REFORM OF CIVIL LITIGATION IN GHANA

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UNDER THE THEME:
“SAVING THE FUTURE GENERATION FROM THE SCOURGE OF CORRUPTION AND ENVIRONMENTAL DEGRADATION – THE ROLE OF THE LEGAL PROFESSION”

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SALUTATIONS
My Seniors, Colleagues, and Juniors at the Bar;
Ladies and Gentlemen.

CHANGE IS KNOCKING AT OUR DOORS
Some of you were present a decade ago, in 2008, when I spoke at the GBA Conference in Kumasi on legal reform. For those whose memories have experienced slight fading and for you younger ones who were still in High School, I made a number of recommendations including doing away with the collar, wig and bib from the Lawyers’ “uniform”\(^1\). I did my best to alarm my audience with facts about how all the heavy black attire we wear will inevitably lead to heat retention, sweating, then dehydration. Dehydration, as I pointed out then, has a deleterious effect on the Central Nervous System of the brain, leading to impairment of cognitive function, and limiting the ability to think quickly\(^2\). For those of you with hypertension, diabetes and sickle cell diseases, dehydration may precipitate acute illness with undesirable consequences.

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\(^2\) Ibid
Yesterday, after taking off the noose around my neck, which you call a tie, and as I was exercising jurisdiction over a bowl of Omu Tuo, groundnut soup, salmon, the liver of some poor animal, beans, ground ginger, and a lump of kpakpo shito, a team of first aiders rushed in to collect one of our colleagues who had collapsed. I am almost certain he would not have collapsed but for the heavy black cloths, black socks, black shoes, and noose around his neck. So, some of what I said a decade ago fell on deaf ears. And, paradoxically, I am quite honored to stand before all of you today to speak once again about change. And I still have faith and hope, that just one day, change will indeed happen to the legal profession in Ghana.

When I spoke on change in 2008 we were anticipating the blessings of our oil discovery to our profession. I spoke in the context of the effects of globalization, and the savviness, sophistication, and diligence that would be needed to face such forces. I expressed my hope that we would be the initiators of change, lest change catches us unawares; trousers around our ankles or holding sticks (not even knives) in a gunfight.

I stand before you today, no longer so confident that I am heralding change. I am no longer the weatherman giving the forecast of the storm to come. It is here. Hurricane Irma is here, and she stands ready to burst through and dismantle us. It is at our door. I stand here today to ask that we clean up the house, put on our Sunday best, and answer the door with a smile and warm greetings.

The attitude too many of us in this profession have is not in the least commendable. We have gotten so used to the way things are that any kind of change, even beneficial change is irritating – sometimes even painful or threatening. Change is a necessary part of the life of anything in this world, including the processes and procedures we have become accustomed to. Writing in June 2017, just a few months ago, the father of the Rapporteur for this session, Justice S.Y. Brobbey, said:

“One can unfortunately see several parallels between Charles Dickens’ depiction of the practice of the law in 19th Century England, and the practice of the law in Ghana today—at least to the extent that it underscores its slowness of legal processes, its formality and its bureaucracy.”

We must all bow our heads in shame. In the same 2017 Martyrs’ day lecture, copies of which, as my Partner at our law firm, Rowland Atta-Kesson, pointed out to me yesterday, was given to you at registration for this conference, Justice Brobbey, one of the more conservative of our judges, calls for very urgent legal reforms. He says:

“Every day the society changes, those of us in the law have to change. We have no choice just like day follows night and night comes at the end of day…Unfortunately, the law, lawyers and judges are innately conservative…But there are times when we have to accept and indeed
embrace change...the time for change is now...no viable alternative is open to us...Whether we like it or not, changes in the law and law practice are unavoidable, inescapable, indispensable and inevitable...we administer justice not for the benefit of judges...or lawyers but for the benefit of those who patronize our services...

I have expressed my displeasure before about the culture in this country of copying instead of leading. Even more frustrating is the fact that we insist on copying from no other source than the invaders who burdened us with their systems of law and governance. I have mentioned that it is unacceptable for us to wait for over a hundred and fifty years for our British masters to switch to a Witness Statement in place of laborious, resource intensive and time wasting oral testimony by countless witnesses in a case before we do same. Reform has spread throughout many of the jurisdiction that we often look to for persuasive authority or fresh ideas to experiment with here in Ghana. As we find ourselves lagging behind the times once again, we probably have no choice but to copy some more.

The English civil litigation system saw major reforms through the 1995 Woolf Reforms to address cost, complexity and delay. The Woolf reforms also sought to level the playing field between litigants by eliminating wealth gaps and taking away the power of one litigant to bully another with money\(^3\). Amazingly, Woolf’s reforms were the 63rd such review of the system in 100 years\(^4\) – this goes to show that change must necessarily be continuous. Notable amongst the Woolf reforms were the Pre-Action Protocol, Part 36 (out of court settlements which could be done either pre-trial or in appeal proceedings), Judicial Case Management and ADR\(^5\). Judicial statistics reveal number of claims falling as a result of these reforms.\(^6\)

A 1996 study published by the Institute of Civil Justice found that the introduction of judicial case management in the 1990 American Civil Justice Reform Act led to reduced time to disposition\(^7\). The study also found that early use can yield reduction of one and a half or 2 months to resolve cases that typically last at least 9 months\(^8\).

