

OPENING ADDRESS BY JUSTICE M. B. MARUMO
POLICY FORMULATION CONSULTATIVE MEETING
NATIONAL BROADCASTING BOARD OF BOTSWANA
FRANCISTOWN COUNCIL HALL
WEDNESDAY 24 JULY 2002

IT IS A GREAT HONOUR FOR ME TO HAVE BEEN ASKED TO OFFICIATE AT AN OCCASION OF THIS IMPORTANCE. THE SIGNIFICANCE OF THE CONSULTATION PROCESS UNDERTAKEN BY THE NATIONAL BROADCASTING BOARD AS PART OF THE FORMULATION OF A NATIONAL BROADCASTING POLICY SHOULD NOT BE LOST SIGHT OF. BROADCASTING, DEFINED IN THE BROADCASTING ACT AS THE DISTRIBUTION OF TELEVISION OR RADIO BY TECHNOLOGICAL MEANS IN SUCH A WAY AS TO BE CAPABLE OF BEING RECEIVED BY THE PUBLIC USING APPROPRIATE APPARATUS, IS PRESENTLY BY FAR THE MOST COMMON MEANS OF DISSEMINATING INFORMATION IN THIS COUNTRY. RADIO, FOR EXAMPLE, IS ACCESSIBLE TO LARGE SECTORS OF THE POPULATION, INCLUDING THOSE NOT ENDOWED WITH LITERACY SKILLS AND THOSE IN FAR FLUNG AREAS NOT NORMALLY COVERED BY SUCH FORMS OF COMMUNICATION AS THE PRINT MEDIA. JOINTLY AND INDIVIDUALLY TELEVISION AND RADIO OFFER

PROFOUND OPPORTUNITIES TO EDUCATE AND TO INFORM. THEY ARE CAPABLE OF, AND VERY OFTEN, DO SET THE AGENDA FOR PUBLIC DEBATE ON ISSUES OF NATIONAL IMPORTANCE.

THEY SHAPE,OR AT THE VERY LEAST INFLUENCE PUBLIC OPINION. THEY PLAY AN IMPORTANT ROLE IN THE PROMOTION OF DIFFERENT INTERESTS IN SOCIETY, INCLUDING THOSE RELATING TO CULTURE, LANGUAGE, RELIGION AND MANY OTHERS. THEY ARE CRUCIAL IN EFFORTS ASSOCIATED WITH NATION BUILDING AND THE CREATION OF A FREE, JUST AND TOLERANT SOCIETY IN WHICH THE RIGHT TO KNOW AND FREEDOM OF EXPRESSION ARE EXALTED. IN SHORT BROADCASTING CAN MAKE OR BREAK A SOCIETY. IT IS CAPABLE OF PLAYING THE ROLE OF AN ELIXIR IN THE CURE OF SOCIETY'S ILLS, OR WHEN ABUSED OR PLACED IN THE WRONG HANDS, THE BANE THAT RIPS IT APART.

DEVELOPMENTS OVER THE PAST FEW DECADES HAVE ALSO PROVED BEYOND A SHADOW OF A DOUBT THAT THE BROADCASTING INDUSTRY IS HIGHLY LUCRATIVE IN ECONOMIC TERMS. EXPERIENCE IN SOCIETIES MORE ADVANCED THAN OURSELVES HAS SHOWN THAT IT IS CAPABLE OF CREATING JOBS, FACILITATING THE TRANSFER OF SKILLS AND TECHNOLOGY, PROVIDING A

SIGNIFICANT TAX BASE FOR THE GENERATION OF GOVERNMENT REVENUE AND FORMING A BASE FOR FOREIGN AND DOMESTIC INVESTMENT.

