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**THE UNNECESSARY GRAVITY OF THE SOUL PUBLIC SERVICE BROADCASTERS OR GOVERNMENT MOUTHPIECES – AN APPRAISAL OF PUBLIC SERVICE BROADCASTING IN BOTSWANA**

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**Abstract**

Public service broadcasting is a critical component of modern democratic societies. These broadcasters are expected to serve the general public interest by providing for the informational needs and interests of citizens in order to empower them to participate in public life. A public service broadcaster is therefore a national asset that must be independent of both political and commercial pressures in the performance of its mandate. The institution must never be used as a government mouthpiece whereby it will only serve the interests of the government of the day. A public service broadcaster thus requires a particular legal framework and certain structural attributes to enable it to execute its mandate effectively. This article examines public service broadcasting in Botswana and interrogates the question of whether or not the legal and policy framework in the country recognises this concept, and if so, whether or not the framework in place is appropriate for the effective delivery of a true public service broadcasting mandate.

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“The state media are national assets; they belong to the entire community, not to the abstraction known as the state nor to the government in office nor its party. If such national assets were to become the mouthpiece of any one or the combination of parties vying for power, democracy would be no more than a sham”.<sup>†</sup>

## 1. Introduction

Public Service Broadcasting (PSB) is considered to be a vital element of modern democratic societies.<sup>1</sup> Public service broadcasters are expected to play the important role of providing access to, and participation in, public life by promoting access to education and culture; developing knowledge; and fostering interactions among citizens.<sup>2</sup> There is no universal definition of PSB, instead, there is a plethora of definitions and descriptions of the concept. Barendt argues that PSB is ‘a normative as well as a descriptive concept’ whose principal features can be identified.<sup>3</sup> He identifies the following principal features:

- i) General geographic availability;
- ii) Concern for national identity and culture;
- iii) Independence from both state and commercial interests;
- iv) Impartiality of programmes;
- v) Range and variety of programmes; and
- vi) Substantial funding by a general charge on users.<sup>4</sup>

The above principal features of PSBs reveal their characteristics, focusing on their structure and programme content. The features on national identity and culture, impartiality of programmes and range and variety of programmes relate to programme content to ensure that it meets the informational needs and interests of the public. The other three features are more structural in nature, in that they address requirements of a PSB to ensure that it effectively delivers on its mandate. PSB is thus generally defined in terms of its characteristics and purposes. It has been observed that while there may be many definitions and different models of PSB, the lowest common denominator across the various models is a commitment to delivering a wide-ranging

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<sup>†</sup> Per Justice Amua Sekyi in *New Patriotic Party v Ghana Broadcasting Corporation* [1992 – 93] GBR 522 at 536 (Supreme Court of Ghana).

<sup>1</sup> See among others, African Commission on Human and Peoples Rights, Declaration of Principles on Freedom of Expression in Africa, adopted at the 32<sup>nd</sup> Session, 17<sup>th</sup> – 23<sup>rd</sup> October, 2002: Banjul, the Gambia, Article VI; and Council of Europe Parliamentary Assembly, *Recommendation 1641 (2004) I*, adopted by the Assembly on 27 January 2004 (3<sup>rd</sup> Sitting) para. 1.

<sup>2</sup> UNESCO, “Approved Programme and budget, 2004-2005”, UNESCO General Conference, 32<sup>nd</sup> Session; 2003.

<sup>3</sup> E. Barendt, *Broadcasting Law: A Comparative Study* (Clarendon Press, 1995) p. 52.

<sup>4</sup> *Ibid.*

quality service to the whole population.<sup>5</sup> PSB models were developed to remedy a weakness inherent in the then two dominant broadcasting systems – state-controlled broadcasting and the profit-oriented commercial models.<sup>6</sup> State broadcasters' programming is essentially driven by political interests, while commercial broadcasters are driven by commercial interests. The programming of a PSB is driven by the public interest, thus at the heart of PSB, is the goal of serving the needs and interests of the public.<sup>7</sup>

The United Nations (UN) has identified government control over public media as one of the ten key challenges to freedom of expression in the next decade.<sup>8</sup> The UN has observed that “political influence or control over public media so that they serve as government mouthpieces instead of as independent bodies operating in the public interest” remains one of the major challenges to freedom of expression across the world.<sup>9</sup> Where government has control over public media, such control may compromise the latter's ability to deliver on its public service mandate. Public media are national assets that should be neutral and must show no bias or favour to the government or any other person in its programming.<sup>10</sup> International bodies such as the UN and regional bodies, including the African Union and Council of Europe, have therefore adopted declarations calling upon their member states to transform state and government-controlled broadcasters into public service broadcasters that are accountable to all strata of the people and that serve the overall public interest.<sup>11</sup>

In Botswana, the Department of Broadcasting Services (DBS) has been granted licences to operate two PSB radio services. DBS is a government department under the Media Division in the Office of the President. In December 2001, DBS was issued a licence to operate a PSB radio service commonly known as Radio Botswana 1 (RB1). Again in January 2010, the department was issued a second licence to operate another PSB radio service, Radio Botswana 2 (RB2). In addition, DBS also operates a television service, Botswana Television (BTV), which was launched in July 2000. BTV is currently operating without a licence. DBS however maintains that the service is being operated in accordance with the conventional norms of PSB, and that it complements the mandates of both RB1 and RB2.<sup>12</sup> Although DBS has been issued licences to operate as a PSB, there have been concerns in the country that its services

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<sup>5</sup> M. Feintuck, *Media Regulation, Public Interest and the Law* (Edinburgh University Press, 1999) p. 47.

