Contempt of court as a sanction for non-compliance with EU-wide court orders

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Introduction

Many years ago Lord Coke stated that "[q]uando lex aliquid alicui concedit, concedere videtur id, sine quo res ipsa esse non potest",[1] which means that when the law gives anything to anyone, it also gives those things without which the thing itself would be unavailable; in other words, it gives the means for obtaining it.

Some court judgments are merely declaratory and need no enforcement, such as a decree for divorce. Generally, however, a judgment against a person requires him to do or to refrain from doing something.[2] Judgements creating such legal obligations always demand acts of compliance. Such compliance can be voluntary. If it is voluntary, no problem arises. If it is not voluntary, however, the legal system must provide some remedy in order to overcome the respondent's denial to comply with the order of the court. Indeed, coercion is central to the very idea of the rule of law.[3]

Most judgments that create legal obligations are money judgments, under which a person is ordered to pay a sum of money. All legal sys-

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[1] *Franklin's case* (1594) 5 Coke 46 (b), 47(a); 77 ER 125, 126.

[2] Richard Meredith Jackson & J R Spencer, *Jackson's Machinery of Justice* (8th edn., CUP, 1989) 86.

[3] Carlo Giabardo, 'Disobedience of court orders and the image of the Judge: a comparative analysis' (American Association of Comparative Law Young Comparativist Committee IV Annual Conference Florida State University, College of Law, Tallahassee, 16-17 April 2015).

tems provide for enforcement mechanisms to force persons to render their available assets for the satisfaction of such judgments. Things get more complicated, however, in the case of non-monetary judgments, i.e. those judgments that order a person to do, or to abstain from doing, a specific act, such as orders for specific performance and injunctions. In those cases without adequate coercive tools able to influence and to guide human conduct, "jurisdictional power would be an empty illusion".[4]

A court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilised community. Without such protection, courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible.[5]

There are various mechanisms in the different legal systems that are used to force compliance with a court order. At the same time, no measure to secure enforcement of EU-wide judgments exists in EU law. The method that stands out from all others is "contempt of court" which is found in the common law world. Contempt of court may look like the ideal way of securing compliance with a court order because of its effectiveness. However, while plaintiffs' remedial rights must be protected, at the same time certain measures are necessary to address the potential for arbitrariness against defendants in imposing contempt sanctions.[6]

Contempt of Court in the Common Law Tradition

In the common law tradition, there is an inherent power vested in

[4] John Dobbyn, *Injunctions in a Nutshell* (West Publication Co., 1974) 216; see also John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (OUP, 2008) 116.

[5] James Francis Oswald, *Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process* (Butterworth & Company, 1910), p. 9.

[6] Margit Livingston, 'Disobedience and contempt' (2000) 75 *Wash L. R.* 345, 360.

the courts of justice to make sure that the administration of justice is not hampered by extraneous action.[7] Courts possess this inherent power to remove obstructions to the discharge of their work. The conventional description of such obstruction is called "contempt" and the mode of dealing with it is characterized as the power of courts to punish for contempt.[8] Moskovitz has described contempt as "the Proteus of the legal world assuming an almost infinite diversity of forms",[9] but equally it can be said that contempt of court is as diverse as are the means of interfering with the due course of justice.[10]

Contempt of court is of ancient origin yet of fundamental contemporary importance.[11] It has always served as a continuing protector of the fundamental supremacy of the law. Oswald tried to define 'contempt of court'. He said that it primarily signifies disrespect to that which is entitled to legal regard.[12] The rationale for the law on contempt was set out more specifically in the report of the Phillimore Committee, a committee under Lord Justice Phillimore, which presented its report on the law of contempt of court in December 1974:

> The law relating to contempt of court has developed over the centuries as a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally.[13]

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[7] Rajeev Dhavan, 'Contempt of Court and the Phillimore Report' (1976) 5 *Anglo-Am. L. R.* 186, 187.

