Domestic implementation of Article 19 of the WHO Framework Convention on Tobacco Control

A comparative report prepared for the World Health Organisation

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EXECUTIVE SUMMARY

I. INTRODUCTION

1. This is a report prepared by Oxford Pro Bono Publico ('OPBP') for the benefit of the World Health Organisation, to assist in the preparation of a toolkit that provides advice for the implementation of Article 19 of the WHO Framework Convention on Tobacco Control (hereinafter: Article 19). The key issue addressed is the extent to which access to justice provisions in domestic jurisdictions assist the implementation of Article 19.

2. The WHO is creating a resource for states to comparatively assess how to implement Article 19. The Article effectively requires states parties to examine ways of strengthening their legal systems to make it possible to bring civil liability claims arising out of economic and physical harm caused by tobacco use. This Report will be submitted as a part of the resources made available to states seeking to comply with their Article 19 obligations and aims to be of use to states in determining their domestic implementation of Article 19.

II. NATURE OF THE RESEARCH

3. To assist the WHO with its creation of the toolkit, OPBP has undertaken research to establish the legal position and practice in seven comparative jurisdictions regarding the various civil liability provisions that exist to facilitate access to justice through courts and other quasi-judicial bodies.

4. The research addresses three questions in respect of each of the jurisdictions covered:

   I. *Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?*

II. *What is the general assessment about the success, or otherwise, of these rules in improving access to justice? You may limit your research to opinions of leading academics, bar associations and civil society groups that are particularly concerned with access to justice.*

III. *Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?*

5. These three questions all concern the key legal issues which this Report seeks to address, namely to what extent would domestic civil liability provisions across jurisdictions facilitate the implementation of Article 19?

6. The comparative perspective brought to this issue draws on the following jurisdictions:

i. Canada
ii. European Union
iii. France
iv. Germany
v. India
vi. Ireland
vii. United Kingdom

7. These jurisdictions reflect a range of legal cultures and offer diverse perspectives on the research questions. The selected jurisdictions include: (i) prominent common law jurisdictions (the UK and Ireland); (ii) prominent civil law jurisdictions (Germany, France, and the European Union); (iii) a common law jurisdiction with a strong practice of public interest litigation (India); (iv) and a jurisdiction with a unique democratic arrangement that has both a civil and common law system coexisting in the same state (Canada).

8. The U.S. has been excluded from this Report. This is due to the fact that it has a successful track record in pursuing civil liability claims against the tobacco

industry. This experience is well documented, including in reports prepared by or on behalf of the WHO.[1]

9. This Report focuses on laws and reform proposals from domestic systems designed to facilitate access to justice, particularly where there is a perceived power imbalance between claimants and corporate or public defendants that might be adaptable for Article 19 related purposes.

[1] See, for example, Consolidated Review of Best Practices and Obstacles to Establishing Civil Liability, and Options for Reform (2014) The Review is a background resource for Parties to the Convention and a complement to the Article 19 Expert Group Report FCTC/COP/6/8. Both the Review and the Expert Group Report can be found on the resources page of the WHO-FCTC's Article 19 online toolkit.

III. SUMMARY CONCLUSIONS

10. This section is a summary of our main findings for each of the three questions considered. By identifying broad trends as well as significant differences across jurisdictions, we hope that our comparative research will provide an enriched understanding of the civil liability and practice on these questions. The report demonstrates that all jurisdictions have adopted a number of general or specific rules and practices designed to facilitate greater access to justice. Some of these rules are intended to deal with situations where there are perceived power imbalances between claimants and corporate or public defendants, while other rules are part of general commitment to promoting accessibility and equality between litigants. These rules have included collective redress procedures, relaxing standing rules on who can bring claims, shifting the burden of proof to defendants in certain situations and/or expanding defendants' disclosure obligations, fixing or capping costs for certain (or all) types of litigation, providing public legal aid and/or permitting commercial (contingency) funding, extending limitation periods in which claims can be made and using case management practices to limit the delays in hearing cases. While many of these rules have been *partly* successful in the jurisdictions in which they have been adopted, a recurring theme across the different jurisdictions covered in this report is that no system can claim to have dealt with all the obstacles that impede access to justice including delays, excessive costs and resource and information asymmetry. In all jurisdictions there are calls for further reforms.

Question 1:

Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

11. The comparative reports indicates that all jurisdictions explored have adopted rules and procedures that facilitate access to justice. In general, these rules and procedures are not specifically intended to target situations where there is a perceived power imbalance. However, they have been used to address these

situations. These tools are largely similar across the board, with some jurisdictions having additional rules that are outlined specifically.

12. In Canada, the rules governing class proceedings take note of this, as well as adverse costs protections. These protect claimants from having to pay an opponent's legal costs, even if the claim is unsuccessful. Specifically, consumer protection legislation makes it easier to bring claims, and in addition, healthcare recovery legislation enables provincial governments within Canada, to recoup costs of treatment of diseases including those that are tobacco related.

13. The European Union has regulations that encourage cross border judicial cooperation amongst member states. The regulations also lay out guidelines for representative entities in class actions, and expedient procedures for injunctions. They mandate the provision of legal aid through a Legal Aid Directive. In discrimination cases, the burden of proof is reversed to not unfairly prejudice claimants.

14. In France, it is pertinent to note that only associations are permitted to bring group actions. This has been utilised in the areas of consumer and competition law.

15. In Germany, unlike most other jurisdictions, collective action and redress is not provided for by the German Constitution. However, the Advisory Assistance Act allows for a mechanism to provide legal aid to low-income claimants. There are provisions for contingency fees in civil litigation, as well as reversals of burden of proof in certain circumstances.

16. India's relaxation of standing requirements for public interest litigation functions as a facilitator of access to justice. This is in addition to the possibility of filing representative suits; entitlement to legal aid; time limit extensions; and enhanced availability of administrative tribunals and other quasi-judicial authorities.

17. Ireland also has provisions for a company to litigate on behalf of a third party, in the event that they are otherwise unable to litigate on their own. In the area of environmental protection, non-governmental organisations are permitted to

challenge decisions of planning authorities in the public interest. Amicus curiae may also be appointed to assist the court. Courts have discretion in relation to varying the rules on costs.

18. The United Kingdom has adopted procedural rules in order redress the balance of power between claimant and defendant, by allowing third parties to intervene; by reducing the administrative/cost burden of bringing a claim; or by providing the claimant with financial assistance in the form of legal aid.

Question 2:

What is the general assessment about the success, or otherwise, of these rules in improving access to justice? You may limit your research to opinions of leading academics, bar associations and civil society groups that are particularly concerned with access to justice.

19. In Canada, a general assessment indicates that there are issues with lawyer-driven cases, settlement approval, class members take-up rates of damages award as well as the distribution of damages. In the EU, a number of reports have indicated that there are problems with burden of proof rules due to information asymmetry; rules of disclosure are critiqued based on their tendency to protect privacy rather than openness and transparency to ensure relevant evidence is before the court.

20. In France, there have government reductions on funding for the legal aid system, which adversely affects access to justice. In addition, standing requirements have been deemed to be too stringent to allow for effective group claims. So far, group actions have only been utilised in the cases of consumer law and competition law. Similarly, in Germany, the key critique is that there is a need for a broad and effective procedure for collective redress that can be readily utilised by claimants.

21. With regard to India, the public interest litigation system used to be considered a positive example of procedural provisions facilitating access to justice. However, there is a fear that is articulated in a number of critiques, that there has been a misuse of this instrument to facilitate development and disinvestment activities of the state at the cost of marginalised groups. Legal aid is inaccessible, or improperly administered, and the long pending caseloads in

courts and tribunals is a major barrier to litigants obtaining decisions on the merits, and a deterrent to prospective litigants. The issue of funding for legal aid is also a problem highlighted in Ireland, along with the pending cases and large time frames for dispensing justice.

22. In the UK, rules that make interveners liable for adverse costs create a potential chilling effect upon intervention petitions. In addition, there is concern that there is a narrow set of circumstances that allow for collective redress, which is counterproductive. The lack of funding for legal aid continues to remain an issue.

Question 3:

Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

23. In Canada, the Bar Association of Canada has reviewed issues related to access to justice. Despite the review, there has been a reduction in federal aid. However, some changes have been made to amend limitation periods, thereby allowing for suits to be filed for a longer period, thus increasing access. In the European Union, there have been major improvements in the rules of evidence in order to facilitate cross-border litigation. These include the reversal of burden of proof where claimants are vulnerable. In addition, there have been a number of measures adopted to increase the coverage of legal aid across the EU through cross border judicial cooperation. In France, the government has not responded adversely in relation to increasing the funding of legal aid.

24. There is a consumer protection law that is being proposed in Germany, to encourage consumer claims, but the introduction of the bill failed in the last session of the legislature. It is yet to be seen how it will be received subsequently. There has been no change in their position on collective redress.

25. In India, the government has attempted to increase infrastructure for courts and tribunals. In addition, the Consumer Protection Act has systematised consumer protection including rules regarding the bringing of legal claims by consumers. There has been a decision taken to continue funding local self-

government justice initiatives, as well as the expansion of the provision of legal aid to new districts that are in need of it.

26. Ireland has recently established a review mechanism to take into account concerns regarding access to justice, and produce a report on the same, to be submitted to the President of the High Court. The UK has rejected proposals for a general collective action to be introduced into the law, but has undertaken a review of the legal aid programme in light of its various criticisms.

CANADA

Canada has a federal structure, whereby certain powers are allocated to the provinces and the remaining powers are allocated to the federal government.[2] Civil procedure is a provincial matter.[3] The questions below will therefore be answered for each of the ten provinces, and, where applicable, for the federal level which administers Canada's three territories.

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

1. Class proceedings legislation has been passed in nine of Canada's ten provinces,[4] and such proceedings are also available under the Federal Court Rules.[5] A common-law class action can be brought in Prince Edward Island, which does not have its own statute, pursuant to the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc v Dutton*.[6] Under such legislation, issues such as separate contracts and varying damages claims are not a bar to certification as statistical evidence may be admitted to establish the quantum and distribution of damages, and damages may be awarded on an aggregate basis without the need for individual assessments. In most provinces, the commencement of a class action suspends the limitation period for all members of the class.
2. Adverse costs protection exists in class proceedings. In Ontario and Quebec, litigants may obtain protection from statutorily-created funding bodies.[7] Some other provinces are "no-costs" jurisdictions where adverse costs are not awarded in class actions.[8] The provisions of some class proceedings legislation give courts the discretion not to award adverse costs in

[2] The Constitution Act, 1867, 30 & 31 Vict, c 3, ss 91 and 92.
[3] ibid s 92(14).
[4] Code of Civil Procedure, CQLR c C-25.01, Title III (Quebec Code); Class Proceedings Act, RSBC 1996, c 50 (BCCPA); Class Proceedings Act, 1992, SO 1992, c 6 (ONCPA); Class Proceedings Act, SA 2003, c C-16.5 (ABCPA); Class Proceedings Act, CCSM c C130 (MBCPA); Class Proceedings Act, SNS 2007, c 28 (NSCPA); Class Proceedings Act, RSNB 2011, c 125 (NBCPA); The Class Actions Act, SS 2001, c C-12.01 (SSCAA); Class Actions Act, SNL 2001, c C-18.1 (NLCAA).
[5] Federal Courts Rules (SOR/98-106), Part 5.1 (FC Rules).
[6] 2001 SCC 46.
[7] The Ontario body is the Class Proceedings Fund, and the Quebec body is the Fonds D'Aide aux Actions Collectives. See Janet Walker et al (eds), *Class Actions in Canada: Cases, Notes and Materials* (Emond Publishing 2013) 232.
[8] These are British Columbia, Manitoba, Newfoundland and Labrador, as well as the Federal Court. Saskatchewan was also a "no-costs" jurisdiction until 2015, when changes were made to the SSCAA (n 4). However, Saskatchewan costs awards continue to be much more modest than in other provinces. The fee-shifting provinces are Ontario, Alberta, New Brunswick, Nova Scotia, and Quebec (but only at the level of small claims court costs, so that the Quebec legislation is more like a no-costs regime). See Walker (n 7) 23.

certain circumstances, such as when the action involves the public interest.[9] In all provinces, adverse costs protection is increasingly provided by third-party funders. These arrangements are not currently regulated, but judges have provided guidance on acceptable practice.

3. Outside of the class proceedings context, the "loser pays" rule applies, although the extent to which it applies varies between provinces.[10] Adverse costs protection is limited, although insurance products offering such protection are growing in popularity. The courts may take certain circumstances into account when awarding costs, such as the importance of the issues and the complexity of the action.[11]
4. Contingency fees are permitted in all provinces, although there are restrictions in some jurisdictions.[12] Legal aid is available for individual litigants, although the assistance does not extend to all types of legal problems and the financial eligibility criteria are fairly stringent.[13] Legal expenses insurance is available, although not used widely.[14]
5. Individuals or organizations may intervene in litigation in Canada,[15] although there is very little funding to facilitate public interest interventions. The Supreme Court of Canada has held that superior courts are empowered to order governments to fund public interest litigation before statutory courts and tribunals, although the circumstances in which they will do so are "rare and exceptional."[16] There is also funding available for litigants before certain tribunals.[17] Finally, *amicus curiae* can assist the court in most Canadian jurisdictions.[18]

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[9] Quebec Code, a 593; ONCPA, s 31; Alberta Rules of Court, Alta Reg 124/2010, r 10.32 (AB Rules); NSCPA, s 40(2); SSCAA, s 40(2).

[10] Quebec is notable in this respect: the costs tariff is maintained at a very low level, such that both sides effectively bear their own costs: H Patrick Glenn, 'The Irrelevance of Costs Rules to Litigation Rates: The Experience of Quebec and Common Law Canada' in Mathias Reimann (ed), *Cost and Fee Allocation in Civil Procedure* (Springer 2011) 100. See also FC Rules, r 400, where costs are in the discretion of the Court.

[11] AB Rules, r 10.33(1); Rules of Civil Procedure, RRO 1990, Reg 194, r 57.01(1) (ON Rules); Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008, r 77 (NS Rules); The Queen's Bench Rules, Sask Gaz December 27, 2013, 2684, Part 11(4) (SK Rules); Rules of Court, NB Reg 82-73, r 59.02 (NB Rules); FC Rules, r 400.