In Australia, the civil litigation process has evolved ordinary case management to bring forth the managerial judge. The managerial judge is the Lord of the litigation process and takes away the

\(^4\) Ibid
\(^5\) Ibid
\(^6\) Ibid
\(^8\) Ibid
ability of pesky litigants to stall the litigation process. The judge even has the power to limit
discovery or, to require that discovery be wholly electronic\(^9\).

Here in Africa, aside the well-known successes in Rwanda, our neighboring Nigeria is a good
example. Docket congestion, delayed resolution of cases, and unpredictability of trial costs were
some of the driving forces behind the reforms of various States’ High Courts (Civil Procedure)
Rules\(^10\). These reforms were geared primarily toward fast-tracking civil justice administration in
the courts. Case Law Management Systems, Fast Track Court Systems, Multi-Door Courthouses,
Court Connected A.D.R. Systems, Simplified Methods of Initiating Actions in Court, Obligatory
Time Linked Pre-Trial Procedural Systems, and Small Claims Courts are amongst the variety of
reforms implemented in the Nigerian States\(^11\).

The Nigerians have taken another interesting step in civil litigation through the advent of a
“front-loading” system in the civil litigation process. Front-loading is, in essence, a method of
expediting the civil litigation process and a method of ensuring that only the most substantive
cases are brought to the court by mandating that the totality of the respective case for all parties
to a suit be brought forward from the very beginning of the suit\(^12\). Order 3 Rule 2 of the Lagos
Rules provide that, “all proceedings commenced by a writ of summons shall be accompanied by
(a) statement of claim; (b) list of witnesses to be called at the trial; (c) written statement on oath
of the witnesses and (d) copies of every documents to be relied on at the trial.” \(^13\) Order 4 Rule 15
of the 2004 Abuja Rules contain similar provisions\(^14\).

The Lagos Rules also apply the front-loading system to interlocutory applications.\(^15\) Accordingly,
an application must be supported by an affidavit, supporting exhibits, as well as a written
address. Equally, a respondent must file a written address in answer to an application along with
a counter-affidavit. Additionally, any claimant who intends to file an application may do so
simultaneously with the filing of the originating motion. Thus, it is no longer necessary in Lagos

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\(^11\) Ibid
\(^13\) Ibid. supra note 11 at p.19
\(^14\) supra. note 13
\(^15\) Ibid at p.4
State to apply for leave to file and serve an application with an originating process\textsuperscript{16}. 

The Nigerians also cast their minds far on the issue of access to justice with respect to the enforcement of Fundamental Human Rights. In 2009, the then Chief Justice of Nigeria introduced the Fundamental Right (Enforcement Procedure) Rules 2009\textsuperscript{17}. The rules change the cumbersome and limiting procedural norms through a provision that we here in Ghana would be able to find in Order 81 of our Civil Procedure Rules. Order 9(1) of Nigeria’s 2009 Rules provides that where at any stage in the course of or in connection with any proceedings there has, by any reason of anything done or left undone, been a failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify such proceedings except as they relate to the mode of commencement of the application\textsuperscript{18}. This procedural change is just one of many which the Fundamental Rights (Enforcement Procedure) Rules introduced to ensure that access to justice in the nature of fundamental human rights are not impeded.

Under the 2009 Rules, when initiating an action for fundamental human rights, there is no need for the applicant to seek leave from the court\textsuperscript{19}. Also, an applicant may engage the court by any originating process accepted by the court\textsuperscript{20}. There is no restriction. An application for enforcement of human rights must be fixed for hearing within seven days from the day of filing and may be heard \textit{ex parte} and such interim relief as the application may demand may be granted where the court is satisfied that exceptional hardship may otherwise be caused\textsuperscript{21}.

I can see some questions rolling through some of your heads. You are thinking, “\textit{what exactly does he want us to change in this great big mess we have inherited? This is years of practice and tradition we are talking about. Are we just supposed to overhaul the whole legal order overnight? Have we not introduced enough reform already?}”

What I am proposing is that we REFORM CIVIL LITIGATION IN GHANA. I will make my proposal in four parts: Part 1 will highlight the Growing Import of Civil Litigation in Ghana,

\textsuperscript{16}ibid at p.5
\textsuperscript{19}ibid
\textsuperscript{20}ibid. at p.9
\textsuperscript{21}ibid. at p.10
focusing on the faith that the people of Ghana have in the legal system; the changing demands on the courts, us as lawyers and the law itself; the increasing willingness of individuals and groups of individuals to challenge the status quo; and the increasing caseloads of judges. Part 2 warns of the Dangers of Refusing to Change, focusing mainly on the social and economic detriments we are likely to encounter should we fail to reform. Part 3 pays respect to some Attempts at Reform which have been made over the years, and tries to identify some of the reasons those reforms have not been able to make their intended impact on the civil litigation process. In the fourth Part, I will make some suggestions as to how we can go about reforming the civil litigation process in a way that addresses the challenges we currently face from their roots, rather than just throwing temporary fixes at the symptoms.

