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## Third-Party Litigation Funding: Legal Feasibility and Insights from Australia, the UK, and the US for Expanding Access to Justice in Indonesia

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Article	Abstract
<p><b>Keywords:</b> Access to Justice; Litigation; Third-Party Litigation Funding;</p> <p><b>Article History</b> Received: Dec 8, 2023; Reviewed: Jan 23, 2025; Accepted: Jan 28, 2025; Published: Jan 31, 2025.</p> <p><b>DOI:</b> 10.28946/slrev.Vol9.Iss1.3444.pp173-193</p>	<p>Access to justice is often hindered by financial constraints, preventing plaintiffs from pursuing legal claims. Third-Party Litigation Funding (TPLF) offers a potential solution by allowing external funders to finance litigation in exchange for a share of any awarded damages or settlement. By covering litigation costs, TPLF enables financially disadvantaged plaintiffs to seek legal redress, making it a crucial mechanism for expanding access to justice. However, unregulated TPLF poses risks, including encouraging frivolous claims, ethical concerns, and profit-driven motivations that may override legal merit. Indonesia currently lacks specific TPLF regulations, raising questions about its legal permissibility and practical implementation. This study examines TPLF frameworks in Australia, the United Kingdom, and the United States to derive insights that may inform the development of TPLF practices in Indonesia. The study uses a normative legal research methodology based on secondary data to explore the opportunities and challenges of introducing TPLF into the Indonesian legal system. The findings indicate that while TPLF can be legally accepted in Indonesia, its application should be restricted to cases with broad public interest, such as environmental and consumer litigation. Furthermore, Indonesia's ongoing efforts to enhance access to justice and the absence of explicit legal prohibitions present opportunities for the regulated adoption of TPLF. This research contributes to the discourse on litigation funding by providing recommendations for policymakers, legal practitioners, and stakeholders in shaping a fair and regulated TPLF framework in Indonesia.</p>

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### INTRODUCTION

Research on access to justice showed that land and environmental cases account for 30% of the type of legal issues most commonly experienced by Indonesian society.<sup>1</sup> Among the respondents interviewed, 38% claimed not to have tried to resolve the problem they were experiencing. Most respondents claimed to surrender to their fate (51%) and were afraid that the problem would be more complicated if they went to court (42%). In addition, the majority

<sup>1</sup> Dio Ashar Wicaksana, "Index of Access to Justice in Indonesia in 2019," in *First Edition*, 2020.

of respondents who did not take legal action were women (52%), with 34% working as housewives. The data showed that public confidence is still low in the mechanism of solving legal problems.<sup>2</sup> Part of the hesitancy to take legal action is financial constraints.

Consumers or people affected by environmental cases usually lack sufficient resources to pursue their claims. At the same time, the defendants are usually big companies possessing considerable financial resources that can be utilised for litigation.<sup>3</sup> Parties with such resources have obvious advantages in pursuing or defending legal claims. They can afford legal assistance from qualified lawyers, pay litigation costs, hire expert witnesses, and present scientific evidence.<sup>4</sup> The lack of funding and fees in accessing dispute resolution endangers access for the consumers or people affected by environmental cases to be brought before the court. In short, a well-financed party has more access to justice in the sense of access to remedies to vindicate someone's legal rights and advance their recognised interests. Consequently, they tend to have greater access to justice, enabling them to pursue remedies to assert their legal rights and protect their recognised interests.<sup>5</sup> Third-party litigation funding (TPLF) offers a potential solution to this problem. TPLF is a mechanism where an independent third party provides financial resources to cover litigation costs in exchange for a share of the potential monetary recovery if the case is successful. This funding arrangement allows claimants who lack financial resources to access the justice system, enabling them to pursue valid claims without bearing the upfront financial burden.

The term “access to justice” has two concepts. First, in its procedural nature, it relates to the process of seeking justice, enabling individuals to assert their rights or resolve disputes under State protection, regardless of social, economic, or ethnic background. Second, its substantive aspect focuses on achieving justice by ensuring the system delivers socially fair outcomes.<sup>6</sup> Cappelletti pointed out three issues lingering in the access to justice movement: litigation costs and the need for legal aid, collective legal claims/class actions, and alternative dispute resolution.<sup>7</sup> Among those concerns, lack of funding was cited as the most significant obstacle to people's access to justice.

Environmental cases in Indonesia are costly and complex, leaving underfunded individuals disadvantaged against well-resources corporations. The plaintiff in an environmental case needs to bear the burden of proof, which means they have to prove that the pollution or environmental damage has occurred. Obtaining evidence is expensive since it involves expert testimony or laboratory tests. Such costs become a huge obstacle to both private and public interest.<sup>8</sup> As quoted by Nicholson, Emmy Hafid, the director of the Indonesian Forum for Environment (WALHI), stated: " The cost of just one sample can be hundreds of thousands of Rupiah, so you can imagine what sort of cost WALHI had to pay to prove the Arafura sea was

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<sup>2</sup> Wicaksana.

<sup>3</sup> Wicaksana.

<sup>4</sup> Wicaksana.

<sup>5</sup> Tom Mullen, “Access to Justice: Beyond the Policies and Politics of Austerity,” *Justice in Administrative Law and Administrative Justice*, 2024.

<sup>6</sup> Eloisa Torlig, Adalmir Gomes, and Fabricio Lunardi, “Epistemological Guide for Future Research,” *Lex Humana* 15 (2023): 207.

<sup>7</sup> Mauro Cappelletti, “Alternative Dispute Resolution Processes Within the Framework of the Worldwide Access-to-Justice Movement,” *The Modern Law Review* 56 (1993): 283–84.

<sup>8</sup> David Nicholson, *Environmental Dispute Resolution in Indonesia* (Leiden: Kitlv press, 2009).

polluted by tailings.”<sup>9</sup> Hafid further stated: “WALHI has brought environmental cases to court nine times now and has been defeated. The judges' reason is usually a lack of evidence.”<sup>10</sup> Under Indonesian civil procedure, witness testimony has weak evidentiary power, while documentary evidence has the strongest power. This is why eye-witness accounts of pollution are usually given little weight, while laboratory tests that indicate excessive pollution levels have the highest evidentiary power. However, having such a laboratory test only may still not satisfy legal elements because, under Indonesian law, the plaintiff must prove another element, which is causation.<sup>11</sup>

Another problem with environmental and consumer protection cases is that if enforcement is sought individually, it will not be as effective as sought collectively. Sometimes, the stake of any individuals in remedying the infringement is too small to induce them to seek law enforcement against the big corporations.<sup>12</sup> In such cases, the individual lawsuit may not be effective; the businesses that commit legal infringements may not be deterred from continuing their actions. Therefore, the accumulation of claims to obtain remedy in the infringement of a collective interest, in the form of class action, will be more effective.<sup>13</sup> However, a lack of funds will likely prevent this class from pursuing the case in a class action. The legal and technical difficulties associated with proving environmental law infringement are further obstacles to environmental litigants.<sup>14</sup> Regardless of the quality of procedures that give citizens the right to pursue claims, such rights are of little value if those citizens are unable to do so. TPLF offers a viable solution by covering litigation costs in exchange for a share of potential recovery.