[12] Contingency fees are not permitted in family law cases in British Columbia, Ontario and Quebec. Ontario does not permit contingency fees for criminal law cases. British Columbia imposes caps on fees for certain kinds of cases (for example, personal injury and automobile accident cases): Glenn, (n 10) 104.

[13] This statement applies across the Canadian provinces; see, for example, the eligibility guidelines for British Columbia's Legal Services Society <https://www.lss.bc.ca/legal_aid/doIQualifyRepresentation.php> accessed 6 Nov 2017; and Legal Aid Ontario <http://www.legalaid.on.ca/en/getting/eligibility.asp> accessed 6 Nov 2017.

[14] Paul A Vayda et al, 'Legal Services Plans: Crucial-Time Access to Lawyers and the Case for a Public-Private Partnership' in Michael Trebilcock et al (eds), *Middle Income Access to Justice* (University of Toronto Press 2012).

[15] AB Rules, r 2.10; ON Rules, r 13.01; NS Rules, r 35.10; SK Rules, r 2-12; NB Rules, r 15; Quebec Code, a 184-190; Rules of Civil Procedure, RRPEI 1990, r 13.01 (PEI Rules); Court of Queen's Bench Rules, Man Reg 553/88, r 13 (MB Rules); Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D, r 7.05 (NL Rules); FC Rules, r 109(1).

[16] *R v Caron*, 2011 SCC 5.

[17] Iler Campbell LLP, 'Intervenor Funding and Access to Environmental Justice: Time for the Ontario Political Parties to revisit this issue?' (Iler Campbell, August 2011) <https://www.ilercampbell.com/blog/wp-content/uploads/Intervenor-Funding-and-Participation.pdf> accessed 6 November 2017.

[18] ON Rules, r 13.02; SK Rules, r 2-13; NB Rules, r 15.03; Quebec Code, a 187; PEI Rules, r 13.02; MB Rules, r 13.02; NL Rules, r 7.06.

6. Litigants are afforded standing in public interest cases if there is a serious justiciable issue raised as to the legislation's validity, where the plaintiff has a genuine interest in that validity, and where the proposed suit is a reasonable and effective way to bring the issue before the courts.[19] The courts have interpreted this flexibly and will generally lean towards granting standing.[20]
7. Provincial consumer protection statutes make it easier to bring certain claims. For example, certain provinces allow consumers to bring claims for misrepresentation, without having to establish that these misrepresentations were actually relied upon.[21] Other provisions render "arbitration clauses" invalid, such that contractual clauses mandating that the consumer must resort to arbitration instead of litigation are unenforceable.[22]
8. Limitation periods are contained in provincial limitations statutes, and generally specify a period of two years for bringing an action.[23] These have been strictly enforced, although there are exceptions in certain circumstances such as sexual assault. Most provinces have discoverability provisions, such that the limitation period runs from the date of discovery of the injury and not of the injury itself. Provinces such as Ontario, however, impose an ultimate 15-year limitation period even on undiscovered claims.[24]
9. All the provinces have passed healthcare cost recovery legislation to enable provincial governments to recoup the costs of treating people for tobacco-related diseases.[25] This legislation confers a direct cause of action on provincial governments, allows for the assessment of liability based on market share, provides for multiple defendants to be jointly

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[19] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45.
[20] ibid [37] – [51].
[21] Consumer Protection Act, 2002, SO 2002, c 30, Sch A, s 14(2) (ON CPA); The Consumer Protection and Business Practices Act, SS 2014, c C-30.2, s 24(3) (SK CPA); Consumer Protection and Business Practices Act, SNL 2009, c C-31.1, s 7(1) (NL CPA); Business Practices and Consumer Protection Act, SBC 2004, c 2, s 4 (BC CPA). The BC CPA, ss 5 and 9, place the burden of proof on the supplier to establish that an unconscionable or deceptive act or practice did not take place. See also Conference of the Parties to the WHO Framework Convention on Tobacco Control, Sixth Session, 13-18 October 2014, *Implementation of Article 19 of the Convention: "Liability" – Report of the expert group* (FCTC, June 2014), 12 (WHO FCTC Expert Group Report).
[22] ON CPA, s 7(2); SK CPA, s 101; Consumer Protection Act, CQLR c P-40.1, s 11.1; NL CPA, s 3(1); BC CPA, s 3.
[23] Limitations Act, RSA 2000, c L-12; Limitations Act, 2002, SO 2002, c 24, Schedule B (ON Limitations); Limitation Act, RSBC 2012, c 13; The Limitations Act, SS 2004, c L-16.1; The Limitation of Actions Act, CCSM c L150; Limitations Act, SNL 1995, c L-16.1; Limitation of Actions Act, SNB 2009, c L-8.5; Limitation of Actions Act, SNS 2014, c 35; Statute of Limitations, RSPEI 1988, c S-7. The general limitation period in Quebec is three years: Civil Code of Quebec, CQLR c CCQ-1991, a 2925. For actions brought in the Federal Court, the limitation period of the province from which the action arises generally applies: FC Rules, r 39(1).
[24] ON Limitations, ibid s 15(2).
[25] Tobacco-related Damages and Health Care Costs Recovery Act, SQ 2009, c 34; Tobacco Damages and Health Care Costs Recovery Act, SBC 2000, c 30; Tobacco Damages and Health Care Costs Recovery Act, 2009, SO 2009, c 13; Tobacco Damages and Health Care Costs Recovery Act, SNB 2006, c T-7.5; The Tobacco Damages and Health Care Costs Recovery Act, CCSM c T70; Tobacco Damages and Health-care Costs Recovery Act, SNS 2005, c 46; The Tobacco Damages and Health Care Costs Recovery, SS 2007, c T-14.2; Tobacco Damages and Health Care Costs Recovery Act, RSPEI 1988, c T-3.002; Tobacco Health Care Costs Recovery Act, SNL 2001, c T-4.2; Crown's Right of Recovery Act, SA 2009, c C-35, Part 2 – Third Party Liability – Tobacco Products.

and severally liable if they jointly breached a duty, and allows plaintiffs to bring otherwise time-barred claims.[26] Tobacco consumers in Quebec who brought class action litigation against three major tobacco companies were awarded $15 billion in 2015,[27] although the decision is under appeal.

10. In an attempt to improve access to justice and reduce the costs and delay in civil litigation, several expedited or simplified pre-trial processes have been introduced in recent years. Parties may move to strike pleadings if, for example, they fail to plead a reasonable cause of action;[28] they may move for summary judgment (and, in some provinces, summary trial) if the litigation revolves around a certain number of discrete issues;[29] and they may have a question of law determined by the court, which may be determinative of the some or all of the action.[30] Certain cases may also be subject to case management or mediation.[31] Settlement is encouraged through costs mechanisms.[32] Simplified procedure, which is an expedited process for the entire action, is also available in most provinces.[33]
11. A complex network of administrative tribunals, both provincial and federal, is available for the determination of Canadians' rights and liabilities. Tribunals oversee issues regarding human rights, social security, workers' compensation, labour relations, landlord and tenant disputes, and numerous other issues. There are 235 tribunals in Ontario alone.[34] In addition, arbitration is available should the parties contract to have their disputes decided in this way.

II. What is the general assessment about the success, or otherwise, of these rules in improving access to justice?

12. Serious questions have been raised about the efficiency of class proceedings legislation in bringing about access to justice. Jasminka Kalajdzic, a prominent academic in the field, has

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[26] WHO FCTC Expert Group Report, n 21, 31.
[27] *Létourneau c JTI-MacDonald Corp*, 2015 QCCS 2382.
[28] AB Rules, r 3.68; ON Rules, r 21.01(1)(b); NS Rules, r 88; SK Rules, r 7-9; NB Rules, r 23.01(b); Quebec Code, a 53; PEI Rules, r 21.01(1)(b); MB Rules, r 21.01; NL Rules, r 14.24; Supreme Court Civil Rules, BC Reg 168/2009 (BC Rules), r 9-5; FC Rules, r 221(1).
[29] AB Rules, rr 7.2-7.11; ON Rules, r 20; NS Rules, r 13; SK Rules, rr 7-2-7-8; NB Rules, r 22; PEI Rules, r 20; MB Rules, r 20; NL Rules, r 17; BC Rules, rr 9-6; FC Rules, rr 213-216.
[30] AB Rules, r 7.1; ON Rules, r 21.01(1)(a); NS Rules, r 12; SK Rules, r 7-1(1); PEI Rules, r 21.01(1)(a); MB Rules, r 21; BC Rules, r 9-3; FC Rules, r 220(1).
[31] AB Rules, r 4.12; ON Rules, rr 77, 24.1; NS Rules, rr 26.02, 59.18; SK Rules, rr 4-5, 4-10; NB Rules, r 81.10; Quebec Code, aa 148-152, 420-424; MB Rules, rr 70.16, 70.24; FC Rules, Part 9.
[32] AB Rules, r 4.29; ON Rules, rr 49.10-14; NS Rules, r 10.09; SK Rules, rr 4-31; NB Rules, r 49; PEI Rules, r 49; MB Rules, r 49; BC Rules, r 9-1.
[33] ON Rules, r 76; NS Rules, rr 57-58; SK Rules, Part 8; NB Rules, r 79; PEI Rules, r 75.1; MB Rules, r 20A; BC Rules, r 15-1; FC Rules, rr 292-299.
[34] Ministry of the Attorney General, 'Guidelines for Administrative Tribunals' (MAG, 29 October 2015) <https://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french_language_services/services/administrative_tribunals.php> (accessed 3 November 2017).

noted extensive problems with lawyer-driven cases, settlement approval, class members' take-up rate of damages awards, and *cy-près* distribution of damages.[35] The Law Foundation of Ontario, an independent body, is conducting a wide-ranging review of the Ontario CPA because of such issues.[36] In addition, the Canadian Bar Association (CBA) has established a National Task Force on Class Actions to address the procedural challenges posed by multi-jurisdictional and overlapping class actions, a problem that is compounded by the division of powers between the provinces and the federal government.[37]

13. With regard to other areas of the civil litigation system, the Access to Justice Committee of the CBA issued a comprehensive report in 2013. The report concluded that access to justice in Canada is "abysmal".[38] Calling for systemic change by 2030,[39] the report stated that one of the biggest concerns was the growing number of self-represented litigants, those whose income is too high for legal aid, but too low to afford a lawyer.[40] The problem is particularly pronounced in the area of family law, where contingency fees are generally not available.[41] The report also called for more federal funding for civil legal aid.[42] These findings came on top of the 2011 World Justice Project, which ranked Canada ninth out of twelve developed countries on access to civil justice.[43]
14. Concerning funding for public interest litigants and intervenors, there is a general opinion that this could also be improved. Intervenor funding was much more widely available in the 1990s and there are now calls to return to that state of affairs.[44]
15. The criticisms directed at the tobacco-related healthcare cost recovery legislation is similar to that directed at the civil litigation in general: litigation is still too slow and expensive.[45] For example, the Létourneau litigation referred to above was commenced in 1998, and a judgment was not obtained until 2015. Various recommendations have been made to address

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[35] J Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (Thesis for Masters Degree at the University of Toronto 2009) <https://tspace.library.utoronto.ca/bitstream/1807/18780/6/Kalajdzic_Jasminka_200911_LLM_Thesis.pdf> (accessed 6 November 2017).

[36] Law Commission of Ontario, 'Class Actions Project' (22 September 2017) <http://www.lco-cdo.org/wp-content/uploads/2013/04/CA-Backgrounder-Qs-and-As-FINAL-Sept-22-2017-1.pdf>(accessed 6 Nov 2017).

[37]Canadian Bar Association (CBA), 'Class Action Task Force Consultation' (12 July 2017) <http://www.cba.org/News-Media/News/2017/July/Class-action-task-force-consultation> (accessed 6 Nov 2017).

[38]CBA, 'Equal Justice: Balancing the Scales' (Nov 2013) <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> 8 (accessed 6 Nov 2017).

[39] ibid 153.

[40] ibid 28-33.

[41] ibid 30, 44.

[42] ibid 55-57.

[43] CBA, 'Working for an Inclusive Justice System' (Nov 2013) <http://www.cba.org/CBA-Equal-Justice/Home> (accessed 6 November 2017).

[44] Environmental Justice (n 17).

[45] WHO FCTC Expert Group Report (n 21) 25.

these delays, including judicial docketing, active case management, and the setting of procedural timetables at an early stage of the proceedings.[46]

16. The use of expedited or simplified pre-trial processes has been more successful, especially in the area of summary judgment motions. For example, since the changes to the Ontario Rules of Civil Procedure in 2010 and the subsequent Supreme Court of Canada judgment in *Hryniak v Mauldin,*[47] which advocated a culture shift towards expedited pre-trial processes, there has been an increase in the number of summary judgment motions determined, an increase in the number granted, and an increase in the proportion of successful summary judgment motions.[48]

III. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

17. As noted above, the reviews of class proceedings legislation by the Canadian Bar Association and the Law Foundation of Ontario remain ongoing and have in fact been subject to significant delays (the CBA's review began in 2010, and the LFO's review began in 2013). Some changes have been made in the class proceedings legislation of other provinces, although some of these would appear to be counterproductive to access to justice. For example, Saskatchewan was a 'no-costs' province until 2015, when it changed its legislation to accord with the 'loser pays' rule. Recent changes to the Quebec Code also provide more rights to defendants and make the national class action issue more complicated.
18. Federal legal aid funding has shrunk in recent years, even as the numbers of people seeking access to the civil justice system has risen.[49] While there have been repeated calls for increased investment into the legal aid system, the federal government appears to have been unresponsive.[50] It has, however, noted the crisis regarding self-represented litigants in the civil justice system.[51]

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[46] ibid.
[47] 2014 SCC 7.
[48] Brooke Mackenzie, 'Effecting a Culture Shift – An Empirical Review of Ontario's Summary Judgment Reforms' (2017) 54 *Osgoode Hall Law Journal* 1275.
[49] CBA, 'Study on Access to the Justice System - Legal Aid' (CBA 2016) <https://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a> (accessed 6 November 2017).
[50] ibid.
[51] Trevor CW Farrow et al, *Self-Represented Litigants in the Canadian Justice System: a White Paper Prepared for the Association of Canadian Court Administrators* (Association of Canadian Court Administrators 2012) <http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf> (accessed 6 November 2017).

