

# How Can Business Best Approach Human Rights in Third-Party Litigation Funding?

## Guidelines for Future Regulations

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### Abstract

Conceived as a human right, access to justice is part of the rule of law, well recognised in several international instruments (Arts. 8 and 10 of the UDHR; Arts. 2.3 and 14 of the ICCPR; Arts. 6 and 13 of the ECHR and Art. 47 of the CFR). The present fulfilment of this right includes forms of privatisation like private insurance covering the costs of litigation, contingency-fee arrangements between lawyers and clients, crowdfunding applied to support the costs of litigation, and third-party litigation funding (TPLF). In the present article, I will restrict my analysis to TPLF as a private form of investment designed to finance access to justice. The aim of this article is to provide arguments in support of the regulation of TPLF as well as normative guidelines to inform that regulation. For this purpose, I will start by presenting different approaches to TPLF and will then assess – from the human rights perspective – examples of regulation. This evaluation intends to determine to what extent these regulations are in line with the human rights matrix of obligations: namely, the duty to respect, to protect and to fulfil human rights. Finally, I will present conclusions following the results of this evaluation and suggest guidelines to improve future regulations.

**Keywords:** access to justice, human rights, third-party litigation funding, business and human rights.

## 1 Introduction

Conceived as a human right, access to justice is part of the rule of law, and it has been recognised in several international instruments such as Articles 8 and 10 of the Universal Declaration of Human Rights, Articles 2.3 and 14 of the International Covenant on Civil and Political Rights, Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the European Charter of Fundamental Rights. We should consider, however, that the content of this right and the related duties have not

always been the same; they have evolved over the past few decades, especially through jurisprudence.<sup>1</sup>

The concept of access to justice is complex. It not only relates to the right to a fair trial and due process but also takes into account the barriers that can prevent citizens from having *effective access to the courts*. For the purposes of this article, I consider that the elements related to *effective access* to the courts can be conceptually distinguished from those linked to a fair trial and due process of law. In this way, we can clearly observe that over the past few decades those elements related to *effective access* have been interpreted in accordance with the rationale behind the welfare state.<sup>2</sup> This means that the content of the right to *access to justice* was linked intrinsically to the way the state could help its citizens to overcome not only economic but also cultural and territorial obstacles that prevented them from effectively accessing the courts and, as a result, from having a fair trial.<sup>3</sup>

Over the last three decades, however, we have witnessed in many countries the evident crisis of the welfare state and the consequent process of privatisation of many of the roles formerly performed by the state. Therefore, we observe that private actors are starting to develop some of the functions that were previously the domain of public services. What has been termed as the commodification of many public goods has to a certain extent led to the marketisation of certain public services, including civil justice. This trend has been intensified in Europe, as many austerity policies followed the 2008 financial crisis and had a strong impact on civil justice.<sup>4</sup> Also worth noting is that despite what any personal or polit-

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1 X. Kramer, J. Hoevenaars & E. Themeli, 'Frontiers in Civil Justice – Privatising, Digitising and Funding Justice', in X. Kramer, J. Hoevenaars, B. Kas & E. Themeli (eds.), *Frontiers in Civil Justice* (2022) 1-20, at 4.

2 See B.G. Garth and M. Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', 27 *Buffalo Law Review* 181-292, at 183-5 (1978). Also M.C. Ucin, 'Revisiting the Concept of Access to Justice as a Human Right in the Post-Welfare State', in YSEC, *Yearbook of Socio-Economic Constitutions* (2023), Springer, [https://doi.org/10.1007/16495\\_2023\\_49](https://doi.org/10.1007/16495_2023_49), 1-25.

3 See Garth and Cappelletti, above n. 2; B.G. Garth and M. Cappelletti, *Access to justice: the worldwide movement to make rights effective. A general report in Access to Justice Series*, Book 1, Vol. I, (1978), at 3-12; B.G. Garth and M. Cappelletti, 'Access to Justice and the Welfare State: An Introduction', in M. Cappelletti (ed.), *Access to Justice and the Welfare State* (1981) 1-24, at 20.

4 Kramer, Hoevenaars & Themeli, above n. 1, at 2, 9.

ical preferences might be, this trend shows no signs of changing.

This leads to a topical debate, as many states are cutting the budgets given to legal aid programmes, thereby leaving room for several alternatives that are guided by the aim of profit while at the same time legitimately fulfilling a social demand.<sup>5</sup> For this reason, the legal system must provide a new balance that takes into account all the interests at stake. It becomes crucial to take time to redefine not only the role of the state but also that of private actors, especially because the values implied in access to justice are fundamental to the rule of law.

In this context, we observe that there is a growing field of investment where the market has found an efficient way of providing access to justice regarding certain claims. This can be done by insurance companies expanding their services to cover litigation costs, by investors such as private funders (third-party funding or crowdfunding), and even by lawyers supporting their clients' claims in an entrepreneurial venture adopting the form of contingency-fee agreements (CFA) or damages-based agreements (DBA)<sup>6</sup> where this is allowed by the law.

In this article, my analysis will focus on third-party litigation funding (TPLF), conceived as a contract whereby a funder – with no direct interest in a piece of litigation – pays the legal fees of one of the parties – normally the claimant – and receives a return on that investment that is normally contingent on the success of the case and is paid to the funder from the proceeds of the action.<sup>7</sup> This private way of financing access to justice is controversial, however, and gives rise to at least three different attitudes. In some countries belonging to the common law tradition, this business model is viewed with distrust and is associated with certain forms of maintenance and champerty.<sup>8</sup> Therefore, from this perspective, TPLF should be limited, if not forbidden.

5 This is particularly evident in the case of England and Wales, as J. Sorabji illustrates in 'Legal Expenses Insurance and the Future of Effective Litigation Funding', 14(4) *Erasmus Law Review* 189-97, at 189-90 (2021). The author mentions that public funding of civil litigation since the 1940s was the paradigm as the 'Legal Aid and Advice Act' entered into force in 1949. However, this had changed by 2016, when public financial provisions to that legal scheme decreased to the lowest possible level, considering the minimum obligations under the European Convention of Human Rights. See also M. Ahmed and X. Kramer, 'Global Developments and Challenges in Costs and Funding of Civil Justice', *Erasmus Law Review* 4, (2021): 181-8 at 181.

6 DBA is a funding agreement between a lawyer and a client, whereby the lawyer's fees are dependent on the success of the case and are determined as a percentage of the damages received by the client. As in contingency fees agreements, the lawyer will not receive anything if the case is lost. See Ahmed and Kramer, above n. 5, at 184. The Jackson Reforms suggest the introduction of DBA as an improvement to CFA. However, this kind of agreement is not allowed in every country. In the Netherlands, for example, lawyers are prohibited from working based on a purely contingent fee. See R. Philips, *The Third-Party Litigation Funding Law Review: Netherlands* (2021) 122-9, at 124.

7 N. Rowles-Davies, *Third Party Litigation Funding* (2014), at 4. See also C. Mendez, 'Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiff', 39(1) *Mississippi College Law Review* 102-23, at 102 (2021).