By examining case studies and practical examples, this paper elucidates the impact of TPLF on access to justice and the ethical considerations associated with third-party involvement in legal proceedings. Furthermore, the paper addresses cultural and socio-economic factors, recognising the need to contextualise lessons from foreign jurisdictions within Indonesia's unique legal and societal context. It explores potential challenges and opportunities in adapting TPLF practices and principles to align with Indonesia's legal system and cultural norms. By synthesising these insights, the research aims to provide policymakers, legal practitioners, and stakeholders in Indonesia with a comprehensive understanding of the nuances and considerations in developing a robust TPLF framework. This research contributes to the growing discourse of TPLF by offering a practical guide for Indonesia, drawing from the experiences of established jurisdictions to navigate the complexities and opportunities in the evolving landscape of third-party litigation funding.

This research analyses two issues: firstly, to what extent can third-party litigation funding be legally implemented in Indonesia, and secondly, what are the challenges and opportunities

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<sup>9</sup> Nicholson.

<sup>10</sup> Nicholson.

<sup>11</sup> For example, in the Sari Morawa case of 1996, the Lubuk Pakam district court rejected a claim for environmental compensation despite considerable eye-witness and laboratory evidence of pollution. In the Banger River case (1999), the district court decided to favour the plaintiff's pollution claims because the plaintiff provided the undisputed fact that the industries in question did not even own waste management units before 1996. In addition, in the WALHI v. Freeport case (1995), the deaths of four men in the Lake Wanagon disaster were used as evidence of Freeport's negligence in the matter, which was further confirmed by a government investigation.

<sup>12</sup> Bryan Garth, *The Newest Wave in the Worldwide Movement to Make Rights Effective*, n.d.

<sup>13</sup> Garth.

<sup>14</sup> Nicholson, *Environmental Dispute Resolution in Indonesia*.

associated with implementing TPLF in Indonesia's civil justice system? In doing so, this research investigates the practice of TPLF in Australia since it became the first to develop TPLF, which started with some resistance and finally ended up with the successful formal legalisation of it.<sup>15</sup> This research will also study TPLF in the United States, especially to look into how the US legal system handles challenges. One of them is critics who say TPLF violates the Model Rules of Professional Conduct with respect to conflicts of interest and fee-splitting.<sup>16</sup>

Addressing the challenges of implementing TPLF in Indonesia is critical for strengthening the legal system and promoting broader socio-economic equity and access to justice. TPLF can empower disadvantaged groups to pursue justice against well-resourced corporations. Ensuring fair access to justice is vital for building public trust in the legal system.

Indonesia's drawing insights from Australia, the UK, and the US regarding TPLF is significant because those three jurisdictions have demonstrated that TPLF can significantly enhance access to justice. By studying the models in these jurisdictions, Indonesia can identify strategies, develop its regulatory framework, and navigate its own cultural nuances to address its own TPLF model and ensure the responsible and effective integration of TPLF into the country's legal landscape.

## RESEARCH METHODS

This study employs a normative method<sup>17</sup> which involves analysing legal principles, rules and doctrines by doing library research to obtain secondary data.<sup>18</sup> This approach is suitable for this research because it examines the legal framework and theoretical foundations of third-party litigation funding. The legal materials learned include primary legal materials,<sup>19</sup> such as the Indonesian civil procedure, the Civil Code, the Consumer Protection Act and Environment Protection Act and secondary legal materials;<sup>20</sup> such as books, journal articles relevant to the topic, and relevant court decisions and/or arbitral awards. Primary legal materials provide the legal framework. Secondary materials offer context, commentary, and comparative insights, and court/arbitral decisions highlight practical applications and interpretations of laws. The data collection method used was a documentary study of the previously stated legal materials. The data analysis employed qualitative analysis.<sup>21</sup> Additionally, this study incorporates a legal approach methodology to explore the application and interpretation of relevant laws and a historical approach to examine the evolution of legal principles and frameworks pertinent to the topic.

## ANALYSIS AND DISCUSSION

### Third-Party Litigation Funding in Australia, The UK, and the US

The definitions, concepts, and rules of the TPLF vary, depending on the jurisdiction. Generally speaking, TPLF can be defined as a concept where a third party (with no prior connection to the

<sup>15</sup> George R Baker, "Third Party Litigation Funding in Australia and Europe, Centre for Law and Economics ANU College of Law," 2011, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2034625](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034625).

<sup>16</sup> Baker.

<sup>17</sup> Soerjono Soekanto, *Penelitian Hukum Normatif* (Jakarta: PT. Raja Grafindo, 2004).

<sup>18</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986).

<sup>19</sup> Soerjono Soekanto.

<sup>20</sup> Soerjono Soekanto.

<sup>21</sup> Maria S. W. Soemardjono, *Metodologi Penelitian Ilmu Hukum* (Universitas Gadjah Mada, 2014).

litigation) agrees to finance all or part of the legal costs of the litigation in return for a fee payable from the proceeds recovered by the funded litigant.<sup>22</sup>

### **TPLF in the United States of America**

In the US, the types of litigation funding are divided into 2 (two), namely commercial claims and consumer claims. Commercial litigation has various types of cases, starting from breach of contract, business torts, antitrust violations, intellectual property infringement, trade secret theft, and insolvency. Consumer claims are carried out for individual claim holders in cases such as mass tort or personal injury.<sup>23</sup> Furthermore, in terms of the relationship between the funder, the funded, and the representatives (lawyers), there are 2 (two) types of agreements: direct lawyer-funder arrangements and client-funder arrangements.<sup>24</sup>

Other jurisdictions distinguished litigation funding based on the subject: individual plaintiff and corporate litigant. In the individual claimant (IP) model, a company pays money directly to the plaintiff. It charges interest on a regular basis (maybe monthly or daily) at an annual rate that can exceed 100 per cent of the credit value.<sup>25</sup> The loan is provided without collateral, which means if the plaintiff loses, the funder has no claim for repayment.<sup>26</sup> This is because this funding is repaid only if it ends in a winning decision and monetary compensation for the plaintiff.<sup>27</sup> These loans are generally for relatively small loans with relatively small nominal losses as well, and the plaintiff is usually an individual involved in a personal injury case.<sup>28</sup>

The second type of litigation fund is known as the corporate litigant (CL) model. Financial aid is given to the plaintiff as a balanced share based on a predetermined average of any compensation generated from the lawsuit.<sup>29</sup> The funding company is typically a company specialising in investment or hedge funds, and the borrower is typically a company. Like the IP Model, CL loans are also non-recourse, allowing the lawyers and their clients to receive a contingent fee.<sup>30</sup> However, the IP and CL Models differ from contingent expense attorneys.

