

**KEYNOTE ADDRESS BY THE HONOURABLE LADY**  
**CHIEF JUSTICE MRS GEORGINA T. WOOD, AT THE ANNUAL BAR**  
**CONFERENCE HELD ON THE 16<sup>TH</sup> SEPTEMBER, 2013 AT HO**

**UNDER THE THEME:**  
**THE ROLE OF THE LEGAL PROFESSION IN DEVELOPING**  
**A PUBLIC PRIVATE PARTNERSHIP (PPP) REGULATORY**  
**FRAMEWORK FOR NATIONAL DEVELOPMENT**

I am delighted to be here in the company of my colleague Chief Justice V M Lebedev of the Russian Federation, at such an illustrious gathering of Lawyers – a profession that indubitably is of vital importance to Ghana’s continuing stability and sustainable development. It is indeed refreshing to meet as one big family in such a congenial and relaxing atmosphere away from board room wrangling or the hustle and bustle of the court room.

It is a truism that the legal profession has over the centuries, contributed immensely, to the orderly development of this nation. Legal professionals, have helped to define the rights and obligations of the State as well as individuals within the State, delineated the permissible and impermissible conduct of people and communities, influenced the orderly economic and political institutional arrangements of societies and generally set the stage for the distillation of the legal system we currently have. This has largely been achieved by rules, no matter how rudimentary and, which have now translated into distinct legal disciplines which range from constitutional, tort, criminal, contract, commercial, industrial, property

and intellectual property, and, newer ones including finance, trade and investment law.

The theme for this year's conference, which revolves around the burgeoning public sector management concept "Public Private Partnership" (also referred to as a "P3" or P "PPP"), with a special emphasis on the role of the Legal Profession in developing the appropriate legal backbone for this important activity, namely a regulatory framework suited for accelerated national development, is therefore apposite.

Given that PPP is in its embryonic stages in Ghana, I thought that in addressing a large gathering of such learned men and women in the law, whose professional life is centered on legal terminologies, it would be useful if I began with a brief explanation of what is involved in this activity. We can contribute to the development of the framework only if we understand what P3 PPP entails.

There is no one size fit all definition for the concept and therefore a universally accepted definition of the concept is obviously lacking. In its generic sense, it covers a wide range of economic activity which, broadly refers to arrangements between the public sector, as represented by the government and private sectors, with the main object of delivering infrastructure or projects and or services traditionally provided by the public sector. It can take the form of a traditional Joint- Venture, in its varied forms, by both public and private sector entities to undertake a particular business venture or the provision of a social service. It is through this vehicle that a government, suffering from the dearth of resources, is enabled to provide infrastructure and service through the utilization of private

sector financial, human and technical resource, while additionally in the process, is capable of transferring risk to the private sector over a period of time.

Our national policy document on P3 PPP defines it as “a contractual arrangement between a public entity and a private sector party, with clear agreement on shared objectives for the provision of public infrastructure and services traditionally provided by the public sector.”

PPP offers governments the lifeline for forging new strategies to meet the ever growing needs and competing demands of society and in so doing reducing poverty. A typical P3 scheme would include a concession agreement between the government or public sector agency and private sector enterprise which may guarantee a minimum revenue stream for the private sector party or operator to ensure that it earns enough revenue to liquidate the debt incurred to finance the infrastructural facility plus a decent return. Where there is a shortfall in these earnings the government or public sector agency may be obligated to make up for the shortfall. As explained in the national policy document, a typical arrangement would have “the private sector party performs part or all of a government’s service delivery functions and assumes the associated risks for a significant period of time.” This arrangement must clearly be beneficial for developing countries with weak monitoring and accountability systems.

In recent times, efficiently managed PPPs, have contributed to the rapid growth experienced in countries like Brazil and India. These countries which have catapulted as the new growth poles of the world have had major industrial and infrastructural developments fuelled with the constant injection of massive PPP capital.

Ghana is a new frontier on this evolving phenomenon with the Government of Ghana (GoG), after a considerable period of debate and unending discussions within governmental circles, re-affirming its commitment to PPP as an effective tool for financing public infrastructural development so critical to accelerated growth. The Government of Ghana (GoG) has therefore embraced the use of PPPs as a strategic mechanism for procuring, financing and delivering public infrastructure and services, with strict government oversight and regulation.

