Money, Blackmail and Lawsuits

Revisiting *Coventry* v. *Lawrence* and the Principle of (In)equality of Arms

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Abstract

The right to a fair trial under Article 6 ECHR (European Convention on Human Rights) provides one of the procedural guarantees of access to justice. One of the elements on which access to justice under Article 6 ECHR depends is party resources. The concern for equality of arms is that both parties should be able to effectively argue their case before a court, not being impeded by a lack of resources that undermines the tools of their pleading. Such an equality is subject to case-specific analysis. The Lawrence ruling is a ruling on the compatibility of the regime of recoverability of conditional fee agreement (CFA) additional liabilities under the Access to Justice Act 1999 with Article 6 ECHR. The majority in the UK Supreme Court (UKSC) ruled, under a proportionality test, that there was no infringement of Article 6 ECHR because the introduction of the recoverability of CFA additional liabilities was a necessary measure for England to adopt in the pursuit of access to justice under its margin of appreciation. In this article, I will argue that a more holistic view of the procedural guarantees provided for by Article 6 ECHR is called for to properly assess its infringement, considering mainly the principle of equality of arms. The aim of this article is, therefore, to investigate how the principle of equality of arms should have informed the UKSC's decision in Lawrence.

Keywords: right to a fair trial, access to justice, equality of arms, conditional fee agreement, after the event insurance.

1 Introduction

Litigation costs and funding are intertwined, both mechanistically and in their impact on access to justice.[1] Litigation costs, consisting essentially of court and lawyer fees, can be prohibitively expensive in different stages of civil proceedings, to a point in which access to justice will be hindered. Prohibitively expensive litigation costs have been extensively dealt with by the European Court of Human Rights (ECtHR) over the last decades, under allegations of violation of the right to a fair trial. These violations entailed initial costs,[2] appeal fees[3] and, more closely related to the topic at hand, costs payable at the end of the lawsuit.[4] The battle over the compatibility of rules on litigation costs with the right to a fair trial has gained particular attention regarding the latter issue, as some Central and Eastern European countries imposed excessive *ex post* fees on litigation against the state.[5]

In England, not only litigation costs have grown sharply[6] but also significant cuts to legal aid have been made for balancing public expenditure.[7] In common law systems, a significant costs burden is imposed on litigants since such litigation costs are expected to be disbursed by the litigants themselves.[8] Legal scholarship has recently pointed to the possibility that the Scottish system of

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1 C. Hodges, S. Vogenauer & M. Tulibacka, 'The Oxford Study on Costs and Funding of Civil Litigation', in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (2010) 3, at 4.

2 See *Kreuz* v. *Poland*, ECHR (2001) No. 28249/95; *Weissman* v. *Romania*, ECHR (2006) No. 63945/00.

3 See *Tolstoy Miloslavsky* v. *UK*, ECHR (1995) No. 18139/91; *Podbielski and PPU Polpure* v. *Poland*, ECHR (2005) No. 39199/98.

4 See *Stankov* v. *Bulgaria*, ECHR (2007) No. 68490/01; *Stankiewicz* v. *Poland*, ECHR (2006) No. 46917/99; *Klauz* v. *Croatia*, ECHR (2013) No. 28963/10; *Cindrić and Bešlić* v. *Croatia*, ECHR (2016) No. 72152/13.

5 *Ibid.* Concerns over advantages granted to the state as a litigant have also been expressed before the Court of Justice of the European Union (CJEU). In Case C-205/15 *Directia Generală Regională a Finantelor Publice Brasov (DGRFP)* v. *Vasile Toma and Biroul Executorului Judecătoresc Horatiu Vasile Cruduleci*, an exemption on public bodies to pay certain court fees was deemed compatible with equality of arms. The CJEU made an important distinction between this case and the ECtHR cases about *ex post* fees in litigation against the state I just mentioned in paras. 55 and 56 of such a ruling. For a more detailed analysis of limitations to litigation costs imposed by European Union (EU) law, see J. Krommendijk, 'Is there Light on the Horizon? The Distinction between '*Rewe* Effectiveness' and the Principle of Effective Judicial Protection in Article 47 of the Charter after *Orizzonte*', 53 *Common Market Law Review* 1395, at 1395-1418 (2016). EU law no longer applies to the United Kingdom (UK). The UK left the EU on 31 January 2020.

6 A. Zuckerman, 'Lord Justice Jackson's Review of Civil Litigation Costs – Preliminary Report', 28 *Civil Justice Quarterly* 435, at 436 (2009).

7 Hodges, Vogenauer & Tulibacka, above n. 1, at 23.

8 J. Peysner, 'England and Wales', in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (2010) 289, at 290. For a discussion on the market imbalances embedded in the provision of legal services in the English litigation system, see A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2013), at 1307-1308; N. Dunne, 'Liberalisation and the Legal Profession in England and Wales', 80 *The Cambridge Law Journal* 274, at 274-307 (2021). A perspective on this matter from a civil law country can be found in A. Lejeune and A. Spire, 'The Role of Legal Intermediaries in the Dispute Pyramid: In-

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court fees – under which the costs of administration of the civil justice system are expected to be met by the users of the court system themselves – might trigger violation of the right to a fair trial in individual cases.[9] Coupled with the unavailability of legal aid, this burden prompted the surge of conditional fee agreements (CFAs), together with legal expenses insurance (before- and after-the-event), as prominent means of financing individual claims.[10]

CFAs were introduced in the English legal system by the Courts and Legal Services Act 1990. Differently from contingency fee arrangements, in CFAs a normal charge out rate is agreed but payable only if the lawyer wins the case together with a success fee. This success fee, which is also referred to as CFA uplift, is an increase in the normal charge out rate because the lawyer is working under a CFA.[11] In parallel, the English Law Society developed the concept of after-the-event (ATE) insurance, which consists of an insurance policy under which, after the event potentially giving rise to litigation took place, the insurer is obliged to bear the losing party's litigation costs.[12] CFAs and ATE insurances facilitated access to justice for selected claimants, since they no longer needed to fund the lawsuits themselves (in the first case) or face the risk of adverse costs orders (in the second case). However, it also made litigation costs for defendants rise even more with the introduction of the recoverability of CFA success fees and ATE premiums (additional liabilities) under the Access to Justice Act 1999.[13] This recoverability, discussed below in further detail, was one of the main issues dealt with by Sir Rupert Jackson's Review of Civil Litigation Costs,[14] in which four flaws were identified.

One of the flaws identified, namely, the 'chilling' effect of the regime, consisted of the threat that defendants could potentially face excessively high costs in case of defeat, since all the court fees together with the additional liabilities would have to be paid for. In such cases, the defendant could feel, for example, pressured to settle at an early stage.[15] This flaw was centrepiece to the UK Supreme Court's (UKSC) landmark ruling in *Coventry* v. *Lawrence* (*Lawrence*).[16] The majority of the UKSC recognised the existence of such a flaw and that defendants indeed suffered this 'chilling' effect. However, it held that a rule obliging defendants to pay court fees together with the additional liabilities was within England's margin of appreciation under the European Convention on Human Rights (ECHR) to choose the means for achieving the objective of promoting access to justice.[17]

In the aftermath of the UKSC's ruling in *Lawrence*, equality of arms has been effectively removed as a core concern regarding disparities in parties' ability to afford litigation. As will be explained in Section 2, the principle of equality of arms is one of the key guarantees of access to justice. Equality of arms is understood here as the legal requirement of equality of party resources. It is the guarantee of access to justice according to which a minimum balance between the quality of legal representation, as well as the opportunities afforded by procedural rules for presenting a case, afforded to each party, must be ensured.[18] One of the goals of setting up legal aid schemes is to promote equality of arms.[19] The failure of the UKSC to consider how such a guarantee should serve as a parameter for judging cases indicating disparities in legal resources, in my view, rings an alarm bell regarding the future of equality of arms in UK constitutional and human rights adjudication.[20]

The *Lawrence* case concerned the challenging, by the respective defendants, of the compatibility of the regime of recoverability of additional liabilities with Article 6 ECHR. The majority in the UKSC ruled, under a proportionality test, that there was no such infringement because it was a necessary measure for England to adopt in the pursuit of access to justice under its margin of appreciation.[21]

In this article, I will argue that a more holistic view of the procedural guarantees provided for by Article 6 ECHR is called for to properly assess its infringement, considering mainly the principle of equality of arms. But

equalities before the French Legal System', 17 *International Journal of Law in Context* 455, at 455-72 (2021).