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<sup>22</sup> Matthew Amey, "Third Party Litigation Funding in England and Wales: An Overview," Thomson Reuters Practical Law, n.d.

<sup>23</sup> Amey.

<sup>24</sup> Resolution 111A, "Best Practices for Third-Party Litigation Funding August 2020," American Bar Association, 2020.

<sup>25</sup> Christopher Mendez, "Welcome to the Party: Creating A Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs," *Mississippi College Law Review* 39 (2021): 102–3.

<sup>26</sup> John L. Ropiequet, "Current Issues in Consumer Litigation Funding," *Banking & Financial Services Policy Report* 33 (2014).

<sup>27</sup> Mendez, "Welcome to the Party: Creating A Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs."

<sup>28</sup> Maya Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding," *Minnesota Law Review* 95, no. 1227 (2011).

<sup>29</sup> Steinitz.

<sup>30</sup> Thurbert Baker, "Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding," *Widener Law Journal* 23 (2013).

They are outliers in litigation, which means neither of them is a party to the court.<sup>31</sup> Their sole role as profit-seeking investors is to maximise the return on their investment.<sup>32</sup>

### TPLF in Australia

Australia has experienced a long road to implementing TPLF in its legal system. One of the prominent cases is *Campbell Cash and Carry Pty Ltd v. Fostif Pty Limited* (known as *the Fostif* decision). The case stems from claims filed by Campbell Cash and Carry Pty Ltd for the recovery of amounts paid by tobacco retailers to tobacco wholesalers after the license fee paid was declared unconstitutional. Litigation funders, who are willing to pay a third of the amount collected in a claim along with the advantages of any costs order, are providing funding for this litigation procedure. The decision declared that there had been no misuse of the process or violation of public policy in the funding.<sup>33</sup>

Furthermore, the decision contained a dissenting opinion by Justice Callinan and Justice Heydon. These two Justices considered that:<sup>34</sup> "the purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved...". Meanwhile, on the other hand, Justice Kirby assessed that public policy also includes ensuring access to justice, in which stated:<sup>35</sup> "The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or 'grouped' proceedings...".

One of the legal topics covered by the Australian Securities and Investment Commission Act of 2001 now is litigation funders. This Act protects against unscrupulous contract clauses, unethical behaviour, and dishonest and fraudulent behaviour.<sup>36</sup> Furthermore, this Act governs provisions pertaining to channels of recourse against unjust, fraudulent, and deceptive terms or objectives in funding agreements. Nevertheless, the regulations do not specify the requirement that funders hold a license (an Australian financial services license or any other license issued under the National Credit Code). In the absence of this law, litigation funders are not subject to corporate and risk management regulatory standards or capital adequacy criteria.<sup>37</sup> However, the Australian Government announced that litigation funders must hold an Australian Financial Service License and comply with investment fund regulations.<sup>38</sup> Another case that discusses the litigation funding is the *Multiplex*<sup>39</sup> and *Chameleon*<sup>40</sup> cases, where a conflict management

<sup>31</sup> Collin R. Flake, "Third Party Funding in Domestic Arbitration: Champerty or Social Utility?," *Dispute Resolution Journal* 70 (2015).

<sup>32</sup> Flake.

<sup>33</sup> Wayne Attrill, "Funding Justice: The Role of Litigation Funders in Class Actions," *Precedent* 129 (2015): 3.

<sup>34</sup> "High Court of Australia" (2006).

<sup>35</sup> High Court of Australia.

<sup>36</sup> Jason Geisker and Jenny Tallis, "The Third-Party Litigation Funding Law Review," in *Second Edition* (United Kingdom: Law Business Research Ltd, n.d.).

<sup>37</sup> Geisker and Tallis.

<sup>38</sup> Victoria Shannon Sahani, "Symposium in Global Labs of International Commercial Dispute Resolution: Global Laboratories of Third-Party Funding Regulation," *AJIL Unbound* 115 (2021): 38, <https://doi.org/https://doi.org/10.1017/aju.2020.79>.

<sup>39</sup> Brookfield Multiplex and International Litigation Funding Partners, "Federal Court of Australia" (2009).

<sup>40</sup> International Litigation Partners and Chameleon Mining NL, "High Court of Australia" (2012).

regime was introduced in this decision. Since 2012, litigation funders that provide both single-party funding and multiparty funding are required to review and maintain written procedures for identifying and managing conflicts of interest.<sup>41</sup>

In Australia, a standard retainer agreement with a lawyer recording the scope and terms under which legal services are to be provided, and a litigation funding agreement with the funder recording the terms on which litigation funding is to be provided are typically the two agreements made between the client and the funders.<sup>42</sup> In addition, the Australian courts may also actively work to reduce the litigation funding agreement's commercial terms and consider that the commission offered is exorbitant. This was considered in *Earglow Pty Ltd v. Newcrest Mining Ltd*, where Justice Murphy stated that the commission to be received by the funder was too large when approving a class action settlement.<sup>43</sup> In the judgment, Justice Murphy stated that the court had the authority to accept or reject settlements up to the amount payable to the funder, legal costs, risks assumed by the funder, adverse cost exposure, and the experience of funded litigants.<sup>44</sup> Similar matters may also be found in *Mitic v. OZ Minerals Ltd*, where Justice Middleton agreed that the court has the authority to change the amount payable to a litigation funder in class action settlements.<sup>45</sup> However, in *Liverpool City Council v. McGraw-Hill Financial Inc.*, the Justices, in their judgment, stated that the court has no authority to make judgments about reasonable commissions or to modify valid contracts, provided there are no objections or requests to waive the agreement.<sup>46</sup>

Over time, litigants have started using litigation funding in securities and antitrust class action suits.<sup>47</sup> Australia's legal community was first reluctant to accept third-party litigation funding.<sup>48</sup> Their main concerns were that litigation funding attacked the established means of enforcing legal rights, that the changes would encourage a litigious culture in Australia, that the practice of law would change as a result of lawyers promoting litigation funding, and that the changes were an overreaction to Australians' worries about the expense of litigation. These arguments were all refuted. Furthermore, the concern for a shift in the status quo within the legal profession did not materialise.<sup>49</sup> Current third-party litigation funding has caused class action cases to rise and comprises a significant proportion of Australian litigation. Between 2001 and 2007, 63% of class actions were supported by litigation funders. According to a Burford survey in 2018, 83 per cent of the 75 Australian respondents "are most likely to agree that litigation funding is a growing and increasingly important area in the business of law."<sup>50</sup> This part of the research will examine what lessons Indonesia can learn from Australia, the UK, and the US in implementing TPLF.