[8] Felix Frankfurter, 'Power of Congress over procedure in criminal contempts in inferior federal courts—a study in separation of powers' 37 [1923-24] *HarvardL. R.* 1010,1023.

[9] Joseph Moskovitz, 'Contempt of injunctions, civil and criminal' (1943) 43(6) *Col L. R.* 780, 780.

[10] *A-G v Newspaper Publishing plc* [1988] Ch 333, 361; [1987] 3 All ER 276, 294 (Sir John Donaldson MR).

[11] C. J. Miller, *Contempt of Court* (3rd edn, OUP, 2000), p. 2.

[12] James Francis Oswald, *Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process* (Butterworth & Company, 1910) p. 1.

[13] Lord High Chancellor and Lord Advocate, *Report of the Committee on Contempt*

In other words, the law of contempt is designed to ensure that all citizens have unhindered access to effective, unbiased courts whose authority is respected, and that public confidence in the legal system is maintained. It also aims to ensure that no citizen can undermine the functions of the court, either by depriving the court of the ability fairly to decide the case or by hindering the enforcement of the courts' judgments.[14]

A distinction is drawn between two kinds of contempt: contempt by disobedience and contempt by interference; these are described as civil and criminal contempt, respectively. Contempt by disobedience, or civil contempt, consists in a failure to obey an order of the court. Contempt by interference, or criminal contempt, consists of an improper interference with the administration of justice which is not a disobedience of a court order.[15] Criminal contempt comprises a wide range of matters such as disrupting the court process itself, acts which risk prejudicing or interfering with particular legal proceedings, and acts which interfere with the course of justice as a continuing process.[16]

While on the face of it these distinctions between the two types of contempt are clear, in practice it can be difficult to determine whether a particular act amounts to a criminal or civil contempt. One of the reasons for this difficulty is that the law of contempt as a whole is concerned to uphold the due administration of justice, and it is obvious that disregard of a court order not only deprives the other party of the benefit of that order but also impairs the effective administration of justice.[17]

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of Court (Cmd 5794, 1974), p. 2.

[14] David Eady and A. T. H. Smith, *Arlidge, Eady and Smith on Contempt* (4th edn, Sweet & Maxwell, 2011) paras 2-8 and 2-9; Law Commission, *Contempt of Court (1): Juror Misconduct and Internet Publications* (Law Com No 340, 2013) para1.3.

[15] A. A. S. Zuckerman, *Zuckerman on Civil Procedure* (3rd edn, Sweet & Maxwell 2013) para 23.128.

[16] Ian Cram, Gordon Borrie, and Nigel Lowe, *Borrie and Lowe: The Law of Contempt* (4th edn, Lexis Nexis, 2009) para 1.2.

[17] Ian Cram, Gordon Borrie &Nigel Lowe, *Borrie and Lowe: The law of contempt* (4th edn, Lexis Nexis, 2009) para 6.72.

Contempt as a coercive process has been the child of equity. Since equity operates *in personam*, breach of an order based on equity does not mean the breaking of a legal rule but an act in contempt of court.[18] This is a complete contradiction of that which the Romans declared impossible, i.e. to coerce a man into a certain behaviour, a principle which still exists in the civil law tradition as it will be seen below.[19] The penalties for a civil contempt of court, which may be imposed cumulatively, include imprisonment, a fine, and sequestration of property.[20] The court also has power to bind over a contemnor to be of good behaviour, to grant an injunction restraining the repetition of the contempt, and to penalise the contemnor with an order to pay the costs of the committal proceedings.[21]

The general principle is that an order to do or refrain from doing an act is addressed to the party enjoined, who must be a party to the proceedings.[22] This, however, does not preclude parties not named in the order from breaching its terms. The basic rule applies, namely that an order is binding on any person having notice of the making of the order.[23] An order of the court should not be allowed to be set at naught and violated by any member of the public who assists in the breaking of it a person bound by the order.[24]

The reason for the effect on third parties is the principle that a person who, knowing of an injunction, aids and abets the party enjoined

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[18] Gary Watt, *Trusts and Equity* (OUP 2014) 447

[19] *Nemo potest praecise cogi ad factum*. See J. H. T., 'Contempt as a coercive process. A review' (1946) 32 (5) *Virginia L. R.* 1010, 1022.

