

**CONTINGENCY FEE REGULATIONS: A MEANS OF ENHANCING ACCESS TO  
JUSTICE IN ZAMBIA**

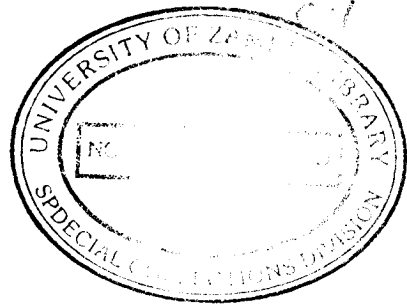
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**MTAJA JOAN**



**A DIRECTED RESEARCH SUBMITTED TO THE SCHOOL OF LAW AT THE  
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**2012**

**DECLARATION**

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## **DEDICATION**

To my wonderful parents, Samuel and Hope Mtaja; I never would have done this without your love and support. The many experiences we have gone through as a family gave me the will and strength to pull through and reach for higher heights.

## ACKNOWLEDGMENTS

This work is the product of the love and support, and gentle (and sometimes not so gentle) pushes and nudges from so many people; people who devoted their time to listen to me, to correct me when I was wrong; people who freely gave their ideas, suggestions, criticisms and advice. It is here that I thank them.

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## ABSTRACT

Access to justice is one of the most fundamental human rights, that is or should be the cornerstone of any democratic society and any country that purports to uphold the Rule of law. There are many ways identified that help to enhance access to justice, one of which is the use of contingency fee arrangements. In Zambia, contingency fee arrangements (arrangements in which a lawyer agrees, subject to certain conditions, to be paid upon successfully winning his client's case) are prohibited by the Legal Practitioner's Act. This is a reflection of the common law prohibition on champerty. However, the prohibition means that many people who have a plausible cause of action are not able to maintain proceedings as they are not able to afford a lawyer. Thus, the vast majority of the citizens are precluded from accessing justice due to the fact they are unable to afford a lawyer.

This dissertation examined contingency fee arrangements and their effect on access to justice. Essentially, it focused on ascertaining whether enabling the use of contingency fee arrangements in Zambia would enhance access to justice.

The dissertation began by considering the history of contingency fee arrangements in the United States of America and England. Further, the study examined the law that prohibits contingency fees in Zambia. The impact of contingency fee arrangements on access to justice was examined through the investigation of contingency fee arrangements in three jurisdictions, namely the United States of America, England and South Africa. The study also captured the opinions of members of the public and representatives from key institutions in order to analyse public opinion regarding access to justice and contingency fees.

Through mainly qualitative research methods and interviews, the study found that the majority of the people are unable to afford legal practitioner's fees as they are exorbitant. The study revealed that the public would welcome the enactment of legislation enabling contingency fees as an alternative to the normal method of remunerating legal practitioners. However, the study also found that such arrangements must be statutorily regulated and supervised to prevent abuse and unethical behaviour by members of the legal profession.

It is therefore recommended that the Legal Practitioner's Act and the Legal Practitioners Rules be amended to allow for the use of contingency fees as a means of enhancing access to justice. In addition, a Contingency Fees Act must be enacted to regulate the contingency fee arrangements.

## CASES

Alabaster v Harness [1895] 1 QB 339

Beinash and another v Ernst & Young and others [1999] (2) SA 116 (CC)

Chief Lesapo v North-west Agricultural Bank and another [2000] (1) SA 409 (CC)

Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) [2001] (4) SA 491 (CC)

Price WaterHouse Coopers Incorporated and 5 others v National Potato Cooperative Limited.  
[2004] Case No. 448/02

Sheard v Land and Agricultural Bank of South Africa and another (2000) (3) SA 626 (CC)

## **STATUTES**

### **Zambia**

The Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia

The English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

The Legal Aid Act, Chapter 34 of the Laws of Zambia

The Legal Practitioner's Act, Chapter 30 of the Laws of Zambia

The Legal Practitioner's Rules, Statutory Instrument No.51 of 2002

The Zambia Law Development Commission Act, Chapter 32 of the Laws of Zambia

### **England**

Solicitor's Practice Rules

Solicitors Act of 1974

The Criminal Law Act of 1967

### **South Africa**

The Contingency Fees Act of 1997 (South Africa)

### **International Instruments**

The African Charter on Human and People's Rights

The International Covenant on Civil and Political Rights

The Universal Declaration of Human Rights

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## CHAPTER ONE

### 1.0 GENERAL INTRODUCTION

#### 1.1 INTRODUCTION

Access to justice is a right that is guaranteed by the Constitution of Zambia, which assures equality before the law to all its citizens.<sup>1</sup> As a right, access to justice is also guaranteed by the Universal Declaration of Human Rights<sup>2</sup> and other International treaties and agreements that the Government of Zambia is party and signatory to, including the International Convention on Economic and Social Cultural Rights and the International Convention on Civil and Political Rights.<sup>3</sup>

Despite the importance of this right, very few, especially the poor and marginalised in society, realise that they have it.<sup>4</sup> Apart from being a basic human right, the United Nations Development Program (UNDP) describes access to justice as an indispensable means to combat poverty, and prevent and resolve conflicts.<sup>5</sup> It includes the capability of people to seek formal and informal justice systems, and exercise influence on law-making and law-implementing processes and institutions.<sup>6</sup> Access to justice therefore, also includes the ability of people to access lawyers and quality legal services.

The majority of Zambians, however, are precluded from accessing justice through access to lawyers because they are unable to afford lawyer's fees. Compared to the National

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<sup>1</sup> The Preamble of the Constitution Chapter 1 of the Laws of Zambia; and Part III which enshrines the Bill of Rights

<sup>2</sup> Article 7 of the Declaration states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

<sup>3</sup> Paralegal Alliance Network. *Report on the Legal Aid Baseline Survey*. (Lusaka: Paralegal Alliance Network, 2010), 13.

<sup>4</sup> Paralegal Alliance Network, 8

<sup>5</sup> United Nations Development Program. "UNDP Practice Note," Last modified: March 9, 2004. Accessed January 25, 2012, [http://www.undp.org/governance/docs/justice\\_PN\\_English.pdf](http://www.undp.org/governance/docs/justice_PN_English.pdf)

<sup>6</sup> Bedner. "Towards Meaningful Rule of Law Research: An Elementary Approach". 2004. Quoted in *A Framework for Strengthening Access to Justice in Indonesia*. Accessed January 26, 2012, <http://siteresources.worldbank.org/.../Resources/A2JFrameworkEnglish.pdf>

population, there are very few private practitioners in the country. According to a study carried out by Nicholas Kahn-Fogel, there is about one lawyer for every 18, 000 people in Zambia.<sup>7</sup> Thus many Zambian law firms are able to charge hundreds of Kwacha an hour, fees that equal or surpass those of lawyers in countries like the United States and the United Kingdom, and that are vastly disproportionate to incomes of other professionals in Zambia.<sup>8</sup> In a country where more than half of the population lives below the poverty line, this means that the average Zambian citizen cannot afford legal representation. This then means that the government bears the magnanimous responsibility of implementing policies that enable more people to access justice through the courts by whatever avenues necessary.

The government has engaged in various programs to enhance access to justice, including the introduction of the Access of Justice Department in the Ministry of Justice.<sup>9</sup> However, little regard is being given to the legislation that governs lawyers who play an important role in the process of accessing justice.

Lawyers in Zambia are governed by the Legal Practitioner's Act<sup>10</sup>, supplemented by the Legal Practitioner's Rules<sup>11</sup>. Both the Act and the Statutory Instrument allow a legal practitioner to make arrangements with the client for remuneration through any other means apart from the use of contingency fees.<sup>12</sup> The Statutory Instrument defines a 'contingency fee' as any sum, whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever, payable only in the event of success in the prosecution or defence of

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<sup>7</sup> Nicholas Kahn-Fogel, "The Troubling Shortage of African Lawyers: Examination of a Continental Crisis Using Zambia as a Case Study," *Selected Works*, (2011): 11, accessed October 30, 2011, [http://works.bepress.com/nicholas\\_kahn-fogel/1](http://works.bepress.com/nicholas_kahn-fogel/1)

<sup>8</sup> Kahn-Fogel, 13

<sup>9</sup> European Union, "GRZ and Cooperating Partners sign MoU on Support to Access to Justice Programme for next three years, 2011 – 2013", *EEAS (European External Action Service): Press Corner*, September 7, 2010, accessed on January 25, 2012, [http://eeas.europa.eu/delegations/zambia/press\\_corner/all-news/news/2010/20100907\\_01\\_en.html](http://eeas.europa.eu/delegations/zambia/press_corner/all-news/news/2010/20100907_01_en.html)

<sup>10</sup> Chapter 30 of the Laws of Zambia

<sup>11</sup> Statutory Instrument No. 51 of 2002

<sup>12</sup> Section 81 (1) (b) of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia; Rule 8 of the Legal Practitioner's Rules, Statutory Instrument No.51 of 2002

any action, suit or other contentious proceedings.<sup>13</sup> A contingency fee agreement is an arrangement between a lawyer and his/her client whereby the lawyer undertakes to provide advocacy or litigation services and agrees to be remunerated only after the case has been won.<sup>14</sup>

Contingency fee arrangements have been identified in various jurisdictions across the globe as a means of increasing the likelihood of people in communities having access to quality legal services and to justice in general.<sup>15</sup> In analysing the use of contingency fee arrangements in South Africa, Labuschagne stated that the arrangements should relate to a genuine case of assisting an impecunious client to assert his rights.<sup>16</sup> Impecunious does not mean totally indigent but in context it would refer to someone who, due to lack of means, is unable to assert his right to relief in the Courts.<sup>17</sup> Therefore, contingency fee arrangements enhance access to justice by allowing people without the means to sustain a case in court a chance to do so.

Access to justice is a right of every citizen and lack of means should not necessarily be a bar to justice. This research, therefore, is intended to gather various views from the public and to recommend the enactment of legislation in Zambia enabling the use of contingency fees as an alternative method of remunerating legal practitioners in order to allow more people to have access to quality legal services and thus enjoy their right to access to justice.

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<sup>13</sup> Rule 2 of the Legal Practitioners Rules, Statutory Instrument No. 51 of 2002

<sup>14</sup> Sheila Borne, ed, *Osborne's Concise Law Dictionary* (London: Thompson & Maxwell, 2001)

<sup>15</sup> Sean Harris (Esq.), "Contingency Fees: The Key to the Court House Even if they Change Locks," *Central Ohio Association for Justice Communicator*, Volume 5, No. 1 (2009): 12, accessed January 31, 2012, <http://www.kitricklaw.com/wp-content/themes/kitrick-from-h/images/contingency-fees.pdf>

<sup>16</sup> E. C Labuschagne, "Contingency Fee Agreements," *Society News* (2002), accessed 31 October, 2011, <http://www.northernlaw.co.za/conti>

<sup>17</sup> Labuschagne, "Contingency Fee Agreements," *Society News*

## **1.2 STATEMENT OF THE PROBLEM**

The *Zambian government* has engaged in many programs with the aim of enhancing access to justice. However, these efforts are principally directed towards the criminal sector of justice. Civil litigation is thus largely left to the exorbitant pricing of lawyers. Since the majority of the citizenry cannot afford to pay their legal fees up-front, many people are unable to access justice as they are unable obtain civil legal services, partly because of the prohibition on the use of contingency fees. It is therefore critical to analyse how the legal community and the society at large would react to the enactment of legislation enabling contingency fee arrangements in Zambia. Furthermore, it is necessary to consider these views and suggest ways in which the current legal structure can address them.