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<sup>41</sup> Geisker and Tallis, "The Third-Party Litigation Funding Law Review."

<sup>42</sup> Geisker and Tallis.

<sup>43</sup> *Earglow Pty Ltd and Newcrest Mining Limited*, "Federal Court of Australia November 28" (2016).

<sup>44</sup> Geisker and Tallis, "The Third-Party Litigation Funding Law Review."

<sup>45</sup> *Mitic and OZ Minerals Limited*, "Federal Court of Australia April 21" (2017).

<sup>46</sup> *Liverpool City Council and McGraw-Hill Financial*, "S&P Global Inc" (n.d.).

<sup>47</sup> Council and Financial.

<sup>48</sup> Justice Sarah Derrington, *Speech to Australian Academy of Law Lecture* (Brisbane, 2018).

<sup>49</sup> Derrington.

<sup>50</sup> Elizabeth Korchin, "The Third Party Litigation Funding Law Review," in *Fourth Edition* (United Kingdom: Law Business Research, 2020).

## TPLF in the United Kingdom

The United Kingdom (the UK) has its own experience with TPLF. Initially, the UK prohibited the Act of Champerty, as it is stated under Champerty laws. In 1967, the UK altered the laws and decriminalised champerty.<sup>51</sup> Moreover, the UK enacted the Courts and Legal Services Act in 1990, which allows lawyers and clients to enter into a conditional fee agreement. The conditional fee agreement may be seen in *Arkin v. Borchard Lines, Ltd.* The case started when Yeheshkel Arkin sued United Information Systems Conference members, accusing them of alleged predatory pricing and other unlawful activities.<sup>52</sup> For the proceeding, Yeheshkel Arkin entered into an agreement with Managers and Processors of Claims, Ltd., a financing litigation company. One of the clauses under the agreement was the provision in which Managers and Processors of Claim, Ltd. would pay all of the litigation expenses in the case of Arkin's claim granted by the court. Unfortunately, the court denied Arkin's claim and burdened Arkin with the legal costs as the losing party.<sup>53</sup> As stated under the agreement, Arkin's could not request reimbursement. Arkin was insolvent, so the defendants sought an order for the company to pay their legal fees. The judge denied the order on the basis that litigation finance must only be for public policy and enhancing access to justice.<sup>54</sup> Moreover, the judge, after considering the case, ruled that litigation finance should not be discouraged by forcing the company to pay legal fees.<sup>55</sup>

The case demonstrated the first recognition of litigation finance companies' role in facilitating access to justice. The property and maintenance doctrine has superseded the right of an individual to access justice, and UK courts have recognised third-party funding as a legitimate method of financing cases.<sup>56</sup> In addition to the case, in 2008, the court ruled out another threshold for litigation finance under *London & Regional (St. George's Court) Ltd. v. Ministry of Defence*, stating implicitly that the litigation finance agreement should not tend to corrupt public justice.<sup>57</sup> After that, in 2017, the UK Court reaffirmed in *Excalibur Ventures LLC v. Texas Keystone Inc.*,<sup>58</sup> by stating, "Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest."<sup>59</sup>

Third-party funding in the UK is dominated by the nine funder members of the Association of Litigation Funders of England and Wales (ALF).<sup>60</sup> However, most cases taken are in the context of commercial litigation and arbitration, and personal injury claimants use none of these.<sup>61</sup> Research from Oxford and Lincoln Universities in 2012 conveyed a similar message. The study's results showed that TPLF had not addressed the issue of "access to justice" for the

<sup>51</sup> Rachael Mulheron and Peter Cashman, "Third Party Funding: A Changing Landscape," in *Civil Justice Quarterly*, 2008, 3.

<sup>52</sup> "Arkin v. Borchard Lines" (n.d.).

<sup>53</sup> Nicholas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries," *Northern Kentucky Law Review* 38 (2011): 699.

<sup>54</sup> Arkin v. Borchard Lines.

<sup>55</sup> Arkin v. Borchard Lines.

<sup>56</sup> Arkin v. Borchard Lines.

<sup>57</sup> "London and Regional (St George's Court)" (2008).

<sup>58</sup> "Excalibur Ventures LLC v Texas Keystone Inc" (n.d.).

<sup>59</sup> Korchin, "The Third Party Litigation Funding Law Review."

<sup>60</sup> Korchin.

<sup>61</sup> Korchin.



poor.<sup>62</sup> In line with that, until now, the funded litigants have mostly been given to commercial entities, experienced professionals, or businesspeople.<sup>63</sup> This shows that the practice of TPLF in the UK is still intended for commercial purposes.

Similar to the UK, champerty and maintenance have long been prohibited by the United States (the US). The reason for this ban is that it is feared that it will promote frivolous litigation, increase damages, and hinder settlements.<sup>64</sup> Even so, the history of litigation financing companies began in the 1980s and 1990s. Although initially, litigation financing generally funded corporate lawsuits, there has been an expansion of the focus on litigation financing for poor, individual plaintiff's lawsuits.<sup>65</sup> In the past, litigation funding in the US has been defined as a way for claimants with limited resources to pursue affirmative action in situations where the financed litigants might not have the financial wherewithal to bring a lawsuit.<sup>66</sup>

### Indonesia and Third-Party Litigation Funding

There is no text prohibiting third-party funding in Indonesia. However, there appears to be no specific information regarding the perspective and application of third-party funding in the country. While third-party funding lawsuits can be an alternative for disputing parties to avoid the danger and expense of financing litigation, third-party funding is currently not completely acknowledged in Indonesia. Typically, the parties finance their own legal cases, which are occasionally set up through contingency agreements with their respective attorneys.

Informal TPLF is found in litigation involving public interest, such as environmental protection cases.<sup>67</sup> The funding is facilitated through non-profit institutions such as the Indonesian Legal Aid Foundation (YLBHI) and WALHI, which generally receive grants or donations from foreign institutions for certain cases.<sup>68</sup> Even though the funding is not considered TPLF, non-profit institutions use it to finance some of their cases. In practice, this funding does not cover the large costs required in proving environmental cases or is difficult to obtain because the resources are provided with various conditions.

Currently, there are no publicly available judicial precedents or regulations regarding implementing TPLF. Without specific rules and precedents, TPLF in Indonesia can be analysed from a contract law point of view.<sup>69</sup> The Indonesian contract law upholds the principle of party autonomy and freedom of contract. This means that parties to a contract are free to determine the clauses in their contracts if it does not infringe the applicable law. Hence, in TPLF funders

<sup>62</sup> Christopher Hodges OBE, "Litigation Funding: Status and Issues," Oxford Legal Studies Research Paper, 2012.

<sup>63</sup> Korchin, "The Third Party Litigation Funding Law Review."