8 To find the antecedents of maintenance and champerty, we should look back to mediaeval times, as David Capper explains. In those days, rich

Another approach may suggest that private initiative can offer an efficient solution, while market laws may provide enough guidelines to regulate this practice. In between, we can foresee an intermediate approach that admits the importance of regulating this activity to safeguard the public values involved. Within this last perspective, several degrees of regulation are suggested in the international panorama, ranging from the proposal of self-regulation by these funders to heteronomous regulations provided by international instruments or domestic laws. At the same time, these options could be strict or moderate, depending on the different scenarios analysed.

When trying to determine the best alternative among all these possibilities, we may not be able to arrive at absolute answers, because opting between them entails taking several elements into account. These factors include the cultural context, the impact on the market, and additional rules governing civil litigation, among other aspects that only policy designers can evaluate consistently. From the legal perspective, however, we have a say in stating the standards that should guide any decision adopted in the policy field. Therefore, evaluating these alternatives and which steps should be taken requires that we adopt a normative approach. So the purpose of this article is to provide arguments in support of the regulation of TPLF as well as normative guidelines to inform that regulation. Accordingly, it will assess to what extent present or projected regulations are in line with the human rights matrix of obligations, namely the *duty to respect, to protect and to fulfil* human rights.

For this purpose, I will introduce in Section 2 of this article the human rights dimension, which I contend has been disregarded in the debate but could be helpful in providing guidance regarding the possible future regulation of TPLF. In this approach, we can claim that the concept of human rights imposes a matrix of duties (to *respect, to protect and to fulfil*) and that these duties are expected to be complied with to varying degrees by the state and private actors. These categories allow us to assess in Section 3 the different approaches to TPLF. Following this analysis, in Section 4 I will review – from a critical perspective – examples of strict regulation, moderate regulation and self-regulation to determine to what extent these alternatives serve the human rights approach. After this evaluative analysis, I will elaborate guidelines to be considered in the discussions on TPLF regulation.

landowners bought up others' rights to sue in order to harass their enemies, thereby acquiring more landholdings together with the political and social influence that this provided them. According to this author, maintenance is the support of another's litigation without any justification, and champerty is a kind of maintenance, whereby the supporter is given a share of the recovery received by the sponsored party. See D. Capper, 'Litigation Funding in Ireland', *Erasmus Law Review* 4 (2021): 211-20, at 212.

## 2 Access to Justice as a Human Right: The Duties Framework

Despite the tendency of the state to delegate some of its functions, it remains responsible for the protection of human rights through maintaining an adequate balance between public and private interests. Indeed, the privatisation of public services leads to many new challenges that must be faced by the state through regulation to avoid the prevalence of economic interests over those purposes and values that support newly privatised areas.<sup>9</sup> At the same time, the state and its regulations should be proportionate and respect the right to contract and provide services that are demanded by society. I suggest that private law should mediate in order to limit profit-related goals while protecting the logic and the intrinsic values related to access to justice conceived as a human right.<sup>10</sup> First, this will contribute to preventing market logic from eventually corrupting the internal values of democratic participation, access to justice and the rule of law. Second, it will help to limit some of the ethical problems relating to the market, such as the risk of inequalities, discrimination and asymmetry of information.

Worth noting is that access to justice not only serves individual purposes such as the right of individual citizens to have their controversies decided by an impartial body but also upholds public values. It also serves the rule of law, as it provides the right interpretation of the laws and supports the dynamics of democracy by feeding the public debate that sometimes takes place in the courtrooms, such as in public interest litigation cases.<sup>11</sup> Consequently, both dimensions of this right should be protected adequately by establishing a good balance between the opposing interests. I posit that both of these interests – namely, the aim of profit and the protection of access to justice – could be balanced adequately by regulation if we were to adopt the human rights approach that I present in what follows.

Within the doctrine of human rights, it is topical that the complete fulfilment of each kind of right involves the performance of three types of duties that are transversal and apply to every right, regardless of whether it is categorised as being positive or negative. In this transversal perspective, the *duties to respect, to protect and to fulfil* apply to every right irrespective of whether it be civil, political or social.<sup>12</sup> It must be noted, however,

that this does not mean that each of these duties should be performed equally by the same actors or institutions.<sup>13</sup>

And although human rights refer to norms concerning the relationship between individuals and the state – which is understandable from a historical perspective – there is still room to include the responsibilities of private actors, particularly when this becomes the result of a change in the social dynamic. Indeed, it can be accepted as evident that to protect and fulfil human rights, the state is entitled to impose duties on individuals through the law.<sup>14</sup> Similarly, under Article 29 of the Universal Declaration of Human Rights, everyone has a duty to the community. And for corporations, this entails two levels of responsibility: to the local community in their area of operation and to the national society in which they function. Therefore, it becomes urgent to stipulate the boundaries of these responsibilities.<sup>15</sup>

To better understand how we could assign responsibilities, we should define the aforementioned duties: *to respect, to protect and to provide aid or to fulfil*.<sup>16</sup> The duty to *respect the rights* or to *avoid depriving* the protected good means that subjects should avoid doing harm to others or to deprive them of the protected good. This duty applies generally to everybody in a civilised society. However, it is reasonable to foresee that this duty may be infringed on, and it is the role of the state to establish norms defining crimes or the conditions of civil liability that pertain to the violation of this first duty.

The *duty to protect* the right is linked strongly to the first duty. From the state's perspective, this duty implies two levels of obligation. The first level implies maintaining law enforcement by the police and by any criminal or administrative prosecution. The second level entails the duty to design social institutions that do not exceed the capacity of individuals and organisations – including private and public corporations – to conduct themselves in an appropriate manner. This includes persistent

kinds of rights. The complete fulfilment of each kind of rights involves the performance of multiple duties', in *Basic Rights. Subsistence, Affluence and U.S. Foreign Policy* (1980), at 52. See also: A. Eide, 'The International Human Rights System', in A. Eide, W.B. Eide, S. Goonatilake, et al. (eds.), *Food as a Human Right* (1984) 152-61, at 154; A. Eide, 'Economic, Social and Cultural Rights as Social Rights', in R.P. Claude and B.H. Weston (eds.), *Human Rights in the World Community. Issues and Action*, Third Edition (2006), at 170-9; P. Alston, 'International Law and the Right to Food', in A. Eide, W.B. Eide, S. Goonatilake, et al. (eds.), *Food as a Human Right* (1984), at 162-74. At a positive level, these same levels of duties are defined in the General Comment N° 24 (2017) from the Committee on Economic, Social and Cultural Rights, on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

9 G. Teubner, 'After Privatisation? – The Many Autonomies of Private Law', in T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (1999) 51-82, at 75.

