

**Judicial discretion and contempt power: two
elements of equity that would benefit the
EAPO and future EU-wide provisional and
protective measures**

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Abstract

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A person filing a civil claim faces the risk of being unable to enforce a favourable judgment. This is because their opponent may dissipate his assets and consequently be unable to satisfy a judgment given against him. Several mechanisms seek to alleviate this risk by preserving the defendant's assets pending judgment. These are predominantly the civilian in rem order and the common law freezing order.

Fundamental differences between the common and civil law traditions may be observed in the freezing order and its civilian counterpart. Primarily, these are to be found in the margin of discretion given to the judge and the sanctions against non-compliance. The latter issue is closely related to the entity against which an order is directed: in the common law it is directed against the person, while in the civil law, against the asset. The significantly diverse approaches in these areas show the different course each of the legal families has taken in the administration of justice.

The problem of preserving assets pending judgment becomes more complicated when the assets are not located in the same country as the courts with jurisdiction on the merits. The recently introduced European Account Preservation Order ('EAPO') regulation is a pre-judgment instrument which

enables a litigant to obtain an order preventing the transfer of funds held by the respondent in a bank account within the EU. It is the first of what may become several EU-wide provisional and protective measures. At first glance, the EAPO resembles the continental model rather than its common law counterpart, and, thus, brings into the open the differences between the two traditions in the area of provisional and protective measures.

This work examines whether the features of the common law tradition—which in fact derive from the law of equity—ie judicial discretion in granting or refusing relief and contempt of court sanctions, could improve the EAPO as well as other EU-wide provisional and protective measures that may follow. It is argued that greater judicial discretion and a contempt sanction, provided that they are kept within certain limits, would improve the EAPO and similar measures in terms of efficiency and fairness.

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The topic of my thesis has fascinated me. As Samuel Johnson said, the curiosity of the mind is never more usefully employed than in ‘examining the laws and customs of foreign nations’.² Indeed, to use the expression of a legal scholar, a planet with one culture, one language, and one legal system would be an ‘impoverished habitat’.³

I wish that, with the knowledge that I have acquired through my studies, I will someday be able to do something useful for my country, Cyprus. My hope is to be able to contribute somehow towards social unity, transparency, and justice either as a lawyer, an academic, or from any other post.

¹ B S Markesinis, *Writing for Myself* (Livanis, 2011) [Published in Greek] 492.

² James Boswell, *The Life of Samuel Johnson* (T Cadell and W Davies 1804) vol 1, 61.

³ Michele Graziadei, ‘The Functionalist Heritage’ in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (CUP 2011) 114.

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I. Asset preservation orders: an overview

1. Asset preservation orders in the different legal systems

a. Definition of asset preservation orders

‘Milking a dry udder gets you nothing but kicked off the milking stool,’⁴ said Eleanor of Aquitaine (the Queen) to her son, Prince John, in a movie version of Robin Hood, trying to explain that taxing people with no money would only cause trouble.⁵ Likewise, a plaintiff would not normally bring proceedings unless he⁶ is confident that the defendant has sufficient funds for satisfying a judgment. Modern technological developments, such as the possibility to transfer funds between bank accounts rapidly, allow the defendants to dispose of their assets very easily. Consequently, plaintiffs run a risk that by the time they attempt to enforce a favourable judgment—which they fought very hard to obtain—the defendant, who seemed to be solvent before the commencement of

⁴ *Robin Hood* movie (Universal Pictures 2010).

⁵ Nicolas Kyriakides, ‘A European-wide preservation order: how the common law practice can contribute’ (2014) 33 CJK 93.

⁶ For purposes of concision and convenience, the pronouns throughout this work are all in the masculine form.

proceedings, will be left with no assets to satisfy it, and, thus, the plaintiffs' investment in litigation will be worthless.⁷

In order to overcome this problem the majority of the legal systems have developed measures which are of provisional and protective nature,⁸ whereby a litigant may apply—usually without notice to the other party—for his opponent's assets to be preserved until the end of proceedings. When reference to these

⁷ A A S Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3d ed Sweet & Maxwell 2013) para 10.201. See also Peter Biscoe, 'Transnational Freezing Orders' (Magdalen College presentation, Oxford, 15 July 2011) 1.

⁸ As explained by Fouchard, Gaillard, and Goldman, the terms 'provisional measures' and 'protective measures' are often used interchangeably. The former expression, also referred to as 'interim relief', refers to the nature of the decision made; a provisional order is a decision which does not bind the court hearing the merits of the dispute, but supplies short-term relief pending final resolution at trial. The latter refers to the purpose of the decision, ie a protective ruling does not concern the substance of the case but instead the preservation of assets, evidence or a party's rights, in order to keep open the prospect of achieving justice at the end of proceedings. A protective measure will generally be provisional in nature. John Savage and Emmanuel Gaillard (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 709. See also Neil Andrews, *Andrews on Civil Processes* (Intersentia 2013) 215. Within the English version of the Brussels I system, as Pretelli indicates, it is common to refer to 'provisional, including protective, measures'. The question of whether the European concept includes measures of a protective nature that do not have a provisional character must be answered in the negative. Ilaria Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (Springer 2016) 101. As Hartley explains, although the text says 'provisional, including protective, measures', the Court of Justice of the European Union ('CJEU') seems to require that the measure in question be both provisional and protective. In other words, it must be only temporary and not final, and it must be intended to preserve the situation pending a final judgment. Trevor C Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (CUP 2015) 483. Accordingly, the Court has defined the measures in question as measures which are 'intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case'. Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149, para 34. This is repeated in recital 25 of the Brussels I (recast). Regulation (EU) 1215/2012, of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Recast) [2012] OJ L351/1. In this work, the phrase 'provisional and protective measures' is mainly used, while the term 'provisional, including protective, measures' is used when referring to the Brussels I system.

measures is made in a general context, the term ‘asset preservation order’ is usually used.⁹ In legal literature, an asset preservation order is usually defined as a measure which restricts a defendant from dealing with his own assets only. It does not include remedies which restrain the defendant from dealing with assets to which the plaintiff asserts title, such as the common law proprietary injunction.¹⁰ Asset preservation orders are available when there is a possibility that the defendant’s assets might be disposed of, jeopardising the satisfaction of a potential judgment against him. In other words, asset preservation orders are not to be granted in every claim, but only when there is a risk that attempts to vindicate substantive justice may be thwarted.¹¹

⁹ This term has been used by EU institutions as well as by scholars in the context of national and international law to define all types of such measures as a group. See eg Commission, ‘Proposal for a Regulation establishing a European Account Preservation Order’ COM (2011) 445 final; Neil Andrews, ‘Towards a European Protective Order in Civil Matters’ in Marcel Storme (ed) *Procedural Laws Towards Harmonisation in Europe* (Maklu Publishers 2003) 270.

¹⁰ See Burkhard Hess, ‘On making more efficient the enforcement of judicial decisions within the European Union’ (Study No JAI/A3/2002/02, Heidelberg, 2004) 120; Neil Andrews, ‘Towards a European Protective Order in Civil Matters’ in Storme *Procedural Laws in Europe: Towards Harmonization* (n 9) 270. As Zuckerman explains, by a proprietary injunction, the applicant seeks to restrain the respondent from disposing of assets which the applicant claims to be his own. An asset preservation order is designed to restrain the disposition of assets to which the applicant makes no proprietary claim. Zuckerman (n 7) para 10.208 (Cross-referencing in this work is only made for books and certain frequently cited journal articles). This work only deals with the latter category of remedies.

¹¹ See Burkhard Hess, ‘On making more efficient the enforcement of judicial decisions within the European Union’ (Study No JAI/A3/2002/02, Heidelberg, 2004) 129.

In the common law and civil law traditions¹² there are mainly two mechanisms which fall under this definition: the in rem asset preservation order, which mainly exists in civilian jurisdictions, and the freezing order, which is a creation of the common law¹³ judges. Recently, an EU-wide asset preservation order has been introduced—the European Account Preservation Order ('EAPO')—which allows litigants to obtain an order from a Member State in order to preserve¹⁴ assets in another Member State. This instrument, which has been the first attempt of an EU-wide provisional and protective measure, has many similarities with the type of asset preservation orders found in civil law systems.

In this introductory chapter, the common law and civilian asset preservation orders are briefly explained, followed by an analysis of extra-territorial asset preservation orders and the EAPO. The features of equity are

¹² According to Merryman and Pérez-Perdomo, the term 'legal tradition' or 'legal family' is distinguished from the term 'legal system'. A legal system is an operating set of legal institutions, procedures, and rules. A legal tradition is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather, it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. There are two highly influential legal traditions in the contemporary world: the civil law and the common law. John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (3rd edn, Stanford UP 2007) 1. See more on this subject below in this chapter.

¹³ In this work the term 'common law' is used to denote the legal tradition of English law as distinguished from the codified systems of continental Europe, referred to as 'civil law'. In some instances it is also used as the part of English law that is derived from judicial precedent rather than statutes.

¹⁴ In this work the verbs 'preserve', 'freeze', 'attach', 'block', and other verbs with a similar meaning as well as their corresponding nouns are used interchangeably.

subsequently explained, to draw attention to the main elements which differentiate asset preservation orders in the two legal families, this being one of the two tasks of this research. The chapter concludes by articulating the second research task: to determine whether the two elements found only in the common law tradition and specifically in the law of equity, ie judicial discretion and the contempt of court power, could add value to the EAPO as well as other attempts to introduce EU-wide provisional and protective measures that will probably follow.¹⁵

b. The common law freezing orders

In the second half of the twentieth century, as Neil Andrews explains, the English courts tried to tackle three obstructive tactics employed by litigants to

¹⁵ There is no specific proposal by any organ of the EU yet for further EU-wide provisional and protective measures apart from the EAPO. However, there are indications that this matter is being considered. In its Impact Assessment for the EAPO regulation, the Commission identified that there are problems in obtaining provisional and protective measures in cross-border cases, the latter being of crucial importance in debt recovery proceedings. Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters' SEC (2011) 937 final, 11. Various academics have also spoken of a 'uniform European protective order'. See Neil Andrews, 'Towards a European Protective Order in Civil Matters' in Storme, *Procedural Laws in Europe: Towards Harmonization* (n 15) based on his earlier article Neil Andrews, 'Provisional and Protective Measures: Towards an Uniform Protective Order in Civil Matters' (2001) 6 Uniform L Rev 931. According to Andrews, there should be an asset preservation order, an asset disclosure order, and an evidence preservation order. A similar suggestion was made by Burkhard Hess. Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 147. See also Gerry Maher and Barry J Rodger, 'Provisional and protective remedies: the British experience of the Brussels Convention' (1999) 48(2) *The Intl and Comparative L Q* 302, 338.

thwart justice, namely dissipating assets, destroying evidence, and absconding from the jurisdiction. Thus, in these procedural contexts three different types of remedies were developed: freezing, search, and passport impoundment orders respectively.¹⁶

In the area of dissipating assets, the Court of Appeal, first in the *Karageorgis* case¹⁷ and then in the eponymous *Mareva* case,¹⁸ both decided in 1975, developed the 'Mareva injunction'.¹⁹ Although acknowledging that the prior case of *Lister & Co v Stubbs*²⁰ had established that a court has no power to protect a creditor before he gets judgment, the Court recognised in those two cases the jurisdiction to issue a freezing injunction prohibiting the defendant from dissipating his assets with the intention or effect of preventing the plaintiff

¹⁶ Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Springer 2011) 151. These orders took the names of Mareva, Anton Piller, and Bayer orders after one of the first cases in which they were granted (*Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA); *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA); *Bayer AG v Winter and others* [1986] 1 All ER 733 (CA)).

¹⁷ *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093 (CA).

¹⁸ *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA) (hence the term 'Mareva injunctions').

¹⁹ In England and Wales, the order is now available under CRP 25.1(1)(f) which changed its name to 'freezing injunction.' In modern legal parlance the expressions 'freezing order' and 'freezing injunction' tend to be used indiscriminately. *White Book* (Sweet & Maxwell 2016) vol 1, para 25.1.25. Freezing orders are also available in the other common law jurisdictions of the EU: Ireland, Northern Ireland, and Cyprus.

²⁰ *Lister & Co v Stubbs* [1890] 45 Ch D 1 (CA) mentioned in the Mareva case. In the *Lister* case Lord Justice Cotton stated at page 13: 'I know of no cases where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.'

from enforcing a judgment that may in due course be given against the defendant.²¹ Lord Denning explained in *the Karageorgis* case that the jurisdictional basis of the new remedy was the statutory power to grant an injunction whenever the court believed that it was just or convenient:

There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 [later, section 37(3) of the Supreme Court Act 1981 and then, section 37(3) of the Senior Courts Act 1981] which says that the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case.²²

As it is explained below, the freezing injunction operates in personam. The respondent is ordered to refrain from dealing with his assets. However, dealing with the assets remains legally possible because the assets remain the respondent's property. The order does not give the applicant any security interest on the defendant's assets. If the respondent or any third parties do not

²¹ See *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399 [1]. See also Zuckerman (n 7) para 10.201; Maurice Kay, Stuart Sime, and Derek French (eds), *Blackstone's Civil Practice 2015: The Commentary* (4th edn, OUP 2015) para 38.1; *Halsbury's Laws* (5th edn, 2015) vol 11, para 595.

²² *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093 (CA) 1095. In Australia, as Steven Gee explains and it is further explained below, the Mareva jurisdiction is not placed on the jurisdiction to grant injunctions. It is part of a jurisdiction not based on statute but which is part of the inherent jurisdiction that a court can act by injunction so as to protect the integrity of its own process or in support of the due administration of justice. In England this principle of inherent jurisdiction is one of the justifications for the jurisdiction to grant Anton Piller relief (now 'search orders'). Steven Gee, *Commercial Injunctions* (6th edn, Sweet & Maxwell 2016) paras 1-009, 1-022. See also Steven Gee, *Mareva injunctions and Anton Piller relief* (4th edn, Sweet & Maxwell 1998).

comply with the order, they would be liable to be punished for contempt of court with fine, imprisonment, or sequestration of assets.

The freezing injunction has been recognised as a powerful tool for creditors.²³ It brought the English common law and those jurisdictions which follow it²⁴ into line with the practice of civil law countries (the *Arrest* in Germanic jurisdictions, the *saisie conservatoire* in French-based jurisdictions, and other similar remedies) and of the United States (the writ of attachment), and provided a remedy where one should always have been available.²⁵

c. The civilian in rem asset preservation orders

In civilian jurisdictions, as it is further explained below, asset preservation orders operate in rem. This means that the targeted asset is directly frozen and

²³ Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87 (CA) 92, characterised the freezing injunction as one of the law's two 'nuclear weapons', the other one being the search order. See also Richard N Ough and William Flenley, *The Mareva Injunction and Anton Piller Order: Practice and Precedents* (2d edn, Butterworths 1993) xi.

²⁴ Apart from Australia, Mareva injunctions were formally endorsed in Canada in *Chitel v Rothbart* (1982) 39 OR (2d) 513 (Ontario Court of Appeal) as well as the rest of common law jurisdictions. The Supreme Court of Canada blessed them in *Aetna Financial Services Ltd v Feigelman* [1985] 1 SCR 2, but cautioned that care should be exercised to avoid having them become a form of 'litigious blackmail.' [43].

²⁵ Lawrence Collins, 'The territorial reach of Mareva injunctions' (1989) 105 LQR 262, 263. See also David McClean, 'A Common Inheritance? An Examination of the Private International Law Tradition of the Commonwealth' in Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 1997) vol 260, 22; Robert C Effros, *Current Legal Issues Affecting Central Banks* (International Monetary Fund 1998) vol 5, 463; Philip R Wood, *Conflict of Laws and International Finance* (Sweet & Maxwell 2007) vol 6, para 10-002.

any transaction related to the asset is deemed to be invalid against the creditor.²⁶ The protective remedy of in rem preservation of assets traces its origins to the ancient Romans. Under Roman law, if a debtor avoided to appear before the court, he was summoned three times, with an interval of ten days between each summons, and if he still refused to appear, his goods were attached and put in the possession of his creditor.²⁷ This process was originally intended to compel the appearance of a person before the court.

Preservation of assets in rem also existed in England. The custom of foreign attachment, as it was called because it was directed against the property of a foreign or absent debtor, was recognised by the merchants of London and it was most likely in use long before the time of William I.²⁸ It was first certified in a case by Starkey, Recorder of London, in 1482.²⁹ If a citizen of

²⁶ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 120.

²⁷ Alexander Adam, *Roman Antiquities* (Lorenzo L Da Ponte and James Boyd eds, Keese & Co 1837) 153. See also Charles D Drake, *A Treatise on the Law of Suits by Attachment in the United States* (Little, Brown & Co 1891) 1; John Locke, *The Law and Practice of Foreign Attachment in the Lord Mayor's Court, Under the New Rules of Practice* (Sweet 1853) 1. For further analysis of this category of remedies see Theodor Muther, *Sequestration und Arrest im Römischen Recht* (Hirzel 1856) 23.

²⁸ It is sometimes said that the custom of foreign attachment in the City of London was a continuation of the custom in the Roman courts when London was under Roman occupation, but this may be dismissed as something out of the realm of legend. Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (The Lawbook Exchange 1952) 482.

²⁹ The earliest case in which the custom appears pleaded in the City of London is the case of *Bowser v Collins* (1482) YB Mich 22 Edw IV, fo 30, pl 11; 145 Eng Rep 97; Henry Rolle, *A General Abridgement of the Common Law* (Knightley D'Anvers ed, J Walthoe 1713) vol 2, fol 554, pl 4; Mr Serjeant Williams note on *Turbill's Case* (1667) 1 William's Saunders 67 as quoted in *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 (HL) 242.

London, as Gee explains, issued a plaint of debt in the Court of the Mayor and Aldermen of London and the defendant was not to be found within the jurisdiction of the court, the plaintiff was able to make an application to attach any belongings of the defendant, whether money, goods or debts in the hands of third parties, to be found within the jurisdiction of the court. The debt had to be owed in London and the defendant had to be foreign in the sense of being 'not civic', ie out of the jurisdiction of the London court.³⁰

The basis of the later attachment statute in England was the custom of London and similar customs of other cities including Bristol, Liverpool, and Chester.³¹ The first recorded legislation in England on the subject of attachment was that of May 16, 1699. This Act recognised and confirmed writs of attachment issued before that time. In 1723, Bohun wrote in his *Privilegia Londini* that '[b]y the custom of London, one may attach money or goods of the defendant either in the plaintiff's own hands or in the custody of a third person.'³² However, according to Gee, by the middle of the 19th century, the process of foreign attachment was riddled with fictions. The absence of notice to the defendant was contrary to modern notions of natural justice and the

³⁰ Gee, *Commercial Injunctions* (n 22) para 1-016.

³¹ James Kent, *Commentaries on American Law* (Little, Brown and Company 1867) 531. See also Woodthorpe Brandon, *A Treatise upon the Customary Law of Foreign Attachment: And the Practice of the Mayor's Court of the City of London* (Butterworths 1861) 1.

³² William Bohun, *Privilegia Londini: or the Rights, Liberties, Privileges, Law and Customs of the City of London* (3rd edn, D Browne and others 1723)) 253. See also John J McEvoy and Janet M Dine, 'Are Mareva injunctions becoming attachment orders?' (1989) 8 CJK 236, 236.

procedure raised difficulties as to the jurisdiction of the London court over defendants abroad. The procedure became obsolete in English law by the late nineteenth century³³ although it thrived in the United States.³⁴

In the United States, although a common law jurisdiction, the primary remedy against asset dissipation has traditionally been an in rem order. The American pre-judgment attachment is one of the statutory interim remedies that have existed since around 1700, when many New England colonists enacted attachment statutes based on the customs of London.³⁵

Indeed, the only major common law jurisdiction where the in personam freezing injunction has not flourished is the United States.³⁶ Nonetheless, some state courts have issued in personam freezing orders. The viability of freezing orders was the subject of the opinion of the Supreme Court of the United States in *Grupo Mexicano de Desarrollo v Alliance Bond Fund Inc.*³⁷ In a 5-4 opinion

³³ In 1881 when the House of Lords decided that foreign attachment did not apply when the garnishee was a corporation. *Mayor and Aldermen of London v London Joint Stock Bank* (1881) 6 App Cas 393.

³⁴ Gee, *Commercial Injunctions* (n 22) para 1-016. See also *Rasu Maritima SA v Perusahaan Pertambangan* [1978] QB 644 (CA) 657; Lawrence Collins, *The territorial reach of Mareva injunctions*, (1989) 105 LQR 262, 265.

³⁵ Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJQ 359. See also *Ownbey v Morgan* 256 US 94, 104 (1921).

³⁶ David Capper, 'The Need for Mareva Injunctions Reconsidered' (2005) 73(5) Fordham L Rev 2161, 2162.

³⁷ *Grupo Mexicano de Desarrollo v Alliance Bond Fund Inc* 527 US 308 (1999). Although the *Grupo Mexicano* case involved the jurisdiction of federal courts, it caused confusion in the state

authored by Justice Scalia, the Court noted that an asset-freezing procedure was a valuable procedural tool but concluded that federal courts' equity jurisdiction was confined to the English Chancery practice at the time of the adoption of the Constitution and the enactment of the Judiciary Act 1789, and the flexibility of equitable remedies should not be allowed to extend beyond the broad boundaries of traditional equitable relief. Freezing injunctions were not part of the law of equity at that time, and, therefore, Justice Scalia remarked that the decision whether federal courts should have the power to issue such orders should be left up to the legislature.³⁸

In France, as Gee notes, the French Code of Civil Procedure (*Code de Procédure Civile*), which entered into force in 1807, did not have any procedure for dealing with the risk that a defendant might dispose of his assets before the plaintiff could obtain judgement. Pothier, however, whose works were to have a profound influence on the Napoleonic codes, had listed among the modes of execution available at the time the *saisie arrêt*, an order which enabled a creditor to compel a third party indebted to the debtor to pay the creditor

court system. In order to remedy this lack of uniformity on asset freezing orders, the National Conference of Commissioners on Uniform State Laws ('NCCUSL', also called 'Uniform Law Commission', 'ULC') drafted in 2012 the so-called 'Uniform Asset Freezing Orders Act' which aimed to introduce itself to the state legislatures.

³⁸ *Grupo Mexicano de Desarrollo v Alliance Bond Fund Inc* 527 US 308, 318, 321, 333 (1999). Justice Ginsburg's dissent at page 322 posited that the increasing complexity of international transactions required an invocation of the 'grand aims of equity', conferring an expansive power in the federal courts to craft new remedies to deal with new problems. See also Stephen McCaffrey and Thomas Main, *Transnational Litigation in Comparative Perspective* (OUP 2009) 46.

instead. Pothier also observed that under article 144 of the Statutory Ordinance of Orleans, a plaintiff was able to obtain permission from a judge to effect a *saisie arrêt* even though the claim was based on a simple promise in dispute and not only after judgment was issued.³⁹ This procedure was a form of pre-judgement attachment, similar to the procedure of foreign attachment available by custom in the City of London.⁴⁰

Until 1955, continues Gee, a variety of particular seizures was available in France under specific articles of the Code of Civil Procedure, but whilst there were specific types of conservatory seizure (*saisies conservatoire*), there was no general regime for conserving a debtor's assets before judgement. In July 1950, reform of conservatory measures in France was discussed at a meeting of lawyers at Chambéry, and a proposed law was subsequently (1954) put forward to the National Assembly by Maurice Grimaud. This led to the enactment of the Law 55-1475 of November 12, 1955 which introduced *Mesures Conservatoires* into the Code of Civil Procedure. Amongst them was the overhauled *saisie conservatoire* whereby a creditor with a claim that appeared to be grounded could, in case of emergency, ask the court to freeze the assets of his debtor temporarily.⁴¹

³⁹ Robert Joseph Pothier, *Oeuvres Posthumes de M Pothier* (Chez de Bure 1778) vol 3, 195.