<sup>6</sup> I. Banerjee and K. Seneviratne (Eds), *Public Service Broadcasting: A Best Practices Sourcebook* (UNESCO, 2005) p. 13.

<sup>7</sup> T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, 2011) p. 3.

<sup>8</sup> See UN, ‘Report of the Special Rapporteur on the Promotion and Protection of the Rights of Opinion and Expression - Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade’ A/HRC/14/23/Add.2, para. 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> See *New Patriotic Party v Ghana Broadcasting Corporation* (supra).

<sup>11</sup> See among others, UN's Human Rights Committee General Comment No. 34, para. 16, (12 September 2011); Principle VI of the Declaration of Principles on Freedom of Expression in Africa, *op. cit.*, and Council of Europe Parliamentary Assembly, *Recommendation 1641 (2004) 1*, para. 3.

<sup>12</sup> ‘From the Director’ [www.btv.gov.bw/from\\_the\\_director.html](http://www.btv.gov.bw/from_the_director.html).

are no more than government mouthpieces as they are controlled by the government of the day.<sup>13</sup>

This article is motivated by two events that occurred during the year 2011, which drew attention to DBS and casts doubts on its ability to fulfil its PSB mandate. First, in January 2011, there was an attempt by the government to re-deploy a chief broadcasting officer at RB1 and BTV to another government department. The reason given for the officer's re-deployment was, according to an affidavit filed by the officer with the Industrial Court in an application challenging his re-deployment, "victimisation for resisting the politicisation of the national broadcaster".<sup>14</sup> The officer alleged that he had fallen out with his supervisors for giving coverage to the Botswana Movement for Democracy (BMD), a break-away political party from the ruling Botswana Democratic Party (BDP). The BMD was established in 2010 after serious in-fighting within the BDP, which culminated in some members of the latter resigning from the party, subsequently forming the BMD. The officer further alleged that the Minister of Presidential Affairs and Public Administration, under whom DBS falls, had given instructions that the national broadcasters should not give coverage to the BMD.

Furthermore, during the public servants' industrial action that took place in May and June 2011, DBS services, RB1, RB2 and BTV, only gave coverage to the government's views on the strike. Employees' trade unions and opposition political parties were denied an opportunity to air their side of the story on the industrial action on the national broadcasters.<sup>15</sup> When the issue of the biased reporting of the national broadcasters was raised in Parliament, the Minister of Presidential Affairs and Public Administration made a startling response which suggested that DBS services are merely government mouthpieces and not PSBs. The Minister responded by saying, "DBS services are government owned and shall continue to operate within the parameters for media as set by the government from time to time".<sup>16</sup> While DBS has been granted licences to operate as a PSB, evidence on the ground suggests that its services are operated merely as government mouthpieces instead of serving the needs and interests of the public.

The aim of this article is to critically assess whether or not DBS is best placed and empowered to deliver a true PSB mandate. In addressing this question, the point of departure will be a discussion of the remit of PSBs in general, its attributes and conditions necessary to enable a PSB to effectively play its role. These shall then be used as a benchmark for assessing whether or not DBS is a PSB. The discussion will proceed to look at the concept of PSB in the context of Botswana laws and policies. Finally, the paper will assess whether or not the services provided by DBS fit the

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<sup>13</sup> See Media Institute of Southern Africa, *So This is Democracy? State of Media Freedom in Southern Africa 2009* (MISA 2010) p. 34.

<sup>14</sup> See 'Btv chief spills beans on plot to impose a news blackout on BMD', *Sunday Standard*, 17<sup>th</sup> January 2011.

<sup>15</sup> See 'Botswana: News blackout on major civil service strike', *Free African Media*, 10<sup>th</sup> May 2011 [www.freeafricanmedia.com](http://www.freeafricanmedia.com), and 'Btv faces suit over news blackout', *Mmegi*, 03<sup>rd</sup> June 2011, Issue: Vol. 28 No. 81.

<sup>16</sup> 'Masisi unaware of alleged news editing by ministers', *Sunday Standard*, 17<sup>th</sup> July 2011.

criteria for PSB and whether the conditions under which it is operating are supportive of its role as a PSB.