10 In this line, although not referring to access to justice, see Teubner, above n. 9.

11 O. Fiss, 'The Social and Political Foundations of Adjudication', *Law and Human Behaviour* 6-2 (1982): 121-8 at 121; see also O. Fiss, 'Against Settlement', *The Yale Law Journal* 93, 6 (1984): 1073-1090, at 1085. M. Ahmed and X. Kramer show the relationship between the citizen's right to access to the courts and the rule of law within English jurisprudence. See Ahmed and Kramer, above n. 5 at 182-3.

12 As H. Shue argues, 'The useful distinctions [between rights] are among duties, and there are no one-to-one pairings between kinds of duties and

13 Shue, above n. 12, at 52.

14 Eide (1984), above n. 12, at 154 and Eide (2006), above n. 12, at 175.

15 A. Eide, 'Obstacles and Goals to Be Pursued in Economic, Social and Cultural Rights', in A. Eide, C. Krause & A. Rosas (eds.), *Economic, Social and Cultural Rights*. A textbook, second revised edition (2001) 553-62, at 560. This is enacted by the N.U. Guiding Principles on Business and Human Rights as it will be briefly presented later on in this article. However, it is worth noting that the aforementioned categories differ slightly from the ones given in the UN Guiding Principles, namely the duty to respect, to protect and to remedy.

16 See Shue, above n. 12, at 52-64; Eide, above n. 12 (1984), at 154.

threats that require imaginative legislation and long-term planning.<sup>17</sup> In this vein, to avoid violation, the law may also try to prompt compliance by providing incentives and indirect burdens in the form of subsidies, tax discounts or exceptions.

Finally, it is crucial to consider that, despite every effort, there may be instances where certain people may need practical assistance. And here is where the *duty to fulfil* comes into play. As a typical example, we can mention any programme related to social benefits and – within the scope of this article – it also refers to legal aid programmes and may include private alternatives like TPLF. Indeed, it is precisely at this level that the shift in the role of the state is taking place and where the manner in which the public provision of legal aid is leaving space for some private forms of financial services and investment becomes more visible.

Under the present circumstances, the debate on access to justice must consider the needs of those citizens who are beyond the protection of curtailed legal aid programmes. In effect, if we consider that in many countries these systems have undergone budgetary limitations, it is logical to accept that their beneficiaries are being affected and may suffer the consequences of these restraints.<sup>18</sup> However, the issue of access to the courts is not restricted only to those citizens that may be left out of legal aid schemes. It also includes those citizens that may choose not to bring their claims to the court because the costs and benefits equation discourage them from doing so. For these cases, private alternatives may be useful, as they can provide financial aid to further the exercise of rights while promoting the rule of law.<sup>19</sup>

As stated previously, it is at the level of *fulfilling* the right of access to justice that we are witnessing the emergence of private forms of financing. Hence, we observe that not only legal aid schemes – and therefore not only the states – are involved in this third category of duties. Moreover, when profit-oriented private actors intervene in this arena, they must at the same time *respect human rights*. This last standard should then guide future TPLF regulations, while the states comply with their *duty to protect* the human rights of its citizens by elaborating such regulation.

Putting all these premises together, we may find a few guidelines on designing better TPLF regulation. A complete analysis of this complex scenario needs to be twofold. On one level, we should study the evolution of the role of the state and consequently revise the newly privatised areas that need to be regulated in accordance with their intrinsic values. This first level of analysis leads to the protection of the access to justice core prin-

ciples, related to the rule of law, the right to a fair trial, and the adequate functioning of the justice service. The potential risk is related to the eventual prevalence of the aim of profit over those fundamental principles. This perspective is supportive of the proscription of maintenance and champerty, which are considered torts and offences in several common law jurisdictions. In the same vein, we present below examples of regulations focusing on the avoidance of conflicts of interests between the funder, the funded party and their lawyers.<sup>20</sup>

A second and parallel level of analysis can be conducted, from which we should be able to establish an adequate coordination between the state and the private actors in these privatised areas. It is fair to acknowledge that a balance that may have worked during the period of the welfare state may no longer be suitable to face new challenges. The evident decline in the public investment in some former public services has allowed the intervention of new actors such as corporations or civil society itself. However, the change in the role of the state must not imply abandoning a certain protection of individuals and respect for their fundamental rights.

It is particularly at this level that the human rights framework can be helpful to determine how public policies could guide the behaviour of private actors towards more extensive responsibility. The balance may come from allowing practices such as TPLF, which derive from the freedom of contract while at the same time inducing businesses to meet human rights standards. In this view, businesses may *respect* the human right to access to justice, but they may also take concrete action to *protect* this right while they *fulfil* it, by proceeding in accordance with human rights values (including, among others, dignity and non-discrimination).

Without denying that TPLF is a business model, we should still require that the behaviour of private actors be set in accordance with the protection of the human rights standards. Therefore, the state should *protect* human rights by setting regulations that encourage their business models to *respect* and *protect* human rights in general and access to justice in particular. Likewise, the Guiding Principles on Business and Human Rights establish that states should enforce laws that are aimed at requiring business enterprises to respect human rights and ensure that laws that govern the creation and operation of business enterprises, such as corporate law, do not constrain but enable respect for human rights

17 Shue, above n. 12, at 62.

18 See references in n. 5.

19 See T.Q. Higgins, 'Bridging the Gap: Providing Access to Justice for Middle-Market Litigants', 51 *Suffolk University Law Review* 289, at 303 (2018). Although this article refers to the experience in the United States, this can also be the case in many European jurisdictions, as the legal aid programmes are being reduced in scope. See also A. Cordina, 'Is It All that Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe', *Erasmus Law Review* 4, (2021): 270-9, at 273.

20 For a review of these issues on arbitration, see Y. Chen, *Third-Party Funding in International Arbitration: A Transnational Study of Ethical Implications and Responses* (2022). The axiological tension between TPLF and maintenance and champerty is illustrated in the Irish case in Section 3.1.





(Principle 3, a, b).<sup>21</sup> We add here that when a corporation is involved with the fulfilment of a human right, these duties should be reinforced, as suggested previously.

### 3 An Overview of the Attitudes Towards TPLF

In this section, I will present an array of possible attitudes towards the emerging practice of third-party litigation funding (TPLF). Worth noting is that this is not intended as an exhaustive description of the concrete attitudes being adopted in the different jurisdictions. It is not even a comprehensive report on the positions of the actors involved in the debate, although there are, of course, concrete representatives of them, as I will demonstrate further on. The intention of this reconstruction is to discuss reasons for and against the regulation of this alternative way of financing access to the courts.

These several attitudes can be illustrated in the graphic above. The arch of possibilities ranges from strict prohibition to total permission, based on the notion that the market should regulate itself. In between, some forms of regulation may take place, ranging from strict rules set by the state to certain forms of self-regulation. I will present each of them while discussing a few of their main arguments.

#### 3.1 Prohibition of Commercial TPLF

The case in Ireland serves as an example of how this position could be defined. In short, any form of commercial third-party funding is illegal in Ireland, and funding

agreements are not enforceable because they could constitute examples of maintenance or champerty.<sup>22</sup> In the case *Persona Digital Telephony Ltd. v Minister for Public Enterprise* (2017) IESC 27, the Supreme Court of Ireland analysed, for the first time, the potential use of a third-party professional funding agreement in the context of the Irish rules.<sup>23</sup> I will present further on some of the definitions stated in that decision, as they are useful to understand the Irish prohibitive system.