⁴⁰ Gee, *Commercial Injunctions* (n 22) para A2-002.

⁴¹ Gee, *Commercial Injunctions* (n 22) para A2-003. The words '*saisie conservatoire*' literally mean a 'conservative [or conservatory] seizure' or a 'seizure of assets so as to conserve them

In Germany, the *Arrest*, although it probably had a Roman origin and first traces of similar remedies can be found earlier in Italy and France, it was basically developed and took its current shape through the judicial practice in Germany.⁴² In early times, *Arrest* was voluntarily agreed between the litigating parties as a way to secure an eventual judgment.⁴³ Later on, it became compulsory in favour of the creditor, while its compelling effects were initially against the person and only afterwards it was directed against the property.⁴⁴

As Quentin explains, the institution of *Arrest* already existed and was used in Germany during the Middle Ages. Escape and complications of enforcement were part of the everyday life, and, thus, practitioners tried to codify all the cases where *Arrest* was available. In the beginning, *Arrest* was only known by a

for the creditor in case he should afterwards get judgment.’ Lord Denning, *The Due Process of Law* (OUP 2005) 133; May Lee, ‘Prejudgment Attachment in England: The Mareva Injunction’ (1982) 5 *Loy LA Intl & Comp L Rev* 143, 143. The *saisie conservatoire* is now regulated by sections 523ff of the Code of Civil Enforcement Procedures (*Code des Procédures Civiles d’Exécution*, ‘CPCE’). The CPCE came into force on June 1st, 2012. It has codified most of the statutes in the field of enforcement of civil judgments including Law 91-650 of July 9, 1991 ‘Reforming the civil procedures of execution’ and its implementing Decree 92-755 of July 31, 1992 ‘Establishing new rules relating to the civil procedures of execution giving effect to Law 91-650 of July 9, 1991 reforming the civil procedures of execution’.

⁴² Hieronymus von Bayer, *Theorie der summarischen Prozesse* (7th edn, Verlag der Literarisch–Artistischen Anstalt 1859) 85; Arthur Engelmann, *A History of Continental Civil Procedure* (Robert Wyness Millar tr and ed, Little Brown & Co 1927) 585; Otto Friedrich von Gierke, *Deutsches Privatrecht* (Duncker & Humblot 1895) vol 1, 330. See also Adolf Wach, *Der Italienische Arrestprozess* (Kessinger Publishing 2010) discussed in Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (OUP 2011) 23.

⁴³ Pontes de Miranda, *Historia e Pratica do Arresto Ou Embargo* (Saraiva e Cia 1929) 25.

⁴⁴ Julius Wilhelm von Planck, *Das deutsche Gerichtsverfahren im Mittelalter: nach dem Sachsenspiegel und den verwandten Rechtsquellen* (Schwetschke 1879) vol 2, 367; Hans Planitz, ‘Studien zur Geschichte des deutschen Arrestprozesses’ (1919) 40(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 49.

limited number of lawyers, but in the course of time it became more popular due to the change of commercial circumstances. Especially in the cities, *Arrest* was commonly used, and the codifications of the empires assumed its existence, but did not set any specific regulations on it.⁴⁵ Ultimately, the *Arrest* was included in the German Code of Civil Procedure (*Zivilprozessordnung*, 'ZPO') in 1879.⁴⁶

2. Extra-territorial asset preservation orders and the EAPO

a. The need for extra-territorial asset preservation orders

Not infrequently, a litigant may wish to block, in advance of judgment, his opponent's assets located in another country. This may happen because the latter has insufficient assets in the state whose courts are competent for deciding the case on its merits. However, the extra-territorial effects of asset preservation orders implicate concerns of sovereignty and other national policies, making the law surrounding them extremely complicated.⁴⁷

⁴⁵ A H Quentin, 'Bemerkungen über das Prinzip des gemeinrechtlichen Arrestes' [1840] 23 *Archiv für die Civilistische Praxis* 240.

⁴⁶ The *Arrest* is now regulated by ZPO sections 916ff.

⁴⁷ Oscar Chase and others, *Civil Litigation in Comparative Context* (West Academic Publishing 2007) 317.

Many countries, under certain conditions, exercise jurisdiction to order provisional and protective measures in relation to act or things abroad.⁴⁸ Within the EU, in order to freeze a party's assets in another Member State, a litigant has mainly two options: Firstly, he may apply to the courts of the Member State which have jurisdiction as to the substance of the matter, for a provisional and protective measure to preserve the other party's assets in a foreign jurisdiction and then attempt to enforce it in that foreign jurisdiction. In the common law jurisdictions of the EU,⁴⁹ this is mainly possible by issuing a Worldwide Freezing Order ('WFO').⁵⁰ Under article 36 of the Brussels I Regulation (recast), a judgment granted in a Member State will automatically be recognised in another Member State. Moreover, as article 39 stipulates, a judgment which is enforceable in the Member State in which it was granted is immediately

⁴⁸ Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Clarendon Press 1994) 80.

⁴⁹ England and Wales, Northern Ireland, Ireland, and Cyprus.

⁵⁰ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 135. A Worldwide Freezing Order was first granted in *Republic of Haiti v Duvalier* (No 2) [1990] 1 QB 202 (CA). However, in order not to infringe any foreign jurisdiction or affect any third parties holding assets abroad, various cases have imposed guidelines and a number of conditions to be satisfied before a party is allowed to enforce a WFO in a foreign jurisdiction. See eg, in England and Wales, the Babanaft proviso, first explained in *Derby & Co Ltd v Weldon* (Nos 3 and 4), [1990] Ch 65 (CA) and then in *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA), the Baltic proviso explained in *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673 (QB), the Dadourian guidelines set out in *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399, [2006] 1 WLR 2499 (CA), etc. See also Lawrence Collins and others (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) paras 8-014ff; Pippa Rogerson and John Collier, *Collier's Conflict of Laws* (CUP 2013) 215; Zuckerman (n 7) paras 10.238ff; Richard Fentiman, *International Commercial Litigation* (OUP 2015) 562. Worldwide asset preservation orders are not available in continental jurisdictions. See Peter F Schlosser, 'Coordinated Transnational Interaction in Civil Litigation and Arbitration' (1990) 12 Michigan J Intl L 150, 152.

declared enforceable in another Member State. 'Judgments' as defined by article 2 contain provisional, including protective, measures, and, thus, asset preservation orders ordered by a court which has jurisdiction as to the substance of the matter.

However, in *Denilauler v Couchet Frères*, the CJEU held that judgments can be recognised and enforced in another Member State only if they have been the subject of 'an inquiry in adversary proceedings' in the Member State of origin, ie they were not granted without notice to the respondent.⁵¹ This position is now also reflected in article 2 of the Brussels I Regulation (recast). It follows that asset preservation orders granted *ex parte* cannot be recognised and enforced outside the jurisdiction unless they were obtained after notice has been given to the respondent or the respondent had the opportunity to contest the order subsequently after being served with it. This restrictive position undermines the efficient protection of parties who apply for asset preservation orders because they are deprived of the essential 'surprise effect' of these orders.⁵²

⁵¹ Case 125/79 *Denilauler v Couchet Frères* [1980] ECR 1553, [1981] 1 CMLR 62; Lawrence Collins, 'The territorial reach of Mareva injunctions' (1989) 105 LQR 262, 291. A number of later cases confirmed that the simplified enforcement scheme is only available for judgments where the proceedings have had an adversarial nature. See eg Case C-394/07 *Gambazzi v Daimler-Chrysler Canada Inc* [2009] ECR I-0000 and Case C-514/10 *Wolf Naturprodukte GmbH v SEWAR spol sro* [2012] ECR I-0000.

⁵² Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 138.

Secondly, the plaintiff may pursue a preservation order directly in the state where the assets are situated under the foreign procedural law even though the courts of that state do not have jurisdiction as to the substance of the matter. This is possible under article 35 of the Brussels I Regulation (recast). Nevertheless, recourse to different jurisdictions entails delays and the respondent might be alerted that a preservation order is sought against him, and, thus, transfer his assets out of the reach of the applicant.⁵³

These complications and inefficiencies make litigants within the EU less inclined to seek an asset preservation order in a cross-border dispute than in a domestic one. In addition, the differences between the mechanisms preserving assets in the different Member States, discourage litigants and the lawyers advising them from seeking asset preservation orders in cross-border cases.

⁵³ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 138. Also, the granting of a provisional and protective measure is subject to the existence of a real connecting link between the subject matter of the order and the territorial jurisdiction of the court granting the order based on the *Van Uden* case decided by the CJEU. See Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091. In the English case *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* [2007] EWCA Civ 662, [2008] 1 WLR 1936, [2007] ILPr 51, a case involving an application of protective measures in the context of the enforcement in England of an Italian judgment, the English Court of Appeal granted a domestic freezing injunction, but refused to make a worldwide order on the basis that there was no connecting link between the subject matter of a measure directed at assets abroad and the territorial jurisdiction of the court. cf *Motorola Credit Corp v Uzan* (No 2) [2004] 1 WLR 113 (CA) where a worldwide order was granted in support of substantive proceedings in New York against a defendant who, although domiciled in Turkey, had substantial assets in England. The Court granted the measure on the mere fact that there was such a connecting link to England. In *Royal Bank of Scotland plc v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm), the link was not to the territory of England but, rather, to the English law and English exclusive jurisdiction clauses in the agreements between the parties. Burkhard Hess, Thomas Pfeiffer, and Peter Schlosser, 'Report on the Application of Regulation Brussels I in the Member States' (Study JLS/C4/2005/03, Heidelberg, 2007) 304.

Firstly, the conditions required under national laws for obtaining and enforcing asset preservation orders vary throughout the EU. For example, in all Member States the applicant must prove the existence of a claim on the merits. However, the standard of proof varies: in Belgium, the applicant must only provide sufficient evidence to establish that the claim exists, in Portugal and Spain a *prima facie* standard applies, while in England and Wales the applicant must present a 'good arguable case'.⁵⁴

Furthermore, in most Member States, it is difficult for a party to obtain information regarding the whereabouts of his opponent's assets if he does not have that information. The reason for this lack of transparency is that the central registers containing the relevant information are inadequate.⁵⁵ This causes problems, since in some Member States, such as Austria and Germany, the applicant needs to specify the assets targeted for seizure in order to apply for a preservation order.⁵⁶ Consequently, the applicant has to turn to private investigation agencies in order to find out information about the respondent's

⁵⁴ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 129.

⁵⁵ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 26.

⁵⁶ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 132.

assets. These services are not only costly, but they do not offer a guarantee of success, especially to a foreigner.⁵⁷

The differences between the national enforcement systems are equally deterring for obtaining asset preservation orders in cross-border disputes. As explained in a study carried out by Burkhard Hess in 2002 on 'making more efficient the enforcement of judicial decisions within the European Union', apart from variations in the speed of enforcement, and the position of the debtor, another key difference relates to the competent authorities.⁵⁸ Differences also exist as to who is responsible for serving the order on the respondent, how much time the respondent has to implement the order, and how long the order remains in force.⁵⁹

Finally, the costs of obtaining and enforcing an asset preservation order in a cross-border dispute are higher than in domestic cases. If an asset

⁵⁷ Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters' SEC (2011) 937 final, 16.

⁵⁸ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 131. See also Burkhard Hess, 'Comparative Analysis of the National Reports' in Mads Andenas, Burkhard Hess, and Paul Oberhammer (eds), *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) 31.

⁵⁹ Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters' SEC (2011) 937 final, 20.

preservation order must be obtained in a Member State other than the one which has jurisdiction on the substance of the matter, the applicant will need lawyers licensed to practise in two jurisdictions to represent him.⁶⁰ Of course, the applicant will, at some point, need a lawyer in the other jurisdiction too, for the enforcement of the final judgment, if the defendant has assets in that jurisdiction. However, extra costs so early in the litigation process are a disincentive for the litigant to apply for an asset preservation order in a cross-border case.

b. The EAPO

The above factors, identified long ago, have prompted the EU legislators to take action in the area of asset preservation orders in cross-border disputes. The Commission noted this need in its 1998 Communication 'Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union'.⁶¹ In view of the diversity of the Member States' legislation and the complexity of the subject, the Commission proposed to confine reflection initially to the problem of

⁶⁰ Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters' 17, SEC (2011) 937 final.

⁶¹ Commission, 'Communication to the Council and the European Parliament Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union' COM (1997) 0609 final.

bank accounts. The Council endorsed this approach in its 2000 Program of Mutual Recognition.⁶² Indeed, in practice, plaintiffs regard bank accounts as priority targets for asset preservation orders because of their high net value. At the same time, the preservation of a bank account is a sensitive matter for the respondent because the funds in bank accounts are often essential to ensure the livelihood of private persons and are of vital importance for businesses. Moreover, the extra-territorial preservation of a bank account seems to involve less sovereignty concerns than the preservation of other assets in a foreign state such as land or buildings.

The Commission conducted various studies and consultations with experts and other key-players. In 2006, it adopted a Green Paper on improving the efficiency of the enforcement of judgments in the EU through the attachment of bank accounts.⁶³ In 2008, it adopted another Green Paper related to the enforcement of judgments, on the Transparency of Debtors' Assets.⁶⁴ Finally, in the Stockholm Programme of December 2009, which set freedom, security, and justice priorities for 2010 to 2014, the European Council invited the Commission to assess the need for certain provisional and protective measures at Union

⁶² Council, 'Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters' 2001/C 12/01.

⁶³ Commission, 'Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts' SEC (2006) 1341.

⁶⁴ Commission, 'Green Paper on Effective Enforcement of Judgments in the European Union: The Transparency of Debtors' Assets' COM (2008) 128 final.

level, to prevent, inter alia, the disappearance of assets before the enforcement of a claim.⁶⁵ Therefore, after examining and rejecting other options, such as the harmonisation of national rules for the preservation of bank accounts, the Commission decided in 2011 to propose the EAPO regulation.

The text was finalised in May 2014 and the new EAPO regulation⁶⁶ was published in the Official Journal of the EU on June 27, 2014. As confirmed in article 54, the Regulation entered into force on the twentieth day following that of its publication in the Official Journal and applies from January 18, 2017. It applies automatically to all Member States except the United Kingdom⁶⁷ and Denmark, both of which have chosen not to opt in.⁶⁸ The Regulation has

⁶⁵ Council, 'The Stockholm Programme - An open and secure Europe serving and protecting citizens' (5731/10, Brussels, 3 March 2010) 32.

⁶⁶ 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 [2014] OJ L189/59. See also Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

⁶⁷ While this work is being drafted, the United Kingdom is still a Member State of the EU. In the event of the United Kingdom leaving the EU there are concerns that EU law might lose the influence of the common law tradition and the common law tradition could lose the influence of EU law, an interconnection that is mutually beneficial.

⁶⁸ On 31 October 2011 the United Kingdom's government, although it initially welcomed the Commission's proposal ('Impact Assessment on proposed EU Regulation creating a European Account Preservation Order to Facilitate Cross-border Debt Recovery in Civil and Commercial Matters' (MOJ109, 2011)), it announced by way of a written Ministerial Statement to the House of Commons its decision not to opt in to the proposed regulation because the Government's recent consultation revealed significant problems, including a concern that there was a lack of adequate safeguards for defendants. However, it stated that it will participate in the forthcoming negotiations with a view to opting in in the future (HC Deb 31 October 2011, col 28WS). In February 2013 the European Scrutiny Committee of the United Kingdom's Parliament examined

established a new and self-standing EU-wide procedure for the preservation of bank accounts, which enables a creditor to prevent the transfer or withdrawal of his debtor's assets in any bank account located in the EU. According to recital 7 of the Regulation, the preservation of funds in the debtor's account should have the effect of preventing not only the debtor himself, but also persons authorised by him to make payments through that account. The procedure is available to citizens and companies as an alternative to procedures existing under national law.

As noted in a report produced by the working group on provisional and protective measures of the 'ELI-UNIDROIT Rules of Transnational Civil Procedure' project, the EAPO regulation represents a major shift towards a specific approach. For decades, harmonisation efforts have attempted to work at an unreasonable level of generality. It is submitted that this largely explains why the results of these efforts have often been disappointing. Provisional and protective measures are very diverse. They serve different functions, and, thus, logically, have different requirements and produce different effects. Consequently, in many legal systems, there are very few rules common to all provisional and protective measures. Provisional and protective measures vary also considerably from one national legal order to another. Thus, the new

a letter by the Ministry of Justice regarding the EAPO and stated that 'several developments have gone the UK's way', but there are still 'significant concerns' about various issues of the proposal.

approach on particular measures promises to be more fruitful.⁶⁹ In this respect, the comparison between previous efforts of harmonisation and the EAPO regulation is enlightening. Previous efforts resulted in a limited number of principles which were highly general. The EAPO regulation offers a detailed legal regime governing one particular provisional and protective measure.⁷⁰

An EAPO is only available in the context of pecuniary claims in civil and commercial matters in cross-border cases. Article 3 of the EAPO regulation defines a cross-border case as one in which the bank account to be preserved by the EAPO is maintained in a Member State other than the Member State of the court where the applicant may apply for an EAPO or the Member State in which the applicant is domiciled.⁷¹

⁶⁹ cf Robert Magnus in Loïc Cadiet, Burkhard Hess, and Marta Requejo Isidro (eds), *Procedural Science at the Crossroads of Different Generations* (Nomos Verlagsgesellschaft 2015) 44 on the issue of recognition and enforcement of judgments: 'the basic principle should be 'one set of rules fits all judgments' and not 'individually drafted rules for every single case'. See also Burkhard Hess, Maria Bergstrom, and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016) x: 'The experience of the last 15 years demonstrates that it is now time to evaluate and to streamline existing instruments and to improve the efficient and uniform application of the existing law.'

⁷⁰ ELI–Unidroit Working Group on Provisional and Protective Measures, 'First Report November 2014: The Recent European Shift from a General to a Particular Approach' (Study LXXVIA, 2014) 4. See also Policy Department for Citizens' Rights and Constitutional Affairs, 'The European Law Institute/UNIDROIT civil procedure projects as a soft law tool to resolve conflicts of law' (European Parliament 2017)14.

⁷¹ Recital 48 of the EAPO regulation states that an EAPO is available only to applicants who are domiciled in a Member State bound by the Regulation and orders issued under the Regulation should relate only to the preservation of bank accounts which are maintained in such a Member State. Since the United Kingdom and Denmark have chosen not to opt in to the Regulation, British and Danish plaintiffs are not able to obtain an EAPO, while bank accounts held in the United Kingdom or Denmark may not be preserved.

The idea of the preservation of bank accounts in the EAPO regulation is based on garnishment proceedings. Garnishment is a process of enforcing a money judgment where the judgment creditor seizes debts due to the judgment debtor. The judgment creditor must present an enforceable instrument when applying for garnishment and garnishment is effected in a two-stage process. At the first stage, as explained by Hess, the garnishee is informed about the attachment of the judgment debtor's bank account and the enforcement organ prohibits any payment by the garnishee to the judgment debtor. In the second stage the judgment creditor gets an enforceable title against the garnishee. The structure of garnishment proceedings favours the enforcement of provisional and protective measures, ie asset preservation orders, which, in civilian jurisdictions, as explained below, are analogous to the first stage of the garnishment procedure, ie the attachment.⁷²

According to article 5, EAPOs are available to applicants both before judgment, ie at any time prior to and during proceedings, and after the applicant has obtained a judgment. Before the initial proposal by the European Commission, there was uncertainty about whether such procedure should only be provisional and protective in nature or should also comprise a mechanism for enforcement. The EAPO regulation, however, was finally restricted to

⁷² Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 60. See also W Kennett, *The Enforcement of Judgments in Europe* (OUP 2000) 249.

provisional and protective measures, preserving the defendant's bank account until a measure to enforce judgment takes effect (article 20).⁷³ Article 6 provides that jurisdiction to grant an EAPO lies with the courts of the Member State which have jurisdiction on the substance of the matter. If the respondent is a consumer, jurisdiction to issue an EAPO lies only with the courts of the Member State in which the debtor is domiciled. When the applicant has already obtained a judgment, the courts of the Member State in which the judgment was issued have jurisdiction to grant an EAPO.

In order to obtain an EAPO, article 7 dictates that the applicant must satisfy the court that there is an urgent need for an order because there is a real risk that, without such an order, the subsequent enforcement of the applicant's claim against the respondent will be impeded or made substantially more difficult. Additionally, in the case of an application for an EAPO before a judgment is issued, the applicant must also satisfy the court that he is likely to succeed on the substance of his claim against the respondent. These conditions, if they are fulfilled, are sufficient for the grant of an EAPO and the judge has no discretion to refuse to issue an order.

With a view to ensuring the surprise effect of an EAPO, the respondent will not be informed about the application for an order nor be heard or notified prior

⁷³ Commission, 'Proposal for a Regulation establishing a European Account Preservation Order' COM (2011) 445 final, 5.

to its issue and implementation, ie EAPOs will be granted *ex parte* (article 11). By virtue of article 22, an EAPO issued in a Member State will automatically be recognised and will be enforceable in other Member States. Article 23 provides that the order will be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement. Thus, the EAPO regulation does not provide for any sanctions against non-compliance and, in the majority of Member States, since they are civil law jurisdictions, an EAPO will have an *in rem* effect, ie it will be directed against specific accounts and not against the debtor personally.

As Merryman and Pérez-Perdomo pointed out, the civil law has been the legal tradition familiar to the European scholars and politicians who have been the fathers of EU law. The basic charters of the continuing legal development and operation of the EU are the work of people trained in the civil law tradition.⁷⁴ This is also the case with the EAPO regulation. At first glance, the EAPO resembles more closely to civilian asset preservation orders rather than to common law freezing injunctions. The majority of EU Member States, in contrast to common law jurisdictions explained below, have in place *in rem*

⁷⁴ Merryman and Pérez-Perdomo (n 12) 3; As David Edward explains, all the original six Member States of the EU belonged to the civil law tradition. The structures and procedures of the EU and EU law were put in place when Britain remained outside, and, thus, the majority of legislation, such as the Brussels Regime, reflect primarily the civil law tradition. 'The British Contribution to the Development of Law and Legal Process in the European Union' in B S Markesinis (ed), *The British contribution to the Europe of the Twenty-First Century* (Hart Publishing 2002) 25.

asset preservation orders not accompanied by any sanctions against non-compliance, while no discretion is given to the judge in deciding whether or not to grant them.⁷⁵

It is argued that EU legislation must also be influenced by principles of legal traditions other than the civil law, such as the common law. The European judicial area is built on the cornerstone principle of mutual trust, which requires reinforced understanding of the different legal traditions.⁷⁶ Moreover, the guiding principle of EU legislators in drafting legal texts should be the functionality and fairness of the instrument and not the solution provided by the majority of Member States. In fact, in the area of asset preservation orders, it is argued that the common law freezing injunction has been the most sophisticated instrument because, *inter alia*, it strikes a very good balance between the conflicting rights.⁷⁷

⁷⁵ In the European Commission's proposal for the EAPO, it was said: 'In line with the legal traditions of the large majority of Member States, the European order will have an *in rem* effect.' Commission, 'Proposal for a Regulation establishing a European Account Preservation Order' COM (2011) 445 final, 5.

⁷⁶ Commission, 'Action Plan on the Stockholm Programme, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme' COM (2010) 171 final, 4. The overall operation of the EU places, or at least it should place, a premium on co-operation rather than confrontation. D Edward, 'The British Contribution to the Development of Law and Legal Process in the European Union' in Markesinis, *The British contribution to the Europe of the Twenty-First Century* (n 74) 26.

⁷⁷ The English Court of Appeal called the freezing injunction innovation 'one of the most imaginative, important and, on the whole, most beneficial of modern times.' *Deutsche Schachtbau- und Tiefbohrgesellschaft v R'as al Kaimah National Oil Co* [1987] 3 WLR 1023 (CA) 1036.