## **1.3 SIGNIFICANCE OF THE STUDY**

The significance of this study lies in the fact that many *Zambians* are not able to access justice due to financial constraints. It is obvious that there is a commitment towards enhancing access to justice, however Zambia is still experiencing obstacles where other avenues to accomplish this objective are concerned. One such obstacle is the prohibition of contingency fees. It is therefore imperative to ascertain whether enabling the use of such arrangements would enhance access to justice.

## **1.4 OBJECTIVES OF THE STUDY**

The objective of this study is to ascertain whether enabling the use of contingency fee arrangements would enhance access to justice in Zambia. The precise objectives of the study are to:

- i.) Consider the history of contingency fee arrangements in England and America. The study shall also consider the advantages and disadvantages of contingency fee arrangements;
- ii.) Analyse the law regarding contingency fee arrangements in Zambia;
- iii.) Consider how contingency fee arrangements can impact on the capacity of Zambians to access justice;
- iv.) Examine the position of different jurisdictions regarding contingency fee arrangements and make a comparative analysis between Zambia and other jurisdictions;
- v.) Obtain and analyse the opinions of the public regarding the enactment of legislation enabling contingency fees; and
- vi.) Make recommendations as to what measures Zambia can take considering the various opinions that shall be expressed

## **1.5 METHODOLOGY**

This study will be mainly qualitative, based on both primary and secondary information. The primary information will be obtained through formal and informal interviews (face-to-face and via email) with various individuals and institutions. These shall include key members of the Judiciary, the Ministry of Justice, the Law Association of Zambia, the Legal Aid Board, lawyers and ordinary members of the public. The face-to-face interviews will be complemented by a questionnaire which will be distributed to people targeted as being relevant to access to justice. A list of people and institutions interviewed and the questionnaire employed shall be attached as an annex.

Secondary sources will include Statutes, judicial decisions, textbooks, articles, reports and other relevant documents on the subject. The internet shall also provide a useful source of information on the subject matter.

## **1.6 BRIEF HISTORY OF CONTINGENCY FEE ARRANGEMENTS IN ENGLAND AND AMERICA**

Contingency fee arrangements have their roots embedded in a common law tort known as champerty.<sup>18</sup> Champerty is an English common law misdemeanour which refers to a bargain between a party to legal proceedings and another who finances or assists these proceedings that the latter will take as his reward for the assistance a portion of anything which may be gained as a result of the proceedings.<sup>19</sup> Champerty was known at common law as a species of *maintenance*, which prohibited a person from engaging in a suit not his own.<sup>20</sup>

In medieval England it was common among noble men and other wealthy individuals within that society to fabricate ways in which they transferred land to each other.<sup>21</sup> Regardless of the fact that they did not have title to that land, they retained a portion of it for themselves as payment. This practice was then proscribed by the doctrine of champerty, a doctrine which survived the voyage to the colonies,<sup>22</sup> as evidenced in the legal provisions of most former British colonies; Zambia in particular.

The prohibition of champerty was accepted in the colonies, but some countries developed ways to go around the prohibitions in order to help the poor.<sup>23</sup> In America, for instance, in the mid 19<sup>th</sup> century, the frontier experience led to the creation of contingency fee arrangements.

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<sup>18</sup> Edwin Upenieks & Tricia T. Thompson, *The Unleashing of Contingency fees in Ontario*, 2, accessed on January 31, 2012,

<http://www.lawrences.com/uploads/publications/Unleashing%20of%20Contingency%20Fees.pdf>

<sup>19</sup> Borne, *Osborne's Concise Law Dictionary*

<sup>20</sup> William Long, "Champerty and Contingent Fees," December 13, 2005, accessed on 30<sup>th</sup> October, 2011

<sup>21</sup> Harris, 12

<sup>22</sup> Harris, 12

<sup>23</sup> Harris, 12

The arrangement involved paying a lawyer a fixed proportion of the recovered amount. These arrangements were pursued usually because the plaintiff had no money but possibly had a just cause.<sup>24</sup> Peter Karsten summarised the situation as follows:

Settlers who had purchased titles from mere squatter-enclosures and had built homes, cleared farms and paid taxes for years, now found themselves ejected, their improvements treated as mere offsets for rent they had not paid to the true land grantees. These [disseised] settlers, desperate for legal representation and with no ability to pay up-front fees, had no choice but to use attorney contingency fee arrangements to defend their rights at trial or on appeal.<sup>25</sup>

According to records, during America's first decades, a variety of litigation involved contingency fees, and clients included creditors who were owed money but had no means of recovering it, wealthy heirs who were denied their inheritance, revolutionary war veterans, American diplomats, Indian tribes and settlers with conflicting land grants.<sup>26</sup> Contingency fees were also a preferred method for the Civil War veterans to sue the Government after the war ended.<sup>27</sup>

From the above, it is obvious that contingency fees were essentially created for egalitarian purposes. The early proponents believed in human equality and thus advocated for the removal of inequalities through allowing people with a good cause to have their day in court.<sup>28</sup>

In a number of countries around the world, even though some jurisdictions still maintain that champerty-proper is illegal, they have made modifications to the rule in the form of conditional and contingency fees. A conditional fee agreement is defined as an agreement with a person for advocacy or litigation services which provides that the fees for the service

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<sup>24</sup> Labuschagne, "Contingency Fee Agreements."

<sup>25</sup> Peter Karsten, "Enabling The Poor To Have Their Day In Court: The Sanctioning Of Contingency Fee Contracts, A History To 1940", *47 DePaul Law Review* (1998): 231, 237-38

<sup>26</sup> Karsten, "Enabling The Poor To Have Their Day In Court."

<sup>27</sup> Karsten, "Enabling The Poor To Have Their Day In Court."

<sup>28</sup> Karsten, "Enabling The Poor To Have Their Day In Court."

are paid only in certain circumstances, usually if the client wins.<sup>29</sup> Under a contingency fee arrangement, the legal practitioner gets a share of the judgment if his client wins and nothing if his client loses.<sup>30</sup> The difference between the two is minimal and the two are often used interchangeably to refer to the other. There is however, a difference, which is that where contingency fees are concerned, a percentage of the judgment is paid to the attorney, whereas conditional fee arrangements pay a reward that is unrelated to the adjudicated amount.<sup>31</sup>

Contingency fee arrangements have been identified as the only practical way to allow poor and indigent people to have their case heard by a jury or judge, as the case may be.<sup>32</sup>

Countries that allow contingency fee arrangements to be made have enacted legislation that deals specifically with contingency fee or conditional fee arrangements, as the case may be.<sup>33</sup>

The legislation prescribes how the arrangements are to be made, the maximum percentage of the recovered amount that a lawyer can claim and other specifics to ensure that lawyers are not unreasonable in their charging and also to protect the interest of both the lawyer and the client.<sup>34</sup> The legislation of three of these countries, namely the United Kingdom, the United States, and South Africa, shall be discussed under chapter three.

## **1.7 ADVANTAGES AND DISADVANTAGES OF CONTINGENCY FEES**

Contingency fees have disadvantages and advantages. There are almost as many proponents as there opponents, but the majority of views considered in this study are positive.

One of the concerns raised by critics of such arrangements is that the net recovery of a plaintiff becomes less because a fraction of the recovered amount must be paid to the lawyer.

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<sup>29</sup> Borne, *Osborne's Concise Law Dictionary*

<sup>30</sup> Emons, Winand, "Conditional and Contingent Fees: A survey of Some Recent Results," accessed on 30 October 2011, [http://www.law.ua.edu/pubs/jlp/files/issues\\_files/vol12/vol12art15.pdf](http://www.law.ua.edu/pubs/jlp/files/issues_files/vol12/vol12art15.pdf)

<sup>31</sup> Winand, "Conditional and Contingent Fees."

<sup>32</sup> Harris, 13

<sup>33</sup> Deborah Pujoue, "Contingency Fees", *Word Press*, accessed on 30 October 2011 <https://dpujoue.wordpress.com>

<sup>34</sup> Winand, "Conditional and Contingent Fees."

However, considering the nature of the risk taken by the lawyer, it is only fair that he be rewarded for both the risk and the outcome achieved.<sup>35</sup>

Another concern that has been raised is that of the degrading of the legal professional. Some critics are of the opinion that such arrangements encourage lawyers to engage in unethical practices so as to win a case in order to have a financial gain. William Ross, in the *Honest Hour 242* stated:

One of the most serious dangers is that contingent fees tend to erode an attorney's judgment... 'When the lawyer in effect invests in a cause of action by taking his fee as a percentage of the recovery, it is easy for him to lose his detachment from the client's interests. He often becomes more of a businessman concerned with his own financial well-being than a proper advisor to the client.' ...[T]he contingent fee is now viewed as giving a lawyer an interest in the actual accident, disaster, or transaction that precipitated the lawsuit and a stake in its outcome.' This...undermines public faith in the judicial system by seeming to encourage the filing of lawsuits that lack merit.<sup>36</sup>

In addition, critics claim that contingency fee arrangements encourage litigation and that this is likely to congest court filings. They also assert that lawyers will only accept good cases and leave certain cases, thereby effectively leaving some people without access to justice.<sup>37</sup>

On the other hand, proponents of contingency fee arrangements suggest that such arrangements encourage lawyers to complete cases in adequate time. They opine that encouraging lawyers to work on an hourly basis promotes dragging of cases because the more hours they work on a case, the more they get paid.<sup>38</sup>

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<sup>35</sup> Upenieks & Thompson, 2

<sup>36</sup> William Ross, "The Honest Hour 242," *Carolina Academic Press* (1996)

<sup>37</sup> Ross, "The Honest Hour 242."

<sup>38</sup> Harris, 13

Some German and Spanish courts have ruled that prohibiting contingency fees is unconstitutional. The courts held that it is a limit on the freedom of contract of both clients and lawyers to engage in whatever arrangements best suits them.<sup>39</sup>

Contingency fees also provide clients with credit (because the fee is only paid upon recovery) and insurance (if the claim fails, the fee is not paid).<sup>40</sup>

More importantly, contingency fees increase access to justice, thus empowering the underprivileged and forcing injurers to internalise the costs of their activities.<sup>41</sup>

## 1.8 CONCLUSION

This chapter has established that access to justice is a right that is guaranteed by the Zambian Constitution and other international human rights treaties. It is generally accepted in many countries that contingency fee arrangements can enhance access to justice. Many have raised concerns over such arrangements, but overall it is accepted that when enabled and regulated by statute, coupled with the integrity of legal practitioners, contingency fee arrangements have proved to be the most practical way of enhancing access to justice where civil litigation is concerned.

The next chapter discusses the legal history of Zambia in relation to its English origins. It shall also consider the law that regulates legal practitioners and the capacity of Zambians to access justice.

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<sup>39</sup> Robert Arnson, "Attorney-Client Fee Arrangements: Regulation and Review" (1980): 90-93

<sup>40</sup> E. Zamir & Ilana Ritov, "Notions of Fairness and Contingent Fees," *Duke Law Journal*, accessed January 26, 2012, [www.law.duke.edu/journals/icp](http://www.law.duke.edu/journals/icp)

<sup>41</sup> Zamir & Ritov, "Notions of Fairness and Contingent Fees."

## CHAPTER TWO

### **2.0 ACCESS TO JUSTICE AND THE LAW IN ZAMBIA**

#### **2.1 INTRODUCTION**

It has been established in the previous chapter that access to justice is a right that is guaranteed by the Zambian Constitution and that contingency fees have been accepted in many countries as a means of enhancing the right to access justice. It is therefore important to discuss access to justice in Zambia and the capacity of Zambians to access it.