In *Persona Digital*, the Court reached the conclusion that, in the Irish system, maintenance and champerty are torts and offences. Therefore, it is prohibited for an entity to fund, for a share of the profits, litigation in which it has no independent or bona fides interest. *Maintenance* is defined in that case as the giving of assistance to a party in litigation by a third party who has no interest in the litigation, while *champerty* is where the third party who is giving assistance will receive a share of the proceeds of a successful litigation. Both are offences that evidence a public policy (pars. 22-6).

In addition – and even though the law on the issue has ancient roots – the Court shows that there are recent cases involving maintenance and champerty. The Irish Court also remarked that the Statute Law Revision Act (2007) repealed certain statutes that were enacted before 6 December 1922, while torts and crimes of maintenance and champerty were retained in Ireland.

For the purposes of this presentation, it is relevant to understand which reasons support this approach to third-party funding, because it would not be exact to say that the Irish prohibition of TPLF could be reduced to a mere matter of positive law. In other words, I would not claim that judges apply the law in a formalistic fashion. Conversely, on reading this decision we find elements to affirm the opposite and claim that the judges are interpreting the laws in accordance with the values that support them. In this vein, the Court says that these two criminal offences evidence a public policy and then, in para. 43, cites the case *Fraser v Buckle Costello J.* (1996-WJSC-SC 1113, 5-3-96), which I replicate here:

21 The Guiding Principles on Business and Human Rights were endorsed by the Human Rights Council in 2011. The full text is available online: [www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights](http://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights). These Principles are built on a three-pillar framework which is similar but not identical to the one developed in this article. The duties included in the Guiding Principles are to protect, to respect and to remedy. On this topic, see J. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *Corporate Responsibility Initiative Working Paper N° 67*; J. Ruggie, 'Protect, Respect and Remedy: A United Nations Policy Framework for Business and Human Rights', *ASIL Proceeding*, International Law As Law 103, (2009): 282-287; M. Murphy and J. Vives, 'Perceptions of Justice and the Human Rights Protect, Respect and Remedy Framework', 116 *Journal of Business Ethics* 781 (2013).

22 For a broader presentation of the antecedents of maintenance and champerty, see Chen, above n. 20, at 26-9.

23 The case raised an interesting question regarding the impact of third-party funding in the constitutional guarantee of access to justice. However, I will not focus on this aspect of the decision, as it could deviate from my analysis. See paras. 8 and 54 (vi-vii & ix) of the Supreme Court decision.

The reasons why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These *fears* may be exaggerated; but, be that so or not, the law for centuries had declared champerty to be unlawful and we cannot do otherwise than enforce the law. (Emphasis added)

I find that this definition is conclusive and lets us understand this first position regarding TPLF. The word *fears* was highlighted, as it expresses not only a reason to support the condemning of champerty but also an affective attitude against certain forms of corruption of justice. We can foresee that the Irish case reflects a legal tradition backed by the protection of core values that are important for that tradition. This can explain why the Court says that these offences involve a public policy, and, in my view, it also explains why it may not be easy to adopt this emerging practice unless a legal reform introduces rules that take these fears carefully into account.

Despite this, however, it must be noted that the Irish Government has expressed that it will legislate allowing certain forms of private funding of international commercial arbitration.<sup>24</sup> This is in line with the opinion that Ireland, being one of the two common law jurisdictions remaining in the EU, could be developed as a legal services hub, and the adoption of litigation funding would then enable disputants to use this hub and consequently generate income.<sup>25</sup>

### 3.2 Strict Regulation

In this perspective, TPLF could be deemed legal under certain strict conditions. This attitude deviates in part from the previous one, as it allows the practice. However, certain fears or suspicions are still present and subtly guiding the proposed regulation. This appears to be the attitude adopted by the European Parliament when elaborating the proposal for a Directive on the responsible private funding of litigation in line with the Draft Report published in June 2021 (Voss Report) and the European Parliamentary Research Service Study issued in March 2021. It can be read in the Study that TPLF should be regulated because it may pose certain risks and entail conflicts of interests. It says explicitly: ‘If not properly regulated, it could lead to excessive economic costs and to the multiplication of opportunity claims, problematic claims and so-called ‘frivolous claims’. It could also be used for the pursuit of strategic goals by competing businesses, and the cost and time wasted in frivolous lit-

igation in some instances could also potentially directly affect aggregate productivity and competitiveness.’<sup>26</sup> In brief, we could say that this attitude recognises certain benefits of TPLF and therefore accepts that it may be legalised, albeit with the introduction of several limitations and safeguards to prevent any conflict of interest or corruption of the justice system. The main elements to be regulated under this position are the conflict of interest between the funder and the funded party, the excessive returns that the funders may impose in the funding agreements, and the undue influence they may intend to have on the procedures.

Although this may sound in keeping with my previous statement regarding the need to have a regulation that enforces an adequate balance between the interests at stake, this position still needs to be evaluated in accordance with human rights standards to determine to what extent this balance is achieved and whether the second level of protection – related to the responsibility of private actors to respect human rights – is taken into account. In the following section, I will dedicate a few paragraphs to reviewing this project.

### 3.3 Moderate Regulation

In line with the notion of providing regulation, this position appears to be more optimistic about the benefits of the intervention of private actors in the financing of civil justice. Consequently, it tries to promote this practice through a proportionate regulation that not only prevents possible abuses but also incentivises private action. In turn, this type of attitude can serve as a fair example of the way by which regulation can promote the fulfilment of access to justice through private action in the context of a post-welfare state. However, the main challenge is to protect this human right adequately through that stated regulation. Because there is no fixed balance at this point, many alternatives could satisfy the protective standards.

The different alternatives under this category could range from legislative regulation to the empowerment of judges, allowing them to control the funding agreements to avoid any conflict of interest or the restriction of access to justice of the funded parties. An example of the role of judges in the control of these agreements can be found in the self-regulated English system and its case law.<sup>27</sup> In England and Wales, judges are empowered to control the content of the agreements, and this may also apply in those systems that include a duty of disclosure regarding the existence of this financial support. A similar experience can be found in the case of Australia. As illustrated in what follows, these two cases, English and Australian, combine a degree of judicial review of the funding agreements with self-regulation instruments.

24 MC Cann FitzGerald, *Litigation Funding – New Rules on the Way?*, September 2022, [www.mccannfitzgerald.com/knowledge/disputes/litigation-funding-new-rules-on-the-way](http://www.mccannfitzgerald.com/knowledge/disputes/litigation-funding-new-rules-on-the-way).

25 Capper, above n. 8, at 220.

26 European Parliamentary Research Service Study issued in March 2021, at 1. A. Cordina reviews some of these objections from a Law & Economics perspective, Cordina, above n. 19, at 274-9.

