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## Third-Party Litigation Funding as a Vehicle for Access to Justice: A Sustainable Avenue or a Dead End?

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### I. Access to Justice: Past and Present

#### A. The Demise of Legal Aid

##### *i. The Rise (and Fall) of Generous Legal Aid Schemes*

*Access to justice* is one of the most powerful formulas which have determined global law reforms. In 1978, Bryant Garth and Mauro Cappelletti called access to justice ‘the newest wave in the worldwide movement to make rights effective’<sup>2</sup> arguing that this notion serves two basic purposes: to create a legal system which is equally accessible to all, and at the same time leads to results that are individually and socially just.<sup>3</sup> The right to effective access to justice principally implies the need to overcome excessive costs of litigation as one of the primary barriers for many parties who seek protection of their rights in a formal dispute resolution process. Already in 1956, US Supreme Court declared that ‘[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has’.<sup>4</sup>

What is the appropriate way to secure justice that is just but affordable? The Florence Access to Justice project identified legal aid as the first and the most essential form of access to justice solutions.<sup>5</sup> For a long time, legal aid schemes were fundamentally inadequate, with some notable exceptions. Some positive changes in Europe happened after the landmark *Airey* case in which the European Court of Human Rights established that fair trial guarantees are intended ‘to guarantee not rights that are theoretical or illusory but rights

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<sup>2</sup> Mauro Cappelletti and Bryan Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 181.

<sup>3</sup> *ibid* 182.

<sup>4</sup> *Griffin v Illinois*, 351 U.S. 12 (1956).

<sup>5</sup> Cappelletti and Garth (n 2) 196.

that are practical and effective,<sup>6</sup> recognising in that way the obligation of states to provide legal aid not only in criminal, but also in civil cases if this is indispensable for an effective access to court. Consequently, many Western and Northern European countries further developed generous systems of legal aid and assistance which were covering a broad range of civil matters and a large part of their population. Generous state-supported and subsidised access to justice schemes which existed in England and Wales already from 1950s as a part of welfare state reforms<sup>7</sup> became a role model for good access to justice policies.<sup>8</sup> At the end of 1990s and in the early 2000s, effective and generous legal aid schemes became an important rule of law parameter necessary for membership in organisations such as the Council of Europe<sup>9</sup> and the European Union.<sup>10</sup>

### ii. *Introducing Austerity: Until When?*

The global financial crisis of 2007–08,<sup>11</sup> accompanied by changes on the political landscape, turned the tide. On the wave of austerity policies, many legal aid systems experienced unprecedented cuts.<sup>12</sup> The most notorious changes took place in England and Wales after government change in 2010, and the adoption of LASPO<sup>13</sup> in 2012. Civil legal aid and assistance in England and Wales was thereby decimated, in particular in the provision of early advice where budgets were reduced by 93 per cent in 2009–10 to the 2019–20 period,<sup>14</sup> leading to the conclusion that ‘civil legal aid ... is now able to help a much smaller proportion of the population than it once could’.<sup>15</sup>

After the end of the global financial crisis, one might have expected a return to more generous and equitable legal systems of legal aid and assistance. However, this did not happen. Some interest in legal aid systems is still present in organisations like the Council of Europe, but the focus is on the optimisation of resources in order to make existing legal

<sup>6</sup> *Airey v Ireland* (1979) Series A no 32, para 24.

<sup>7</sup> In 1949, legal aid covered 80% of the UK population. See John Sorabji, ‘Open Justice and the Privatisation of English Civil Justice’ in Burkhard Hess and Ana Koprivica Harvey (eds), *Open Justice* (Nomos 2019) 253, 260f.

<sup>8</sup> The annual state budget allocated in UK to legal aid was over €50 per capita in 2010. See Jean-Paul Jean and Hélène Jorry, ‘Judicial Systems of the European Union Countries: Analysis of Data by the European Commission for the Efficiency of Justice (CEPEJ) Council of Europe’ (June 2013) 9, indicating €45.70 per capita in England and Wales and €53.50 in Northern Ireland (2010 data).

<sup>9</sup> See Council of Europe, Recommendation Rec(93)1 of the Committee of Ministers to member states on effective access to the law and to justice for the very poor, which invited the CoE member states to promote legal advice services for the very poor by defraying the cost of legal advice through legal aid, by supporting advice centres in underprivileged areas and by enabling non-governmental organisations or voluntary organisations providing support to the very poor, to give legal assistance.

<sup>10</sup> See Directive 2003/8/EC which was the result of the Tampere Conclusions of 1999 that called on the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union.

<sup>11</sup> The global financial crisis (GFC) that culminated by Lehman Brothers bankruptcy in September 2009 was the most severe post-war crisis, caused by predatory lending in the form of subprime mortgages. One of its consequences were austerity measures introduced to preserve the neoliberal capitalist model.

<sup>12</sup> For England see eg John Sorabji, ‘Austerity’s Effect on English Civil Justice’ (2015) 4 *Erasmus Law Review* 159.

<sup>13</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

<sup>14</sup> See House of Commons Justice Committee, *Third Report: The Future of Legal Aid* (HC 2021-22), para 82 (Table 6) <<https://committees.parliament.uk/publications/6979/documents/72829/default/>> accessed 19 May 2024.