BY REASON OF THE INFLUENTIAL AND PERVASIVE NATURE OF THE INDUSTRY GREAT CARE MUST OF NECESSITY BE EXERCISED IN THE FORMULATION OF A POLICY TO REGULATE ITS CONDUCT AND DEVELOPMENT. THE PROCESS BY WHICH THIS EXERCISE IS UNDERTAKEN MUST NOT ONLY BE FAIR AND TRANSPARENT, IT MUST MANIFESTLY BE SEEN TO BE SO. IN THIS REGARD I MUST COMMEND THE NATIONAL BROADCASTING BOARD FOR THE APPROACH IT HAS ADOPTED. WHILST THE BROADCASTING ACT DOES NOT ENJOIN THE BOARD TO CONDUCT PUBLIC CONSULTATION MEETINGS OF THE NATURE WE ARE GATHERED FOR THIS MORNING, THE BOARD HAS ITSELF RECOGNISED THE PRE-EMINENT VALUE AND INDEED PROFOUND FAIRNESS AND INDISPENSABILITY OF INCLUSIVITY AND TRANSPARENCY.

IN ALL LIKELIHOOD THE NATIONAL BROADCASTING BOARD WILL AT THE END OF THE COUNTRY-WIDE CONSULTATION PROCESS BE ABLE TO PRODUCE A DOCUMENT WHICH CAN BE SAID TO BE REPRESENTATIVE OF THE VIEWS, INTERESTS AND CONCERNS OF THE STAKEHOLDERS. THE TEMPTATION THEREAFTER MAY BE

TO PAT YOURSELVES ON THE BACKS AND EXCHANGE HIGH FIVES FOR A JOB WELL DONE. BUT WILL YOU HAVE COMPLETED THE JOB? I VENTURE TO SAY YOU WILL HAVE NOT. YOUR CONCERN FOR NOW, AS I UNDERSTAND THE SITUATION, IS THE FORMULATION OF A POLICY DOCUMENT. THIS PROCESS HAS LITTLE OR NOTHING TO DO WITH DOWN-STREAM ACTIVITIES WHICH, GIVEN THE IMPORTANCE AND SENSITIVITY OF THE SUBJECT OF BROADCASTING, WILL NO DOUBT ALSO CRY OUT FOR TRANSPARENCY, FAIRNESS AND EQUITY. PERHAPS TO ILLUSTRATE THE POINT I HAVE JUST RAISED IT IS NECESSARY THAT I ATTEMPT TO PINPOINT THE POSITION OF A POLICY IN THE GRAND SCHEME OF A REGULATORY SYSTEM, TOGETHER WITH ITS IMPACT ON THE DOWN STREAM ACTIVITIES I HAVE JUST MENTIONED.

A POLICY SIGNIFIES A BLUE PRINT OR A GENERAL PLAN OF ACTION DESIGNED AND INTENDED TO ADVANCE AND FACILITATE CERTAIN GOALS OF A COMMUNITY. IT IS A SET OF PRINCIPLES OR PHILOSOPHIES, USUALLY EXPRESSED IN GENERAL TERMS, INTENDED TO BRING ABOUT CERTAIN GOALS, OR TO GUIDE AND INFORM A SERIES OF ACTIONS TO BE UNDERTAKEN IN PURSUIT OF SPECIFIED GOALS BELIEVED TO BE IN THE OVERALL PUBLIC INTEREST. IN THE CONTEXT OF BROADCASTING ONE MAY SET OUT A LIST OF GENERAL PRINCIPLES THAT MAY SERVE TO GUIDE THE

INDUSTRY, FOR EXAMPLE PLURALITY, DIVERSITY, EQUITY, CITIZEN EMPOWERMENT, NATION BUILDING, CULTURE AND LANGUAGE PROMOTION ETC. ONCE THESE BASIC PRINCIPLES ARE ADOPTED AND CONSTITUTED INTO A POLICY, ALL ACTIONS AND ACTIVITIES IN THE CONDUCT OF THE AFFAIRS OF THE INDUSTRY SHOULD IDEALLY BE IN KEEPING WITH, BE MEASURABLE AGAINST THEM. CONVENTIONALLY POLICY DOCUMENTS IN BOTSWANA ARE PREPARED BY THE EXECUTIVE ARM OF GOVERNMENT AND ARE PLACED BEFORE PARLIAMENT FOR DEBATE AND APPROVAL. THERE IS HOWEVER, NO LEGAL REQUIREMENT FOR THIS PROCEDURE. IT IS A PURELY CONVENTIONAL PRACTICE THAT HAS DEVELOPED OVER TIME.