[20] Sir Jack I. H. Jacob, *The Fabric of English Justice* (Stevens, 1987) 208; C J Miller, *Contempt of Court* (3rd edn, OUP, 2000) 4.

[21] David Eady & A. T. H. Smith, *Arlidge, Eady and Smith on Contempt* (4th edition, Sweet & Maxwell, 2011) para 14-1; Maurice Kay, Stuart Sime, and Derek French (eds) *Blackstone's Civil Practice 2013: The commentary* (OUP 2012) para 78.22; *Halsbury's Laws*, Vol. 22 (5th edition, 2009) para 111.

[22] Steven Gee, *Commercial Injunctions* (Sweet & Maxwell 2006), p. 541

[23] Brendan Kirwan, *Injunctions: Law and practice* (Thomson Round Hall, 2008), p. 771.

[24] Richard Kuloba, *Principles of Injunctions* (OUP 1987)19.

in committing a breach of it, is guilty, not of a breach of the injunction, but of a contempt of court tending to obstruct the course of justice.[25] The principle was established in *Seaward v. Paterson* when one Edwin Murray was committed to prison for a month for putting on a boxing context at 53 Fetter Lane knowing that the under-lessee had been enjoined from holding on the premises boxing contests which had been advertised under the name of meetings of the Queensberry Sports Club Ltd.[26]

Sanctions for Non-compliance with Court Orders in Continental Legal Systems

While the common law tradition maintains that judicial power to punish non-compliance with court orders under the doctrine of contempt of court is inherently and incontrovertibly necessary for the workings of a system of administration of justice, the civil law operates without a general concept of contempt; the concept is simply unknown.[27] There are laws in the continental systems which prohibit interference with the administration of justice. But a broad-ranging principle to the effect that any significant interference with the administration of justice is punishable under a broad doctrine such as contempt is not to be found.[28] Courts in civil law countries manage without it.[29]

Comparing the judicial penalties for non-compliance provided for in the civil law jurisdictions, such as the French astreinte and the German Zwangsgeld and Zwangshaft which are analysed below,[30] with

[25] Lawrence Collins, 'The territorial reach of Mareva injunctions' [1989] *LQR* 265.

[26] *Seaward v. Paterson* [1897] 1 Ch 545; William Williamson Kerr and John Melvin Paterson, *On the Law and Practice of Injunctions* (6th edn, W. W. Gaunt, 1927) 675; Lawrence Collins, 'The territorial reach of Mareva injunctions' [1989] *LQR* 265.

[27] Michael Chesterman, 'Contempt: in the common law, but not the civil law' [1997] *ICLQ* 521, 521.

[28] The Law Reform Commission (Australia), *Report no 35 (Contempt)* (Australian Government Publishing Service, 1987), p. 17.

[29] Robert Martineau (1981) 50 (4) *University of Cincinnati L. R.* 677, 677.

[30] German and French law were selected for this comparison as they are the ma-

the common law contempt of court, it seems that the two legal families have a different conceptual viewpoint in this area. The main reasons for this divergence are to be found in the role that courts and individuals have had in the society through the years. In other words, these ideological differences and, consequently, the differences between the methods of compliance with court orders between the two legal families is a product of history.