#### **2.2 THE LIVING LAW**

There are various theories of law but the one that shall be considered for the purposes of this research is the Sociological school of thought. By definition, sociology is the science of social order and progress.<sup>1</sup> Ihering, one of the sociological philosophers propounded that the law is an instrument for serving the needs of society. The purpose of the law is to further and protect the interests of society, and this purpose should guide juridical thinking.<sup>2</sup>

One sociological approach that dealt with the impact of laws on society is that of Austrian jurist Ehrlich. He drew a distinction between what is traditionally understood to be laws and the norms that govern the life of society. He advanced that there is considerable difference between the two and that there is usually an inevitable gap between the norms of the formal law and of actual behaviour and conduct. His point was that for the law to be 'living', it has to be sought outside the confines of formal legal material, that is, in society itself. Therefore, if the law is not being obeyed, or if the social norm is contrary to the legislation, then that law is dead.<sup>3</sup>

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<sup>1</sup> R.W.M Dias, *Jurisprudence*, 3<sup>rd</sup> Edition, (London: Butterworths, 1970), 481

<sup>2</sup> Dias, 485

<sup>3</sup> Dias, *Jurisprudence*, 489

The point advanced by sociological philosophers is that the law must meet the needs of the people. It is obsolete if it does not reflect the will and activities of the society. The law must therefore be dynamic, because the social activities are never static.

### 2.3 LEGAL HISTORY OF ZAMBIA

According to Elias, one of the inevitable consequences of British rule over dependent territories is the introduction into them of English law at the same time as an existing local law is recognised within limits. He further stated that there is usually express legislation stating the dates from which English law applies to a particular territory. In the case of Zambia, this date is August 17, 1911.<sup>4</sup> The legislation that expressly provides for this is Chapter 11 of the Laws of Zambia, the English Law (Extent of Application) Act. Section 2 of the said Act states:

Subject to the provisions of the Constitution of Zambia and to any other written law-

- (a) the common law; and
- (b) the doctrines of equity; and
- (c) the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
- (d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; and
- (e) the Supreme Court Practice Rules of England in force until 1999:

Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes, shall be in force in the Republic.<sup>5</sup>

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<sup>4</sup> T.O Elias, "Colonial Courts and the Doctrine of Judicial Precedent," (1955), Article first published online: January 18, 2011, *The Modern Law Review* 18, No. 4, accessed January 26, 2012 <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1955...x/pdf>

<sup>5</sup>Section 2 of the English Law (Extent of Application) Act

Thus, common law, the doctrines of equity and any law which was in force in England on the 17<sup>th</sup> of August 1911 is automatically in force in the Republic. In general, many of the Zambian Laws are laws either derived from English Common law or statutes.<sup>6</sup> The main reason given for this is that Zambia is a country of diverse people who originate from different places in central and Southern Africa. There are about 72 ethnic groups in Zambia, each different and distinct in its own right.<sup>7</sup> The solution for the independence government, for the sake of progress, was to retain the British laws of the time, amending them, only slightly at the time, to suit the prevailing conditions, but the bulk of the laws still reflect British law.<sup>8</sup>

As valid as this point is, it goes without saying that there were and are many repercussions in continuing to rely heavily on common law and English law from as far back as before the 17<sup>th</sup> of August, 1911. The reality is that relying on old English laws and common law is prohibitive because the law fails to meet modern needs and is thus obsolete.

## 2.4 ACCESS TO JUSTICE IN ZAMBIA

As already established, access to justice is a fundamental human right that is guaranteed by the Universal Declaration of Human Rights (1948) and other International treaties to which the Government of Zambia is a signatory.<sup>9</sup> Some of these treaties are the International Covenant on Civil and Political Rights<sup>10</sup> and the African Charter on Peoples and Human Rights.<sup>11</sup>

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<sup>6</sup>According to *New Economia*, the Zambian Legal system is primarily based on English Common Law tradition. Zambia is overly reliant on the colonial legal system (many of the Governments inefficiencies can be traced to its decision to adhere to a system that is ill-fitted for post-colonial rule). Accessed March 1, 2012, [www.neweconomia.com/zambia/zambiagovlegalsystem.html](http://www.neweconomia.com/zambia/zambiagovlegalsystem.html)

<sup>7</sup> The Under Secretary for Public Diplomacy and Public Affairs, "Zambia," *The Office of Electronic Information, Bureau of Public Affairs*, accessed January 20, 2012, <http://www.state.gov/r/pa/ei/bgn/2359.htm>

<sup>8</sup> "Zambia Legal System," *New Economia*, accessed March 1, 2012 [www.neweconomia.com/zambia/zambiagovlegalsystem.html](http://www.neweconomia.com/zambia/zambiagovlegalsystem.html)

<sup>9</sup>Articles 7, 8 and 10 of the Universal Declaration of Human Rights

<sup>10</sup>Articles 1, 2, 3 and 14 of the International Covenant on Civil and Political Rights

<sup>11</sup>Articles 2, 3 and 7 of the African Charter on Human and People's Rights

Because access to justice is a human right, therefore, the government is obliged, with the involvement of civil society organizations, to consider a wide range of measures, strategies and interventions that will promote access to justice in the particular circumstances and needs of the nation. Access to justice as a human right also sets universal standards by which the adequacy of any legal aid system may be judged. Thus in observance of its international obligations, Zambia provides guarantees on access to justice in its 1996 constitution.<sup>12</sup>

The Constitution of Zambia guarantees equality before the law to all its citizens and also establishes the Judicature of Zambia. Part III of the Zambian Constitution houses the protection of fundamental human rights and freedoms. In particular, Article 11 recognises and declares every person's fundamental human rights and freedoms including the rights to life, liberty, and security of person; freedom of conscience, expression movement and association; protection of the young from exploitation; and protection from deprivation of property without exploitation.<sup>13</sup> Article 18 of the Constitution provides for protection of the law in criminal matters and accords the accused a number of rights including the right to be assumed innocent until proven guilty, the right to be informed of the offence charged, the right to legal aid, and the right to accord himself legal representation.<sup>14</sup> In addition, Article 28 allows for the enforcement of the protective provisions from Articles 11 to 26 in cases where they have been contravened.<sup>15</sup>

In a bid to enhance access to justice, the Government has provided for legal aid to indigent persons. This service has, however, been confronted with resource constraints both human and financial, which has in turn restricted the number of people who access it.<sup>16</sup>

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<sup>12</sup> Paralegal Alliance Network, 8

<sup>13</sup> Article 11 of the Constitution, Chapter 1 of the Laws of Zambia

<sup>14</sup> Article 18 of the Constitution, Chapter 1 of the Laws of Zambia

<sup>15</sup> Article 28 of the Constitution, Chapter 1 of the Laws of Zambia

<sup>16</sup> Paralegal Alliance Network, 8

### **2.4.1 Administration of Justice**

In Zambia, the administration of justice involves several institutions both governmental and non-governmental including the Judicature<sup>17</sup> and legal providers<sup>18</sup>, the Ministry of Justice, the Director of Public Prosecutions; the Legal Aid Board, the Police and Prison Services.<sup>19</sup>

The Ministry of Justice has two chambers, the Attorney General's office and the Director of Public Prosecutions. These chambers are both established and created by the Constitution.<sup>20</sup>

The Ministry has departments structured along constitutional and statutory mandates. The Ministry of Justice superintends three statutory bodies namely, the Zambia Law Development Commission (ZLDC), Zambia Institute of Advanced Legal Education (ZIALE) and Legal Aid Board.<sup>21</sup>

### **2.4.2 The Role of the Zambia Law Development Commission**

The Zambia Law Development Commission is responsible for ensuring that the law is meeting the needs of the people. In this way it contributes towards enhancing access to justice. The Commission was established in 1996 by the Zambia Law Development Commission Act. According to section 4 (1) and (2) of the Zambia Law Development Commission Act, the functions of the Commission are to research and make recommendations on:

- a) the socio-political values of the Zambian people that should be incorporated into legislation;

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<sup>17</sup> It consists of the Supreme Court, High Court, Industrial Relations Court, Subordinate Courts, Small Claims Court and the Local Courts.

<sup>18</sup> Typically this includes private legal practitioners, Government lawyers employed by the Legal Aid Board and non-governmental organizations such as the Legal Resources Foundation (LRF) and National Legal Aid Clinic for Women (NLACW). As quoted from Patrick Matibini's Study: *Access to Justice and the Rule of Law: An Issue Paper Presented for the Commission On Legal Empowerment Of The Poor*.

<sup>19</sup> Patrick Matibini, "Access to Justice and the Rule of Law: An Issue Paper Presented for the Commission On Legal Empowerment Of The Poor" (2007): 12-17

<sup>20</sup> Article 54 (the creation of the office of the Attorney General) and Article 56 (the creation of the office of the Director of Public Prosecutions), of the Constitution, Chapter 1 of the Laws of Zambia

<sup>21</sup> Matibini, 12-17

- b) the anomalies that should be eliminated in the statute book;
- c) new and more effective methods of administration of the law and the dispensation of justice that should be adopted and legislated;
- d) new areas of the law that should be developed which are responsive to the changing needs of Zambian society; and
- e) the removal of archaic pieces of legislation from the statute book.

(2) Without prejudice to the generality of subsection (1) the functions of the Commission shall be to-

- a) revise and reform the law in Zambia;
- b) codify unwritten laws in Zambia;
- c) review and consider proposals for law reform referred to the Commission by the Minister or the members of the public;
- d) hold seminars and conferences on legal issues;
- e) translate any piece of legislation into local languages;
- f) encourage international co-operation in the performance of its functions under this Act; and
- g) do all such things incidental or conducive to the attainment of the functions of the Commission.<sup>22</sup>

Addressing the House of Chiefs, director of the Commission Miss. Annette Nhekairo stated that it is the mandate of the ZLDC to develop the law to meet the changing needs of society. In accordance with its objectives, therefore, the Commission is required to undertake research and make special recommendations on the need to revise an Act which is not up-to-date with modern needs.<sup>23</sup> This means that the Commission is the legal institution that is responsible for ensuring that the law is abreast with the current needs of society.<sup>24</sup> In this way, the sociological perspective of the function of the law is expressed.

### **2.4.3 The Legal Aid Board**

The Legal Aid Board was established under the Legal Aid Act which was enacted in 1967, although it was amended in 2005. The objective of the Act is to provide for legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them to

<sup>22</sup>Section 4 (1) and (2) of the Zambia Law Development Commission Act, Chapter 32 of the Laws of Zambia

<sup>23</sup>Miss Nhekairo was addressing the House of Chiefs on the intention of the ZLDC to revise the Intestate Succession Act, Chapter 59 of the laws of Zambia because it was not up to speed with modern administration of estates for people who die intestate.