<sup>64</sup> Dietsch, "Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries."

<sup>65</sup> Dietsch.

<sup>66</sup> Sean Thompson, "The Third Party Litigation Funding Law Review," in *Second Edition* (United Kingdom: Law Business Research Ltd, n.d.).

<sup>67</sup> Carissa T. A. Temenggung and Yetty Komalasari Dewi, "Pendanaan Pihak Ketiga (Third Party Funding) Dalam Penyelesaian Sengketa Melalui Arbitrase Dan Kemung-Kinan Penerapannya Di Indonesia," *Jurnal Hukum & Pembangunan* 50 (2023).

<sup>68</sup> Temenggung and Dewi.

<sup>69</sup> Korchin, "The Third Party Litigation Funding Law Review."

and plaintiffs are free to determine their funding agreement, including the governing law of the contract.

The Indonesian Civil Code distinguishes between "named" and "unnamed" contracts. Unnamed contracts are those that are not regulated in the Civil Code. This means that the Civil Code permits parties to make any contract even though such a contract is not stipulated in the Code. This is why a contract on third-party funding is legitimate under Indonesian law despite not yet being formally regulated. Although there are no regulations regarding third-party funding in Indonesian law, the practice of it continues to operate.<sup>70</sup>

TPLF is based on a contract that promises to return the funders for their investment from the money obtained via the judgments. The purpose of TPLF is to support a party involved in a lawsuit—typically the plaintiff or claimant—who lacks the funds necessary to fund the action adequately. Additionally, TPLF can be utilised to reduce cash flow disruptions and distribute the risk of litigation.<sup>71</sup> Such objectives are lawful since they do not breach laws, customs, or proprieties.

Following Indonesian Civil Procedure, the plaintiff must pay all other costs and court-related fees to record the claim. However, the defendant is also responsible for covering their own costs. The civil procedure or other legislation does not require conflicting parties to reveal how they pay for their commitments. Neither limits the parties' ability to pay for their expenses. Clients and advocates can negotiate the arrangement or type of fees under Law No. 18 of 2003 regarding Advocates and the Code of Ethics for Indonesian Advocates. Furthermore, no rules forbid a third party from covering the expenses incurred by a different party in court. The Indonesian courts are not qualified to inquire about the parties' financial origins. Therefore, there are no ethical or legal limitations on third-party sponsorship. It is permissible to include legal fees in losses that may be recovered under Indonesian civil procedure, and it is also permissible to make a claim for reimbursement of legal costs.<sup>72</sup>

### Access to Justice

Access to justice requires that domestic legal systems be formally and practically accessible, especially for poor and marginalised individuals, groups, and communities. This way, access to justice is equated with the formal possibility of accessing courts and other mechanisms of legal dispute resolution.<sup>73</sup> Improving access to justice matters so that everyone can go to the courts and demand their rights enforced regardless of their social, economic, or affiliation.<sup>74</sup>

There are 2 (two) understandings of access to justice, namely formal conceptions and substantive conceptions. Formal conceptions include people's abilities to have "reasonable and effective access to courts of law and other tribunals and the opportunity to obtain legal services

<sup>70</sup> Temenggung and Dewi, "Pendanaan Pihak Ketiga (Third Party Funding) Dalam Penyelesaian Sengketa Melalui Arbitrase Dan Kemung-Kinan Penerapannya Di Indonesia."

<sup>71</sup> Korchin, "The Third Party Litigation Funding Law Review."

<sup>72</sup> Korchin.

<sup>73</sup> Leander Beinlich, "Max Planck Institute for Comparative Public Law & International Law," Access to Justice, 2021.

<sup>74</sup> Valesca Lima and Miriam Gomez, "Access to Justice: Promoting the Legal System as a Human Right," in *Encyclopaedia of the UN Sustainable Development Goals* (Switzerland: Springer Nature, 2020).

from qualified professionals".<sup>75</sup> Stated differently, formal conceptions centre on the availability of lawyers, court-related costs, and court procedures. However, substantive conceptions include people's capacity to acquire substantive justice to achieve a substantive legal conclusion. The formal notions of access to justice are related to TPLF.<sup>76</sup>

Access to justice is recognised not only in domestic law but also in international law. This was stated in the General Assembly Resolution dated 30 November 2012 (The Declaration of the High-Level Meeting on the Rule of Law), which states that equal access to justice is an important right, especially for women and those belonging to vulnerable groups. The UN General Assembly, in this regard, is committed to providing fair, transparent, effective, non-discriminatory, and accountable services that promote access to justice for all, including legal aid.<sup>77</sup>

To uphold access to justice, the United Nations enacted the Sustainable Development Goals, which are proclaimed to achieve a better and more sustainable future for all. One of the Goals in the Sustainable Development Goals (SDGs) is Goal 16: Peace, Justice, and Strong Institutions. Goal 16 covers the civil and political dimensions of human rights, where this includes the right to life, the right to be free from torture and slavery, the right to freedom of information, the right to political participation, the right to legal personality, and the right to access to justice.<sup>78</sup> Access to justice is promoted in Target 16.3, which aims to promote the rule of law at the national and international levels and ensure equal access to justice for all.<sup>79</sup> Lack of access to justice leads to unresolved problems, which in turn lead to unprotected people affected by the conflict who are prone to arbitrariness and abuse of power.<sup>80</sup>

The Organization for Economic Co-operation and Development (OECD) states that barriers to access to justice include economic, structural, and institutional factors. Related to economic factors, matters of concern are the complexity and cost of the legal process. In fact, the complexity of cost includes direct costs (costs of obtaining legal representation) and indirect costs (such as transportation costs, opportunity costs, and childcare costs). This is the determinant factor in determining whether people will seek legal assistance or take action at all.<sup>81</sup>

### **To What Extent Third-Party Litigation Funding Can Legally Be Implemented**

Currently, no organisation or corporation in Indonesia is known to be formally involved in providing third-party funding for arbitration or litigation. In Indonesia, funding for third-party

<sup>75</sup> Micah B. Rankin, "Access to Justice and the Institutional Limits of Independent Courts," in *Windsor Yearbook of Access to Justice*, n.d., 104.

<sup>76</sup> Rankin.

<sup>77</sup> UN General Assembly, "Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: Resolution / Adopted by the General Assembly," Refworld (blog), 2012.

<sup>78</sup> National Commission on Human Rights, "Peace and Justice as Human Rights," Human Rights Based Development in Indonesia (blog), n.d., <https://sdg.komnasham.go.id/en/goal-16/#:~:text=The Goal 16 covers a right to access to justice.>

<sup>79</sup> Rights.

<sup>80</sup> The United Nations, "Why They Matter," Peace, Justice, and Strong Institutions, n.d.