<sup>15</sup> *ibid* para 81.

aid schemes more efficient and effective ‘without changing their overall organisational framework’,<sup>16</sup> which can hardly compensate for the insufficient coverage and funding. At the same time, organisational frameworks for the provision of legal aid in many European countries diverge enormously.<sup>17</sup> One of the key challenges remains in the fact that ‘a reliable measure of quality of access to justice’ is lacking, and ‘that countries also differ considerably in the amount of (access to) justice they create per Euro ... spent on legal aid’.<sup>18</sup>

Against this backdrop, the leading comparative trend is attempting to compensate for lacunas in legal aid schemes by seeking a synergy of multiple alternative ways to secure access to justice. Among these alternatives are attempts to simplify procedures and enable self-representation, the introduction of specialised procedures for frequent and urgent problems, collective handling of claims (including representative actions), reduction of lawyers’ monopoly on legal representation, integration of legal analysis into other services (eg family counselling or debt restructuring), fixing of legal aid fees, providing closed legal aid budgets based on controlled compensation levels, availability of legal expenses insurance, facilitation of mediation and ADR, applying diversified systems of contributions and, most notably, improvement of preventive legal assistance through provision of early information and advice aimed at negotiation, problem solving and just settlements, preferably outside of formal court proceedings.<sup>19</sup> The most recent field for improvement of access to justice is in the change of technology of case management and case processing and, soon, decision making, by digitisation and introduction of artificial intelligence (AI).

At the same time, a parallel ‘emerging trend’ (as indicated by the title of the conference at which this chapter was originally presented as a paper) is to give a more prominent role to market-driven mechanisms like third-party litigation funding (TPLF). In TPLF arrangements private investors assume the place once reserved for legal aid and help litigants (mainly claimants) to overcome the prohibitive costs of litigation and pursue their claims in court proceedings. The discussion of TPLF has intensified in recent years, first in the context of domestic and international commercial and investment arbitration, and later in respect to court litigation.

At first sight, the idea that a profitable third-party investment in private dispute resolution can serve as a vehicle for access to justice is attractive, almost seductive. In this chapter I will address the question as to whether it is really a sustainable avenue, or, on the contrary, is a dead end? While resisting the siren’s call of praising a new and attractive topic, I will present the roots of this new trend and summarise some possible reasons for curbing our enthusiasm regarding TPLF as a promising and sustainable avenue in securing access to justice.

<sup>16</sup> cf Committee of Ministers of the Council of Europe, Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law, (CM(2021)36-add2final) 1.

<sup>17</sup> See Maurits Barendrecht and others, ‘Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?’ (WODC 2014).

<sup>18</sup> *ibid* 111.

<sup>19</sup> *ibid* 106–10. See also the contributions in Part III (‘Self-Representation’) in Xandra Kramer and others (eds), *New Pathways to Civil Justice in Europe* (Springer 2021) 185ff.

## B. Emerging Alternatives: TPLF and Contingency Fees as Surrogates for Legal Aid

### *i. Why TPLF? The Joys of Private Funding v Other Alternative Schemes*

Among legal professionals, generous legal aid schemes used to have quite a few friends during times of economic upswing and the functioning welfare state. But, in times of recession and austerity, legal aid schemes became chronically underfunded and neglected. Barely capable of covering basic expenses, crippled legal aid regimes at present create a lot of frustration both among end recipients (who have difficulties in finding motivated legal aid lawyers and/or receive sub-par services) and among professional lawyers (who work for inadequate remuneration which is usually paid late and requires excessive paperwork).

Among the alternative ways of securing access to justice noted under Section I.A.i above, some may be advantageous but have slim chances of being broadly embraced by legal professionals. Loosening the grip of practising lawyers on the monopoly of legal representation inevitably causes negative reactions of the bar, especially in an environment saturated with lawyers accustomed to being the only players who seek to make profits in an ever-shrinking local market of legal services. Disapproval arises even in cases where an overlap with traditional allies like auditors, notaries or bailiffs is expanded in an attempt to improve services or boost efficiency.<sup>20</sup>

The participation of non-governmental organisations and other civil society entities in the provision of pro bono legal advice is often met by vigorous opposition on the part of bars that seek every opportunity to create the impression that they cater for narrow interests to keep all legal matters – profitable or not – for their constituency. Even worse, policies which encourage *pro se* representation often come into conflict with the monolithic bloc of almost all legal professionals, including judges and other court staff. This is not peculiar to Europe: it is noted that, in the USA, '[s]ome courts are openly hostile to unrepresented parties' and '[e]ven the most sympathetic judges often have been unwilling to push for reforms that will antagonise lawyers whose economic interests are threatened by pro se assistance.'<sup>21</sup> Encouraging people to represent themselves on their own and evade lawyers 'wins few friends in the circles that matter most'.<sup>22</sup>

On the other side, private funding is readily embraced in legal spheres by various providers of professional services. Investment in other people's legal proceedings to achieve speculative gains does not need a planned state policy – it is emerging spontaneously. A characteristic example is the proliferation of private debt-collection agencies in many European countries after the GFC. Using deficiencies of the public enforcement system, such agencies are developing profitable but often abusive debt-collection practices.<sup>23</sup>

<sup>20</sup> For instance, between October 2014 and January 2015 all attorneys in Serbia were on the strike when the law reintroducing Latin notariat was enacted; in Croatia, attempts of introducing private bailiffs failed in 2012, at least partly due to effective lobbying of attorneys and notaries.