The discussion on an EU-wide asset preservation order brings into the open fundamental differences in the approach between the common law and the civil law tradition. Arguably, the different course that each legal tradition has followed through the centuries is reflected in asset preservation orders. More specifically, freezing injunctions differ from all other similar solutions in the different legal systems because of their equitable nature.

3. Equity: the factor that differentiates the common law from the civil law tradition and its impact on asset preservation orders

a. History and origin of equity

Alexander Haim Pekelis argued that if someone were compelled to explain the essence of civil law to a common lawyer in one sentence, he could perhaps say that civil law is what common law would have been had it never known a Court of Chancery and, thus, the law of equity.⁷⁸ In order to fully understand the role

⁷⁸ Alexander H Pekelis, 'Legal Techniques and Political Ideologies: A Comparative Study' (1943) 41 (4) Michigan L Rev 665, 689–690. cf Ralph Newman, who pointed out that, in reality, neither in the civil law nor in the common law has equity been completely absorbed into the mainstream of the law. In the common law, equity is still looked upon, as a result of the former practice of administering equitable relief in a separate court, as an auxiliary system of law, to be resorted to only in cases of extreme hardship and in the absence of an adequate remedy. In the civil law systems, equity is also relegated to a subordinate position; such equitable doctrine as is received into the law loses its separate identity in the fatal embrace of the codified rules. Ralph A Newman, *Equity and Law: A Comparative Study* (Oceana Publications 1961) 16.

of the Court of Chancery and the nature of equity, an investigation of their history and origin is useful.⁷⁹

In eleventh-century England, following the Norman Conquest, as Strahan explains, the *Curia Regis*, also called *Aula Regis* (the King's Court or King-in-Council) maintained a prerogative to grant relief outside the law. At first, the exercise of this prerogative was regarded as extraordinary, since justice in general was not administered by the King, but by local courts. Later on, in late 12th century, the King's judges superseded the local courts, and the administration of the law became the ordinary business of the King-in-Council. When this change occurred, special courts were appointed by the Council to enforce the law. These were the Court of King's Bench, the Court of Common Pleas, and the Exchequer. The function of these was merely to apply the customs of the realm and the Acts of Parliament, ie the law. The prerogative, however, to give relief outside the law remained in the King-in-Council.⁸⁰

Those who cannot get relief elsewhere, Maitland explains, present their petitions to the King and his Council praying for some remedy. Already by the

⁷⁹ The examination of the historical foundations of an institution in a separate section in the outset of the discussion is a pattern used throughout this work instead of them being incorporated into the arguments. This is in order to lay down the background and fully explain a notion before proceeding to its analysis and comparison.

⁸⁰ James Andrew Strahan, *Strahan's Digest of Equity* (R A Eastwood ed, Butterworth & Company Limited 1939) 5. See also William Holdsworth, *A history of English law* (Methuen & Company 1903) vol 1, 73; R C Caenegem, *The Birth of the English Common Law* (Cambridge 1989) 19.

end of the thirteenth century, the number of such petitions presented in every year was very large and the work of reading them and considering them was very laborious. In practice, a great share of this labour fell on the Chancellor. The Chancellor was a member of the Council, the keeper of the Great Seal,⁸¹ keeper of the King's Conscience, and a priest.⁸² From mid-fourteenth century onwards, the Lord Chancellor and his personal staff, the Chancery, constituted the Court of Chancery which had jurisdiction to exercise the King's prerogative on his behalf.⁸³

In the course of time, Maitland continues, the Court of Chancery's judicial powers were classified as being of two kinds, soon to be called a common law and an equity side respectively: Firstly, many of these petitions were seeking justice against the King. Such matters were referred to the Chancellor. Secondly, very often, the petitioner required some relief at the expense of some other person. He complained that for some reason he could not get a remedy in the ordinary course of justice and yet he was entitled to a remedy. He was poor, he was old, he was sick, his adversary was rich and powerful, would bribe or intimidate jurors, or had by some trick acquired an advantage of which the

⁸¹ One of the duties of that great staff of clerks over which the Lord Chancellor presided was to draw up and issue those writs whereby actions were begun in the courts of law. Such writs were sealed with the King's Seal. F W Maitland, *Equity: A Course of Lectures* (first published 1909, CUP 2011) 3.

⁸² Maitland (n 81) 2. See also K L Bhatia, *Legal Language and Legal Writing* (Universal Law Publishing 2010) 201.

⁸³ Strahan (n 80) 4; Sir John Baker, *Collected Papers on English Legal History* (CUP 2013) 946.

ordinary courts with their formal procedure would not deprive him. The petition was often couched in piteous terms and the King was asked to find a remedy for the love of God and in the way of charity. Such petitions were referred by the King to the Chancellor.⁸⁴

The Chancellor, according to Maitland, having considered the petition, or 'bill' as it was called, ordered the adversary to come before him and answer the complaint. The writ whereby he did this was called a 'subpoena', because it ordered the man to appear upon pain of forfeiting a sum of money. Then, when he would come before the Chancellor, he would have to answer on oath the bill of the plaintiff. This procedure was rather like that of the ecclesiastical courts and the canon law than like that of old English courts of law.⁸⁵ The origin of the independent jurisdiction of the Chancellor is generally sought in the proclamation of Edward III, in 1349, to the Sheriffs of London:

Forasmuch as we are greatly and daily busied in various appeals concerning us and the state of our realm of England, we will that all business, whether relating to the common law of our kingdom or to our special grace hereafter cognisable before us, be prosecuted as follows, viz., the common law business before the Archbishop of Canterbury elect, our Chancellor, by him to be despatched, and the other matters grantable by our special grace, be prosecuted before our said Chancellor or our well-beloved clerk, the Keeper of the Privy Seal, so that they or one of them transmit to us such petitions of business as cannot be determined without consulting us, together with their advice thereupon, without any further prosecution to be had

⁸⁴ Maitland (n 81) 3. See also Walter Ashburner, *Ashburner's Principles of Equity* (Denis Browne ed, 2nd edn, Butterworth & Company 1933) 20.

⁸⁵ Maitland (n 81) 5.

before us for the same, that upon inspection thereof we may further signify to the said Chancellor or Keeper our will and pleasure therein, and that none other do for the future pursue such kinds of business before us, we command you immediately, upon sight thereof, to make proclamation of the premises, &c.⁸⁶

The *Earl of Oxford's Case*,⁸⁷ decided in 1616, is the first case in the official reports of Chancery cases. In that case, there was a debate between the Lord Chief Justice, Sir Edward Coke, and the then Lord Chancellor, Lord Ellesmere, as to whether it was the common law courts or the courts of equity which should take priority if both wanted to deliver judgments which contradicted one another.

The dispute centred on what became known as 'common injunctions', which were being issued by the Chancellor, who contended that, even though a judgment was technically good, he was entitled to set it aside where it had been obtained by 'oppression, wrong and a bad conscience'.⁸⁸ By a common injunction, he would restrain parties to an action at common law either from proceeding with their action at law, or, having obtained judgment, from enforcing it.⁸⁹ The courts of law highly resented this interference with their proceedings. Finally, it was decided by King James I that the injunction was

⁸⁶ Quoted in Ashburner (n 84) 20.

⁸⁷ *Earl of Oxford's Case* (1615) 1 Ch Rep 1, (1615) 21 ER 485.

⁸⁸ In the *Earl of Oxford's Case*, it had been proved before the Chancellor that the original judgment had been obtained by the fraud of the plaintiff who had involved the defendant's chief witness in a drinking bout which prevented him giving evidence. Thereupon, the Lord Chancellor issued an injunction forbidding the plaintiff to seek execution of his judgment and the Lord Chief Justice furiously protested. See Strahan (n 80) 7.

⁸⁹ Philip H Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 4.

within the powers of the Court of Chancery and it was the courts of equity which should take priority.⁹⁰ Therefore, Lord Ellesmere delivered his seminal judgment in the *Earl of Oxford's Case* to the effect that the purpose of equity is 'to correct men's consciences'.⁹¹

During the seventeenth century, as J R Lewis explains, the principles upon which equitable jurisdiction was based began to become more fixed and by the early nineteenth century, equity 'had become simply that part of the law enforced in the Court of Chancery'. The reorganisation of the courts carried out by the Judicature Act of 1873⁹² meant that no longer would there be courts of

⁹⁰ As Alastair Hudson explains, part of the conflict between the King and the common law courts for some centuries had been whether or not the monarch was entitled to introduce new jurisdictions, such as the ever-expanding jurisdiction of the Court of Chancery having equity in civil matters and of the court of Star Chamber, a court which exercised equity jurisdiction in criminal matters, or even to intervene in judicial decisions directly. Therefore, the primacy of equity over common law was not simply a technical legal question, it was also a matter of political controversy. Alastair Hudson, *Equity and Trusts* (8th edn, Routledge 2014) 37. The validity or invalidity of common injunctions, as Pettit notes, would determine the question whether legal supremacy was vested in the common law courts or the Chancery. The matter was referred by the King to Bacon, the Attorney General, and other counsel. In due course he accepted their advice that the injunctions were valid and, in 1616, accordingly issued an order in favour of the Chancery maintaining the plurality of independent courts in his kingdom. Pettit (n 89) 4. As Pekelis put it, James I 'fully appreciated the advantages of a legal polytheism and would not deprive the Olympus of the common law of one of its most industrious gods, the court of equity.' Pekelis (n 78) 690.

⁹¹ See Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016) 29.

⁹² Charles Dickens in his book *Bleak House*, first published in 1853, explains that proceedings in the Court of Chancery were beset by inordinate delays and expense. At the centre of the novel, as Davies and Virgo explain, is the long-running fictional case, Jarndyce and Jarndyce, which came about because someone wrote several conflicting wills. By the end of the novel, judgment is given, but the legal costs that have been incurred are so great that they devour most of the estate that was disputed in the first place. This novel helped support a judicial reform movement, which culminated in the enactment of legal reform in the 1870s. Paul S Davies and Graham Virgo, *Equity & Trusts: Text, Cases, and Materials* (OUP 2013) 3.

common law standing separate from a Court of Chancery exercising an equitable jurisdiction. A Supreme Court was established, which was to administer both law and equity.⁹³

The result of the Judicature Act 1873 was that the practical distinction between common law and equity disappeared. However, as Hudson points out, it is vitally important to understand that the intellectual distinction remained. There remains a division between certain claims and remedies which are available only at common law and other claims and remedies available only in equity. The principles of equity remain subject to their own logic, even though all courts are now empowered to apply both systems of rules.⁹⁴

Maitland insisted that equity is founded on ancient English elements and rejected the idea that equity was taken from Roman law.⁹⁵ However, as Hudson argues, the basis of equity as a counterpoint to the common law is not an idea which should be considered to be simply English.⁹⁶ There are echoes of it in the

⁹³ J R Lewis, *Outlines of Equity* (Butterworth 1968) 3.

⁹⁴ Hudson, *Equity and Trusts* (n 91) 17.

⁹⁵ Maitland (n 81) 6.

⁹⁶ Hudson, *Equity and Trusts* (n 90) 11.

ancient Greek philosophers when Aristotle argued that equity, *epieikeia*,⁹⁷ is the rectification of legal justice in so far as the law is defective.⁹⁸

According to Hudson, Aristotle considered that equity provides a better form of justice because it provides for a more specific judgment as to right and wrong in individual cases, which rectifies any errors or unfairness that the law would otherwise have made. His core point is that if the law has failed to anticipate a particular situation or if it would produce unfairness or allow unconscionability to persist without a remedy, then equity will intervene to correct that universal rule.⁹⁹ Aristotle said in the *Nichomachean Ethics*:

⁹⁷ The term *epieikeia* is the compound word of the word *epi* (proposition which means 'upon') and the word *eikos*. In Aristotle's *Rhetoric* we find the phrase '*to men gar eikos esti [to] hos epi to poly ginomenon*', which means that "'eikos' is the *hos epi to poly ginomenon*." See Aristotle, *Rhetoric*, para 1357a35. The latter phrase means 'in most cases'. Therefore, the idea behind *epieikeia* is 'with allowance for exceptions'. As Kasai explains, this concept is the key to appreciate Aristotle's understanding of equity and his awareness of the incompleteness of the written law. Yasunori Kasai, 'In search of the origin of the notion of *aequitas* (*epieikia*) in Greek and Roman law' 広島法学 37 卷1号 (2013 年) 560. See also María José Falcón Tella, *Equity and Law* (Brill 2008) 11; Mike Macnair, 'Equity and Conscience' (2007) 27(4) *Oxford J of L Studies* 659, 660.

⁹⁸ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) 42. The leading figure in early modern England in the discussions concerning the relation between law and equity, which had been a topic in the ancient world, is Christopher Saint Germain and his two *Dialogues between a Doctor of Divinity and a Student of the Common Law*. The first was published in 1523 and the second in 1530. As Plucknett explains, this work is very important for the history of English legal thought and particularly for the ideas which underlie equity. According to Saint Germain, the philosophical justification for equity was to be found in the canon law, which had long accepted the principle that the circumstances of human life are so infinitely various that it is impossible to make a general rule which will cover them all. Theodore F T Plucknett, *A Concise History of the Common Law* (Liberty Fund 2010) 279. See also Mark Fortier, *The Culture of Equity in Early Modern England* (Routledge 2016) 60.

⁹⁹ Hudson, *Equity and Trusts* (n 91) 7.

[E]quity is just, but not what is legally just; it is the rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.¹⁰⁰

It is argued that Aristotle would probably have been a part of the education of the early judges in courts of equity, and, therefore, it is possible that those judges had ideas like Aristotle's.¹⁰¹ For example, Lord Ellesmere held in the *Earl of Oxford's Case* that '[m]ens Actions are so divers and infinite, That it is impossible to make a general Law which may aptly meet with every particular Act and not fail in some circumstances'.¹⁰² In the course of time, the definition of Aristotle has gradually found its way into the treatises of most of the modern authors who have discussed the subject.¹⁰³ Nineteen hundred years after

¹⁰⁰ Aristotle, *The Nicomachean Ethics*, para 1137b11. The same sense of equity was recognised in the Justinian's Pandects. For example: '*Placuit in omnibus rebus praecipuam esse justitiae aequitatisque quam stricti juris rationem*' (The best solution in all matters seems to be equitable justice rather than a strict legal reasoning). *Justinian's Code* Book 3, title 1, para 1.8. See Joseph Story, *Commentaries on Equity Jurisprudence* (C C Little and J Brown 1839) vol 1, 1.

¹⁰¹ Hudson, *Equity and Trusts* (n 91) 8.

¹⁰² *Earl of Oxford's Case* (1615) 1 Ch 1, 21 ER 485 [6].

¹⁰³ Story (n 100) vol 1, 1.

Aristotle, his ideas were echoed by Grotius¹⁰⁴ and Pufendorf¹⁰⁵, and later by Blackstone in his definition of equity:

For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, (which had they been foreseen) the legislation himself would have expressed.¹⁰⁶

In Roman law, as Honsell notes, there existed the *ius civile*, which was first, and the *ius honorarium* which was established to meet the special needs of changed circumstances. The purpose of the latter was to support, amend, and correct the old *ius civile*. It was adopted by certain magistrates (praetors) who enacted their law in form of edicts.¹⁰⁷ As Strahan explains, just as the authority on which English equity was based was the royal prerogative, so the authority on which Roman equity was based was the *imperium*,¹⁰⁸ a survival of the royal power to see justice done to the people, which vested in the praetor during his year of office. The *imperium*, however, entitled the praetor to set out on assuming office a list of the rights and remedies which he would recognise

¹⁰⁴ Hugo Grotius, *Droit de la Guerre et de la Paix* (P de Coup 1729) vol 2, 582.

¹⁰⁵ Samuel Pufendorf and Jean Barbeyrac, *Le Droit de la Nature et des Gens* (Kuyper 1706) vol 5, 549.

¹⁰⁶ BI Comm vol 1, 61. See also Ola Wiklund, 'Taking the World View of the European Judge Seriously – Some Reflections on the Role of Ideology in Adjudication' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Kluwer Law International 2003) 12-14.

¹⁰⁷ Heinrich Honsell, *Römisches Recht* (6th edn, Springer 2006) 9. See also H F Jolowicz, Barry Nicholas, *A Historical Introduction to the Study of Roman Law*, (CUP 1972) 192; WW Buckland, *Equity in Roman Law* (University of London Press 1911) 3.

¹⁰⁸ *Imperium* can be translated loosely as 'sphere of power'.

during his reign. Thus, from the beginning, Roman equity was a matter of principle and a matter of right. English equity was neither matter of principle nor matter of right for a long time. This is the point which caused the chief difference in the development of English equity compared to Roman equity.¹⁰⁹

b. Nature of equity

Mirjan Damaška said that, explaining the relation of law and equity to Europeans, is still one of the comparatist's most challenging tasks.¹¹⁰ As it emerges from the above description of equity's origin, equity is the means by which a system of law balances out the need for certainty in rule-making with the need to achieve fair results in individual circumstances. At its broadest sense, equity appears to give the courts a general discretion to disapply statutory or common law rules whenever good conscience requires it.¹¹¹

¹⁰⁹ Strahan (n 80) 7. Continental justices in the highest sovereign courts applied equity, which was more often than not found in Roman law. They continued to do so, as Zwolve says, until the end of the legal 'ancient regime' on the Continent. Consequently, there has never been an incentive on the Continent for the introduction of a separate branch of the judiciary responsible for the subjection of the law to equitable standards. However, dissatisfaction with the 'equity' of continental European sovereign courts was widespread on the Continent since the 16th century. It was perceived as an arbitrary, and, therefore, unpredictable standard of law, as expressed in the legal proverb '*de l'équité des Parlements, Dieu nous garde*' (God keep us from the equity of the *Parlements* [The *Parlements* were high courts of appeal]). E Koops and W J Zwolve (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Brill 2014) 3.

¹¹⁰ Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale UP 1991) 42.

¹¹¹ Hudson, *Equity and Trusts* (n 91) 4.

The necessity for an equitable jurisdiction, as just explained, arose in the first place out of the fact that the law could not provide a remedy in all cases. As J R Lewis puts it, equity may therefore be regarded as a system of rules based on fairness¹¹² and morality, or natural justice, to use a more precise phrase. Equity arises *ex aequo et bono* (according to the right and good), and exists outside the rules of law. Such an 'escape' from legal rules is often necessary, since the legislature cannot legislate for all contingencies and circumstances can render the strict application of legal principles unfair.¹¹³ To this end, Lord Ellesmere said in the Earl of Oxford's Case:

The Office of the Chancellor is to correct mens consciences for frauds, breach of trusts, wrongs and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called summum jus [highest law]. And for the judgment, &c., law and equity are distinct, both in their courts, their judges, and the rules of justice; and yet they both aim at one and the same end, which is, to do right; as justice and mercy differ in their effects and operations, yet both join in the manifestation of God's glory.¹¹⁴

Apart from its discretionary nature which is analysed further in the next chapter, the core of the equitable jurisdiction is the principle that it acts in

¹¹² In Ulpian's writings, equity is related to equality, not directly, but in the sense that it requires the interests of each person to be taken into account and given equal weight. Tony Honoré, *Ulpian: Pioneer of Human Rights* (OUP 2002) 93.

¹¹³ Lewis (n 93) 3. In the same vein, Fonblanque said: '[A]s the rules of the common law are finite, and the subject of it infinite, there will often fall out cases, which cannot be determined by them; for there can be no finite rule of an infinite matter, perfect. So that there will be a necessity of having recourse to the natural principles, that what was wanting to finite, may be supplied out of that which is infinite; and that this is properly what is called equity, in opposition to strict law'. Henry Ballow, *A Treatise of Equity* (John Fonblanque ed, W Clarke and Sons 1793) 9.

¹¹⁴ *Earl of Oxford's Case* (1615) 1 Ch 1, 21 ER 485.

personam. That means, as Hudson explains, that a court of equity is concerned to prevent any given individual from acting unconscionably. If that person does not refrain, he will be in contempt of court, a feature which is also analysed below in a separate chapter. The equitable remedy is addressed to that person in respect of the particular issue complained of. It is best thought of as a form of judicial control of that particular person's conscience.¹¹⁵

Equity sounds like a good idea in theory. As Atkins argues, the principle that the plaintiff's legal problem can be resolved according to good conscience creates a nice, warm feeling.¹¹⁶ Now it would be a great mistake to suppose that equity embraces a jurisdiction as wide and extensive as that which arises from the principles of natural justice.¹¹⁷ As it will explained below, equitable jurisdiction is also restricted by its own rules.

Modern society, Hudson says, is simply far more complex than Aristotle could ever have imagined. So much so that equity is all the more essential in

¹¹⁵ Hudson, *Equity and Trusts* (n 91) 19. See also Jamie Glister and James Lee (eds), *Hanbury & Martin: Modern Equity* (Sweet & Maxwell 2015) 7. As Virgo explains, in rem rights are valid against the world while in personam rights are valid against a particular person because all equitable property rights are defeated if the property is obtained by a *bona fide* purchaser for value, and so cannot be good against everybody in the world. Graham Virgo, *The Principles of Equity and Trusts* (OUP 2012) 39.

¹¹⁶ Scott Atkins, *Equity and Trusts (Spotlights)* (Routledge 2013) 8. As Mason argues, the underlying values of equity, centred on good conscience, will almost certainly continue to be a driving force in the shaping of the law unless the underlying values and expectations of society undergo a fairly radical alteration. Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, 258.

¹¹⁷ Story (n 100) vol 1, 2.

the modern world.¹¹⁸ In this sense equity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible that any legislation, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.¹¹⁹ The history of the establishment of courts of equity in England, described above, explains the nature of that *vis medicatrix naturae* (healing power of nature), to which English law is indebted for the wisest part of its jurisprudence.¹²⁰

Equitable principles are of great width and elasticity. During many centuries, the principles and techniques of equity have been of general importance, both in so far as their application has often led to a just resolution of disputes that would not otherwise have been possible, and also because their elasticity has led to the development of new rules.¹²¹ An example of the latter has been the creation of the freezing injunction.

¹¹⁸ Hudson, *Equity and Trusts* (n 91) 8.

¹¹⁹ Story (n 100) vol 1, 7.

¹²⁰ James Philemon Holcombe (ed), *An Introduction to Equity Jurisprudence* (Derby, Bradley & Co 1846) 9. 'The fundamental notions of equity are universal applications of principle to continually recurring problems; they may develop but cannot age or wither.' John Dyson Heydon, Mark James Leeming, and Peter J Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015) xv.

¹²¹ I C F Spry, *Equitable Remedies* (9th edn, Thomson Reuters 2013) 1.

c. The impact of equity on injunctions

The Court of Chancery fashioned an instrument which was very flexible and generally applicable, and thereby it obtained a power of making its own doctrines prevail at the expense of the doctrines of the common law. This instrument was the injunction.¹²² An injunction is an order made by the court forbidding a person from doing a certain act or, in certain exceptional cases, requiring him to perform a certain act.¹²³ The common law freezing order is essentially an injunction prohibiting the respondent from dissipating his assets. The injunctive nature of the freezing order is the source of most of its features. Injunctions are equitable remedies and, therefore, their features are to be found in the principles of equity.

The granting of injunctions has long fallen within the powers of courts of equity. The ‘writs of injunction’, explains Steven Gee, were issued only by the order and under the seal of courts of equity. They could be issued before a decree, as a restraint upon a party, which was called a ‘remedial writ’, or after a decree, as a ‘judicial writ’, which was in the nature of an execution. These writs

¹²² Injunctions in English law are similar to the Roman *interdicta* (interdicts). As Plessis explains, the interdicts were orders normally issued after a complaint by an aggrieved person, instructing a person to do or refrain from doing something. Paul du Plessis, *Borkowski’s Textbook on Roman Law* (OUP 2015) 79. According to Joyce, interdicts were wholly placed on the praetorian authority and were pronounced by the praetors under the *ius honorarium*. By the time of Justinian they had become obsolete. William Joyce, *The Law and Practice of Injunctions in Equity and at Common Law* (Stevens & Haynes 1872) 2, fn 2.