<sup>81</sup> OECD and Open Society Foundations, "Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All," n.d., <https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>.

litigation is still not seen as a commercial endeavour. Despite the significant risk, Indonesia has a possibility of developing third-party funding to provide more access to justice.

In TPLF, third parties with financial capacities (the funders) enter into an agreement with the plaintiff in a civil dispute. Thus, the TPLF contract is part of the financing agreement. This indicates that there is a contractual legal relationship between the plaintiffs and the funders. Based on Article 1320 of the Indonesian Civil Code (ICC), four conditions must be fulfilled to make a legally valid contract: mutual agreement, legal capacity, object certain, and lawful cause. The agreement between the plaintiff and the funder, with the legal capacity to enter litigation financing, satisfies the subjective requirement under Article 1320 of the ICC. With respect to objective requirements, the object of the TPLF agreement is money paid by the funders to the plaintiff. The amount of money is certain. The objective of the contractual relationship between funders and the plaintiff is to provide funding for the plaintiff's claim to spread the risks of litigation and maintain the plaintiff's **cash flow**. Furthermore, in terms of lawful cause, a financing contract is legal under Indonesian law. No law, regulation, precedent, or customary rule forbids litigation financing agreements. Therefore, agreement to finance litigation through TPLF is legal, provided it is based on the general principles of Indonesian contract law.

This legitimacy is reflected in the principles of freedom of contract<sup>82</sup> and party autonomy, which is generally known under the Indonesian Civil Code.<sup>83</sup> The parties to the TPLF are free to determine the structure of the agreement. Based on this, in principle, both parties are allowed to draw up an agreement, either as a financing agreement, purchase of receivables or a loan agreement. Due to the freedom of contract principle and because of the absence of rules and regulations pertaining to TPLF, the parties are granted a significant amount of latitude in determining its terms and arrangements. Agreements concerning the specifics of other terms and conditions, such as those pertaining to “exclusivity, withdrawal, confidentiality, pricing, settlement, and liability for expenses, as well as those pertaining to the substance of the TPLF agreement, may be made between the funded party and the financier.”<sup>84</sup>

Another principle that the parties in the TPLF agreement must take into consideration is good faith. Article 1338 of the ICC requires the contracting parties to perform their contractual duties in good faith. Upholding the principle of good faith<sup>85</sup> the parties in TPLF must have acted in a way that they believed was proper. The belief must be honest because it has some basis in morality. In addition, good faith includes observing reasonable standards of fair dealing.<sup>86</sup> If a TPLF contract abides by those principles, the contract is legally valid under Indonesian law.

However, to safeguard the parties' interests and minimise the potential misuse of TPLF, the agreement must clearly define the limits on the funder's control. This is particularly true when it

<sup>82</sup> “Indonesian Civil Code” (n.d.).

<sup>83</sup> Rizky Amalia, “The Principle of Good Faith in the Choice of Law of Foreign Direct Investment Contracts in Indonesia,” *Fiat Justisia* 12 (n.d.): 177–78.

<sup>84</sup> Victoria A. Shannon, “Harmonising Third-Party Litigation Funding Regulation,” *Indiana Journal of Global Legal Studies* 14 (n.d.): 891.

<sup>85</sup> Korchin, “The Third Party Litigation Funding Law Review.”

<sup>86</sup> Korchin.

comes to making strategic decisions to protect the funders' investments. These limits also prohibit the funder from interfering with the attorney's ability to continue serving as the case's strategist and advisor.

In addition, TPLF should only be permitted for certain claims involving public interests, such as environmental cases and consumer protections. Indonesians are hesitant to initiate cases regarding environmental and consumer protection. Due to financial restraints, victims of environmental degradation or product defects cannot sue the violators, usually major firms.<sup>87</sup> Suparto Wijoyo stated that there are at least 2 (two) difficulties faced by victims of environmental pollution when filing a lawsuit.<sup>88</sup> First, it is difficult to prove the elements of unlawful acts contained in Article 1365 of the Indonesian Civil Code, especially in terms of elements of fault (regarding the Act by the defendant) and causal relationships (between the Act and effects of the action). This is also related to the high cost of litigation in environmental cases and the collection of evidence that must be based on scientific data. Second, environmental pollution victims are generally unfamiliar with legal issues and are in a weak position. This is also related to the victims' access to qualified advocates or representatives and the high costs.<sup>89</sup>

TPLF is also an important element in consumer protection. Protecting consumers is fundamental because they are the biggest party in the economy.<sup>90</sup> In Indonesia's legal context, consumer protection is regulated in Law no. 8 of 1999. This law provides legal certainty and protection for consumers from all negative actions from business actors. It also creates the Consumer Dispute Settlement Agency and the National Consumer Protection Agency to realise all consumer protection.

The Consumer Protection Law provides an opportunity for consumers to file lawsuits to resolve disputes. The claim can be submitted through the Consumer Dispute Settlement Agency or the judiciary at the consumer's domicile.<sup>91</sup> Even so, similar to environmental cases, there are several criticisms of dispute resolution through the courts, namely: slow dispute resolution, expensive court fees, the court's unresponsiveness in protecting the public interest; court decisions do not solve the problem, and the ability of judges to consider complex matters.<sup>92</sup>

The issue of environmental sustainability is one of the biggest issues in the world. There are almost no human activities that do not cause pollution or negative environmental effects.<sup>93</sup> Activities such as mining, transportation, agriculture, and industry are sources of high

<sup>87</sup> M. Syamsudin, "The Failure of the Court to Protect Consumers: A Review of Consumer Dispute Resolution in Indonesia," *Journal of Consumer Policy*, 2020.

<sup>88</sup> Suparto Wijoyo, *Environmental Dispute Resolution Penyelesaian Sengketa Lingkungan* (Airlangga University Press, n.d.).

<sup>89</sup> Moh. Fadli, "Hukum & Kebijakan Lingkungan," in *Environmental Law & Policy* (UB Press, n.d.).

<sup>90</sup> Charles Makanyeza, "The Effect of Consumer Rights Awareness on Attitude and Purchase Intention in the Hotel Industry: Moderating Role of Demographic Characteristics," *Cogent Business & Management*, n.d.

<sup>91</sup> "Article 23 of Indonesian Law No. 8 of 1999 Concerning Consumer Protection" (n.d.).

<sup>92</sup> Adhitya Bagus Kuncoro, *Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom: Consumer Protection Based on Justice in Order to Advance State Administration System in Indonesia* (Atlantis Press, 2019).

<sup>93</sup> Naveen Kumar Arora, "Environmental Sustainability– Necessary for Survival," *Environmental Sustainability*, 2018.

environmental damage and pollution.<sup>94</sup> In fact, environmental problems have become an obligation for all people in the world to be protected.