9 B. Christman and M. Combe, 'Funding Civil Justice in Scotland: Full Cost Recovery, at What Cost to Justice?', 24 *The Edinburgh Law Review* 48, at 64-9 (2020).

10 Peysner, above n. 8, at 294.

11 *Coventry* v. *Lawrence* [2015] UKSC 50.

12 *Ibid.*

13 Zuckerman, above n. 6, at 436. Recently, the recoverability of the cost of third party litigation funding was advocated in response to the *Financial Times*' editorial on the matter, see www.ft.com/content/ffb22ddd-ec52-4321-9591-5842d57c9f85.

14 Sir Rupert Jackson identified the existence of CFAs as the main cause for disproportionate legal costs in English Civil Justice. The reforms to the CFA regime he proposed sought to remedy such lack of proportionality, see J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (2014), at 202. The reforms he proposed consisted of (a) the removal of the obligation of the losing party to pay CFA success fees and (b) a raise of 10% in the value of damages awarded to victims of tort to compensate for them having to bear the costs of CFA success fees themselves, see www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf. Importantly, in the context of assessment of litigation costs in English Civil Justice, 'proportionality' is measured by two criteria: individual proportionality and collective proportionality. Individual proportionality is the ratio between the resources the parties spend on the proceedings and the compensation they expect to obtain from it. Collective proportionality is the share of public expenditure to be spent on the proceedings when compared to other proceedings, see Sorabji, above n. 14, at 167. These concepts of individual and collective proportionality are, however, not to be confused with the proportionality test discussed in this article. The proportionality test that the UKSC applied in *Lawrence* consisted of a scrutiny, under European human rights law, of the means employed by England under its margin of appreciation to pursue the objective of achieving access to justice. The goal of this latter proportionality test was to assess the compliance of such means with Art. 6 ECHR.

15 *Ibid.*

16 *Coventry* v. *Lawrence* [2015] UKSC 50.

17 *Ibid.*

18 M.A. Shapiro, 'Distributing Civil Justice', 109 *The Georgetown Law Journal* 1473, at 1487-1490 (2021).

19 X. Kramer, 'Legal Aid', in C.U. Schmid, J.R. Dinse & T. Wakabayashi (eds.), *Encyclopedia of Private International Law* (2017) 1088, at 1089.

20 A concrete example of the continuity of this disregard for equality of arms was a reuse of the *Lawrence* guidelines in a recent case, namely, *R (on the application of Leighton)* v. *Lord Chancellor* [2020] EWHC 336 (Admin), further discussed below.

21 *Coventry* v. *Lawrence* [2015] UKSC 50.

I will add a further inquiry into the rationale behind the assessment made by the majority of the UKSC, pushing the argument away from the proportionality test suggested. The reason for rejecting this proportionality test, as will be explained below, is because it focuses on the system as a whole, which is inappropriate for dealing with equality of arms.

The aim of this article is, therefore, to investigate how the principle of equality of arms should have informed the UKSC's decision in *Lawrence*. In doing so, I intend to demonstrate that there is a flaw in the majority's assessment of infringement of Article 6 ECHR in resorting to this type of proportionality test. To demonstrate the tensions between the *Lawrence* guidelines and equality of arms under Article 6 ECHR, this article will describe both before pointing out where the UKSC *Lawrence* ruling erred in its assessment of infringement of Article 6 ECHR (Sections 1 to 3). Furthermore, there will be a discussion on how the *Lawrence* ruling made its way into the post-Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) case law on access to justice (Section 4). Finally, the arguments will be brought together to demonstrate the shortcomings in the ruling associated with a lack of due concern for equality of arms (Sections 5 and 6).

2 Access to Justice, Access to a Court and Equality of Arms

Lord Reed has described the essence of access to justice in the UK legal system in *R (on the application of UNISON)* v. *Lord Chancellor* (*UNISON*). Under this conception, access to justice is implied in the notion that the United Kingdom is a democratic state governed by the rule of law. This conception is a counterpoint to the other notion offered by one of the parties to the *UNISON* case according to which courts provide a public service like others and the benefits of such a service are restricted to its direct users (the parties to a specific lawsuit).[22] The ECtHR case law also adopts this rule of law conception under Article 6 ECHR.[23]

The counterpoint, provided by Lord Reed in *UNISON*, to the idea that courts provide a public service like others is as follows. Both the democratic exercise of voting for parliament to enact statutes and the law-making role of common law courts would be rendered meaningless without the possibility of properly enforcing such laws. Laws represent 'the institutional form of the life of a people represented under the light of the understandings of group or class interests and collective ideals that make sense of them'.[24] Therefore, the power of courts to give effect to laws is in public interest, and the benefits from the exercise of such a power are not restricted to the parties to a specific lawsuit. This assertion does not concern public law solely but also the ascertainment of the legal content of private law rules for the purpose of application in future cases.[25]

Outside the realm of UK case law, however, it is fair to state that this link between rule of law and access to justice is not so straightforward. Both access to justice and rule of law are not easily defined concepts, never mind the link between the two.[26] To discuss in-depth the theoretical possibility of this link is out of the scope of this article. Therefore, I will work under the assumption pointed by Lucy according to which access to justice entails at least three elements. The first element is legal knowledge or, in other words, the requirement that governing laws are made public and are in clear language. The second element is the provision of legal advice without which, although publicly available, legal rules may not be properly understood by its addressees. Finally, the third element is the ability to bring legal proceedings before a court – access to courts.[27] This section focuses on the two latter elements: access to courts (Section 2.1) and legal advice, the latter being discussed under the heading of equality of arms (Section 2.2).

2.1 The Right of Access to a Court

The right to a fair trial under Article 6 ECHR provides one of the procedural guarantees of access to justice.[28] As mentioned earlier, under the ECtHR case law this right to a fair trial must be construed considering the notion of rule of law – the protection of rights by judicial means being one of its paramount aspects. This right is an accessory guarantee to private autonomy, which protects individuals from the state acting against them without recourse to judicial oversight.[29] Moreover, one of the impacts of the welfare state on access to justice is the idea that assistance should be provided for those who are not able to afford legal representation.[30]

22 *R (on the application of UNISON)* v. *Lord Chancellor* [2017] UKSC 51. Discussion about this conception can be found in A. Higgins, 'The Costs of Civil Justice and Who Pays?', 37 *Oxford Journal of Legal Studies* 687, at 691-6 (2017); A. Weale, 'Principles of Access: Comparing Health and Legal Services', in E. Palmer, T. Cornford, Y. Marique & A. Guinchard (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 41, at 45-7. An in-depth discussion of this distinction can be found in T. Cornford, 'The Meaning of Access to Justice', in E. Palmer, T. Cornford, Y. Marique & A. Guinchard (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 27, at 30-5. The CJEU ruled on this matter in Case C-279/09 *DEB* v. *Germany* [2010] ECR I-13849.

23 *Běleš* v. *Czech Republic*, ECHR (2002) No. 47273/99.

24 R. Unger, *The Universal History of Legal Thought* (2021), at location 169. Kindle Edition.

25 *R (on the application of UNISON)* v. *Lord Chancellor* [2017] UKSC 51. See also C. Parker, *Just Lawyers: Regulation and Access to Justice* (1999), at 41-56.

26 W. Lucy, 'Access to Justice and the Rule of Law', 40 *Oxford Journal of Legal Studies* 377, at 384-5 (2020). An illustration of the different perspectives on the matter can be seen in a hypothetical dialogue between an American and a European lawyer about legal aid in J. Maxeiner, 'A Right to Legal Aid: The ABA Model Access Act in International Perspective', 13 *Loyola Journal of Public Interest Law* 61, at 79-81 (2011).

27 *Ibid.*

28 *Brown* v. *Stott* [2003] 1 AC 681, 694.

29 M. Cappelletti and J. Gordley, 'Legal Aid: Modern Themes and Variations Part One: The Emergence of a Modern Theme', 24 *Stanford Law Review* 347, at 354-5 (1971).