¹²³ Maitland (n 81) 318.

were not adapted to every case in which the court could grant a remedy. Therefore, the court of equity also granted orders in the nature of writs of injunction. Although these orders were not enforced by means of a writ of injunction, the writs and the orders were indiscriminately called 'injunctions'.¹²⁴

Before the Judicature Act of 1873, according to Strahan, the prerogative to grant relief outside the law could only be exercised in matters of three kinds: First, in matters in which the law gave no rights but conscience required that certain rights should be given; this was called the exclusive jurisdiction of equity and the plaintiff could only sue in a court of equity. Secondly, in matters in which the law gave the rights required by conscience but the remedies which it gave to enforce the rights were insufficient to satisfy justice; this was called the concurrent jurisdiction of equity. Thirdly, in matters in which the law gave the rights required by conscience and remedies sufficient to satisfy justice but as to which its process was not sufficient to secure the remedies without the assistance of equity; this was called the auxiliary jurisdiction of equity.¹²⁵ In the case of injunctions, they were available in each class.¹²⁶ The Judicature Act 1873 consolidated the courts of law and equity and all courts can now provide

¹²⁴ Gee, *Commercial Injunctions* (n 22) para 1-001. See also Robert Henley Eden, *A treatise on the law of injunctions* (J Butterworth and J Cooke 1821) 1.

¹²⁵ Strahan (n 80) 7. See also Story (n 100) vol 1, 27; Samantha Hepburn, *Principles of Equity & Trusts* (Routledge 2013) 21.

¹²⁶ Story (n 100) vol 2, 155.

equitable remedies in each case based on statute. These classifications, however, although abolished, are helpful in understanding the nature and the role of injunctions within equity.

Lord Denning, as mentioned above, stated in the *Karageorgis* case that the jurisdictional basis for granting a freezing order was the power given to courts by statute to grant injunctions whenever it was just or convenient. The statutory jurisdiction to grant injunctions can only be exercised when the plaintiff has a legal or equitable right.¹²⁷ This was explained by Lord Denning in the *Mareva* case, who cited a passage from Halsbury's Laws of England saying:

[N]ow, therefore, whenever a right which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision [section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, mentioned above in the abstract from the *Karageorgis* case], in a proper case, to grant an injunction to protect that right.¹²⁸

However, Lord Denning further explained that even before judgment was given and the right was established, the order could still be granted. He said specifically:

In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction

¹²⁷ *North London Railway Company v The Great Northern Railway Company* (1883) 11 QBD 30, 40. See Gee, *Commercial Injunctions* (n 22) para 1-005.

¹²⁸ *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA) 215.

in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.¹²⁹

As with most equitable remedies, Clements and Abass point out, injunctions are granted not as of right to applicants, but by the discretion of the court. However, as it will be explained in the next chapter, injunctions are not a remedy that the court may grant indiscriminately.¹³⁰ They are granted only when to do so accords with equitable principles.¹³¹

Injunctions have proved to be one of the most important equitable remedies because of the concern of equity with the conscionability of particular behaviour of the defendant. This led to a need for a remedy consisting in a personal direction to the defendant requiring him to abstain from the performance of specified acts under threat of committal for contempt.¹³² The discretionary character of injunctions and contempt of court as a sanction for non-complying with them are in the nature of freezing orders as well, the latter being injunctions.

¹²⁹ *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA) 213.

¹³⁰ Richard Clements and Ademola Abass, *Equity & Trusts: Text, Cases, and Materials* (3rd edn, OUP 2013) 612.

¹³¹ Spry (n 121) 333.

¹³² Spry (n 121) 333.

d. Introducing elements of equity into the EAPO

The absence of certain characteristics of the law of equity in civilian legal systems and EU law is the main issue under consideration in this work. There is some historical basis on the statement of Pekelis quoted above, that the civil law today is what the common law would look like if there had never been a Court of Chancery in England. Indeed, there has been nothing like the loosening and liberalising influence of the Court of Chancery in the civil law tradition since early in the Roman period. More concretely, say Merryman and Pérez-Perdomo, the differences between the contemporary common law and civil law traditions are mainly attributed to two specific contributions of equity to the common law tradition. These are, as already mentioned, judicial discretion in granting relief and the contempt of court power.¹³³ These features of equity are also present in the common law freezing orders, while they are absent from civilian asset preservation orders and the EAPO.

The first point of analysis in this work, dealt with in the second chapter, examines a major dilemma in the drafting of an EU-wide provisional and protective order such as the EAPO: whether the judge should have discretion in deciding an application for an order. The third chapter deals with the sanctions against non-compliance with a court order in an inquiry as to which is the most fair and efficient mechanism in enforcing asset preservation orders, and

¹³³ Merryman and Pérez-Perdomo (n 12) 51.

provisional and protective measures in general. The hypothesis is pursued that there is a close connection between, on the one hand, the origins of a legal tradition—and, accordingly, a legal system—and, on the other hand, the exercise of judicial discretion and sanctions against non-compliance with court orders. The thesis ultimately argues that, by introducing judicial discretion in granting an EAPO and the contempt of court power in enforcing it, the jurisdiction will become more just and functionally useful. Moreover, since the EAPO is the first of what may become several EU-wide provisional and protective measures, it will be suggested that these two elements—judicial discretion and the contempt power—need to be included in the Regulation now because they will become increasingly valuable for the development of future procedures.

In order to find the best legal solutions for EU legislation, it is argued that we should first look for inspiration in national legal sources. Instruments which are based on the law of the Member States, says Maduro, will provide an added guarantee for the social acceptance of EU legislation and its smoother application by national courts. Reference to the general principles of law common to the Member States is also an expression of the particular legitimacy of the EU legal order which ultimately rests on the peoples of Europe.¹³⁴

¹³⁴ Miguel Poiates Maduro, 'Interpreting European Law – On Why and How Law and Policy Meet at the European Court of Justice' in Henning Koch and others (eds), *Europe: The New Legal Realism* (Djøf Publishing 2010) 463.

Thus, in order to determine the optimal features for EU-wide provisional and protective measures—and using the EAPO as a vehicle for discussion—we should engage in a comparative analysis of the merits of asset preservation orders that each Member State has in place.¹³⁵ The very fact that systems vary makes comparison useful.¹³⁶ More specifically, a full understanding as to whether judicial discretion and contempt of court are suitable for EU law is only possible if those solutions are examined through the experiences of the legal systems where they do and do not exist.

In order to reduce the complexity of studying diverse legal systems in the world, comparatists have developed the concept of ‘legal families’ or ‘legal traditions’. The basic idea is that certain legal systems are closely related, or at least more closely related when compared with members of another legal family. However, even the authors who accept the concept of categorising the different legal systems within legal families, do not agree about the relevant criteria determining the attribution of a certain legal system to one or the other legal family. The main criterion is traditionally taken to be that of legal sources, which can be, for instance, judges, legislators, or scholars.¹³⁷ Zweigert and Kötz

¹³⁵ The purpose of this thesis is not to trace every development in the use of asset preservation orders. Rather, the discussion is focused on the general principles that govern the grant of asset preservation orders in the various legal systems.

¹³⁶ Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004) 12.

¹³⁷ See eg Stefan Vogenauer ‘Sources of Law and Legal Method’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 874.

add the criteria of the historical background and development, distinctive institutions, the characteristic way of legal thinking, and ideology.¹³⁸

In a union of 28 Member States, 24 different languages, and 30 different legal systems—including the three systems of the United Kingdom—there is a variety of legal traditions and procedural rules.¹³⁹ Based on the distinction put forward by Zweigert and Kötz, the legal families found in the EU are the common law, the Germanic, the Romanistic, and the Nordic.¹⁴⁰

The inquiry begins from the premise that in the area of asset preservation orders, as mentioned above, there are basically two available mechanisms, the one found in the common law and the other in the civil law tradition. For the purpose of comparison, the German, French, and English legal systems are largely used. German and French law were selected because they are the major representatives of the main legal families of civilian jurisdictions, namely the Germanic and the Romanistic respectively, as well as because Germany

¹³⁸ K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 68.

¹³⁹ Nicolas Kyriakides 'European Account Preservation Order: What does the common Law tradition have to say?' in Stéphanie Francq, Miguel Gardeñes Santiago (ed), *Boundaries of European Private International Law* (Bruylant 2015) 185.

¹⁴⁰ See the distinction indicated by Zweigert and Kötz (n 138) 73 which was based on the distinction in Pierre Arminjon, Baron Boris Nolde and Martin Wolff (eds), *Traité de droit comparé* (LGDJ, 1950) tome I, 47). See also Henry W Ehrmann, *Comparative Legal Cultures* (Prentice Hall 1976) 13.

and France are the biggest players in the EU. English law was selected because it is the main representative of the common law tradition.¹⁴¹

Additionally, from a substantive point of view, this work does not just simply assume that English, German, and French are good to compare. Zweigert and Kötz spoke about a '*praesumptio similitudinis*', ie a presumption of similarity, which posits that the real-life problems in the different legal systems are similar and that the results from the different legal institutions employed to regulate these real-life problems are also similar.¹⁴² Having in mind the presumption suggested by Zweigert and Kötz, all jurisdictions have a similar real-life problem in the area of asset preservation orders, ie the disposing of assets pending judgment. Moreover, the selected jurisdictions, differ as to the mechanisms they have in place for remedying this problem. Specifically, they differ to the extent of the judge's power in granting asset preservation orders and in the way of enforcing them. However, contrary to the presumption put forward by Zweigert and Kötz, it is suggested that the result in these jurisdictions is usually not the same.

¹⁴¹ Other common law jurisdictions, mainly the United States, Australia, and Canada are also mentioned on occasions.

¹⁴² '[If we] concentrate on those parts of private law which are relatively 'unpolitical', we find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way. Indeed it almost amounts to a '*praesumptio similitudinis*', a presumption that the practical results are similar.' Zweigert and Kötz (n 138) 40.

In comparing the different kinds of asset preservation orders, based on the abovementioned criteria put forward for defining the different legal families, firstly there is a need to pay attention to historical detail and the contemporary political, economic, and cultural conditions that prevail in individual systems; this aspect is central to this research.¹⁴³ Moreover, the essence of a legal order does not lie in the sum of the legal norms, but rather in the structure of the system.¹⁴⁴ Therefore, it is essential to examine the role of the judiciary¹⁴⁵ and the legislature in the different legal traditions. Finally, this research also focuses on the mode of legal thought¹⁴⁶ and ideology that prevail in the legal traditions which are analysed. The different characteristics in each legal tradition vis-à-vis these criteria will help explain the differences between those traditions in the pre-judgment mechanisms provided for preserving assets, and, thus, in the wider area of provisional and protective measures. They will also render the comparative inquiry, ie to ascertain which are the best solutions, more complete.

¹⁴³ J Zekoll and M Reimann (eds), *Introduction to German Law* (Kluwer Law International 2005) 1334.

¹⁴⁴ René David and John E C Brierley, *Major Legal Systems of the World Today* (3rd edn, Carswell Legal Publications 1985) 333.

¹⁴⁵ As Waltman and Holland indicate, courts are part of every political system and the politics of none can be understood without an appreciation of their role. Jerold L Waltman, 'Introduction' in Kenneth M Holland and Jerold L Waltman (eds), *The Political Role of Law Courts in Modern Democracies* (St Martin's Press 1988) 5.

¹⁴⁶ As Legrand argued, if the comparatist focuses on the 'soul' of the laws—an expression of Montesquieu—he will be led to the conclusion that the common law and the civil law traditions have on some occasions distinctive modes of legal perception and thinking. Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45(1) *Intl and Comparative L Q* 52, 81.

II. Judicial discretion in asset preservation orders

If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence. Plainly this world is not our world; human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring.¹⁴⁷

1. Introduction

Can computers replace judges in granting an EU-wide provisional and protective measure such as an EAPO?¹⁴⁸ In other words, should the granting of an order be automatic, or should judges have discretion? This is the main inquiry of this chapter. The chapter begins by defining judicial discretion. It then argues that the EAPO regulation allows little discretion to judges in dealing with an application. This is followed by an examination of the role of judges in the common law and the civil law tradition, with a particular emphasis on judicial discretion in granting provisional and protective measures. The chapter explains where the inherent discretion that the common law judges have in granting

¹⁴⁷ HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, OUP 2012) 128.

¹⁴⁸ Professor Anthony D' Amato posed the general question whether computers can/should replace judges in his article Anthony D' Amato, 'Can/Should Computers Replace Judges?' (1977) 11 Georgia L Rev 1277.

freezing orders comes from. It subsequently presents the broad powers that the common law judges have in various areas of the law. This picture is contrasted with the portrait of the continental judge and the insistence on legal certainty in civilian systems which reflects on the area of the pre-judgment asset preservation orders. The discretion of judges in the context of EU law is then explored. In seeking to justify a wider role for judicial discretion in examining an application for an EAPO, the chapter proceeds by laying down the advantages and disadvantages of judicial discretion and suggesting that discretion should be exercised with certain limitations.

2. Defining judicial discretion

Before examining judicial discretion in the different legal traditions and opining on whether the EAPO regulation and other EU-wide provisional and protective measures that may follow should give discretion to judges, it is necessary to examine what is meant by the term 'judicial discretion'. As Hess argues, the concept of judicial discretion is inherent to every legal system. Furthermore, one can assume a current trend of enlarging judicial flexibility and discretion in most legal systems all over the world. Yet apart from certain parallels which may

appear at first sight, there are considerable differences in the legal construction of the term and its cultural background.¹⁴⁹

No national law contains a precise definition of the notion of judicial discretion. Judges, practitioners, and academics have used the expression 'judicial discretion' in a variety of senses. Judicial discretion, however, is dangerous as capable of leading to arbitrariness, and, therefore, what it entails must be clearly defined. As Lord Bingham put it, 'any lack of certainty as to what judicial discretion is may be thought undesirable'.¹⁵⁰

The permissible forms and limits of adjudication have probably been under discussion ever since something equivalent to a judicial power emerged in primitive society.¹⁵¹ On the issue of judicial discretion, the debate has been extensive especially between legal positivists and their critics. There seems to be a consensus, however, on what judicial discretion is. According to a definition provided by Lord Bingham, 'an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual

¹⁴⁹ Burkhard Hess, *Judicial Discretion* (General Report) in Marcel Storme and Burkhard Hess (eds), *Discretionary Power of the Judge: Limits and Control* (Kluwer 2003) 45.

¹⁵⁰ Tom Bingham, 'The Discretion of the Judge' (1990) 5 *Denning L J* 27, 28.

¹⁵¹ Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 (2) *Harvard L Rev* 353, 355; Edgar Bodenheimer, 'Hart, Dworkin, and the problem of judicial lawmaking discretion' 11 *Georgia L Rev* 1143, 1143.

judge's assessment', even within certain boundaries.¹⁵² Put differently, discretion is the freedom of the adjudicator to choose between different alternatives, assisted by certain legal or extra-legal standards, but without being criticised afterwards of being right or wrong.¹⁵³ As Aharon Barak put it:

[Discretion] is (...) a legal condition in which the judge has the freedom to choose among a number of options. Where judicial discretion exists, it is as though the law were saying: I have determined the contents of the legal norm up to this point. From here on, it is you, the judge, to determine the contents of the legal norm for I, the legal system, am not able to tell you which solution to choose. It is as though the path of the law came to a junction, and the judge must decide—with no clear and precise standard to guide him—which road to take.¹⁵⁴

Discretion is conferred upon judges by doctrines or rules of law or it can be inherent as in the case of equitable remedies in the common law tradition, as it is explained below.¹⁵⁵ As Bone explains, discretion may be explicit, ie given to judges directly using phrases such as 'the court may' or 'as the judge thinks', or

¹⁵² Tom Bingham, 'The Discretion of the Judge' (1990) 5 Denning LJ 27, 28.

¹⁵³ According to David Maxwell Walker, discretion is defined as a person's ability or entitlement to choose and exercise his own judgment as to what is appropriate, or right, or best in the circumstances as opposed to his being subject to a rule compelling him or dictating what must be done in a case. David Maxwell Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* (8th edn, Sweet & Maxwell 2001) 100. Another popular definition is that discretion is the situation where it is possible to choose, and a choice has to be made between more than one legally acceptable solutions. Ola Wiklund, 'Taking the World View of the European Judge Seriously – Some Reflections on the Role of Ideology in Adjudication' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Kluwer Law International 2003) 35. See also Marisa Iglesias Vila, 'Judicial Discretion and Judicial Positivism: The Substantive Criteria of Validity' (Seminario Latinoamericano de Teoría Constitucional y Política, Puerto Iguazú, Argentina 2000) 29; Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 5.

¹⁵⁴ Aharon Barak, *Judicial Discretion* (Yale UP 1989) 8.

¹⁵⁵ Walker (n 153) 101.

by a straight-forward declaration that the judge has discretion in deciding a certain issue. It may also take the form of vague phrases such as general clauses, a technique usually followed in continental systems, thus, indirectly allowing judges to engage in an interpretation exercise.¹⁵⁶

It is surely true, Lord Bingham says, that when judges support their conclusions with references to public policy, commercial good sense, certainty, good industrial relations, and so on it is because they are conscious of making a choice and are, quite properly, concerned to justify the choice that they have made. He further suggests that factors to be put into the scales for the balancing exercise are not in a strict sense the subject matter of discretion. Only in *assessing the weight* to be given to the various factors for and against any decision the outcome turns on the judgment of the individual assessor.¹⁵⁷

Of course, a judge does not have discretion in amending the law at will. As Samuel Johnson put it, to permit a law to be modified at discretion is to leave the community without law. According to Johnson, a legal system that is administered in this way operates not by law, but by opinion. Moreover, persons are not governed by a certain rule to which they can apply their intention before they act, but by an uncertain and variable opinion, which they can never know

¹⁵⁶ Robert Bone, 'Who Decides? A Critical Look at Procedural Discretion' (2007) 28(5) Cardozo L Rev 1961, 1967.

¹⁵⁷ Tom Bingham, 'The Discretion of the Judge' (1990) 5 Denning LJ 27, 32.

but after they have committed the act on which that opinion shall be exercised.¹⁵⁸

As explained, however, this does not mean that statutes do not allow discretion to the judge in interpreting certain provisions, usually by using open-ended phrases. Furthermore, in the choice of the applicable provisions, typical legal problems may arise; for example there may be no rule which at first sight governs the dispute (ie there is a legal gap, also called 'lacuna') or there may be more than one rule that seem to apply.¹⁵⁹ All these activities involve a fair amount of discretion.

At this point, it is important to examine the debate between legal positivists and their critics on whether judicial discretion exists. For positivists, discretion occurs when a judge makes a decision in the face of two equally legally valid answers. HLA Hart argued that in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is partly indeterminate or incomplete. These cases, Hart says, are legally unregulated and in order to reach a decision in

¹⁵⁸ Robert Lynam (ed), *The Works of Samuel Johnson* (George Cowie and Company, 1825) 610.

¹⁵⁹ Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 61.

such cases the courts must exercise the restricted law-making function which is called 'discretion'.¹⁶⁰

Many scholars, such as Ronald Dworkin, have disagreed with the existence of the notion of discretion. Dworkin believed that the law provides 'a single right answer'.¹⁶¹ In the context of his criticism of positivist legal theory, he accepted that a judge theoretically has discretion—discretion in the strong sense as he calls it—when no clear and established rule applies and a decision is made without recourse to legal standards.¹⁶² 'When a judge runs out of rules,

¹⁶⁰ HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, OUP 2012) 252.

¹⁶¹ Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Bloomsbury Academic 2013) 335. Dworkin had previously challenged the existence of judicial discretion in a series of articles. Ronald Dworkin, 'Judicial discretion' (1963) *J of Philosophy* 60 (21) 624; Ronald Dworkin, 'The Model of Rules' (1967) 35 *U Chi L Rev* 14; Ronald Dworkin, 'Social Rules and Legal Theory' (1972) 81 *Yale L J* 855. Rolf Sartorius agreed with Dworkin in a series of articles in denying that judges are ever entitled to formulate any general policies and principles. R Sartorius, 'The Justification of the Judicial Decision' (1968) 78 *Ethics* 171, 175; Rolf Sartorius 'Social Policy and Judicial Legislation' (1971) 8 *American Philosophical Q* 151, 151; Rolf Sartorius, 'Individual Conduct and Social Norms: A Utilitarian Account' (1972) 82(3) *Ethics* 200, 217; Rolf Sartorius, 'Bayes' Theorem, Hard Cases, and Judicial Discretion' (1977) 11 *Georgia L Rev* 1269, 1269. Dworkin's idea of one right answer has been criticised by many authors for various reasons. See eg Denis James Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1990) 18; Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges' (1975) 75(2) *Columbia L Rev* 359, 365. For an account of Dworkin's 'one right answer' critics in EU law literature see eg Juha Raitio, *The Principle of Legal Certainty in EC Law* (Springer 2003) 289; Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 124; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2013) 25.

¹⁶² Dworkin, *Taking Rights Seriously* (n 161) 33.

he has discretion', as Dworkin put it.¹⁶³ However, he rejected the argument that there may be different ways to decide a case.¹⁶⁴

According to Dworkin, a system of adjudication relies on two sources: legal rules and legal principles.¹⁶⁵ Rules, he argues, are dispositive; they dictate the final result. Principles, on the other hand, are non-legal—or extra-legal—standards that offer a general, non-binding, proposition for judges to use in deciding a case. They are simply requirements of justice or fairness or some other dimension of morality. Two principles may come into conflict and both remain valid. Deciding between them is a question of ascribing weight to each. Principles are to be distinguished from policy, Dworkin says, which is that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.¹⁶⁶ Rules—substantive and procedural legal rules, primary and subsidiary legislation, the ratio decidendi of cases and so on—are binding. Principles, Dworkin argues,

¹⁶³ Dworkin, *Taking Rights Seriously* (n 161) 52.

¹⁶⁴ Dworkin, *Taking Rights Seriously* (n 161) 412.

¹⁶⁵ Dworkin, *Taking Rights Seriously* (n 161) 38. Similarly, Issacharoff distinguishes between rules and standards. He says that rules require bureaucratic administration; standards require discretionary judging. Samuel Issacharoff, *Civil Procedure* (Foundation Press 2011) 40.

¹⁶⁶ In the discussion that follows, the distinction between rules, principles, and policy is mainly used. The term 'rules' includes references to 'conditions', while the term 'principles' includes references to 'guidelines', 'considerations', and 'factors'.

are merely persuasive. They 'state a reason that argues in one direction'.¹⁶⁷ For Dworkin, judicial discretion, on the occasions it does exist, is like the hole in a doughnut. It does not exist except as an area left open by a surrounding belt of restriction. The judge, even in cases of discretion, is still bound by Dworkin's doughnut, ie the ring of law, principles, policy and so on that surround the interstice in which discretion is possible.¹⁶⁸

Hart, on the other hand, argues that there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests.¹⁶⁹ It is suggested that in practice, the search for 'one right answer' and the refutation of discretion which are central to Dworkin's utopian theories, are not central tenets of adjudication in most legal systems.¹⁷⁰ According to the key precept of legal realism, as

¹⁶⁷ See the discussion in Dworkin, *Taking Rights Seriously* (n 161) 38–45. Dworkin argues that whenever there is a disagreement about whether or not normative standards, such as statutes, judicial decisions, etc, exhaust the grounds of law we face a so-called 'theoretical disagreement'. Positivists appear to have a difficult time accounting for this type of disagreement. See Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 5; Scott J Shapiro, *Legality* (Harvard UP 2013) 302.