19. However, as noted above, several provinces have made changes to their limitations statutes in recent years, particularly in order to prevent the time-barring of claims for sexual assault. The provinces have also introduced healthcare recovery legislation to allow for actions against tobacco companies, and have made amendments to the provincial civil procedure rules in order to allow for expedited and simplified pre-trial processes.
20. While the current assessment of access to justice in Canada is somewhat dismal, therefore, there are reasons to be hopeful. More improvements will be made if the government makes efforts to answer the CBA's calls for systemic change by 2030,[52] although the government has not yet issued an official response to that report. As it currently stands, most of the access to justice programs in Canada appear to have been initiated by provincial Law Societies, Law Reform Commissions or other non-governmental bodies.[53]
21. In conclusion, many procedural mechanisms have been created to increase access to justice in Canada. The downside to these mechanisms, however, are the costs and delay with which they are associated, and the lack of funding for those who would use them.

[52] CBA Equal Justice Report (n 38).

[53] See, for example, 'Listening to Ontarians: Report of the Ontario Civil Legal Needs Project' (OCLNP Steering Committee, 2010) <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> (accessed 6 November 2017); 'The Middle Income Access to Justice Initiative' (University of Toronto Faculty of Law, 2012) <https://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf> (accessed 6 Nov 2017); CBA Equal Justice Report, ibid; Karen Cohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Law Foundation of Ontario 2008) <http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf> (accessed 6 November 2017); 'The Cost of Justice: Weighing the Costs of Fair & Effective Resolution to Legal Problems' (The Canadian Forum on Civil Justice 2012), online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA_background_doc.pdf> (accessed 6 November 2017).

EUROPEAN UNION

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

22. The EU has adopted certain regulations and directives that are aimed at facilitating access to justice. They are categorised as follows:

Rules of Evidence

23. On a secondary law level, Council Regulation (EC) No. 1206/200154 encourages judicial cooperation in matters of evidence across borders. Its essential function is to enable a court of a Member State to take evidence in a simple, effective and swift manner in another Member State through direct contact with judicial authorities of the latter. The main objective of the Regulation is not the harmonisation of the law of evidence, but the encouragement of judicial cooperation for speedy justice.

Collective Redress Procedures / Class Actions

24. Furthermore, on 11 June 2013, the European Commission published a recommendation 'on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU law.'[55] The main recommendations included guidelines that representative entities were to follow in representative actions; provision for the dissemination of information in collective redress actions; guidelines as to funding of compensatory collective redress; expedient procedures for injunctive orders and their enforcement, amongst other things. The Commission decided on giving the Member States a 2-year timeframe (until 2015) to take appropriate measures.

Legal aid for civil disputes / Adverse Cost Protection

25. Article 6 (1) of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right to legal assistance in civil proceedings. This allows individuals to access

[54] Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1.
[55] Commission Recommendation (EU) 396/2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law See 2013/396/EU [2013] OJ L 201/60.

justice irrespective of their financial means. Legal aid must be available 'where the absence of such aid would make it impossible to ensure an effective remedy.' It is for national courts to ascertain whether particular conditions granting legal aid constitute unfair restrictions of the right of access to court.[56] Restrictions must not constitute 'a disproportionate and intolerable interference' on the right itself.[57]

26. Besides the provision in Article 47, specific secondary EU law creates standards for legal aid in cross-border civil cases, e.g. the 'Legal Aid Directive'.[58] This directive covers pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings; legal assistance in bringing a case before the court and representation by a lawyer in court and assistance with, or exemption from, the cost of proceedings. In particular, Article 3 of the Legal Aid Directive[59] states: "In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party".
27. This was acknowledged by the CJEU in *DEB Deutsche Energiehandels-und Beratunggesellschaft mBH v. Bundesrepublik Deutschland*:[60] 'It is apparent from those decisions that legal aid may cover both assistance by a lawyer and dispensation from payment of the cost of proceedings'. Member States are still free to 'define the threshold above which a person should be presumed able to bear the cost of proceedings, in the conditions defined by this Directive' (Preamble to the Legal Aid Directive,[61] (14)). Furthermore, the Directive contains provisions dealing with appeals, extrajudicial procedures or authentic instruments, legal aid in relation to enforcement and the procedure for transmitting and processing legal aid applications.[62]
28. In addition, there are also detailed rules on legal aid in the specific field of maintenance obligations in cross-border situations. The right to legal aid in such cases applies to review, appeal procedures and enforcement. The EU has also sought to develop an e-justice system to lower the costs for the access to legal systems; for that purpose, e.g., an online portal giving access to national justice systems has been established.

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[56] Case C-156/12 *GREP GmbH v Freistaat Bayern* [2012] EU:C:2012:342.
[57] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice* (2009), ch 3 Legal Aid, Scope of Application, para 3.1.1.
[58] Council Directive EC 8/2002 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] (Legal Aid Directive) OJ L 26/41 of 27 January 2003.
[59] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L026.
[60] C-279/09 *DEB Deutsche Energiehandels und Beratungsgesellschaft mBH v Bundesrepublik Deutschland* [2010] ECR I-13849, para 48.
[61] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L026.
[62] ibid, Articles 12-16.

Burden of Proof

29. EU law applies a modified burden of proof in the context of non-discrimination law. Where the claimant is able to establish facts from which it is presumed that there has been discrimination, it then falls to the respondent to prove that there is no breach.
30. These rules are contained in the Racial Equality Directive (Article 8), Gender Goods and Services Directive (Article 9), Gender Equality Directive (recast) (Article 18) and Employment Equality Directive (Article 10).
31. In addition, the use of statistical data is accepted as evidence capability giving rise to a presumption of discrimination by the CJEU (see Hilde Schönheit v. Stadt Frankfurt am Main *and* Silvia Becker v Land Hessen).63 This facilitates the establishment of the presumption of discrimination by the claimant.
32. However, the burden of proof provisions have not, per CJEU jurisprudence, tempered limitations on disclosure of information. In *Patrick Kelly v National University of Ireland*,[64] *Asociatia Accept v Consiliul National pentru Combaterea Discriminârii*,[65] and *Meister v Speech Design Carrier Systems*,[66] the CJEU affirmed that the Directive – and in particular, the burden of proof provisions – did not entitle the plaintiff to confidential information held by the employer. In the latter decision, however, it was held to be one of the factors to be taken into account in the event of a subsequent discrimination claim.

Rules on Disclosure

33. The EU has implemented Regulation No 1049/200167 on public access to documents held by the EU institutions. All documents held by the European Parliament, Council, and Commission are generally public. Article 15(3) TFEU extends the public right of access to documents of all Union institutions, bodies, officials and agencies. Limitations to the transmission of documents by the Commission is bound by Article 39 TFEU which prevents officials of the Commission from disclosing information covered by the obligation of professional secrecy. In the absence of EU rules on disclosure, it is for the Member State to establish and apply national rules on the right of access to documents, subject to the principles of effectiveness and equivalence.[68]

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[63] Joined cases C-4/02 and C-5/02 *Hilde Schönheit v. Stadt Frankfurt am Main* [2003] ECR I-12607.
[64] C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)* [2011] ECR I-06813.
[65] C-81/12 *Associatia Accept v Consiliul National pentru Combaterea Discriminarii* [2013] ECR 275.
[66] C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] ECR I-217.
[67] Council Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents [2001] OJ L145/43.
[68] Described further in Maquis and Cisotta, *Litigation and Arbitration in EU Competition Law* (Edward Elgar Publishing 2015) 83.

II. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

Rules of Evidence

34. As pointed out earlier, Regulation 1206/2001 represents a major improvement to the regime of evidence taking in cross-border litigation, therefore especially facilitating the efficiency and speed in the transmission of evidence between States.

Collective Redress Procedures / Class Actions

35. The recommendation of the Commission related to collective redress procedures has not yet led to significant improvements in the legal systems of the Member States. Reasons for that could be, at least in some Member States, the strong influence of lobby organisations and a general rejection towards the establishment of a class-action system like in the U.S.[69] Furthermore, the recommendation is only a soft law instrument that is not binding on the Member States. While this provides more flexibility for national governments, some countries might decide not to transpose the collective redress principles. The EU's approach has been an attempt at regulation of these already well-established structures.[70]

Legal aid for civil disputes / Adverse Cost Protection

36. The Commission has reported on the application of the 'Legal-Aid-Directive' in practice in 2012. In its view, the adoption and transposition of the Directive brought, in general, clarity and uniformity among the Member States.[71] According to the Commission, all the Member States who are bound by the Directive have transposed the right to legal aid in cross-border cases in civil and commercial matters, although it was observed that not all the application modalities of the Directive have been perfectly implemented. These difficulties are explained principally by the fact that the dispositions of the Directive are sometimes different from national provisions concerning legal aid and the lack of the ECJ case law did not yet add to the uniformity of application.[72]

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[69] Tilp/Schiefer, 'VW Dieselgate – die Notwendigkeit zur Einführung einer zivilrechtlichen Sammelklage' (2017) Neue Zeitschrift für Verkehrsrecht (NZV) 14, 15.
[70] Iris Benöhr, 'Collective Redress in the Field of European Consumer Law' (2014) *Legal Issues of Economic Integration*, Issue 3, 243, 252.
[71] *Report from the Commission on the application of Directive 2003/8/EC to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes* [2012], COM(2012)71, 4.
[72] ibid 14.

37. It has to be underlined, however, that there has been only one case before the European Court of Justice concerning cross-border legal aid which may prove that the practical application of the Directive is satisfactory.[73]

Burden of proof

38. The Commission has noted[74] that the efficacy of the reversal of the burden of proof is hindered by the plaintiff's limited access to information. Specifically, when the respondent is unwilling or unable to provide confidential information, it may be difficult for the plaintiff to substantiate a prima facie case of discrimination. This points to the need to reconcile the reversal of burden of proof rules with rules on disclosure of documents. The Commission describes these rules as 'mismatch[ed]'.[75]
39. In addition, clarity is increasingly important when the burden of proof is reversed. It is imperative to clearly define what is meant by a 'prima facie' case. It has been noted by Commission[76] that the jurisprudence of the Court is not characterised by clarity or coherence in this regard. In particular, what is meant by a 'prima facie' case is not well-explained, and the Court can require either a minimal or maximal standard of proof.
40. Despite these difficulties, it is acknowledged by academics that the reversal of burden of proof is a 'powerful source of law' which allows otherwise 'unwinnable cases' to 'have a fighting chance'.[77]

Rules of Disclosure

41. The Directorate General for Internal Policies has criticised EU rules on disclosure as 'too strongly tilted towards [data protection]'[78]. They state that transparency and openness are fundamental rights which should 'override especially in situations where disclosure does not create harm for privacy'[79]. This is largely influenced by cases establishing a general presumption against disclosure in certain matters, such as state aid, mergers, court

[73] ibid 14.
[74] European Commission, 'Reversing the burden of proof: Practical dilemmas at the European and national level' (2015) 6.
[75] ibid 52.
[76] ibid 6.
[77] Anna Beale, 'Proving Discrimination: The Shift of the Burden of Proof and Access to Evidence (2015) Cloisters Chambers Papers <http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/115DV93_Beale.pdf> (accessed 9 November 2017).
[78] Directorate-General for Internal Policies, European Parliament , 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) 24.
[79] ibid.

proceedings, etc.[80] In particular, the Directorate General warns against decisions on disclosure being influenced by 'institutional politics'[81].

III. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

42. Concerning collective redress procedures, the Commission has made a call for evidence on the operation of collective redress arrangements in the Member States of the EU in May 2017.[82] It is likely[83] that the European legislator will take stronger legislative measures (Regulations, Directives) to achieve the goals set by the Recommendation, in the future. In contrast to the Recommendation, these measures could then be legally binding for Member States.
43. In relation to legal aid and adverse cost protections, the EU has adopted several complementary measures ensuring wider coverage of legal aid provisions. Of note is the Directive on the right to access to a lawyer[84] and the Recommendation on the right to legal aid in criminal proceedings.[85] This demonstrates sector-specific improvements that can be made vis-à-vis legal aid.

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[80] See C-139/07P *Commission v Technische Glaswerke Ilmenau* [2010] ECR 376, C-404/10P *Commission v Editions Odile Jacob* [2012] ECR-393, C-514/07P *Sweden and others v API and Commission* [2010] ECR-541, and C-365/12P *Commission v EnBW* [2014] ECR-112.

[81] Directorate-General for Internal Policies, European Parliament , 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) 13.

[82] European Commission, 'Call for evidence on the operation of collective redress arrangements in the Member States of the European Union' (22 May 2015) http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539 accessed 9 November 2017.

[83] Iris Benöhr, 'Collective Redress in the Field of European Consumer Law' (2014) *Legal Issues of Economic Integration*, Issue 3, 253; Tilp/Schiefer, 'VW Dieselgate – die Notwendigkeit zur Einführung einer zivilrechtlichen Sammelklage' (2017) *Neue Zeitschrift für Verkehrsrecht* (NZV) 14, 15.

[84] Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in the European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

[85] Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings [2013] OJ C 378/11.

FRANCE

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

44. The main special rules seeking to address access to justice issues are the possibility of class actions, legal aid, the change to the burden of proof for work and employment cases, and the recent reform to the substantive law of obligations and civil liability.
45. The Civil Code (Code Civil) and the Code of Civil Procedure (Code de Procedure Civile) govern the law of obligations, the law of proof of obligations, civil liability and civil procedure in French Law. They are two of the five original Napoleonic Codes. The Codes have been extensively updated since their introduction. There are over 40 Codes in French Law in total some of which cover certain parts of civil procedure (see below class actions).
46. In 2016 the private law of obligations and the law of proof of obligations was rewritten by the French government.[86] One of the general objectives of this reform was to protect weaker parties. Specifically, this concerned the protection of a party to a contract that was in a weaker position economically and socially.. In March 2017, the French Ministry of Justice published a draft bill for the reform of civil liability[87] which is linked and follows the 2016 reform of the law of obligations.[88] This bill aims to reflect the case law over the past century that has developed the law of civil liability[89] but has not been reflected in the Code.