PART 1: THE GROWING IMPORT OF CIVIL LITIGATION IN GHANA

As this nation has slowly matured and found its footing in this foreign concept called Democracy, the people of Ghana have progressively accustomed themselves to another foreign concept known as the Rule of Law and the accompanying processes of utilizing judicial actions to resolve disputes. I commented recently that fortunately or unfortunately, the people of modern day Ghana have dumped our survival, national aspirations, the essence of our being, faith, and much more at the altar of the law and the courts. We have left ourselves open and vulnerable to this slow, expensive, and at times harsh system in the belief that somehow the learned will bring salvation and the judicial system will ultimately dispense justice. Somehow, the Ghanaian people have been convinced and are convinced that civil litigation is their best solution to dispute resolution.

This increased dependence on the law and courts in Ghana has brought a change in the face of the law. Today we can clearly see a change in the popular expectation of the law and the legal processes. It is worth reiterating that Ghanaians are invested in the rule of law. The majority of the population views the law as the last stop – an alternative to meaningless conflict. In short, today’s Ghanaian sees the law as the solution to personal and social problems.

Some of us who have aged some years at the Bar can attest to the changed nature of clients we see now and the peculiar demands these clients have. Our clients now range from the ordinary individual looking to recover land to civil society organizations, NGOs, student movements, social groups, and entire communities looking to make use of the legal system in dispute resolution or in taking reformatory action. Our colleague, Martin Kpebu, exemplifies part of the new class of client looking to use their knowledge and resources to effect societal change through the legal system. Another of our colleagues, Francis Sosu, sought to challenge the frankly antiquated provisions of the Legal Profession Act. We saw ordinary people trooping to
court and taking the initiative to resolve the energy crisis and its impact on them. We have witnessed and applauded the initiative of active, concerned citizens such as Professor Stephen Kweku Asare, who see a social problem from afar and engage the courts to right the wrongs that affect Ghanaians.

The growth of civil litigation in Ghana has spurred a growing range of vehicles for legal services. Like it or not, we are expanding beyond clients laying all their burdens on the lone practitioner or the traditional law firm. Institutions like the International Federation of Women Lawyers (FIDA), the African Women Lawyers Association (AWLA), Women in Law and Development in Africa (WILDAF), the Legal Resources Center (LRC), and the Center for Public Interest Law (CEPIL) are providing Ghanaians with alternative means of interacting with the law.

Some of you in here saw change coming. In the dark of the night, like the five wise virgins of Matthew 25, you refreshed your lamps with new oil and met the new expectations of today’s Ghana. Now the rest of us have to compete with you foreign trained lawyers with a mix of legal traditions ready to deploy in aid of a variety of clients. Some of you saw the wave of human rights litigation coming toward our shores and have dug yourselves into comfortable bunkers with metaphorical turbines; just generating revenue from all over.

Ladies, and Gentlemen, we must change with the times! Everything from the rules of court, to our own litigation strategies, must be subject to reform. We must be ready to go beyond the law; to get involved with non-lawyers; to take advice from experts in various fields of practice; and to embrace the use of technology in civil litigation.

In this new reality we find ourselves in, I think it might be safe to say that our love of the old ways may be our own downfall. It is baffling to think about how in the face of all these changes, access to something as critical as the enforcement of fundamental human rights or even to judicial review can be impeded by non-conformity to a writ system inherited from the 1800s. As we enter the third decade of the 21st century, years after the rest of the world began to view enforcement of human rights and access to justice as vital to good governance, many applications for judicial review and human rights are being dismissed in courts all over Ghana because the judges say there is only one way to initiate an action.

PART 2: DANGERS OF REFUSING TO CHANGE

The average Ghanaian loathes the court system, hates lawyers and distrusts judges. And they are right. In July 2010, the World Bank published a Report titled “Uses and Users of Justice in
Africa: The Case of Ghana’s Specialised Courts. The data for the report was gathered by myself and my team of researchers. Among other things, we gathered data on caseload burden on the judicial system. We found that in the year 2000 there were 28,665 cases filed at the High Court. Between that year and 2009, the High Court peaked at a staggering 48,629 cases in the year 2002. For the 2008/09 legal year, the Court was burdened with 30,071 cases.

What is most significant about these massive caseloads is the data indicating how many of these cases were actually disposed of in each year. The year 2000 only saw 1,777 of the 28,665 cases filed disposed of. That accounts to a measly 6.2% of the total cases filed. The highest disposal rate recorded by the researchers was from 2004/05 year, when the court managed to dispose of 34.3% of the cases filed. Year after year, 66 to 94% of the cases that go to the court are left hanging in the air.

The fact that Ghanaians have begun a migration toward the courtroom does not wipe away the existence of the pre-existing law of the common sphere. In this country, we have constructed a two-faced governance and legal architecture and infrastructure. One is the legal sphere in which we as practitioners operate, and the other is the common sphere which has birthed the “Montie 3”, the “Delta Forces” and the “Invincible Forces.” The kind of disappointment Ghanaians face with the civil litigation system accounts for a growing gulf between law and justice in the courthalls and law and justice in the byways.

During the Maiden Revolutionary Lecture Series in June this year, I warned that part of the problem with our governance system is that it fails to recognize the evolution of these two different domains and is therefore ill-prepared to moderate them. We must act quickly to prevent the total loss of confidence in the power and effectiveness of the courts. Ultimately, displeasure with the civil litigation process does not bode well for the courts or for us as lawyers. Our bottom line is at stake should the civil litigation process fail today’s clients.