Indonesia supports protecting the environment under Law No. 32 of 2009. This law provides protection, prevents damage, and enforces environmental issues for all stakeholders. Based on this Law, there are several types of litigation rights, namely: the Right to Sue by Government and Local Governments;<sup>95</sup> the Rights to Sue by the Community;<sup>96</sup> and the Right to Sue by Environmental Organizations.<sup>97</sup> Even so, individuals and organisations still face difficulties filing lawsuits in court. Legally recognising TPLF in environmental and consumer cases will help people access litigation when their legal rights are affected and also support the Government in protecting the environment and improving product safety.

### **The Opportunities and Challenges for The Implementation of Third-Party Litigation Funding in The Delivery of Civil Justice System**

To see the challenges and opportunities of TPLF in the Indonesian legal environment, it is important to see the experience of jurisdictions that are considered pioneers in applying TPLF. Modern litigation funding in the UK started in 2002. At first, the UK prohibited the practice of third-party litigation funding due to champerty and maintenance, which are mediaeval doctrines created to avoid frivolous litigation. The UK judicial system has acknowledged that litigation funding was "accepted and perceived to be in the public interest".<sup>98</sup> In the United States, TPLF was born due to the high cost of civil litigation due to the adversarial system of litigation. Attorneys and law firms want to provide their clients with flexible and dynamic financing agreements to ensure their clients' satisfaction.<sup>99</sup> Nevertheless, TPLF's popularity has been scrutinised, as the US Chamber of Commerce has criticised the practice's ethical implications.<sup>100</sup> The Chamber of Commerce also stated that third-party litigation funding contacts violate the Model Rules of Professional Conduct regarding conflicts of interest and fee-splitting.<sup>101</sup>

In the US, TPLF has some debate in ethical matters. Rule 5.4(a) of the Model Rules of Professional Conduct states that a lawyer or law firm shall not share legal fees with a nonlawyer other than specified circumstances under the rule.<sup>102</sup> On the comment, it is noted that the aim of the enactment of this rule is to protect professional independence and judgment in cases. Even so, under *Hamilton Capital VII, LLC, I v. Khorrami, LLP*, the court considered that the action conducted by the firm to have a transaction in exchange for legal services did

<sup>94</sup> Muhar Junef and Moh. Husain, "Establishment of Environmental-Specific Jurisdiction as a State Responsibility for Ecological Justice Efforts [Pembentukan Pengadilan Khusus Lingkungan Sebagai Wujud Tanggung Jawab Negara Pada Upaya Keadilan Ekologis]," *Jurnal Penelitian Hukum De Jure* 21 (March 2021).

<sup>95</sup> "Indonesian Law No. 32 of 2009 Concerning Environmental Protection and Management" (n.d.).

<sup>96</sup> Indonesian Law No. 32 of 2009 Concerning Environmental Protection and Management.

<sup>97</sup> Indonesian Law No. 32 of 2009 Concerning Environmental Protection and Management.

<sup>98</sup> Justice Sarah Derrington, "Speech to Australian Academy of Law Lecture," n.d.

<sup>99</sup> Attrill, "Funding Justice: The Role of Litigation Funders in Class Actions."

<sup>100</sup> Jarret Lewis, "Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?," *The Georgetown Journal of Legal Ethics* 33 (n.d.).

<sup>101</sup> Lewis.

<sup>102</sup> 111A, "Best Practices for Third-Party Litigation Funding August 2020."

not violate Rule 5.4(a).<sup>103</sup> Moreover, in *Lawsuit Funding, LLC v. Lessoff*, it is also considered that the Act of receiving a portion of the contingent legal fee that the attorneys were expected to receive if five specifically named lawsuits were adjudicated in favor of the attorneys' clients did not violate Rule 5.4(a).<sup>104</sup>

The Federal Government has not taken the initiative to regulate the license or authority of the funders. However, several states in the US have required licenses for consumer litigation financiers.<sup>105</sup> In addition, the federal Government does not yet have legislation regarding dispute finance. Thus, in November 2018, the Federal Civil Rules Advisory Committee held a conference to discuss the revision of the Federal Rules of Civil Procedure and include provisions regarding dispute finance. However, until now, there has been no further information regarding proposals or initiatives.<sup>106</sup>

According to Budidjaja et al., there is a market and opportunity for TPLF in Indonesia, yet it possesses a high-risk prospect.<sup>107</sup> In Indonesia, TPLF poses several risks in its possible implementation. There are ethical issues in litigation funding, which are broadly divided into “3 (three) areas: those relating to the funder-funded litigant relationship; those relating to the due administration of justice and the proper allocation of court resources; and those relating to the tripartite relationship between the funder, the funded litigant, and the lawyer retained to conduct the funded litigation.”<sup>108</sup>

In the context of litigation and funding agreements, avaricious funders have the potential to exploit weaker plaintiffs by putting unjust conditions on funding agreements.<sup>109</sup> In addition, protection towards the funded is also considered not sufficiently regulated in domestic regulations.<sup>110</sup> The TPLF is also vulnerable to conflicts of interest between funders and funded parties, which could result in the funded parties' interests and full rights being excluded. Additionally, the funder intends to obtain complete access to all private information to jeopardise their security.<sup>111</sup>

The legal system may see new phenomena, such as “trafficking” in litigation, where funders fabricate or construct fictitious issues in order to persuade parties to settle their differences in court with the funders' assistance.<sup>112</sup> Next, the issue raised by TPLF also pertains to the court's capacity to prevent funders from abusing their influence and tainting the legal system and the court's level of information regarding the existence or nonexistence of such funding. The topic of whether litigation funders should be subject to additional regulation by

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<sup>103</sup> Thompson, “The Third Party Litigation Funding Law Review.”

<sup>104</sup> *Lawsuit Funding LLC v Lessoff*, “Supreme Court New York Country December 4, 2013” (n.d.).

<sup>105</sup> Sahani, “Symposium in Global Labs of International Commercial Dispute Resolution: Global Laboratories of Third-Party Funding Regulation.”

<sup>106</sup> Sahani.

<sup>107</sup> Korchin, “The Third Party Litigation Funding Law Review.”

<sup>108</sup> Wayne Attrill, “Ethical Issues in Litigation Funding,” February 16, 2009.

<sup>109</sup> The Standing Committee of Attorneys General, “Litigation Funding in Australia” (n.d.).

<sup>110</sup> General.

<sup>111</sup> General.

<sup>112</sup> General.

creating organisations outside of the legal system to serve as a form of oversight and punishment also came up throughout the conversation.<sup>113</sup>

In a funder-client-lawyer relationship (tripartite relationship), funding litigation is feared to “undermine the performance of the lawyers' fiduciary and professional obligations towards the funded litigant, such as providing advice freely and regardless of funder pressure. In addition, the freedom to have its own power of attorney may also be harmed with the existence of TPLF.”<sup>114</sup>

Another challenge is that TPLF may cause Indonesians to become highly litigious. A litigious society causes an increase in litigation fees.<sup>115</sup> TPLF may encourage the pursuit of frivolous claims, as funders may be driven more by potential financial returns than the case's merit. It also can increase litigation costs as funders seek significant returns on their investments, potentially leading to higher settlement amounts. This will further increase the cost of justice for the impoverished in civil proceedings. Furthermore, by controlling the litigation process, the funders may behave abusively toward the plaintiff and its legal representation. Naturally, this jeopardises the Indonesian civil justice system.