On the one hand, the common law tradition has a strong moralistic character. The Court of Chancery in England, which had jurisdiction over all matters of equity, had its very origin in the aim to interfere with the conscience of the party. Moreover, the fact that until 1529 the Lord Chancellor had always been a high ecclesiastic dignitary, that he exercised civil jurisdiction in his capacity of the Keeper of the King's Conscience, and that his devices were those used widely in ecclesiastic tribunals, contributed to the obliteration of a clear-cut line between the techniques of ecclesiastic and secular courts. On the other hand, as Pekelis explains, the philosophy of the civil law countries is that law has to do with the external behaviour of man in society and questions of conscience are reserved to the moral forum.[31]

Accordingly, German law does not have any distinct concept of contempt of court, nor does an equivalent term for contempt of court exist in the German legal language. German law, however, provides for remedies which can be compared to the consequences of contempt of court on two occasions. The first is when the judgment debtor does not perform an action which depends exclusively on him and cannot

jor representatives of the main legal families of civilian jurisdictions, namely the Germanistic and the Romanistic (See the distinction indicated by Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (OUP 1998) 73 which was based on the distinction in Pierre Arminjon, Baron Boris Nolde and Martin Wolff (eds), Traité de droit comparé, tome I (*LGDJ*, 1950) 47) as well as because Germany and France are the biggest players in the EU. English law was selected because it is the main representative of the common law tradition.

[31] A. H. Pekelis, 'Legal Techniques and Political Ideologies: A Comparative Study' (1943) 41 (4) *Michigan L. R.* 665, 677.

be taken by a third party (*unvertretbare Handlung*, section 888 of the *Zivilprozessordnung* or ZPO) and the second is when the judgment debtor violates his obligation to refrain from doing an action (*Unterlassung*) or to tolerate (*Duldung*) an action (section 890 of the ZPO). Upon an application by the judgment creditor, in the case of section 888 the court can order the payment of a coercive fine (*Zwangsgeld*) and in the case of section 890 an administrative fine (*Ordnungshaft*) and, in either cases, coercive detention (*Zwangshaft*) or both fine and detention.

As German law, French law too, possesses no law of contempt of court in the area of compelling compliance with court orders and has had to develop other mechanisms for the enforcement of judgments and other court orders.[32] The only comparable procedure is a distinctly different one: the so called astreinte. The French procedure of astreinte was first developed by judicial decisions but was formally established by Law 72-626 of 5 July 1972. It differs fundamentally from civil contempt in that only a civil remedy, the award of a sum of money, is ordered and not a penal sanction.[33] The astreinte is basically a private penalty that the defaulting party will have to pay to the aggrieved party and not to the State.[34]

Today, the astreinte is regulated by the French Code of Civil Enforcement Procedures (*Code des procédures civiles d'exécution* or CPCE). The statute of 1972 made the astreinte independent of damages and transformed it into a means of indirectly coercing a litigant to comply with a court order. It presupposes a judgment order of which it attempts to assure execution by threatening the judgment debtor with

[32] John Bell, Sophie Boyron & Simon Whittaker, *Principles of French Law* (OUP, 2008) 116; Catherine Elliot, Eric Jeanpierre and Catherine Vernon, *French Legal System* (2nd edin, Pearson/Longman, 2006), p. 183; Bernard Schwartz, *The Code Napoleon and the Common-law World* (The Law book Exchange Ltd., 1998) 129; Horatia Muir Watt, 'Injunctive relief in the French courts: a case of legal borrowing' [2003] *CLJUK* 573, 575.

[33] Michael Chesterman, 'Contempt: in the common law, but not the civil law' [1997] *ICLQ* 521, 545.

[34] George A. Bermann & Etienne Picard (eds.), *Introduction to French Law* (Kluwer Law International, 2008), p. 234.

the forfeiture of a sum of money if he does not comply.[35] Put otherwise, the astreinte is more a pressure than a method of enforcement, which may be awarded to the plaintiff together with, and on top of, actual damages.[36]

Non-compliance with Court Orders in the EU Law

Sanctions against non-compliance are not foreign to EU law. Article 55 of the Brussels I Regulation (recast) 1215/2012 reads as follows: "A judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin." The French version uses the term astreinte *and* the German text the term *Zwangsgeld.* It seems that the Regulation uses terms clearly anchored in national law (*astreinte, Zwangsgeld*) or descriptive (payment by way of a penalty*).* This diversity in wording is not surprising since sanctions against not compliance are not known in all EU countries.[37]

The above provision implies that a court having jurisdiction on the merits also has jurisdiction to issue a penalty for non-compliance, even though it accompanies an extraterritorial order. The sovereignty of the foreign state is protected by its recognition rules and by the fact that enforcement will take place pursuant to the rules applicable at the place where the coercive measure is to be effectively implemented.[38] Although it may be logical that the imposition of sanctions for non-

[35] George E. Glos, 'Astreinte in Belgian law' (1985) 13 *International J. of Legal Information* 17, 17; Edward Yorio & Steve The *Contract Enforcement: Specific Performance and Injunctions* (Aspen Publishers Online, 2011) 24-13.