¹⁶⁸ Dworkin, *Taking Rights Seriously* (n 161) 48, 108. These may be described as the 'hard cases'. See also Ronald Dworkin, 'Judicial discretion' (1963) *J of Philosophy* 60 (21) 624, 637.

¹⁶⁹ Hart (n 160) 132.

¹⁷⁰ As Klatt put it, ideal legal systems might be able to do without discretion, but for existing legal systems discretion remains a condition *sine qua non*. Thus, it is a 'universal and unavoidable problem.' Matthias Klatt, 'Taking Rights less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506, 506. Furthermore, according to Rosenberg, 'discretion is not a dispensable concept. Courts will surely continue to use it.' Maurice Rosenberg, 'Judicial discretion of the trial court, viewed from above' (1971) 22 *Syracuse L Rev* 635, 636.

Hodes explains, notwithstanding the invocation of supposedly immutable, predetermined, and transcendent rules of law, the law is instead indeterminate and crowded with opportunities for the exercise of discretionary judgment. Judges are not law-spouting computers, but university-trained jurists who bring with them to the bench all manner of life experiences, philosophies, habits of thought, cultural values, personality traits, and intellectual prowess.¹⁷¹ Distilling one absolutely correct answer from the facts is not always possible.¹⁷² As Joseph Raz points out, the fact that principles *can* dictate results does not necessarily mean they *always do*.¹⁷³

It is suggested that what actually happens is closer to a judicial application of the scientific method than a quest for an exact correct answer. This analogy is put forward by Kerr. As he explains, there is, for instance, one exactly correct answer to the question of the origins of life on earth.¹⁷⁴ The answer is, as yet, unknown. Since time immemorial theories and myths have been posited in an attempt to provide an answer. Over time these have become more complex and

¹⁷¹ W William Hodes, 'Bias, the Appearance of Bias, and Judicial Disqualification in the United States' in H P Lee (ed), *Judiciaries in Comparative Perspective* (CUP 2011) 384.

¹⁷² David Kerr, 'Is There Always Only 'One Right Answer' in Law? A Consideration of Professor Ronald Dworkin's Denial of Judicial discretion from a United Kingdom, and in particular a Scottish, Juristic Perspective (LLM thesis, University of Glasgow, 2014) 34.

¹⁷³ Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 (5) *Yale L J* 823, 855.

¹⁷⁴ Barry Hoffmaster explores a similar question: 'What is the temperature on the surface of Pluto at this moment?' Barry Hoffmaster, 'Understanding Judicial Discretion' (1982) 1 *L and Philosophy J* 21, 32.

as new research is carried out, older theories are overturned. What is offered is not a single 'right answer' or one 'best fit' solution at any given time, but one of many possible ones under the circumstances based on fact and evidence. If the 'answer' requires to be changed, it is. As in science, the same thing happens in adjudication. A judge in a case that he has to exercise his discretion cannot arrive at the 'one right answer' which satisfies Dworkin's theory.¹⁷⁵ Instead, the judge offers the solution 'he honestly thinks is best' and bases this on 'the best reasons he is able to give'.¹⁷⁶ On these grounds, an appeal court will usually not interfere with a judgment on which reasonable minds could differ.¹⁷⁷

Perry argues that we could only know that a case involving conflicting or doubtfully applicable legal standards has a uniquely correct result by knowing that all competent and disinterested jurists in the relevant field of law do or would agree on some particular result for that case.¹⁷⁸ It is fair to suggest, says Kerry, that such a consensus would never be reached. In situations where the law 'runs out' and resort must be had to policy and principle, there will be as

¹⁷⁵ Kerr (n 172) 34.

¹⁷⁶ Thomas D Perry, 'Judicial Method and the Concept of Reasoning' (1969) 80 (1) *Ethics* 1, 9. A judge being bound by standards or principles could mean merely that he is required to use those standards or principles even though they might not determine one correct answer but leave alternative choices that are equally acceptable. See Wilfrid J Waluchow, 'Strong Discretion' (1983) 33(133) *The Philosophical Q* 321, 329 discussed in Michael D Bayles, *Hart's Legal Philosophy: An Examination* (Springer 1992) 174.

¹⁷⁷ Tom Bingham, 'The Discretion of the Judge' (1990) 5 *Denning L J* 27, 32.

¹⁷⁸ Thomas D Perry, 'Judicial Method and the Concept of Reasoning' (1969) 80 (1) *Ethics* 1, 5.

many shades of opinion on the answer as there are experts in the field. Law does not exist in a vacuum. Experts will undoubtedly hold differing views on the case depending on their various positions on the social and political spectra.¹⁷⁹

The nonexistence of a single right answer in all cases is recognised in the majority of legal systems. Perhaps one reason for Dworkin's one right answer thesis, argues Kerr, had been his background. From an American juristic perspective, it might be easier to find 'right answers' in the United States Constitution. Moreover, modern American jurisprudence, under the influence of legal realism, favours a 'jurisprudence of justifications'.¹⁸⁰ That is to say, there is a trend among American judges to aim for the right answer and then retrospectively justify it.¹⁸¹ Relevant to this observation are the words of Benjamin Cardozo who stated: 'Of the cases that come before the court in which I sit [the New York Court of Appeals at the time], a majority, I think, could not, with any semblance of reason, be decided in any way but one.'¹⁸² It should be mentioned, however, that later on Dworkin somewhat softened his position

¹⁷⁹ Kerr (n 172) 36.

¹⁸⁰ See eg Frederick Schauer, 'The Jurisprudence of Reasons' (1987) 85 Michigan L Rev 847.

¹⁸¹ Kerr (n 172) 39.

¹⁸² Benjamin N Cardozo, *The Nature of the Judicial Process* (first published 1921, Wildside Press LLC 2010) 67.

suggesting that the occasions when a legal question has no right answer may be ‘much rarer than is generally supposed’.¹⁸³

It emerges from the above that, although it is hard to define it precisely, judicial discretion does exist. At this point, the extent of discretion given to judges by the EAPO regulation will be set out. Subsequently, in order to decide whether and to what extent judicial discretion would be beneficial in granting provisional and protective relief, it is useful to compare the extent of discretion—or the lack thereof—in the common law freezing orders and the civilian in rem asset preservation orders. It is also interesting to observe how judicial discretion generally operates in the two legal traditions. Comparative law scholars mention several factors which contribute to the relative amount of judicial discretion in a particular legal tradition.¹⁸⁴ These factors include traditional conceptions of the role of judges, the structure of the judicial profession, and its degree of independence from the legislature.¹⁸⁵

¹⁸³ Ronald Dworkin, *A Matter of Principle* (Harvard UP 1985) 119.

¹⁸⁴ Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989); Barak, *Judicial Discretion* (n 154) mentioned in Dieter Schmidtchen and Robert Cooter, *Constitutional Law and Economics of the European Union* (Edward Elgar Publishing 1997) 108.

¹⁸⁵ Schmidtchen and Cooter (n 184) 108.

3. Judicial discretion in the EAPO regulation

Inspired by the civilian model of in rem asset preservation orders, the EAPO regulation gives very little discretion to national judges in granting or refusing a preservation order. The EAPO broadly reflects the civil law tradition where the judge's discretion is heavily circumscribed by the relevant legal rule, such that the judge's task, at least as it seems, is to mechanically apply the law to the true facts without any residual discretion. Specifically, article 7 of the Regulation provides:

1. The court *shall*¹⁸⁶ issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult.
2. Where the creditor has not yet obtained in a Member State a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor.

Recital 14 of the Regulation, gives some guidance to the judge in interpreting when the subsequent enforcement of a judgment may be 'impeded or made substantially more difficult'.¹⁸⁷ According to the recital, this will be the

¹⁸⁶ (emphasis added).

¹⁸⁷ Where a recital in EU legislation is clear, it controls an ambiguous operative provision. Tadas Klimas and Jūratė Vaičiukaitė, 'The Law of Recitals in European Community Legislation' (2008) 15 *ILSA J of Intl & Comparative L* 1, 32. As Professor Janeen Carruthers put it, 'Recitals are not the law, but neither not the law'. Janeen Carruthers, 'The recast of the Brussels I Regulation:

case when there is a 'real risk' that, by the time the applicant is able to have a judgment enforced, the respondent may have dissipated, concealed, or destroyed his assets or have disposed of them at an under value, to an unusual extent or through unusual action. Considering the above, it seems that the rationale of granting an EAPO is to prevent *intentional* nefarious or unusual dissipation of the assets on behalf of the respondent.

In determining when such 'real risk' exists, the court has to assess the evidence submitted by the applicant. According to the same recital, the existence of a risk may be inferred from the respondent's conduct in respect of the applicant's claim or in a previous dispute between the parties, the respondent's credit history, the nature of the respondent's assets, and any recent action taken by the respondent with regard to his assets. In assessing the evidence, recital 14 indicates that the court may consider that withdrawals from accounts and instances of expenditure by the respondent to sustain the normal course of his business or recurrent family expenses are not, in themselves, unusual. The recital indicates that the mere non-payment or contesting of the claim or the mere fact that the debtor has more than one creditor should not, in themselves, be considered sufficient evidence to justify the issuing of an order. Nor should the mere fact that the financial circumstances of the debtor are poor or deteriorating, in itself, constitute a

forthcoming changes and open issues' (Academy of European Law (ERA) conference on 'Cross-border Debt Recovery in Legal Practice', Trier, Germany, 6–7 February 2014).

sufficient ground for the issuing of an order. However, the court is allowed to take these factors into account in the overall assessment of the existence of the risk.

The Regulation gives discretion to the judge in deciding certain other issues related to the EAPO. For instance, article 12 gives discretion to the court in determining the amount of security to be given by the applicant as a condition to grant an order. Additionally, article 17 allows the judge to give the applicant the opportunity to rectify his application if he has not provided all the information required. Moreover, the judge that issued the preservation order may, of his own motion, modify, or revoke the order due to changed circumstances, if the law of that Member State so permits (article 35). The judge also has discretion to order the release of the funds preserved if the respondent provides to the court security in the amount of the order. The court, however, does not have discretion to order inter partes proceedings before granting the order and it is bound to examine the application ex parte (article 11). Furthermore, the court does not have discretion in determining the amount to be preserved (article 17).

From the above provisions it is evident that the court has discretion in interpreting the conditions to be satisfied for the granting of an EAPO as well as in deciding certain side issues related to an order. No discretion, however, is given to the court in deciding whether or not to *issue* an EAPO. If the tests that

the court has to apply are met, the court *shall* issue the order and has no discretion to refuse to grant it.¹⁸⁸ One could argue that this is not the case since the court has considerable leeway in interpreting the conditions for issuing an order. However, it is suggested that the judge does not have the kind of discretionary power to grant or refuse relief as in English equity and by extension in common law freezing injunctions. Essentially, in the case of the EAPO, the judge may not refuse to grant the order if the conditions for issuing an EAPO are fulfilled, even if the circumstances of the specific case may suggest a different outcome.

As Katja Lenzing explains, the dilemma between using ‘may’ or ‘shall’ provisions has been a common one in the discussions for drafting EU procedural legislation. The legislators usually want to ensure that if the conditions for a remedy are fulfilled, the remedy should be granted. The general consensus is that this way legal certainty is preserved, as many judges on the Continent would not be able to handle discretion because they are not used to it.¹⁸⁹ Another common argument against ‘may’ provisions is that discretion counts against expedition; the more automatic the outcome, the less litigation, and the quicker the remedy. The approach in favour of ‘shall’ provisions, which

¹⁸⁸ Emily Lew, ‘Speedy Cross-border Debt Recovery? The New Europe-wide Freezing Order’ [2011] *Butterworths J of Intl Banking and Finance* L 699, 701.

¹⁸⁹ Interview with Katja Lenzing, Legal Officer, Directorate-General for Justice, European Commission (Brussels, Belgium, 4 February 2014).

do not allow discretion to the judge in granting a remedy was followed in other instruments as well, such as the European Small Claims Procedure¹⁹⁰ and the European Order for Payment Procedure.¹⁹¹ As in the EAPO regulation, less important provisions within such instruments do provide for some discretion, but in general, drafters of EU legislation try to be as more prescriptive as possible.

Moreover, EU instruments similar to the EAPO, restricted by the principle of subsidiarity,¹⁹² leave domestic legislation untouched and introduce another regime on top of it, which is optional. In other words, a litigant may choose between the domestic and the EU remedy. This two-tier system is driven by the desire to render EU legislation the least intrusive possible to the national legal systems. Judicial discretion in granting or refusing relief could arguably negate to a certain extent this idea of non-intervention of EU legislation in national legal orders and, therefore, EU legislators are very reluctant in using it.¹⁹³

¹⁹⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

¹⁹¹ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1.

¹⁹² The principle of subsidiarity is the principle whereby the EU does not take action except in the areas that fall within its exclusive competence, unless it is more effective than action taken at national, regional, or local level. It is defined by article 5 of the Treaty on European Union [2012] OJ C326/13. See eg Eva Storskrubb, *Civil Procedure and EU Law: A policy area uncovered* (OUP 2008) 71.

¹⁹³ Interview with Katja Lenzing, Legal Officer, Directorate-General for Justice, European Commission (Brussels, Belgium, 4 February 2014).

One might question why a respondent to an EAPO application who may be transferring his assets should be, in effect, automatically subject to such a measure. It might be the case for example that the respondent is about to use the funds in his account for a business opportunity that will soon lapse. Under the EAPO regulation, that would be considered an unusual action on the part of the respondent and the order will have to be granted under any circumstances. But what if the harm that will be caused to the respondent if the order is granted will be much more serious than the harm that will be caused to the applicant if the order is not granted? Moreover, third parties who are in a business relationship with the respondent might be more seriously harmed by the order than the applicant would be, had the order not been granted. For example, a respondent's potential creditor may suffer serious injury owing to the impossibility of the respondent to complete the transaction.¹⁹⁴

Undoubtedly these hypotheses are the exception and not the norm, but it is submitted that judicial discretion is necessary if only to do justice in one case out of a hundred. The circumstances in which applications for an EAPO are made are infinitely varied and one rigid test cannot adequately provide a good solution for all. In other words, it is better to deal with such situations by reference to the facts of the particular case and, strictly following the rule, may sometimes—although rarely—be inappropriate.

¹⁹⁴ See *Denilauler v SNC Couchet Frères* (125/79) [1980] ECR 1553, [1981] 1 CMLR 62, Opinion of AG Mayras, para 2.

An asset preservation order is by its nature an exceptional remedy because of the inconvenience that it might cause to the respondent. A procedure, however, which grants an order automatically upon proof that there is a risk that the assets might be disposed of because of nefarious or unusual conduct by the respondent, and not after careful judicial consideration of all the circumstances, might put its fairness at risk. Therefore, the judge examining an EAPO application should have discretion to refuse relief in the interests of justice.

The lack of discretion in examining an application for an EAPO was one of the concerns expressed by practitioners in common law jurisdictions when they were called to comment on the European Commission's proposal for the EAPO.¹⁹⁵ Furthermore, even though the EAPO regulation marks a major shift from a general to a specific approach vis-à-vis harmonisation of provisional and protective measures,¹⁹⁶ previous studies in the area have opted for judicial discretion.

Specifically, rule 10.2 of the first effort to approximate procedural laws in the EU in 1994, uses discretionary language for the granting of provisional and

¹⁹⁵ See eg Ministry of Justice, 'Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters—Response to public consultation' (CP(R) 1/2012, 2012) para 14.

¹⁹⁶ ELI–Unidroit Working Group on Provisional and Protective Measures, 'First Report November 2014: The Recent European Shift from a General to a Particular Approach' (Study LXXVIA, 2014) 4.

protective relief where it sets the conditions for relief.¹⁹⁷ The same suggestion—for judicial discretion in granting relief—is found in the Principles of Provisional and Protective Measures in International Litigation drafted by the International Law Association (ILA) in 1996.¹⁹⁸ Furthermore, the study commissioned by Professor Burkhard Hess in 2002, which essentially opened the way for the EAPO, suggested the setting up of ‘a European Protective Order for Cross-Border Garnishment’, the grant of which ‘should be discretionary’.¹⁹⁹ Finally, principle 8.1 and rule 17.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, a project which aimed to create a set of acceptable rules and principles that would be accepted globally, indicate that the grant of provisional and protective measures should be governed by the principle of proportionality, which implies a certain degree of judicial discretion.²⁰⁰

Below in this chapter, it will be argued that the EAPO Regulation as well as future EU-wide provisional and protective measures should incorporate the kind of judicial discretion that is the central feature of the equitable jurisdiction to grant freezing orders in common law systems. This is because, while a non-

¹⁹⁷ Marcel Storme, *Approximation of Judiciary Law in the European Union* (Kluwer Law International 1994) 204.

¹⁹⁸ Principles of Provisional and Protective Measures in International Litigation (ILA Principles 1996) para 4.

¹⁹⁹ Burkhard Hess, ‘On making more efficient the enforcement of judicial decisions within the European Union’ (Study No JAI/A3/2002/02, Heidelberg, 2004) 143.

²⁰⁰ ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (CUP 2005) 25, 120.

discretionary statutory rule would work in the majority of the cases, it risks causing injustice in certain cases whose facts cannot be predicted beforehand.

4. Judicial discretion in equity and the wide powers of judges in the common law tradition

a. Origin of equitable discretion

In the common law tradition, equity is grounded on rules, yet the grant of equitable remedies, including freezing injunctions, is said to be characterised by judicial discretion. But where does this alleged discretion historically come from and what is its exact nature?

It is argued that the discretion that judges in the common law world have today in granting or refusing equitable relief derives from the fact that their predecessors awarded remedies in equity as a matter of prerogative and not as a matter of right of the applicant. As already explained in the first chapter, equity in the common law tradition is that body of remedies which before 1873 were provided only by the Court of Chancery and not by courts of law.²⁰¹ The power by virtue of which the Court of Chancery provided those remedies emerged in

²⁰¹ James Andrew Strahan, *Strahan's Digest of Equity* (R A Eastwood ed, Butterworth & Company Limited 1939) 3.

fourteenth-century England from the delegation to its head—the Chancellor—of the King’s prerogative to afford to the King’s subjects relief where the common law gave either no remedy at all or a remedy which was inadequate. In other words, the purpose of the courts of equity was to prevent unfairness caused by rigid legal rules.

As Strahan explains, the Court of Chancery was not a court of law but a court of ‘conscience’. Its function was to use the King’s prerogative to intervene in the interests of justice only where conscience rendered such intervention necessary. The term used for litigants coming before the Court of Chancery is indicative of the discretionary nature of the relief it provided: a person, seeking relief in the Court of Chancery, was called a suitor or a petitioner, who was humbly praying for the benefit of the court’s grace. He was asking for something which the law did not afford him and which the King alone could give him by the discretionary exercise of his prerogative to interfere and grant relief outside the law. By contrast, a person seeking relief in a court of law was called a plaintiff and he was claiming a benefit to which he was by law entitled. Here, all that the court had power to do was to decide if his claim was good according to law; if it was, the court was compelled to grant him relief. This is shortly summed up in the maxim that ‘equitable relief always was within the discretion of the court’, while legal relief was *ex debito justitiae* (a matter of right).²⁰²

²⁰² Strahan (n 201) 6.

b. The change in the notion of discretion in equity throughout the years

At this point, a continental jurist would wonder how the jurisdiction of the Chancellor could be so deeply enmeshed in discretion that equitable relief seems to be more a matter of grace than of right.²⁰³ However, the degree of discretion that judges have had to grant equitable relief has fluctuated through the years. The idea that equitable relief has been completely discretionary is only half true.²⁰⁴

According to Joseph Story, initially, the Court of Chancery administered justice according to what appeared to be the dictate of conscience and upon principles of natural law without taking into account any law or rule. As precedents accumulated in the Court, however, equity became a system of jurisprudence as strictly technical as the law. There are now many settled principles of equity over which judges do not assume a discretionary power.²⁰⁵ The continuous variation of the extent of judges' discretion in granting equitable remedies can be attributed to the differing attitudes of different judges, some of whom were equity enthusiasts and some were equity sceptics.²⁰⁶

²⁰³ Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale UP 1991) 219.

²⁰⁴ Graham Virgo, *The Principles of Equity and Trusts* (OUP 2012) 29.

²⁰⁵ Joseph Story, *Commentaries on Equity Jurisprudence* in James Philemon Holcombe (ed), *An Introduction to Equity Jurisprudence* (Derby, Bradley & Co 1846) 17.

²⁰⁶ Hudson, *Equity and Trusts* (n 206) 30.

More specifically, in the infancy of the English courts of equity, as Blackstone and Story observed, the chancellors themselves, partly from their ignorance of the law as they were frequently bishops or statesmen, partly from ambition and lust of power, but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves unlimited authority.²⁰⁷ The lack of principles in the area of equity at that time was the reason that no professional training was thought necessary for the office of Chancellor, while the law courts were staffed by judges trained in the principles of the law.²⁰⁸ It was at that time that John Selden famously attacked the discretionary nature of equity by comparing it to the length of a 'Chancellor's foot' insinuating that it was a random standard that would change from chancellor to chancellor.²⁰⁹

In the following years, mainly for political reasons, there was a pressure towards converting equity into a system of rules.²¹⁰ Most equity scholars agree

²⁰⁷ BI Comm vol 4, 433; Story (n 205) vol 1, para 22.

²⁰⁸ Strahan (n 201) 3.

²⁰⁹ John Selden, *Table Talk* (A Murray & Son 1689) 46. See also Iain McDonald and Anne Street, *Equity and Trusts Concentrate: Law Revision and Study Guide* (OUP 2014) 3. Indicatively, Chief Justice Fortesque declared in 1452 that '[w]e are to argue conscience here, not the law', meaning that the role of the court of equity at that time was to reach a morally correct judgment without worrying about precedent. See Fitz Abr, Subpoena, fol 188, pl 23; J H Baker, *An Introduction to English Legal History* (4th edn, OUP 2002) 108.

²¹⁰ Sarah Worthington, *Equity* (OUP 2006) 11. Francis Bacon, who served as a Lord Chancellor between 1618 to 1621 said: 'Certainty is so essential to a law, that a law without it cannot be just. For if the trumpet gives an uncertain sound, who shall prepare himself to the battle? So if the law has an uncertain sense, who shall obey it? The courts of equity should have power, as well of abating the rigour of the law as of supplying its defects: for if a remedy be afforded to a person neglected by the law; much more to him who is hurt by the law. But above all, it is of the greatest moment to the certainty of the laws we now speak of, that courts of equity keep from

that Lord Nottingham, appointed in 1673, was the first Chancellor who, by examining the grounds on which his predecessors based the grant of relief outside the law, turned equity from a matter of chance into a matter of principle.²¹¹ At that time, as Hudson points out, there was no systematic reporting of court decisions. Different court reporters could produce very different accounts of what a judge had said in the course of his judgment. In addition, the first book concentrating exclusively on equity was Francis' Maxims of Equity published in 1727. Consequently, it was difficult for legal principles to develop systematically. Therefore, the work of someone like Lord Nottingham in seeking to regularise the principles of equity was very important.²¹²

In this attempt, Lord Nottingham tried to define the broad notion of 'conscience'. Unlike his predecessors, Lord Nottingham preferred to think of conscience as being a technical term. In *Cook v Fountain* he held that:

With such a conscience as is only naturalis et interna, this court has nothing to do; the conscience by which I am to proceed is merely civilis et politica, and tied to certain measures: and it is infinitely better for the public that a trust, security, or agreement, which is

swelling, and overflowing; lest, under pretence of mitigating the rigour of the law, they should cut its sinews, and weaken its strength, by wresting all things to their own disposal. No court of equity should have a right of decreeing against a statute, under any pretext of equity whatever: otherwise the judge would become the legislator, and have all things dependent upon his will.' Francis Bacon, *The works of Francis Bacon* (M Jones ed, 1815) vol 7, 267.

²¹¹ Strahan (n 201) 6; Hudson, *Equity and Trusts* (n 206) 30; Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate Publishing 2010) 76.