<sup>24</sup>“Toothless law under review to curb rising cases of property grabbing,” *The Lusaka Times*, May 22, 2011, accessed March 24, 2012, <http://www.lusakatimes.com/2011/05/21/toothless-law-review-curb-rising-cases-property-grabbing/>

engage practitioners to represent them.<sup>25</sup> According to Section 3 of the Act, legal aid consists of two things, namely (i) the assistance of a practitioner including all such assistance as is usually given by a practitioner in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and (b) representation in any court.<sup>26</sup>

The Legal Aid Board has offices in Lusaka, Kitwe, Ndola, Kabwe and Livingstone. There are many challenges faced by the Board, including crashing caseloads for the lawyers due to critical shortage of staff, inadequate transport and lack of operational funding.<sup>27</sup> Because of the preceding constraints, the Board tends to limit the grant of legal aid to accused persons facing serious criminal cases mostly in the High Court.<sup>28</sup> It therefore handles a very limited number of civil cases. The woes of the Board are further exacerbated by the fact that the Board is not capable of attracting and retaining lawyers due to the poor conditions of service. The failure to decentralize the Board and its myriad of administrative and logistical problems has resulted in denying many indigent persons especially in rural areas legal aid.<sup>29</sup>

#### **2.4.4 Pro Bono Services**

‘Pro bono’ literally means ‘for the public good.’<sup>30</sup> These are legal services offered at no cost. They may be offered by Non-Governmental Organisations<sup>31</sup> and even private practitioners. According to the study executed by Patrick Matibini, pro bono services are actually available

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<sup>25</sup> Part III of the Legal Aid Act is concerned with legal aid in Criminal cases while Part IV is concerned with legal aid in civil cases.

<sup>26</sup> Section 3 of the Legal Aid Act, Chapter 34 of the Laws of Zambia

<sup>27</sup> Matibini, 16

<sup>28</sup> Matibini, 16

<sup>29</sup> Matibini, 16

<sup>30</sup> “Pro bono”, *Merriam-Webster’s*, [Electronic] 11<sup>th</sup> Collegiate Dictionary

<sup>31</sup> Such as the National Legal Aid Clinic for Women and the Legal Resources Foundation

to any person meeting the set criteria, for example someone who is not in gainful employment.<sup>32</sup>

#### **2.4.5 Current Government Efforts to Enhance Access to Justice**

The Access to Justice Programme was started with Danish support about a decade ago in the Ministry of Justice. The primary focus of the programme has been on the criminal justice system. The Access to Justice Document defines the overall objective as “easier access to justice for all, including the poor and vulnerable, women and children”. The immediate objective has been defined as “improved performance of their mandates by justice agencies and institutions”.<sup>33</sup> The Access to Justice Programme has identified five key justice institutions through which support to the justice sector will be channelled. These are the Judiciary as a separate arm of government; the Police and Prisons Services which operate under the Ministry of Home Affairs; the Directorate of Public Prosecutions and the Legal Aid Board operating under the Ministry of Justice.<sup>34</sup>

The Commonwealth Secretariat gave practical support to Judges in Zambia on assessing civil claims for damages and the taxation of costs, in order to increase people’s access to justice in the Country. The workshop, which was held from the 15<sup>th</sup> to the 18<sup>th</sup> of February 2011, was aimed at strengthening the skills and expertise of registrars and deputy registrars in the country to assess claims for damages filed in civil courts and the role of the court to assess the costs of lawyers.<sup>35</sup>

On the 7<sup>th</sup> of September 2011, the Government of the Republic of Zambia, represented by the Ministry of Home Affairs, the Judiciary signed a Memorandum of Understanding with the

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<sup>32</sup> Matibini, 16

<sup>33</sup> Access to Justice Programme Document 2009-2011, Final Draft May 2008.

<sup>34</sup> Thomas Krimmel, Dick Chellah and Henry Kabinga, “Capacity Assessment of the Access to Justice Institutions,” 14, accessed February 24, 2012, [www.gtz.de/.../en-civil-society-capacity-assessment-justice-institutions-report.pdf](http://www.gtz.de/.../en-civil-society-capacity-assessment-justice-institutions-report.pdf)

<sup>35</sup> Common Wealth Secretariat, “Strengthening Access to Justice in Zambia,” *Common Wealth News*, accessed February 24, 2012, <http://www.thecommonwealth.org/news/190591/163072/234549/010311zambiacourts.htm>

European Union, the Royal Danish Embassy and German Technical Cooperation, to provide support to the justice sector for the years 2011 to 2013.<sup>36</sup> The support allows for a significant scaling up of activities under the Access to Justice Programme. The programme will contribute to establishing a more efficient system for processing cases; improve coordination in the sector; enhance support to vulnerable people to access justice at all levels; increase use of non-custodial sentences; reduce overcrowding in prisons and construction of justice houses in five provinces.<sup>37</sup>

It is important to note that access to justice in Zambia has largely been viewed from the perspective of Criminal law. When asked why access to justice in Zambia is biased towards criminal law, Mr. Davies Chikalanga<sup>38</sup> explained that the criminal justice system has a myriad of problems including poor prison conditions, lack of information on the part of the accused, poor training of law enforcement personnel and a general lack of availability of well-trained personnel in justice institutions.<sup>39</sup> He, however, agreed that the Civil justice system also required particular attention.

#### **2.4.6 Challenges to Access to Justice**

In a study conducted on behalf of the Institute for Security Studies, Richard Bowd identified four major challenges to access to justice common among three countries namely, Sierra Leone, Tanzania and Zambia. These challenges are high levels of illiteracy, lack of information, weak mechanisms of justice and poverty.<sup>40</sup>

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<sup>36</sup> European Union, “GRZ and Cooperating Partners sign MoU on Support to Access to Justice Programme for next three years, 2011 – 2013.”

<sup>37</sup> European Union, “GRZ and Cooperating Partners sign MoU on Support to Access to Justice Programme for next three years, 2011 – 2013.”

<sup>38</sup> Access to Justice Expert, Head of the Access to Justice Department at the Ministry of Justice

<sup>39</sup> Mr. Davies Chikalanga, interview by Joan Mtaja, January 30, 2012

<sup>40</sup> Richard Bowd, “Access to Justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia,” *Institute for Security Studies Policy Brief* 13, (2009): 2

Poverty, being the factor on which this study is based, affects access to justice more profoundly than the other factors. The principal barrier posed by poverty is the inability to meet the costs of legal representation.<sup>41</sup> In Zambia, 64% of the population is classified as living below the national poverty line, while 51% of the population is classified as ‘extremely poor’.<sup>42</sup> Thus, because of these high poverty levels, the services of professional lawyers are beyond the reach of many.<sup>43</sup>

## **2.5 THE LEGAL PRACTITIONER’S ACT AND ITS IMPACT ON ACCESS TO JUSTICE**

The remuneration of legal practitioners is provided for and regulated by Part IX of the Legal Practitioners Act<sup>44</sup>. There are different requirements for contentious and non-contentious business. For both types of business, section 70 provides for the Chief Justice (in non-contentious business) or the High Court Rules Committee (in contentious business) to make general orders as to the remuneration of practitioners. Where agreements are concerned, section 74 states that whether or not an order is in force a practitioner and his client may enter into an agreement with respect to remuneration for non-contentious business, which agreement may provide for remuneration either by gross sum, commission or percentage, or by salary or otherwise.<sup>45</sup> Section 76 of the Legal Practitioner’s Act gives legal practitioners the power to make written agreements as to remuneration for contentious business, which remuneration shall be either by a gross sum, or salary, or otherwise. Section 80 (1) (a) and (b) further states:

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<sup>41</sup>Bowd, 3

<sup>42</sup>Zambia Country Report, “Multi-Sectoral AIDS Response Monitoring and Evaluation Biennial Report,” (2006 – 2007): 11

<sup>43</sup>Paralegal Alliance Network, 8

<sup>44</sup>Chapter 30 of the Laws of Zambia

<sup>45</sup>Section 74 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia

(1) Nothing in section seventy-six, seventy-seven, seventy-eight, seventy-nine or eighty shall give validity to:

(a) any purchase by a practitioner of the interest, or any part of the interest, of his client in any action, suit or other contentious proceedings; or

(b) any agreement by which a practitioner retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success of that action, suit or proceeding...<sup>46</sup>

Contingency fees have been defined as fees paid to a legal practitioner in the event of success of the suit.<sup>47</sup> The above provisions mean that the Legal Practitioners Act expressly forbids contingency fees in contentious business, which is what is contemplated by section 80(1) (b).

In fact, according to the Legal Practitioners' Practice Rules<sup>48</sup> "contingency fee" means any sum, whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever, payable only in the event of success in the prosecution or defence of any action, suit or other contentious proceedings.<sup>49</sup> The Rules further stipulate in rule 8 that a practitioner who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding.

The Legal Practitioner's Act and the Legal Practitioner's Rules are a reflection of the common law position on champerty and maintenance, which prohibited bargains between a party to legal proceedings and a legal practitioner that the practitioner be paid a portion of the recovered amount upon winning the suit.<sup>50</sup>

As earlier alluded to, poverty has an adverse effect on access to justice. In his study, Mr. Matibini stated that legal representation costs are prohibitive of access to justice and this

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<sup>46</sup>Section 80(1) of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia

<sup>47</sup>Borne, *Osborne's Concise Law Dictionary*

<sup>48</sup>Statutory Instrument Number 51 of 2002

<sup>49</sup>Rule 2 of the Legal Practitioners' Practice Rules, Statutory Instrument Number 51 of 2002

<sup>50</sup>Borne, *Osborne's Concise Law Dictionary*

*means that most poor people are unable to instruct legal practitioners to represent them in courts. He also stated that many poor people are unable to seek the services of a legal practitioner because of the ‘exorbitant’ fees charged by legal practitioners.*<sup>51</sup>

According to Nicholas Kahn-Fogel, who also conducted a study in Zambia, Zambian lawyers charge very high fees that are unattainable to the majority of Zambians.<sup>52</sup> He added that allowing contingency fees would allow more people, apart from just the wealthy, to access quality legal services<sup>53</sup>

At present, justice is generally only available to the richest among us, as well as some of the poorest among us through legal aid.<sup>54</sup> Contingent arrangements offer a private mechanism to facilitate access to justice for the largest segment of society, that is, individuals that fall in between.<sup>55</sup> This group is realistically often left without legal recourse because of financial constraints.<sup>56</sup>

The above situation means that the Zambian society has a need that is not being met by the law, that is, the need to be able to access quality legal services even though one is poor. The Legal Practitioner’s Act and the Legal Practitioner’s Rules, while reflecting the common law position on champerty, do not take into account the importance of enabling contingency fees.

Therefore, the Zambian society has a need which is not being met by the law. According to the sociological school of the thought, this means that the law is obsolete and must be revised to meet those needs.<sup>57</sup>

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<sup>51</sup>Matibini, 16

<sup>52</sup>Kahn-Fogel, 11

<sup>53</sup>Kahn-Fogel, 11

<sup>54</sup>Upenieks & Thompson, 2

<sup>55</sup>Upenieks & Thompson, 2

<sup>56</sup>Upenieks & Thompson, 2

<sup>57</sup>Dias, 489

## **2.6 CONCLUSION**

This chapter has considered the sociological school of thought that perceives the law as being a reflection of social needs and activities. It has also been established that the history of the law in Zambia is such that the current law is largely derived from old English laws and common law and that relying on these two sources is prohibitive as the law fails to meet modern needs and is thus obsolete from the sociological point of view. The chapter has also considered access to justice in Zambia, including government efforts and the challenges being encountered. More importantly, the chapter has considered the Legal Practitioners Act and its impact on access to justice.

The next chapter discusses how contingency fee arrangements have been effected in the United States of America, South Africa, and England. This is in order to examine how enabling contingency fee arrangements have affected access to justice in the specified countries.

## CHAPTER THREE

### **3.0 THE CHARGING OF CONTINGENCY FEES IN THE UNITED STATES OF AMERICA, ENGLAND, AND SOUTH AFRICA**

#### **3.1 INTRODUCTION**

The previous chapter examined access to justice in Zambia and the capacity of Zambians to access justice. In order to illustrate the importance of contingency fee arrangements and how they enhance access to justice, it is important to examine how contingency fees have been effected in other jurisdictions and how these arrangements have affected access to justice.