27 See R. Mulheron, ‘England’s Unique Approach to the Self-regulation of Third-Party Funding: A Critical Analysis of Recent Developments’, 73(3) *The Cambridge Law Journal* 570-97 (2014).

### 3.4 Self-Regulation

This is an alternative to moderate regulation by which the state decides to allow investors to regulate themselves in their own interest, while at the same time preserving good practices and ethical values. This is done through an organisation, like the English Association of Litigation Funders (ALF), which joins the litigation funders and maintains control of their activity. It appears to be an interesting option that fits well with the idea of privatisation, whereby private actors are the ones taking the lead in developing these financial services and are in control of the activities of associated actors. Accordingly, this alternative has the advantage that the regulation is going to be efficient in promoting the growth of this practice. It is in the interest of these associations to ensure that their members comply with the codes of ethics and develop good practices that protect the image of the whole group.

However, and as a possible disadvantage, this could be seen as a corporative way of lobbying, and therefore the neutrality of these associations could be doubtful. It could be argued that this alternative may never replace legal regulation and the protection of access to justice provided by the state. In addition, the case of England and Wales illustrates that the ALF does not include every funder operating in that jurisdiction, and therefore this could weaken the control system.<sup>28</sup>

In the Australian experience, TPLF was encouraged by adopting minimal regulation, which included a form of self-regulation adopted by the Association of Litigation Funders of Australia (ALFA) through their Best Practice Guidelines (2019). This approach was intended to support access to justice on the part of class actions. However, stricter regulations have recently been introduced to protect the interests of the funded parties by avoiding excessive returns obtained by the funders.<sup>29</sup> For this reason, the Australian case is moving into a more regulated scenario that blurs it as an example of a self-regulated system. In turn, it can be mentioned that the Association of European Litigation Funders (EALF) has recently been integrated, and it is working on the draft of an instrument for self-regulation.<sup>30</sup>

### 3.5 Free-Market Option

With this last option, the decision would be to let the market alone provide better rules for this practice without further action being taken by the state. This alternative may sound like a laboratory example, and in its pure version it may be so. However, in many cases this is how TPLF begins to develop, since the litigation funding agreement (LFA) could be interpreted to be the exercise of freedom of contract. This was also the case in Austral-

ia and is the present case in the Netherlands. Although this alternative appears to be the most liberal, it is not accurate to say that it absolutely lacks regulation, because certain limits are implicit in contracts law. In the Netherlands, for example, the funding agreement is governed by the general rules of contract, with considerable room to choose the terms of the agreement but under the condition that these do not violate public policy or due process.<sup>31</sup>

This alternative assumes that the market can regulate itself efficiently. However, it is known that consumers or, in this case, solicitors of litigation funding may not always be powerful enough to negotiate the conditions in absolute freedom. Consequently, this alternative could potentially result in the abuse of solicitors by funders as well as in the predominance of economic interests over the protected right to access to the courts. At the same time, this last option should be avoided in the context of a post-welfare state, because the course of evolution should not imply going back to the previous stage, which is characterised by the state's lack of intervention in the protection of its citizens' welfare. Instead, a real evolution would imply overcoming the welfare-state crisis by creating sustainable systems in which standards of human rights are fulfilled either by the action of the state or by private actors.

## 4 Evaluation

Looking back at the previous alternatives from the human rights perspective, we may claim that the two options presented in the extremes of the arch – namely, the absolute prohibition of TPLF (3.1) and the free-market option (3.5) – do not satisfy adequately the duties that the human rights perspective imposes on the states. This is because for some sectors of society that are excluded from legal aid programmes it is mandatory for the state to provide alternatives while permitting private actors to play a role. Allowing and regulating TPLF adequately is in accordance with the shift taking place in many domains by the process of privatisation. At the other extreme, the alternative by which no regulations are introduced, thereby leaving its resolution to the market, is inadequate because it may not fully protect those citizens requiring these services. In both cases, if this were the attitude adopted by a state, it would not be complying sufficiently with its *duty to protect* access to justice conceived as a human right.

28 By 2014, for example, only 7 out of 16 recognised Funders operating in England were members of the ALF. See Mulheron above n. 27, at 578.

29 M. Legg, 'The Rise and Regulation of Litigation Funding in Australian Class Action', *Erasmus Law Review* 4, (2021): 221-34.

30 See A. Stadler, 'Third-Party Funding in Collective Redress', in X. Kramer, S. Voet, L. Ködderitzsch, M. Tulibacka & B. Hess (eds.), *Delivering Justice. A Holistic and Multidisciplinary Approach. Liber Amicorum in Honour of Christopher Hodges* (2022) 151-9, at 157.

31 Phillips, above n. 6, at 124. Note that in the context of the WAMCA, the courts could have discretionary powers to evaluate the content of the agreement. According to the WAMCA explanatory memorandum, the court may have the means to review the funding structure if it is concerned that the party funder is able to have an adverse effect on the interests of the claimants, for example, by having complete power over the decision to accept a settlement proposal. As Phillips explains (at 125), this instrument does not have force of law but could provide a guideline for the court to interpret the law.



Therefore, I will analyse below the other alternatives: namely, *strict regulation*, *moderate regulation* and *self-regulation*. I will present examples of regulations (those in force or projected) and examine to what extent they provide an adequate protection of access to justice conceived as a human right. It is obvious that this evaluation is not going to be complete, as we would need to assess the results of the implementation of these TPLF regulations on an empirical basis. However, my intention is not to conclude which option better *respects, protects* and *fulfils the right to access to justice*. Instead, it is to determine which alternative(s) could be the one(s) that better suit(s) – from a normative perspective – the human rights approach here elaborated. Subsequently, I will provide certain guidelines to be considered in the debate and the design of future reforms involving civil justice.

According to the previous statements, we could provisionally conclude that TPLF is a practice that – if *adequately regulated* – could serve access to justice in the post-welfare state. However, this conditional clause forces us to provide a more precise definition of what *adequate* regulation entails. I will try to do so in the following paragraphs.

#### 4.1 Projected Directive: A Strict Approach to Regulation

On 13 September 2022, the European Parliament adopted a resolution with recommendations to the Commission regarding a Directive on the responsible private funding of litigation.<sup>32</sup> This resolution acknowledges that although Directive (EU) 2020/1828 includes a few regulations on TPLF, it is limited to consumers' collective redress, therefore leaving a regulatory gap involving other cases related to business or human rights claims (para. L). It is interesting to note that the resolution assumes a broad perspective, as it connects the issue with the measures that Member States should take to ensure the fulfilment of access to justice by their citizens. Mentioned explicitly is the duty to make legal aid available to those in need, taking measures oriented to lowering legal costs and providing adequate public funding to civil society organisations or even promoting solutions like crowdfunding (para. A). This approach is relevant, as it shows how TPLF interacts with other solutions, considering the bigger picture of access to justice and its barriers.