²¹² Hudson, *Equity and Trusts* (n 206) 30.

wholly secret, should miscarry, than that men should lose their estates by mere fancy and imagination of a chancellor.²¹³

Therefore, the idea of conscience was still in play but it was not a 'conscience' as that term was ordinarily understood: instead, the form of conscience with which Lord Nottingham was concerned was a conscience that is a strictly legal concept as opposed to a religious, moral, or philosophical notion.²¹⁴

The work of Lord Nottingham, Hudson explains, was continued by Lord Hardwicke in the 18th century and Lord Eldon in the 19th century, as subsequent Lords Chancellors. Furthermore, this line of thought can be seen in the beginning of the 20th century where it was regularly suggested that the courts would only apply equitable doctrines if they could be shown to be predicated on clear authority and not simply because they appeared to be 'just', or 'right', or 'conscionable'.²¹⁵

Although the first 60 or 70 years of the 20th century saw one trend towards great rigidity in decision-making, continues Hudson, the late 20th century saw a liberalising tendency in the decisions of Lord Denning. Lord Denning dominated the large flow of cases through the Court of Appeal in his

²¹³ *Cook v Fountain* (1733) 3 Swanston 585, 600; 36 ER 984, 990 (Lord Nottingham).

²¹⁴ Hudson, *Equity and Trusts* (n 206) 31.

²¹⁵ Hudson, *Equity and Trusts* (n 206) 30.

role as Master of the Rolls. He had the power to decide which cases he heard himself and which judges sat alongside him on the three-person panel. In fact, Lord Denning was perhaps one of the clearest examples of a 'pure equity' judge in that his primary task was to achieve 'fair' results no matter what the strict legal rules would seem to have required. In any case, this approach had nothing to do with the arbitrary judgments of the early days of equity.²¹⁶ In fact, Lord Denning writing extra-judicially early in his judicial career said himself that 'the Courts of Chancery are no longer courts of equity. They are as fixed and immutable as the courts of law ever were'.²¹⁷

According to Lord Halsbury, discretion in equity, although wide, is a rule-bound judicial discretion exercised only along settled principles and not according to private opinion, sympathy, or benevolence, or exercised wildly, indiscreetly, or capriciously. In equity, discretion means a sound discretion guided by law; it is not arbitrary, vague, or fanciful. It must be exercised within the limit to which the judge, as an honest man, competent to the discharge of his office, ought to confine himself.²¹⁸ In other words, when discretion in equity is exercised, reasons for its exercise must be given.²¹⁹ As Lindley LJ said in

²¹⁶ Hudson, *Equity and Trusts* (n 206) 32.

²¹⁷ Alfred Denning, 'The Need for a New Equity' (1952) 5(1) CLP 1, 8.

²¹⁸ *Sharp v Wakefield* [1891] AC 173 (HL) 179 (Lord Halsbury LC).

²¹⁹ Richard Kuloba, *Principles of Injunctions* (OUP 1987) 26.

Holmes v Millage ‘courts of equity proceeded upon well-known principles capable of great expansion; but the principles themselves must not be lost sight of’.²²⁰

In the course of time, the so-called ‘maxims of equity’ were developed. The maxims are mere declarations of principles of obvious and universal justice.²²¹ For example, one maxim states that ‘he who seeks equity must do equity’, another one declares that ‘he who comes into equity must come with clean hands’, and a third one prescribes that ‘where there is equal equity the law must prevail’.²²² In his Commentaries, Blackstone outlined over 60 equitable maxims.²²³ Maxims tended to play a significant part in guiding the exercise of judicial discretion in the old Court of Chancery and they are still employed

²²⁰ *Holmes v Millage* [1893] 1 QB 551 (CA) 555 (Lindley LJ). As Lawson said, the supposed aversion of common lawyers to principle is a myth. What common lawyers are really afraid of is the authoritative verbal formulation of principle. F H Lawson, ‘Comparative Judicial Style’ (1977) 25 *American J of Comparative L* 364, 371. Lord Selborne in *Barnes v Addy*, repeated by Lord Upjohn in his powerful dissent in *Boardman v Phipps*, said: ‘There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them’. *Boardman v Phipps* [1967] 2 AC 46 (HL) 133 citing *Barnes v Addy* (1874) 9 Ch App 244, 251 (Lord Selborne LC). See Jill Martin, ‘Equitable and Inequitable Remedies’ (1990) 1 *KCLJ* 1168.

²²¹ Joseph Story, *Commentaries on Equity Jurisprudence* in James Philemon Holcombe (ed), *An Introduction to Equity Jurisprudence* (Derby, Bradley & Co 1846) 22. They have, as Simon Gardner has observed a peculiarly Delphic quality, wrapped as they are in metaphor, grandly unqualified, and acknowledging no authority but transcendent wisdom. Simon Gardner, ‘Two maxims of equity’ (1995) 54(1) *Cambridge L J* 60, 60.

²²² Edmund Henry Turner Snell, *The Principles of Equity* (J R Griffith (ed), 2nd edn, Stevens & Haynes 1872) 12.

²²³ Samantha Hepburn, *Principles of Equity & Trusts* (Routledge 2013) 13.

today. They are a flexible tool and they are useful to the extent that they guide what would otherwise be an even broader discretion.²²⁴

The recognition of specific principles within equity, however, does not mean that there is no role for discretion. Lord Hardwicke, in his letter to Lord Kames, on the subject of equity, in answering the question whether a court of equity ought to be governed by any general rules, said:

Some general rules there ought to be; for otherwise the great inconvenience of *jus vagum et incertum* will follow; and yet the [judge] must not be so absolutely and invariably bound by them, as the judges are by the rules of the common law. For if they were so bound, the consequence would follow, which you very judiciously state, that he must sometimes pronounce decrees, which would be materially unjust since no rule can be equally just in the application to a whole class of cases, that are far from being the same in every circumstance.²²⁵

It follows that equity is grounded on rules, principles, and doctrine that are strictly interpreted, but their application and the award of remedies depend on the judge's discretion whose task is to secure a just and fair result.²²⁶ This is basically the meaning of the suggestion that equitable relief is discretionary whereas legal relief is a matter of right. As Ashburner explained, if A has entered into a contract with B and has breached the contract, B is entitled as of

²²⁴ Gary Watt, *Trusts and Equity* (OUP 2014) 526.

²²⁵ Joseph Parkes, *History of Chancery* (Longman, Rees, Orme, Brown, and Green, 1828) 506; Story (n 205) vol 1, para 18.

²²⁶ Paul S Davies and Graham Virgo, *Equity & Trusts: Text, Cases, and Materials* (OUP 2013) 6.

right to obtain judgment in his favour and to recover at least nominal damages. Conversely, equitable discretion means that a court will have discretion to decide, when for example A has contracted to convey land to B and refuses to convey it, whether to compel A or not to perform his contract under the equitable doctrine of specific performance.²²⁷ On the one hand there is always a need for simplicity, certainty, and predictability, and this is provided by rules, but on the other hand there is always a countervailing need for equitable discretion to offset the unfairness inherent in rules.²²⁸

c. The role and power of judges in the common law tradition

Broad judicial powers are arguably a key feature of most common law systems. Judges are usually not the only adjudicators, since juries, as finders of fact, have also been a significant player in common law trials. However, judges in the common law world have extraordinary powers.

Common law judges, Merryman and Pérez-Perdomo indicate, are culture heroes and parental figures. Many of the great names of the common law are those of judges such as Denning, Holmes, and Cardozo. The common law

²²⁷ Walter Ashburner, *Ashburner's Principles of Equity* (Denis Browne ed, 2nd edn, Butterworth & Company 1933) 18.

²²⁸ Worthington (n 210) 334.

tradition was originally created and has grown and developed in the hands of judges through the principle of judicial precedent, the process whereby judges follow previously decided cases where the facts are of sufficient similarity and which involves an application of the principle of stare decisis.²²⁹ There is no formal judicial career or profession and judges are recruited from amongst practitioners. They are appointed to judicial positions on the basis of a variety of factors, including success in practice and their reputation among their fellow lawyers. It is a form of recognition that brings respect and prestige. Judges are well paid, and if they are among the higher judicial echelons, they will have law clerks and judicial assistants. If they sit on the highest court of a country, their name may be a household word. Their opinions will be discussed in the newspapers and dissected and criticised in the legal periodicals. Dissenting opinions of judges are not considered seditious or subversive as in continental legal systems.²³⁰ In other words, they are very important people.²³¹

²²⁹ Common law courts started to adhere to a stare decisis principle during the sixteenth century in matters of procedure and pleading and subsequently extended the principle to apply to matters of substantive law. Harold J Berman and Charles R Reid, Jr, 'The transformation of English legal science: From Hale to Blackstone' (1996) 45 Emory L J 437, 446. At the end of the nineteenth century, under Bentham's positivist influence, the doctrine of stare decisis was more formally restated. Barbara Luppi and Francesco Parisi, 'Judicial creativity and judicial errors: an organizational perspective' (2010) 6 J of Institutional Economics 91, 92.

²³⁰ The polyphonic conception of law in common law countries is shown by the importance that dissenting opinions have in the process of legal change. Alexander H Pekelis, 'Legal Techniques and Political Ideologies: A Comparative Study' (1943) 41 (4) Michigan L Rev 665, 691.

²³¹ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (3rd edn, Stanford UP 2007) 34. See also Lord Mackay, *The Administration of Justice (The Hamlyn Lectures)* (Stevens and Sons 1994) 1; Arthur Taylor von Mehren and James Gordley, *The civil law system: an introduction to the comparative study of law* (2nd edn, Little Brown 1977) 1146;

Furthermore, the number of judges in common law jurisdictions is much smaller compared to the civil law world, especially in the higher courts.²³² For instance, nine justices serve in the Supreme Court of the United States, 12 in the Supreme Court of the United Kingdom, seven in the High Court of Australia, and nine in the Supreme Court of Canada. By contrast, in line with the relatively less prominent role of judges in the civil law world, which is discussed below, these numbers are very different in the civil law jurisdictions. Specifically, in Germany there are almost 130 judges serving in the Federal Court of Justice, while in France the Court of Cassation has nearly 200 members.

The role of judges in the common law tradition has its roots in history. As Arruñada and Andonova explain, the English Parliament was one of the few to survive from the Middle Ages, constantly increasing its control over the Crown. The result was a shift of power from the Crown to the Parliament which limited further the Crown's right to tax, and, thus, to interfere with private property rights. The common law courts and the English judiciary shared the

Mauro Cappelletti (ed), *International Encyclopedia of Comparative Law* (Mohr Siebeck and Martinus Nijhoff 2014) vol XVI, 83; Daniel Duman, *The Judicial Bench in England, 1727–1875: The Reshaping of a Professional Elite* (Royal Historical Society 1982) 29; Keith Abbott, Norman Pendlebury, and Kevin Wardman, *Business Law* (8th edn, Thomson 2007) 48ff. As Frankli said, in British law, as received in America, judicial method has as its basis the decision as expounded by a judge. The case and the judge are central. The judge is hero, and the opinion is his weapon. Mitchell Franklin, 'The Historic Foundation of the American Law Institute: Restatement as Traditional to Codification' (1934) 47 *Harvard L Rev* 1367, 1370.

²³² Cappelletti, *International Encyclopedia of Comparative Law* (n 231) vol XVI, 75; Nigel Foster and Satish Sule, *German legal system and laws* (4th edn, OUP 2010) 105; John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (OUP 2008) 55.

Parliament's appreciation of property rights and its understanding of market mechanisms. The appointment of English judgeships depended to a much greater extent than elsewhere in Europe on professional practice, as English judges were chosen from amongst barristers. As such, they had seen the world from the perspective of the parties they had represented and were therefore more familiar and educated on the intricacies of the developing market economy.²³³

According to Beck and Levine, while landholding rights in England were originally based on William I's feudal system, the courts developed legal rules that treated large estate holders as private property owners and not as tenants of the King. For this reason, unlike in pre-revolutionary France, the courts in England were frequently viewed more favourably and sometimes as supporters of progressive reforms so that judges were afforded greater discretion.²³⁴

²³³ Benito Arruñada and Veneta Andonova 'Market Institutions and Judicial Rulemaking' in Claude Ménard and Mary M Shirley (eds), *Handbook of New Institutional Economics* (Springer 2008) 234. The understanding by English judges of the fundamentals of the market economy also benefited from the early checks imposed on royal authority, as these checks limited the ability of the Crown to sell new public offices making judgeships secure investments and converting early common law judges into defenders of private property rights. K W Swart, *Sale of Offices in the Seventeenth Century* (Martinus Nijhoff Publishers 1949) 46.

²³⁴ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 257. The transformation of the feudal economy received an early ally in the English judiciary which, by making institutional changes, assisted the evolutionary development of common law toward the new market order. Todd J Zywicki, 'The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis' (2003) 97(4) *Northwestern U L Rev* 1551, 1607. See also Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, OUP 2014) 252.

The increased powers of common law judges are not limited to the area of equity. Firstly, it is suggested that judges in common law jurisdictions have in some instances a similar kind of discretionary power that they have in equity in almost every other area. In contract, for example, when assessing issues of unfair terms in consumer contracts, in tort when assessing whether there is a duty of care or whether the plaintiff's negligence has contributed to his own damage, and in the law of contract and tort together in quantifying compensation.²³⁵ Furthermore, outside the area of private law, as Lord Bingham says, criminal law has been described as the real sanctuary of judicial discretion. It is true that in a criminal trial, although juries have large powers, the judge has a broad discretion as regards, inter alia, sentencing, admission of evidence, etc.²³⁶

In addition, another source of judicial power in the common law tradition is the doctrine of the inherent jurisdiction of the court. The inherent jurisdiction is sometimes confused with the exercise of judicial discretion. These two concepts resemble each other and they often appear to overlap, but they must be distinguished. From the earliest times, the English courts had used the inherent jurisdiction to regulate their own procedure. As Isaac Hai Jacob points out, this

²³⁵ Worthington (n 210) 333.

²³⁶ Tom Bingham, *The Business of Judging: Selected Essays and Speeches: 1985–1999* (OUP 2011) 44. See also Roscoe Pound, *The Theory of Judicial Decision* (Harvard Law Review Association 1923) 816.

power did not have a basis on any statute or any other rule and existed alongside the rules of court. It is said to be derived from ‘the very nature of the court as a superior court of law’. The exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, which is explained in detail in the next chapter, and by way of regulating the practice of the court and preventing the abuse of its process, which was achieved typically by staying or dismissing an action shown to be vexatious and frivolous. Its distinctive and basic feature is that it is exercisable by summary process, ie without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial of the original proceedings where the contempt or abuse arose or for the outcome of any other proceedings.²³⁷

The English doctrine of the inherent jurisdiction of the court is reflected in most, if not all, other common law jurisdictions—though not so extensively in the United States—while it has no exact counterpart in civil law systems, except perhaps in relation to abuse of process.²³⁸ The grant of Mareva injunctions in Australia, for example, apart from statute, is also based on the inherent jurisdiction of the court to act by injunction so as to protect the integrity of its

²³⁷ Isaac Hai Jacob, ‘The Inherent Jurisdiction of the Court’ [1970] CLP 23, 24-27. See also Masayuki Tamaruya, ‘The Anglo-American Perspective on Freezing Injunctions’ (2010) 29 CJK 350; M S Dockray, ‘The Inherent Jurisdiction to Regulate Civil Proceedings’ (1997) 113 LQR 120.

²³⁸ Isaac Hai Jacob, ‘The Inherent Jurisdiction of the Court’ [1970] CLP 23, 23.

own process or in support of the due administration of justice.²³⁹ Moreover, the jurisdiction of granting Anton Piller orders (now ‘search orders’ in England) was also based on the inherent jurisdiction of the court.²⁴⁰

In modern times, the inherent jurisdiction is best regarded as a residual source of autonomous control, which the courts exercise over their own process and they can use to supplement the statutory procedural framework.²⁴¹ Although it may be argued that the inherent jurisdiction is a necessary part of the armoury of the courts to enable them to administer justice, it does not have distinct limits and its exercise may sometimes be characterised as arbitrary.²⁴²

A further source of judicial power in the common law world is case management. In England during the 1990s, courts led the way to strengthening the trial judge’s case-management role.²⁴³ Their practices were accepted by

²³⁹ See *Jackson v Sterling Industries* (1987) 162 CLR 612 (High Court of Australia) [14]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 (High Court of Australia) 399–401; Marion Hetherington, ‘Inherent Powers and the Mareva Injunction’ (1983) 10 Sydney L Rev 76; Marion Hetherington, ‘Mareva After Thirty Years’ (2004) 8(1) U of Western Sydney L Rev 21; Steven Gee, *Commercial Injunctions* (6th edn, Sweet & Maxwell 2016) paras 1-009, 1-022; Clint Hinchin, Emma Mitchell, and Carly Dunn, ‘Australia’ in Lawrence W Newman (ed), *Attachment of Assets* (Juris Publishing Inc 2014) AUS-7; Bernard Cairns, *Australian Civil Procedure* (10th edn, NSW Lawbook Co 2014) 534.

²⁴⁰ *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA) 61; M S Dockray, *Anton Piller Orders* (Watson Hill 1992) para 1.8.

²⁴¹ Neil Andrews, ‘The New English Civil Procedure Rules (1998)’ in C H van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia 2005) 165.

²⁴² Isaac Hai Jacob, ‘The Inherent Jurisdiction of the Court’ [1970] CLP 23, 52.

²⁴³ Masayuki Tamaruya, ‘The Anglo-American Perspective on Freezing Injunctions’ (2010) 29 CJQ 350, 358.

Lord Woolf in his *Access to Justice Inquiry*²⁴⁴ and were expanded in the resulting Civil Procedure Rules 1998. The English example was followed by other common law jurisdictions. Individualised case-management within the Rules conferred—although not always successfully—significant discretionary powers on trial judges.²⁴⁵ In the midst of concerns that such powers may be exercised capriciously, inconsistently, or unpredictably, Lord Woolf said in *Biguzzi v Rank Leisure plc* that ‘judges have to be trusted to exercise the wide discretions which they have fairly and justly in all the circumstances’.²⁴⁶

Moreover, Beck and Levine point out that common law systems typically impose less rigid and formalistic requirements on the presentation of evidence, witnesses, etc, and instead offer judges greater latitude. As they argue, the common law is obsessed with facts and deciding concrete cases fairly.²⁴⁷ Thus, the popular dictum by Oliver Wendell Holmes that ‘[t]he life of the law has not been logic: it has been experience’.²⁴⁸

²⁴⁴ Lord Woolf, *Access to Justice Inquiry Final Report* (HM Stationery Office 1996).

²⁴⁵ Hazel Genn, *Judging Civil Justice* (CUP 2010) 149. See also Michael Zander’s criticism of judicial inconsistency as a result of increased judicial discretion. Michael Zander ‘More harm than good’ (2009) 159 New L J 7360.

²⁴⁶ *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 (CA) 1934 (Lord Woolf MR).

²⁴⁷ Thorsten Beck and Ross Levine ‘Legal Institutions and Financial Development’ in Ménard and Shirley (n 233) 257.

²⁴⁸ Oliver Wendell Holmes, *The Common Law* (first published 1881, Courier Corporation 2013) 1.

Contrary to other common law jurisdictions, as Tamaruya explains, judges in the United States are perceived as possessing powers that could have significant societal impact and the concentration of such powers, especially the judges' powers in equity, has been viewed with caution. Moreover, American procedure is overtly political in the sense that the debates on procedures concern the distribution of power among different decision-makers or different groups of people in the society.²⁴⁹ However, although it could be argued that American judges are not trusted in their daily administration of procedural law as much as their English counterparts,²⁵⁰ there is a current trend in the United States towards more procedural discretion.²⁵¹

To sum up, mainly for historical reasons, the judicial powers in the common law world are vast and they are evident all over the legal spectrum. Judges in most common law jurisdictions, except perhaps the United States, possess wide discretionary powers in equity and the law, an inherent jurisdiction

²⁴⁹ Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJK 350, 363.

²⁵⁰ An exception to this statement is the 'Rocket Docket' system of case management which began to develop during the 1970s in the US District Court for the Eastern District of Virginia and later spread to other federal district courts. The key elements of the system are an early scheduling of pre-trial procedures and a completion of discovery which adheres to strict and short deadlines. Russell Fox, *Justice in the 21st Century* (Routledge 2012) 30. Once the case is assigned for trial, the date is 'written in stone', meaning that there is a policy of consenting to almost no continuances. James Apple, 'Management in American Courts' [1996] 1 (18) *Issues of Democracy* 1, 30.

²⁵¹ See eg Richard L Marcus, 'Slouching toward Discretion' (2003) 78 *Notre Dame L Rev* 1561, 1564.

to control their courts' processes, as well as wide case-management powers. As a German observer of English judges would put it, these officials can be characterised either as 'constitutional monarchs or enlightened despots'.²⁵² These wide judicial powers, as well as the position of judges in the justice system and the structure of the judicial career, perhaps explain why judges are entrusted so easily with discretion to handle any particular situation in the common law world, in contrast with the reluctance, as it will be seen below, to give any kind of discretion to a judge in the continental tradition.

5. The exercise of discretion in granting relief in the common law tradition

a. Models of exercising discretion in granting relief

When it comes to granting or refusing a discretionary remedy, judicial discretion has a greater significance than when the judge is called to decide upon ancillary matters in a particular case, such as issues regarding costs, the adducing of evidence, whether there will be an oral hearing, etc. A judge's decision in the former instances must, more than in any other occasion, be adapted to the

²⁵² Damaška (n 203) 65; the quote is attributed to Albrecht Mendelssohn-Bartholdy, *Das Imperium des Ricthers* (K J Trübner 1908) 120.

circumstances of the immediate case.²⁵³ Thus, the way discretion is exercised within that framework is very important in order to reach just outcomes. As Sarah Cravens suggests, and as argued throughout this work, discretion may—and should—have procedural bounds. These are bounds on methodology to use, factors to consider, explicit normative priorities to acknowledge, and so on. These bounds do not constrain the actual outcomes but, rather, the decision-making process, where the legislator wants to give more flexibility in judgment.²⁵⁴

Over the years, the granting of discretionary relief in the common law tradition became structured. One can identify a number of patterns whereby discretion is exercised in a systematic way, which mainly aim at increasing certainty. Although there is little literature on the available techniques which seek to optimise certainty and flexibility in granting discretionary relief, it could be argued that there are broadly two such models: Firstly, open ended discretion centred around an exhaustive or non-exhaustive list of values, such as ‘just and convenient’ or ‘according to the interests of the administration of justice’, which is then developed into guidelines with varying degrees of specificity, usually through case law or practice directions.

²⁵³ See Lord Dyson MR, ‘The application of the amendments to the Civil Procedure Rules’ (2014) 33 CJK 124, 126.

²⁵⁴ Sarah M R Cravens, ‘Judging Discretion: Contexts for Understanding the Role of Judgment’ (2010) 64 U Miami L Rev 947, 955.