## 2. PSB – Core Criteria

There is no one universally accepted definition of PSB as observed in the introduction above. Instead, various definitions of the concept have been advanced by scholars and commentators on the subject. What emerges from the various attempts to define PSB is that the concept is commonly associated with a set of minimum conditions or attributes.<sup>17</sup> The Council of Europe's Committee of Ministers has refined and summarised the core attributes of PSB to include the following:

- a) A reference point for all members of the public, offering universal access;
- b) A factor for social cohesion and integration of all individuals, groups and communities;
- c) A source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;
- d) A forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals; and
- e) An active contributor to audiovisual creation and production and greater appreciation and dissemination of diversity of national cultural heritage.<sup>18</sup>

The attributes of PSB identified by the Council of Europe are similar to what Barendt argues are the principal features of such broadcasters. This arguably demonstrates a consensus on the key characteristics of PSBs. An examination of the above attributes of PSBs reveals that these are underpinned by the value that is accorded to freedom of expression in democratic societies. Freedom of expression is regarded as an indispensable condition for democracy. The African Commission on Human and Peoples Rights (ACHPR) has opined that freedom of expression is vital to an individual's personal development, political consciousness, and participation in the conduct of public affairs.<sup>19</sup> The media, which is a particular way of exercising freedom of expression, serves as a vehicle for self-expression, a reflection of public opinion, an informer of the public, and a participant in the formation of public opinion.<sup>20</sup> Pluralism and diversity in the media promotes the full enjoyment of freedom of expression in that it ensures citizens have access to a wide range of information and ideas so that they can be informed participants in the democratic process. Toby Mendel argues, "It is through the availability of a range of viewpoints that individuals can exercise full citizenship, choosing between competing

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<sup>17</sup> See, among other works, E. Barendt, *Broadcasting Law: A Comparative Study*, *op.cit.* p. 52; M. Raboy, 'Introduction: Public Service Broadcasting in the Context of Globalisation' in M. Raboy (ed.) *Public Service Broadcasting for the 21<sup>st</sup> Century* (Luton University Press, 1996) p. 6, and M. Tracy, *The Decline and Fall of Public Service Broadcasting* (Oxford University Press, 1998) pp. 26 – 32.

<sup>18</sup> Council of Europe, Recommendation Rec(2007)3 of the Committee of Ministers to member states on the Remit of Public Service Media in the Information Society, adopted by the Committee of Ministers on 31 January 2007 at the 985<sup>th</sup> meeting of the Ministers' Deputies.

<sup>19</sup> *Constitutional Rights Project and others v Nigeria* (2000) AHRLR 227 (ACHPR 199) para. 36.

<sup>20</sup> See *The National Media Commission v The Attorney-General*, 20 January 2000, Writ No. 2/96, p. 10, Ghana Supreme Court (unreported).

perspectives as they engage in public decision-making”.<sup>21</sup> A PSB that is free from political interference and commercial pressures has the potential to ensure quality programming covering a wide range of interests that respond to all sectors of the public, thereby promoting pluralism and diversity of media content. The special mandates of the UN, the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS), and ACHPR in their 2007 Joint Declaration on Diversity in Broadcasting, specifically call for special measures to promote diversity in PSB. In terms of the Declaration, PSBs must contribute to diversity which should go beyond offering different types of programming and include “giving voice to, and serving the information needs and interests of, all sectors of the society”.<sup>22</sup> An independent PSB should also supplement commercial services to cater for the needs and interests to which the market cannot respond.<sup>23</sup>

A PSB is a national asset as correctly held by the Ghana Supreme Court in the case of *New Patriotic Party v Ghana Broadcasting Corporation*. It must serve the public interest and not partisan interests. A PSB thus requires a supportive legal, political and financial environment that will insulate it against any risk of political or commercial interference in the discharge of its mandate. The UN’s Human Rights Committee (HRC) enjoins all UN member states to guarantee the institutional and editorial independence of PSBs.<sup>24</sup> International and regional bodies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and ACHPR have developed standards on structural guarantees and rules necessary to ensure both the institutional and editorial independence of PSBs.<sup>25</sup> These standards require, among others, that:

- i. The public service remit of a PSB must be clearly defined in law.<sup>26</sup> The Council of Europe’s standards are more comprehensive in that, while member states are allowed to define the remit of their PSBs, they are required to maintain key elements underpinning the traditional public service remit;
- ii. The institutional autonomy of a PSB must be guaranteed through a proper organizational structure. This can be achieved in one or more of the following ways:

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<sup>21</sup> T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, *op. cit.*, p. 12.

<sup>22</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *International Mechanisms for Promoting Freedom of Expression: Joint Declaration on Diversity in Broadcasting*, adopted on 12 December 2007.

<sup>23</sup> See V. Lee and M. Yu, ‘Public Service Broadcasting in Selected Places’ (Research and Library Services Division, Legislative Council Secretariat, Hong Kong, 2006), p. 2.

<sup>24</sup> UN’s Human Rights Committee General Comment No. 34, *op. cit.*, para. 16.

<sup>25</sup> See, among others, UNESCO’ Declaration of Sofia, adopted 13 September 1997; Council of Europe Committee of Ministers, Recommendation N0. R (96) 10, on the Guarantee of the Independence of Public Service Broadcasting, adopted by the Committee of Ministers on 11 September 1996, at the 573<sup>rd</sup> meeting of the Ministers Deputies; and Declaration of Principles on Freedom of Expression in Africa, *op. cit.*

<sup>26</sup> See Council of Europe, Recommendation Rec (2007)3 *op. cit.*, and Declaration of Principles on Freedom of Expression in Africa, *op. cit.*, Principle VI.