FURTHERMORE, AND MORE IMPORTANTLY, POLICY DOES NOT EVOLVE INTO BINDING LAW UPON APPROVAL BY PARLIAMENT. IT REMAINS A SET OF PRINCIPLES AGAINST WHICH GOVERNMENT CAN BE HELD POLITICALLY, AS OPPOSED TO LEGALLY, ACCOUNTABLE.

THE STATUS OF POLICY MUST BE CONTRASTED WITH THAT OF LEGISLATION. THE LATTER CONSTITUTES BINDING LAW. IT IS ENFORCEABLE BY THE LAW ENFORCEMENT AGENCIES OF OUR SOCIETY INCLUDING THE POLICE AND THE COURTS. SUCH LEGISLATION FALLS

INTO TWO CATEGORIES, NAMELY PRIMARY OR PARLIAMENTARY LEGISLATION ON THE ONE HAND, AND DELEGATED OR SUBSIDIARY LEGISLATION ON THE OTHER. PRIMARY LEGISLATION IS MADE BY PARLIAMENT IN THE DISCHARGE OF ITS CONSTITUTIONAL LAW MAKING DUTIES. THE PROCESS BEGINS IN THE PREPARATIONS OF BILLS WHICH AFTER DUE PUBLICATION, DEBATE AND APPROVAL BECOME STATUTES (ALSO KNOWN AS ACTS) WHICH BECOME LAW AFTER BEING ASSENTED TO BY EXCELLENCY THE PRESIDENT AND TAKE EFFECT FROM THEIR SPECIFIED DATES OF COMMENCEMENT. DELEGATED OR SUBSIDIARY LEGISLATION INCLUDES INSTRUMENTS SUCH AS REGULATIONS, RULES, ORDERS, BYE-LAWS AND OTHERS MADE UNDER THE AUTHORITY OF AN ENACTMENT. PARLIAMENT HAS THE POWER TO DELEGATE ITS LAW MAKING FUNCTIONS TO OTHER BODIES, AGENCIES OR OFFICIALS (E.G. MINISTERS), HENCE THE TERM DELEGATED LEGISLATION. SUCH LEGISLATION IS MADE UNDER THE AUTHORITY OF AN ENACTMENT AND DERIVES ITS LEGITIMACY THEREFROM. THE NEED FOR DELEGATED LEGISLATION IS NORMALLY JUSTIFIED ON THE BASIS THAT PARLIAMENT HAS NEITHER THE TIME, PERSONNEL AND IN MANY CASES, THE TECHNICAL EXPERTISE TO PROPERLY DEAL WITH MATTERS OF DETAIL. IT IS ACCORDINGLY THOUGHT PRUDENT THAT PARLIAMENT SHOULD CREATE A SKELETON CALLED AN ACT, AND APPROPRIATE MINISTERS

AND OTHER BODIES, WITH THE ASSISTANCE OF ADMINISTRATIVE AND TECHNICAL OFFICERS TO WHOM THEY HAVE ACCESS, MUST THEN BE CALLED UPON TO GIVE FLESH AND BLOOD TO THAT SKELETON. FURTHERMORE IT IS CONSIDERABLY MORE DIFFICULT TO AMEND AN ACT TO MEET CHANGED CIRCUMSTANCES, THAN TO DO THE SAME TO A REGULATION. THE PROCESS INVOLVED IN DRAFTING A BILL, PILOTING IT THROUGH ALL ITS ADMINISTRATIVE PROCESSES, HAVING IT PUBLISHED, PLACED BEFORE PARLIAMENT, PASSED, ASSENTED TO AND PUBLISHED AS AN ACT CAN TAKE SEVERAL YEARS. REGULATIONS ON THE OTHER HAND ARE PROMULGATED BY WAY OF STATUTORY INSTRUMENTS, IN THE PRESENT CONTEXT PROMULGATED BY THE MINISTER. SUCH A PROCESS CAN BE INIATED AND COMPLETED IN A FEW MONTHS. IN AN AREA SUCH AS BROADCASTING WHERE TECHNOLOGICAL ADVANCEMENTS MAY NECESSITATE CONSTANT CHANGES TO THE LEGAL FRAME-WORK, REGULATIONS WILL NO DOUBT PLAY A VERY IMPORTANT ROLE IN THE GOVENENCE OF THE AFFAIRS OF THE INDUSTRY.