#### **3.2 THE UNITED STATES OF AMERICA**

The United States of America adopted the position in the UK, which banned champerty and maintenance, until the late eighteenth century.<sup>1</sup> However, the beginning of the nineteenth century saw a change in civil litigation as the ban was lifted for the sole purpose of enabling impecunious litigants to access the courts and inevitably, justice.<sup>2</sup> According to the UK Lord Chancellors Department, there is no jurisdiction other than the States in America that extensively operates a contingency fee system.<sup>3</sup> Aranson has observed that America's use of contingency fees is unmatched by any other country.<sup>4</sup> This means that America is the best jurisdiction to refer to in any discussion on contingency fee arrangements. According to Aranson, all fifty states allow contingency fees. It is however, important to note that there are significant differences in the operation and control of the contingency fee schemes.<sup>5</sup>

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<sup>1</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*, (2007), accessed March 25, 2012, [http://www.hkreform.gov.hk/en/docs/rconditional\\_e.pdf](http://www.hkreform.gov.hk/en/docs/rconditional_e.pdf)

<sup>2</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>3</sup> "Contingency Fees," *The United Kingdom Lord Chancellor's Department Report*, (1989 : Cmnd 571): para 2.13

<sup>4</sup> Allison F. Aranson, "The United States Percentage Contingent Fee System: Ridicule and Reform From an International Perspective," *Texas International Law Journal* 27, (1992): 755

<sup>5</sup> Aranson, "The United States Percentage Contingent Fee System: Ridicule and Reform From an International Perspective." In New York, Michigan and Delaware statute has overruled initial restrictions against contingency fees while in New Jersey, California, Alabama, and Ohio they are allowed subject to stringent regulations and controls.

Contingency fees are primarily used for financing arrangements in personal injury and other tort litigation. They are also used for debt recovery, workmen's compensation, corporate business practice, taxation and contested wills.<sup>6</sup> On the grounds of public policy, the use of contingency fees is proscribed, such as in criminal and matrimonial matters.<sup>7</sup>

There are various methods which states use to fix the contingency fee. However, it is usually a percentage of the sum recovered. A lawyer and his client are however at liberty to agree to apply a fixed percentage rate to the whole sum recovered.<sup>8</sup> Alternatively they may agree a changing percentage rate as the amount recovered increases, depending on the additional skill and effort required. In addition, the lawyer and his client may agree a series of increasing percentage rates applied to the recovery, depending on the stage reached in the proceedings.<sup>9</sup> Typically, a contingency fee arrangement may provide that the lawyer's fee will constitute 25% of the amount recovered if the case is settled, or 30% if the case proceeds to trial.<sup>10</sup>

The American system of contingency has been met with as much criticism as praise. Critics of the system state that because of the percentage basis of the fee, lawyers may be likely to choose to represent clients with frivolous claims, to pursue cases for their own interest rather than the interests of their clients, and to extract excessive fees at the conclusion of the case.<sup>11</sup> It is however important to note that critics like Aranson are not necessarily against such outcome related fees for they agree that such fees are valid and essential to facilitating access to justice in the United States. However, the critics propose that reforms should be made so as to maintain the advantages and mitigate the disadvantages of the contingency fee system. Thus it is generally accepted that contingency fee arrangements are the only system yet devised that permit the ordinary citizens equal access to the courts, as well as guaranteeing the availability

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<sup>6</sup> J. Kakalik & N Pace, "Costs and Compensation Paid in Tort Litigation" (1986). Quoted at footnote 6 by the *Law Reform Commission of Hong Kong Report*, "Conditional Fees."

<sup>7</sup> Kakalik & Pace, "Costs and Compensation Paid in Tort Litigation".

<sup>8</sup> Kakalik & Pace, "Costs and Compensation Paid in Tort Litigation"

<sup>9</sup> Aranson, 755

<sup>10</sup> Aranson, 756

<sup>11</sup> Aranson, 755

of counsel equally skilled and knowledgeable as those available to the wealthy and corporate classes.<sup>12</sup>

Where costs are concerned, in the US each party to the proceedings bears his own costs, except where the litigation is vexatious or an abuse of process. When this rule is supplemented with contingency fee arrangements, it means that it costs the plaintiff almost nothing to bring a civil claim.<sup>13</sup>

The Hong Kong Report concluded its considerations on America's contingency fees as follows:

“It seems, therefore, that the way in which contingency fees are operating in the American civil litigation system flows from the interplay of a number of factors...It is not possible, for instance, to attribute the high level of litigation to contingency fees or any one factor alone. In fact, when Aranson criticised the American percentage contingency fee system he made it clear that he believed “some form of contingency fee system is essential to facilitate access to the justice system in the United States.”

Thus, from the above, contingency fees have been recognised in the United States as a sure way of enhancing access to justice. The important thing however, is to put in place measures to mitigate the disadvantages that these arrangements may cause if left untrammelled.<sup>14</sup>

In conclusion, in America Contingency fees are the principal financing arrangements in personal injury and other tort litigation. They have in a sense ‘opened the courthouse doors to the poor.’ However, they have attracted some criticism as lawyers may be likely to choose to represent clients with frivolous claims, and to pursue cases with their own interests in mind rather than their clients’ interests. This means that it is fundamental that lawyers maintain their integrity if contingency fees are truly to be seen as enhancing access to justice.<sup>15</sup>

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<sup>12</sup> Aranson, 755

<sup>13</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>14</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>15</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

### 3.3 ENGLAND

Until recently, the only outcome-related arrangements that were allowed in England and most of the United Kingdom are called Conditional Fee Arrangements or CFA's.<sup>16</sup> These arrangements are substantially different from contingency fee arrangements in that essentially conditional fees are based on the traditional basis of calculation of legal fees. Conditional fees only depart from the traditional basis because if the civil lawsuit is lost, then no legal fees will be charged. However, when the case is won, an additional percentage of the traditional legal fees is charged.<sup>17</sup> The additional percentage is usually referred to as the 'uplift fee' or the 'success fee'.<sup>18</sup>

Until the introduction of CFA's in 1999, no form of outcome related arrangements were allowed in England.<sup>19</sup> The ban of contingency fees stemmed from the rule against maintenance and champerty. This rule was essentially developed to protect what was perceived as an abuse of the judicial process in medieval England.<sup>20</sup> At the time, maintenance was used by the nobles and officials as a tactic to oppress individuals and protect the interests of the rulers.<sup>21</sup>

Although champerty and maintenance fell into disuse as torts and crimes, they were duly abolished in 1967 by the Criminal Law Act.<sup>22</sup> The report by the United Kingdom Law Commission recommended that criminal and tortious liability for champerty and maintenance be abolished<sup>23</sup>. This was duly implemented by the Criminal Law Act.<sup>24</sup> The Act, however, maintained the position that the abolition would not affect the rule as to the cases in which a

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<sup>16</sup> Peter Malamed, "An Alternative to the Contingent Fee? An Assessment of the Incentive Effects Of The English Conditional Fee Arrangement," *The Cardozo Law Review* 27, No.5: 2436

<sup>17</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>18</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>19</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>20</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>21</sup> *Alabaster v Harness* [1895] 1 QB 339 per Lord Esher M.R at 342.

<sup>22</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>23</sup> The United Kingdom Law Commission, "Proposals for Reform of the Law Relating to Maintenance and Champerty" (1966) No 7.

<sup>24</sup> Sections 13(1) and 14(1) of the Act effectively abolish the torts and crimes of champerty and maintenance

contract is to be treated as contrary to public policy or otherwise illegal.<sup>25</sup> This was in response to the Commission's recommendation that any champertous arrangements, including lawyer-client contingency fee arrangements, should remain unlawful and contrary to public policy. In effect this meant that outcome related fee arrangements were still regarded as contrary to public policy.<sup>26</sup>

In addition, contingency fees are prohibited by section 59 of the Solicitors Act of 1974.<sup>27</sup> The Solicitors Practice Rules of 1988 proscribe contingency fees in much the same way as the Legal Practitioners (Rules) in Zambia.<sup>28</sup> Further, the rules define a 'contingency fee' as "any sum (whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentious proceeding."<sup>29</sup>

In 1989 the United Kingdom Government published a Green Paper wholly devoted to the subject of Contingency fees and outcome related fee arrangements. The paper explored various arguments for and against the introduction of outcome related fees by assessing the risks that allowing them would entail in terms of conflict of interest, the United States experience, access to justice and allowing more choice to the consumer.<sup>30</sup>

Shortly after the publication of the Green paper, a White Paper (*Legal Services: A Framework for the Future*) was issued in which the government proposed the removal of the prohibition on these fee arrangements in all cases except criminal and family proceedings. This then resulted in the enactment of section 58 of the United Kingdom Courts and Legal Services Act of 1990.<sup>31</sup> The Act allowed speculative actions based on the Scottish model and rendered

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<sup>25</sup> Section 14(2)

<sup>26</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>27</sup> Section 59 of Solicitors Act of 1974 states:

<sup>28</sup> Rule 8 (1) states that: "A solicitor who is retained or employed to prosecute any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding."

<sup>29</sup> Solicitors Practice Rules 1988 rule 18(2)(c)

<sup>30</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

<sup>31</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

enforceable, subject to various conditions, a conditional fee agreement.<sup>32</sup> The Act set out stringent conditions regarding the regulation of the percentage of the uplift fee. The Lord Chancellor was empowered to prescribe the types of cases for which conditional fee agreements would be enforceable and to determine the permissible level of uplift fee.<sup>33</sup>

Because of the ‘loser pays’ principle, a conditional fee agreement alone would not protect the client against payment of the opponent’s legal costs in the event of unsuccessful proceedings. Thus, the introduction of conditional fee agreements in England led to the development of “after-the-event insurance” (ATE insurance).<sup>34</sup> The insurance means that an insurance company pays on behalf of the loser in the event of a loss. Of course, the loser has to pay premiums to the insurance provider in order to be covered.<sup>35</sup>

Many reforms took place that refined and simplified the use of conditional fees in England. However, more recently, the UK Government has recognised the various flaws of the conditional fee arrangement system.<sup>36</sup> In 2010 Lord Justice Jackson in the *Review of Civil Litigation Costs* and Lord Young of Graffham in the Report *Common Sense, Common Safety* recommended that the government reform the costs and the funding of litigation by introducing contingency fees and increased mediation. In response to these recommendations, the government on 30 March 2011 made a series of announcements about major reforms of funding and reform of the civil justice system.<sup>37</sup>

The intention is to deconstruct the CFA arrangement for funding claims, as it has cost the defendants and insurers a lot of money, and to replace them with contingency fees, albeit regulated and capped. The regime of the conditional fee arrangement that existed since 1999 is

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<sup>32</sup>“Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>33</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>34</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>35</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>36</sup> European Justice Forum, “UK: Government Implementation of Jackson Reforms on the Costs and Funding of Litigation. Introduction of Contingency Fees and increased Mediation,” (2011), accessed March 25, 2012, <http://www.justice.org/cps/rde/justice/hs.xsl/2011.htm>

<sup>37</sup> European Justice Forum, “UK: Government Implementation of Jackson Reforms.”

being made less attractive to both lawyers and claimants by the abolishment of the recoverability of the CFA success fee and the ATE insurance premium.<sup>38</sup> This action, it is anticipated, will considerably reduce defence or insurance costs and reduce the ‘CFA blackmail settlement’ pressure. Claimants will be required to pay success fees and other charges from their damages.<sup>39</sup>

It was stated by Ken Clarke QC MP and Jonathan Djanogly MP that:

... access to justice for all parties depends on costs being proportionate and unnecessary cases being deterred...Yet in recent years, the system has become unbalanced, fuelled to a significant extent by the way that ‘no win, no fee’ conditional fee agreements (CFAs) have evolved....The aim is to restore a much needed sense of proportion and fairness to the current regime.<sup>40</sup>

Thus, the legal system in England has recognised that contingency fees are a sure way of enhancing access to justice, but only if specific measures are taken to regulate the system and protect it from abuse.<sup>41</sup>

In conclusion, contingency fees in England have replaced conditional fees as they are seen as increasing access to justice for parties who fall outside the shrinking scope of legal aid, but are unable to fund the litigation personally.<sup>42</sup>

### 3.4 SOUTH AFRICA

South Africa is one of the only African countries which allows any out-come related fee arrangement.<sup>43</sup> In 1996, the South African Law Commission issued the *Report on Speculative and Contingency Fees*. The report stated that a system of contingency fees ‘can contribute significantly to promote access to the courts’ and that ‘such a system is desirable’.<sup>44</sup> Although

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<sup>38</sup> European Justice Forum, “UK: Government Implementation of Jackson Reforms.”