- a) PSBs should be governed by a board that is protected against interference, especially of a political or economic nature;
- b) The governing board of a PSB must be appointed in an open and pluralistic manner so that it represents collectively the interests of society in general;
- c) Members of the management of a PSB should be appointed in a manner that is protected against political or other interference;
- d) There should be a clear separation of roles of the governing board and management of a PSB. The latter should be solely responsible for the day-to-day operation of a PSB, including editorial decision-making, while the governing board should be responsible for general oversight of the PSB;
- e) The editorial independence of a PSB should be guaranteed in law and practice;
- f) A PSB must be subject to direct programme obligations that require that its programming should be balanced and impartial, particularly in relation to news and current affairs; and
- g) A PSB should be directly accountable to the public and be open in its operations. This entails that a PSB should publish information on its activities and develop procedures for allowing viewers and listeners to comment on the way it is carrying out its mandate.

The above international standards demonstrate that a PSB requires certain protections against state control and commercial pressures for it to effectively serve the public interest. These protections are both of a legal and practical nature.<sup>27</sup> The legal protections aim at creating an appropriate structure that will ensure that a PSB is able to discharge its mandate in an independent manner. These legal protections include: that the remit of a PSB be clearly stated in law and that it must be governed by an independent board whose members are appointed in an open and pluralistic manner. There must further be a guarantee of its editorial independence in law. The practical protections require that there must be a separation of roles between a PSB's governing board and management. The editorial independence of the institution must also be respected in practice. The placement of direct programme obligations to ensure that a PSB's programme is balanced and impartial, additionally promotes its practical independence.

The resources available to a PSB are also critical to the promotion of its institutional independence and ability to fulfil its public service remit. PSBs are generally expected to provide high quality programmes in all genres and to be a benchmark for quality.<sup>28</sup> The Council of Europe therefore calls upon its member states to ensure "appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions".<sup>29</sup> A PSB must be guaranteed financial

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<sup>27</sup> See T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, *op. cit.*, p. 13.

<sup>28</sup> See G. Born and T. Prosser, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations' (2001) 64 *Modern Law Review* 657 at 671.

<sup>29</sup> Resolution No. 1 on the Future of Public Service Broadcasting, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, December 1994).

independence. This implies the ability to have access to funds reasonably required to enable an entity to discharge the functions it is obliged to perform.<sup>30</sup> The financial independence of a PSB requires that its funding arrangements should not be used to exert directly or indirectly, any influence over its editorial independence and institutional autonomy.<sup>31</sup> A PSB is expected to promote citizen's participation in public life through promoting access to information. This requires that its programming must be of high quality, which generally does not come cheap. The institution must therefore be adequately funded in order to provide citizens with high quality programmes.

### 3. PSB in Botswana

PSB in Botswana was introduced into the country's broadcasting regulatory framework in 1999 through the enactment of the *Broadcasting Act 1998*.<sup>32</sup> This Act introduced three types of broadcasters, one of which is referred to as 'a public broadcasting service'. This service is defined in s 2 of the Act as "a broadcasting service provided by any statutory body which is funded either wholly or partly through State revenues". Although the *Broadcasting Act 1998* refers to a public broadcasting service, it is submitted that this carries essentially the same meaning as PSB. This is evident when one looks at the mandate of this broadcaster. The mandate of a PSB is not addressed in the Act, but in the *Broadcasting Regulations 2004*.<sup>33</sup> Regulation 33 (2) provides, among others, that a public broadcaster shall ensure, as far as is reasonably possible, that the programmes it broadcasts:

- a) Consist of a wide range of subject matter;
- b) Serve the needs of different audiences;
- c) Are accurate, fair and impartial;
- d) Do not contain any material expressing the opinion of the broadcaster on current affairs or matters of public policy;
- e) Provide a public service for the dissemination of information, education and entertainment;
- f) Reflect the diversity of cultural activities in Botswana;
- g) Provide coverage of sporting and other leisurely interests; and
- h) Contain educational material.

The programme obligations of a PSB as outlined in Regulation 33(2) are consistent with the general remit of PSBs discussed above in this paper. The programme obligations reveal a desire to maintain that these services serve the informational needs and interests of the public, and further, that their programmes are fair and impartial.

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<sup>30</sup> See *Ex parte Chairperson of the Constitutional Assembly: In Re Certificate of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) at 823.

<sup>31</sup> See Declaration of Principles on Freedom of Expression in Africa, *op. cit.*, Principle VI and; Council of Europe Committee of Ministers, Recommendation N0. R (96) 10, on the Guarantee of the Independence of Public Service Broadcasting, *op. cit.*

<sup>32</sup> Act no. 6 of 1999.

<sup>33</sup> Statutory Instrument No. 97, 2004.