Secondly, a two-stage process in which at Stage 1 certain jurisdictional conditions must be satisfied before the court's power to grant relief is enlivened and, if those jurisdictional conditions *are* satisfied, there is a Stage 2 discretion to refuse relief, where courts or the statute usually prescribe exhaustive or non-exhaustive factors that are relevant for Stage 2 discretion. As Kuloba explains, in the first stage, the aim is simply to sweep away those applications for which the remedy is not appropriate. In discharging this task, there is no discretionary element; the conditions either are or they are not fulfilled. If any condition is not fulfilled, the court need proceed no further, since failure to satisfy any condition is fatal, and, thus, spells the end of the application procedure. On being satisfied, and only then, can the court move on. But this time, special factors are being considered not in order to say whether in a case of this type relief *can* be granted at all, but whether, given the actual circumstances of *this* case, and given that the particular remedy may be granted, relief *ought* now to be granted.²⁵⁵

Kuloba further argues that the first stage of this two-stage procedure is useful when it is necessary to establish an initial presumption of right to relief in favour of the applicant. For instance, as explained in Chapter I, in the area of injunctions, the jurisdiction to grant an injunction can only be exercised when the applicant has, or appears to have, a legal or equitable right. Additionally, it is

²⁵⁵ Kuloba (n 219) 38.

a rational order of inquiry for a judge to follow, that unless questions of law are answered in favour of the applicant, the consideration of questions of fact does not arise.²⁵⁶

It could be argued that there is also a third way of exercising discretion in granting relief: a discretion to depart from rules which would otherwise determine the outcome of the application. This type may be found mainly in administrative law, where there exists a rule against fettering discretion.²⁵⁷ For example, in the UK's immigration law, the Home Secretary, in the exercise of his discretion, may depart from rules, for instance granting leave to remain in the country when the rules require refusal.²⁵⁸ The examination of this type is not necessary for the purposes of this work as it does not usually concern the exercise of *judicial* discretion.

An example of the first type is CPR 3.9. CPR 3.8 introduced an automatic sanctions regime whereby sanctions would take effect automatically in the event of non-compliance, but the defaulting party could apply to the court for relief under CPR 3.9. The court had a discretionary power to grant relief taking

²⁵⁶ Kuloba (n 219) 38.

²⁵⁷ See eg Peter Cane, *Administrative Law* (5th edn, OUP 2011) 144; Judith Bannister and others, *Government Accountability* (CUP 2014) 559.

²⁵⁸ See eg Christian Joppke, *Immigration and the Nation-state: The United States, Germany, and Great Britain* (OUP 1999) 115; Gina Clayton, *Textbook on Immigration and Asylum Law* (OUP 2016) 217; Kevin Browne, *Immigration Law 2017* (College of Law Publishing 2017) para 1.2.2.

into account all the circumstances of the case. In considering whether to exercise its discretion, the court was required to consider a list of nine non-exhaustive factors: the interests of the administration of justice; whether the application for relief has been made promptly; whether the failure to comply was intentional; whether there is a good explanation for the failure; the extent to which the party in default has complied with other rules, practice directions, court orders, and any relevant pre-action protocol; whether the failure to comply was caused by the party or his legal representative; whether the trial date or the likely date can still be met if relief is granted; the effect which the failure to comply had on each party; and the effect which the granting of relief would have on each party.

This long check list of factors resembled a menu or ‘Laundry List’,²⁵⁹ containing a large variety of items which bore little relationship to each other and which contained no particular normative message.²⁶⁰ There was information overload.²⁶¹ Consequently, because of the structure of the

²⁵⁹ As Levy explained, according to human behaviour theories a judge will recognise the relevant factors in the ‘Laundry List’, but having done so will fail to give the optimal weight to each factor in the integration process. The more considerations, the more confusion that is caused. Inbar Levy, ‘Lightening the overload of CPR rule 3.9’ (2013) 32 CJK 139, 140.

²⁶⁰ Andrew Higgins, ‘CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don’t make for good case management’ (2014) 33 CJK 379, 382.

²⁶¹ Stuart Sime, ‘Sanctions after Mitchell’ (2014) 33 CJK 133, 136.

provision, the outcome of applications for relief from sanctions was unpredictable.²⁶²

CPR 3.9 was thus heavily criticised. Following suggestions by Sir Rupert Jackson,²⁶³ the Civil Procedure Rules Committee subsequently—in April 2013—amended it to provide that on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost; and to enforce compliance with rules, practice directions, and orders. Although some guidance to the rule was provided by case law,²⁶⁴ CPR 3.9 has arguably been transformed to a rule that does contain a normative message, but no specific criteria or guidance for the exercise of discretion.

The experience with CPR 3.9 so far, Andrew Higgins explains, is that the rule itself needs to give clear practical guidance to courts when exercising their discretion. It needs to indicate whether there are any pre-conditions to the

²⁶² See Adrian Zuckerman, 'The revised CPR 3.9: a coded message demanding articulation' (2013) 32 CJK 123, 132; Adrian Zuckerman, 'The continuing management deficit in the administration of civil justice' (2015) 34 CJK 1, 4.

²⁶³ See Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2009) ch 39 para 6, followed by revised recommendations.

²⁶⁴ See *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Denton v TH White Ltd* [2014] EWCA Civ 906.

granting of relief. The pre-conditions, apart from establishing that there is a presumption of right to relief, arguably help convey to the judge the rationale of the remedy and a normative message indicating when relief should be granted. Furthermore, the rule must also provide an *exhaustive* list of specific factors—the number of which should not be very large—upon which discretion is to be exercised.²⁶⁵ If there is a large number of considerations in play, although all the circumstances of the case should be considered, consistency of approach could be achieved only by attaching greater weight to particular factors in comparison to others.²⁶⁶ In any event, CPR 3.9 remains an example of the first model of exercising discretion in granting relief, as mentioned above, namely discretion exercised by reference to a list of general considerations.

An instance of the type of discretion which requires a two-stage approach is the one exercised in applications for pre-action disclosure under CPR 31.16. An order for pre-action disclosure will require a party to disclose documents currently in his possession before any proceedings have been issued, thus, giving the applicant a clearer understanding of the parties' respective positions. CPR 31.16(3) sets out the necessary conditions for obtaining pre-action disclosure. It states that the court may make an order under this rule only where

²⁶⁵ Andrew Higgins, 'CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don't make for good case management' (2014) 33 CJK 379, 392.

²⁶⁶ Adrian Zuckerman, 'The continuing management deficit in the administration of civil justice' (2015) 34 CJK 1, 3. See also Jack R Williams, "'Well, that's a relief (from sanctions)!'" - Time to pause and take stock of CPR r.3.9 developments within a general theory of case management' (2014) 33 CJK 394, 407.

the respondent is likely to be a party to subsequent proceedings; the applicant is also likely to be a party to those proceedings; if proceedings had started, the respondent's duty by way of standard disclosure would extend to the documents in respect of which the applicant seeks disclosure; and disclosure before proceedings is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.

These are jurisdictional conditions, in the sense that a court may not make a disclosure order under this rule unless the applicant has fulfilled these conditions. If they are, the court proceeds as a second stage to consider whether, as a matter of discretion, an order for disclosure should be made.²⁶⁷ In *Bermuda International Securities Ltd v KPMG*, Waller LJ explained that even if the court has concluded that the disclosure would assist disposing fairly of the proceedings, would help settlement and would save costs, it may still conclude that for some reason an order would be undesirable.²⁶⁸ The exercise of discretion, Rix LJ explained in *Black v Sumitomo*, will depend, among other considerations, on the nature of the injury or loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the

²⁶⁷ *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585, [2014] 1 WLR 2283 (CA) [10].

²⁶⁸ *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269, [26].

opportunity which the complainant has to make his case without pre-action disclosure.²⁶⁹

The most striking illustration of the second type of exercising discretion in granting relief, ie certain jurisdictional conditions followed by a list of factors, is the granting of injunctions in English law—including interim injunctions, freezing orders, and search orders. The process of exercising discretion in applications for injunctions, although it used to belong to the first type, as it will be explained fortwith, it is now based on the second type.

b. Discretion in injunctions

The same kind of discretion that judges have in equity exists in granting different kinds of injunctions, interim and permanent, because, as already mentioned, injunctions are an equitable remedy. Arguably, the discretionary approach is the most distinctive attribute of equity in the area of injunctions. In the early days of equity, the Chancellor enjoyed wide discretion in granting injunctive relief. Today, however, instead of applying subjective standards such

²⁶⁹ *Black v Sumitomo Corpn* [2001] EWCA Civ 1819, [2002] 1 WLR 1562 (CA) [88]. See also A S Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) paras 15.108ff and Stuart Sime, *A Practical Approach to Civil Procedure* (19th edition, OUP 2016) para 45.22.

as conscience, judges balance established factors in deciding whether or not to allow an injunction.²⁷⁰

In England, the jurisdiction to grant all types of injunctions had been exercised solely by the Court of Chancery. After a short time during which common law courts could also grant injunctions in certain cases by virtue of the Common Law Procedure Act 1854, the Judicature Act 1873, which merged the courts of law and the courts of equity, gave jurisdiction to grant injunctions to the newly introduced courts. Section 25(8) of the Judicature Act 1873 empowered the new courts to grant an injunction in all cases in which ‘it appear[ed] to the court to be just or convenient that such order should be made’.²⁷¹ This section is the lineal predecessor of section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 and section 37(1) of the current Senior Courts Act 1981, all being provisions with a very similar wording.²⁷² Similar statutory provisions exist in almost all common law jurisdictions that followed the English practice. This statutory standard was an important step

²⁷⁰ Kirstin Stoll-DeBell, Nancy Dempsey, and Bradford Dempsey, *Injunctive Relief* (American Bar Association 2009) 3.

²⁷¹ The provision further provided that ‘any such order may be made either unconditionally or upon such terms and conditions as the court thinks just’. Section 37 of the Senior Courts Act 1981 now provides that the High Court may by order grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so and any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

²⁷² Gee, *Commercial Injunctions* (n 239) para 1-004.

towards structured discretion in granting injunctions, which was refined further by judges, as explained below.

The statutory jurisdiction did not supersede and did not render the old equitable principles and precedents irrelevant.²⁷³ In other words, the Judicature Act has not altered the principles on which courts acted in granting injunctions.²⁷⁴ The provision simply conferred a general equitable discretion to judges to grant injunctions.²⁷⁵ This is not a license for a judge to grant an injunction whenever he dislikes what the defendant is doing; that would be palm tree justice.²⁷⁶ It is normally 'just and convenient' to grant an injunction only where the court reasonably supposes that there are urgent circumstances requiring its coercive power to intervene.²⁷⁷

Although the power given to judges to grant injunctions may seem wide, there is now unanimity in the view that the words 'just and convenient' do not confer an 'arbitrary or unregulated discretion on the court'.²⁷⁸ What is right or

²⁷³ Gee, *Commercial Injunctions* (n 239) para 1-005.

²⁷⁴ *Holmes v Millage* [1893] 1 QB 551 (CA) 557; William Williamson Kerr, *On the Law and Practice of Injunctions* (6th edn, W W Gaunt 1927) 6.

²⁷⁵ I C F Spry, *Equitable Remedies* (9th edn, Thomson Reuters 2013) 143.

²⁷⁶ David Bean, Isabel Parry, and Andrew Burns, *Injunctions* (12th edn Sweet & Maxwell 2015) 1-11.

²⁷⁷ *UPS Ltd v Stop Huntington Animal Cruelty* [2011] EWHC 3199 (QB) [11].

²⁷⁸ *Harris v Beauchamp Bros* [1894] 1 QB 801 (CA) 809. See also Linda Clarke, 'Injunctions and the Human Rights Act 1998: jurisdiction and discretion' (2002) 21 CJK 29, 30.

just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles.²⁷⁹ In other words, as Kuloba suggests, the discretion does not mean that the judge, ignoring legal rights and duties, principles and rules, can, like Solomon, decide with perfect justice when an injunction ought to be issued. It means rather that in any given case, the judge, taking careful note of the relevant legal rules, can also take into account certain additional matters relevant to the specific case such as the conduct of the parties. The crucial aspect is that the discretion of the court is sound and reasonable, guided by principles, the application of which may be checked by an appellate court.²⁸⁰

Discretion in the context of injunctive relief, continues Kuloba, has an essential purpose: it implies that a just and fair result will be achieved only if judges are freed from, and not bound by, strict rules. It is indeed inherent in the concept of an injunction that it is a remedy that the court may but need not grant, depending on its judgment of all the circumstances.²⁸¹ The reluctance to define the factors upon which discretion is to be exercised too closely stems from a belief that this should not be done.²⁸²

²⁷⁹ *Beddow v Beddow* (1878) 9 Ch D 89 (Ch) 93.

²⁸⁰ Kuloba (n 219) 7.

²⁸¹ *South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558 [28].

²⁸² Kuloba (n 219) 36.

On the one hand, it is undesirable to lay down any general rule upon the subject by which the discretion of the court to grant injunctions is in all cases to be regulated.²⁸³ In attempting to define the considerations too strictly, a part of the freedom to do justice will be lost. As Lord Denning indicated in *Hubbard v Vosper*, the remedy of injunction is so useful that it should be kept flexible and it must not be made the subject of strict rule.²⁸⁴ Similarly, in *Kirklees MBC v Wickes Building Supplies Ltd*, Lord Goff, with the agreement of all members of the House of Lords stated that '[t]he power to grant injunctions (...) is a discretionary power, which should not as a matter of principle be fettered by rules'.²⁸⁵

On the other hand, says Kuloba, a clear and more precise statement of the rules, conditions, and factors upon which discretion is to be exercised is desirable. Indeed, no one denies that the discretion is in some sense rule-bound. A judge, when granting injunctive relief, is not empowered to choose afresh in each case what is to be taken into account in deciding whether it is just and convenient to grant the remedy. He does not decide cases at will. Every time an appellate court indicates that a court has wrongly exercised its discretion, it says, in effect, that it has ignored some rule or principle. In this

²⁸³ *Saunders v Smith* (1838) 40 ER 1100, 1107; My & Cr 711, 728.

²⁸⁴ *Hubbard v Vosper* [1972] 2 QB 84 (CA) 96 (Lord Denning MR).

²⁸⁵ *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227 (HL) 271 (Lord Goff).

sense, there is a correct and a wrong way of exercising discretion. The possibility of being wrong is what following a rule means.²⁸⁶

According to the same author, the rules governing the exercise of the discretion are of two closely related types: First, there are rules that indicate the factors which may be taken into account. Secondly, there are rules laying down the proper order in which the factors must be considered, ie the relation between the factors inter se. The sum of injunction law currently appears as no more than rules defining what the factors are plus the rule that *all* these factors must be considered. It is argued that the ambiguity in the number of factors and the weight to be given to them usually leads to uncertainty. Thus, the specification of the relevant factors and the question of priority between them merit a more rigorous and systematic treatment than it has been given so far.²⁸⁷

²⁸⁶ Kuloba (n 219) 36. Initially, the House of Lords had stated that the power to grant injunctions 'has been circumscribed by judicial authority dating back many years'. *South Carolina Insurance Co v Assurantie Maatschappij* [1987] AC 24 (HL) 40. The debate on more or less discretion in granting injunctions continued in a number of cases over the years, but the modern trend is towards granting an injunction if the ends are thought to justify the judicial means. Bean, Parry, and Burns (n 276) 1-13. In his dissenting opinion in the Privy Council in *Mercedes-Benz AG v Leiduck* [1996] 1 AC 284 (PC) 308, Lord Nicholls said that dicta in previous cases were 'highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year.'

²⁸⁷ Kuloba (n 219) 37.

Although today the legal framework governing injunctions differs to some extent between permanent and interim injunctions, usually, in granting any type of injunction in common law jurisdictions, a judge must first establish some basic pre-conditions, which are not discretionary. Once satisfied that the minimal conditions have been fulfilled, the court must next take into account the discretionary factors.²⁸⁸ A discretionary factor is a pointer to consider some aspect of the circumstances of the particular case which the court must take into account and before deciding to grant or withhold an injunction.

Indicatively, in English law, as Bean explains, where the plaintiff has established a legal right and that this right has been infringed, then he will prima facie be entitled to a permanent injunction.²⁸⁹ From that point on, it is in the discretion of the court whether it will grant or refuse an injunction. The readiness of the court to refuse a permanent injunction varies according to the branch of the law and the nature of the plaintiff's rights which have been infringed. First, if damages or some other common law remedy would provide adequate relief to the plaintiff, an injunction will normally be refused.²⁹⁰ The behaviour of the plaintiff, such as unclean hands and delay (acquiescence or laches), may also argue against an injunction. Other discretionary factors which may point against

²⁸⁸ *ibid* 57.

²⁸⁹ Certain considerations in granting a permanent injunction are peculiar to individual areas of the law, but there are also criteria which apply generally.

²⁹⁰ See *London & Blackwall Railway Co v Cross* (1886) 31 Ch D 354 (CA).

the granting of a permanent injunction include the hardship to the defendant or third parties and that the injunction will be in vain.²⁹¹

As regards *interim* injunctions, the threshold question that has to be passed and the factors that have to be taken into account by the court in exercising its discretion for granting or refusing an interim injunction, were described by the House of Lords in *American Cyanamid Co v Ethicon Ltd*.²⁹² According to the *Cyanamid* case, the court first needs to establish as a basic pre-condition the existence of a serious question to be tried. If the applicant fails the threshold question, relief will be denied; if he passes the threshold question, the case will proceed to the next step. Here, the court will examine the adequacy of damages to the applicant if the order is refused. If damages would be an adequate remedy, no injunction is granted. If they are not, the court will go on to exercise its discretion to grant or refuse the interim injunction according to the so-called 'balance of convenience'.

In this process, the court will basically weigh the likely harm which would be suffered by the applicant if the injunction is not granted against the likely harm for the respondent if it is. In doing this, the court may take into account the preservation of the status quo if other factors are evenly balanced, the *extent* to

²⁹¹ Bean, Parry, and Burns (n 276) 2-01. See also Kuloba (n 219) 21; Alastair Hudson, *Understanding Equity & Trusts* (4th edn, Routledge 2012) 219.

²⁹² *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

which the harm to each party would be incapable of being compensated, as well as the relative strength of each party's case where the facts are clear. As the Court further indicated, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.²⁹³ In the different common law jurisdictions the factors vary and courts may exercise their discretion under different tests.

Essentially, concludes Kuloba, such factors can be regarded as representing a sort of check-list to ensure that in considering an application for an interim injunction, nothing is overlooked which must be considered and nothing is considered which must not to be considered. Consequently, lawyers and judges are equipped with a systematic set of principles which by no means operates to minimise the opportunity of doing justice; rather, it makes justice more secure. Moreover, there is no suggestion that the list of factors is closed; others may emerge as different practices and circumstances emerge.²⁹⁴

²⁹³ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) 408. See also *Halsbury's Laws* (5th edn, 2015) vol 11, para 584; Maurice Kay, Stuart Sime, and Derek French (eds) *Blackstone's Civil Practice 2015: The Commentary* (4th edn, OUP 2015) paras 37.20ff; *White Book* (Sweet & Maxwell 2016) vol 2, para 15-7; Gang Mei, 'Interlocutory injunctions in IP infringement actions in England and Wales and in Ireland - American Cyanamid revisited' (2015) 46 IIC 175, 178.

²⁹⁴ Kuloba (n 219) 58.

c. Discretion in freezing injunctions

The freezing injunction is, by nature, an equitable remedy as all injunctions are. It is, therefore, discretionary and not granted as a matter of course.²⁹⁵ Moreover, it is a remedy that has been created by the judiciary. In this area, there is a tension between the need to maintain the broad powers invested in the court by Parliament to grant injunctions, and the need to acknowledge the potency of the freezing injunction. The relevant considerations that judges must take into account have changed over time, but the overarching rationale is the risk of asset dissipation, which would preclude the satisfaction of a judgment or order. It is important to note that this condition is a minimum, and is necessary but not sufficient for an injunction to be granted. The court will consider the evidence as a whole, and account for a wide set of factors. This emphasises the wide discretion held by the court in this area.

To discuss this in more detail, judges have developed over time, based on the wide statutory power given to them to grant injunctions, principles governing the exercise of discretion in all kinds of injunctions, including freezing injunctions.²⁹⁶ In other words, in the common law world—except perhaps the

²⁹⁵ Benjamin Andoh, 'The freezing injunction today' (2010) 31(2) Business L Rev 28, 29.

²⁹⁶ Hudson, *Understanding Equity & Trusts* (n 291) 218. As indicated in the previous chapter, freezing injunctions are injunctions that fall within the scope of article 37 (1) of the Senior Courts Act 1981. See eg *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA); *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA, The Siskina* [1979] AC 210 (HL) 249. In Australia, however, this approach has been rejected. See Gee, *Commercial Injunctions* (n 239) paras 1-009, 1-022.

United States' federal system which has followed a different path²⁹⁷—the judge's power has had the dual function of administrating the daily operation of freezing relief as well as developing its governing principles.²⁹⁸

In 1977, in the *Rasu Maritima* case, Lord Denning—the judge who first granted a freezing injunction in 1975²⁹⁹—tried to explain that judges had enough power to invent a new type of injunctive relief, namely the freezing injunction, as well as to set out the conditions based on which it would be granted. Referring to his earlier judgment in *Ward v James*,³⁰⁰ he stated that judges can lay down themselves the considerations which should be borne in mind in exercising their discretion. He further argued that from time to time the considerations may change as public policy changes. For Lord Denning, this was part of the evolutionary process of the exercise of discretion and of the law in general. In his view, the only condition for a judge to exercise his discretion in granting an injunction was to be just or convenient to do so. Accordingly, Lord Denning believed that it was both just and convenient that a court should

²⁹⁷ For the developments in American law in the area of asset preservation orders, see the previous chapter.

²⁹⁸ Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJK 350, 366.

²⁹⁹ First in *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093 (CA) and shortly after in the eponymous case *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA).

restrain a debtor from dissipating his funds if this could deprive a creditor of the money to which the latter is entitled.³⁰¹

More than a decade later, Lord Donaldson explained in *Derby v Weldon* that it is not the power or overarching principles that change, but the circumstances in which courts are asked to exercise their discretion. This can and does call for shifts in the practice of the courts. We live in a time of rapidly growing commercial and financial sophistication, Lord Donaldson said, and courts should be prepared to adapt their practices to meet the current wiles of those defendants who attempt to make themselves immune to the courts' orders.³⁰² In the same case, Neill LJ, quoting previous case law, said that where Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, the court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised.³⁰³

It may be argued that the judges' approach in the aforementioned cases seems contradictory to the position that injunctions are not to be granted at the

³⁰⁰ *Ward v James* [1966] 1 QB 273 (CA) 295.

³⁰¹ *Rasu Maritima SA v Perusahaan Pertambangna* [1978] QB 644 (CA) 660.

³⁰² *Derby & Co Ltd v Weldon* (Nos 3 and 4) [1990] Ch 65 (CA) 77 (Lord Donaldson).

³⁰³ *Derby & Co Ltd v Weldon* (Nos 3 and 4) [1990] Ch 65 (CA) 92 (Neill LJ).

judge's will, but according to sufficient legal reasons and on settled legal principles. In fact, judges sought to introduce principles that would help them exercise their discretion in granting or refusing a freezing injunction. This was in line with Lord Denning's statement in *Third Chandris*, where he said that much as he was in favour of the Mareva injunction, it should not be stretched too far lest it be endangered, meaning that principles were necessary in guiding the operation of the freezing injunction.³⁰⁴ The existence of established principles enables litigants to assess in advance the likelihood of obtaining a freezing injunction in the particular circumstances of their case. The more refined the principles are, the greater the predictability of outcome.

Thus, a number of pre-conditions have been established by the case law in the different common law jurisdictions to govern the granting of freezing injunctions. In England, when the matter of principles arose, the Court of Appeal ruled on the issue and sometimes set out guidelines.³⁰⁵ The conditions are basically that the plaintiff has a good arguable case, the defendant has assets within the jurisdiction, and that there is a real risk of dissipation of the defendant's assets which would render the plaintiff's relief nugatory.³⁰⁶

³⁰⁴ *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 (CA) 668 (Lord Denning MR).

³⁰⁵ Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJK 350, 356.