IT SHOULD BE APPARENT FROM THIS BRIEF, IF NOT PERHAPS INARTICULATE ANALYSIS, THAT FOR PRINCIPLES SET OUT IN A POLICY DOCUMENT TO BE AS FULLY EFFECTIVE AS POSSIBLE THEY MUST ALSO FIND EXPRESSION IN THE LEGAL INSTRUMENTS THAT REGULATE

THE INDUSTRY. ALL ACTS AND REGULATIONS GOVERNING THE INDUSTRY MUST BE IMBUED WITH THE CORE PUBLIC INTEREST VALUES AND PRINCIPLES THAT ARE ENSHRINED IN THE POLICY DOCUMENT. IN THIS WAY THEY WILL EVOLVE FROM BEING A SET OF VALUES TO WHICH THE GOVERNMENT OF THE DAY MAY OR MAY NOT SUBSCRIBE, TO LEGAL DICTATES WHICH CAN ONLY BE ALTERED BY A FURTHER ACT OF PARLIAMENT. I NOTICE THAT TWO IMPORTANT PRINCIPLES WHICH WILL NO DOUBT FORM AN IMPORTANT PART OF THE POLICY, NAMELY DIVERSITY OF OWNERSHIP AND CITIZEN EMPOWERMENT ALREADY FIND EXPRESSION IN THE BROADCASTING ACT. THAT IS COMMENDABLE, BUT IS NOT SUFFICIENT. ONE CAN THINK OF OTHER PRINCIPLES, SOME OF WHICH WILL NO DOUBT ARISE IN THE COURSE OF YOUR DELIBERATIONS, THAT MAY BE CONSIDERED DESERVING OF SIMILAR TREATMENT. ONE SUCH PRINCIPLE IS THAT OF THE INDEPENDENCE OF THE BROADCASTING REGULATORY BODY, IN THIS CASE THE NATIONAL BROADCASTING BOARD. THE PUBLIC HAS A FUNDAMENTAL INTEREST IN AN INDEPENDENT AND IMPARTIAL BROADCASTING OVERSEER. THE REGULATORY REGIME MUST BE SUCH AS TO INSTIL IN THE PUBLIC THE CONFIDENCE THAT THE REGULATOR WILL ACT INDEPENDENTLY, OBJECTIVELY AND PROFESSIONALLY, AND WILL BE FREE FROM UNDUE INFLUENCE FROM ANY INTERESTED SECTOR BE IT

BUSINESS, POLITICAL, CIVIC, GOVERNMENT, NGO'S AND OTHERS. THIS PRINCIPLE DOES NOT FIND ADEQUATE EXPRESSION IN THE ACT. THE ACT IS SILENT ON THE EXTENT TO WHICH THE BOARD CAN EXERCISE ITS OWN INDEPENDENT JUDGMENT IN THE GOVERNANCE OF THE INDUSTRY. WHILST IN PRACTICE IT MAY INFACIT TURN OUT TO BE THE CASE THAT INDEPENDENCE WILL BE VERY MUCH IN EXISTENCE THERE IS A NEED FOR SUCH INDEPENDENCE TO BE GUARANTEED AS A MATTER OF LAW. THE INDEPENDENCE MUST NOT ONLY BE IN EXISTENCE, IT MUST MANIFESTLY BE SEEN BY ALL AND SUNDRY TO BE IN EXISTENCE.

ANOTHER PRINCIPLE WHICH MAY NEED FURTHER ADDRESSING IS THAT OF EQUITY. IT MAY SEEM, AT FIRST GLANCE, THAT THIS PRINCIPLE IS SUBSUMED UNDER THAT OF DIVERSITY WHICH IS ALREADY GUARANTEED UNDER THE ACT. ALLOW ME HOWEVER TO USE THE FOLLOWING, ALBEIT SIMPLISTIC ILLUSTRATION TO FORTIFY MY VIEW THAT IT IS NOT ADEQUATELY COVERED. LET US ASSUME THAT THERE ARE 9 BROADCASTING LICENCES IN A PARTICULAR SECTOR AVAILABLE FOR ALLOCATION. THREE OF THEM ARE ALLOCATED TO JAZZ LOVERS WHO CONSTITUTE 5% OF THE POPULATION. THE REST ARE ALLOCATED TO VARIOUS OTHER INTERESTS WHICH CONSTITUTE THE REMAINING 95% OF THE POPULATION.