<sup>39</sup> European Justice Forum, “UK: Government Implementation of Jackson Reforms.”

<sup>40</sup> European Justice Forum, “UK: Government Implementation of Jackson Reforms.”

<sup>41</sup> European Justice Forum, “UK: Government Implementation of Jackson Reforms.”

<sup>42</sup> “Conditional Fees,” *The Law Reform Commission of Hong Kong Report*

<sup>43</sup> H. M. Kritzer, *Risks, Reputations and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004)

<sup>44</sup> Kritzer, *Risks, Reputations and Rewards*.

the report uses the term 'contingency fee' it is obvious from the context that they were in fact referring to conditional fees. This is evidenced in the definition of contingency fees in the Contingency Fees Act of 1997 and the types of agreements allowed by the Act.<sup>45</sup>

The Act was a result of the government's response to the Law Commission's recommendations. It provides for two forms agreements that lawyers and their clients may enter into. Firstly, there is the 'no win, no fee' agreement, described in section 2 (1) (a) as follows:

Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed— (a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement.

Secondly, the Act provides for an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful. This is provided for in section 2 (1) (b) which states that:

...the legal practitioner shall be entitled to fees equal to or, subject to subsection (2)<sup>46</sup>, higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

It is therefore obvious from the definition of a conditional fee which is given above, that the South African Contingency Fees Act of 1997 was actually referring to conditional fees.

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<sup>45</sup> Kritzer, *Risks, Reputations and Rewards*.

<sup>46</sup> Subsection 2 of section 2 states: "Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs."

In the case of *Price WaterHouse Coopers Incorporated and 5 others v National Potato Cooperative Limited*<sup>47</sup>, Judge Southwood stated the legal system and legal developments in English law are mirrored in South African law.<sup>48</sup> In this case the respondents were unable to fund their litigation and requested a third party to do so for a share of the proceeds. The appellants appealed on the grounds that this was contrary to public policy. The Supreme Court of Appeal of South Africa held that an agreement in terms of which a person provides a litigant with funds to litigate in return for a share of the proceeds of the litigation is not contrary to public policy or void. The Court also held that it is empowered to prevent abuse of process despite right of access in s 34 of the South African Constitution.<sup>49</sup> In his deliberation, Judge Southwood set out the history of contingency fees in South Africa.

The agreements allowed by the South African Act can be used in all civil matters except for criminal or family law proceedings.<sup>50</sup> The reason given by the Commission for this exception is that availing conditional fee agreements in family law might encourage litigation in, for example, the field of divorce. Where criminal law is concerned, the Commission considered that those accused of crime were adequately catered for in terms of the Constitution as far as access to justice was concerned.<sup>51</sup>

In its efforts to mitigate the likelihood of abuse, the South African Act presses various conditions that must be met in order for a conditional fee agreement (or a contingency fee agreement as it is referred to in the Act) to be valid. Section 3 provides for the requirement of an explanation to be given to the client that he would be liable to pay the uplift portion of the advocate's fee (in cases where counsel had to be employed) in the event of success. The basis of payment should be agreed between the attorney and his client; and the client should be

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<sup>47</sup> [2004] Case No. 448/02

<sup>48</sup> *Price WaterHouse Coopers Incorporated and 5 others v National Potato Cooperative Limited*. per B.R Southwood, Acting Judge of Appeal, The Supreme Court of Appeal of South Africa: 22

<sup>49</sup> *Price WaterHouse Coopers Incorporated and 5 others v National Potato Cooperative Limited*. per B.R Southwood, 22

<sup>50</sup> Section 1 of the Contingency Fees Act of 1997

<sup>51</sup> "Conditional Fees," *The Law Reform Commission of Hong Kong Report*

advised of any other options for financing the litigation, and of their respective implications. The client should also be informed of the normal rule that he might be liable to pay the opponent's taxed party and party costs if the litigation proved unsuccessful. Finally, it should be explained to the client that there would be a cooling off period of fourteen days during which the client could cancel the conditional fee agreement.<sup>52</sup>

In Section 4, the South African Act stipulates that any offer of settlement can only be accepted after the legal practitioner has filed an affidavit which contains a wide range of conditions.<sup>53</sup>

The South African Contingency Fees Act of 1997 is designed to encourage legal practitioners to undertake speculative actions for their clients. The legislature was obviously aware of the view that the conflict between the duty and interests of legal practitioners would not lead to an abuse of legal procedure. It clearly considered that it is better that people be able to take their disputes to court in this way rather than not at all.<sup>54</sup>

Judge Southwood explained that the South African Constitution expressly enshrines in section 34 that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. On a number of occasions the Constitutional Court has emphasised the importance of the right to access justice.<sup>55</sup>

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<sup>52</sup> Section 3 as paraphrased in *The Law Reform Commission of Hong Kong Report*, "Conditional Fees."

<sup>53</sup> This includes the following information: (a) the full terms of the settlement; (b) an estimate of the account or other relief that may be obtained by taking the matter to trial; (c) an estimate of the chance of success or failure at trial; (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial; (e) The reasons why the settlement is recommended; (f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

<sup>54</sup> *Price WaterHouse Coopers Incorporated and 5 others v National Potato Cooperative Limited*, per Judge Southwood

<sup>55</sup> For example, in *Beinash and another v Ernst & Young and others* (1999) (2) SA 116 (CC) para 17 the court held that access to justice is of cardinal importance and requires active protection and courts have a duty to protect *bona fide* litigants; In *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* (2001) (4) SA 491 (CC) para 23, it held that the 'untrammelled access to the courts is also a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom'; In *Chief Lesapo v North-west Agricultural Bank and another* 2000 (1) SA 409 (CC) para 22, the court held that access to justice is the foundation for stability of an orderly society and it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes,

In conclusion, it is clear that the legislature in South Africa has expressly recognised that the civil justice system is strong enough to withstand the abuses which could arise as a result of contingency fee agreements between legal practitioners and their clients and it has made such agreements legal within carefully circumscribed limits and subject to regulation by the professions' controlling bodies and the Minister of Justice.<sup>56</sup> This is a significant change in view of the fact that dishonest legal practitioners conducting the lawsuit would be in the best possible position to manipulate the facts to get a favourable outcome in the suit.<sup>57</sup> Therefore, the position in South Africa, like that of England, is that contingency fees make the courts accessible to people who cannot afford lawyers but do not qualify for legal aid.<sup>58</sup>

### 3.5 CONCLUSION

This chapter has examined how contingency fee arrangements have been effected in the United States of America, England and South Africa and their effect on access to justice. It has established that all three jurisdictions recognise the importance of contingency fee arrangements in promoting and enhancing access to justice. It is also recognised that because such arrangements are prone to abuse, statutory measures have to be taken to protect both the lawyers and the claimants, thus certain conditions must be fulfilled in order for contingency fee arrangements to be valid. Among others, some of these conditions are that the arrangements must be in writing, the entire arrangement must be explained in detail to the client, including whether or not they will be required to pay an uplift fee (in the case of South Africa), that they

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without resorting to self help'. Access to justice is 'a bulwark against vigilantism, and the chaos and anarchy which it causes'; and in *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and others; Sheard v Land and Agricultural Bank of South Africa and another* 2000 (3) SA 626 (CC) para 6 it was held that access to justice is fundamental to a democratic society that cherishes the rule of law.

<sup>56</sup> Section 6 and 7 of the South African Contingency Fees Act of 1997 state: (6) Any professional controlling body or, in the absence of such body, the Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), may make such rules as such professional controlling body or the Rules Board may deem necessary in order to give effect to this Act. (7) The Minister of Justice may make regulations prescribing further steps to be taken for the purposes of implementing and monitoring the provisions of [the Contingency Fees Act of 1997]

<sup>57</sup> *Price WaterHouse Coopers Incorporated and 5 others v National Potato Cooperative Limited*, per Judge Southwood at p. 26

<sup>58</sup> D. McQuoid-Mason, "The Delivery of Civil Legal Aid Services in South Africa," presented at the *Eleventh Annual Philip D. Reed Memorial Issue Partnerships Across Borders: A Global Forum on Access To Justice*, April 6-8, 2000

are at liberty to request the normal rate of payment and an explanation that they are at liberty to cancel the arrangement within a reasonable period of time.

Although the three countries all allow contingency fee arrangements, there are differences in how they are applied, mainly because of the differences in legal systems. In America for example, where the claim is not frivolous, each party usually bears his costs; whereas England operates under the loser pays principle. Typically in America, the contingency fee arrangement provides that the lawyer's fee will constitute 25% of the amount recovered or up to 30% if the case goes to trial. England enforced conditional fee arrangements on the basis that an uplift fee of up to 100% would be paid to the lawyer. These arrangements have since been abolished in favour of American-style contingency fee arrangements. South Africa on the other hand still applies England's style of conditional fees even though they are referred to as contingency fees. Despite the differences however, there are similarities like the fact that none of the jurisdictions permit the use of contingency fee arrangements in criminal and family matters on the grounds of public policy.

From the discourse above, it is the opinion of this writer that the American arrangement of contingency fees is the best. This is because the arrangements permit the ordinary citizens equal access to the courts, as well as guaranteeing the availability of counsel equally skilled and knowledgeable as those available to the wealthy and corporate classes. In addition, because each party bears his own costs, except where the litigation is vexatious or an abuse of process, it may cost the plaintiff almost nothing to bring a civil claim. This then helps to supplement the Legal Aid system. However, it must then be noted that the contingency fee system does not work in isolation. Other factors such as the costs system and insurance services must also be considered.

The next chapter provides an assessment of the various views that were obtained during the research regarding contingency fees.

## **CHAPTER FOUR**

### **4.0 PERCEPTIONS ON CONTINGENCY FEES AND ACCESS TO JUSTICE IN ZAMBIA**

#### **4.1 INTRODUCTION**

The previous chapter discussed how contingency fee arrangements have been effected in the United States of America, England and South Africa. It established that all three jurisdictions recognise the importance of contingency fee arrangements in enhancing access to justice, subject to statutory conditions set to protect both the lawyer and the client. For the purposes of this study, it is necessary to analyse various views from selected people in society on how contingency fee arrangements would affect them if they were to be allowed through statute. A field survey was undertaken involving individuals from organisations involved in access to justice and selected ordinary individuals from various sectors of society. Details of the questionnaire are provided in Annex 2. It, therefore, should be noted at the outset, that the views expressed below are based primarily on the information obtained through interviews and the questionnaires administered during fieldwork.