To minimise the risks, the Indonesian Government should limit TPLF to cases involving the public, such as environmental and consumer protection only. It is crucial to develop principles containing safeguards to provide a situation where TPLF is allowed but balances the tool's availability with the interests of the disputing parties and a healthy litigation system.<sup>116</sup> In addition, the Government needs to provide guidance on issues that need to be taken into account before a plaintiff enters into a TPLF agreement. This will increase transparency and help people understand the advantages and disadvantages of TPLF.<sup>117</sup>

Despite the challenges mentioned above, there are opportunities for TPLF to flourish in Indonesia from the point of view of access to justice. The Indonesian Government has made some efforts to provide people with access to justice, one of which is Law No. 16 of 2011 concerning Legal Aid. The purpose of the establishment of this law relates to ensuring and fulfilling the rights of recipients of aid (in this case, poor people or groups of people) to get access to justice.<sup>118</sup> In addition, efforts to fulfil access to justice are also stated in the Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases in Conflict with the Law. This Supreme Court Regulation aims to guarantee women's rights to equal access to justice.<sup>119</sup> In addition, the Indonesian Government has mandated advocates,<sup>120</sup> legal aid agencies,<sup>121</sup> and the judiciary<sup>122</sup> to provide *pro bono* and *pro deo* for justice seekers.

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<sup>113</sup> General.

<sup>114</sup> General.

<sup>115</sup> Syamsudin, “The Failure of the Court to Protect Consumers: A Review of Consumer Dispute Resolution in Indonesia.”

<sup>116</sup> Susanne Augenhöfer, Dame Sara Cockerill, and Henrik Rothe, “Third Party Fund of Litigation,” European Law Institute, n.d., <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/third-party-funding-of-litigation/>.

<sup>117</sup> Augenhöfer, Cockerill, and Rothe.

<sup>118</sup> “Article 3 of Indonesian Law No. 16 of 2011 Concerning Legal Aid” (n.d.).

<sup>119</sup> “Article 3 of the Supreme Court Regulation of the Republic of Indonesia Number 3 of 2017” (n.d.).

<sup>120</sup> “Article 22 Paragraph (1) of Indonesian Law No. 18 of 2003 Concerning Advocates” (n.d.).

<sup>121</sup> Article 3 of Indonesian Law No. 16 of 2011 Concerning Legal Aid.

<sup>122</sup> “Supreme Court Regulation of the Republic of Indonesia Number 1 of 2014” (n.d.).



In practice, the provision of free assistance is still relatively minimal.<sup>123</sup> Justice seekers who are poor must look for advocates who are willing to provide free legal aid because the advocate profession has shifted from *official nobile* to commercialisation.<sup>124</sup> There are three (three) tendencies among advocates who offer legal aid to the impoverished: avoiding the case for various reasons, accepting it if it seems interesting (because it could have a cascading effect that raises the advocate's profile), and accepting it in full.<sup>125</sup>

Furthermore, the context of case funding in legal aid still leaves problems in the implementation, from advocates' reluctance to the bureaucracy's difficulty in providing funds to legal aid institutions.<sup>126</sup> Legal aid funding does not cover other sorts of expenditures, such as those associated with gathering evidence or other indirect costs; it only covers pro bono and pro deo. The applicant for legal aid must also demonstrate that he is qualified for and unable to receive legal aid services.<sup>127</sup> As a result, expectations regarding the purpose of granting access to justice remain low. For these reasons, Indonesia must explore other means of expanding access to justice, specifically via TPLF. The purpose of TPLF is to help society get past these financial obstacles. Legal formalisation will provide victims of consumer protection and environmental disputes, as well as attorneys, the financial means to pursue their legal rights vigorously. Thus, Indonesia should be cautious of potential limitations. These include ethical risks, such as conflicts of interest, exploitation of claimants by funders, and the risk of "trafficking" in litigation. Furthermore, Indonesia should ensure that TPLF does not overly commercialise the legal process or lead to systemic misuse of the judiciary.

## CONCLUSION

To sum up, Indonesia currently does not have a regulatory framework allowing or prohibiting TPLF. In Indonesia's legal environment, third-party litigation funding is allowed as a funding mechanism for plaintiffs based on a contract. The absence of regulation provides a sense of flexibility, allowing parties to pick and choose the terms of TPLF agreements if they fulfil the requirement of legal cause as stipulated in Article 1320 of the Civil Code. Thus, the funders and plaintiffs are in a valid legal relationship.

As has happened in the UK, Australia, and the US, there are currently some fears about the possible risks TPLF may have. This includes, for example, ethical risks, commercialisation of litigation, and bad faith from the funders and plaintiff. The challenges with TPLF are the possibility of exploitation from funders to plaintiff, "trafficking" in litigation, where funders fabricate or construct fictitious issues to persuade parties to settle their differences, and the misuse of the judicial system. Those can be overcome by regulating TPLF and limiting them to environmental and consumer protection cases. Regulation is important for the sake of legal certainty since TPLF carries the potential to improve access to justice, which has recently become the agenda of the Indonesian Government. Indonesia could take several concrete steps. First, the Government should enact specific legislation to formally recognise TPLF, with clear terms and conditions, particularly for cases involving public interest, such as environmental and

<sup>123</sup> Agus Raharjo, "Dilema Dalam Pemberian Bantuan Hukum Oleh Advokat," *Jurnal Mimbar Hukum* 27 (2015).

<sup>124</sup> Raharjo.

<sup>125</sup> Marudut Tampubolon, *Membedah Profesi Advokat, Perspektif Ilmu Sosial Interaksi Advokat-Klien* (Yogyakarta: Pustaka Pelajar, 2014).

<sup>126</sup> Tampubolon.

<sup>127</sup> Tampubolon.

consumer protection cases. Second, mandatory disclosure requirements should be introduced, ensuring funders disclose their identity and funding arrangements to promote transparency. Third, ethical guidelines should be established to govern the behaviour of both funders and plaintiffs, ensuring that the funding arrangements are fair and made in good faith.

If Indonesia were to enact legislation on TPLF, it should specify the scope of disclosure and qualification requirements for third-party funders to maintain the efficiency and fairness of proceedings. Indonesia's situation seems more supportive than discouraging for TPLF. Therefore, considering the benefits TPLF offers in improving access to justice, there is no reason not to start formally recognising it in the legal system.

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