<sup>21</sup> Deborah L Rhode, *Access to Justice* (OUP 2004) 14f.

<sup>22</sup> Russel Engler, 'And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks' 67 (1999) *Fordham Law Review* 1987, 2014, 2016; State Bar of California, 'And Justice for All: Fulfilling the Promise of Access to Civil Legal Service in California' (1996) 47.

<sup>23</sup> See Olivier Jérusalmy, Paul Fox and Nicolas Hercelin, 'Is the Human Dignity of Individual Debtors at Risk? A Research Paper on Debt Collectors' Practices and the Protection of Debtor Household Income' (Finance Watch,

Third-party litigation funders also emerged without any push from the side of regulatory state policies, simply treating the financial needs of litigants as another opportunity to invest capital at fair profit margins. The fact that private investment is praised as an important contribution to the access to justice movement may come as an unexpected extra bonus, a win-win for both the funder and the state officials that can, without any efforts of their own, present TPLF as a successful achievement of their new access to justice policies. But despite the popularity of the TPLF, its capacity to secure access to justice must be objectively assessed.

## *ii. TPLF as Surrogate for Legal Aid?*

TPLF may serve as an example of privatisation of state functions in the provision of fundamental public services. Some may argue that it is not necessarily bad as long as it is effective. But can private funding in this form effectively and adequately replace a broad and generous public legal aid system?

The link between the demise of legal aid and the rise of private litigation funding is clear. Basically, the introduction of TPLF in its pure form occurred after huge cuts in legal aid budgets, in parallel with similar privatisation trends in the form of contingency fees. The loosening of ethical and legal prohibitions on contingency fees<sup>24</sup> did not proceed at the same speed everywhere. Competing with the new class of entrepreneurial lawyers, independent private funders in some jurisdictions had a better head start, while in the others they were lagging.

A characteristic example is Australia, which was among the first countries to witness the rise of independent third-party funders. As one of the countries with the highest lawyers' fees, following economic crisis of 2007 Australia experienced a reduction of some 78 per cent in the volume of legal aid funding since 1995–96.<sup>25</sup> In a situation described as 'a significant and continuing shortfall in legal aid for civil law matters'<sup>26</sup> privatisation trends were gradually expanding. In 1993, crimes of maintenance, champerty and barratry were abolished in most states, paving way for conditional fee arrangements.<sup>27</sup> But, since these arrangements were limited and contingency fees in the strict sense remained prohibited, the chance for institutional litigation funders was opened and Australia was one of the first countries to develop a significant number of thriving TPLF providers. They first began operating in insolvency cases, later expanding to class actions and other cases. Contrary to lawyers, they were allowed to charge their services as a percentage of the recovered amount.<sup>28</sup> In the absence of court control of private funder's fees' fairness,<sup>29</sup> the litigation funders started to

January 2020) <[https://www.finance-watch.org/wp-content/uploads/2020/01/Report\\_Human-dignity\\_final\\_with-annex.pdf](https://www.finance-watch.org/wp-content/uploads/2020/01/Report_Human-dignity_final_with-annex.pdf)> accessed 19 May 2024.

<sup>24</sup> Some forms of contingency arrangements were criminally punishable in common law countries as crimes of maintenance, champerty and barratry.

<sup>25</sup> Camille Cameron, 'Australia' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Beck/Hart 2010) 195, 211.

<sup>26</sup> Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) 42–44.

<sup>27</sup> See Maintenance, Champerty and Barratry Abolition Act 1993 No 88. In England, conditional fee arrangements were permitted for the first time by the Courts and Legal Services Act 1990.

<sup>28</sup> Cameron (n 25) 212–14.

<sup>29</sup> Michael Legg, 'Class Action Settlements in Australia – The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 600–605.

earn multimillion figures in fees which, together with lawyers' fees, sometimes take half of the settlement amounts in large class actions.<sup>30</sup>

The link between the drop in public legal aid and the rise in private litigation funding arrangements was often accentuated, creating the impression that the latter will eventually cover for the lack of former. In England, it was argued that conditional and contingency fee arrangements 'provide the consumer more choice in a market place of funding'.<sup>31</sup> John Sorabji argues that private funding arrangements were originally:

... viewed as an addition to public legal aid, rather than a substitute for it in limited areas of civil proceedings. That being said, that it was intended to create greater choice in the market place is, at the very least, suggestive of the view that public and private funding sources were competitors. It is but a step to consider that in such a market place there would be an expectation that more efficient private funding models would develop to supplant the public one, enabling it to then wither on the vine.<sup>32</sup>