[36] Konstantinos D Kerameus, 'Enforcement of non-money judgments and orders in a comparative perspective', in Arthur Taylor Von Mehren, James A. R. Nafziger & Symeon Symeonides (eds.), *Law and Justice in a Multistate World: Essays in honor of Arthur T. Von Mehren* (Transnational Publishers, 2002) 112.

[37] Petar Sarcevic& Paul Volken, *Yearbook of Private International Law* Vol. III(Walter de Gruyter, 2001) 265.

[38] Petar Sarcevic& Paul Volken, *Yearbook of Private International Law* Vol. III(Walter de Gruyter, 2001) 277.

compliance with judgments which are based on domestic law is also regulated by the national laws of the Member States, there is no reason why EU law does not have its own uniform procedure for enforcing EU-wide court orders which are granted based on EU legislation. This deficiency can be seen, for instance, in the recently introduced European Account Preservation Order ("EAPO") Regulation[39] which allows a litigant to obtain an order preserving a defendant's bank account upon proof that the defendant is likely to thwart the enforcement of a future judgment. In order to respect national procedures of enforcing and implementing equivalent orders in the Member States, the EAPO Regulation does not impose any specific sanctions for not complying with an order. Article 23 of the Regulation provides:

> 1.Subject to the provisions of this Chapter, the Preservation Order shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement.

Recital 23 further analyses this provision. It states that since enforcement structures for preserving bank accounts vary considerably in the Member States, the Regulation should build on the methods in place for the enforcement and implementation of equivalent national orders in the Member State in which the order is to be enforced.

It is argued that the lack of a common set of sanctions for non-compliance with orders based on EU legislation in all Member States, creates confusion and renders EU-wide court orders less effective. A counterexample of the current state of affairs in this area of EU law is the UNIDROIT Principles of International Commercial Contracts of 2010 which in Article 7.2.4 contain a provision allowing the court, at its discretion, to order the breaching party to pay a monetary amount to the aggrieved party if it does not comply with the order.[40]

[39] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

[40] The UNIDROIT Principles have chosen the model of the French astreinte.

The Effectiveness of Contempt of Court Power

As Remien and Paulus explain, in Germany, any other means of enforcing a judgment have priority over coercive measures. Any indirect coercive measure, i.e. fine and detention, is only permissible when the possibility of direct enforcement does not exist. Coercion against the person of the judgment debtor should be as minimal as possible. The aim of the enforcement provisions of the ZPO is to keep the judgment debtor himself out of the process as far as possible. In general, German law tries to refrain from coercive measures which aim to change a person's will.[41] The use of civil fines is also used in other legal systems belonging to the Germanic family, but has in fact ultimately found an even more restricted application in these jurisdictions.[42]

Moreover, another serious defect in the German armoury of enforcement of non-money judgments is that judgments are only effective between the parties concerned. Third parties cannot be held to have acted in contempt of court for impeding the effectiveness of court orders, as they can in the common law systems.[43]

Regarding the French astreinte, evidently, it is an institution substantially different from contempt of court. It is essentially a bluffing threat and does not really add to the dignity of the courts, at least as understood in the common law countries.[44] The comparison between them shows that the two legal systems retain different attitudes in the area of enforcement as they do not attach the same weight to the various specific aims that may be associated with the broad objective of protecting the administration of justice. Indeed, the French system attributes somewhat lower levels of importance to ensuring that court decisions are effective or that the general public has respect in general

[41] Oliver Remien, *Rechtsverwirklichung durch Zwangsgeld* (Mohr, 1992) 10; Christoph Paulus, *Zivilprozessrecht* (5th edn, Springer 2013) paras 672, 889, 894.