The public service obligations of DBS are further reinforced by the Editorial Guidelines governing its employees adopted in 2005 (hereinafter, *Editorial Guidelines 2005*). The preamble to these Guidelines clearly asserts that since the services are funded by the public, they exist to serve the public. The *Editorial Guidelines 2005* further impose some obligations on DBS services that are aimed at promoting their public service values. These obligations, among others, are to;

- i) Provide leadership in broadcasting and print media in Botswana through quality news, current affairs and programming free of political, commercial or any other interference;
- ii) Seek balance through the presentation of all sides to a controversy and at the same time recognizing that this may not always be possible in a single programme or news bulletin, but should be done within a reasonable time;
- iii) Present editorial decisions on news merit by investing on the editorial staff the authority for all editorial decisions and directions without any external influence;
- iv) Ensure that during political and election broadcasts the public is fully informed about the policies and programmes of all political players;
- v) Ensure that stories, news items and programmes offer viewers, listeners and readers an intelligent and informed account of issues that enables them to form their own views; and
- vi) Ensure that content of news and programmes is accurate and in context, impartial and balanced.

The public service remit of PSBs in Botswana is clearly articulated in both Regulation 33 (2) of the *Broadcasting Regulations 2004* and the *Editorial Guidelines 2005*. It is further observed that the mandate of a PSB in Botswana compares favourably with the core attributes of PSBs outlined in the various international instruments.

The PSB obligations of the DBS services which have been licensed to provide PSB in Botswana are endorsed in their respective licences. The licence that was issued to DBS to operate RB1 requires the licensee's programming to:

- a) Reflect both the unity and diverse cultures of Botswana to audiences;
- b) Include significant amounts of educational programmes, both curriculum based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to human rights, health, early childhood development, agriculture, culture, justice and commerce and contributing to a shared Botswana identity;
- c) Support by inclusion in its programming traditional and contemporary artistic expressions of Botswana as a way of elevating the country's culture(s);
- d) Contain a comprehensive, authoritative and impartial coverage of news and current affairs in Botswana and around the world to support fair and informed debate at local, regional and international levels; and

- e) Include a wide range of sporting programmes.<sup>34</sup>

Furthermore, the programming format of RB2 as stipulated in its licence requires the station to disseminate programmes that:

- a) Support by inclusion, traditional and contemporary artistic expressions of Botswana as a way of elevating the country's culture(s);
- b) Contain a comprehensive, authoritative, and impartial coverage of news and current affairs in Botswana and around the world to support fair and informed debate at local, regional and national levels.<sup>35</sup>

The discussion above demonstrates that the public service remit of PSBs in Botswana is clearly defined in law and in official policies. The remit of PSBs, as defined in the *Broadcasting Regulations 2004*, is consistent with the international standards on the mandate of such broadcasters. The entities that have been issued licences to provide PSB services in Botswana have clear obligations in terms of their licences that require them to operate as PSBs.

#### **4. Organisational Structure of PSB in Botswana**

For a PSB to effectively execute its mandate, it requires a supportive legal, political and financial environment that will protect it against any risk of political or commercial interference. The organizational structure of a PSB must guarantee both its institutional and editorial independence. The discussion on PSBs' core criteria above highlights some international standards on structural guarantees and rules necessary to promote the independence of a PSB. The following discussion will appraise DBS to determine whether or not its organizational structure suits its mandate as a PSB.

##### ***4.1. Is DBS Governed by an Independent Board?***

DBS is a government department in the Media Division in the Office of the President. The department was formed in April 2004 after the then Department of Information and Broadcasting Services was split into two departments: the DBS and the Department of Information Services (DIS). The Radio Division of DBS oversees the operations of both RB1 and RB2, the two entities that have been licensed to operate as PSBs. There is no board overseeing DBS in the performance of its broadcasting mandate. The Radio Division of DBS is headed by a General Manager, who reports to the director of DBS. The director has oversight over the department's divisions and units, and reports to the Permanent Secretary (PS) in the Ministry of Presidential Affairs and Public Administration in the Office of the President. The PS is the chief accounting officer of the ministry with oversight over all its departments and divisions. A PS is a non-political appointment, but accounts to the minister, who is the political head of the ministry. Government departments are therefore under the control of ministers, who themselves are appointed by the State President.

Entrusting a government department with the responsibility of providing PSB is not appropriate, as there is no guarantee against interference of a political nature. DBS is

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<sup>34</sup> Schedule 4: Radio Botswana Licence, issued by the National Broadcasting Board on 21 December 2001.

<sup>35</sup> Schedule 5: Programming Format, RB2 Licence, issued by the National Broadcasting Board on 26 January 2010.

made even more vulnerable to political interference when one looks at its mandate. Its mandate and that of its sister department, DIS, can be traced to the *Botswana Information Media Directive 1969*. The Directive sets out the functions of state-owned media, which are:

- (i) To interpret the policy and actions of government to the people by a continuing service of information and public relations and campaigns, and by concentrated publicity on particular subjects;
- (ii) To encourage and assist the people of Botswana to take an increasing interest in and responsibility for the economic, cultural and political development of their country;
- (iii) To advise government on public opinion and in the field of public relations generally;
- (iv) To develop and exploit media which will assist Ministries and Departments in performing their routine and extensive duties; and
- (v) To publicise Botswana outside its borders.