Substitution of central, public financing by private and market-driven schemes is a favourite formula of liberal market capitalism advocates. Can such formula bring access to justice comparable to achievements of a public system? So far, is it fair to conclude with Sorabji that alternative forms of private litigation funding have not been able to fill the gap left by the destruction of public legal aid systems. On the contrary, 'albeit explicitly driven by the aim of increasing access to justice [such developments] have had limited impact in respect of those individuals and claims that would otherwise and previously have been funded via civil legal aid'.<sup>33</sup>

The rhetoric of privatisation has not only been employed in the jurisdictions which used to have working and generous public legal aid systems. Access to justice used to be one of the main rule of law criteria for EU accession. But the negative trends in the old (then) EU members like the UK gave a good excuse and provided an alibi for the creation of legal aid systems which are scarce, over-bureaucratized and dysfunctional.<sup>34</sup> Since the starting point was much lower, the historic chance to improve the situation and actually bring justice close to the majority of citizens was missed. Instead of investing in public systems of legal aid and assistance, former Socialist countries generously opened doors to contingency fee arrangements, allowed uncontrolled growth of prices of legal services and excluded a number of fields from eligibility for legal aid and advice. For instance, the government of Croatia used the availability of contingency fee arrangements as an explanation for the exclusion of all claims for damages and most other money claims from state legal aid funding.<sup>35</sup>

<sup>30</sup> Michael Legg, 'Evaluating Class Action Effectiveness' (2015) 129 *Precedent* 10, see Table 1.

<sup>31</sup> The words of Lord Mackay in 1997 (Mackay was Lord Chancellor during Thatcher and Major governments).

<sup>32</sup> Sorabji (n 7) 261.

<sup>33</sup> John Sorabji, 'Justice Without Lawyers' in Xandra Kramer and others (eds), *New Pathways to Civil Justice in Europe* (Springer 2021) 221, 224f.

<sup>34</sup> See more in Alan Uzelac and Barbara Preložnjak, 'The Development of Legal Aid Systems in the Western Balkans: A Study of Controversial Reforms in Croatia and Serbia' (2012) 38 *Kritisk Iuss. Utgitt av Rettspolitisk Forening (Liber amicorum – Jon T. Johnsen)* 261.

<sup>35</sup> See Art 13 of Croatian Legal Aid Act (2013) and Art 4 para 2 Croatian Legal Aid Act (2008). There are striking similarities between these provisions and developments in England; cf Lord Chancellor's speech of 1997 announcing that '[t]he Government are set to begin the task of reforming legal aid by refocusing expenditure towards those areas where publicly-funded legal services are the only option available to the poor. As part of this, we propose to remove from the scope of civil legal aid most cases involving claims for money or damages which we believe can,

In Section II, I will analyse in more detail the extent to which TPLF is compatible with the fundamental goal of modern civil procedural reforms – the goal of establishing inexpensive, quick and fair litigation systems equally accessible to everyone.

## II. Whether and How TPLF Corresponds to the Goals of Good Administration of Justice

### A. Avenue(s) in Access to Justice: What TPLF?

Before addressing the compatibility of TPLF with good administration of justice, some preliminary explanations are necessary. The first relates to the scope of examination and the understanding of the notion of third-party litigation funding (TPLF) in this text.

While generally embraced, the TPLF notion is notoriously vague and imprecise. If we explore different funding options as presented in the standard Hodges text on the costs and funding of civil litigation, ‘third-party funding’ would literally cover most of the cited categories. Namely, Hodges distinguishes following principal possible methods of litigation funding that might exist in a particular legal system:

- personal funds;
- funds or services of an association (eg trade union);
- legal expenses insurance;
- legal aid;
- funding by lawyers (whether pro bono, or as a conditional fee arrangement – CFA);
- funding by independent third party.<sup>36</sup>

If we exclude personal funds of the parties and (maybe) legal aid and CFAs, all other cited litigation funding methods are technically ‘third-party funding’. So is also crowdfunding (discussed at the Rotterdam conference) and, in particular, different forms of public interest funding, including various forms of strategic litigation. Mixing all these forms under the same notion is obviously confusing. In public discussions, most attention is devoted to TPLF as a private, profit-driven engagement by commercial actors (investment funds, insurance companies or other commercial entities) which enter into funding agreement with a party (or potential party) to litigation when a dispute is already in existence, in return for a fee which will generally be dependent on the outcome of the dispute, normally as a part or percentage of the amount recovered in litigation. This amount may be recovered as the result of a settlement, or a consequence of a final and binding judicial decision.

Unless indicated otherwise, this text uses the ‘TPLF’ designation in this narrow sense, recognising that other methods (‘avenues’) of securing funding from ‘third persons’

in future, be funded through conditional fee agreements’; House of Lords, *Civil Justice and Legal Aid: Volume 584*: debated on Tuesday 9 December 1997.

<sup>36</sup> Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, ‘The Oxford Study on Costs and Funding of Civil Litigation’ in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Beck-Hart 2010) 3, 20f.