30 M. Cappelletti and B. Garth, 'Access to Justice and the Welfare State: An Introduction', in M. Cappelletti (ed.), *Access to Justice and the Welfare State*

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The right of access to a court under Article 6 ECHR has two dimensions: positive and negative. In its positive dimension, the right of access to a court under Article 6 ECHR demands a positive obligation to guarantee such access for litigants, for example, but not necessarily, through a legal aid scheme.[31] The negative dimension consists of the state's duty to not impose barriers to such access. Since the abolition of self-help with the emergence of politically organised systems of dispute resolution, the legal process is the means to protect rights.[32]

In the UK legal system, Article 6 ECHR has two functions. The first is to serve as a parameter to declare legislation incompatible with the ECHR.[33] Such a declaration of incompatibility does not impinge upon the validity of the legislation concerned[34] (the Human Rights Act 1998 preserved the doctrine of parliamentary sovereignty).[35] The second function is, in an overlap with the common law right of access to a court, to prevent the executive from taking action that undermines such a right unless parliament so authorises explicitly or by necessary implication.[36]

In turn, the common law right of access to a court is a manifestation of the principle of legality in UK constitutional and administrative law.[37] The United Kingdom does not have a written constitution. Therefore, the legal content of constitutional rights is defined by the common law. Differently from those enshrined in written constitutions, these rights are not parameters for scrutinising legislation enacted by the parliament.[38] The doctrine of parliamentary sovereignty prevents the judiciary from engaging in judicial review of primary legislation.[39] Rather, constitutional rights under the UK common law prevent the executive from taking action that undermines such rights unless parliament so authorises explicitly or by necessary implication. Or, in other words, from infringing the principle of legality that is, along these lines, a principle of statutory interpretation. In this sense, the protection that the common law right of access to a court affords, as a trigger of the principle of legality, is against administrative acts.[40] As Bingham put it, judicial review consists of judges 'reviewing the lawfulness of administrative action taken by others'.[41] Building on these foundations and considering the long-established recognition of the right of access to a court in the UK common law, Laws J stated in *R* v. *Lord Chancellor, ex parte Witham* that 'the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; *and this is the meaning of the constitutional right*'.[42]

2.2 Equality of Arms

A second element on which access to justice depends is party resources.[43] Often, the effectiveness with which one will litigate her case is proportional to the resources she is able to spend on the proceedings. Although this is not always the case, since both a lawsuit can be cheap to pursue and a not so expensive lawyer can perform good legal representation, a lot of other costly tools can be necessary for effective litigation. Examples are the need to pay for expensive technical evidence, expert opinions, travel expenses of witnesses, and so on. The concern for equality of arms is that both parties should be able to effectively argue their case before a court, not being impeded by a lack of resources that undermines the tools of their pleading. Importantly, such an equality is subject to case-specific analysis,[44] meaning that a ruling on an infringement of the principle of equality of arms is based '*inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively'.[45] As Shapiro explains, '[g]iven that party resources matter insofar as they enable a party to litigate effectively against her opponent, equality of party resources must be ruled at the level of the individual lawsuit, not the civil justice system as a whole.'[46] Legal scholarship[47] and the United Nations Committee on the Elimination of Racial Discrimination[48] have criticised this current approach to assessing infringement of the principle of equality of arms. In their view, more precise criteria

(1981) 1, at 4; M. Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and School Trends', 25 *Stanford Law Review* 651, at 715 (1973); E. Storskrubb and J. Ziller, 'Access to Justice in European Comparative Law', in F. Francioni (ed.), *Access to Justice as Human Right* (2007) 310, at 313-14.

31 L. Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights', in Y. Haeck and E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century* (2013) 69, at 122.

32 D. Squires, 'Access to a Court after *Witham*, *Lightfoot* and *Saleem*', 6 *Judicial Review* 38, at 43 (2001); Marie-Anne Frison-Roche, 'Le droit d'accès à la justice et au droit', in R. Cabrillac (ed.), *Libertés et droits fondamentaux* (2009) 497, at 523.

33 Human Rights Act 1998, Section 4(2).

34 Human Rights Act 1998, Section 4(6)(a).

35 J. Goodwin, 'The Last Defence of *Wednesbury*', *Public Law* 445, at 466 (2012).

36 *R (on the application of UNISON)* v. *Lord Chancellor* [2017] UKSC 51.

37 J.N.E. Varuhas, 'The Principle of Legality', 79 *Cambridge Law Journal* 570, at 581 (2020).

38 There are also countries, such as France and the Netherlands, with written constitutions and no judicial review of enacted legislation.

39 *R* v. *Lord Chancellor, ex parte Witham* [1998] QB 575.

40 Varuhas, above n. 37, at 582.

41 T. Bingham, *The Rule of Law* (2011), at 61.

42 *R* v. *Lord Chancellor, ex parte Witham* [1998] QB 575 (emphasis added).

43 L.M. Friedman, 'Access to Justice: Social and Historical Context', in M. Cappelletti and J. Weisner (eds.), *Access to Justice: Promising institutions* (1978) 1, at 12-13; See also M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law & Society Review* 95, at 95-160 (1974).

44 Shapiro, above n. 18, at 1487-1490.

45 *Steel and Morris* v. *UK*, ECHR (2005) No. 68416/01.

46 Shapiro, above at n. 189, at 1487-1490.

47 M. Lillard, '*McGoliath* v. *David*: The European Court of Human Rights Recent Equality of Arms Decision', 6 *German Law Journal* 895, at 899-901 (2005); J. Pollock and M. Greco, 'It's Not Triage if the Patient Bleeds Out', 161 *University of Pennsylvania Law Review PENNumbra* 40, at 42-4 (2012); M. Davis, 'Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law', 122 *Yale Law Journal* 2260, at 2280-2281 (2013).

48 U.N. Human Rights Comm., General Comment No. 32, 90th Sess., 9-27 July 2007, UN Doc. CCPR/C/GC/32 (23 August 2007).

should be set for establishing when the lack of legal aid impacts equality of arms negatively.[49]

Criticisms aside, the law as it stands is that the assessment of a possible infringement of the principle of equality of arms is to be made on a case-by-case basis. This rule is essential to abide by the standard set by the ECtHR in the Article 6 ECHR case of *Steel and Morris* v. *UK*, explained below, according to which a party's equality of arms is negatively affected if she is placed 'at a substantial disadvantage'.[50] To verify whether a party is placed at a substantial disadvantage, it is necessary to assess whether such disadvantages are present in the specific case (hence the need for a case-by-case assessment). Part of the problem with the majority of the UKSC's ruling in *Lawrence* is that, instead of prioritising the specificities of the case at hand, the role played by the recoverability of additional liabilities in the English system for allocation of legal costs was the focus of attention.

A concrete example, for illustrative purposes,[51] of the necessity to judge equality of arms on a case-by-case basis was set forth in Case C-543/14 *Ordre des barreaux francophones et germanophone*, ruled by the CJEU (Court of Justice of the European Union).[52] In this case, Belgium had revoked the value-added tax (hereafter 'VAT') exemption to services provided by lawyers under the Belgian legal aid scheme. This revocation was challenged before the *Cour constitutionelle* on grounds that it limited access to justice rights, including equality of arms.[53] The case was then referred to the CJEU. The reason why the CJEU ruled that equality of arms was *not* negatively affected is as follows. Under Article 168(a) Council Directive 2006/112 (EU VAT Directive), taxable persons who acquire goods or services in connection with taxable transactions from another taxable person can deduct the VAT due from such acquisition.[54] Therefore, non-taxable final consumers who hire legal services will also have to pay for such taxable services but without having the right to deduct.[55] After outlining the more general notion of equality of arms referred to earlier, the CJEU found no violation of such a right. More notably, AG Sharpston opined in this case comparing it to the ECtHR Article 6 case of *Steel and Morris* v. *UK* (explained in more detail below). Such a comparison was made to argue that, although both cases concerned the interaction between legal costs and equality of arms, the latter consisted of a fact-specific situation that cannot be compared to the challenging of a VAT rule in the abstract.[56] The CJEU concurred with such a conclusion, holding that a general rule on VAT is not sufficient to create a substantial disadvantage for one of the parties.[57] In my view, this is consistent with the idea mentioned earlier that equality of arms is to be ruled on a case-by-case basis since the specificities of the case are paramount to deciding whether the disparity of party resources affects equality of arms negatively.