The aim of the projected Directive is to regulate commercial TPLF: that is, situations in which a commercial actor invests for profit in certain cases by assuming the costs of litigation. It excludes any other non-for-profit forms of financing civil justice. In this vein, the European Parliament argues that *responsible* TPLF can lower costs, make them predictable, simplify certain procedures, and thereby deliver efficient services at costs that can be proportionate to the amounts in dispute. And for

it to be responsible, the funding should be subjected to certain specific regulations and assessment.<sup>33</sup>

The system provisionally designed in the proposal is built on Supervisory Authorities in the Member States, who should grant authorisations to conduct TPLF activities, provided that these entities comply with certain minimum criteria such as confidentiality, independence, governance, transparency, capital adequacy and fiduciary duty to claimants.<sup>34</sup> The aim of this authorisation system is to provide support and protection to funded claimants and beneficiaries while preventing conflict of interests, abusive litigation and the disproportionate allocation of money awards to litigation funders. At the same time, authorisation tries to ensure that TPLF allows access to justice by its beneficiaries and that the funders have some level of corporate accountability. This aim resonates with one of the levels of protection that we mentioned earlier, namely the need to regulate newly privatised areas in a post-welfare state, by avoiding any possible means of corruption of their intrinsic values.<sup>35</sup> In the case of access to justice and its connection with the rule of law, it should prevent any possible conflict of interests and abuse in the use of the public justice system.

As regards the main obligations of the funders involving their relationship with the benefiting parties, the projected Directive states conditions relating to the content of the agreements as well as to the duty of disclosure. It also prohibits the unilateral termination of the agreement by the funder (Art. 15) and includes a provision on the responsibility for adverse costs if the claimant party has insufficient resources to meet them (Art. 18 & 14, para. 5). It further states that a minimum content of the agreement will include clear details of the costs and expenses assumed by the funder, any cost to be borne by the claimants or beneficiaries (or both), and a reference to the responsibility of the funder for adverse costs. The risks being assumed include the escalating costs of litigation, the strictly defined circumstances in which the agreement could be terminated, and any potential risk of having to pay adverse costs.

The agreement should also include a clause stating that the awards would first be paid to the claimants, who would subsequently pay the agreed sums to the litigation funders. According to the terms of the proposed Directive, the agreement should include a disclaimer regarding the non-conditionality of funding in relation to procedural steps as well as a declaration of the absence of conflict of interest by the funder. This transparency requirement is determined in Article 13, stating that Member States shall require funders to disclose to a claimant and intended beneficiaries in the third-party funding agreement all information that may reasonably be perceived as having the potential to give rise to a conflict of interest.

32 European Parliament, 2020/2130 (INL).

33 See para. 3 of the Annex to the resolution.

34 Chapter II of the proposed Directive.

35 See Section 2 of this article.



In its turn, Article 14 establishes that agreements concluded with non-authorized entities have no legal effect. Likewise, any clause in the agreement granting the funder the power to have undue influence on the decisions in relation to the proceedings or to receive a minimum return on their investment before a claimant can receive their share shall have no legal effect. It also includes a limit to the return that funders may receive, and any clause that could entitle a funder to a share that would reduce the share of the claimant to 60% or less of the total award shall have no legal effect. The projected Directive explicitly states a *duty of disclosure* of the agreement upon request, stating that Member States should empower the courts or administrative authorities to review the terms of the funding agreement. Under the projected Directive, the judicial review of the agreement should assess the compliance with its terms. In conclusion, it is worth noting that the recommendations point explicitly to the link with the Charter of Fundamental Rights of the European Union and should therefore be interpreted according to those rights and principles, in particular the right to an effective remedy and to a fair trial as well as to the right of defence.<sup>36</sup> This statement is relevant as it stresses the idea that access to justice must be understood within the human rights framework. This serves to support my claim regarding the second level of protection, oriented to determine the role and responsibility that private actors may assume when making a profit in certain social areas like those related to fundamental rights. In this regard, the scope of the projected Directive is still limited, as we do not find any precision regarding the duties to *respect*, *protect*, or *fulfil* the right to an effective remedy or to access to a fair trial in the sense explained previously. This means that the projected Directive focuses on the first level of protection, namely the protection of the access to justice core principles, related to the rule of law, the right to a fair trial and the adequate functioning of the justice service. It does not, however, state any provision in relation to the second level of protection, which is related to the coordination between the state and the private actors. This dimension may be eventually included in the Directive if it seriously wants to state a link with the Charter of Fundamental Rights of the European Union and, in particular, with the protection of the rights to access to justice and an effective remedy as mentioned in paragraph 32 of the Annex to the Resolution.

#### 4.2 A Moderate Approach to Regulation

I will analyse here two examples of regulation that could be considered to be in the category of a moderate approach, as they introduce only a few limits to those elements considered to be relevant to protect the core values implicated in TPLF. These elements are the eventual conflict of interest between the funder, the funded party and their lawyer and the linked duty of disclosure. This

duty implies control of the content of the funding agreement by judges, allowing them to assess possible conflicts of interests as well as any inherent abuse.

##### 4.2.1 Directive (EU) 2020/1828 of the European Parliament on Representative Actions for Redress Measures on Behalf of Consumers

The experiences related to TPLF can be found in the field of arbitration, in certain cases with high costs and expected redress, in insolvency proceedings, investment recovery, anti-trust claims and class actions. This can explain why Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 includes provisions related to the funding of representative actions for redress measures on behalf of consumers. Article 10 states that Member States shall ensure that *conflicts of interests* are prevented when third-party funding of a representative action for redress measures is allowed by national law. Furthermore, states should prevent the economic interest of third parties in the economic outcome of the action from diverting the representative action away from protecting the collective interests of consumers (para. 1). The content of this article again illustrates the importance given to preventing any type of corruption of justice through the pursuit of economic gains.

To achieve this purpose, the norm establishes that Member States should particularly ensure that all decisions made by the qualified entities in the context of the representative action are not influenced by the third party in a detrimental way. In the same vein, they should guarantee that the representative action is not brought against a defendant that is a competitor of the funding provider or a defendant on which or on whom the funding provider is dependent (para. 2).

In line with this goal, Member States should empower the courts or administrative authorities to assess compliance with the previous conditions. To that end, the qualified entities shall disclose the sources of funds used to support their action. Consequently, courts and administrative authorities should be able to require the qualified entity to refuse or to make changes in the relevant funding (according to the conditions stated in paras. 1 and 2 of the norm), and even to reject the legal standing of the entity for that specific representative action, without prejudice regarding the consumers represented (paras. 3 and 4).

The rationale behind this norm is to reduce ethical shortcomings related to the potential conflict of interest between the funders and the consumers represented by the qualified entity, protecting in the end the right to a fair trial and the due process of law. As becomes evident, the Directive does not encounter any issue that could be related to the role of investors in financing access to justice, nor does it provide any rule related to the eventual responsibility borne by the funders in connection with the duties to respect, protect or fulfil the right to access to the courts.