(individuals or organisations other than the parties) may also exist. They will, however, be left aside and disregarded in the following analysis. In this way, we can focus on one ‘avenue’ that is not only practically the most relevant, but also conceptually the purest example of a ‘private’ model for securing access to justice.<sup>37</sup>

## B. Does TPLF Contribute to Inherent Goals of Good and Affordable Justice?

### *i. Main Features of Good Administration of Justice*

Almost all reforms of civil justice systems in the last decades have been concentrated around the same ideals of inexpensive, quick and fair civil litigation. There are several aspects of these ideals. In this text I focus on six points which have played a prominent role in law reforms. I consider these points to be broadly accepted and generally uncontroversial.

These points are:

- The treatment of civil justice as a public service. As a public service, civil justice needs to be accessible, on an equal basis, to all those who need public dispute resolution services (see Section II.B.ii).
- Within the civil justice system, litigation is the means of last resort which, while indispensable, must be kept under control; it implies reducing unnecessary proceedings, expediting and streamlining their course and limiting their scope (see Section II.B.iii).
- While public justice has inherently public goals, it is providing dispute resolution services at the initiatives of the litigants who are in control of their procedural actions, subject only to legal limitations and the need to collaborate with the court (see Section II.B.iv).
- Legal process needs to be transparent to secure public trust and make clear that justice is being served (see Section II.B.v).
- The costs of litigation must be proportionate and adequate, and the burden of their sharing has to be fairly shared among the litigants (see Section II.B.vi).
- The party whose rights have been violated deserves wherever possible full redress for the harm caused (see Section II.B.vii).

For each of these points I will explore what TPLF arrangements bring to their realisation – whether they are in line with them, what they can contribute, and whether there are potential elements of friction and contradiction.

<sup>37</sup> For a similar approach to understanding of TPLF providers, see Ianika Tzankova, ‘Anti-specialisation Trends in Dispute Resolution or a Shift Towards a New Paradigm? An Initial Exploratory Analysis of Dispute Resolution in the Global Village’ in Xandra Kramer and others (eds), *New Pathways to Civil Justice in Europe* (Springer 2021) 276, 285. See also the definition of third-party funders from Principle A.3 of the ICCA-Queen Mary Task Force Principles on Third-Party Funding in: International Council for Commercial Arbitration (ICCA), ‘Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration’ (ICCA 2018) 81 (‘ICCA 2018’).

*ii. Civil Justice Must be a Public Service Equally Accessible to All its Users*

‘Equal justice for all’ is perhaps the most powerful (and most illusory) claim made in the context of access to justice movement. Yet, it has a strong persuasive force and needs to be taken seriously as a guideline for law reforms. How much is TPLF contributing to an accessible civil justice system that is genuinely public and equally accessible to all its users?

Proponents of TPLF may argue that the availability of private litigation funding contributes to accessibility of civil justice, and thereby also to equality of access, as TPLF would fund cases that users would otherwise drop since they would not be able to cope with the costs and expenses of litigation and engage capable legal representatives. This is also the logic followed by some courts, which have argued that ‘... it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure those who are involved in litigation have the benefit of legal representation.’<sup>38</sup> If something is better than nothing, this logic is flawless – however, how much is TPLF *really* contributing to equality and the image of civil justice as a public and publicly available service?

Public services need not be exclusively composed of public entities; public–private partnerships are possible and sometimes desirable. Still, behind-the-scenes participation typical of many TPLF arrangements and the urge to produce profits for the private funding provider do not look great from the public perspective. They hold as much potential for friction as the participation of private clinics in public medical aid schemes.

The level of TPLF’s contribution to equality of access to justice depends on the coverage of cases that would otherwise be dropped due to insufficiency of personal resources and unavailability of other external funding sources. At that point, we encounter another major problem: while there is abundant and largely reliable data on cases within a public legal aid system, there is no comparable dataset for cases covered by TPLF arrangements. Most information on TPLF is anecdotal and fragmentary.

Moreover, the limited available information on TPLF points to the rather modest reach of TPLF. Statements about claiming a significant contribution to equal access are no more than wishful thinking, since it is certain that huge gaps left in legal aid systems have been only minimally narrowed. To use English examples again, the drop in legal aid coverage from 80 per cent of population in the 1950s to about 11 per cent of the population in the 2020s can barely be mitigated, even minimally, by TPLF arrangements. Not only is there no data that would prove otherwise, but it is also reflected in the very nature of TPLF arrangements.

Investing private capital in other people’s dispute resolution generally brings profits only in a limited number of high-value cases. A lot of discussion about TPLF emerged in the context of international arbitration, where such funding became sufficiently frequent to stir debates and provoke research.<sup>39</sup> In the context of a public civil justice system,

<sup>38</sup> Lord Phillips in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 92 [54].

<sup>39</sup> cf ICCA 2018 (n 37) 4; Willem H van Boom, ‘Third-Party Financing in International Investment Arbitration’ (SSRN Papers, 23 March 2012) <<http://ssrn.com/abstract=2027114>> accessed 19 May 2024; Oliver Gayner, ‘Third Party Funding: From Origins to International Arbitration’ (2018) 37 *The Arbitrator and Mediator* 69; Peter M Muriithi, ‘Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions’ (2022) 10(1) *Alternative Dispute Resolution Journal* 193.

third-party funders generally offer their services in high-volume commercial cases. Typical legal aid cases related to family, labour or housing disputes that used to be, and continue to be, characteristic of access to justice discussions are seldom in a position to find speculative investors willing to cover litigation costs for negligible gains. This is even less the case with small claims and consumer disputes – with the notable exception of aggregate and collective litigation proceedings, which are still unavailable or dysfunctional in many countries.