Class Actions[90]

47. There are broadly two ways to bring group action in France. The first was established by the Cour de Cassation and covers the standing of associations when defending individual interests collectively. This normally covers relatively small groups of people such as workers for the same company.[91] The second method the action *en représentation cojointe* or action *de*

[86] An English version was requested by the French Ministry of Justice and is available. https://www.law.ox.ac.uk/news/2017-05-24-french-draft-legislation-reforming-law-civil-liability-translated-english and http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf

[87] http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-du-droit-de-la-responsabilite-civile-29782.html

[88] http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-du-droit-de-la-responsabilite-civile-29782.html

[89] Likewise, and English version is available. [ft: http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-de-la-responsabilite-civile-traduit-en-anglais-30553.html

[90] *Resolving Mass Claims in France – Toolbox and experience* (2016) https://www.law.ox.ac.uk/sites/files/oxlaw/france_0.pdf

[91] ibid.

groupe were introduced subsequently and deal with larger reforms.[92] Class actions have long been on the political agenda but have remained unsuccessful until 2014 when France adopted a system of class action where associations play the central role.[93] According to the French Ministry of Justice, these reforms had the objective of improving access to justice and facilitating compensation[94] in consumer and competition law.

48. There are seven areas where group action provisions have been adopted. Only in the field of consumer law and competition law has the change in the law been effectively utilised.

49. In relation to consumer law, only associations may claim compensation for damage suffered by consumers that are in a similar position. Associations must have existed for at least one year, must have been involved in public activity protecting consumer interests and have a minimum? threshold of individually paid up members. These requirements are only met by a handful of associations.[95] Lawyers do not have standing to bring an action on behalf of a group (*de groupe*) of their own motion. There are no provisions as to public funding of these actions, but the court has the discretion to order the defendant to pay an advance to the association, to cover the association's anticipated costs and expenses of bringing the action.

50. In relation to competition law, the procedure for bringing a group action is similar to consumer law, but these actions can only be initiated when there has already been a determination of a breach of competition law, and no longer than five years from the date that the administrative decision or review of the court's action has become final.

51. Group action in relation to health-related claims, privacy and data protection, environment and discriminatory practices have also been more recently introduced.[96]

Legal Aid in France

52. Legal aid (aide juridiique) is specifically identified as one of the rights that guarantees access to justice[97] and results from the the loi 91-647 du 10 juillet 1991, (as modified). The allocation of legal aid is determined by reference to the financial position of the claimant. The 1991 law sets a maximum salary possible that still qualifies for legal aid - just under 1500 euros at which point 15% of the expenses are covered by legal aid (2013 figures). The percentage grows with decreasing resources and reaches 100 percent if the claimant is

[92] Ibid.
[93] S. Amrani- Mekki, *Action de groupe, mode d'emploi, Procedure* (December 2014).
[94] *Circulaire* 26 Septemern 2014 *de presentation des dispositionsde la loi 2014-344.*
[95] Resolving Mass Claims in France – *Toolbox and experience (2016) https://www.law.ox.ac.uk/sites/files/oxlaw/france_0.pdf*
[96] ibid. See also, Act No. 2016-41, 26 January 2016, and Act No. 2016-1547, 18 November 2016.
[97] http://www.vie-publique.fr/decouverte-institutions/justice/definition/garanties/comment-acces-justice-est-il-garanti.html

earning 929 euros a month or less (2013 figures).[98] In 2016, this rose to 1000 euro for full legal aid and 1500 euro for partial legal aid.[99]

Burden of proof changes

53. With reference to the European Directives on equal treatment, Loi 2001-1066 16 Nov 2001 reversed the burden of proof in work and employment cases which concern the potential breach of the principle of equal treatment. This means that upon the claimant's allegation of instances of unequal treatment, the defendant has the burden to prove that the decision in question was made based on objective factors that are unrelated to discrimination. This is reflected in the Labour Code (article 1134-1). A similar provision exists for the purposes of housing litigation and has been extended to all non-criminal matters.[100]

II. What is the general assessment about the success, or otherwise, of the rule improving access to justice? You may limit your research to opinions of leading academics, bar association and civil society groups that are particularly concerned with access to justice.

54. Perceptions of legal aid and the recent reforms of legal aid in France have been negative.[101] In 2013 the French government cancelled the tax on litigants and proposed to reduce the fees for parts of the legal profession that do legal aid work. In 2013 bar associations in France went on strike highlighting that the funding for legal aid was grossly insufficient.[102] There is likewise a general consensus that the funding for legal aid is insufficient. This reflects the general opinion of the specific reports on legal aid - since 2007 there has been a wide call for substantial reform of the system..[103]
55. The 2013 Report[104] refers in more detail to the above issues. Specifically, it refers to a number of the above issues and the need for the legal aid system to be more linked to reforms in civil and criminal law. In relation to mass claims, the experience has been limited due to the recent introduction of these procedures.[105] However, group actions generally

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[98] ibid.
[99] Montants 2016 de l'aide juridictionnelle, La Semaine Juridique Edition Générale n° 1-2, 11 Janvier 2016, 37
[100] Article 4 of Act no. 2008-496 of 27 May 2008
[101] Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice? (2014) http://www.hiil.org/data/sitemanagement/media/Report_legal_aid_in_Europe.pdf
[102] Quel avenir pour les « avocats des pauvres » ? - À propos du rapport Le Bouillonnec, La Semaine Juridique Edition Générale n° 43, 20 Octobre 2014, 1067
[103] Assises de l'accès au droit et de l'aide juridictionnelle, La Semaine Juridique Edition Générale n° 6, 7 Février 2007, act. 73.
[104] *Modernisation de laction publique (MAP) Evaluation de la gestion de l'aide juridictionnelle Rapport de diagnostic* http://www.justice.gouv.fr/publication/rapport_igsj_map_2013/rap_map_aj2013-rapport.pdf
[105] Resolving Mass Claims in France – *Toolbox and experience (2016) https://www.law.ox.ac.uk/sites/files/oxlaw/france_0.pdf*

suffer from multiple procedural flaws such as the stringent standing requirements mentioned above.[106] The general assessment of actions *de groupe* at this early stage is inconclusive, but the feedback available is mostly negative.

56. Some stakeholders argue that individuals who assert a claim against a defendant should be able to bring a class action directly. Interestingly, the majority reject lawyers being able to initiate a class action,, though bar associations have protested strongly against this.[107] A lack of funding is identified as a weakness, together with the length of proceedings. The National Assembly specifically mentions that the stringent standing requirements are too restrictive – though a dozen associations technically qualify to bring actions – only two can do so effectively long term.[108] The action *de group* is affected by other collective redress procedures such as action *jointe* which can confuse matters.[109]

III. Has the government responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

57. Though there have been calls for reform since 2007 and multiple reforms in recent years, the government has not addressed the way that legal aid is funded. Recent concerns[110] have focused on the ever-rising cost of legal aid without "any reform of its scope", and the inadequate financial management of the legal aid system; almost every action potentially qualifying for legal aid which is determined almost exclusively by income. The recommendation[111] highlights the necessity to reduce the number of cases eligible for legal aid arguing that in "civil matters, on appeal, more rigorous criteria be applied to the merits of the proceedings and to the proportionality of the issue for the plaintiff." This proposal for reform is untimely according to the Minister of Justice.[112]
58. There are no further proposals by the government to reform class action procedures at this stage.

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[106] ibid.
[107] ibid.
[108] D.Abad & P. Kemel, *Rapport d'information sur la mise en application de la loi 2014-344 du 17 mars 2014 relative à la consummation (http://www.assemblee-nationale.fr/14/rap-info/i4139.asp) and RC Mader* "Action de group à la francaise: premiers retours d4une associationde consommateurs"
[109] ibid.
[110] *Cour des comptes - Vers une réforme de l'aide juridictionnelle?* – Veille, Droit Administratif n° 5, Mai 2017, alerte 79
[111] ibid.
[112] ibid.

GERMANY

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

59. The German legal system provides for a range of mechanisms and rules that intend to ensure access to justice and equality of arms in all stages of a civil dispute. Access to justice and the principle of equality of arms are guaranteed by the German Constitution (*Grundgesetz*).[113]
60. The Advisory Assistance Act (*Beratungshilfsgesetz, BerHG*) provides low-income citizens with the opportunity to get legal advice outside of court proceedings. Applications for advisory assistance are made to the Local Court (*Amtsgericht*), which issues a certificate of eligibility for advisory assistance by a consultant of the applicant's choice if the requirements laid down in section 1(1) BerHG are fulfilled. It reads:

> **Section 1**
>
> (1) Assistance for the exercise of rights outside court proceedings and in mandatory conciliation proceedings pursuant to Section 15a of the Introductory Act to the Code of Civil Procedure (Gesetz betreffend die Einführung der Zivilprozessordnung) (advisory assistance) shall be granted upon application if:
>
> 1. litigants cannot mobilise the necessary resources due to their personal and economic circumstances,
> 2. there are no other possibilities for assistance, use of which can be expected from the litigant,
> 3. use of advisory assistance does not seem frivolous.[114]

61. Similarly, sections 114-127 *Zivilprozessordnung*, (*ZPO*)[115] provide for assistance with the costs of civil litigation. Assistance with costs of civil litigation will be granted if: (1) the party is unable to pay the costs of litigation, or is able to so pay them only in part or only as instalments; (2) the party's case has sufficient prospects of success; and (3) does not seem frivolous.[116]
62. If assistance is granted, the court will usually assign an attorney as counsel (Section 121 ZPO).[117] The attorneys assigned as counsel are prohibited from asserting claims to remuneration against the party, and the party will only be obliged to pay for court costs if

[113] See eg BVerfGE 69, 381; BVerfGE 74, 228; BVerfGE 88, 118 (access to justice); BVerfGE 52, 131 (equality of arms).
[114] <http://www.gesetze-im-internet.de/englisch_berathig/englisch_berathig.html> accessed 28 October 2017.
[115] <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> accessed 28 October 2017.
[116] Section 114 ZPO.
[117] Pursuant to Section 121 ZPO, the party shall be assigned an attorney as counsel where representation by an attorney is mandatory or, where it is not mandatory, if representation is deemed necessary or the opponent is represented by counsel.

and insofar as the court so decides.[118] Under section 123 ZPO, the approval of assistance does not affect the (losing party's) obligation to reimburse the opponent for the costs it has incurred.[119]

63. Other provisions such as Section 14(3) *Gerichtskostengesetz*, Section 10 *Kostenverfügung*, Section 12(4) *Unlauterer Wettbewerb-Gesetz*, Section 247(2) *Aktiengesetz*, Section 144 *Patentgesetz*, Section 142 *Markengesetz*, Sections 4a-4d *Insolvenzordnung* also provide for financial assistance or relief in civil proceedings. Section 4a *Rechtsanwaltsvergütungsgesetz* (*RVG*) allows agreements on contingency fees if the client would otherwise be deterred from taking legal proceedings due to their financial situation.

64. For the majority of civil proceedings where the value in dispute exceeds €5, 000, regional courts (*Landgerichte*) are the courts of first instance.[120] Pursuant to section 78 ZPO, parties must be represented by an attorney before the Regional Courts and the Higher Regional Courts. This is intended to serve the principle of procedural equality.[121] In order to provide for access to justice where a party is unable to find a lawyer, section 78b ZPO gives the court the power to assign an attorney as counsel to that party.

65. In general, the Local Courts (*Amtsgerichte*) have jurisdiction in civil disputes where the value in dispute does not exceed €5, 000. In proceedings before the Local Courts, parties do not need to be represented by attorneys.[122] Parties may submit the statement of claim or any other statement either in writing or orally, for recording with the registry for the files (*zu Protokoll der Geschäftsstelle*) of the Local Court.[123] To ensure that a party that is unacquainted with the law is enabled to give procedural statements with the intended legal effects, the court official who records the oral statement has the duty to assist and advise the party.[124]

    In all civil proceedings, regardless of whether a party is represented by an attorney or not, courts are obliged to give the parties directions and ask questions (*Materielle Prozessführung*) if the situation so requires, for example, if a party's submissions of fact are contradictory, incomplete or ambiguous.[125] Even though the court is bound to be neutral when giving

[118] Section 122(1) ZPO.
[119] Cf sections 91(1) and 92 ZPO.
[120] Section 23 *Gerichtsverfassungsgesetz, GVG* <https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0137> accessed 28 October 2017.
[121] Cf. Guido Toussaint, in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) § 78 para 2; Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393 (405).
[122] Sections 78 and 79 ZPO.
[123] Section 496 ZPO.
[124] Cf. BGH (Federal Supreme Court), NJW 1957, 990 (991).
[125] Section 139 ZPO; BGH NJW-RR 2002, 1071; BGH NJW-RR 2003, 1718.

directions under section 139 ZPO,[126] such directions and questions can help to reduce power imbalances between the parties.[127] Section 139 states:

> **Direction in substance of the course of proceedings**
>
> (1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.
>
> (2) The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do.

66. Sections 524 and 554 ZPO provide for the right of the respondent to join an appeal (*Anschlussberufung*, *Anschlussrevision*) even if the time period for an own appeal has lapsed or if the respondent has previously waived the right to appeal. Joining the appeal has the effect that the previous judgment can be modified in favour not only of the appellant but also of the respondent.[128] The provisions intend to provide for equality of arms.[129]
67. Collective redress such as class actions is usually not available within the German legal system. An exception is the model case proceeding under the *Kapitalanleger-Musterverfahrensgesetz* (*KapMuG*).[130] The KapMug applies in cases where compensation of damages for false or misleading public capital markets information is sought.[131] The KapMug allows for common factual or legal issues that arise equally in a number of different court proceedings to be settled in a model case. Claimants and defendants of the affected cases are parties to the model case proceedings.[132] The courts suspend all pending proceedings until the final decision in the model case is rendered.[133] Subsequently, the main proceedings will recommence and the model case ruling, in general, binds the courts in their decisions of

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[126] BGH NJW 2004, 164.
[127] OLG (Higher Regional Court) Schleswig, NJW 1983, 347 (348); Reinhard Gaier, 'Der moderne Zivilprozess', NJW 2013, 2871 (2872); Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393 (395).
[128] Wolfgang Ball, in Hans-Joachim Musielak and Wolfgang Voit (eds), Zivilprozessordnung (14th edn, Franz Vahlen 2017) § 524 para 2; Bruno Rimmelspacher, in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) § 524 paras 1 et seqq; Wolfgang Krüger, in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) § 554 para 1.
[129] BGH NJW 2015, 2812 (2814); BGH NJW 1984, 2951; Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393 (413).
[130] <https://www.gesetze-im-internet.de/englisch_kapmug/index.html> accessed 28 October 2017.
[131] Section 1 KapMug.
[132] Section 9 KapMug.
[133] Section 8 KapMug.

disputes between the parties.[134] For business practices that infringe consumer protection laws, the *Unterlassungsklagengesetz*[135] allows competent organisations to bring an action for injunctive relief.