THIS SITUATION MAY WELL PASS THE DIVERSITY TEST. AFTERALL JUST ABOUT EVERYONE WILL HAVE BEEN ACCOMMODATED. BUT WOULD IT PASS THAT OF EQUITY. I THINK NOT. IT WOULD BE INEQUITABLE FOR SUCH A SMALL MINORITY TO CONTROL FULLY ONE THIRD OF THE RESOURCES AT THE EXPENSE OF THE REST OF THE POPULATION. I THINK MANY WOULD AGREE THAT THE PRINCIPLE OF DIVERSITY ENSHRINED IN THE ACT MUST BE EXTENDED TO CLEARLY INDICATE THAT IT OUGHT TO GO HAND IN HAND WITH THAT OF EQUITY.

THE EXAMPLES GIVEN ABOVE ARE BY NO MEANS EXHAUSTIVE. NO DOUBT IN THE COURSE OF YOUR DELIBERATIONS YOU WILL BE ABLE TO IDENTIFY MANY OTHERS WHICH WILL EVENTUALLY FIND THEIR WAY INTO THE POLICY DOCUMENT, AND HOPEFULLY, ALSO INTO THE LEGAL INSTRUMENTS TO BE FORMULATED OR REFORMULATED SUBSEQUENT TO THE SETTLING OF THE FORMER.

IT MAY BE TEMPTING TO CONCLUDE FROM WHAT I HAVE SAID THUS FAR THAT THE SEQUENCE OF EVENTS IN THE DEVELOPMENTS IN THE INDUSTRY TO THIS POINT HAVE BEEN CHARACTERIZED BY A VERITABLE PLACING OF THE CART BEFORE THE HORSE. WHY WAS AN ACT PASSED PRIOR TO THE SETTLING, IN THE FORM OF A POLICY, OF

THE PRINCIPLES THAT WILL GUIDE AND INFORM THE REGULATION OF THE INDUSTRY?- ONE MAY ASK. IN FAIRNESS TO GOVERNMENT AND PARLIAMENT IT SHOULD BE CONCEDED AT THE OUTSET THAT THEY WERE FACED WITH THE PROVERBIAL CHICKEN AND EGG SITUATION. IDEALY THE POLICY SHOULD PRECEDE THE ACT AND THE LATTER SHOULD REFLECT AND PROTECT THE CORE VALUES IN THE POLICY DOCUMENT. IN AN AREA SUCH AS BROADCASTING HOWEVER, ONE REQUIRES ON THE ONE HAND, AN EMPOWERED AND MANDATED STRUCTURE, SUCH AS THE NATIONAL BROADCASTING BOARD TO FACILITATE AND MANAGE THE PROCESS OF THE FORMULATION OF THE POLICY. SUCH A STRUCTURE CAN, ON THE OTHER HAND, ONLY COME INTO EXISTENCE AS A CREATURE OF STATUTE. THE ACT MUST THEREFOR BE PASSED PRIOR TO THE ADOPTION OF THE POLICY, WHICH ORDINARILY SHOULD FIND EXPRESSION IN SUCH ACT. THIS IS A COMMON QUANDARY AND SHOULD BY NO MEANS BE ASSUMED TO BE PRESENTING INSURMOUNTABLE DIFFICULTIES.

