 - (i) By not obliging public lawyers to pay practising fees to the LSB, the Legal Practitioners Act has the effect of making the LSB forgo the fees of arguably the most important employer of lawyers in the country, thereby weakening the LSB financially.
 - (ii) It is divisive to the legal profession which may find it difficult to speak with one voice in matters of public importance.
 - (ii) It is inequitable. Public attorneys, without some of the responsibilities private attorneys face, such as carrying out *pro-bono* and *pro-deo* work, still have the right to stand for office at the LSB, and other benefits of being members of the LSB.

Consensus-based enforcement

In terms of enforcement, the case studies show one common trait; responsive regulation. This regulatory approach is geared more towards engendering compliance than necessarily punishing non-compliers (Ayres and Braithwaite 1992). At the centre of this approach is the continual escalation of punitive measures in response to infractions of the rules (see Figure 7 below). Inversely, compliance leads to lesser application of punitive measures; the system thus creates incentives for compliance. For example, NBFIRA's risk-based approach to regulation emphasises proactive enforcement, diagnosing challenges and addressing them before they reach the need for punitive action, whereas the LSB case similarly demonstrates gradual, step-by-step measures of redress.

Figure 7 below is a widely accepted depiction of this type of approach.

Figure 7: Consensus Based Regulation Model or Responsive Regulation



Source: Ayres and Braithwaite

Figure 7 also shows that while the regulator has the authority to apply more punitive remedies at the apex of the pyramid, the majority of regulatory interactions occur at the level of persuasion. Indeed the regulator may apply a stepped approach to enforcement, stopping when compliance is given. However, eventually the regulator may temporarily end the participation of a regulated entity (suspension), as in the case of the LSB with errant attorneys, or terminate the existence of the company totally (in the case of the NBFIRA against a fund manager). As most of the enforcement energies are spent at the bottom of the pyramid, deploying persuasive power and educating regulated entities and other stakeholders, regulators spend more energy assisting stakeholders with compliance.

NBFIRA's design of the new Pensions Prudential Rules (NBFIRA undated), and their contribution to the amendment of the Pensions and Provident Funds Act is particularly instructive in this manner. The regulator spent a lot of the time consulting with stakeholders in order to engender consensus. Even after a draft was designed, stakeholders still had 90 days to add further comment to the drafts. This effort was then followed by educating stakeholders about the new regulations. Either of these efforts is meant to enable better outcomes.

Regulation as a substitute for competition

Another basic characteristic of the way regulation is deployed in Botswana is that it is used, more often than not, as a substitute for competition. While this assertion may appear to contradict the earlier finding that regulation is state centred, the fact is that, as it is actually deployed, regulation facilitates for heterogeneity of actors, allowing many firms or professionals to enter markets previously monopolised by the state, to compete to capture a share of the market or clientele. The state, though with a huge amount of

residual regulatory authority becomes one of the players. The media typifies this occurrence. Government monopolies of the past are exposed to new entrants; Btv competes with Multi-Choice and E-Botswana, and Radio Botswana competes with Duma FM, Gabz FM and Ya-Rona FM for listenership. The Daily News has since 1984 been exposed to competition from the likes of Mmegi, the Guardian, the Sunday Standard and The Voice newspapers. These instances are replicated in other sectors not discussed in the volume, such as telecommunications, road passenger transport, education and others.

THE POSSIBILITIES OF CORPORATE GOVERNANCE

Another recurring theme in this book is that of (missed) possibilities offered by corporate governance. Corporate governance means the giving of direction to management, which direction is of an overseer nature. While the management team may be expected to run the day-to-day affairs of the regulator (or state-owned-enterprise), corporate governance gives overall direction and accountability. The practice, as applied to Botswana's regulators, appears to be one aimed at enhancing ministerial control rather than affording the regulators (or state-owned corporations) the best chances of succeeding. Two issues explain this, as below.

- (a) The Minister is sole appointing authority for board members of either regulators or state-owned corporations. The Minister is also the only authority that may dismiss members of boards of directors. Such partiality in appointments means the executive gains more control of the regulator. There is a lack of checks and balances in the function of corporate governance.
- (b) Statutes limit the consequences that may be meted in cases of board complicity or culpability. Members of the board of directors are overly shielded from personal responsibility, to the extent that the incentive to perform above average is non-existent. As an example, in our case studies, only the pensions industry imposes the duty to act personally on directors, limiting the ability to hold board members to account. Accountability by board members is limited to accountability to the Minister.

CONTINUOUS, MUTUAL ACCOUNTABILITY

Accountability, under regulation, is continuous, as it is made to occur prior to implementation, during implementation and after implementation is complete. It is thus gained on an ongoing basis. Added to this continuity of accountability is that many stakeholders variously account to each other.

An important consequence of accountability under regulation is the possibility of loss of political accountability. Even though Ministers appoint board members and CEOs of regulatory organisations, they end up losing control of the regulatory process as private actors take the place of government departments in implementation. These private actors are primarily accountable to their shareholders and boards of directors, not to politicians. Expecting the Minister to account on behalf of these stakeholders,

or resign when things go wrong may be unrealistic in some instances. To strengthen accountability, and avoid accountability loss, combining both *ex-ante* and *ex-post* accountability measures (for example, combining risk-based regulation and legislative oversight may be the answer).

HOW USEFUL ARE DISTINCTIONS OF REGULATORY TYPES?