68. Some rules on the burden of proof are also intended to further procedural equality.[136] The starting point in German civil law is that a claimant must prove the requirements of the cause of action.[137] German civil law, however, recognises that it is sometimes very difficult for a claimant to prove certain elements of the cause of action such as fault or causation, especially considering that there is no pre-trial discovery[138] in German civil proceedings. There are both written and unwritten rules (i.e. case law) on the burden of proof including circumstances in which the burden of proof is shifted to defendants. If a claimant provides prima facie proof for a certain fact, there is under certain circumstances a shift of the burden of proof according to the principle of *Anscheinsbeweis* (prima facie evidence).[139]
69. Special rules on the burden of proof exist for the liability of manufacturers for defective products.[140] The German Federal Supreme Court (BGH) has found that there is an assumption of fault, where the claimant can prove that a defectively manufactured product has caused damage (regarding section 823 *Bürgerliches Gesetzbuch*[141]).[142]
70. German courts are obliged to determine and apply both domestic and foreign law ex officio.[143] There is, therefore, no obligation for a party to prove, for example, the content of the applicable foreign law.[144]

II. What is the general assessment about the success, or otherwise, of these rules in improving access to justice? You may limit your research to opinions of leading academics, bar associations and civil society groups that are particularly concerned with access to justice.

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[134] Section 22 KapMug.
[135] <http://www.gesetze-im-internet.de/uklag/BJNR317300001.html#BJNR317300001BJNG000101377> accessed 29 October 2017.
[136] Cf Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393 (408).
[137] Cf BGH NJW 1999, 352 (353).
[138] A court can, however, impose an obligation on a party to produce documents, Sections 142, 143 ZPO - see Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393 (402).
[139] Hanns Prütting, in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) § 286 paras 48 et seqq.
[140] <https://www.gesetze-im-internet.de/englisch_prodhaftg/englisch_prodhaftg.html#p0013> accessed 29 October 2017.
[141] See eg BGH NJW 1999, 1028; BGH NJW 1969, 269.
[142] <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 29 October 2017.
[143][143] Cf BGH NZI 2013, 763; Hanns Prütting, in Thomas Rauscher and Wolfgang Krüger (eds*), Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) § 293 paras 2 et seqq.
[144] Hanns Prütting, in Thomas Rauscher and Wolfgang Krüger (eds*), Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) § 293 para 6.

71. The general assessment of these rules is positive, and many authors stress that the rules further access to justice and equality of arms in civil proceedings.[145] Recently, many academics, bar associations and civil society groups have urged the legislator to provide for a broad and effective procedure for collective redress.[146]

III. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

72. In July 2017, the Ministry of Justice put forward a draft bill that would allow model declaratory actions (*Musterfeststellungsklagen*) in consumer matters.[147] The draft bill grants standing to initiate the proceedings exclusively to competent organisations and not to consumers. As soon as the action is registered, consumers can become applicants (*Anmelder*). The final declaratory judgment binds the courts in their decisions of disputes between applicants and the defendant. As such the procedure is an 'opt in' class action.

    Attempts to implement the procedure in the last legislative term failed and it remains unclear what the position of the next German government will be.

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[145] See eg Bernd Hirtz, 'Plädoyer für den Prozess', NJW 2012, 1686 (1687 et seq); Thomas Rauscher, in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016) Einleitung paras 258 et seqq; Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393.

[146] See eg Verbraucherzentrale Bundesverband e.V., 'Die Musterfeststellungsklage muss kommen' (14 September 2017), <https://www.vzbv.de/pressemitteilung/die-musterfeststellungsklage-muss-kommen> accessed 29 November 2017; Bundesrechtsanwaltskammer, Stellungnahme Nr. 32, Oktober 2017, zum Diskussionsentwurf eines Gesetzes zur Einführung einer Musterfeststellungsklage < http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2017/oktober/stellungnahme-der-brak-2017-32.pdf> accessed 29 October 2017; Axel Halfmeier, 'Musterfeststellungsklage: Nicht gut, aber besser als nichts' ZRP 2017, 201; Franziska Weber and Willem van Boom, 'Neue Entwicklungen in puncto Sammelklagen – in Deutschland, in den Niederlanden und an der Grenze' VuR 2017, 290; Reinhard Gaier, 'Der moderne Zivilprozess', NJW 2013, 2871 (2874 et seq); Haimo Schack 'Waffengleichheit im Zivilprozess', ZZP 2016, 393 (405).

[147] <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Musterfeststellungsklage.pdf;jsessionid=A36A033C1A6C7DD1537E112442366FA2.2_cid297?__blob=publicationFile&v=3> accessed 29 October 2017.

INDIA

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

Public Interest Litigation

73. Public Interest Litigation (PIL) in Indian has eased the traditional rule of locus standi, which required litigants to have suffered a legal injury to maintain an action for judicial distress. Through PIL, any member of the public or the court itself[148] can maintain an application under Article 32 or Article 226 of the Constitution of India on behalf of a person or a determinate class of persons are by 'reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief', seeking judicial redressal for legal wrong or injury.[149]

74. Procedural requirements for filing of applications have been relaxed in the context of PIL. Courts have previously treated letters and postcards as a valid application.[150] The PIL proceedings are non-adversarial, and it is expected that the governmental respondents cooperate with the petitioners to address the issue at hand.[151] In certain cases, if non-governmental institutions perform public functions, and can be defined within the ambit of a state, PILs may also be brought against them for the violation of fundamental rights.[152] PIL also involve an active role for third-party interveners, including expert committees who possess specialized knowledge on the subject matter of the litigation[153] and commissioners appointed to monitor compliance with court orders.[154] States are usually asked to bear

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[148] Joseph Otteh, 'Litigating for Justice: A Primer on Public Interest Litigation Page' 42 (2010), *Access to Justice,* <http://accesstojustice-ng.org/Litigating%20for%20Justice.pdf> accessed 9 November 2017.

[149] *S. P. Gupta v Union of India* 2 SCR. 365 [17].

[150] Some examples of PILs which commenced with letters are *Sunil Batra (II) v Delhi Administration*, 1980 SCR (2) 557**;** *Dr Upendra Baxi v State of UP* (1998) 9 SCC 388; *People's Union for Democratic Rights v Union of India*, (1982) 3 SCC 235. See *S. P. Gupta v Union of India* 1981 2 SCR. 365 [17], where Court said: procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.

[151] P. D. Mathew, *Public Interest Litigation* (Indian Social Institute, 2005) 17-34; *People's Union for Democratic Rights (PUDR) v Union of India* (1983) 1 SCR 456 [2]. See also *Bandhua Mukti Morcha v Union of India*, (1984) 2 SCR 67 [13]. The Court has justified this shift away from adversarial litigation arguing that:

> Strict adherence to the adversarial procedure can sometimes lead to injustice, particularly where the parties are not evenly balanced in social or economic strength. . . . If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution

[152] Article 12, Indian Constitution defines state.

[153] For Example, in *Indian Council for Enviro-Legal Action v Union of India*, AIR 1996 SC 1446 NEERI was appointed to study ground water and soil pollution and prepare a report for the court.

[154] For example, R.K. Jain and Indira Jaising were appointed as Commissioners in *M.C. Mehta v State of Tamil Nadu* (child labour case) (1996) 6 SCC 756. Similarly, Gopal Subramanium was appointed Commissioner in *Sheela Barse v Union of India* 1994 (4) SCALE 493, to visit Assam and carry out the orders of the Court in regard to the release of the mentally ill held in the jails there.

expenses incurred by such bodies.[155] Amicus curiae play a significant role, by providing the court with relevant factual data and comparative examples, verifying information supplied by the petitioner and suggesting innovative remedies.[156]

Representative Suits and Class Action

75. Order 1 Rule 8 of the Code of Civil Procedure, 1908 allows for representative suits in all matters. Rule 8 provides that when there are a number of persons similarly interested in a suit, one or more of them can, with the permission or under the direction of the court, sue or be sued on behalf of themselves and the others. The suit can be pursued only once notice has been issued to the parties who are to be represented in the suit.
76. Consumer class action suits are permitted under the Consumer Protection Act[157], 1956, which envisages three types of class action, based on who files the suit on behalf of the consumers: (a) voluntary consumer organisations[158] (b) central or state government[159] (c) one or more consumers[160]. Procedure provided under Order 1 Rule 8 applies in case of consumer class actions as well.[161]
77. In *Ambrish Kumar Shukla & 21 Others v Ferrous Infrastructure Pvt. Ltd.*[162], the National Consumer Disputes Redressal Commission stated that to file a claim for consumer class action, there must be a common grievance amongst the persons on whose behalf the petition is being filed. Thus, the Commission accepted the maintainability of consumer class action complaints.[163]
78. Class action suits are also permitted under the Companies Act, 2013.[164] It empowers shareholder associates or group of shareholders to take legal action in the event of fraudulent practices on the part of the company, allowing them to seek damages not just from the company but also its directors, auditors and expert advisors for any unlawful or wrong

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[155] Mathew (n 151) 4, 17.
[156] For example, A.K. Ganguly was the amicus curiae in *People's Union for Civil Liberties v State of Tamil Nadu* 1997 (7) SCALE SP-17. Similarly F.S. Nariman was amicus curiae to the Court in *Vishaka v State of Rajasthan* (1997) 6 SCC 241. K.K. Venugopal assisted the Court in one aspect of the case concerning the Narmada Dam: *Narmada Bachao Andolan v Union of India* 1999 (5) SCALE 437.
[157] Consumer Protection Act 1986, s 12(1).
[158] Consumer Protection Act 1986, s 2(1)(b)(ii).
[159] Consumer Protection Act 1986, s 2(1)(b)(iii).
[160] Consumer Protection Act 1986, s 2(1)(b)(i), (iv).
[161] Consumer Protection Act 1986, s 13(6).
[162] National Consumer Disputes Redressal Commission, New Delhi, Consumer Case No. 97 of 2016.
[163] This is post *Union of India v Nestle India Ltd,* Consumer Complaint No. 870 of 2015 where the Government of India filed a class action complaint against Nestle. The case did not reach a conclusion because the proceedings were stayed by the Supreme Court, leading to concerns that class action suits could not be initiated under the Consumer Protection Act, 1986.
[164] Companies Act 2013, s 245.

conduct. Under the Act, the Investor Education and Protection Fund will be used to reimburse legal expenses incurred in pursuing class action suits.[165]

Burden of Proof

79. In PIL, the court has placed the burden of proof on the respondent, in order to ease the evidentiary burden on the claimant. For instance, in *Bandhua Mukti Morcha v Union*[166] of India, the Court stated that it would treat every case of forced labour as bonded labour unless proven otherwise by the employer. Similarly, in environmental litigation, the burden of proof is placed on the respondent to show that the action is environmentally sound.

Disclosure Requirements

80. To improve transparency and accountability within companies, and assist shareholders in verifying information, the Companies Act, 2013 introduced expanded disclosure obligations including the publication of details of financial statements[167] and financial records of each subsidiary[168]. The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 also provide disclosure obligations with respect to listed companies in India.[169] Similarly, regulations governing advertisements by companies mandate complete disclosure of material information.[170]

Legal aid for civil disputes and other forms of funding assistance

81. The Constitution (42nd Amendment) Act, 1976 inserted Article 39A[171] in the Constitution of India as part of the Directive Principles of State Policy.[172] Article 39A essentially imposes a duty on the state to ensure that the legal system operates in a manner that furthers the goal of justice, provides equal opportunity and more importantly, devises appropriate mechanisms or legislation so that it can extend legal aid free of cost. The Court in *Hussainara Khatoon v State of Bihar* has emphasised the importance of this article stating that 'free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering

[165] Companies Act 2013, s 125(3)(d).
[166] (1984) 2 SCR. 67.
[167] Companies Act 2013, s 136(1).
[168] Companies Act 2013, s 136(1).
[169] Securities Exchange Board of India (Listing Obligation and Disclosure Requirement) Regulations, r 4.
[170] See for example TRAI Direction on Preventing Misleading Tariff Advertisement, 2012, Insurance Advertisements and Disclosure Regulations, 2000 and Chapter IX of the (Disclosure and Investor Protection) Guidelines, 2000 of the Securities and Exchange Board of India.
[171] 39A. Equal justice and free legal aid.- The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
[172] As per Article 37 of the Indian Constitution, these principles are not enforceable in court but are fundamental in the governance of the country and there is a a duty on the state to apply them in the making of law.

from economic or other disabilities would be deprived of the opportunity for securing justice.'[173] In *M.H Hoskot v State Of Maharashtra,* Justice Krishna Iyer noted that providing free legal aid is the State's duty and not Government's charity.[174]

82. In furtherance of the objective of this article, the Legal Services Authority Act 1987 was constituted to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.[175]

83. Order 33 and Order 44 of the Code of Civil Procedure (1908) exempts an indigent person, from paying requisite court fee at the first instance and allows him to institute suit or prosecute appeal in forma pauperis. For example, In A.*A. Haja Muniuddin v Indian Railways*, the Court held 'access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee.'[176]

Res judicata reforms to limit defendants' capacity to recontest adverse findings

84. In the Code of Civil Procedure, section 11[177] embodies the concept of res judicata prohibiting courts from trying issues that have already been dealt with directly and substantially. The scope of this section has been discussed in the case of *Gulam Abbas v State of U.P* where the Court held that that section 11 of the Code of Civil Procedure was not exhaustive of the general doctrine of res judicata and though the rule of 'res judicata as enacted in section 11 has some technical aspects, the general doctrine was founded on considerations of high public policy to achieve two objectives. The objectives are that there must be finality of litigation and that individuals should not be harassed twice over with the same kind of litigation.'[178]

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[173] *Hussainara v State of Bihar*, AIR 1979 SC 1369, para 9. This approach has been followed in many cases like *Mohd. Ajmal Kasab v State of Maharashtra* (2012) 9 SCC 1 at 184; S*uk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

[174]*Madhav Hayawadanrao Hoskat v. State of Maharashtra* (1978) AIR SC 1548, para 21.