The World Bank report I cited earlier indicated that institutions (artificial persons) made up 44.4% of plaintiffs. That was in 2009. They were involved in the majority of commercial cases (53.4% of cases between 2000 and 2008). Let us all project eight years past that and imagine the increase. In the year the report was put together, they were the major users of automated courts and fast track courts, making up 50.8% of the plaintiffs. Institutions will continue to prefer the

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22 July 2010
23 *ibid.* at p.12
24 *ibid*
25 *ibid.* at p.24
26 *ibid*
quick and efficient option in civil litigation. They go that route because they are looking for speed and innovation and are willing to pay to get that.

If we want to keep our clients happy; if we want to keep money flowing our way; if the courts hope to remain the go to place for dispute resolution, then we must necessarily take steps to ensure that we eliminate the practices that are sure to drive away those who come to the courts to resolve matters affecting their lives.

**PART 3: ATTEMPTS AT REFORM**

I am well aware that the rules of court that were in force prior to the commencement of this fourth Republic were updated at various points to suit the times. We were introduced to the current Supreme Court Rules in 1996\(^{27}\) and saw amendments in 1999\(^{28}\). The Court of Appeal Rules came around in 1997\(^{29}\) and have been amended twice - in 1998\(^{30}\) and 1999\(^{31}\). Our current High Court Rules were gifted to us in 2004\(^{32}\) and amended in 2015\(^{33}\).

Aside Case Management Conferences and Written Submissions in lieu of oral evidence-in-chief, the more modern reform efforts to litigation in Ghana are probably the introduction of the automated and specialized courts. In the World Bank’s 2010 report it was discovered that there is no correlation between taking notes in longhand, court automation, court refurbishment, and the disposition of cases. In fact, the report revealed that the delays in the automated courts were comparable to those in the unautomated court. The saving grace of the whole system was the automated commercial court, which had a high rate of case disposals, mainly because of the Rules operated in that court.\(^{34}\)

The fast track courts were found to be plagued by avoidable adjournments, missing case dockets, and slow processing\(^{35}\). This became the case because of the understandable desire of our clients to run away from the normal unautomated court system. The avenue that was created to provide speedy (and initially more expensive) services had become clogged with the suits of litigants

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\(^{27}\) Supreme Court Rules, 1996 (CI 16)
\(^{28}\) Supreme Court (Amendment) Rules, 1999 (CI 24)
\(^{29}\) Court of Appeal Rules, 1997 (CI 19)
\(^{30}\) Court of Appeal (Amendment) Rules, 1998 (CI 21)
\(^{31}\) Court of Appeal (Amendment) Rules, 1999 (CI 25)
\(^{32}\) High Court (Civil Procedure) Rules, 2004 (CI 47)
\(^{33}\) High Court (Civil Procedure) (Amendment) Rules, 2014 (CI 87)
\(^{34}\) *supra*. note 23
\(^{35}\) *ibid*. at pp 37-38
desperate to get away from the alternative, which was slowly draining them of time, patience, energy and money.

Case Management Conferences under C.I. 87 have been a welcome addition to the civil litigation process. Other jurisdictions saw the benefits of this reform some years before we caught on, but, as the saying goes, better late than never.

Written Submissions as an alternative to oral evidence in chief, although a frustratingly late reform, was a welcome relief. If we really wanted to make an impact, written statements should have been accompanied with full written arguments, written defences, written replies, written concluding statements - really, any aspect of civil litigation which does not absolutely require that we herd ourselves, our clients, and volumes of books to court to babble on and on should be filed in writing.

I know I am blaspheming to those who pride themselves in their oral prowess. I am certainly making myself an enemy to the young lawyers in training who are pursuing this profession in the hopes that they will have dramatic careers filled with the kind of endless excitement and courtroom antics they see all the time on TV and in the movies. My heart goes out to the youngsters. And if these reforms go through, do not tell them I was one of those who pushed for them, lest the youth of tomorrow catch me in some dark alley and beat me up.

But these reforms are bigger than our vainglory, our egos and our glamorous fantasies of this profession. We want to increase access to justice. We want to see more clients with resolved disputes. We want to increase confidence in our judicial system. And sometimes that means making things a little more boring.

As I have made clear before, I should never be taken as holding the view that our Law and Justice systems have not benefited in some ways from the reforms we have attempted. However, our attempts at reform have missed three critical things:

1. The real or root causes of the problem have often been missed, and only the symptoms addressed - the High Court Divisions and even the advent of the automated courts only touch on the symptoms of an overburdened court system, when the rules of court are the root cause of the problem.

2. The wrong reform agents have been identified for the task of reform - we have seen time and again in this country that self-regulation only leads to minimal adjustments within a broken system. It is not necessarily always an issue of bad intention, but it is a fact that
when a body is left to govern itself, it will only do so much as is necessary to stave off the external forces crying at its feet.

3. Finally, the reform locus has been misplaced - the problem with the civil litigation system is not first felt when parties come to court. It starts much earlier, when processes have to be filed and served. The electronic systems that we were so excited to have within our courts should have first been situated outside the complex. Electronic filing and notification of court processes can improve efficiency, and also reduce vehicular and human traffic through the courts.