It bears emphasis that the promotion of PPP initiatives without first creating the appropriate policy, legal, regulatory and institutional environment could result in poor quality, unsustainable projects as well as damage investor confidence. Clearly then, there is the need for the relevant regulatory framework and efficient and effective jurisprudence to govern this new area of development financing, and with Lawyers being an indispensable tool in this entire process. Unquestionably, there will be a strong need for lawyers who understand the principles of intellectual property, contract, regulatory and tax laws that apply in the process chain.

It is well recognized that, with the present state of physical infrastructure, Ghana will be hard pressed to sustain high levels of annual GDP growth over the medium term. Be it in power, roads, ports, airports, urban water, railways, healthcare, education, sanitation, housing, government office buildings amongst others, the country's infrastructure needs are enormous.

I speak in my capacity as the administrative head of the Judiciary and also the Chair of the General Legal Council, poor infrastructure is one of the greatest challenges confronting these two institutions. A visit to court houses in our

regional capitals, not to mention the Districts, a trip to the court houses in Tema, Ghana's industrial and maritime hub, puts the matter of the severe infrastructural deficiency facing the judiciary of Ghana beyond any controversy. And yet, on account of the expanding populations, increasing urbanization and rising per capita incomes, legal rights awareness in spite of all these the demand for judicial justice, higher and higher by the day. Access to justice, we may do well to remind ourselves is a human right! There is therefore a massive and urgent need to increase investment in court infrastructure.

I proceed to explain and state the case of the Ghana School of Law (GSL), the statutory body responsible for legal education in Ghana, which was established by the Legal Profession Act 1960 (Act 32.) Since its establishment however, the GSL has not benefitted from any infrastructural development to meet the challenges posed by increasing student intake over the years. The school now runs three campuses not because it loves to but because of the severe infrastructure deficit. The environment of the main campus, which is located right in the heart of the central business District, is not in the least conducive to teaching and learning, research or clinical work and the training of legal professionals in etiquette and deportment. To address the numerous challenges facing the school, the GLC and the School, as part of its medium to long term measures, has decided to build a multimillion ultra modern Law Village on a 5 acre parcel of land purchased from the University of Ghana, Legon. The main objective of this project is to provide the appropriate facilities for both office and academic use together with the necessary ancillary spaces for faculty, staff and students of the school. But it is obvious that this project, which is neither extravagant, nor wasteful, cannot be financed through budget allocations nor levies or the contributions by the school's alumni which most of us are. There is every justification that P3 holds the key to

the success of this important project and I would therefore urge that we make a case for this to happen in our life time.

The State of Sao Paulo in Brazil I understand launched in early 2013 a PPP for the construction and operation of six courthouses in the state. In The Hague, Netherlands the RGD (Dutch Government Building Agency) has entered into a PPP agreement with a private sector party for the design, building, financing, maintenance and operation of a new courthouse for the Dutch Supreme Court. The range of services to be provided during the operations phase comprises: building services, cleaning, catering, security, ICT infrastructure and waste management. Ghana can borrow a leaf from our Brazilian counterparts in this regard.

It is on account of this reality, namely, that given limited resources, the country's huge infrastructural deficit cannot be met by the public sector alone through budget allocations, that the Ministry of Finance in 2010 established the Public Investment Division to take a lead role in developing Ghana's PPP Programme. The Ministry of Finance has prepared a National Policy on PPP that was approved by Cabinet in June 2011 to serve as the operating framework for its implementation in Ghana. As Lawyers, it is therefore imperative, that we acquaint ourselves with this Policy document. I am informed that the preparation of the National Policy on PPP was home grown as indeed it had input from Ghanaian Lawyers. This is indeed good to know.

A clearly well-defined legal framework is required to enable the establishment and implementation of PPP arrangements and structures. There are a plethora of laws with PPP impact in Ghana, though most are uncoordinated. The uncertainty of the legal regime for PPPs in Ghana results not only in inconsistent approaches to the

participation of the private sector in the delivery of PPPs but it also constitutes a potential risk that may adversely affect the appetite of private sector partners to participate in PPP projects in Ghana.

Commendably, the Ministry of Finance has engaged the services of a Ghanaian law firm as lead consultants for the preparation of legislation governing PPPs in Ghana. A draft PPP law has been prepared and undergoing stakeholder consultations.