But even disregarding the limited case areas and modest coverage, access of different litigants to TPLF funding in the same and typical categories of TPLF cases is hardly equal. In the end, the decision on funding depends on the assessment of risks and potential gains. Thus, access to justice of litigants in cases with different likelihoods of success, different potential profits and different estimated duration and complexity is *per definitionem* unequal. Many legally sound cases will never be able to find a funder, while some less sound ones may get abundant funding. Is such access equal? It does not seem to be the case – it rather resembles a situation where, in a public hospital, only patients with blue eyes and AB blood type would have a chance to be examined and hospitalised. The controversies around equal access to justice were noted even in the context of investment arbitration, which is one of the areas where third-party funding is most practical and most frequently used.<sup>40</sup>

### *iii. Unnecessary Litigation Must be Avoided – Litigation is the Ultimum Remedium*

On a certain level, it can be argued that TPLF contributes to less litigious dispute resolution. Third-party funders generally do not favour long judicial procedures and tend to keep their investments in legal proceedings as low as possible. Such considerations (to the extent that they can be voiced by funders and have an impact on litigation) can contribute to less abusive behaviour in the proceedings, preventing protraction, reducing delays and stimulating early settlements.

However, the positive effects of TPLF arrangements on reducing (the length of) litigation and promoting consensual dispute settlement need to be verified objectively. So far, there is no sufficient empirical evidence that would prove them. On the other side, it is certain that the main purpose and aim of TPLF is to make litigation possible and to promote it as a means of dispute resolution. It is obvious and almost trite to note that, in this context, TPLF promotes litigation, and does not focus on negotiation and alternative dispute resolution methods.

It is also fair to say that there are no reliable studies that would confirm that TPLF significantly raises the number of litigation proceedings, or that it affects the number of frivolous cases brought before judicial and arbitral fora. Still, individual cases demonstrate that the availability of funding arrangements can incidentally encourage abusive litigation

<sup>40</sup> The ability to submit claims in investment arbitration is contested as a form of access to justice, since the availability of alternative public channels for recourse (like national courts) makes third-party funding of claims in investment arbitration non-essential, even limiting for access to justice of other unrepresented and unfunded interests. See Lise Johnson and Lisa E Sachs, 'The Outsized Costs of Investor-State Dispute Settlement' (2016) 16 *AIB Insights* 10.

and arbitration.<sup>41</sup> Conceptually, it is important to note that profit-driven investment in litigation is not immune to unethical practices, similar to those of US patent trolls, where litigation (or the threat thereof) would be used to extort settlements. After the decriminalisation of barratry, defined as ‘the persistent incitement of litigation,’ both domestic and international practice must still find effective methods to prevent TPLF from shifting from a tool that supports access to justice through litigation into a generator of litigation that brings no justice at all.”

#### *iv. Parties Must have Control of their Procedural Actions*

The times when parties were regarded to be *domini litis*, sovereign masters of litigation, are gone. Parties have various procedural obligations, and they need to collaborate with the court to achieve not only their private interests, but also inherent public goals of proportionate, quick, inexpensive and fair litigation. Still, we need to be aware that the litigation system is established to provide a dispute resolution forum for private parties and their interests. To this extent, the principle of party control is still at the core of good administration of justice – not in the sense that parties’ actions are the only controlling element (the court needs to maintain active and effective case management), but in the sense that it is assumed that parties (and not unknown third persons) control their own actions. Every civil procedure textbook emphasises that claims in litigation are decided upon the initiative of the parties, and that *parties* define both whether and about what the court will litigate. Subject to legal limitations and the court’s case management powers, parties also determine the course of proceedings.

Financial limitations and the necessity to rely on third-party funders bring the risk of de facto departure from this fundamental procedural principle. As a party enters into a contractual relationship with a third-party funder, it is necessarily a limiting factor on its autonomy in disposing with the subject matter of the dispute. What is required from the funder as a condition precedent for concluding the funding agreement is dependent upon the circumstances. Nevertheless, standard practices of insurers and other financial investors include a broad obligation on the part of the party to present and disclose numerous details relevant to assess the risks of litigation. Thus, it may be assumed that third-party funders often receive from the funded party much more information than the litigation court. Moreover, conditions and limitations contained in the funding agreement, allegedly to reduce risks and increase the likelihood of success (on which funder’s fee depends) may include a significant reduction in parties’ freedom to decide on any or all of the actions that determine their procedural tactics and strategy. In many cases, the funder may wish to control not only the parties, but also their lawyers. For instance, the funder can contractually take from the parties a substantial part of their rights relating to the conduct of the litigation, such as the right to instruct lawyers.<sup>42</sup>

<sup>41</sup> The author of this text was personally involved as arbitrator in an arbitration where the same claim (loosely disguised as allegedly different) was submitted consecutively three times before three different arbitral tribunals, in an attempt to find one that would accept it. It turned out that such attempts were facilitated by financial arrangements which guaranteed the claimant (who was treated as foreign investor) the coverage of procedural costs.