WHICH BRINGS ME BACK TO THE ISSUE I FORESHADOWED EARLIER, RELATING TO DOWN-STREAM ACTIVITIES WHICH WILL HAVE TO BE UNDERTAKEN. UPON COMPLETION OF THE CONSULTATION EXERCISE, A

POLICY WHICH WILL NO DOUBT REFLECT THE WISHES AND ASPIRATIONS OF BATSWANA AND OTHER STAKEHOLDERS WILL BE FORMULATED. BY REASON OF THE STATUS OF POLICY IN THE WIDER SCHEME OF THINGS, A MATTER I SPOKE ABOUT EARLIER, THE PRINCIPLES SPELT-OUT THEREIN WILL AT SOME POINT HAVE TO BE ACCORDED FULL RECOGNITION IN THE ACT SO THAT THEY GRADUATE FROM STATEMENTS OF INTENT ONLY BINDING AT A POLITICAL LEVEL, TO PRINCIPLES OF LAW BINDING ON, AND ENFORCEABLE AGAINST, ALL CONCERNED. THIS WILL NECESSITATE, AT SOME POINT IN THE FORSEABLE FUTURE, AN AMENDMENT OF THE ACT SO THAT THE WISHES OF THE CITIZENS AND STAKEHOLDERS, ARTICULATED IN THE FORM OF OBJECTS OF THE POLICY, ARE BETTER DEFINED AND IMPLEMENTED AS PART OF THE LAW OF THE LAND.

AT SOME POINT EVEN FURTHER DOWN STREAM REGULATIONS WILL HAVE TO BE DRAFTED. THEY TOO MUST ACCORD WITH THE BASIC PRINCIPLES AS WILL BE DEFINED BY THE CITIZENRY AND STAKEHOLDERS IN THE COURSE OF THE PRESENT CONSULTATION EXERCISE.

IT SHOULD ALSO BE APPRECIATED THAT THE TASK OF DEVELOPING AN EFFICIENT AND PROPERLY MANAGED

INDUSTRY IS A PROCESS AND NOT AN EVENT. THERE MAY BE A NEED TO REVISIT THE POLICY AT SOME POINT IN THE FUTURE, NOTWITHSTANDING THE CAREFUL AND PAINSTAKING EXERCISE YOU ARE PRESENTLY UNDERTAKING. THE SAME GOES FOR THE BROADCASTING ACT AND REGULATIONS. THERE MAY EVEN HAVE TO BE A NEED FOR THE PROMULGATION OF OTHER ACTS AND REGULATIONS TO MEET CHANGED OR UNFORSEEN CIRCUMSTANCES.

I AM CONFIDENT THAT THE SPIRIT OF OPENESS, TRANSPARENCY AND THERISANYO THAT HAS SO FAR CHARACTERIZED THE ACTIVITIES OF THIS NASCENT INDUSTRY WILL CONTINUE TO BE EVIDENT WHEN THE IMPORTANT FUTURE ACTIVITIES ARE UNDERTAKEN. IN PARTICULAR CONSULTATIONS OF THIS NATURE WILL HAVE TO PRECEDE THE PROMULGATION OF ANY LEGISLATION, PRIMARY OR SUBSIDIARY, AND THE VIEWS OF THE STAKEHOLDERS MUST, TO THE EXTENT POSSIBLE BE TAKEN ON BOARD. AT NO POINT SHOULD AN INDUSTRY OF SUCH ECONOMIC AND STRATEGIC IMPORTANCE AS THE BROADCASTING INDUSTRY BE SEEN TO BE DOMINATED BY CERTAIN INTERESTS TO THE EXCLUSION OF OTHERS. THE FINEST TRADITIONS OF THE DEMOCRATIC SYSTEM OF GOVERNMENT, TO WHICH WE ROBUSTLY SUBSCRIBE, DEMAND NO LESS.

IN CONCLUSION I TAKE THIS OPPORTUNITY TO WISH YOU ALL FRUITFULL AND PRODUCTIVE DELIBERATIONS. WHAT YOU ACHIEVE NOW AND IN THE IMMEDIATE FUTURE WILL IMPACT HUGELY ON MANY ASPECTS OF OUR SOCIETY. YOU ARE BUILDING THE FOUNDATIONS OF AN INDUSTRY THAT WILL IMPACT PROFOUNDLY ON OUR GENERATIONS AND MANY MORE TO COME. WE ARE COUNTING ON YOU NOT TO LET US DOWN.

ON THAT NOTE IT IS MY SINGULAR PLEASURE TO DECLARE THIS MEETING OPEN.

I THANK YOU.

PULA!!!!