Another set of matters considered by the case studies is how closely the Botswana regulatory state reflects the theoretical distinctions common in the literature, such as the social-economic regulation distinction, and the hierarchical/command and control/self-regulation distinction. What can we learn from these? Does implementation follow theory?

Social regulation and economic regulation

The distinctions often made in the literature on regulation suggest a clear demarcation between social and economic distinction. Upon reflection however, these are not as clear-cut.

- (a) For instance, the management of the pensions industry, which is in the economic regulation category, tends to rely on many methods of social regulation such as the use of corporate governance. Similarly, NBFIRA applies the 'fit and proper' test, a set of standards (social regulation) on would be entrants; and
- (b) The management of construction on the other hand demonstrates a mixture of social and economic approaches: labour (the use of on-site safety standards); and environment (the use of environmental standards). Economic regulation methods however are used by the PPADB in the use of pricing as a method of determining an applicant's fitness to enter into contract.

While the distinctions between social and economic regulation rarely appear in practice, to an analyst they provide a reasonable starting point of enquiry. They suggest what the likely intentions of policy makers are or were in relation to each regulatory sector.

Regulatory structures

While the literature on regulation often makes the distinction between self-regulation and other types of structures, again the case studies suggest that there are rarely clear-cut cases in practice where such distinctions occur.

For instance, one may speak of co-regulation, in the case of the regulation of the legal profession, where the supposedly *self-regulating* Law Society of Botswana shares the space with the High Court. While the LSB has the duty to register attorneys or ensure they are struck off the roll for ill discipline, it is only after it passes the names of errant practitioners to the High Court that they may be removed from the roll. Similarly, both government and the media co-regulate the media fraternity. In the pensions industry, corporate governance is deployed as a form of self-regulation, and is combined with command and control through NBFIRA, and multi regulatory schemes involving the

Competition Authority, BURS, the BSE and others. In construction, the professions self-regulate, while environmental issues are regulated by command and control. The boundaries of organisational form are very fluid. It is safe to conclude that no regulatory form appears in its purest sense.

RECOMMENDATIONS

From the case studies, these sets of recommendations are aimed at challenges facing policymakers when designing regulators. As recommendations specific to each of the case studies are found under those specific case studies the ones that appear below are generic.

1. In order to improve regulatory outcomes, government must ensure competitive neutrality by allowing state-owned corporations to be regulated as fully as private business entities are.
2. Appointing chief executives, board members of regulatory authorities leads to *de-facto* executive capture of regulation. Two options are available to government to reduce this, without losing control absolutely: either the government allows Parliament to have a say in the hiring or firing of the chief executive officers of the regulatory organisations, or, the appointment of the board of directors of regulators at the same time, robust mechanisms for limiting the discretion of regulators need to be developed. These could include requiring regulators to state publicly their reasons for decisions.
3. Policy design is an area that policymakers need to pay more attention to. Whereas policy statements are not prerequisite for regulation, they help to guide in terms of policy goals, coordination, and general good governance.
4. For regulatory decision making to have more credibility, Parliament needs to be more robust in its oversight function. Such oversight must extend to self-regulatory organisations. The legislature must therefore take more interest in the business of self-regulatory agencies through the scrutiny of annual reports, interacting with regulators, or for these bodies to appear before Parliament. A proactive approach is also important to build trust between self-regulators and legislators.
5. To maximise the advantages of self-regulation, Government must consider replication of the LSB model, particularly in sectors where professional ethos makes self-regulation viable. Government may:
 - (i) make it clear that the professionals will pay for the running of the regulators in their areas;
 - (ii) allow the regulators to select all, or the majority of the members of the boards of directors of the regulatory agencies in question.
 - (iii) remove the power of the Minister to overrule technical decisions of these agencies. The courts or the Competition Authority may undertake such appellant duties, depending on the nature of the issue being contested.

WHAT IS THE FUTURE OF REGULATION IN BOTSWANA?

Whereas regulation in its current iteration is a relatively new policy approach, Botswana looks set to use that mode of governance more in the future. A number of factors make it likely that government will adopt more regulatory reforms for the foreseeable future, as below.

1. Once divestitures get underway, government will set up more regulators as required by the Privatisation Policy for Botswana (Government of Botswana, 2000). While several other models of privatisation such as contracting are now widespread, to date divestitures lag behind. It can be expected with the onset of privatisation in Botswana, government will set up more regulatory agencies, in such sectors as water, power, transport and others (Government of Botswana 2000; PEEPA/ Government of Botswana (2005).
2. Other sectors are unregulated and will need to be. Already government is planning to set up a whole-of-sector regulator for the construction sector (Khama 2011, p.25).
3. Due to the inability of the competition law to address competition in the media markets, there is need to set up a special regime to promote and monitor competition the media markets.
4. With increasing private sector participation in the economy, in areas either previously regulated by government or unregulated, statutory regulation appears likely to increase. Food safety and advertising are examples in this regard.
5. Finding ways to enhance accountability is paramount as regulation has led to complexity and possible loss of accountability.
6. Sequencing of the reforms would be of utmost importance. For example, the design of policy statements or definition of how extensive regulation ought to be (e.g., whether every employee must have a pension), including exactly which step comes before which is important to ensure the success of reform.

While regulation in Botswana remains an unfolding development, overall, these developments point to the growth of the regulatory state in the foreseeable future.

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