The law must provide for such critical issues as the definition, objectives, and guiding principles to be followed in developing P3s; its scope and application. In which case it would be quite useful if we followed the example of other countries by enshrining in our laws a customised definition of PPP; one tailored to meet our peculiar conditions. Other critical provisions would include the bidding process required for procuring PPPs; complaints mechanism and settlement of disputes; institutional framework, that establishes procedures and approvals for contracting out of PPPs; form of contract and contract management; government support for PPPs, and provisions for other related matters. It is important that we acquaint ourselves with the draft provisions and make the relevant input before its final passage into law.

The role of the legal profession in developing a Regulatory Framework for PPPs for national development is critical to avoiding pitfalls and creating the right conditions for success. For the successful implementation of the PPPs scheme in Ghana, the Regulatory Framework, must among others, seek to achieve a right balance between the interests of both the public and private sector partners and also clearly delineate the rights and obligation of the parties.

And the main reason is to foster an enabling environment constituted by stable, reliable long term laws conducive to attracting investors. It is important that the appropriate legal framework in place is such as would minimize both the real and perceived risks by providing legal safe guards with clear and predictable rules for private investment and security of tenure. Reasonable assurances guaranteeing the continuity of operations over the life of the project is imperative as government interference and frequent and sudden regulatory changes may scare away potential future investors in other areas or deter market players from making sufficient investments.

The common legal document that will normally regulate a PPP is a Concession Agreement, and, for the purposes of a PPP, it refers to an agreement between the owner of a facility and the concession owner or concessionaire that grants the latter exclusive rights to operate a specified business in the facility under specified conditions. Some of the common provisions in such agreements include exclusivity, the establishment of the concessionaire as the project company, project financing, lenders security, assets injections, design and construction and so on and so forth.

PPP arrangements and contracts, including Joint Operating Agreements between the operator and co-ventures or equity participants as we can clearly see, are very complex and effective drafting will demand highly accomplished legal expertise and a strong understanding of both general and sector-specific laws including the new P3 law under consideration. As such, lawyers and law firms that can offer these services to clients on both sides of the partnership will be in high demand. Also, lawyers with the ability to add value through their understanding of

complicated legal and regulatory frameworks and difficult negotiations will see no slowdown in their workloads for the foreseeable future.

It follows that for lawyers and the legal profession to be able to play their role effectively, we must forge a radical change in the traditional focus and culture of legal education and practice. Consequently, legal instruction must not continue to focus solely or purely on the traditional law subjects, legal rules, statutes and decided cases only, but rather begin to bring to the fore the economic, political economic, financial and social underpinnings that make the legal rules and principles more relevant to society. In effect, legal education and the legal profession must appreciate, even more, the relevance of and interplay between economics, finance, project financing and execution and societal needs. It is only then that lawyers will begin to be at ease with specialized legal documents, including PPP Concession Agreements, that they might be tempted to consider far too technical for their comprehension. In this regard, there is the need for Lawyers to again acquaint themselves with the rules, customs and practices of international trade and commerce as well as terminologies adopted in international trade and finance.

For government, a sound regulatory framework is crucial for purposes of maximizing benefits by ensuring that PPPs adhere to their obligations, operate efficiently and create value through the optimal use of resources and protect the interests of all stakeholders, including users of the facilities provided by the partnership, affected people, the public at large, the government itself and the private sector. Government also has concerns about social policy and environmental issues, especially in the provision of infrastructural facilities such as roads, harbours, airports, energy generation plants etc.

For the private sector, a sound legal framework must guarantee respect for contracts and contractual rights, respect for the rights and obligations of parties, predictability of the efficient performance of an agreement and consequences of a breach, the uninterrupted and non-disturbance of recovery of costs and repatriation of profits commensurate with risks taken. In which case as has been pointed out on many occasions, an ineffective and inefficient judicial system, with a weak and unreliable Alternative Dispute Resolution (ADR) programme, which has no room for the private and speedy resolution of disputes will certainly not be in our interest as a nation.

The legal profession thus has an important role to play in ensuring that the regulatory framework achieves the needed balance and alignment of the interests of government and the private sector. Such alignment cannot be achieved by economists and public policy specialists alone, but lawyers and even so lawyers in such specialist areas as environmental, human rights, investment law. Various areas of the law which were hitherto perhaps rather dormant would be tested and stressed to great lengths. In the absence of clear, unambiguous and clearly written contracts and unarguable allocation of liability, there would be likely lengthy and complex litigation to establish liability, for losses based on the general law principles of contract and tort. The time for us to work is now so we avoid some of these pitfalls.