[175] The Legal Services Authority Act 1987, long title. Section 12 of the Act allows a person to engage legal aid under the act if he has to defend or file a case and if he belongs to the following category: member of Scheduled Caste or Scheduled Tribe, or he is a victim of human trafficking or a natural disaster or beggar, or if it is a woman or child, or if the individual is mentally ill or suffers from any disability, etc. Legal Aid Funds have been created at the National, State and District Level in order to provide the costs of the legal services.

[176] *A.A. Haja Muniuddin v Indian Railways* (1992) 4 SCC 736 para 5.

[177] 'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.'

[178] *Gulam Abbas & Ors v State Of U.P. & Ors* (1981) AIR 2198.

Time limit extensions

85. While the Limitation Act prescribes time limits within which the civil cases have to be filed, Order 41 Rule 3A of the Code of Civil Procedure read with Section 5 of the Limitation Act provides for circumstances in which there can be a condonation of delay.[179] Section 5 of the Limitation Act prescribes that there can be an extension in the prescribed period if the applicant satisfies the court that there is sufficient cause for not filing an appeal within the prescribed time, in a superior court. The phrase 'sufficient cause' has been liberally interpreted by the Court in *Oriental Aroma* stating that 'the legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay', and that the phrase should be liberally constructed to understand law in a meaningful way which subserves the ends of justice.[180]

Availability of administrative tribunals (including boards, commissions, any other authorities with the power to determine the rights and liabilities of the parties)

86. The advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats (People's Court comprising of retired judicial officers, specialised persons) to secure that the operation of the legal system promotes justice on the basis of equal opportunity.[181] Section 21 of the Act specifically provides that the award passed by the Lok Adalat formulating the terms of compromise will have the force of decree of a court which can be executed as a civil court decree. The Lok Adalats have been encouraged to use alternate dispute settlement methods without too many legal technicalities. The Gram Nyayalaya Act, 2008 led to the establishment of Gram Nyayalayas at grassroots levels to provide access to justice to citizens at their door step.

87. The National Green Tribunal Act, 2010 provides for the constitution of a specialised body equipped with the needed expertise to deal with civil cases involving substantial questions of environmental disputes called the National Green Tribunal (NGT). NGT provides 'effective

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[179] Section 5 - Extension of prescribed period in certain cases. —Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Explanation.— The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

[180] *Oriental Aroma Chemical Industries Limited v Gujarat Industrial Development Corporation and Another* (2010) 5 SCC 459, Paragraph 8. The same Court refers to precedents to state that while 'same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time causing delay.'

[181] Chapter VI, Legal Services Authority Act 1987.

and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property'.

88. Similarly, Chapter III of the Consumer Protection Act, 1986 provides for the establishment of Consumer Dispute Redressal Commissions or Forums at District, State and National Level. Various other tribunals (quasi-judicial institutions) like Central Administrative Tribunal, Income Tax Appellate Tribunal, Armed Forces Tribunal, Competition Appellate Tribunal and Securities Appellate Tribunal etc. are present in India with the aim of providing speedy justice in specialised cases.
89. Special Courts like Court to deal with child sexual offences have also been constituted under Protection of Children from Sexual Offences Act 2012, courts to deal with family law related cases (Family Courts) under Family Courts Act, 1984 etc.

Simplified pleading rules or rules of evidence

90. The Lok Adalats established under the Legal Services Authority Act to improve access to justice need not follow the technical rules of evidence or pleading. The rules allow the parties to the dispute, even if they are represented by their advocate, to interact with the Lok Adalat judge directly and explain their stand in the dispute and the reasons thereof, which is not possible in a regular court of law. [182]
91. Section 14[183] of the Family Court Act set up to settle disputes related to family law has relaxed rules of evidence and like in the Lok Adalats, participation of the individuals is encouraged. Similarly, section 19[184] of the Arbitration and Conciliation Act set up in law to consolidate laws related to commercial arbitration has relaxed rules of evidence and pleadings.

II. What is the general assessment about the success, or otherwise, of these rules in improving access to justice?

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[182] Section 13, Nations Legal Service Authority (Lok Adalat) Regulations, 2009 http://nalsa.gov.in/sites/default/files/document/Lok%20Adalat%20Regulationa%202009.pdf.

[183] Section 14 - Application of Indian Evidence Act, 1872.-A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

[184] 17. Determination of rules of procedure. – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (I of 1872). (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. 3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. (4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

92. The Centre for Research and Planning (Supreme Court of India) has noted in its 2016 report on 'Access to Justice' that the main problems in accessing justice remain the lack of judicial manpower, deficiencies in judicial infrastructure, delay and arrears caused due to adjournments as well as the problems caused in access due to people not being in 'proximity' to the courts.[185] One way the court has dealt with time limits for filing written submissions is seen in the Supreme Court decision of *New India Assurance*.[186] In this case, the Court held that written submissions must necessarily be filed within the time limits provided for by the Consumer Protection Act, otherwise it would defeat the goal of a speedy trial.

Public Interest Litigation

93. The PIL mechanism has been perceived as effective in nudging the executive into action.[187] PIL has also enabled the court to reach out to victims of injustice who were previously invisible.[188]
94. However, academic literature analysing the trend of PIL in India has expressed a fear that recent examples of the use of PIL[189] has indicated support to the disinvestment and development policies of the state, at the cost of the rights and interests of the marginalized,[190] thereby shifting focus away from the original purpose of introducing PILs. This has taken place for instance in *Sheela Barse*,[191] where the petitioner was not allowed to withdraw the suit as such withdrawal was deemed to be against the public interest.
95. Further, it is questioned whether PIL continue to remain useful in serving public interest,due to them 'being misused by people agitating for private grievances in the garb of public interest and seeking publicity rather than espousing public causes'.[192]
96. Another concern is the large number of cases brought in through the PIL mechanism, even when they do not fit the requirements of a PIL, further impeding access to justice and speedy trial for legitimate cases. The long duration involved in issuing orders in PIL cases is

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[185] Supreme Court of India, 'Subordinate Courts of India: A Report on Access to Justice 2016' <http://supremecourtofindia.nic.in/pdf/AccesstoJustice/Subordinate%20Court%20of%20India.pdf> accessed 10 November 2017.
[186] *New India Assurance Co. Ltd. v Hilli Multipurpose Cold Storage Pvt. Ltd.* AIR 2016 SC 86.
[187] Avani Mehta Sood, 'Gender Justice through Public Interest Litigation: Case Studies from India' (2008) 41(833) *Vanderbilt Journal of Transnational Law* 845-847 (the author argues this based on interviews with advocates and judges at the Supreme Court).
[188] S P Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 *Washington University Journal of Law & Policy* 42.
[189] See for example *Delhi Science Forum and Ors v Union of India*, 1996 SCC (2) 405.
[190] Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 1 *Civil Justice Quarterly* 29; Pritam Kumar Ghosh, 'Public Interest Litigation in India: Judicial Activism or Judicial Overreach' (2014) 1(9) *International Journal of Research* 285.
[191] *Sheela Barse v State Of Maharashtra,* 1983 AIR 378.
[192] Ashok H. Desai and S. Muralidhar, 'Public Interest Litigation: Potentials and Problems' in B.N Kirpal (ed) *Supreme but not Infallible: Essays in honour of the Supreme Court of India* (OUP 2009) 159.

also said to reduce the practical value of the judgments that are rendered..[193] PILs are additionally critiqued for merely being a symbolic form of justice, as the courts have limited powers to enforce their orders against the state.[194]

Class Action

97. Class action suits help in the sharing of costs of the litigation, benefits minority shareholders and reduce the probability of multiple cases for the same cause thus reducing judicial burden.[195] The class action provisions under the Companies Act, 2013 have been criticised as narrow, as, unlike the United States, they only provide a remedy to shareholders, and not to other stakeholders such as creditors or employees to organize themselves as a group and claim damages from the company.[196] Further, the provisions are silent on how the damages or compensation would be distributed amongst claimants having different holdings in the company.[197] Finally, due to the absence of a contingency fee model in India, it is argued that law firms would not have incentives to fight class action suits.[198] The IEPF (Investor Education and Protection Fund), which is a government controlled fund, carries with it a risk of mismanagement and corruption, which is concerning.[199]

Legal aid for civil disputes and other forms of funding assistance

98. Professor NR Madhava Menon provides a good criticism on the accessibility of legal aid by saying that the difficulties arise in access to legal aid due to its conventional nature.[200] He suggests that the legal education system should be revamped to provide a curriculum for the education and training of legal service providers, appropriate to rural and tribal needs which are very different.[201]According to him, while Lok Adalats were designed to be a better model

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[193] Ghosh (n 190) 28, 285.
[194] ibid 286.
[195] PSA Legal, 'Class Action Suits: Notified yet Ambiguous' (2016) <http://psalegal.com/wp-content/uploads/2017/01/ENewslineNovember2016.pdf> accessed 10 November 2017.
[196]Shreya Srivastava, 'Gaps in Class Action Suits under Companies Act, 2013' 6 <https://www.gnlu.ac.in/monthly-column/GNLU-MA-SS-0916-01.pdf> accessed 10 November 2017.
[197] ibid.
[198]Ashish Rukhaiyar, 'Class Action Suits ripe for review?' *The Hindu* (27 August 2017) <http://www.thehindu.com/business/Industry/class-action-suits-ripe-for-review/article19570982.ece> accessed 10 November 2017.
[199] ibid.
[200] NR Madhava Menon, 'Serving the justice needs of the poor' *The Hindu* (03 December 2013) <http://www.thehindu.com/opinion/lead/serving-the-justice-needs-of-the-poor/article5415018.ece> accessed 10 November 2017.
[201] ibid.

they 'turned into an exercise to reduce arrears in courts through what some people call "forced settlements or hurried justice.'"[202]

Availability of administrative tribunals (including boards, commissions, any other authorities with the power to determine the rights and liabilities of the parties)

99. A Vidhi Centre for Legal Policy Report (2014) identified about 29 different tribunals set up under various Central legislation, and found them to be inconsistent with the parameters laid down by the Supreme Court which left open the possibility of constitutional challenge.[203] It was also noted in this report that the goal of speedy disposal of cases has not been met. According to scholars, the Court endorsed requirement that Tribunals, which were replacing the jurisdiction of the courts, should enjoy the same constitutional protections as Courts, has not been met by the legislation.[204]

III. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

100. To counter the problem of deficiencies in judicial infrastructure, the Government has come up with a Centrally Sponsored Scheme for Development of Infrastructure Facilities for the Judiciary to augment the resources of State Governments to construct court buildings and residential offices for judges.

Public Interest Litigation

101. To address concerns about the number of frivolous PIL claims, the Supreme Court issued a notification clarifying the nature of matters which could be entertained as PIL, excluding issues such as landlord-tenant disputes, service matters and admissions to educational institutions from its purview. The notification also required a PIL application to be reviewed by the PIL Cell, to ensure that it fell within the permissible categories.[205]

Class Actions

102. With respect to consumer class actions, a Consumer Protection Bill has been tabled in the Parliament, which establishes the Central Consumer Protection Authority (CCPA) to

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[202] ibid.

[203] Vidhi Legal Policy, 'State of the Nation's Tribunals'<https://vidhilegalpolicy.in/reports/2015/4/15/the-state-of-the-nations-tribunals-i?rq=Tribunals> accessed 10 November 2017.

[204] Editorial, 'Battling Tribunal' The Hindu (18 March 2015) <http://www.thehindu.com/opinion/editorial/battling-tribunals/article7004087.ece> accessed 10 November 2017.

[205] Supreme Court of India, 'Compilation of Guidelines to be Followed for entertaining letters/ petitions received' (1988) <http://supremecourtofindia.nic.in/pdf/Guidelines/pilguidelines.pdf> accessed 10 November 2017

protect and enforce the rights of consumers. The authority will intervene in the event of unfair trade practices and initiate class action including enforcing recall, refund and return of products. The authority will act in a manner similar to enforcement agencies in other jurisdictions such as the Federal Trade Commission in the US.[206]

Availability of administrative tribunals (including boards, commissions, any other authorities with the power to determine the rights and liabilities of the parties)

103. In the 14th Finance Commission Period, the Government has decided to continue providing (until 31st March 2020) financial resources for the establishment and operationalising of Gram Nyayalyas which seek to provide access to justice at grass root levels.[207]

104. The Government has also launched the Nyaya Mitra scheme[208] in 2017 which seeks to reduce the long delays in resolving cases with a focus on those pending for more than ten years. This scheme will operate out of District Facilitation Centres by retired judicial officers or legal executives and will try to help the litigants who have been suffering due to the delay. Under this scheme, the marginalised applicants will be referred to Lok Adalats for dispute redressal.

Legal aid for civil disputes and other forms of funding assistance

105. The Government has launched a new scheme called 'Tele Law' [209]which will be initiated in 1800 districts. The focus of this scheme will be mainstreaming legal aid to marginalised sections through Common Services Centres. The project would connect clients with lawyers through video conferencing facilities. It also seeks to empower 1000 women as paralegal volunteers in states like Uttar Pradesh and Bihar.

106. In conclusion, India has various mechanisms through which it tries to provide access to justice such as specialised administrative tribunals or redressal commissions. India has unique mechanisms like PIL, Lok Adalats and Gram Nyayalayas. The general assessment by civil

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[206] Bejon Misra, 'No time to lose on consumer protection' *Business Line* (24 July 2017) <http://www.thehindubusinessline.com/opinion/issues-regarding-consumer-protection-in-india/article9786478.ece> accessed 10 November 2017; 'New Consumer Protection Bill could be next big game changer' *Economic Times* (29 July 2017) <https://economictimes.indiatimes.com/news/economy/policy/new-consumer-protection-bill-could-be-next-big-game-changer/articleshow/59820484.cms> accessed 10 November 2017

[207] Government of India, 'Continuation of the Scheme for Establishing and Operationalising Gram Nyayalayas from 01.04.2017 to 31.03.2020', <http://doj.gov.in/sites/default/files/GN%20cont.%20order.pdf, http://doj.gov.in/sites/default/files/gmn_1.pdf> accessed 10 November 2017.

[208] Government of India, 'Launch of Nyaya Mitra Scheme: District Facilitation Centres' <http://doj.gov.in/page/nyaya-mitra-scheme> accessed 10 November 2017.