[42] Wendy Kennett, *The Enforcement of Judgments in Europe* (OUP, 2000), p. 165.

[43] Gerhard Dannemann, *An Introduction to German Civil and Commercial Law* (British Institute of International and Comparative Law, 1993) p. 106.

[44] A. H. Pekelis, 'Legal techniques and political ideologies: a comparative study' (1943) 41(4) *Michigan L. R.* 665, 671.

for the court system compared to the common law tradition. French law and practice, when looked at through common law spectacles, appear at first sight to be notably "soft" on non-compliance with court orders, particularly when the non-compliance is deliberate and overt.[45]

Additionally, an astreinte does not operate *in personam* and the judgment debtor can never be imprisoned for non-compliance with the order. Therefore, an astreinte will not be effective where the inadequacy of monetary penalties is due to the difficulty of collecting them.[46] Conversely, a civil contemnor in a common law jurisdiction will fear the prospect of a period in prison and more readily comply with an order. Instilling a court with the power to imprison those who do not comply with a court order arms the court with a strong coercive force. This is extremely important since the purpose in the area of enforcement is not to punish but to induce certain action or inaction from a litigant.[47]

It is argued that, had there not been contempt of court sanctions such as fine and imprisonment, orders to act or to refrain from acting would be converted into mere liability rules if the defendant was *only* forced to pay a substituted sum of money for failing to comply with his primary duty.[48] In the same vein, Lord Donaldson MR said in *Francome v. Mirror Group Newspapers Ltd*:

> It is sometimes said […] that all are free to break the law if they are prepared to pay the penalty. This is pernicious nonsense. The right to disobey the law is not obtainable by the payment of a penalty […]. It is not ob-

[45] Michael Chesterman, 'Contempt: in the common law, but not the civil law' [1997] *ICLQ* 521, 558.

[46] A. H. Pekelis, 'Legal techniques and political ideologies: a comparative study' (1943) 41(4) *Michigan L. R.* 665, 669.

[47] Jennifer Fleischer, 'In defense of civil contempt sanctions' (2002-2003) 36 *Columbia Journal of Law and Social Problems* 35, 58.

[48] See Guido Calabresi & A. Douglas Melamed, 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 (6), *Harvard L. R.* 1089, 1124 ("[W]e impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules").

> tainable at all in a parliamentary democracy, although different considerations arise under a totalitarian regime.[49]

Not surprisingly, given the potential sanctions of contempt of court, court orders in common law jurisdictions are in the vast majority of cases obeyed.[50] Contempt of court penalties are seen as the most effective means of ensuring compliance with a court order.[51] Therefore, someone may ask: Without the contempt power, what would deter obstruction to the administration of justice?[52]

It is suggested that lenient penalties such as procedural or monetary sanctions would allow defendants to weigh their options and determine whether in the long run it is to their greater detriment to accept the imposition of such sanctions or to comply with the orders. This, however, does not aid the court in its quest for justice. As it has been said, the court in the area of enforcement has no interest in imposing any penalties; it is only using its power as a means of coercion. Therefore, less powerful sanctions may prove ineffectual.[53] Contempt of court sanctions have the ability to lessen the pressure on courts resulting from the duty to supervise the execution of their decisions.[54]

Contempt of Court: A Potentially Oppressive Mechanism

The history of contempt procedures reveals an ongoing and overt tension between the view of contempt as an inherent and necessary weapon of courts to enforce their orders and the fear that courts will

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[49] *Francome v Mirror Group Newspaper Ltd* [1984] 2 *All ER* 408 (CA) 412.

[50] John Bell, Sophie Boyron, & Simon Whittaker, *Principles of French Law* (OUP, 2008), p. 116.