<sup>42</sup> Such an arrangement was noted in landmark Australian case *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 ; See Gayner (n39)70.

Furthermore, the ICCA-Queen Mary Principles on TPF include in the definition of third-party funders the arrangements in which the funder enters into an agreement 'either with a party, an affiliate of that party, or a law firm representing that party'<sup>43</sup> thereby showing that the line of command can be even longer, including an alliance of entrepreneurial lawyers with the funders who can both jointly control the litigation, each seeking to achieve their own financial interests. In the end, it is quite possible that the funding arrangements exclude any control of litigation by the party or parties whose rights and interests the legal process is nominally supposed to protect. Is this aligned with the fundamental ideals of good administration of justice? Some authors have defined the TPF 'as a free market response to a free market problem',<sup>44</sup> but when the free market abolishes the freedom of the parties to decide whether and how their legal rights and interests will be protected, it turns civil courts into places of business, rather than places of justice.

#### *v. Legal Process and its Motives Must be Transparent*

Exactly one hundred years ago Lord Hewart underscored the fundamental importance 'that justice should not only be done, but should manifestly and undoubtedly be *seen to be done*'.<sup>45</sup> Since then, transparency of justice and the accountability of all those who participate in the judicial process have become fundamental procedural human rights, and even more so as they are among very few democratic checks and balances of the ever-growing powers of independent national judiciaries. 'Open justice' is a formula which is frequently discussed.<sup>46</sup> Public and transparent administration of justice is considered to be an essential element of the rule of law.<sup>47</sup>

How much is TPLF as a private funding agreement that determines the course of litigation contributing to open justice? Obviously, not very much. Transparency of TPLF agreements is not mandated, or worse: it is practically non-existent. Not so long ago, the dominant position in the nascent TPLF community was 'that funding is essentially just a form of corporate finance, which should not be subject to any regulation'.<sup>48</sup> In the context of international commercial arbitration (which is an area which 'thrives on confidentiality'),<sup>49</sup> the frequency of TPF arrangements stirred debates and controversies regarding duty to disclose the existence and content of such agreements. So far, no mandatory regulatory framework has been designed. At the level of best practice, ICCA embraced a rather soft view on parties' duty to disclose the existence of a TPF agreement – but not its specific content.<sup>50</sup> Therefore, even more striking is the fact that in most European systems of civil justice there are no specific rules or practices that would allow the public to understand the motives and arrangements that have determined the course of litigation and thereby perceive ('see') whether or not justice has been done in proceedings before a public court of law. Moreover, there are no public or private means that would assess the quality or social

<sup>43</sup> ICCA 2018 (n 3737) 14 (Principle A.3).

<sup>44</sup> Gayner (n 39) 69.

<sup>45</sup> *R v Sussex Justices* [1924] 1 KB 256.

<sup>46</sup> See most recently Sorabji (n 7).

<sup>47</sup> cf Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 8.

<sup>48</sup> ICCA 2018 (n 3737) 5.

<sup>49</sup> Van Boom (n 39) 13.

<sup>50</sup> See ICCA 2018 (n 37) 14ff and more particularly Principles A.1–A.4 ('Disclosure and Conflicts of Interest') and Principles B.1–B.4 ('Privilege and Professional Secrecy').

impact of individual TPLF arrangements. The private funders are virtually unaccountable: while parties and their lawyers are subject to the court's orders and may eventually be sanctioned for the breach of their obligations, it is generally held that courts and arbitral tribunals lack jurisdiction to issue orders (either on costs or otherwise) that would bind a third-party funder.<sup>51</sup>

Another problematic element of TPLF from the perspective of transparency concerns a lack of analytical data that would enable impact assessment and steer civil justice reforms. In contrast to public legal aid systems, which can occasionally be ineffective, but generate an abundance of publicly available reports on expenditures and their recipients, participants, providers and cases covered by legal aid schemes, TPLF arrangements virtually pass under the public radar. Except in rare cases where particulars (usually only financial) of the TPLF agreements are leaked to the public, there are no systematic reports which would allow in-depth analysis of aggregate data and evaluation of the legal, economic and social impact of such arrangements. This does not imply that such arrangements are improper or anti-social, but as long as they remain a 'black box' inaccessible to the public, we have the right (and obligation) to doubt.

#### *vi. Litigation Costs Must be Adequate and Fairly Shared by the Participants in Litigation*

Indisputably, litigation is expensive today – too expensive. In this millennium, the main problem of accessibility in most places is linked to the inability of civil justice systems to provide fair and effective services at an affordable price. Therefore, keeping the costs of legal procedures under control has been a priority since the 1990s. It is also a common fact that most expenses in litigation proceedings are not those arising from court fees. While occasionally significant, not even the costs of evidence can be compared with the costs of legal representation by professional lawyers. This has sparked the trends to cut the costs of intermediaries between parties' interests and the adjudicators by simplifying proceedings and the availability of legal assistance that make self-representation of parties a feasible alternative to the use of professional lawyers.<sup>52</sup>