[209] Government of India, 'Launch of Tele Law Scheme: New Legal Aid and Empowerment Initiatives by Department of Justice.' <http://doj.gov.in/page/tele-law-scheme> accessed 10 November 2017.

society groups and academicians suggest that delays , the unsuitability of conventional methods of providing legal aid to poor or tribal areas, the limits of existing judicial infrastructure, and ineffective tribunal or alternative redress systems are the main obstacles to access to justice. The Government has launched certain schemes to address these problems. .

IRELAND

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

Rules on standing

107. The general rule on standing in public law cases, is that for a person to challenge the validity of law passed by the legislature or an act or omission of the executive they must demonstrate a threat to their individual rights, and may not rely on a threat to the rights of a third party.[210] However, where a challenge is made to a public act on the basis of invalidity under the Constitution, a person may be granted standing where the public act in question affects every citizen, notwithstanding the person's failure to prove the threat of any special injury or prejudice particular to them arising from that act.[211]

108. The courts have also recognised an exception from the general principle that only the Attorney General has standing to sue for a breach of statutory duty by a private person where a statute does not confer a right of enforcement on other private persons. It has been accepted that a private person may sue for such a breach provided that a) the breach of duty interferes with their constitutional rights and b) the person has no other means of preventing that interference.[212]

109. The courts have accepted that a company incorporated by a community group may have standing in an application for judicial review to defend its members' interests in the protection of the environment or other community interests if it is deemed to have a sufficient interest in the subject matter of the proceedings.[213]

110. A company may also be permitted to litigate on behalf of third-party natural persons who would otherwise be unable to assert their own constitutional rights, provided that it is a *bona fide* organisation with an interest common with that of the third parties concerned.[214] It is also possible for a company to take an action in the form of an *actio popularis* on behalf of the

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[210] *Cahill v Sutton* [1980] IR 269.
[211] *Crotty v An Taoiseach* [1987] IR 713 (SC) 766 (Finlay CJ).
[212] *Parsons v Kavanagh* [1990] ILRM 560 (HC) (Hanlon J); *Lovett v Gogan* [1995] 3 IR 132 (SC); *Carroll v Incorporated Law Society of Ireland* [1995] 3 IR 145 (SC); *O'Connor v Williams* [2001] IR 248, 252-3 (HC) (Barron J) *Pierce v Dublin Cemeteries Committee* [2009] IESC 47 (SC) (Macken J); *Sullivan v Boylan* [2012] IEHC 389 (HC) [21] (Hogan J).
[213] *Lancefort Ltd v An Bórd Pleanála* [1999] 2 IR 270 (SC) 317-18 (Keane J), applied in *Shannon Preservation and Development Company Ltd v ESB* [2000] IEHC 136 (HC) (Sullivan J).
[214] *Irish Penal Reform Trust Ltd v Governor of Mountjoy Prison* [2005] IEHC 305 (HC) 22-3 (Gilligan J).

public in general,[215] though only in respect of constitutional rights which the company can itself hold.[216]

111. The advantage of incorporation is that it streamlines litigation by allowing one entity to act in the interests of a larger group. The prospect that incorporation may be used as a device to shield individuals from the costs of litigation is limited by s 52 of the Companies Act 2014, which provides that a plaintiff company may be required to give security for costs if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if the defence is successful.

112. Section 50A(3)(b)(ii) of the Planning and Development Act 2000 permits certain non-governmental organisations whose aims or objectives relate to environmental protection to challenge decisions or acts of the planning authorities which are identified in accordance with s 176 of that Act as being capable of having significant effects on the environment.

113. Finally, s 41 of the Irish Human Rights and Equality Commission Act 2014 provides that the Commission, an independent statutory body, may institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.

Jurisdiction to appoint an amicus curiae

114. A court may appoint an *amicus curiae* under its inherent jurisdiction. In considering whether to exercise its discretion in this manner, the matters a court may have regard to include:

a) whether the organisation or individual has a *bone fide* interest in the proceedings, which, in the case of an organisation, is a general interest and not merely an interest of its members;
b) whether the case has a public law dimension;
c) whether the decision may affect a greater number of persons that the immediate parties to the proceedings;
d) whether the prospective amicus is partisan or neutral and in a position to bring to bear expertise in respect of an area which might not otherwise be available to the court;
e) the extent to which it may be reasonable to assume that the addition of the person or individual might be said to bring to bear on the legal debate before the courts on an

[215] *Digital Rights Ireland Ltd v Minister for Communications, Marine, and Natural Resources* [2010] 3 IR 251 (HC) [93] (McKechnie J).
[216] In *Digital Rights Ireland* (ibid), the company was granted *locus standi* to bring an *actio popularis* to determine whether the impugned provisions violated citizens' rights to privacy and communications, not the rights to family and marital privacy or travel; see [115] (McKechnie J).

issue of significant public importance, a perspective which might not otherwise be placed before the court;

f) whether the proceedings are at the trial or appellate stage, with a preference against appointing the *amicus curiae* at the trial stage where there are contentious matters of fact to be resolved between the parties.[217]

115. There is a general (though not absolute) rule that an *amicus curiae* is not permitted to give evidence in the proceedings.[218] Its role is purely to assist the court.

116. Pursuant to s 10 (2) (e) of the Irish Human Rights and Equality Commission Act 2014, the Commission may apply to be appointed as *amicus curiae* in proceedings before the High or Supreme Court concerning human rights or equality rights, though it is within the absolute discretion of those courts to grant such an application.

Costs rules

121. The normal rule under the rules of civil procedure of the superior courts is that costs follow the event.[219] The courts have a discretionary jurisdiction to vary or depart from that rule if, in the special circumstances of a case, the interests of justice require that they should do so.[220] A court may decide to make no order as to costs, or award full or partial costs in favour of a plaintiff or applicant.

122. The superior courts also have jurisdiction to make a protective costs order if the issues raised in the proceedings are a matter of general public importance and if the making of the order would be both in the public interest and in the interest of justice.[221] The first protective costs order under the civil procedure rules was made in 2014.[222] Additionally, ss. 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011 provide that protective

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[217] See recent summary of the authorities in *Data Protection Commissioner v Facebook Ireland Limited* [2016] IEHC 414 (HC) [7] - [14] (McGovern J).

[218] *Data Protection Commissioner v Facebook Ireland* [2017] IEHC 105 (HC) [7] - [11] (Costello J).

[219] See SI 15/1986 Rules of the Superior Courts 1986, O. 99, r. 1 (4), as substituted by SI 12/2008, Rules of the Superior Courts (Costs) 2008, art.1(i).

[220] *Dunne v Minister for the Environment* [2008] 2 IR 775 (SC) [25] (Murray CJ); for a useful summary of the applicable principles see *Collins v Minister for Finance* [2014] IEHC 79 (HC) [11-18] (Kelly, Finlay Geoghegan, Hogan JJ). For examples of successful applications for departure from the normal rule, see *Roche v Roche* [2010] IESC 10 (SC) (Murray CJ); *Jordan v Minister for Children and Youth Affairs* [2013] IEHC 625 (HC) (McDermott J); *Pringle v Ireland* [2014] IEHC 174 (HC) (Laffoy J); *CA v Minister for Justice and Equality* [2015] IEHC 432 (HC) (McEochaidh J).

[221] *Village Residents Association Ltd v An Bórd Pleanála* [2000] 4 IR 321 (HC) 329-30 (Laffoy J).

[222] The protective costs order was granted on 16th July 2014 by Hogan J in *Schrems v Data Protection Commissioner*, High Court Record No. 2013/765JR. For judgments in the matter, see *Schrems v Data Protection Commissioner* [2014] 3 IR 75 and *Schrems v Data Protection Commissioner (No. 2)* [2014] IEHC 351. Noted by Andrea Mulligan, 'Constitutional Aspects of International Data Transfer and Surveillance' (2016) 55 *Irish Jurist* 199.

costs orders may be granted in certain environmental proceedings. There have recently been some successful applications under that legislation.[223]

123. A special costs regime[224] also applies to matters falling within the scope of certain European Union legislation in the field of environmental law, whereby each party in principle bears its own costs (subject to certain exceptions), although an applicant or plaintiff may still have costs awarded in his favour.[225] The superior courts are entitled to award costs in favour of a party in a matter of expectional public importance and where in the special circumstances of the case it is in the interest of justice to do so.

Civil legal aid

124. A statutory civil legal aid scheme operates under the Civil Legal Aid Act 1995 (as amended) to make provision for the grant by the State of civil legal aid and advice for persons of insufficient means in civil litigation.

Multi-party actions

125. The civil procedure rules of the superior courts provide for a procedure known as a representative action which permits one or more parties to conduct an action on behalf or for the benefit of all persons *"having the same interest in one cause of action or matter."*[226] It bears some resemblance to a class action. It has been used on occasion.[227] However, its effectiveness has been limited by the fact that each member of the class must authorise the named party to act in a representative capacity,[228] the possibility of a strict interpretation of the requirement that each party should have the "*same interest,*"[229] the view that the procedure does not apply to actions founded in tort,[230] and the unavailability of civil legal aid for representative proceedings.[231]

The doctrine of mootness

126. In general, the courts will not decide a case which has become moot because the parties have already resolved their dispute. However, a court may exceptionally depart from this rule

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[223] *McCoy v Shillelagh Quarries Ltd* [2015] IECA 28 (CA) (Hogan J); *O'Connor v Offaly County Council* [2017] IEHC 606 (HC) (Baker J).

[224] Created by s 33 of the Planning and Development (Amendment) Act 2010, and s 21 of the Environment (Miscellaneous Provisions) Act 2011.

[225] See Suzanne Kingston, 'Regulating Ireland's environment in 2016: hierarchy, networks and values' (2016) 56 *Irish Jurist* 42, 62.

[226] SI 15/1986 Rules of the Superior Courts 1986 O. 15, r. 9.

[227] See, for example, *Geaney v Bord of Management of Pobalscoil Corca Dhuibhne & Ors* [2009] IEHC 267 (HC) [3] (Laffoy J) and *Greene v Minister for Agriculture* [1990] 2 IR 17 (HC) 29 (Murphy J).

[228] Report of the Law Reform Commission on Multi-Party Litigation (LRC 76-2005) <http://www.lawreform.ie/_fileupload/Reports/rMultipartylitigation.pdf> accessed 10 November 2017, [1.03].

[229] ibid [1.08]

[230] ibid [1.08]. See *Moore v Attorney General* (No 2) [1930] IR 471 (Supreme Court of the Irish Free State), 490-91 (Kennedy CJ). Doubt on this point was recently expressed in *Hickey v McGowan* [2017] IESC 6 (SC) [57] (O'Donnell J).

[231] See s 28 (9)(a)(ix) of the Civil Legal Aid Act 1995 (as amended).

in the interests of due and proper administration of justice. Such circumstances may include those in which one or more of the parties has a material interest in a decision on a point of law of exceptional public importance,[232] where the issues raised affect many similar cases[233] or where the case is designated as a test case.[234] [235]

II. What is the general assessment about the success, or otherwise, of these rules in improving access to justice? You may limit your research to opinions of leading academics, bar associations and civil society groups that are particularly concerned with access to justice.

127. The rules on standing and the use of *amicus* briefs have been evaluated as areas in which the Irish courts have developed the law in ways that accommodate public interest litigation, whereas the rules relating to costs, the impact of the doctrine of mootness, and the absence of effective mechanisms for enhancing the impact of judicial decisions (for example, by effective multi-party action procedures) have been deemed less successful.[236]

128. With regard to litigation funding, the risk that a plaintiff may not come within one of the exceptions to the normal costs rules is viewed as a serious deterrent.[237] The focus of the civil legal aid scheme has been primarily on family and asylum law, and its effectiveness in facilitating access to justice has been limited by a lack of resources and significant waiting times for services.[238]

III. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

129. On 22 March 2017, the Minister for Justice and Equality, Frances Fitzgerald TD, announced the establishment of a group to review and reform the administration of civil

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[232] *Irwin v Deasy* [2010] IESC 35 (SC).
[233] *O'Brien v PIAB (No.2)* [2007] 1 IR 328 (SC) 334 (Murray CJ).
[234] *Okunade v Minister for Justice* [2012] 3 IR 152 (SC) [36]-[39] (Clarke J).
[235] For recent examples of deviation from the normal mootness rule, see *Kovacs v Governor of Mountjoy Women's Prison* [2016] IECA 108 (CA) [12]-[13] (Finlay Geoghan J); *McG v The Child and Family Agency* [2017] 1 IR 1 (SC); *Farrell v Governor of St Patrick's Prison* [2014] 1 IR 699 (SC); and *Lofinmakin v Minister for Justice* [2013] 4 IR 274.
[236] Gerry Whyte, *Social Inclusion and the Legal Sytem: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration, 2015), 165.
[237] Whyte, n 27, 171. See generally the report by the Public Interest Law Alliance (a project of FLAC Ireland), 'The Costs Barrier and Protective Costs Orders', 2010, < https://www.pila.ie/download/pdf/flac_pila_report_final.pdf>.
[238] See discussion by Diane Duggan BL 'Pro Bono Work and the Bar' (2014) 19 (5) *Bar Review* 104, 105. See also report by the FLAC Ireland 'Civil Legal Aid in Ireland: Forty Years On', 2009, <https://www.flac.ie/download/pdf/cla_in_ireland_40_years_on_final.pdf> accessed 10 November 2017.

justice in Ireland, chaired by the President of the High Court, Mr Justice Peter Kelly. The aims of the review include improving access to justice.[239] The group is to report to the Minister for Justice and Equality within two years.[240]

[239] See press release by the Department of Justice and Equality entitled 'Tánaiste announces review of system of civil justice', 22 March 2017; <http://www.justice.ie/en/JELR/Pages/PR17000097> accessed 10 November 2017.
[240] See response by Charles Flanagan TD, Minister for Justice and Equality, to Parliamentary Question 42, 19 October 2017, [44212/17], by Jim O'Callaghan TD; <http://www.justice.ie/en/JELR/Pages/PQ-19-10-2017-42> accessed 10 November 2017.

UNITED KINGDOM

I. Has your jurisdiction adopted any special rules and procedures intended to facilitate access to justice where there is a perceived power imbalance between claimants and corporate or public defendants?

130. English law contains various rules that can redress the balance of power between claimant and defendant, either by allowing third parties to intervene; by reducing the administrative/cost burden of bringing a claim; or by providing the claimant with financial assistance.