36 As stated in para. 32 of the Annex to the Resolution of the European Parliament regarding the proposal for a Directive on the regulation of third-party litigation funding.

#### 4.2.2 *The ELI-UNIDROIT Model European Rules of Civil Procedure*<sup>37</sup>

In its turn, the ELI-UNIDROIT Model European Rules of Civil Procedure that were approved by the European Law Institute (ELI) and UNIDROIT in 2020 also include provisions related to TPLF. The provisions refer to individual civil procedures, and they also address the funding of collective redress actions, including stricter rules for these collective claims. Specifically, Rule 245 refers to third-party funding and success fees. The first paragraph states that at the beginning of the proceedings any party who receives funding from a professional third-party funder or crowdfunder *must* disclose this situation as well as the identity of the funder to the court and the other party. This rule excludes from the *disclosure duty* the content of the agreement between the party and the funder. In the second paragraph, however, the rule states that the arrangement must respect the applicable law and prevent a disproportionate compensation for the funder or undue influence on the proceedings. Success fees could be part of the arrangement with TPLF according to the third paragraph, respecting the right of parties to fair legal representation and to the integrity of the proceedings.

For third-party funding applied to collective redress, Rule 237 establishes a stricter standard because it allows the court to require the qualified claimant to disclose details of the agreement concluded with the funder. According to the first comment listed under the rule, it sets out the principle that TPLF as such should not be prohibited, but the qualified entity must disclose this circumstance, and the court may require that the terms of the agreement be disclosed but not publicly or to the defendant.

As can be seen, the Model Rules are in line with the Directive, focusing on the conflict of interest and the undue influence of the funder in the internal decisions of the funded party and its lawyer. This represents the first level of protection presented earlier. It is worth noting that the rules support the legality of this practice, as they state that third-party funding should not be prohibited. From the perspective adopted in this article, however, we must emphasise that these rules do not include any provision related to the *access* to justice issue in the second level of protection, which entails the consideration of an adequate coordination between the state and the private actors in the fulfilment of this right. Even if consideration of the avoidance of any disproportionate compensation can be related to the right to have adequate access to the courts, in the terms given here to the concept it is not enough. However, it is fair to admit that the aim of protecting access to justice goes far beyond the scope of this kind of soft law instrument, and this can explain the gap.

37 This soft law instrument was intended to establish rules and principles regarding the harmonisation of civil procedure in Europe.

#### 4.3 An Example of Self-Regulation: Code of Conduct of the ALF

Self-regulation is another possible approach to TPLF, and it could interact with a certain degree of judicial review, as does the aforementioned moderate regulatory approach. This alternative can adopt different forms, but we will focus on the case of England and Wales.<sup>38</sup> The ALF of England and Wales is responsible for administering self-regulation of the litigation funding industry. The Association applies the Code of Conduct for Litigation Funders, which was issued by the Civil Justice Council, dependent on the UK's Ministry of Justice (2011).<sup>39</sup> The Code of Conduct is binding for all members of the ALF, although it must be noted that membership is not mandatory, and therefore the regulation may not apply to all the funders operating in that jurisdiction. We find the advice given by the ALF a kind of nudge, as it recommends on its website that funding be sought from among the associated members as a way of being better protected.<sup>40</sup>

The Code starts by defining a litigation funder as an entity that has access to funds within its control (or acts as the exclusive investment adviser to an entity having access to these funds), and in each case funds the resolution of relevant disputes (Arts. 2.1, 2.2 & 2.3). The funds are invested pursuant to an LFA that enables the funded party to meet all the costs of the resolution of their disputes, and, in return, the funder receives a share of the proceeds if the claim is successful. The Code states that the funders shall not seek any payment from the funded party exceeding the amount of the proceeds of the dispute that is being funded unless that party is in material breach of the agreement (Arts. 2.4, 2.5 & 2.6).

The ALF Code establishes that the funder will observe the confidentiality of all information and documentation relating to the dispute, subject to the terms of the agreement reached between the parties (Art. 7). As to the LFA, the Code states that the funder will take reasonable steps to ensure that the funded party has received independent advice in the terms of the agreement and its execution and will not take any action that could cause the funded party's solicitor or barrister to act in breach of their professional duties or seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder (Art. 9). In the ALF Code of Conduct, there are also references to the 'capital adequacy of funders', as it states that funders will maintain the capacity to pay all debts when they become due and payable and to cover aggregate funding

38 See Mulheron, above n. 27.

39 The original text has been revised on several occasions. In the text, the 2018 version is reviewed.

40 The following statement can be seen on their website: 'Claimants and their lawyers are therefore urged to work only with those funders who are approved members of the ALF. Our funder members are professionals working in the litigation funding industry who satisfy the definition of funders within the meaning of the Code of Conduct. ALF Funder Members abide by our Code of Conduct, which provides significant benefits to those who seek funding. Key protections are afforded to clients, including clarity on issues of control of case strategy, approval of settlements and withdrawal from cases.' <https://associationoflitigationfunders.com/>.

liabilities under all their agreements for at least 36 months (Art. 9.4.1). The funders shall also maintain access to a minimum of 5 million pounds of capital and accept a continuous disclosure obligation in respect of its capital adequacy (Arts. 9.4.2 & 3). The Code also includes provisions on adverse costs (Art. 10).

In addition, the Code rules on the termination and approval of settlements during the procedures and states that the ALF shall state whether and to what extent the funder may provide input in relation to settlements and also be able to terminate the agreement under certain circumstances related to the lack of merits of the claim or the occurrence of a material breach of the agreement by the funded party. This should not be included in the agreement as a discretionary right (Arts. 11 & 12).

As can be observed, the content of the ALF Code of Conduct is exhaustive, as it has also been amended following the experience of TPLF in England and Wales. Therefore, together with some discretion on the part of the judiciary to evaluate the financing agreements, a self-regulated system may be enough to prevent the risk of corruption of the core values of access to justice and the rule of law. However, certain considerations regarding its scope should still be given. Hence, it is worth analysing how the system could comprise all the funders in a certain jurisdiction and at the same time how the Association could exercise stronger control over the conduct of the associated members. I consider that despite the need to improve some of these aspects, more stringent control is a viable option in terms of regulation to encounter the issues related to the conflict of interests. Indeed, it differs very little from the Bar Association, which is efficient in controlling the conduct of lawyers. Nevertheless, although the aforementioned option might regulate adequately any conflict of interests and the risk of corruption, it is still insufficient as a comprehensive means to regulate TPLF. As becomes evident, this alternative does not include the second level of protection, which is related to the human rights approach. It is almost impossible, of course, to require that this kind of professional association have a perspective that is shared by the state and its policy designers. Therefore, a system like this could prove to be adequate only if integrated with other policies oriented to guide private action to promote respect regarding human rights standards.