PART 4: RECOMMENDATIONS FOR REFORM

To conclude my lecture, I have eleven ideas for reforming civil litigation in Ghana:

1. REFORM ITEM ONE: LET'S ABOLISH THE WRIT SYSTEM

It bothers me - more than I can ever let on - the way in which Africans (not just Ghanaians) as a people, have historically been so ready and willing to accept things as being rooted and unchangeable. Ghana was the first African country to demand a break from the control of the Crown. Back then, we had the hunger for taking initiative and for taking our country back for ourselves. Where did that spirit go?

The Americans (our tutors in rebelling against the Crown) also adopted the common law system and all its complexities. They, however, opened their eyes sometime in the late 1930s and begun making changes to the writ system to suit themselves. The common complaints about the writ system stemmed from the view that pleadings in particular were “founded on enforced conformity to arcane technicalities.” and “...too random and arbitrary to [achieve] …expediency in legal proceedings.” In the book The Intellectual Origin of Torts, the author makes the very critical point that although the Americans received the English common law as “the basis of their jurisprudence”, they shed those parts that were “inconsistent with their own views of justice and morality or with their own need and circumstances.”

37 Ibid at p.4
38 Ibid
My fellow lawyers, it is time for us to shed the practices and procedures in our civil litigation process that are not consistent with our needs and circumstances! We do not have a court system that is capable of absorbing, properly tracking, and disposing of all the docket appearances, and painstakingly recorded arguments and testimonies of the flood of litigants that want to utilize our courts.

I am here today to recommend that we ABOLISH THE WRIT. Let us do away with the old, cumbersome way of initiating actions in our courts. We can easily abolish the Writ and replace it with Applications for 99% of cases! The average suit should consist of a Motion Paper, moving the court to grant the reliefs sought by the Plaintiff. This Motion Paper must be supported by Affidavits of as many witnesses as would have been called in trial, who depose to facts within their knowledge or belief, on pain of perjury, and in support of the reliefs sought by the plaintiff. These Affidavits may have annexed to them, the originals or certified true copies from proper custody of any documentation that would have been tendered in evidence. Finally, there must be a Statement of Case, indicating all of the law that the Plaintiff relies on in support of her case.

The Defendant, where he has a counter-claim against the Plaintiff, is free to file a Counter Motion. She must also file Counter Affidavits and a Statement of Case in the same manner as the Plaintiff.

The Plaintiff may file her case at any time she is ready. The Defendant should be given 30 days to file her defence. The Plaintiff should be given 7 days to file a Reply, if need be. The judge should be given 30 days to peruse the documentation and set a date within one week of the expiration of that one month for oral arguments, lasting no more than 30 minutes for each party to the suit.

The judge may use this opportunity to seek any clarifications on any of the material that has been filed; or request the parties or their lawyers to file written submissions on any matter in issue that has not been sufficiently addressed in the Statements of Case. The judge then sets a date for judgement within 8 weeks from the date for oral arguments. Applications for extension of time should be made and granted by E-mail and should in total not exceed 30 days. This way, every case would take less than 6 months to be disposed of.

Let me be absolutely clear-this proposal is for 100% of cases to commence by Application. In the 1% of really complicated cases, absolutely requiring oral evidence and the need for judges to watch the demeanor of witnesses, the original motion would be converted to a Writ, and the case proceeded with under the old Rules. In those 1% of cases we will still, as lawyers, be able to put on spectacular performances for our clients.
2. REFORM ITEM TWO: FRONTLOADING IS THE FUTURE

The literature on frontloading describes it as a term used when referring to the act of producing the oral and documentary evidence required in the prosecution of a case or its defence at the onset of the case and not having to get to trial before doing so\(^\text{40}\).

Nigeria’s Justice Agube, J.C.A. said of frontloading: [it] is to quicken the dispensation of justice and...Judges of the High Court, where such procedure is adopted, are no longer adjudicators and/or umpires or interested in the trial of disputes in the courtroom only, but have become managerial Judges who must effectually utilize the technique and tool of case management and judicial control to achieve/facilitate just, efficient and speedy dispensation of justice.\(^\text{41}\)

The procedure forces both parties to present the totality of their cases and, in essence, show their hand to each other and most importantly, to the judge. The frontloading process will reduce time, cost, and the stress associated with civil litigation. In *Gambari and Anor v. Mahmud and Anor*\(^\text{42}\), the Nigerian Court expressed the view that:

“The rationale for the statutory endorsement of [frontloading] is that through its espousal the configuration and delineation of the contours of forensic contests may be attained with considerable facility such that their resolution could be achieved at the earliest opportunity and with minimal costs. The ultimate objectives of this technique, and the other equally innovative features of the rules, are for the evolution of a user-friendly trial procedure in which the Judge can effectively and efficiently manage the flow of cases in the court.

My second proposal is an advanced form of frontloading to be applied in what is to be our new writ-less civil procedure. In this advanced frontloading system, a claimant’s originating motion, her affidavits, and all other evidence, form the application (this may include videos, audio recordings, references to websites—all electronic files easily contained in pen-drives or uploaded securely onto the Judicial Service websites). The essence of implementing frontloading is to make all these documents available from the minute the claimant brings her motion for relief.