A critical examination of the functions of DBS, as set out in the Media Directive, shows that as a government department, it has the responsibility of promoting government policies. It has been the current government's long-held view that state-owned media could not be allowed to operate like the private media, as they are vehicles through which the government of the day communicates with the people that brought it to power.<sup>36</sup> This remains the government's view to date; the Vice President, in a recent parliamentary debate, asserted that "DBS as government sector must continue to disseminate information to people regarding government issues the way it is".<sup>37</sup> This position conflicts with the mandate of both RB1 and RB2, which have been licensed to provide PSB. The two radio stations, although under DBS, are expected to serve the public interest and not act as mouthpieces of the government of the day.

The government acknowledges that a government department is not best placed to provide PSB. In its National Development Plan 8, it recommended the transformation of the then Department of Information and Broadcasting into "a parastatal, independent from the government, in order to enhance the performance of state-owned broadcasters' democratic mandate".<sup>38</sup> The basis of the recommendation was that the corporation status of public broadcasting would "ensure diversity in coverage and would avoid one way communication which tends to be the norm with wholly government controlled media".<sup>39</sup> The government has so far failed to implement this recommendation, which appears to be because the government feels it needs a medium of communication that it can direct and control.<sup>40</sup> The government's attitude is a blatant abuse of national assets because DBS services should be serving the public

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<sup>36</sup> J. Zaffiro, *From Police Network to Station of the Nation: A Political History of Broadcasting in Botswana 1927 – 1991* (Botswana Society, 1991) p. 88.

<sup>37</sup> 'Change at Btv is unthinkable – Merafhe' *The Monitor*, 19 March 2012, Issue: Vol: 13 No. 11.

<sup>38</sup> Ministry of Finance and Development Planning, *National Development Plan 8 1997/98 – 2002/03* (Government Printer, 1997) p. 448.

<sup>39</sup> *Ibid.*

<sup>40</sup> 'RB Will Remain Under Government Control, Says Kwelagobe' *Daily News*, 28<sup>th</sup> June 2002.

interest and not the partisan interests of the government of the day. The position taken by government regarding DBS has resulted in both RB1 and RB2 violating their licence obligations, as the two are not able to operate as PSBs in terms of the *Broadcasting Regulations 2004*.

In those countries which arguably have successful PSBs, the services are provided by public corporations and not by government departments.<sup>41</sup> These corporations are governed by boards that are independent from the state. In South Africa, the governing board of the South African Broadcasting Corporation (SABC) is appointed by the State President on the advice of the National Assembly in a manner that ensures transparency, openness and public participation.<sup>42</sup> The involvement of the National Assembly acts as a safeguard against abuse of the President's appointing powers. The SABC board controls the affairs of the Corporation's freedom of expression and programming independence.<sup>43</sup> Similarly, the British Broadcasting Corporation (BBC) is also governed by the BBC Trust. The appointment of the members of the Trust is executed by Cabinet after a nominations exercise conducted by the Commissioner for Public Appointments.<sup>44</sup> The latter is an independent office and its involvement provides a safeguard against abuse by Cabinet in the appointment of members of the BBC Trust. Botswana can learn valuable lessons from both South Africa and the United Kingdom on the best structure for a PSB.

#### **4.2. Does DBS have Editorial Independence?**

International standards on structural guarantees necessary to ensure the editorial independence of a PSB require that the law or the instrument establishing the public broadcaster, must expressly guarantee its independence.<sup>45</sup> The editorial independence of DBS services is addressed in the *Editorial Guidelines 2005*. The pertinent provision of the Guidelines on the issue provides that the department shall: "Present editorial decisions on news merit by investing on the editorial staff the authority for all editorial decisions and directions without any external influence".

The editorial independence of DBS as a PSB is addressed in the policy document regulating the department in the execution of its mandate. The editorial independence of a PSB would be greatly enhanced if it is expressly provided for in law. For example, the editorial independence of the SABC is guaranteed in the *Broadcasting Act 1999*.<sup>46</sup>

The editorial independence of a PSB should not only be guaranteed in law, but also in practice. In practice, editorial independence is promoted by ensuring a clear separation between the governing body, with overall responsibility for the public media outlet, and managers and editors, who have the responsibility for day-to-day

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<sup>41</sup> Examples include: the British Broadcasting Corporation (BBC) in the United Kingdom, which is established under a Royal Charter and South African Broadcasting Corporation (SABC), which is a public company established under an Act of Parliament.

<sup>42</sup> See section 13 (1) and (2), Broadcasting Act 1999, Act no. 4 of 1999.

<sup>43</sup> *Ibid*, section 13 (11) and (12).

<sup>44</sup> See T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, *op.cit.*, p. 80.