131. The procedural rules for the various courts and tribunals in England and Wales each allow for interventions by third parties. The Civil Procedure Rules ("CPR") allow the County Courts, High Court and Court of Appeal to join to the proceedings any party that applies to be heard, if the court considers it desirable to join that party so that all matters before the court can be resolved.[241] The rules of the Employment Tribunal allow for interventions by any person, but restrict interventions to those persons who can show a legitimate interest in the proceedings.[242] The rules of the Supreme Court also allow interventions, and specifically contemplate interventions from NGOs and any other person with an interest in the case.[243]

132. No formal procedure exists for the invitation by the courts for submissions from *amici curiae*, although courts do occasionally invite such submissions.[244]The principal cost-reducing procedural rules are those that provide forms of collective redress: representative actions, Group Litigation Orders ("GLOs"), and a special group action in competition law cases. Representative actions allow any person with the same interest in a claim as a group of other claimants to be appointed as a representative of all those claimants, and bring the claim on his and their behalf.[245]

133. Any judgment is binding on all persons in the represented group, even if they were unaware that the proceedings were taking place, but may only be enforced against persons who are not party to the proceedings with the permission of the court.[246] Because members of the represented group are not automatically joined to the proceedings, they avoid the payment of costs under the loser pays principle.[247] Such actions are therefore capable of

[241] CPR 19.2; CPR PR 54A for intervention in judicial review.
[242] Employment Tribunals (constitution and Rules of Procedure) Regulations 2013/1237, Sch. 1(34) and 1(35).
[243] Supreme Court Rules, Rule 26(1).
[244] JUSTICE and Freshfields Bruckhaus Deringer LLP, 'To Assist the Court: Third Party Interventions in the Public Interest', 24 (available online at https://justice.org.uk/assist-court-third-party-interventions-public-interest)
[245] CPR 19.6.
[246] CPR 19.6(4).
[247] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice,* (3rd ed, Sweet & Maxwell Thomson Reuters), 13.58.

redressing the balance of power insofar as less powerful claimants can rely on a well-funded and equipped representative to bring the claim on their behalf.

134. Group Litigation Orders provide a formal procedure for managing multiple claims raising similar issues of fact or law.[248] Such orders are made at the discretion of the Court. Where they are made, a GLO will specify the 'defining issues' common to each claim, and made public.[249] Individual claimants with similar claims must then each bring proceedings and apply to the court to have their claim entered into the Group Register, which tracks all the claims being heard under that GLO.[250] The principal advantages of GLOs are that, once registered, any further procedural steps only need be taken once in relation to all the claims, preventing unnecessary duplication. The Civil Procedure Rules also provide for documents to be disclosed to all claimants on the register, and for any claimant to request documents relating to any other claim managed under that GLO, as though he were a party to that other claim.[251] The court may also select particular claims as test cases on the basis of which to make determinations that will apply to all of the other registered claims.[252] Each registered claimant is a party to the proceedings, and is both bound by the resulting judgment, and bears a share of the common cost of hearing the claim, plus any individual costs ordered by the Court.[253]

135. English law does not contain a general class action; such actions are available only in specific sectors. The Consumer Rights Act 2015 introduced the rules allowing for opt-out collective action for breaches of competition law brought before the Competition Appeal Tribunal ("CAT").[254] Collective proceedings may be initiated only if the claims raise related issues of fact or law, but not all of the claims need be against every defendant.[255] Any private party may allege loss suffered as a result of the breach may initiate proceedings on behalf of the affected class. The CAT may also authorise non-claimants to act as a representative if it considers it just and reasonable to do so.[256] Where the proceedings operate on an opt-out basis, the judgment is binding on any person whose claim falls within the class.[257] The court

[248] CPR 19.10-19.15.
[249] CPR 19.11 and https://www.gov.uk/guidance/group-litigation-orders
[250] Zuckerman (n 247) 13.67-13.69.
[251] CPR 19.12(4); CPR Practice Direction 19B, 6.6.
[252] CPR 19.13.
[253] Zuckerman (n 247) 13.69, 13.75.
[254] Consumer Rights Act 2015, Schedule 8, amending the Competition Act 1998.
[255] Competition Act 1998, s 47B(6) and 47B(3).
[256] ibid s 47B(8).
[257] ibid s 47B(11) and (12).

may make an award of damages without undertaking an assessment of each individual claim.[258] This redresses power imbalances by 'improv[ing] the viability of low value claims'.[259]

136. Legal aid in the English and Welsh jurisdiction is provided for by the Legal Aid, Sentencing and Punishment of Offenders Act, 2012[260], ("LASPO") which significantly reduced the scope of legal aid. The areas in which Civil Legal Aid Services remain could be conceptualised as those which concern a perceived power imbalance between claimants and defendants, such as cases involving children and vulnerable adults, but there is no explicit policy to this effect.[261] The Act also provides for "exceptional case funding"262 whereby in exceptional circumstances other civil legal aid services may be provided in situations where (1) denying funding would risk the individuals Convention Rights263 or any enforceable right in EU law and that it is appropriate to grant funding in all the circumstances of the case or (2) the Director has made a wider public interest determination. LASPO only provides legal aid services for legal persons (as opposed to natural persons) in exceptional circumstances[264].

137. There is an increasing popularity in cases, where there is a power imbalance and no legal aid for claimants, to crowd-fund public interest litigation,[265] the costs implications of which have not yet been fully dealt with by the courts. The Criminal Justice Courts Act 2015[266] provides that in judicial review cases the High Court may order a cap on costs only if (i) the proceedings are public interest proceedings, (ii) without the order the party would cease to participate and (iii) it would be reasonable.[267] In doing so the judge has regard to the "source, nature and extent of the financial resources available or likely to be available"[268]. This may have an impact on how the courts deal with costs implications of crowdfunded cases. This was discussed in *R (on the application of Beety) v Nursing & Midwifery Council (2017).* [269]

138. Disclosure rules in England and Wales are based on the CPR and the court's discretion, and there are no special 'rules' as such when the parties are unequal in power.[270] However,

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[258] ibid s 47C(3).
[259] Andrew Higgins, 'Driving with the Handbrake On: Competition Class Actions under the Consumer Rights Act 2015' (2016) 79(3) *Mondern Law Review* 442–467, 448-9.
[260] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).
[261] LASPO, Schedule 1.
[262] LASPO, s10.
[263] LASPO, s10 (3) (a) (i); 'Convention Rights' are those rights incorporated into British law through the Human Rights Act 1998, as set forth in the European Convention on Human Rights and Fundamental Freedoms.
[264] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s31; Schedule 3.
[265] *Crowdjustice* <https://www.crowdjustice.com/> accessed 09 November 2017
[266] Criminal Justice Courts Act 2015, s88.
[267] Criminal Justice Courts Act 2015, s88 (6).
[268] ibid s89 (1) (a)-(e).
[269] *Unreported* R (on the application of Beety) v Nursing Midwifery Council (2017) (QB).
[270] Zuckerman (n 247) 718-809; *Black v Sumitomo Corp* [2001] EWCA Civ 1819.

the overarching idea which courts adopt when using their discretion is that each side is to be given "equality of arms"[271] in accordance with the CPR.[272] For example, the court may order pre-action disclosure on a discretionary basis. This may assist a less powerful party in obtaining and assessing evidence prior to the undertaking of expense and costs risks of full litigation.[273]

139. Generally, the burden of proof, and any switching between the parties thereof, is a matter of substantive law.[274] Exceptionally, the onus of proof may be imposed on the defendant (where it would not otherwise have been) due to the inherent dangerousness of an activity, but this is confined to certain classes of action. [275]

140. The primary statute providing for time limitations in England and Wales is the Limitation Act 1980. The Act provides for a more generous limitation period to persons under a disability[276]. There is a also discretion afforded to judges in limited cases to extend limitation periods. The factors considered as to whether to use this discretion may go look at incomparable power, such as ignorance of legal rights[277] or psychological harm impairing the claimant's ability to bring proceedings[278]. There is also a discretion in judicial review and proceedings under the Human Rights Act, the time limit for which can be extended if good reasons are shown.[279] The Court will only extend time if an adequate explanation is given for the delay, and if the Court is satisfied that an extension of time will not cause substantial hardship or prejudice to the defendant or any other party, and that an extension of time will not be detrimental to good administration.

141. The CPR allows courts to make a cost capping order to limit the amount of future costs (including disbursements) which a party may recover pursuant to n order for costs subsequently made. This may be ordered by the Court were it is in the interests of justice to do so, whether there is substantial risk that without such an order costs will be disproportionately incurred, and if the said substantial risk cannot be adequately controlled by case management and a detailed assessment of costs.[280] The CPR requires that an application for a costs capping order be made on notice setting out the prescribed details.[281] The CPR also allows for qualified one-way costs shifting in certain categories of cases.

[271] ibid 718.
[272] Civil Procedure Rules, Rule 31
[273] Zuckerman (n 247) 756
[274] Zuckerman (n 247) 1017.
[275] Zuckerman (n 247) 1019; *West v Bristol Tramways* [1908] 2 KB 14.
[276] Limitation Act 1980, s28 (1).
[277] *Burke v Ashe Construction Ltd* [2003] EWCA Civ 717; [2004] P.I.Q.R. P11.
[278] *B v Nugent Care Society* [2009] EWCA Civ 827; [2010] 1 W.L.R. 516.
[279] *XEM v The Home Office* [2016] EWHC 2622 (QB); CPR 3.1(2)(a).
[280] Civil Procedure Rules, Rule 3.19.
[281] Civil Procedure Rules, Rule 3.20 and 3.23.

Where the rules apply, claimants are not liable to pay the defendant's costs when they lose but only where they behave unreasonably. On the other hand, defendant are still liable to pay the claimant's costs whenever the claimant is successful. [282]

II. What is the general assessment about the success, or otherwise, of these rules in improving access to justice? You may limit your research to opinions of leading academics, bar associations and civil society groups that are particularly concerned with access to justice.

Intervener Rules

142. Although there is no significant criticism of these rules overall, concerns have been expressed in the judicial review context about the possible chilling effect of new rules under which interveners may be liable for the costs of the parties to the litigation if their interventions were not of significant assistance, unnecessary for the resolution of the case, or if the intervener otherwise acts unreasonably.[283]

Collective Rredress

143. The general consensus is that collective redress is available in an unjustifiably narrow set of circumstances, and that the introduction of a generally available class action would be desirable. With respect to representative actions, the same interest requirement is interpreted restrictively so that it must be possible to establish that each member of the class and the representative has an identical claim (e.g., unlawful price-fixing affecting multiple persons), and no defences based on circumstances particular to the claimant's case.[284] The leading text on civil procedure criticises this narrow interpretation of 'same interest' for severely restricting its potential use.[285] The requirement of identity of interest was the impetus for the opt-out procedure for competition claims.[286]

144. GLOs are also criticised as 'no more than a [case] management tool […] ill-suited for facilitating access to justice of numerous claimants without extensive transaction costs and without the fear of potentially ruinous costs should the action fail', as compared with opt-out class action procedures.[287]

Legal Aid

[282] Civil Procedure Rules, Rule 44.13 – 44.16.
[283] Criminal Justice Act 2015, s 87; and see above, n.4 at 27-30.
[284] *Emerald Supplies Ltd and another v British Airways Plc* [2010] EWCA Civ 1284, [62]-[65]; and Zuckerman 13.43-44
[285] Zuckerman (n 247) 13.44.
[286] Higgins (n 259) 446.
[287] Zuckerman (n 247) 13.103.

145. The Bach Report[288], concerned with how 'LASPO' had damaged access to justice in the UK, was highly critical of the current legal aid scheme, concluding that "there is an urgent need to bring some areas of civil law back into the scope of legal aid" and that the exceptional funding scheme had "manifestly failed." This mirrored other criticism from NGOs[289] and the Law Society[290] which concluded "LASPO has had a negative impact across a variety of areas, restricting access to justice" and that the "dramatic increase of litigants in person….has created a severe strain on the court system." [291]

Limitations

146. The Law Commission produced a critical report[292] of the system on limitations, criticising them as complex and anachronistic to the point where they achieve neither of their objectives - justice nor certainty. They recommended the development and implementation of a single, core limitation scheme.

III. Has the government proposed to reform or responded to proposals for reform to their civil (or administrative) justice systems, including the above mechanisms, aimed at improving access to justice?

Collective redress

147. Both the European Commission and the Civil Justice Council (an advisory body to the Ministry of Justice) have advocated for a general collective action to be introduced into English law, on the model of that now available in competition cases.[293] However, the government has rejected these proposals, preferring a sector-specific approach.[294]

Legal Aid

148. In response to the widespread criticisms of LASPO, the government have undertaken to review the legislation.[295]

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288 The Bach Commission, *The Right to Justice* (Fabian Policy Report, September 2017).

289 Rachel Robinson, Liberty, *Justice Out of Reach (Liberty,* 02 April 2013) < https://www.liberty-human-rights.org.uk/news/blog/justice-out-reach;> [accessed 09 November 2017]; JUSTICE, *Legal Aid: Vulnerable will suffer most if access to justice and a fair defence for all withdrawn says JUSTICE* (JUSTICE 05 June 2013),< https://justice.org.uk/legal-aid-vulnerable-will-suffer-most-if-access-to-justice-and-a-fair-defence-for-all-withdrawn-says-justice/> [accessed 09 November 2017].

290 The Law Society is the regulator of solicitors in England and Wales.

291 The Law Society, *Access Denied? LASPO four years on: a Law Society Review* (June 2017).

292 Law Commission, *Limitation of Actions* (Law Com No 270, 2001).

293 Civil Justice Council, *"Improving Access to Justice through Collective Actions", Final Report*, Recommendations 1-3 at 137ff.

294 Zuckerman (n 247) 13.33; Higgins (n 259) 445; and see Department for Business Innovation and Skills (BIS) *Private Actions in Competition Law: A Consultation on Options for Reform: Government Response* (BIS 2013).

295 Owen Bowcott *'Impact of cuts to legal aid to come under review'* (*The Guardian,* 31 October 2017) <https://www.theguardian.com/law/2017/oct/31/impact-of-cuts-to-legal-aid-to-come-under-review> [accessed 09 November 2017].

Systems of Limitation

149. The government considered the recommendations in the 270 Law Commission Report on Limitations and accepted them in principle, but declined to implement them in 2009, citing that a recent stakeholder review had demonstrated that there were insufficient benefits to their implementation and potential large scale costs.[296]

[296] HC Deb 19 November 2009, col 13WS.