When an application is made to the court, the judge should have the full picture of what the true issues between the parties are, and the strength of the respective cases of the parties to the suit. For this reason, it is not only required that the plaintiff provide the totality of her case, but the defendant, intervenors, caveators, and other interested parties must follow the frontloading

\(^{40}\text{Supra. note 11. at p.17}^{\text{40}}\)


\(^{42}\text{[Appeal No. CA/IL/38/2006, delivered on May 11, 2009].}^{\text{42}}\)
process.

Enhanced frontloading is critical to achieving enhanced case management, which is my third recommendation for reform.

3. REFORM ITEM THREE: ENHANCED CASE MANAGEMENT AND COURT ADMINISTRATION

Frontloading is the bedmate of judicial case management. It will enable the judge to make the decision as to whether or not there is a case for which counsel for the claimants should draft submissions; the issues on which any submissions should be based; whether or not there is a possibility for alternative dispute resolution; or even whether or not there is a case for the defendant to answer.

Under our own High Court (Civil Procedure) (Amendment) Rules, 2014 (C.I. 87), case management conferences are part of our civil litigation process. Under the Rules, the parties have to go through all their pleadings, apply for directions, and the court must have “dealt with all the matters” before directions for management of the case and timetables are given.

By enhancing this process, we could increase judicial supervision over cases and ensure that the judge will be better able to steer parties to settlement where there is a potential for that, and will be versed with all the relevant facts and issues to make a quick, but well informed, decision where it is absolutely necessary to go to trial.

In enhanced case management, the judge rabidly enforces the rules on production of the parties of detailed affidavits, witness statements, as well as physical and digital evidence. The judge is key to the determination of what the real issues are between the parties, and will have the discretion to determine if the suit before the court belongs to the 1% of cases which require the taking of oral evidence and arguments from the parties, or can be disposed of on the documents provided through the frontloading process.

In enhanced case management, the judge administers the case with timelines for various stages and enforces the timelines with penalties for breaches. The judge is also not confined to the courtroom. The judge is encouraged to actively investigate issues in contention and is thus no longer a passive arbitrator. For instance, where there is a dispute over title to land, the judge or court should be able to independently write to the Lands Commission for an independent record or extract of who owns the land. The case may then be disposed by putting the court’s findings into the mix of evidence and applying the rules of equity, fairness and justice.

43 Rule 7A of Order 32 inserted.
44 *ibid*. Rule 7A(1)
4. REFORM ITEM FOUR: EMBRACE ICT IN THE DAILY CIVIL LITIGATION PROCESSES

All too often we think of Information and Communication Technology as though it is some far-off concept; alien techniques that would be impossible for us to operate. But honestly, technology is our greatest partner when we are desperate for ways to increase the speed of proceedings, cut cost, and maintain the integrity of our systems. There should be no need, absent special circumstances, for us and our clients to appear in court to hear interim orders when we all have working emails on our phones, that we already walk around refreshing every hour of every day.

We have gotten caught up in the notion that reforms to the court systems must necessarily be made to the court itself. Before claimants come to the court there are cumbersome and costly processes which can be eliminated by going electronic. I have already recommended that we cut travel and waiting time by filing more written processes. Now, I add that these writing processes and the court orders that result from them should be transmitted electronically.

Take this for instance: The ECOWAS Rules of the Community Court of Justice came into effect in 2002 (that is fifteen years ago). Article 32 of those 15-year old rules provide that “the date on which a copy of the signed original of a pleading, including the schedule of documents,... is received at the Registry by telefax or other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings. Of course, this provision is made subject to the provision “the signed original of the pleading, accompanied by the annexes and copies....[are] lodged at the Registry no later than ten days thereafter, but AT LEAST for fifteen years now, emailing, faxing, and otherwise transmitting case documents to the ECOWAS court has been an option for expediency. The rule is fifteen years old now. We can do away with filing the original. Why waste the paper?

Not too long ago I realized the Judicial Service has a shiny new website 45. You can see tabs for vision and mission; you can view all the judges’ names and where they sit; as at the time I checked, you could access the amended Supreme Court Rules, and the Court Fees. You can find pdfs of Writs and other basic forms to fill at home. There are tabs for the Cause List and Judgements. You can lodge complaints to your heart’s desire, and it looks like they even plan on streaming cases online as soon as they can figure it out.

45 https://www.judicial.gov.gh/  Aug. 3. 2017
But you cannot file your cases or check what orders have been given in relation to your suit. Why should that be the case? We should be giving the tech-heads designing these fancy websites some real work to do. We should be able to upload our written arguments, affidavits, and motions directly to a database accessible by the Registrar and the judges assigned to our cases. We should have electronic filing and electronic notification of court processes. If for some reason a judge cannot sit, or a party is in need of an adjournment, why should everyone have to waste time and money appearing in court only to have to turn around and go back home. All that should be handled electronically.

We must start serving processes by WhatsApp. And before you say I am crazy, let us examine what happened in Kwabena Ofori Addo v Hidalgo Energy & Julian Admoako Gymah. In this case, substituted service was ordered to be done by WhatsApp. This was a 2015 case, with Suit No. AC/198/2015 for those of you who think I am making things up. The case was handled by Dr. Kweku Ainuson, a fellow colleague at the University of Ghana School of Law. More recently, he managed to convince another Ghanaian judge that a writ of summons (with statement of claim attached) would definitely find an evasive defendant on Facebook Messenger. Justice Sophia R. Bernasko-Essah agreed and granted the order for substituted service by Facebook in IFS Financial Services Limited v Jonathan Mensah & Stanley Owusu, Suit no GJ563/2017 (again for those who think I am making things up).