[51] Pierre Tercier, *Post Award Issues: ASA Special Series No 38* (Juris Publishing Inc, 2012) 80.

[52] Ronald Goldfarb, 'The history of the contempt power' [1961] 1 *Washington University L. R.* 1, 15.

[53] Jennifer Fleischer, 'In defense of civil contempt sanctions' (2002-2003) 36 *Columbia Journal of Law and Social Problems* 35, 59.

[54] Pierre Tercier, *Post Award Issues: ASA Special Series No 38* (Juris Publishing Inc., 2012), p. 80.

misuse their authority to punish unprotected individuals.[55] The contempt power was identified as potentially despotic long ago. Arbitrary excesses of the power have resulted in calls for procedural protection for those persons charged with contempt as well as for limitations on the types of sanctions that can be imposed upon persons found in contempt of court.[56]

The plaintiff, who may have suffered real prejudice by non-compliance, should not be shorn of what he deserves. On the other hand, the defendant, whose only "crime" is non-compliance, must not be unduly harmed.[57] In other words, plaintiffs' remedial rights must be protected while at the same time certain measures are necessary to address the potential for arbitrariness in imposition of contempt sanctions.[58]

Civil contempt does not constitute a criminal offence. However, as Arlidge, Eady, and Smith argue, proceedings for civil contempt are sometimes described as "quasi-criminal" because of the penal consequences that can attend the breach of an order. Some cases of civil contempt may merit imprisonment for a long period, and others can attract very high financial penalties. Because of such potentially serious consequences there has been a tendency towards assimilating civil with criminal contempt proceedings. This is partly because of concern that the safeguards that would normally be thought appropriate to criminal contempts should apply also to civil contempt, at least in serious cases. One might expect to find the courts in the common law tradition insisting upon the greater safeguards normally associated with the criminal trial process. In certain respects, this expectation has been fulfilled; most notably in relation to the standard of proof required, the

[55] Margit Livingston, 'Disobedience and contempt' (2000) 75 *Wash. L. R.* 345, 356.

[56] Robert Martineau (1981) 50 (4) *University of Cincinnati L. R.* 677, 677.

[57] James Brodeur, 'The injunction in French jurisprudence' (1939-1940) 14 *Tulane L. R.* 211, 218.

[58] Margit Livingston, 'Disobedience and contempt' (2000) 75 *Wash. L. R.* 345, 360.

opportunities afforded for legal representation, and the right to be properly heard.[59]

An important question is whether contempt of court sanctions for non-compliance are considered criminal in the eyes of the ECtHR. The traditional view is that fines imposed in order to secure compliance with a civil court decision do not constitute "criminal" sanctions under Article 6 of the ECHR.[60] Moreover, detention for "non-compliance with [a] lawful order of a court or in order to secure the fulfilment of an obligation prescribed by law" (Article 5(1)(b) ECHR) is distinct from the "lawful detention after conviction by a competent court" (Article 5(1)(a) ECHR). Thus, the guarantees provided by Article 6 for criminal proceedings do not apply to the imposition of sanctions for failure to comply with a court order.[61]

According to the case law of the ECtHR, for a sanction to qualify as "criminal" in the sense of Article 6 three elements need to be taken into account: whether the sanction belongs to criminal law under domestic law, the nature of the offence, and the severity of the sanction risked.[62] While the classification of the sanction under national law and the nature of the offence do not pose any difficulty, in light of the severity of the sanctions available in many countries, the continuing validity of the domestic decisions denying the "criminal" nature of sanctions in this context seems questionable.[63] Additionally, the ECtHR does not regard itself as being bound by the domestic characterisation as civil or

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[59] David Eady & A. T. H. Smith, *Arlidge, Eady and Smith on Contempt* (4th edn, Sweet & Maxwell, 2011) para 3-73.

[60] See *Krone Verlag GmbH and Mediaprint Anzeigen GmbH & Co KG v Austria* App no 28977/95 (Commission decision, 21 May 1997).