3 Judgment of (the Majority of) the UKSC

This section will explain the majority of the UKSC's ruling in *Lawrence*. *Lawrence* is a ruling on the compatibility of the regime of recoverability of additional liabilities under the Access to Justice Act 1999 with Article 6 ECHR. The sequence in which the topics will be explained is roughly the same followed by the majority of the UKSC. Firstly, for contextualisation, there will be a brief description of the factual background to the nuisance claim underlying the ruling as well as the amount of the legal costs involved. Secondly, I will explain the legal environment in which the Access to Justice Act 1999 was enacted, inaugurating the recoverability of additional liabilities in the English legal system (Section 3.1). Thirdly, I will describe the four flaws of the recoverability regime pointed out by Sir Rupert Jackson in his Review of Civil Litigation Costs (Section 3.1.1). The need to explain these flaws stems from the centrality of the third flaw in both the defendant's and the majority of the UKSC's assessments of infringement of Article 6 ECHR. Fourthly, there will be a brief description of the ECtHR ruling in *MGN* v. *UK* (Section 3.1.2). This is the case in which the recoverability regime was deemed incompatible with the ECHR but from which the majority of the UKSC attempted to distinguish *Lawrence*, on grounds that such a case concerned Article 10 ECHR (freedom of expression) rather than Article 6 ECHR. Finally, I will explain the majority of the UKSC's ruling itself (Section 3.2), which draws on elements from the issues described in all the sections to which I just referred.

49 *Ibid*.

50 *Steel and Morris* v. *UK*, ECHR (2005) No. 68416/01. In *Stankiewicz* v. *Poland*, the ECtHR decided on a rule under which Polish public authorities were exempt from paying legal costs in proceedings in which they, acting as a party, lost the case (as opposed to ordinary parties, which had to pay such costs in case of losing). This rule was deemed incompatible with Article 6 ECHR, on grounds that privileges granted to public authorities for the protection of the legal order 'should not be applied so as to put a party to civil proceedings at an undue disadvantage *vis-à-vis* the prosecuting authorities', see *Stankiewicz* v. *Poland*, ECHR (2006) No. 46917/99. Although the ECtHR did not expressly mention equality of arms in this ruling, Advocate General (AG) Kokott has interpreted it as concerning equality of arms, see Case C-530/11 *Commission* v. *UK* [2014] ECLI:EU:C:2014:67, Opinion of AG Kokott.

51 Illustrative because, as mentioned before, the United Kingdom left the European Union.

52 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605.

53 K.K.E. Elgaard, 'The Impact of the Charter of Fundamental Rights of the European Union on VAT Law', 5 *World Journal of VAT/GST Law* 63, at 84-5 (2016).

54 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347, 11.12.2006, 1–118, Art. 168(a).

55 Elgaard, above n. 53, at 86.

56 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605, Opinion of AG Sharpston.

57 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605.

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3.1 Facts of the Case (in a Nutshell) and Legal Background to the Dispute

As mentioned earlier, CFAs were introduced in the English legal system through the Courts and Legal Services Act 1990. Under the Courts and Legal Services Act 1990, fees associated to CFAs were not recoverable. ATE premiums were also not recoverable under the Courts and Legal Services Act 1990.[58] After public consultation, the Access to Justice Act 1999 was enacted, to implement the policy pursued by the British government at the time to allow for the recoverability of additional liabilities. The rationale behind this policy was to impose the full costs of litigation on the losing party. And, to achieve this policy goal, a Costs Practice Direction (hereafter 'CPD') was put in place. Paragraph 11.9 of the CPD stated that success fees and ATE premiums could not be 'reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate'.[59]

Lawrence was a dispute regarding nuisance. The claimant argued that the speedway activities performed on the nearby defendant's track was producing excessive noise. The High Court of Justice of England and Wales (High Court) ruled the case in favour of the claimant, finding that indeed the case at hand constituted nuisance.[60] The defendant was therefore deemed liable for the costs of the dispute alongside 60% of the additional liabilities. The Court of Appeal of England and Wales (Court of Appeal), however, reversed the ruling and (consequently) the costs order along with it.[61] Finally, the UKSC reversed the Court of Appeal's decision,[62] reinstating the High Court's judgment and the issuing of the costs order of 60% of the additional liabilities, which amounted to £129,004 – CFA success fee – and £183,000 – ATE premium.[63]

3.1.1 The Four Flaws Identified in the Jackson Review of Civil Litigation Costs

The *Lawrence* ruling is a ruling on the compatibility of the regime of recoverability of additional liabilities under the Access to Justice Act 1999 with Article 6 ECHR. This recoverability system was a key element of the CFA regime under the Access to Justice Act 1999.[64] The CFA regime had four flaws that were among the main causes for disproportionate legal costs in English Civil Justice.[65] The first, second and fourth flaws, although also potentially giving rise to an infringement of Article 6 ECHR,[66] were not the focus of attention in *Lawrence*. It is undisputed between the UKSC Justices that it was the third flaw pointed out by the Jackson Review that had the potential to render the CFA regime under the Access to Justice Act 1999 incompatible with Article 6 ECHR.[67] However, I will briefly point out in this section the four flaws identified by Sir Rupert Jackson because the fourth flaw has a material impact on the transposition, by the UKSC, of the recognition of the aim of achieving access to justice in *MGN* v. *UK* as a justification for the measure at hand. All the four flaws were also the ECtHR's starting point of analysis in *MGN* v. *UK*, discussed in the next section.

The first flaw identified by Sir Rupert Jackson was the lack of eligibility requirements for entering a CFA. Under the Access to Justice Act 1999, the only step for entering a CFA was finding a lawyer who was willing to take on the respective case. The same holds true as regards ATE insurances. The problem to which this situation gave rise was that wealthy companies and insurers who could bear their own legal costs would enter CFAs to avoid these legal costs and impose such a burden on consumers.[68] The imposition of these costs on consumers stems from the fact that, whilst these companies which entered CFAs would not have to pay any lawyer fees in advance, on top of that, the recoverability of CFAs shifted these costs towards consumers.

The second flaw of the scheme was that judicial control over the litigation costs, including the success fees, could only be made at the end of the proceedings. At that point, virtually all costs had already been incurred and it was no longer possible to reject them on grounds of unreasonableness. This flaw afforded parties (especially claimants) whose winning prospects were good the opportunity to 'free-ride' on legal expenses without the need to worry on how excessive they would be, since ultimately the losing party would pay. Furthermore, in case this party was covered by ATE insurance, the respective lawyers also would bear no costs.[69]

The third flaw of the CFA recoverability regime, as mentioned earlier, was its 'chilling' or 'blackmailing' effect. Given that the costs imposed on the losing party could be so high (hence the situation in *Lawrence*), defendants might have felt threatened by the possibility of losing (and thereby having to pay such costs). Such a hesitance could reach a point where the defendant would prefer to settle at an early stage even in cases where a meritorious defence could have been presented.[70]

The fourth flaw of the regime was the lawyers' ability to 'cherry pick' the cases in which they thought to have better chances of winning. This possibility undermined the main aim of the scheme to promote access to justice, since prospective claimants who did not pass the lawyers' case screening criteria would remain unrepresented for their claims.[71]

58 *Coventry* v. *Lawrence* [2015] UKSC 50.
59 *Ibid.*
60 *Lawrence* v. *Fen Tigers Ltd* [2011] EWHC 360 (QB).
61 *Coventry (t/a RDC Promotions) & Anor* v. *Lawrence & Ors (Rev 1)* [2012] EWCA Civ 26.
62 *Coventry* v. *Lawrence* [2014] UKSC 46.
63 *Coventry* v. *Lawrence* [2015] UKSC 50.
64 *Ibid.*
65 Sorabji, above n. 14, at 202; Zuckerman, above n. 8, at 1386-1388.
66 See below in Section 6.
67 *Coventry* v. *Lawrence* [2015] UKSC 50.
68 www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*

3.1.2 *Previous Recognition of Incompatibility of the System With the ECHR: MGN v. UK*