<sup>45</sup> See Council of Europe Committee of Ministers, Recommendation N0. R (96) 10, on the Guarantee of the Independence of Public Service Broadcasting, *op. cit.*

<sup>46</sup> Section 6 (3).

editorial decision-making.<sup>47</sup> The governing body may set general policy, but should not interfere with a particular editorial decision.

Emerging international standards on supervisory bodies of a PSB require that a public broadcaster should be governed by a board that is protected against interference, particularly of a political or economic nature.<sup>48</sup> The members of the supervisory board of a PSB should also be appointed in an open and pluralistic manner, and should represent collectively the interests of society in general.<sup>49</sup> In the case of both RB1 and RB2, there is no supervisory board that oversees the execution of their PSB mandates. The two are under the direct supervision of a government minister by virtue of being operated by a government department. This has made the two broadcasters susceptible to undue interference with their editorial freedom by government ministers. There have been many instances of interference with their editorial independence by government ministers. For example, in November 2008, the Director of DBS forced an RB1 presenter to bring to an end a morning show, which was discussing the recalling of a ruling party parliamentary candidate in the 2009 general elections. The ruling party candidate had been recalled for accusing the government of ‘militarisation of the civil service’ arising from appointment of former military members to key government positions.<sup>50</sup> Again in August 2009, the State President directed the Director of DBS to read a statement announcing the suspension of the then Secretary General of the ruling party on both RB1 and BTV.<sup>51</sup> Employees of state-owned media have been warned not to express issues critical of the government on the premise that they are civil servants performing the job of information officers for the state.<sup>52</sup>

The editorial independence of a PSB could also be promoted through placement of direct programme obligations on the broadcaster to ensure that its programmes are balanced and impartial, particularly in relation to its news and current affairs.<sup>53</sup> This will ensure that a PSB is not used as a government mouthpiece and will thus deliver politically balanced information and programmes to the public. One of the obligations imposed on RB1 and RB2 as PSBs is to ensure as far as is reasonably possible that, their programmes are “accurate, fair and impartial”.<sup>54</sup> In addition, the *Editorial Guidelines 2005* also requires employees of DBS to “ensure that content of news and programmes is accurate and in context, impartial and balanced”. Despite these clear content obligations, which require both RB1 and RB2 to disseminate balanced programmes, it seems the government is turning a blind eye to them. The remarks by the Minister of Presidential Affairs and Public Administration that DBS services shall

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<sup>47</sup> T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, *op.cit.*, p. 9.

<sup>48</sup> Declaration of Principles on Freedom of Expression in Africa, *op. cit.*, Principle VI.

<sup>49</sup> See Council of Europe Committee of Ministers, Recommendation N0. R (96) 10, on the Guarantee of the Independence of Public Service Broadcasting, *op. cit.*

<sup>50</sup> Media Institute of Southern Africa, *So This is Democracy? State of the Media Freedom in Southern Africa 2008*, (MISA, 2009) p.29.

<sup>51</sup> Media Institute of Southern Africa, *So This is Democracy? State of the Media Freedom in Southern Africa 2009*, (MISA, 2010) p.34.

<sup>52</sup> African Media Barometer (2009) ‘Botswana 2009’ (Media Institute of Southern Africa, 2010) p. 31.

<sup>53</sup> T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, *op.cit.*, p. 16.

<sup>54</sup> Broadcasting Regulations, 2004, Regulation 33(2) (d).

continue to operate within the parameters set by the government clearly undermines the programme obligations of the DBS services that have been licensed as PSBs;. As PSBs, they should serve the public interest and not the partisan interests of the government.

The editorial independence of a PSB through the placement of content obligations will be enhanced if there is an independent and effective broadcast sector regulator that will ensure that licensees adhere to their licence obligations. One of the factors that have negatively impacted on the editorial independence of DBS is the absence of an effective broadcast sector regulator to enforce DBS obligations as a PSB.

The *Broadcasting Act 1998* establishes a National Broadcasting Board (NBB), which is tasked with the responsibility of issuing broadcasting licences and regulating the broadcast media.<sup>55</sup> The NBB is composed of eleven members. The Minister of Presidential Affairs and Public Administration directly appoints four members, who serve as officers representing: the Office of the President, the administration of copyright legislation in the Ministry of Trade and Industry; the Department of Cultural and Social Welfare in the Ministry of Youth, Sports and Culture; and the Botswana Telecommunications Authority. The remaining seven members are appointed by the Minister from a list of ten candidates presented to him/her by a Nominating Committee. The Nominating Committee is comprised of a member of the Law Society of Botswana, the Vice Chancellor of the University of Botswana or his/her nominee and a representative of the Office of the President.<sup>56</sup> The Committee nominates ten candidates and submits the list to the Minister for appointment. The Committee is required to invite candidates through adverts in local newspapers and to interview applicants for nomination. The process must be conducted in accordance with the principles of transparency and openness. The Act fails to address how vacancies resulting from vacation of office by members appointed through this process are to be filled. This loophole has resulted in the board going for long periods with vacant positions. Members of the board are appointed for a renewable five-year term.<sup>57</sup>

While there is a semblance of transparency in the appointment of the majority of the members of the NBB, in reality, the regulator is not independent. First, the board is made accountable to the Minister, who is the appointing authority. And secondly, the NBB has no power to make broadcasting regulations. The Minister makes regulations for the board.<sup>58</sup> The lack of administrative independence of the NBB is not in line with international best practice, which requires such institutions to be fully independent.<sup>59</sup> This lack of institutional independence has impeded its mandate to effectively regulate DBS to ensure make sure that it adheres to its PSB mandate.