Arguably, the legal profession and for that matter Lawyers, constitute one of the key professionals around which PPP would evolve. However, lawyers cannot work in isolation. The GBA should consider collaborating with other relevant professional groups such as, Institute of Engineers and Architects, Consultants,

Institute of Chartered Accountants (Ghana), Ghana Institute of Taxation, to anchor PPP industry in Ghana for the benefit of the entire people of Ghana.

Finally, it is appropriate for lawyers in commercial litigation and with specialized knowledge and skills in ADR and particularly international arbitration to make insightful contribution to the development of the regulatory framework. This is because most business men involved in capital intensive ventures and investments prefer resolving disputes through arbitration and appointment of technical experts. As evidenced from the foregoing, PPPs jurisprudence has a bright future. We live in a fast changing world and will continue to live in a world driven and powered by technology for many years to come and in which PPP would play a significant role in our national growth and development. In order to meet the challenges of the emerging PPP world, Law firms should integrate and combine their expertise in order to be strategically placed to be major players in the industry.

Law firms would do well to establish strategic partnership with external law firms in countries with sufficient expertise on the subject. This would facilitate skills training in complex areas of the P3 economic activity and position local law firms to play a strategic role in the development of the legal framework as well as the implementation of P3 projects.

I therefore commend the Ghana Bar Association (GBA) for their choice of theme. Continuing legal education programmes for its members will continue to remain one of the strong pillars for sharpening members' skills in this new area.

From the above, it is extremely clear that the role of the legal profession in developing a regulatory framework and a comprehensive legal regime for PPPs is critical to attaining a solid and sound foundation and functional regime for a

thriving PPP. However, the relevance and effectiveness of the legal profession in this direction will be more appreciated by society when the legal profession begins to understand and appreciate the profession as a tool for social and economic engineering. This can easily be realized when legal instruction incorporates, and imbibes in students of law the knowledge, importance and relevance of economics, finance, investment, trade, project development and financing and intellectual property, among others, to the legal profession in this 21<sup>st</sup> century and beyond and also when the younger generation of lawyers appreciate value addition to their basic law degree through postgraduate legal education in the relevant specialist areas.

But I am definitely confident that the profession can rise to the challenge. There, currently, exists a pool of lawyers specializing in the trade, finance, investment and corporate law, among other areas, who are making great contribution to the development of our motherland. I am equally aware that our lawyers are already playing an important role in the development of the legal regime for the PPP scheme.

The expected boost in the nation's prosperity, occasioned by vast increase in economic activity and rapid urbanization would no doubt come with its challenges. One of the thorny issues which should engage the attention of lawyers, civil society groups and anti-graft crusaders would be the likely upsurge in organised crime, economic and financial crimes some of which hitherto were unknown in Ghana. It should be anticipated that cyber-crime, internet fraud of unprecedented proportions, procurement fraud, grand corruption, illegal political party financing, tax evasion, blackmail, embezzlement, extortion, money laundering and terrorist financing, would witness an increase and lawyers would be required to intensify

their skills in forestalling and dealing with these crimes. Lawyers would need to determine whether the existing substantive and procedural criminal laws sufficiently take cognizance of these related crimes. If they do not, our duty is to ensure all legal loopholes are taken care of.

The legal profession was relevant in the past centuries when it defined rules and regulations to guide and regulate trade among nations and the general conduct of society. The legal profession is even more relevant in this 21<sup>st</sup> century, and will forever be relevant in defining and maintaining peace and order amongst nations and the human race. We as lawyers, like our predecessors, have a duty to continue to strive to ensure that the legal profession continues to be even more relevant than ever before.

When P3 succeeds, everyone is a winner – the public entity, the private enterprise and the citizens at large. Therefore, as lawyers we need to develop our capacities, improve our knowledge and skills in business and government to understand the interests of both partners. It is only by this that we can help clients in the public and private sectors, build partnerships that succeed and promote national growth and development.

On this note, I am happy once again to perform my national duty of declaring the 2013 GBA conference with such a dynamic and development oriented theme at the heart of deliberations, duly open. I wish you fruitful deliberations.

Thank you for your attention.