#### **4.2 PERCEPTIONS ON ACCESS TO JUSTICE IN ZAMBIA AND THE POSSIBLE EFFECT OF CONTINGENCY FEES**

The following is based on interviews with four representatives from four key institutions in the process of enhancing access to justice.

Mrs. Musonda Ulaya<sup>1</sup> from the Ministry of Justice intimated that what must be the overall consideration on access to justice is justice itself. She stated that justice is cardinal to every persons' well-being. Justice is basically the assurance that if someone's rights are tempered with, that person would be able to have the matter adjudicated upon fairly and speedily, and have their rights restored through compensation. She said that that if an individual is not able to have their rights restored then they are not able to access justice and may decide on executing an extreme measure such as taking the law into their own hands. Basically, as it is said, justice delayed is justice denied.

Mrs. Ulaya stated that it is possible that the Legal Practitioners Act forbids contingency fee arrangements because they may be abused by lawyers to the detriment of the general public. She however stated that the Legal Aid system in Zambia has many shortcomings and contingency fee arrangements could be used to buttress the Legal Aid system by catering for indigent citizens who may be unable to access legal aid. She also stated that it would have to be a slow process that would consider how such arrangements have worked in other jurisdictions and how the legal systems in those jurisdictions are structured in order to 'tailor-make' a system of contingency fee arrangements that would be best suited for a country like Zambia.

According to Mr. Davies Chikalanga<sup>2</sup> access to justice is a wide subject and can be understood in many different ways. But firstly, it means physical access to justice institutions such as the police, the judiciary, legal aid board and many other stakeholders. Secondly, it is the availability of skilled personnel in these institutions. Thirdly, it is important that the laws that govern civil

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<sup>1</sup> Mrs. Musonda Ulaya, (Principal Parliamentary Counsel in the Legislative Drafting Department at the Ministry of Justice), interviewed by Joan Mtaja, April, 10, 2012

<sup>2</sup> Mr. Davies Chikalanga, (Access to Justice Expert, Head of the Access to Justice Department at the Ministry of Justice), interviewed by Joan Mtaja, January 31, 2012

and criminal law are up to date with modern needs. Furthermore, the system must allow the indigents to access justice despite their status in society. Thus, mechanisms and institutions must be put in place to allow indigents to access lawyers and the courts. In Zambia there are mechanisms such as the Legal Aid Board and many other institutions that provide free legal advice.

However, according to the current State of Governance Report, very few people are aware of the services being offered by the Legal Aid Board. Among all the five institutions recognised as key to access to justice, Legal Aid Board is the least known. This is because to a large extent it does not deal with matters in the Subordinate Court, only High Court cases are considered.

In Zambia, currently the Access to Justice Program is biased towards the Criminal Justice System. This is because the system is faced with many problems such as dire prison conditions, poor case flow management and lack of funding to criminal institutions. The main goal of the Access to Justice program is to increase access to justice for all, especially the women and children, and also to make the criminal justice system more efficient.

In the opinion of Mr. Chikalanga, contingency fees would help many people access to justice. However, the law should regulate the application of these arrangements as, if left unregulated, they could work to the detriment of the very people that they are trying to protect. Compared to the average income of an ordinary Zambian, legal fees are currently 'irresponsible and immorally' high. They are thus prohibitive to justice. Having done a lot of research regarding why many people refuse to take cases to court, Mr. Chikalanga observed that the main reason given by the majority of the people is that they do not have enough money to afford a lawyer. The contingency fee arrangements should be allowed by statute, but only in civil cases. In his

opinion, the community would benefit from such arrangements but only if they felt that the arrangements were for their benefit.

The Acting Deputy Director for the Legal Aid Board Mr. Nzovwa Chomba<sup>3</sup> described access to justice from a Legal Aid point of view. He intimated that the Legal Aid Board is one of the five key institutions that play an important role in the enhancement of access to justice. He stated that currently access to justice in Zambia focuses on the causes of the problems faced by the criminal and civil justice systems and finding solutions to those problems. One major problem that has been identified is the delays in case flow. Generally cases in Zambia take long, whether the person involved is rich or poor. This stifles the process of accessing justice.

Mr. Chomba stated that the objective of the Legal Aid Board is to help as many people whose means are inadequate to enable to engage practitioners to represent them. The problem is that the LAB is understaffed and thus overburdened by cases. It is therefore not uncommon to have cases clashing in court that must be attended to by the same lawyer. This results in cases being adjourned, thus adding to the delay in the court process.

In Mr. Chomba's view, the enabling of contingency fees must necessarily entail a holistic change of many other structures. In South Africa, for example, there are a lot of insurance schemes that have the backing of the law which inevitably remove the pressure on an individual to pay for necessities such as medical bills or legal services. A law enabling contingency fees cannot operate in isolation but must be supplemented by other structures such as insurance schemes.

Access to justice also depends on the integrity of lawyers and so does the efficiency of a contingency fee arrangement system. A lawyer is an officer of the court and therefore, is an

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<sup>3</sup> Mr. Nzovwa Chomba, (Acting Deputy Director, Legal Aid Board), interviewed by Joan Mtaja, April 10, 2012

integral part of the team that helps the court to arrive at justice. Lawyers play a very important role in enabling and enhancing access to justice. Inasmuch as it is known that their services come at a cost, the focus should be more on the service than the cost or making money. Historically, the legal profession was counted as a noble profession, but this perception has since been diluted because the focus of the lawyer has shifted from serving the client to serving themselves.

Adding to the sentiments expressed by Mr. Chomba, Mr. Sidney Chisenga<sup>4</sup> stated that the nobility of the legal profession in Zambia had been compromised. This is evidenced by the number of disciplinary cases before the Law Association of Zambia. He said that contingency fees could encourage unethical behaviour by lawyers who might be tempted to do whatever it takes to win a case.

Mr. Chisenga observed that generally contingency fee arrangements are a means of enhancing access to justice. However, they have inherent advantages and disadvantages. For the clients, it is advantageous because they are only required to pay when the case is won, and depending on the system put in place, this turns out to be cheaper than the normal fees. On the down side, it means that a lawyer does not get paid if the case is not won. This can then bring about unethical behaviour by lawyers to win by all means.

In his opinion, the economy of a country affects its legal system and access to justice as whole. He said that the Zambian economy had to undergo more development to be able to contain contingency fee arrangements at the level of other countries such as America and South Africa. He did, however stated that it should be an option for a lawyer to make either a normal arrangement with his client or make a contingency fee arrangement where the client is indigent.

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<sup>4</sup> Mr. Sydney Chisenga, (Head of the Dispute Resolutions Department, Corpus Legal Practitioners), interviewed by Joan Mtaja, December 15, 2011

He stated that is clear that such arrangements help decongest Legal Aid because it would mean that people would be able to approach any lawyer instead of burdening the few at Legal Aid. In his view therefore, contingency fee arrangements should only be allowed in special circumstances.

## **4.3 DISCUSSION OF FINDINGS**

### **4.3.1 Income Levels**

About 60% of the respondents stated that they would not be able to hire a lawyer on their salary as many lawyers charge exorbitant fees. They stated that this would be one of the main reasons why they would not approach a lawyer if they had a legal problem.

### **4.3.2 Awareness Levels**

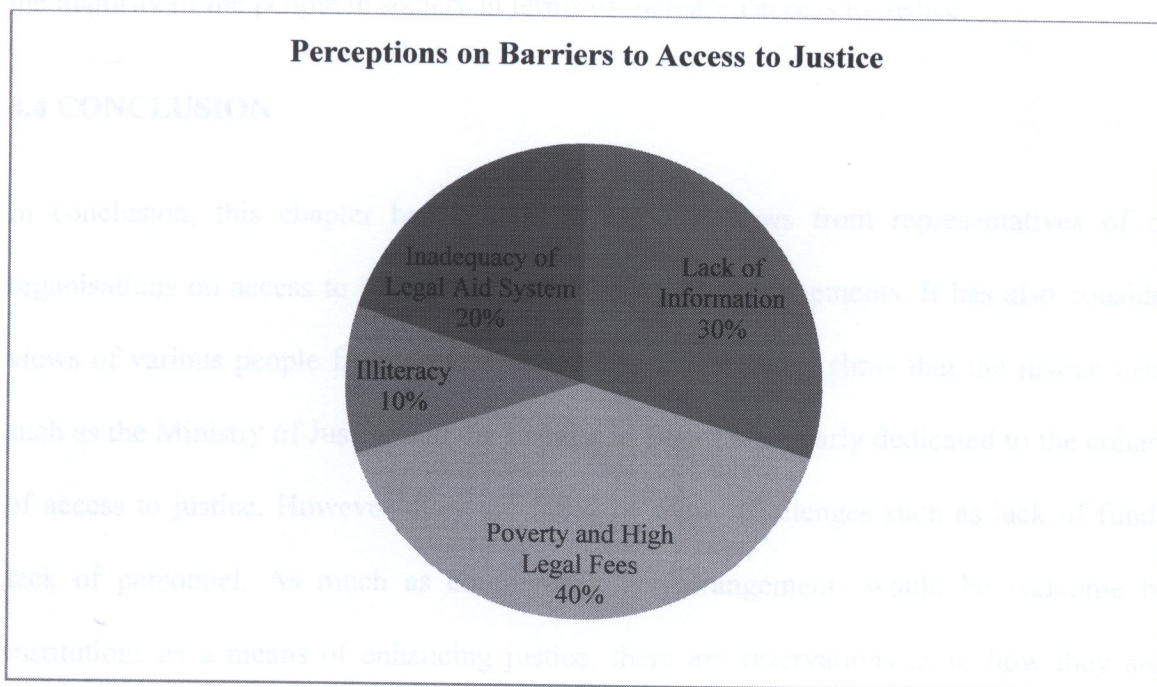
The results of the survey indicate that ordinary citizens are partially aware of what access to justice is. Many of the respondents expressed their understanding of access to justice as the ability of an ordinary Zambian citizen to access lawyers. Others intimated that access to justice is the extension of access to legal redress to as many citizens as possible. Still others expressed their understanding of access to justice as the enabling of an environment where one can be heard in a court of law and being able to access legal services whenever one needs them. In the opinion of this writer, the majority of the people view justice and access to it as being able to access lawyers and having redress in the courts of law.

Where contingency fee arrangements are concerned, however, many people are ignorant. Ordinary citizens are not aware that it is possible to enable such arrangements. Lawyers and other individuals in the legal fraternity have some ideas about them, but because they are

prohibited, many do not dwell much on the possibility of enabling the arrangements as a means of enhancing justice.

#### 4.3.3 Barriers to Access to Justice

Generally, the respondents were unanimously of the view that Zambians are unable to access justice. They stated that some of the barriers to access to justice are high legal fees and poverty, lack of information about legal services, inaccessibility to legal services (especially those in rural areas), illiteracy and the inadequacy of the legal aid system. This has been expressed in the pie chart below:



#### 4.3.4 Perceptions on Contingency Fee Arrangements

All the respondents were of the view that contingency fee arrangements would be helpful to both lawyers and clients. However some of the respondents pointed out that such arrangements should

be regulated by the law in order to protect the ordinary citizen. The therefore, were of the view that enabling contingency fee arrangements would enhance access to justice because:

- (a) They would be invaluable in allowing the indigents citizens to present their case in a Court of law;
- (b) They would encourage lawyers to advise their clients correctly on whether the case should be taken on or not; and
- (c) Even if one does not have enough funds, they would still be able to access legal services.