The policy of cutting the number of intermediaries does not always work, but by and large it is effective in most cases as a method of keeping procedural costs adequate and affordable. Of course, in cases where lawyers are inevitable, these costs are sometimes prohibitive for the parties unless funding is found. The TPLF can enable parties in such cases to litigate, but at what cost? In this scenario, the number of intermediaries is increasing, causing increased total litigation expenses. The third-party funders expect not only to recover their expenses, but also count on a sound profit. As noted by knowledgeable observers, in the context of collective proceedings 'the need for both lawyers and funders to make a profit can result in increased transaction costs and decreased net returns to the class members'.<sup>53</sup>

Effectively, the TPLF increases total litigation costs. Who is expected to bear the price of this increase? Third-party funders mostly work in the shadows, so their share is not a

<sup>51</sup> For arbitral tribunals and their lack of jurisdiction to issue cost orders against third-party funders see *ibid* 15 Principle C.4.

<sup>52</sup> Compare Sorabji (n 3319).

<sup>53</sup> Legg (n 30) 11f.

part of total litigation costs? Not necessarily. At least in international arbitration, in some proceedings the expenses incurred for procuring third-party funding (including their ‘cut’ of the amount awarded) have been calculated as a part of recoverable procedural expenses. The TPF Principles of ICCA-Queen Mary hold middle ground, providing that ‘[t]he question of whether any of the cost of funding, including a third-party funder’s return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details.’<sup>54</sup>

In this way, the back door is opened for shifting of increased, supplementary costs of TPLF to the non-funded party, which has no stake whatsoever in the funding agreement. It is yet another potential violation of fairness (self-funded parties need to cover for commercial funding agreements concluded by their adversaries) and equality (in TPLF cases non-funded parties are in an unequal position, with higher exposure to costs than in non-funded cases). As cost allocation and fee-shifting decisions are made as a part of the final decision on the merits, additional uncertainties are introduced in the process as to who and will finally bear rather sizeable TPLF costs and to what extent. This author would submit that such uncertainties are also not easily reconcilable with fundamental ideals of good administration of civil justice.

*vii. Parties Whose Rights are Violated Deserve Full Redress for the Harm Caused to them*

From the perspective of the funded party, assuming that in most cases it will finally have to waive a part of the duly awarded compensation in favour of the funder, this means that – even in a best-case scenario in which the legal claims of the party are fully endorsed and approved by the court – the party who has been harmed will receive at best some 60 per cent to 70 per cent of the full redress (the rest being paid to the third-party funder). It may sound naïve, but the high ideals of a good system of dispute resolution have always asked for the provision of effective, just and full redress for the wronged party. If TPLF arrangements (and/or agreed contingency fees) make this impossible, the substantive law’s promise is being broken. The law guarantees *redress for harm*, and not ‘*some 60 to 70% of due redress*’. Civil justice that does not keep its promises inevitably does not satisfy the expectations of its principal users. Some users may welcome the fact that they can achieve *any recovery* (it is better than nothing), but ultimately, few will be convinced that *full justice* has been done.

### III. Conclusion: Not a Dead End, but Rather a Narrow Trail ...

A common challenge for public justice systems lies in the fact that – at least for those of us who are professors of procedural law – justice systems are understood as dispute resolution

<sup>54</sup> ICCA 2018 (n 37) 15 Principle C.3.

schemes created for the benefit of their ultimate users, citizens and companies whose rights have been threatened or violated. But, just as in the context of private justice mechanisms, TPF is a vehicle which is largely or solely motivated by the private interest of a non-party to make speculative profit. In the end, this is likely to create anti-social consequences in a not negligible number of cases, unless we have in place strong checks and balances that can force everyone to work in a way that is compatible with the goal of good administration of justice.

Returning to the main question of this chapter, whether TPLF is a vehicle for access to justice, the answer would be – only marginally. In a limited number of high-value cases (in particular in voluminous commercial disputes and in certain class-action proceedings) it is acceptable as a surrogate vehicle – in the expectation of better solutions – as this is the only option that could bring *some* justice.

However, ambitious claims that TPLF is by and large a solid and reliable vehicle for access to justice should be met with much scepticism. Yes, it is the means of last resort in some cases, but these are not typical cases where access to justice is essential for litigants who need to settle their family disputes, regulate their housing problems or secure fair treatment by their employers. Neither is TPLF an option in typical low- to mid-value civil cases which are still the classic examples in litigation textbooks. In cases where TPLF is available, it is not available on an equal basis and its costs are considerable. There are multiple ways in which TPLF may create tensions with basic ideals of proper administration of justice, ideals that propagate a vision of a cheap, affordable, just and transparent legal process that provides, full redress for the litigants on fair terms. Since arguments that private funding through contingency fees and TPLF bring access to justice are readily used by politicians to continue underfunding public legal aid systems, we should avoid them. Maybe TPLF is not a dead end; at present, it seems that it will stay with us and even be expanded. But if TPLF is a road to justice, we must be aware that it is certainly not a broad avenue, but rather a narrow trail which will bring only a few to their chosen destination, and at considerable cost.

PART I

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Public and Private Funding of Civil Justice –  
Regulatory Perspectives

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