The compatibility of the CFA regime under the Access to Justice Act 1999 with the ECHR had been already subject to a ruling by the ECtHR, before *Lawrence*, in *MGN* v. *UK*.[72] In this case, which was among the legal arguments put forward by the defendant in *Lawrence*, a violation of the ECHR had been found. This case did not concern Article 6, but Article 10 ECHR. Such a difference in the legal basis for claims against a potential ECHR violation was one of the reasons upon which the majority of the UKSC, in *Lawrence*, distinguished it from *MGN* v. *UK*.[73] In short, the British tabloid newspaper *Mirror* published a front-page story about supermodel Naomi Campbell's supposed efforts to quit drug addiction with a picture of her disguising by wearing 'jeans and a baseball cap'. She then sued *Mirror*, who lost the case and was directed to pay her lawyer's success fees under the respective CFA.[74] *Mirror* challenged the compatibility of this ruling by the UK House of Lords with Article 10 ECHR. The claim was that the obligation to pay success fees was a violation of *Mirror*'s freedom of expression right. The ECtHR's starting point of analysis was the four flaws identified in the Jackson Review. The 'depth and nature of the flaws in the system' were deemed to impose a costs burden on defendants in defamation cases to such an extent that it prevented them exercising their freedom of expression.[75] Although these flaws were present in any type of lawsuit (i.e., not only defamation cases), the ECtHR ruled that the margin of appreciation afforded to Council of Europe (CoE) Contracting States to impose measures restricting freedom of expression had been violated by the United Kingdom. In this sense, the CFA regime under the Access to Justice Act 1999 was deemed incompatible with Article 10 ECHR.[76] *MGN* v. *UK* was a key case on which the defendant relied to argue the breach of Article 6 ECHR in *Lawrence*. It was also based on *MGN* v. *UK* that the UKSC decided that the regime sought to achieve the legitimate aim of pursuing access to justice.[77] This specific matter regarding *MGN* v. *UK* and the pursuit of access to justice as a legitimate aim for the CFA regime discussed here will be revisited below in more detail.

3.2 The UKSC's Assessment of (Non-) infringement of Article 6 ECHR

The main contention in this judgment was whether the regime of recoverability of additional liabilities under the Access to Justice Act 1999 infringed Article 6 ECHR. The defendant's argument focused on the fact that, under such a regime, 'non-rich' respondents may be held back from defending themselves in court given the blackmailing effect identified in the third flaw mentioned in the Jackson Review.[78]

The majority of the UKSC took a proportionality approach for assessing such a claim. After describing the outcome of *MGN* v. *UK*, the UKSC went on to explain (a) the differences between the margin of appreciation in an international human rights context, such as that of the ECtHR and in the assessment of legislative discretion by national courts; (b) how legislative measures, when they interfere in human rights, can still nevertheless be justified on grounds of necessity and proportionality.[79] The main case cited to draw the boundaries in which the proportionality test would take place is *Animal Defenders* v. *UK*. According to the ECtHR in *Animal Defenders* v. *UK*, governmental measures that pursue legitimate aims can be deemed compliant with the ECHR the more convincing the rationales for such a measure are.[80]

The majority of the UKSC then went on to analyse the concrete specificities of the recoverability regime under the Access to Justice Act 1999 to verify whether its interference in Article 6 ECHR was a necessary and proportional measure to achieve a legitimate aim. The majority of the UKSC accepted the aim of promoting access to justice as legitimate, given its previous recognition as such in *MGN* v. *UK*. In the majority's words, '[t]here was no dispute that the ban amounted to an interference with article 10 rights, was prescribed by law and pursued a legitimate aim. The issue was whether the interference was proportionate to the legitimate aim.'[81] Then, as to the necessity and proportionality of the scheme, the UKSC ruled that the foreseeability of the possible receivable amounts of CFA uplifts – guaranteed by Paragraph 11.9 of the CPD – was key to encouraging lawyers to enter CFAs in the first place. As the majority of the UKSC stated, '[i]f legal representatives knew that reasonable success fees were liable to be reduced on the grounds that, when added to the base costs, the total appeared to be disproportionate, this would have been likely to deter them from entering into CFAs.'[82] With regard to ATE premiums, the majority of the UKSC relied on the rationale provided for the recoverability of ATE premiums in *Rogers* v. *Merthyr Tydfil County Borough Council*.[83] In this latter ruling, the Court of Appeal deemed the ATE insurance market to be 'integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world'.[84] According to the UKSC, to allow for the revision of the costs of additional liabilities on grounds of infringement of Article 6 ECHR would bring uncertainty, thereby undermining the scheme's capability to achieve the sought aim of

72 No complaint was made regarding the obligation to pay the respective ATE premium.
73 *Coventry* v. *Lawrence* [2015] UKSC 50.
74 *Campbell* v. *MGN Ltd* (No 2) [2005] UKHL 61.
75 *MGN* v. *UK*, ECHR (2011) No. 39401/04.
76 *Ibid.*
77 *Coventry* v. *Lawrence* [2015] UKSC 50.
78 *Ibid.*
79 *Ibid.*
80 *Animal Defenders* v. *UK*, ECHR (2013) No. 48876/08.
81 *Coventry* v. *Lawrence* [2015] UKSC 50.
82 *Ibid.*
83 *Rogers* v. *Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134.
84 *Ibid.*

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promoting access to justice. The scheme was therefore deemed necessary and proportionate.[85]

4 The Post-LASPO Costs Regime and R (on the Application of Leighton) v. Lord Chancellor

One of the outcomes of the Jackson Review, also considering the four flaws identified, was the recommendation that the recoverability of additional liabilities should be removed.[86] This removal effected by the LASPO.[87] In this section, I will explain why, despite such a removal, it remains relevant to discuss the (lack of) accuracy of the *Lawrence* ruling in its assessment of infringement of Article 6 ECHR. In short, the reason is that the majority of the UKSC's reasoning in *Lawrence* made its way into the more recent case law regarding the compatibility of rules on litigation costs with Article 6 ECHR. Furthermore, LASPO also introduced key changes to the English legal aid system. As part of the cuts in the legal aid system for balancing public expenditure mentioned earlier, LASPO changed financial eligibility requirements for the granting of legal aid and excluded several areas of law from legal aid coverage. Regarding the cuts in the legal aid system, LASPO's aim was essentially to enhance the efficiency of public spending in this area.[88] With respect to the withdrawal of legal aid for certain areas of law, LASPO had the objectives of channelling resources to more important[89] cases and of increasing litigants' reliance on self-representation, private litigation funding and alternative dispute resolution mechanisms.[90]

Self-representation has indeed increased after the enactment of LASPO, most notably in family law cases.[91] It is out of the scope of this article to assess whether this increase in self-representation triggered by LASPO infringes Article 6 ECHR.[92] Nevertheless, three matters in that respect should be mentioned. Firstly, in *Steel and Morris* v. *UK*, the fact that the applicants had to repeatedly resort to self-representation influenced the ECtHR's ruling in finding a breach of the principle of equality of arms.[93] In addition, Sorabji points out two problems with the increase of self-representation that have recently triggered further debates in the realm of legal philosophy[94] concerning the commodification of justice, the latter topic being discussed more in-depth in Cordina's contribution to this Special Edition.[95] The first problem pointed out by Sorabji is that, since self-represented claimants may not have the required knowledge to present their case properly, judges often 'step down' from their neutral and passive role to assist the party in formulating their claim in legal terms.[96] This attitude undercuts one of the core justifications of the adversarial legal system – pushing it towards a more inquisitorial essence[97] – according to which such a system provides for better judicial impartiality.[98] The reason why judges 'stepping down' to assist one of the parties undercuts the adversarial character of proceedings is as follows. Under an inquisitorial legal system, the judge can trigger the bringing of evidence and then later rule on the evidence she summoned herself. This combination of roles places a significant hurdle on the ability to impartially assess such evidence. Since, under adversarial legal systems, all evidence is expected to be presented by the parties, such a hurdle does not exist. If, however, the judge 'steps down' to assist one of the parties, this combination of roles resembles that which exists in inquisitorial legal systems.[99] The second problem pointed out by Sorabji is the 'McKenzie friend' problem, which consists of litigants being assisted by people who are not qualified lawyers. Against properly represented parties, the disparity in the quality of legal representation that the 'McKenzie friend' problem gives rise to is the entrenchment of economic inequalities in the justice system.[100] In the long term, this entrenchment allows for the wealthier to exert control over such a system and set its terms of use.[101]

85 *Coventry* v. *Lawrence* [2015] UKSC 50.

86 www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf; Recoverability of ATE premiums is still possible under the conditions outlined by the Courts and Legal Services Act 1990, Section 58C.

87 N. Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (2018), at 155.

88 https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf.