[61] Mads Andenas, Burkhard Hess & Paul Oberhammer (eds.), *Enforcement Agency Practice in Europe* (The British Institute of International and Comparative Law, 2005), p. 326.

[62] See eg *Schmautzer v Austria* (1995) 21 EHRR 511 [27]; *Öztürk v Germany* (1984) 6 EHRR 409 [50]; *Demicoli v. Malta* (1992) 14 EHRR 47 [31-34].

[63] Mads Andenas, Burkhard Hess & Paul Oberhammer (eds), *Enforcement Agency Practice in Europe* (The British Institute of International and Comparative Law, 2005), p. 326.

criminal.[64] Thus, there may come a time when the ECtHR will categorise such sanctions as truly "criminal", and therefore require the traditional safeguards referred to in Article 6.[65]

Someone may argue that the guarantees provided for criminal proceedings may render the civil contempt process less quick. Consequently, civil contempt sanctions will not sufficiently coerce obdurate defendants into complying with the court order.[66] This, however, does not mean that fairness must be undermined in favour of expediency. In other words, it is important that civil contempt exists in full vigour but it is equally important that it be not abused.[67]

In mature legal systems, committal to prison is most zealously and carefully checked and reserved only as an extreme measure necessary to preserve or otherwise protect rights, and even then, only when no other pertinent remedy is available. A court will commit a person to prison only if justice requires such a course to be taken, and it will not be taken if the position of the plaintiff has not been made worse by the contempt. Where there is another method of doing justice, recourse ought not to be had to imprisonment in aid of a civil remedy.[68] The label "civil" should not obscure the underlying "taking of liberty". Thus, imprisonment should be limited to cases in which it can be shown beyond a reasonable doubt after a fair trial that the judgment debtor is

[64] See *Benham v UK* (1996) 22 EHRR 293 (the decision of a judge in the United Kingdom to impose imprisonment for non-payment of poll tax was held to be "criminal", notwithstanding the fact that such proceedings are classified as civil under English law).

[65] David Eady and A. T. H. Smith, *Arlidge, Eady and Smith on Contempt* (4th edn, Sweet & Maxwell, 2011) paras 3-4.

[66] Margit Livingston, 'Disobedience and contempt' (2000) 75 *Wash. L. R.* 345, 360.

[67] *State ex rel. Attorney General v. Circuit Court* 97 Wis 1 (Wisconsin Supreme Court 1897.8).

[68] Richard Kuloba, *Principles of Injunctions* (OUP 1987) p. 20. As Lord Denning MR observed in *Danchevsky v Danchevsky* [1975] Fam 17 (CA) 22, "[w]henever there is a reasonable alternative available instead of committal to prison, that alternative must be taken".

fraudulently or wilfully refusing to comply with an order.[69]

Finally, coercive contempt fines can be set at a particular level based on the egregiousness of the violation, the need for prompt compliance, and the defendant's ability to pay. As such, they are likely to result in immediate obedience by the defendant, but at the same time be analogous to the defendant's behaviour.[70]

Conclusion

In order to maintain judicial effectiveness, it is suggested that we must demand respect for the court and its authority. In order to arrive at justice, we must compel compliance with orders of the courts. Civil contemnors seek to thwart this process, and despite their – sometimes – good intentions or personal fears, their actions hinder the judicial system. The court is well within its rights to issue what some may perceive as severe sanctions against the civil contemnor. Such sanctions are the court's sole means of coercing compliance and ensuring a just result.[71] This is why a mechanism analogous to contempt of court should be introduced in enforcing judicial orders based on EU legislation. This must happen, of course, within certain boundaries that secure the respondents' rights.

[69] See also Chester Darling, 'Imprisonment for debt in 1969' [1968-1969] 4 *Portia L. J.* 227, 239.

[70] Margit Livingston, 'Disobedience and contempt' (2000) 75 *Wash. L. R.* 345, 360.

[71] Jennifer Fleischer, 'In defense of civil contempt sanctions' (2002-2003) 36 *Columbia Journal of Law and Social Problems* 35, 63.