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<sup>55</sup> Section 10 (1) (a) and (b).

<sup>56</sup> See Section 5

<sup>57</sup> Sections 8 and 6(2), respectively.

<sup>58</sup> See section 23, Broadcasting Act, 1998.

<sup>59</sup> See *Declaration of Principles on Freedom of Expression in Africa, op.cit.*, Principle VII and Council of Europe Committee of Ministers, Recommendation Rec (2000) 23 of the Committee of Ministers to Member States on the Independence of and Functions of Regulatory Authorities for the Broadcasting Sector, adopted by the Committee of Ministers on 20 December 2000 at the 735<sup>th</sup> meeting of the Ministers' Deputies.

### **4.3. Is the Funding of DBS Secure?**

It has been argued that true independence of a PSB is possible only if its funding is secure from arbitrary government control<sup>60</sup> Guaranteeing the institutional and editorial independence of a PSB is not likely to be effective if the government can exert pressure over it through its control over the funding of the institution. International standards on the framework governing a PSB therefore require that its funding must be appropriate and secure to enable it to accomplish its mandate.<sup>61</sup> Public financial support is essential for the successful delivery of a PSB, which is to serve the public interest. At the same time, the funding of a PSB should not be used to exert, directly or indirectly any influence over its editorial and institutional independence.

DBS is funded like all other government departments through the annual national budget. The department is required annually to draw up its budgetary estimates. The estimates are then submitted to the Ministry of Finance and Development Planning's Estimates Committee through the Office of the President under which DBS falls. The Estimates Committee has power to either approve or reject budget proposals from DBS after considering proposals from all government departments.

There is currently no broadcasting fee paid for accessing any of DBS' radio and television services. While RB2 and BTV are permitted to raise revenue through advertisements and sponsorship, DBS is not allowed to keep the money raised for its use. The funds so raised are paid into the government's central fund.

The manner in which DBS is funded is not appropriate as it is not transparent to guard against arbitrariness in the allocation of funds to the department. The objection here is that to allow a partisan government ministry to have a final say on budget proposals of an institution that serves the public interest undermines its independence. In dealing with funding arrangements for democracy-supporting institutions, the South African Constitutional Court has held that the legislature must consider what such an institution reasonably requires and deal with the request rationally, in the light of other national interests. The Court further holds that it is for the legislature, and not the executive arm of government, to provide for funding reasonably sufficient to enable the institution to carry out its mandate.<sup>62</sup>

For DBS to fully execute its PSB mandate, it must be adequately funded to produce quality programmes. However, its funding model is not appropriate because it is not transparent so as to enable the public to know what informed the Department's funding allocation in a given year.

### **5. Conclusion**

Botswana is often cited as an exemplary functioning democracy in Africa. Democracy needs to be institutionalised, strengthened and consolidated through the promotion of universal values and principles of democracy as reflected in international instruments.

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<sup>60</sup> T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, *op.cit.*, p. 17.

<sup>61</sup> See Council of Europe Committee of Ministers, Recommendation N0. R (96) 10, on the Guarantee of the Independence of Public Service Broadcasting, *op. cit.* and *Declaration of Principles on Freedom of Expression in Africa*, *op.cit.*, Principle VII.

<sup>62</sup> *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191, 231.

PSB is considered critical to modern democratic societies because of the important role it plays in providing access to and participation by citizens in public life. Because of its commitment to democratic ideals, one would have expected the government of Botswana to have taken the lead in the promotion of PSB in the country. It is however saddening to observe that the government does not seem to have the political will to promote PSB even though emerging international standards point to the necessity of such public institutions to promote and support democracy.

This paper has demonstrated that, while the PSB remit outlined in Botswana's laws and policies compares favourably with international standards, there are no structural guarantees and rules to promote PSB in the country. The absence of these is attributable to the government's attitude that public media funded through public funds must serve the interests of the government. This is a clear abuse of national assets, which must be used to serve the public interest and not partisan interests. There is an urgent need for the government of Botswana to implement the recommendation in the National Development Plan 8 that DBS should be transformed into an independent public corporation in order to enhance its democratic mandate. This corporation should be governed by a board whose members will be appointed in an open and transparent manner and represent the collective interests of society in general. Any entity tasked with the responsibility of providing PSB should be guaranteed both institutional and editorial independence in law and practice consistent with international standards. The manner in which PSB is organised in Botswana can draw valuable lessons from countries such as South Africa and the United Kingdom, which have in place good legal and practical structures that promote an environment where a PSB can effectively execute its mandate.