Thus, from the discourse above, it is obvious that contingency fee arrangements would benefit the majority of the people in society in terms of increased access to justice.

#### **4.4 CONCLUSION**

In conclusion, this chapter has considered various views from representatives of different organisations on access to justice and contingency fee arrangements. It has also considered the views of various people from sectors in society. The findings show that the justice institutions such as the Ministry of Justice and the Legal Aid Board are clearly dedicated to the enhancement of access to justice. However, they are faced by many challenges such as lack of funding and lack of personnel. As much as contingency fee arrangements would be welcome by these institutions as a means of enhancing justice, there are reservations as to how they should be introduced. They have expressed concerns over the possible abuse of the process, the lack of an enabling economical environment, and the possibility that certain people may be turned away by lawyers if the lawyers feel that it is not possible to win the case.

However, generally, the view is that if contingency fees have to be allowed there is need to consider a whole range of other structures that should supplement the system as it would not be able to operate efficiently without supporting structures in place such as insurance schemes. In addition, it is generally agreed that contingency fee arrangements would decongest the Legal Aid system. The legal system as it is highly dependent on the integrity of lawyers, however a contingency fee system would be even more dependant on the integrity of the legal professionals.

From the findings, it is clear that Zambians would welcome the introduction of contingency fee arrangements in the legal system. This is because the primary reason why many people cannot sustain a case in court is because they cannot afford a legal practitioner. The high legal fees coupled by the high levels of indigence of the majority of the citizens makes contingency fee arrangements a welcome alternative to normal legal fees.

The next chapter shall draw conclusions based on the facts presented in this paper and make numerous recommendations as to contingency fees and how they should be enabled to enhance access to justice.

## **CHAPTER FIVE**

### **5.0 GENERAL CONCLUSION AND RECOMMENDATIONS**

#### **5.1 GENERAL CONCLUSION**

The objective of this study was to consider whether enabling contingency fee arrangements would enhance access to justice in Zambia. This was done by considering the effect of contingency fee arrangements in three jurisdictions, namely, The United States of America, England and South Africa. In addition, the views of various members in society, including representatives from institutions involved in the process of enhancing access to justice in Zambia, were gathered in order to ascertain whether enabling contingency fee arrangements would enhance access to justice in Zambia.

In chapter one, this paper established that access to justice is a fundamental human right and that it is both nationally and internationally recognised as such. It is a right that is guaranteed in the Zambian Constitution and other international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Access to justice is the backbone of society and so every effort to enhance this right must be approached for the benefit of society.

Chapter two considered the sociological school of thought which perceives the law as a reflection of societal needs. In addition, this chapter observed that the Legal Practitioner's Act of Zambia<sup>1</sup> is based on old English laws and common law and that this position is prohibitive as the law fails to meet the needs of modern needs. Furthermore, the chapter also considered access

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<sup>1</sup> Chapter 30 of the Laws of Zambia

to justice in Zambia, including the efforts being undertaken by the Government to enhance access to justice and the challenges faced by the institutions involved in the process. The Government of the Republic of Zambia has engaged in various activities in an effort to increase access to justice for all. However, it is observed that most, if not all of those efforts are directed towards the criminal justice system, which admittedly has more problems than the civil justice system. Nevertheless access to justice in civil matters needs to be addressed.

In Chapter three, three jurisdictions, namely the United States of America, England and South Africa were examined and it was established that all three have recognised that one of the ways of enhancing access to justice in civil matters is through the use of contingency fee arrangements. Contingency fee arrangements are arrangements whereby a lawyer and his client agree, under certain conditions regulated by statute, that the lawyer will get a percentage of the recovered amount if the case is won. In all three jurisdictions, contingency fee arrangements are prohibited in criminal and family matters. Although the three jurisdictions examined allow contingency fees, they do so under strict statutory conditions as there is an admission that contingency fee arrangements may be prone to abuse to the detriment of the general public. It is however agreed that, generally, contingency fee arrangements are the key to the courthouse doors for the poor.

In Zambia, such arrangements are prohibited by the Legal Practitioner's Act<sup>2</sup> and the Legal Practitioner's Practice Rules<sup>3</sup>. This prohibition contributes to a number of people not being able to access justice as they cannot afford a lawyer, but have a plausible cause of action. In addition whereas, most of these cases could be handled by Legal Aid, the Legal Aid system is faced with a lot of problems, including understaffing. This means that lawyers are overburdened with cases.

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<sup>2</sup> Chapter 30 of the Laws of Zambia

<sup>3</sup> Statutory Instrument Number 51 of 2002

Therefore, in order to help decongest legal aid system, contingency fee arrangement should be enabled in Zambia.

In chapter four, the author gathered various views from the public and representatives from institutions that are involved in the enhancement of access to justice in Zambia. This was done in order to discover whether the general public would benefit from the enabling of contingency fee arrangements. In the view of the representatives from the Ministry of Justice, the Legal Aid Board and the Access to Justice Program, generally agree that contingency fee arrangements would benefit the public, but they would have to be supplemented by other structures such as legal insurance schemes. They also expressed concerns over the possible abuse of the process, the lack of an enabling economical environment, and the possibility that people may be turned away by lawyers. It was also agreed that contingency fee arrangements would decongest the Legal Aid system. The interviewees also echoed the importance of integrity in the legal profession and how access to justice highly depends on it.

The findings show that Zambians would welcome the introduction of contingency fee arrangements in the legal system as an alternative to normal legal fees. The majority of the people interviewed indicated that on their salary they would not be able to afford a lawyer if they had a legal dispute. Therefore, they would benefit from an arrangement where they could legally and with the protection of the law, engage in an arrangement with a lawyer in which they would only be required to pay the fees if the case was successful.

## **5.2 RECOMMENDATIONS**

In light of the above, the writer makes the following recommendations:

### **5.2.1 Expressly Providing for Access to Justice in the Zambian Constitution**

The Zambian Constitution does indeed guarantee access to justice, but it is more focused on access to justice in criminal cases and proceedings.<sup>4</sup> There is need to include a provision in the Constitution that shall expressly guarantee access to justice in all cases whether civil or criminal.

### **5.2.2 Amending the Legal Practitioner's Act and Legal Practitioner's Rules**

The Legal Practitioner's Act and Legal Practitioner's Rules should be amended to allow for contingency fees and contingency fee arrangements. It is indisputable that changing the law to allow contingency fees will ultimately result in extending legal services to people other than the wealthy in the society.

### **5.2.3 Enactment of a Contingency Fees Act**

In order to regulate contingency fee arrangements, a Contingency Fees Act would have to be enacted. Under the realisation that such arrangements are likely to be abused if not well regulated, there would be need to enact this Act in order to protect the beneficiaries, that is, the ordinary Zambian citizens. The Act should include provisions requiring contingency fee arrangements to be in writing, and requiring lawyers to explain to their clients all the details of the arrangements. The Act should also require that the arrangements should be registered with the regulatory body that the Act would enact. More importantly, the Act would have to provide

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<sup>4</sup> Article 11 of the Constitution of Zambia recognises and declares every person's fundamental human rights and freedoms including the rights to life, liberty, and security of person; freedom of conscience, expression movement and association; protection of the young from exploitation; and protection from deprivation of property without exploitation. Article 18 of the Constitution provides for protection of the law in criminal matters and accords the accused a number of rights including the right to be assumed innocent until proven guilty, the right to be informed of the offence charged, the right to legal aid, and the right to accord himself legal representation. In addition, Article 28 allows for the enforcement of the protective provisions from Articles 11 to 26 in cases where they have been contravened.

strict measures monitoring the conduct of lawyers that engage in such arrangements in order to maintain the integrity of the legal profession.

#### **5.2.4 Legal Education**

During the study, the author observed that many people are simply unaware that the Legal Aid Board is open to all, almost for free, and that the board also takes on civil cases. More importantly, many people have never heard of contingency fee arrangements and that they are prohibited by law even though they agree that they would benefit from the arrangements if they were allowed.

#### **5.2.5 Economic Development**

As pointed out by Mr. Sidney Chisenga pointed, there is need to improve and enhance economic development for the country to be able to contain contingency fee agreements. A country's economy also affects the level, amount and type of litigation in the legal system.

#### **5.2.6 Legal Insurance**

As noted above, from the study of contingency fee arrangements in America, England and South Africa, contingency fee arrangements work best when supplemented with a legal insurance scheme. Therefore, there is need to encourage such schemes as legal insurance to make the use of contingency fee arrangements more proficient. Such arrangements it must be noted, are also the result of a higher level of economic activity.

### **5.3 CONCLUSION**

Justice is essential to any justice system. It is important that people are assured that if their rights are tampered with, they would be able to be heard in a court of law and their rights would be restored. Justice is cardinal to the well-being of people in society. Access to justice is therefore pertinent and should be the priority of any Government that respects the Rule of Law, Democracy and prides itself in meeting the needs of the people. Governments should take advantage of every opportunity to increase access to justice whether in civil cases or criminal cases.

The current government efforts to enhance access to justice, and the efforts of the institutions involved in enhancing access to justice, have focussed their efforts on criminal matters. This necessarily means that civil matters are given a back-seat. Contingency fee arrangements are internationally recognised as a sure way of enhancing access to justice in civil litigation. The Zambian Government must therefore amend the laws that prohibit contingency fee arrangements as this shall enhance access to justice and supplement government efforts to provide justice for all.

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## **ANNEX 2: QUESTIONNAIRE**

Dear respondent,

I am a fourth year Law student at the University of Zambia Main Campus carrying out a study on contingency fee arrangements and how they can enhance access to justice in Zambia.

Contingency fee arrangements are arrangements between a lawyer and his client in which the lawyer agrees to take on the clients case and agrees to be paid only when the case is won. There are different types of such arrangements but generally they have to be enabled by statute and various conditions have to be met before they can be valid. The conditions are different, depending on the jurisdiction. Many countries, including America, South Africa have viewed enabling these arrangements as the best way of enhancing access to justice in civil disputes, especially since the majority of the population are neither too wealthy (or else they would afford legal expenses) nor too poor (or else they would qualify for legal aid). The purpose of this study is to gather various views as to whether such arrangements would enhance access to justice.

Please help me by responding honestly and clearly.

Thank you in advance

Joan Mtaja

**QUESTIONNAIRE ON CONTINGENCY FEES AND ACCESS TO JUSTICE**

1. What is your sex? Male  Female
  2. What was your age at your last birthday?
  3. What is your level of education? .....
  4. What is your occupation? .....
  5. How would you rate your income status?                      Low Income                        
   Middle Income                        
   High Income
  6. If you had a legal problem, would you be able to hire a lawyer on your income?
  7. Have you ever heard of Contingency Fee Arrangements (CFA's)?  
Yes  No
  8. If yes, how did you know about them and what do you know about them?  
.....  
.....
- [If no, explain CFA's to interviewee]
9. What do you think of such an arrangement?  
.....  
.....  
.....
  10. Would you benefit from such an arrangement?  
.....  
.....  
.....
  11. What do you understand by the term access to justice?  
.....  
.....  
.....
  12. Do you think Zambians are generally able to access justice?  
Yes  No

13. What in your opinion are the barriers to access to justice in Zambia?.....

.....

.....

.....

14. In your opinion, would enabling contingency fee arrangements increase access to justice?  
Yes [ ] No [ ]

15. If yes, why?

.....

.....

.....

16. If no, why?

.....

.....

.....

17. How do you think allowing CFA's will affect the following people?

- i) The Judiciary .....
- ii) The lawyers .....
- iii) Working members of the public .....
- iv) Non-working members of the public .....

THANK YOU FOR YOUR TIME!!!