It is clear that my ideas are not so revolutionary after all. They are already being implemented, albeit as the exception, rather than the norm. I said at the beginning that change has come already. We are in the middle of change.

5. REFORM ITEM FIVE: CHANGE THE RULES ON ENFORCEMENT OF HUMAN RIGHTS

As much as I hate to recommend that we copy from any jurisdiction, our inability to see past the norm and innovate for ourselves has allowed others to grab some of the good ideas for the reform of civil litigation.

Our Constitution in Article 33, and our High Court Rules of Court in Order 67, have provided enough grounding for the protection of the fundamental human rights of our people.

What we need to borrow from Nigeria is that part of their Rules which allows for the court, where it is satisfied that exceptional hardship may be caused to an applicant before the hearing of
the application, especially when life or liberty of the applicant is involved, to hear the applicant *ex parte*, and order such interim reliefs as the application may demand.


The first 5 reform initiatives above will revolutionise civil litigation in Ghana. And as with any good revolution, it will capture the hearts and minds of the people. Litigation will thrive. Our work will be so much that we probably would not have to limit the number of fresh lawyers coming into the system any longer.

But we are a growing nation with an increasingly educated populace. These people will grow to want to assert more of their rights against government, their employers, multinationals, and product manufacturers. What I am trying to draw your attention to is the need to ensure that we are no longer caught unawares by a surge in litigation. We do not want to return here ten years from now and lament about disappointed clients and anger with the civil litigation system.

To prevent this from happening down the line, we need to start preparing the Commission on Human Rights and Administrative Justice to be the Human Rights court of the future. The rulings of the Commission should have the weight of a judgement of the High Court and should be directly enforceable without any other process. Of course, these judgments would be appealable to the Court of Appeal and the Supreme Court.

7. **REFORM ITEM SEVEN: FIX REASONABLE FEES FOR FILING CASES**

Without a doubt, filing fees are horrible, and many people do not sue because of the fees. That amounts to a denial of access to justice for those people. For the average person who, through no fault of their own, has been injured or has suffered a loss for which they now want to initiate an action to recover one million cedis through insurance, the filing fee for just the writ of summons is Ghc 1500.00!!! This is probably a claimant who has paid hospital bills, paid for vehicle repairs, had to miss out on work. An insurance claim is clearly different from when you engage in a commercial transaction and anticipate going to court. In a scenario of being forced to go to court because of some reckless driver or a fire, or flooding, the insurance claimant and the businessman will both find themselves paying Ghc 1500.00 to crawl through the slow processes

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47 Civil Proceedings (Fees and Allowances) (Amendment) Rules, 2014 (CI 86). at p.6
at the Circuit or High Court. Of course, the rich businessman has the further option of paying the increased amount of Ghc 3000.00 to go through the Fast Track Courts\textsuperscript{48}.

As much as our nation has seen a growing middle class, the average earnings of a Ghanaian household would not be able to absorb the Ghc 20,000.00 filing fee to make a bona fide claim exceeding Ghc 100,000,000.00. How much more the poor and destitute to whom most of the unjust and dastardly situations occur?

It is absolutely unacceptable for the courts to be claiming so much upfront. If there is an award at the end of the suit and an amount is being paid by one party to another, what is to stop the courts from taking a reasonable amount at that point? Why are we restricting access at the door?

These fees do not even work to the advantage of lawyers. Think about all the cases you have missed out on, or those you have pre-financed and lost money on, just because of the high cost of the fees involved in litigation. Would it not have been better if the fees where lower from the onset so that claimants would have money to initiate the action and pay our fees?

Even the courts cannot be said to be winning on this. Afterall, what is better: 100 cases where rich claimants (mostly in Accra and Kumasi) payed Ghc 3000.00 in filing fees, or 100,000 cases where men and women of ordinary means paid Ghc 30.00 to start their litigation? The difference is 2.7million cedis!

We have imposed taxes on all for a National Health Insurance Scheme and also for a Ghana Education Trust Fund. It is time to impose a tax for our Independent Governance Institutions, especially the courts, the Commission on Human Rights and the Legal Aid Scheme. This way, access to these institutions can be absolutely free of filing and other fees.

\textbf{8. REFORM ITEM EIGHT: SHY AWAY FROM SELF-REGULATION}

In 2005, we got a full-fledged Courts Inspectorate and Public Complaints Unit. In the year it was established, the 2005 Judicial Service Report indicated that 635 petitions were filed with the Unit\textsuperscript{49}. At the time of the Report, 107 petitions had been disposed of, 186 were being investigated, and 339 were pending investigation\textsuperscript{50}. The 2015/2016 Judicial Service Report showed a decrease in petitions filed (382 were recorded for the 2015 period and 214 petitions

\textsuperscript{48}\textit{ibid.} at p.10
\textsuperscript{49}\textit{supra.} note 23 at p. 17
\textsuperscript{50}\textit{ibid}
were filed by mid-June 2016). What unfortunately has not changed is the nature of the complaints: Conduct of Judges and Magistrates in cases before them • Abuse of power • Judges displaying open bias in court • Breach of judicial process • Missing dockets, court documents etc. • Corruption on the part of Judges and Staff.