## 5 Concluding Remarks

Following the overview on alternative attitudes that could be adopted regarding third-party litigation funding, I will elaborate here a few preliminary conclusions intended to enrich the debate taking place at present in many countries. According to the theoretical framework presented in this article, it becomes necessary to understand that a shift is underway in the role and functions of the state in many jurisdictions that had formerly adopted the shape of a welfare state. This implies a pri-

vatization process oriented to delegate several functions and public services to private actors and enterprises. This process has taken place in numerous areas, including education, healthcare and prisons, and access to justice is not an exception.

In this domain, the role of the welfare state was primarily not only to administer the judicial system but also to provide legal aid to citizens in need. The constant reduction in budgets led to those programmes suffering a limit in their scope in certain jurisdictions and, as a result, the economic barriers preventing some citizens from having access to the courts became more difficult to overcome. We observe that TPLF has moved beyond the high-value cases brought to arbitration where the practice began to develop. Therefore, we can foresee that, under certain circumstances, third-party litigation funders might also be interested in expanding their business model to include the provision of financial aid to other cases related to public interest litigation or individual claims. In terms of defining a balanced regulation for TPLF, this represents for the legislature an opportunity to take into account all the interests at stake as suggested here.

Connecting all the previous dots, we may argue that TPLF could serve to fulfil access to justice by filling in gaps left by the state over the last few decades owing to its departure from the welfare-state model. For this practice to be respectful of human rights and the values of rule of law, several issues need to be adequately regulated. Worth noting is that TPLF is not a panacea for achieving access to justice. On the contrary, if we think of the design of a sustainable system for financing access to justice, TPLF can only serve as one piece of that complex system. It should interact with legal aid, crowdfunding, legal insurance and other forms of entrepreneurial lawyering, such as CFA or DBA.

Adequate regulation of TPLF implies, as we examined earlier, two levels of concern. First, it is important to prevent the corruption of access to justice and of the intrinsic values of rule of law. This means regulating the duty of disclosure intended to prevent a conflict of interests between the funder, the funded party and their lawyer as well as the eventual spurious interests of the funder if they are a competitor of the defendant. Regulation also includes setting limits to the excessive costs, with a reasonable determination of what this means, as it is also necessary to make the business of funding sustainable. The problems related to the indemnity of the funded party need to be considered as well as the eventual recovery of costs when the defendant wins the case. Stating the condition of the funders' proven financial capacity is also an essential safeguard that can protect the parties involved. As was shown previously, all these topics are tackled to a certain extent in the regulations presented in this article.

Second, a comprehensive regulation of TPLF should also consider the role of private actors in newly privatised areas as well as their social responsibility regarding respect for human rights. These issues are not included in the analysed instruments, and they also appear to be



absent in the debate. As presented here, the human rights perspective and the duties framework provide guidance in determining what we might expect from the different actors involved. Above all, the state is the first entity responsible for *protecting* and *fulfilling* the right to access to justice. However, the shift in the role of the state has led to the emergence of new private forms of financing and therefore to alternative ways of *fulfilling* this right. The state may not simply prohibit these forms, as they can fill a gap regarding access to justice; furthermore, they are examples of freedom of contract and autonomy, which are also rights to be respected. The state should therefore support this emerging practice with a proportionate regulation that can balance the right to access to justice with freedom of contract and the aim of profit.<sup>41</sup>

Similarly, I contend that adequate regulation should take these two levels of protection into account and not simply prevent an eventual conflict of interests or any abusive practice. Furthermore, it should also determine how the funders could better *protect* and *fulfil* the right to access to justice. This kind of regulation exceeds the format of a simple catalogue of rules that try to limit this practice. It is necessary to design a balanced model that considers not only some of the elements that integrate the financing agreement but also the relevance of introducing certain incentives to promote the expansion of this practice. The regulation could include, for example, tax incentives given by the state to promote the expansion of litigation funding to cases that may not be profitable but still valuable from the perspective of public interest. In this way, the state could protect access to justice by creating incentives for private action. As a result, in the concrete arena, investors would have incentives to comply with the duty of fulfilment by providing expanding services.

We can conclude that the human rights perspective presented here and the fundamental values entailed become essential to introduce guidelines in the regulation of access to justice in times when the role of the state is changing and when businesses are developing in areas previously protected by public services. Therefore, we may state that the duties to *respect*, *protect* and *fulfil* the right to access to justice may to a considerable extent apply to everyone according to the role they play. For this reason, everyone must *respect* this right, avoiding any behaviour that could limit concrete access to the courts and to a fair trial or an effective remedy.

In addition, the state is responsible for *protecting* this right by designing a fair regulation that imposes a balanced set of obligations on private funders as well as also protecting their rights to develop a business. This may include not only regulation of the issues related to the prevention of any corruption of justice by avoiding the aforementioned conflicts of interests but also the design of incentives to promote the expansion of private

investment in areas that represent the public interest. Other standards such as the avoidance of discrimination should be considered if there is a risk of violation in the funders' behaviour.

The *fulfilment* of this right still needs to be kept in the domain of the state for legal aid programmes. However, as illustrated in the present article, it must also be considered that third-party funders are in many instances already fulfilling this right. In this domain, third-party litigation funders may also be able to *protect* the right to access to justice within their practice. This could be done, for example, by avoiding any unjustified discrimination when selecting the claims to be supported or by guaranteeing that they do not violate human rights values. At the same time, funders should also consider developing certain pro bono activities or altruistic lines of financing litigation, examples of which are beginning to emerge.<sup>42</sup>

I conclude here with these preliminary ideas that are intended to enrich the debate with a new perspective on third-party funding. The approach presented here has focused on the protection of access to justice considered as a human right, which seems to be disregarded in the current debates. However, as explained previously, the discussion about the design of a sustainable system to finance access to justice must include both levels of analysis. In the regulatory instruments reviewed here, the human rights approach is not considered even though these rights are mentioned in a few of them. This is a positive sign, but it is not enough to have an impact. Moreover, it is worth highlighting that the experience in some jurisdictions indicates that the practice of funding could be undertaken to cooperate in the fulfilment of access to justice together with other instruments and under the coordination of the state. And if the regulation were to succeed in integrating the human rights matrix of duties, we would also see that business could eventually accommodate human rights by including altruistic lines of development. You may think I am a dreamer, but believe me, I am not the only one.<sup>43</sup>

41 In this same vein, see M.J. Khoza, 'Formal Regulation of Third-party Litigation Funding Agreements? A South African Perspective', 21 *PER/Potchefstroom Electronic Law Journal* 17 (2018).

42 Therium is one of the world's largest litigation funding firms, providing legal finance in all forms, including single-case funding, arbitration funding, funding for law firms and portfolio funding. They finance bankruptcy and insolvency, class actions, commercial litigation and disputes, competition and antitrust. But as well as this for-profit branch, the firm has also developed 'Therium Access' to facilitate access to justice by providing grants that can help bridge the growing justice gap and support the rule of law. See [www.therium.com/therium-access/](http://www.therium.com/therium-access/).

43 See for example V. Sahani, 'Rethinking the Impact of Third-Party Funding on Access to Civil Justice', 69 *DePaul University Law Review* 611-32, at 629-32 (2020).