89 '[I]mportance' is understood here as the appertainment of the case to matters regarding 'the individual's life, liberty, physical safety and homelessness' as well as the factor of involvement of the state in the dispute, see *Ibid.*

90 *Ibid.*

91 J. Sorabji, 'Austerity's Effect on English Civil Justice', 8 *Erasmus Law Review* 159, at 164 (2015).

92 For that purpose, see F. Hawken, 'Failed Justice: The Impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the Legal System of England and Wales', 24 *Coventry Law Journal* 129, at 129-35 (2019); E. Uncovska, 'The Impact of Legal Aid Cuts on the Right to a Fair Trial', 24 *Coventry Law Journal* 136, at 136-42 (2019).

93 *Steel and Morris* v. *UK*, ECHR (2005) No. 68416/01.

94 F. Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (2019), at 51-69; S. Agmon, 'Undercutting Justice – Why Legal Representation Should Not Be Allocated by the Market', 20 *Politics, Philosophy & Economics* 99, at 99-123 (2020); A. Sharon and S. Agmon, 'Justice and the Market', in A. Dorfman and A. Harel (eds.), *The Cambridge Handbook of Privatization* (2021) 85, at 85-101. For responses to these philosophical arguments, see M. Gilles and G. Friedman, 'Examining the Case for Socialized Law', 129 *Yale Law Journal* 2078, at 2078-2111 (2020); A. Higgins, 'What Price Are We Willing to Pay for the Dream of Equal Justice?', *Oxford Journal of Legal Studies* (forthcoming 2021).

95 A. Cordina, 'Is It All That Fishy? A Critical Review of the Prevalent Concerns Surrounding Third Party Litigation Funding in Europe', 14 *Erasmus Law Review* (2022).

96 Sorabji, above n. 91, at 165-7.

97 *Ibid.*

98 Agmon, above n. 94, at 108.

99 *Ibid.*

100 Sorabji, above n. 91, at 168. A similar problem exists in the United States, see D.L. Rhode, *The Trouble with Lawyers* (2015), at 38-51.

101 Wilmot-Smith, above n. 94, at 64. One flagship example in this sense is the legitimisation, in the United States, of the control of employees' proce-

You may still (and fairly so) ask yourself why I am raising all these concerns about a recoverability regime that is no longer in place. The reason is that, although the regime has been revoked by LASPO, the reasoning that guided the UKSC's ruling in *Lawrence* was reiterated in the 2020 High Court ruling in *R (on the application of Leighton)* v. *Lord Chancellor*. And it does not stop there. The High Court extended the reach of this reasoning beyond Article 6 ECHR to include the common law right of access to a court as well.[102] The High Court ruled that '[i]f the Article 6 challenge succeeds, the common law challenge will succeed, and vice versa'.[103] This latter statement is grounded on *Lawrence* coupled with *UNISON*. Lord Reed stated in *UNISON*, with regard to the common law right of access to a court, that 'the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve'.[104] However, this complete overlap between the criteria for assessing the infringement of Article 6 ECHR and the common law right of access to a court does not exist. It is true that proportionality plays a role in assessing, on a case-by-case basis, whether an infringement of the principle of equality of arms is the result of inadequacy between the interference in Article 6 rights and the state's means to achieve the aim supporting the measure scrutinised.[105] Nevertheless, as I will demonstrate in Sections 5 and 6, the criteria used by the UKSC in *Lawrence* for such an assessment is inadequate when equality of arms is at stake. Consequently, since equality of arms is a component of Article 6 ECHR, there cannot be a complete overlap between the criteria for assessing the infringement of Article 6 ECHR and the common law right of access to a court.

R (on the application of Leighton) v. *Lord Chancellor* was a case in which the High Court ruled on whether the fact that qualified one-way costs shifting (QOCS) was not applicable to claims regarding discrimination against people with disabilities meant a breach of Article 6 ECHR.[106] QOCS is a litigation costs regime for personal injury claims under which, in case the claimant loses the lawsuit, she will not have to pay for the defendant's costs. If the defendant loses, however, she will have to pay for the claimant's costs.[107] This regime was proposed in the Jackson Review as a substitute for the need for claimants to take out ATE insurance whilst still being safeguarded against a potential costs liability.[108] Regarding defendants, as Sir Rupert Jackson put it, '[i]t would be substantially cheaper for defendants to bear their own costs in every case, whether won or lost, than to pay out ATE insurance premiums in those cases which they lose.'[109] Although equality of arms was not clearly at stake in *R (on the application of Leighton)* v. *Lord Chancellor*, one of the arguments of the appellant was that the non-applicability of QOCS undermined the 'rebalancing costs liabilities between claimants and defendants'.[110] It is out of the scope of this article to discuss the correctness of the High Court's ruling in this case. I am not suggesting here that QOCS in any way breaches the principle of equality of arms under Article 6 ECHR.[111] But it is important to mention that the means through which the High Court found no breach of Article 6 ECHR was to follow the UKSC's ruling in *Lawrence*.[112] Thus, contending the *Lawrence* ruling remains relevant to discuss the future of equality of arms in UK constitutional and human rights adjudication.

5 Article 6 ECHR Is Not Limited to the Right of Access to a Court

In *Hamilton* v. *Al Fayed*, (then) Hale LJ said, 'I would not be so presumptuous as to assume that access to the courts and access to justice were synonymous.'[113] Perhaps not surprisingly, the now Lady Hale is one of the dissenting justices in *Lawrence* whose opinion I am going to in part defend. Therefore, I will now pose my first objection to the UKSC's assessment of (non-)infringement of Article 6 ECHR, which is intrinsically linked to Lord Clarke's dissenting opinion (with whom Lady Hale agreed): it limited the view on access to justice under Article 6 ECHR to the right of access to a court. The point about equality of arms which, in Lord Clarke's words, has 'great force' is the following quotation by Zuckerman about the ECtHR ruling in *MGN* v. *UK*:

The last point raises an issue of equality of arms. Equality of arms requires that both parties should be afforded an equal and reasonable opportunity to advance their respective cases under conditions that do not substantially advantage or disadvantage either side. Yet, an individual defendant without the benefit of a CFA is in a worse position than the CFA claimant because he is ex-

dural rights in arbitration to avoid class actions, see *Lamps Plus, Inc.* v. *Varela*, 587 U.S. ___ (2019).

102 *R (on the application of Leighton)* v. *Lord Chancellor* [2020] EWHC 336 (Admin).

103 *Ibid.*

104 *R (on the application of UNISON)* v. *Lord Chancellor* [2017] UKSC 51.

105 'The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. … It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings', see *Steel and Morris* v. *UK*, ECHR (2005) No. 68416/01.

106 *R (on the application of Leighton)* v. *Lord Chancellor* [2020] EWHC 336 (Admin).

107 Andrews, above n. 87, at 140.

108 www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

109 *Ibid.*

110 *R (on the application of Leighton)* v. *Lord Chancellor* [2020] EWHC 336 (Admin).

111 A proper discussion about the compatibility of QOCS with the right of equality of arms under Article 6 ECHR (considering *Steel and Morris* v. *UK* and not *Lawrence*) can be found in A. Higgins, 'A Defence of Qualified One Way Cost Shifting', 32 *Civil Justice Quarterly* 198, at 210-11 (2013).

112 *R (on the application of Leighton)* v. *Lord Chancellor* [2020] EWHC 336 (Admin).

113 *Hamilton* v. *Al Fayed* [1998] QB 1175.

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posed to the risk of having to pay as much as twice the claimant's reasonable and proportionate costs. The way in which the success fee is calculated compounds the inequality and the unfairness because the magnitude of the 'reasonable' success fee is in inverse proportion to the strength of the claimant's case. The riskier the claimant's case, the greater the success fee that his lawyer may legitimately charge. It follows that the stronger the defendant's prospect of success and the more he has reason to insist on his rights the more he would have to pay the claimant by way of success fee, in the event that the claimant wins.[114]

Regarding the claimant's Article 6 rights, one can say that the majority was correct to focus on the right of access to a court. Indeed, a CoE Contracting State's freedom to design its litigation financing system, including the latter's recourse to private funding, falls within the scope of such a right.[115] However, the majority's ruling makes unclear assertions about the defendant's Article 6 rights. It is explicitly acknowledged that the competing claims of both parties have Article 6 ECHR as their legal basis. Or, in other words, it is the claimant's Article 6 access to justice rights against the defendant's Article 6 access to justice rights. And although, as mentioned, on the side of the claimant the content of such a right is clear, on the side of the defendant this content is blurred.