I have suggested before that one of the reforms that needs consideration is the movement of the court processes closer to the truth, through the incorporation of inquisitorial mechanisms that make the courts more efficient through the reduction of the time and related cost of rolling the wheels of justice. These new processes must audit the judgments and orders of the courts for corruption - whether monetary, political, or otherwise.

Of course, this cannot be done unless the making of the rules of court are protected or guarded from the unfortunate charade that is self-regulation. True internal revolutions are near impossible. We need external agents to ensure the success of regulations on the judiciary. Agents other than judges and lawyers must be central to the Rules of Court Committee if this kind of reform is to bear fruit.

Allow me to make my point using article 19(13) of the 1992 Constitution, which provides that an adjudicating authority for the determination of a right or obligation shall be independent and impartial; and where proceedings are initiated by persons before such an adjudicating authority, the case shall be given fair hearing within a reasonable time. Here, I am making the point that we proclaim all the time that “no man shall be a judge in his own cause”. It is not an indictment on the judiciary, but as I have stated, self-regulation tends to entail doing enough to wave off the clamouring for solutions to critical problems.

We need people who are not lawyers and judges to sit with us and resolve the problems that continue to plague us. Afterall, we are not the only ones who come into contact with the courts. Outside perspective and influence is just what we need to effectively and efficiently regulate our courts.

9. REFORM ITEM NINE: EXPAND LEGAL AID

We have legal aid in Ghana. Many people forget that because the legal aid scheme does not function nearly as well as it should. Almost none of the people who are in desperate need of legal

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aid have even heard that something like it exists. This is not a problem exclusive to Ghana. Many developing nations recognize and freely admit that there is much that needs to be done to ensure that the purposes of implementing legal aid schemes are met.

The website for the scheme in Ghana states that “the Legal Aid Scheme is Ghana's effort at ensuring that constitutional democracy, rule of law and access to justice extends to the poor and vulnerable who would otherwise be excluded from the formal justice delivery system. It provides legal assistance for all who seek to defend or enforce the Constitution in accordance with Article 294 of the Constitution.”

The website also makes it quite clear that the scheme basically works on donations and partnerships. If you want to know how well that has worked for the scheme, feel free to stop at their headquarters, stuffed between our new court complex and the high-rise that is under construction for the Attorney-General’s department. You could actually save yourself the trip and Google “Legal Aid Scheme” and view the pictures that come up for Ghana.

The Scheme must be given the resources it needs to implement its mandate. We have no other option. The thirst for justice is direr than the thirst for water, and the longer we ignore it, the closer we get to a popular uprising to quench the thirst for justice.

10. REFORM ITEM TEN: WEEKEND AND NIGHT JUDGES
Access to justice is often denied through circumstances as seemingly insignificant as limiting court sittings to weekdays and daytime. Every day of the week and every night people are held in custody without a hearing. In what is invariably an infringement of their rights, they are detained beyond the 48-hour constitutional limit.

When we speak of human rights, and access to justice, this recommended reform must be one of the things that we absolutely must have in mind. It is a recommendation that requires more human compassion than funding or infrastructural change. We, as lawyers have to be willing to wake up in the middle of the night to serve our clients and those without representation; we have to be able to cut weekend plans short; judges have to be willing to sit patiently for the extra hours to ensure that the ends of justice are met.

That is the only way this works. And if we really got into this profession for the right reasons, we will all find that it is well worth it.
11. REFORM ITEM ELEVEN: CUSTOMARY DISPUTE RESOLUTION

Another thing we have missed while throwing all our focus on the courts is that justice does not lie only in the courts. For many communities in Ghana, chiefs and elders are still the final authority for civil disputes. We should not look to substitute these alternative systems of community justice, but should rather find ways of encouraging them, and making the most of the sense of obligation the people in the community feel toward their chiefs and elders.

There is more to our traditions than customary arbitration. If we can put our weight behind the authority of the customary dispute resolution mechanisms (with the appropriate mechanisms for checking compliance with basic rules such as the rules of natural justice) we will see that indeed, justice can extend its reach outside the court walls.

CONCLUSION

Change has come to our door. More than ever before, Ghanaians are flocking to the courts. Invariably the flood has placed a great weight on the civil litigation system. This weight has clogged the system. Everything is slow. And now all the people who have come to lay their burdens at the altar of the courts are disappointed and upset.

We could ignore the growing displeasure with the system. But that will be foolish. There is a lot we can do to restore confidence in the civil litigation system in Ghana. The reforms we have tried thus far have made slight improvements, but the problem is bigger than what we could see when we made those attempts. We need to be radical, and for that reason I invite you all to seriously consider the recommendations I have made. I especially want us to take immediate steps implement the most critical of the recommendations:

1. Abolishing the Writ System;
2. Advanced Frontloading;
3. Enhanced Case Management;
4. ICT Reforms;
5. Making CHRAJ the Human Rights High Court; and
6. Adjusting Filing Fees so that we are not denying access to justice.

Thank you for sitting so patiently to listen to me.

I hope the next time we meet we will be assessing progress with these reforms, and that no one would collapse under the weight and heat of our black gowns, robes and nooses.