Two passages of the majority's judgment even seem to steer this content towards equality of arms. The first passage is the assertion that 'at least in the absence of a widely accessible civil legal aid system (which had ceased to exist by 1999), it is impossible to devise a fair scheme which promotes access to justice for all litigants'.[116] I interpret this part of the judgment as acknowledging equality of arms as an aspect of access to justice under Article 6 ECHR. The reason why I interpret it in this way is because, in this context, 'fair scheme' would be one that does not suffer from the third flaw identified in the Jackson Review – the blackmailing effect caused by the possibility of having to pay additional liabilities. The second passage is the majority's assertion accepting that 'in a number of individual cases, the scheme might be said to have interfered with a defendant's right of access to justice'.[117] I also identify this passage as taking equality of arms into account for the same reasons as the first one. Its reference to the interference in Article 6 rights caused by the Access to Justice Act 1999 scheme is also grounded on the third flaw identified in the Jackson Review. In my view, disparities of legal costs are inherently associated with the third flaw identified in the Jackson Review since it is such a disparity that causes the blackmailing effect on defendants with less resources to fight in court. The same can be said with regard to the recoverability of ATE premiums in defamation cases. As pointed in the Jackson Review, under this recoverability regime, a wealthy superstar could take out ATE insurance before suing a small scandal sheet and the costs of the respective premium would be imposed on such a defendant.[118]

Nevertheless, the second part of the core of the majority's reasoning against the defendant's 'most sustained argument' limited access to justice under Article 6 ECHR to the right of access to a court. Such an argument requested the UKSC to rule that the amount of costs payable by the defendant should be calculated considering (a) all base costs, additional liabilities, as well as (b) the personal circumstances of the defendant[119] – contrary to what Paragraph 11.9 of the CPD provides. The (a) first request will be dealt with in the section below. As regards (b) the second request, the UKSC ruled that the ECHR did not require, in terms of legal costs, any regard for the personal circumstances of the parties.[120] Indeed, the extent to which individual financial conditions are considered by the ECtHR to assess the proportionality of legal costs can be quite narrow.[121] Be that as it may, the due proportionality of legal costs as a prerequisite of access to justice under Article 6 ECHR is an element of the right of access to a court, in the sense that such costs are legitimate as far as they do not impair the essence of such a right.[122]

That said, as explained in the first section of this article, access to justice also depends on party resources and equality of arms demands that, at the level of the individual lawsuit, both parties can effectively argue their case before a court. The case law of the ECtHR outlines the conditions under which the lack of litigation funding can be legally deemed to affect equality of arms negatively. In *Steel and Morris* v. *UK*, a case in which the applicants had been denied legal aid, the ECtHR held that a CoE Contracting State is not expected to achieve 'total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage'.[123] Therefore, the criteria to evaluate if the party's equality of arms is negatively affected by her ability to obtain funding is whether she is placed 'at a substantial disadvantage'. The ECtHR then ruled in *Steel and Morris* v. *UK* that, in that case, although in some procedural acts the applicants had been assisted by *pro bono* lawyers, such assistance was not enough to remove the disadvantage they faced given the complexities of the proceedings. Consequently, equality of arms was negatively affected – amounting to a violation of Article 6 ECHR.[124]

The reason why, in *Lawrence*, the dissenting justices found there to be a substantial disadvantage to the de-

114 Zuckerman, above n. 8, at 1399.
115 *Airey* v. *Ireland* App, ECHR (1979) No. 6289/73.
116 *Coventry* v. *Lawrence* [2015] UKSC 50.
117 *Ibid.*
118 www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.
119 *Coventry* v. *Lawrence* [2015] UKSC 50.
120 *Ibid.*
121 *Tolstoy Miloslavsky* v. *UK*, ECHR (1995) No. 18139/91.
122 *Ibid.*
123 *Steel and Morris* v. *UK*, ECHR (2005) No. 68416/01.
124 *Ibid.*

fendants was based on doctrinal scholarship quoted earlier already arguing for the incompatibility of the Access to Justice Act 1999 CFA regime with equality of arms as well as the disparities of legal costs present in the case.[125] The former reason is of course problematic because, as stressed throughout this article, if equality of arms is to be ruled on a case-by-case basis the system itself cannot be the object of analysis. As I said before, the disparities of legal costs, in their turn, are inherently associated with the third flaw identified in the Jackson Review since it is such a disparity that causes the blackmailing effect on defendants with less resources to fight in court. Again, the same can be said with regard to the recoverability of ATE premiums in defamation cases.

What was not pointed out clearly, however, and it is one of the main aims of this article to do so, is that the rationale behind the majority's assessment of non-infringement of Article 6 ECHR had only right of access to a court as its background. The reason why it did so, as mentioned, is because it relied on the fact that the ECHR does not require, in terms of legal costs, any regard for the personal circumstances of the parties. Even though this is not entirely true, that is the case when what is at stake is access to a court, not equality of arms.

For example, in *Tolstoy Miloslavsky* v. *UK*, in which the reasonableness of an order for security for costs was ruled on (and indeed the personal circumstances of the applicant were mentioned only marginally), the ECtHR stated that such a measure falls within the scope of regulations by the State that may interfere in the right of access to a court.[126] This same categorisation was given to a rule that made initial litigation costs proportional to the value of the claim regardless of other factors in *Weissman* v. *Romania*.[127] In this latter example, the ECtHR once again deemed this measure as a restriction of the right of access to a court that, although implied in the ECHR, may be subject to regulation by the state.[128] Differently from *Tolstoy Miloslavsky* v. *UK*, however, in this ruling the ECtHR stated that 'the applicant's ability to pay [the fees] and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court'.[129]

This narrow view falls short of entailing the full scope of the procedural guarantees of access to justice provided for by Article 6 ECHR and does not include equality of arms as a parameter. Therefore, in my view, the majority of the UKSC should have instead focused on whether the aforementioned disparities of legal costs were present. In the terms set by the ECtHR, this scrutiny would need to assess whether each party was 'afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary'.[130] To rule otherwise is to allow for a breach of the principle of equality of arms as outlined in *Steel and Morris* v. *UK*.

6 '[A]n Exercise of a Wholly Different Character'? Reading MGN v. UK Together With Steel and Morris v. UK

As explained in the third section of this article, the UKSC assessed infringement of Article 6 ECHR through a proportionality test taken from *Animal Defenders* v. *UK*, according to which governmental measures that pursue legitimate aims can be deemed compliant with the ECHR the more convincing the rationales for such a measure are.[131] The UKSC also stated that since this was not, like *MGN* v. *UK*, a case concerning Article 10 ECHR, a proper scrutiny of the parties' arguments required 'an exercise of a wholly different character'.[132] It was acknowledged that the ECtHR rejected the claim that the designing of such a system fell within the legislators' discretion since it was made after 'wide consultation' and sought to achieve the legitimate aim of achieving access to justice.[133]

Nevertheless, the type of compliance test then undertaken by the majority, although engaging in a more in-depth analysis of the legal context in which the system emerged, is still not in line with the need to take the principle of equality of arms into account. There are two reasons for this discrepancy, explained below. First, (a) even within the boundaries of such a test, it is not outright clear that the legitimate aim of providing access to justice can be achieved by the CFA regime under the Access to Justice Act 1999. Second, (b) the legal content of the principle of equality of arms demands that its infringement be assessed on a case-by-case basis, preventing analyses that focus on the system.

As regards the first reason (a), the UKSC ruled that the aim pursued by the CFA regime under the Access to Justice Act 1999 – achieving access to justice – was legitimate, since it was recognised as such in *MGN* v. *UK*.[134] Or was it? The UKSC's automatic transposition of the recognition of such a legitimacy seems too quick. As remarked by the UKSC itself, *MGN* v. *UK* was an Article 10 ECHR case rather than an Article 6 ECHR case.[135] Different from Article 10 ECHR, Article 6 ECHR does not have a list of derogating exceptions such as those provided for by Article 10(2) ECHR.

In *MGN* v. *UK*, the exception on which the ECtHR relied to deem the CFA regime under the Access to Justice Act 1999 a legitimate aim was 'the protection of the rights of

125 *Coventry* v. *Lawrence* [2015] UKSC 50.
126 *Tolstoy Miloslavsky* v. *UK*, ECHR (1995) No. 18139/91.
127 *Weissman* v. *Romania*, ECHR (2006) No. 63945/00.
128 *Ibid.*
129 *Ibid.*
130 *Steel and Morris* v. *UK*, ECHR (2005) No. 68416/01.
131 *Coventry* v. *Lawrence* [2015] UKSC 50.
132 *Ibid.*
133 *Ibid.*
134 *Ibid.*
135 *Ibid.*

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others'.[136] Since the system under analysis had as its objective the promotion access to legal services through recourse to private funding, the ECtHR accepted that the aim sought was legitimate.[137] However, the feasibility of attainment of this very same objective was put to doubt by the ECtHR later in the judgment due to the fourth flaw identified by Sir Rupert Jackson mentioned earlier:

The fourth flaw was the fact that the regime provided, at the very least, the opportunity, it not being possible to verify the confidential financial records of solicitors and barristers, to 'cherry pick' winning cases to conduct on CFAs with success fees. The Court considers it significant that this criticism by Jackson LJ would imply that *recoverable success fees did not achieve the intended objective of extending access to justice* to the broadest range of persons: instead of lawyers relying on success fees gained in successful cases to fund their representation of clients with arguably less clearly meritorious cases, lawyers had the opportunity to pursue meritorious cases only with CFAs/success fees and to avoid claimants whose claims were less meritorious but which were still deserving of being heard.[138]

With respect to the second reason (b), the UKSC also ruled that the recoverability regime under the Access to Justice Act 1999 was a proportional means through which to achieve the proclaimed objective of promoting access to justice.[139] The test used for reaching such a conclusion was taken from *Animal Defenders* v. *UK* but with a more in-depth analysis of the specificities of both the regime itself as well as the fact that it was a case concerning Article 6 ECHR.[140] For avoiding any doubt, the UKSC itself remarked in what is, in my view, the *ratio decidendi* of this ruling that, for the reasons explained in paragraphs 58 to 63, it was 'necessary to concentrate on the scheme as a whole'.[141] The reasons explained in paragraphs 58 to 63 are, in their turn, references to case law on why the margin of appreciation granted to legislators may, in some cases, inevitably deny rights to some if the justifications given for such a measure are appropriate, *Animal Defenders* v. *UK* being one of the leading cases.[142] Under European human rights law, this type of proportionality test is also called review *in abstracto*. It is a standard of review used by the ECtHR when competing rights are colliding. According to this standard, if the ECtHR case law is duly considered by national courts and legislators, and the quality of the legislative work and judicial review is deemed sufficient, the Contracting States enjoy a wider margin of appreciation in finding a balance between the competing rights concerned. This standard of review thus replaces the proportionality test *in concreto*, in which it is the ECtHR itself that analyses whether the measure at hand complies with its case law.[143]

As mentioned earlier, the justification relied on by the UKSC to dismiss the defendant's arguments was that, should there be room for discretion to consider *ex post* all base costs when calculating CFA uplifts, the uncertainty as to the receivable amount would discourage lawyers from entering CFAs in the first place, thereby undermining the whole system.[144] With regard to ATE premiums, the majority of the UKSC relied on the rationale according to which the ATE insurance market is 'integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world'.[145]

In this sense, the incompatibility of the UKSC's reasoning with the principle of equality of arms under Article 6 ECHR becomes clear. Although the UKSC said it would be performing 'an exercise of a wholly different character',[146] it is difficult to see how different it is from the original *Animal Defenders* v. *UK* except for the fact that the analysis of the system itself was more in-depth. At the end, both are relying on the proportionality and said legitimacy of the 'system as a whole' to justify the corresponding measures taken. But, again, if equality of arms is to be ruled at the level of the individual lawsuit, then one cannot rule on such a right taking the 'system as a whole' as its object of analysis. This becomes even clearer when comparing *Lawrence* with the above-mentioned case of *Ordre des barreaux francophones et Germanophone*, in which, instead of concrete personal circumstances of litigants, the discussion focused on legal rules in abstract (and therefore the principle of equality of arms was deemed not infringed).[147]

In the atypical situation of the *Lawrence* case, the rule that legitimised the ruling prevented the scrutiny of the individual lawsuit. When such a rule is in place, its incompatibility with the principle of equality of arms stems from its very essence: it is necessary to analyse the particularities of the imbalances between the parties at the level of the individual lawsuit to assess an infringement of the principle of equality of arms. That is the case here with Paragraph 11.9 of the CPD mentioned earlier. In my view, the UKSC did not deem this rule incompatible with equality of arms precisely because it analysed 'the system as a whole'. Therefore, this rule was viewed as an essential part of the overall scheme and as falling within the legislators' margin of appreciation, bypassing the fact that it prevented the scrutiny of individual cases considering equality of arms under Article 6 ECHR.

136 *MGN* v. *UK*, ECHR (2011) No. 39401/04.
137 D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (2014), at 662.
138 *MGN* v. *UK*, ECHR (2011) No. 39401/04 (emphasis added).
139 *Coventry* v. *Lawrence* [2015] UKSC 50.
140 *Ibid.*
141 *Ibid.*
142 *Ibid.*
143 O. Arnardóttir, '*Res Interpretata*, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', 28 *The European Journal of International Law* 819, at 835-8 (2017).
144 *Coventry* v. *Lawrence* [2015] UKSC 50.
145 *Ibid.*
146 *Ibid.*
147 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605.

On this point, it is worth mentioning that the principle of equality of arms as currently defined by the ECtHR has German origins,[148] and the domestic endorsement of rights as a precondition for their acceptance by national courts is embedded in the UK's legal culture. This translates into a judicial tendency to favour the legislative margin of appreciation in detriment of rights as defined by the ECtHR.[149] This does not mean that the principle of equality of arms has not, in the past, been defined more strictly in Germany itself. In his dissenting opinion in *Dombo Beheer BV* v. *Netherlands*, Judge Martens referred to the German interpretation of the principle of equality of arms. In doing so, he stated that such a principle 'can only have a formal meaning: both parties should have an equal opportunity to bring their case before the court and to present their arguments and their evidence'.[150] Nowadays, however, the German interpretation of the principle of equality of arms does impose an obligation on the State to provide for a minimum legal aid.[151]

7 Conclusion

Access to justice under Article 6 ECHR is not limited to the right of access to a court. Article 6 ECHR provides, among others, the procedural guarantee of equality of arms without which the right of access to a court cannot be exercised meaningfully. The recoverability of additional liabilities was introduced in the English legal system with the goal of removing costs barriers for potential claimants and shifting such a burden towards losing parties. This burden, in some cases such as *Lawrence*, gave rise to litigation costs that were considerably high. The threat of being liable for costs of such a magnitude acted as a potential deterrent either for parties bringing claims in the first place or for defendants to properly advance their arguments – thereby incentivising early settlement. The UKSC, in *Lawrence*, by adopting a narrow concept of access to justice, failed to acknowledge the role of equality of arms and did not give a proper weight to it in assessing the infringement of Article 6 ECHR, which, according to the dissenters, was caused by the disparities in legal resources present in the case.

From this perspective, *Lawrence* is an atypical case. As mentioned earlier, the rule that legitimised the ruling – Paragraph 11.9 of the CPD – prevented the scrutiny of the individual lawsuit and, in this sense, its incompatibility with the principle of equality of arms stems from its very essence. To say this is very different from ruling on the role played by Paragraph 11.9 of the CPD as a component of a system for allocation of legal costs. The use of a proportionality test that analyses the system a whole, such as that devised in *Lawrence*, is not appropriate for dealing with cases in which disparities in legal resources may be present. Equality of arms is to be ruled at the level of the specific lawsuit, not of an entire system for allocation of legal costs. This proportionality test was reiterated by the High Court in *R (on the application of Leighton)* v. *Lord Chancellor*, which extended its reach to entail the common law right of access to a court. It should, however, be abandoned. The procedural guarantee of equality of arms is jeopardised by this test, and it runs the risk of remaining neglected in future judgments should this proportionality test continue to be used.

148 J. Langbein, 'The German Advantage in Civil Procedure', 52 *The University of Chicago Law Review* 823, at 843 (1985).

149 N. Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism', in T. Campbell, K. Ewing & A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001) 120, at 128-9.

150 *Dombo Beheer BV* v. *Netherlands* (1993) No. 14448/88.

151 A. Stadler, 'Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?', in L. Cadiet, B. Hess & M. Isidro (eds.), *Privatizing Dispute Resolution: Trends and Limits* (2019) 209, at 224.

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