³⁰⁶ *Halsbury's Laws* (n 293) vol 11, para 598; Kay, Sime, and French (n 293) paras 38.4ff; *White Book* (n 293) vol 2, para 15-65. The law has also developed a number of measures to safeguard defendants from unwarranted harm. Principal amongst them are the applicant's obligations to make full and frank disclosure of all relevant facts at the without notice hearing

The latter condition, as explained above, indicates the rationale of freezing injunctions. The key condition to obtaining a freezing injunction is the existence of a risk of asset dissipation. It is not essential to show a risk of an intentional and improper dissipation, or that the defendant has a 'nefarious intent'.³⁰⁷ Instead, the test is whether 'the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied'³⁰⁸ without good reason. It has been stated that the purpose of the jurisdiction is to safeguard a litigant 'from a situation in which the assets of the opposing party are run down, either with the intention of making that party judgment-proof or at least having that effect without reasonable excuse'.³⁰⁹

The effect of the jurisdiction being discretionary, however, is that a judge may refuse to grant a freezing injunction even if the abovementioned jurisdictional conditions have been fulfilled.³¹⁰ As Steven Gee indicates, the court has to bear in mind that there is a discretion to be exercised in all the

and to provide an undertaking in damages. These two safeguards apply to all without notice applications for interim relief.

³⁰⁷ *Ninemia Maritime Corpn v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1984] 1 All ER 398 (CA) 419. See also Zuckerman (n 269) para 10.218; Gee, *Commercial Injunctions* (n 239) para 3-001.

³⁰⁸ *Ninemia Maritime Corpn v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1984] 1 All ER 398 (CA) 419.

³⁰⁹ *Ghoth v Ghoth* [1992] 2 All ER 920 (CA) 922. See also *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 (CA) 669.

³¹⁰ Kay, Sime, and French (n 293) para 38.14.

circumstances of the case.³¹¹ Those circumstances may make it inappropriate to grant relief even where there is a risk of dissipation.³¹² An example, explains Gee, is where an injunction might destroy the defendant's business. A bank, for instance, depends on business confidence and freezing relief may destroy that confidence at a stroke with losses which of their nature are difficult to quantify.³¹³ The same is true of other businesses liable to be destroyed if confidence is undermined or credit is withdrawn. Similarly, if, on the facts, freezing relief is likely to result in denying the defendant the possibility of finding employment, or preventing him from continuing his business or trade, or starting afresh, this is an important factor to be taken into account in deciding whether to grant the relief.³¹⁴

In other words, the conditions provided by the case law are the minimum which the applicant must show in order to cross the threshold for the exercise of the jurisdiction but at the end of the day the court must consider the evidence as

³¹¹ Gee, *Commercial Injunctions* (n 239) para 12-042.

³¹² See eg *Rasu Maritima SA v Perusahaan Pertambangna* [1978] QB 644 (CA); *Mackew v Moore* [2012] EWHC 1287 (QB) [39]. See also Zuckerman (n 269) para 10.214, 10.220.

³¹³ See *Polly Peck International v Nadir (No 2)* [1992] EWCA Civ 3, [1992] 4 All ER 769 (CA) 786.

³¹⁴ See *Pressurefast Ltd v Hall and Brushett Ltd* (CA, 9 March 1993). In this case, the likely interference with the lives and businesses of the defendants amounted to hardship which went beyond what was appropriate for the legitimate protection of the plaintiff. The defendants had limited means and were unemployed, and the injunction would probably have prevented them from earning their livelihood. Gee, *Commercial Injunctions* (n 239) para 12-042.

a whole in deciding whether or not to grant an injunction.³¹⁵ As already mentioned, the pre-conditions exist in order to ensure that the purpose of the specific remedy will be achieved.³¹⁶ If the pre-conditions are fulfilled, in exercising his discretion, the trial judge takes into account a complex set of factors. These include the strength of the parties' cases,³¹⁷ the hardship suffered by the defendant, the impact on third parties,³¹⁸ the cleanliness of the

³¹⁵ *Ninemia Maritime Corpn v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1984] 1 All ER 398 (CA) 415. Those factors are relevant, not only for the decision whether a freezing injunction should be granted at all but also in deciding in what way the order of the court should be limited or should contain particular provisions for the purpose of avoiding or minimising hardship. See eg *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 (CA); *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632 (CA).

³¹⁶ The granting of search orders is also subject to jurisdictional conditions, which are an extremely strong prima facie case, the risk of serious damage to the applicant, a real possibility that the material in question might be destroyed, and the harm that will be caused to the respondent not being disproportionate to the legitimate object of the order. If any of these four conditions is absent, the order should be refused, and even when all conditions are satisfied, an order is still not necessarily justified. In other words, the granting of an order, involves the exercise of judicial discretion. See the "Staugton Committee" report, Lord Chancellor's Department, *Anton Piller Orders: a Consultation Paper (1992)* para 2.9.

³¹⁷ See eg *Series 5 Software v Clarke* [1996] 1 All ER 853 (Ch). See the discussion in Zuckerman (n 269) paras 10.29ff.

³¹⁸ In *Galaxia Maritime SA v Mineralimportexport (The Eleftherios)* [1982] 1 WLR 539 (CA), an injunction had been obtained restraining the defendant cargo owners from removing cargo out of the jurisdiction. The ship-owners had been given notice of the injunction and faced possible contempt proceedings if they allowed the vessel to sail. The vessel was on voyage charter to the defendants, and, therefore, prima facie, the ship-owners would not be paid extra money by the defendants for the delay. The plaintiffs had given an undertaking to the court to pay the reasonable costs of third parties, such as the ship-owners, in complying with the order. The ship-owners applied to the judge to discharge the injunction, but he ordered the injunction to be maintained on terms that the plaintiffs provided a first class bank guarantee against the ship-owners' loss and expense. However, on appeal the injunction was discharged on the grounds that it constituted too great an interference with the freedom of action of third parties, and the plaintiffs had no entitlement or justification to effect a 'compulsory purchase' by means of the guarantee. [1982] WLR 539 (CA) 541 (Everleigh LJ). See also Gee, *Commercial Injunctions* (n 239) para 21-075; Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJQ 350, 366.

applicant's hands,³¹⁹ the amount of the assets to be frozen and its relation to the amount claimed,³²⁰ whether the applicant has delayed unreasonably,³²¹ and whether the order may be impossible to comply with or may be futile.³²² The court should be satisfied before granting the relief that the likely effect of the injunction will be to promote the doing of justice overall, and not to work unfairly or oppressively.³²³

Although the court may *refuse* freezing relief even when the pre-conditions *are* fulfilled, it may not *grant* relief when the pre-conditions are *not* fulfilled. This was stated by Neuberger J in *Gill v Flightwise Travel Service Ltd*, where he said that he could see the attraction in granting the injunction although the evidence

³¹⁹ This factor stems from the corresponding equitable maxim mentioned above. *Rasu Maritima SA v Perusahaan Pertambangna* [1978] QB 644 (CA). See also Robert Sharpe, *Injunctions and specific performance* (4th edn, Canada L Book 2012) 1-50.

³²⁰ *Sions v Price* (1988) Independent, 19 December, CA; *Rasu Maritima SA v Perusahaan Pertambangna* [1978] QB 644 (CA) 663 ('drop in the ocean' compared to the immense claim which [the plaintiff] is making').

³²¹ *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, [1873] 5 AC 221 (PC); *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764, [2009] 4 All ER 789. See also Spry (n 275) 546.

³²² See eg *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326, 50 LGR 448, [1953] Ch 149 (CA). See also Spry (n 275) 419.

³²³ Gee, *Commercial Injunctions* (n 239) para 12-042. As Spry points out, such general guidelines, should not be regarded as necessarily to be adhered to in all cases but are useful as summaries of some of the various matters to which attention should be directed on applications for freezing injunctions. The making of a freezing injunction is within the discretion of the court. Its terms, as well as the question whether it should be granted at all, depend on the various considerations that arise in the particular circumstances in question. All relevant matters are taken into account by the court, and the order is made that is most just in accordance with the interest of the plaintiff, the defendant, and third persons. Spry (n 275) 542, 544. See also I C F Spry, 'Mareva injunctions' (1990) 20 Western Australian L Rev 169.

could support neither dissipation nor the claim. Nevertheless, he stated that this was a wholly inappropriate line to adopt.³²⁴

Still, the discretion of judges in common law jurisdictions in considering a freezing order application is very wide. In a case before the Court of Appeal of Hong Kong, the judge said that the jurisdiction of granting or refusing Mareva injunctions is a matter of feel for the judge which has to be made upon a consideration of all the facts of the case.³²⁵ Additionally, under section 37(2) of the Senior Courts Act 1981—and similar provisions in other common law jurisdictions—injunctions can be granted on such terms and conditions as the court thinks just. Accordingly, the judge has discretion as to the duration, and other terms and conditions of the order, such as the assets to be frozen, the undertaking in damages, and the amounts exempt.³²⁶

It emerges therefore, that the power of judges in the area of freezing injunctions is extensive. Their power is so broad that it even allows them to establish the conditions that need to be fulfilled for granting an order as well as

³²⁴ *Gill v Flightwise Travel Service Ltd* [2003] EWHC 3082 (Ch) [56] (Neuberger J); Kay, Sime, and French (n 293) para 38.4. This is possible under German law as explained below.

³²⁵ *Yau Kwong Chiu v Yau Kwong Ha* [2001] HKCU 147 (Court of Appeal of Hong Kong) [14].

³²⁶ For example in *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252 (CA) the Court of Appeal continued a freezing injunction in favour of a legally aided plaintiff who could not give a valuable undertaking in damages. See also L A Sheridan, *Injunctions and Similar Orders* (Barry Rose Law Publishers Ltd 1999) 129; Kay, Sime, and French (n 293) para 38.15. The court also has power under CPR 25.1(1)(g) to make ancillary orders for disclosure and answers to requests for further information to ensure the effectiveness of the main freezing injunction.

the factors upon which their discretion is to be exercised.³²⁷ Judges are allowed to refuse relief even if the conditions to grant an order are fulfilled as well as frame the contents of an order. Apart from the basic conditions that *need* to be fulfilled in order to grant an order, ie the showing of a good arguable case, the existence of assets, and the risk of dissipation, no other rules actually *bind* their behaviour. One could further argue that the conditions have been developed by the judges themselves and, technically, they have the power to modify them at any time. Put differently, judges are, to a very large degree, free to innovate and to experiment in the area of freezing relief.

Freezing injunctions have been described as a ‘nuclear weapon’³²⁸ because they are draconian measures which can have very serious consequences on the respondent.³²⁹ Consequently, discretion is of the essence and the granting of an order should not be by any means automatic.³³⁰ However, the extensive judicial activism observed in this area brings into mind

³²⁷ Apart from the original conditions to grant freezing relief, another example showing that rules are judge-made in this area is that various cases have introduced a number of conditions to be satisfied before a party is allowed to enforce a Worldwide Freezing Order in a foreign jurisdiction. See eg in England and Wales as mentioned above the Babanaft proviso, first explained in *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA) and then in *Derby & Co Ltd v Weldon* (Nos 3 and 4) [1990] Ch 65 (CA); the Baltic proviso explained in *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd’s Rep 673 (QB); the Dadourian guidelines set out in *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399, [2006] 1 WLR 2499; etc.

³²⁸ *Bank Mellat v Nikpour* [1985] FSR 87 (CA) 92 (Donaldson LJ).

³²⁹ Henry Suen and Sai On Cheung, ‘Mareva Injunctions: Evolving Principles and Practices Revisited’ (2007) 23(2) Construction L J 117, 117; Kay, Sime, and French (n 293) para 38.1.

³³⁰ *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 (CA) 659 (Lawton LJ).

Justice Scalia's opinion in the *Grupo Mexicano* case, who, in examining whether federal courts in the United States had jurisdiction to grant freezing injunctions, described equitable discretion as an 'instrument of arbitrary power' quoting a passage from a book published in 1836 by Joseph Story.³³¹ This may represent Scalia's antagonism to judicial activism as well as the persistent fear that many contemporary Americans share against the discretionary power concentrated on the judges.³³² The truth is, however, that freezing order proceedings in the common law world—no matter how minutely regulated at the surface—depend entirely on the manner in which judges choose to exercise their discretion.³³³

What is more, in most common law countries, initiatives of the leading members of the judiciary in this area are followed by legislative endorsement and public support.³³⁴ In England, for example, Parliament has often followed the judicial initiative of procedural innovations.³³⁵ In fact, the expansion of the Mareva jurisdiction led by the courts has been approved by a series of

³³¹ *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc* 527 US 308, 332 (1999).

³³² Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJK 350, 368.

³³³ Damaška (n 203) 65.

³³⁴ Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJK 350, 365.

³³⁵ Neil Andrews, 'Development in English Civil Procedure: How Far Can the English Courts Reform Their Own Procedure?' (1997) 2 *Zeitschrift für Zivilprozess International* 3, 3.

legislation such as Part 25 of the Civil Procedure Rules. In other words, not only judges enjoy considerable discretion in the area of freezing injunctions, but this discretion is almost always welcomed and further supported by the legislature.

6. Judges' narrow powers in continental legal systems

a. Historical overview of the civilian judge's powers

In the civil law world, explain Merryman and Pérez-Perdomo, a judge is something entirely different. He is a civil servant, a bureaucrat. This status of the civil law judge stems primarily from the existence of a different judicial tradition in the civil law, beginning in Roman times. The judge (*iudex*) of Rome was not a prominent man of the law. Prior to the Imperial period he was a layman, possessing the arbitral function of presiding over the settlement of disputes where another official, the praetor, laid down, among other duties, the law for his guidance. The *iudex* was not an expert in the law and had very limited power. During the Imperial period, the adjudication of disputes fell into the hands of public officials who were learned in the law, but during that time

their principal function was clearly understood to be that of applying the emperor's will. The judge had no inherent lawmaking power.³³⁶

In France, the legal system evolved as a mixture of law based on the Justinian texts, customary law, and case law, which varied by region.³³⁷ During medieval and pre-revolutionary times judges were interpreting the law creatively, creating a common law that was in contrast with the law of the central government.³³⁸ In other words, they were acting much like their English counterparts. Beck and Levine note, however, that by the 18th century there was a notable deterioration in the integrity and prestige of the judiciary in France. The Crown sold judgeships to rich families and the judges unabashedly promoted the interests of the elite and impeded progressive reforms.³³⁹

Unsurprisingly, the French Revolution turned its fury on the judiciary and quickly strove to place the state above the courts. As Abadinsky explains, codification under Napoleon supported the unification and strengthening of the state, and relegated judges to a minor bureaucratic role. According to the theory

³³⁶ Merryman and Pérez-Perdomo (n 231) 35. See also Cappelletti, *International Encyclopedia of Comparative Law* (n 231) vol XVI, 146; John P Dawson, *A History of Lay Judges* (The Lawbook Exchange 2010) 21.

³³⁷ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 254.

³³⁸ Merryman and Pérez-Perdomo (n 231) 36. See also von Mehren and Gordley (n 231) 1146.

³³⁹ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 255. For an account of the sale of offices, see William Doyle, *Venality: The Sale of Offices in Eighteenth-century France* (Clarendon Press 1996).

underlying the French Civil Code (*Code Civil des Français*), the legislature drafts clear and non-conflicting laws, so that judges do not make law by giving meaning to ambiguous laws or by choosing between laws. Napoleon sought a code that was so clear, complete, and coherent that there would be no need for judges to deliberate publicly about which laws, customs, and past experiences apply to new, evolving situations. In his egalitarian zeal, Napoleon wanted laws so clear that even the peasant with limited education could understand them.³⁴⁰

Furthermore, as Beck and Levine point out, this approach required a high degree of procedural formalism to reduce the discretion of judges in regulating the presentation of evidence, witnesses, arguments, and appeals. Thus, to reduce corruption and enhance the fair application of the law, France adopted both greater procedural formalism and more limited judicial discretion.³⁴¹

Faulk argues that the fundamental distrust of unrestrained judicial discretion underlies the structure of most civil law judicial systems, especially those based on the French model. The revolutionary society distrusted independent judiciaries, preferring instead to concentrate law-making power in parliamentary bodies that were viewed as more responsive and accountable to

³⁴⁰ Howard Abadinsky, *Law, Courts, and Justice in America* (7th edn, Waveland Press 2014) 18; Herbert Jacob and others, *Courts, Law, and Politics in Comparative Perspective* (Yale UP 1996) 4. See also R C Caenegem, *The Birth of the English Common Law* (CUP 1989) 49.

³⁴¹ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 255.

popular opinion.³⁴² Pre-revolutionary judges were creatures of the Crown, and revolutionary France sought to sharply divide legislative and judicial functions, by putting in place a system that did not promote a '*gouvernement des juges*' (a government by judges).³⁴³

Apart from corruption, French judges were less popular than their English counterparts for other reasons. Specifically, as Arruñada and Andonova explain, modern market relations were introduced sooner in England as many feudal constraints were abolished earlier. The Industrial Revolution also took hold earlier, as well as more slowly, without such drastic changes in property rights as on the Continent. This slow evolutionary process, together with a generalised respect of private property, as explained above, gave time for judges and the public to grow into an intellectual tradition more favourable to the free market and property rights.³⁴⁴

³⁴² Richard O Faulk, 'Armageddon through aggregation? The use and abuse of class actions in international dispute resolution' in Charles E F Rickett and Thomas G W Telfer, *International Perspectives on Consumers' Access to Justice* (CUP 2003) 342. See also Simeon Djankov and others, 'Courts' (2003) 118(2) *The Q J of Economics* 453, 458.

³⁴³ Abadinsky (n 340) 18. The phrase '*gouvernement des juges*' is attributed to Edouard Lambert, a professor of comparative legal studies, who used it as the title of his 1921 book on US constitutional adjudication. Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (M Giard & Cie 1921). See Pierre Legrand, 'Adjudication as Grammatication: The Case of French Judicial Politics'; in Luís Pereira Coutinho, Massimo La Torre, and Steven D Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) 50.

³⁴⁴ Benito Arruñada and Veneta Andonova 'Market Institutions and Judicial Rulemaking' in Ménard and Shirley (n 233) 233.

In France, however, continue Arruñada and Andonova, modern market relations, which suppressed the constraints that the *Ancien Régime* (Ancient Regime) imposed on trade and movement of land and people, were generalised later and more abruptly, often alongside the redistribution of property. Most judges were then still the intellectual product of the Ancient Regime, in addition to forming part of the former ruling elite. As a consequence, the judges' lack of understanding of the market and disrespect for private property rights drove legislators to subordinate the judiciary to the law and try to control the professional career structure of judges.³⁴⁵ In other words, while England found liberty through an independent and influential judiciary that helped dismantle the feudal system and protected the rights of landowners against the Crown, the French revolutionaries sought to protect individual rights through strict limits on judicial discretion.³⁴⁶

Turning to Germany, according to Beck and Levine, the French adoption of the Napoleonic Code in 1804 created a similar desire for the introduction of a civil code which would systematise and unify the various heterogeneous laws that were in effect across the country. Bismarck, after unifying the country into the German Empire in 1871, placed a high priority on unifying the legal systems

³⁴⁵ Benito Arruñada and Veneta Andonova 'Market Institutions and Judicial Rulemaking' in Ménard and Shirley (n 233) 233.

³⁴⁶ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 258.

of the individual states through codification. After an amendment to the constitution which transferred legislative authority from the individual states to the *Reich* (Empire) in 1873, Bismarck was able to codify and unify the whole of private law in Germany, culminating in the adoption of the German Civil Code (*Bürgerliches Gesetzbuch* or 'BGB') in 1900.³⁴⁷

The parallels between France and Germany's legal history vis-à-vis the role of judges, however, risk being exaggerated. In contrast to the revolutionary zeal and antagonism toward judges that shaped the French approach, German legal history displays a more favourable treatment of judicial powers and an explicit rejection of France's approach. The German Civil Code was not intended to abolish prior laws and principles of the law established by the judges. Instead, the idea was to codify those principles that would emerge from careful and scientific study of the existing German law in historical context.³⁴⁸

Moreover, Merryman and Pérez-Perdomo note that in most civil law nations, questions during a trial are put to witnesses by the judge, unlike the common law nations where questions are made by lawyers. This leads to the characterisation of civil law systems of proof-taking as inquisitorial and of

³⁴⁷ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 256.

³⁴⁸ Merryman and Pérez-Perdomo (n 231) 32; Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 256; von Mehren and Gordley (n 231) 1147; Dawson (n 336) 238.

common law systems as adversarial. The truth is, however, that in both the civil law and the common law world the determination of what issues to raise, what evidence to introduce, and what arguments to make is left almost entirely to the parties. Nevertheless, in Germany specifically, the law and the judicial tradition encourage the judge to play an active role in the proceedings. Elsewhere, civil law judges are more passive.³⁴⁹ It could be argued, therefore, that judicial powers in Germany are not viewed with such aversion as in France.

b. The importance of legal certainty

Legal certainty is a principle which operates under the umbrella of the rule of law, ie the principle that all people and institutions are subject and accountable to law that is fairly applied and enforced. The rule of law requires that laws must be public, clear, complete, coherent, prospective (ie set in advance), and stable.³⁵⁰ These features overlap with those tied to legal certainty. Overall, the aim is that law must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.³⁵¹

³⁴⁹ Merryman and Pérez-Perdomo (n 231) 115. See also Richard H Kreindler, *Transnational Litigation: A Basic Primer* (Oceana Publications 1998) 7.

³⁵⁰ See eg John Finnis, *Natural Law and Natural Rights* (OUP 2011) 270; Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge 2013) 55; Imer Flores 'Law, Liberty and the Rule of Law (in a Constitutional Democracy)' in Imer B Flores and Kenneth E Himma (eds), *Law, Liberty, and the Rule of Law* (Springer 2013) 84.

³⁵¹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 214.

As Raz points out, the violation of the rule of law may lead to uncertainty and frustrated expectations when it does not allow people to foresee future developments or to form definite expectations; this may happen in cases of vagueness, wide discretion, or retroactive law-making. Uncertainty provides opportunities for arbitrary power and restricts people's ability to plan for their future; it also offends dignity in expressing disrespect for people's autonomy.³⁵²

In the civil law tradition, whether or not there is distrust of, and suspiciousness towards, judges, it can certainly not be denied that, at least in theory, there is a great emphasis on the importance of certainty. Certainty, of course, as Merryman and Pérez-Perdomo suggest, is an objective in all legal systems, but in the civil law tradition it has come to be a kind of supreme value and a fundamental goal. Judges are prohibited from making law or being able to apply it in a broad variety of ways in the interest of certainty. For this reason, legislation should be clear, complete, and coherent and the process of interpretation and application of the law should be as automatic as possible. Moreover, there is also a requirement that the law be stated by the legislature and only by the legislature, and all non-legal considerations must be excluded from the law in the interest of certainty.³⁵³

³⁵² *ibid* 221.

³⁵³ Merryman and Pérez-Perdomo (n 231) 48, 80.

Legal certainty is also recognised as desirable in the common law tradition, but to a lesser extent. In the common law, certainty and flexibility are seen as competing values, each tending to limit the other. As explained above, the law of equity, which focuses on the justice of the individual case, clearly implies a grant of discretionary power to the judge. Therefore, common law judges unavoidably have inherent discretionary powers. These powers are not seen as threats to legal certainty but as a means to avoid arbitrary decisions. The difficulties of rationalising the demand for certainty and the justice of the individual case are issues to be solved by the judges themselves.³⁵⁴

One of the chief features which distinguish the civil law tradition from that of the common law, as Merryman and Pérez-Perdomo point out, is codification, which derives from Emperor Justinian's *Corpus Juris Civilis*. The rationale behind codification is to provide a greater degree of certainty, systematisation, and accessibility to the law. Although codes are also found in some common law systems, such as the United States, the underlying ideology, ie the conception of what a code is and its role in the legal process, is not the same.³⁵⁵

³⁵⁴ *ibid* 49.

³⁵⁵ Merryman and Pérez-Perdomo (n 231) 28. See also The Rt Hon The Lord Woolf, 'The Tides of Change' in B S Markesinis (ed) *The British Contribution to the Europe of the Twenty-First Century* (Hart Publishing 2002) 9. See also A F Hayek, *The Constitution of Liberty* (University of Chicago Press 1978) 173.

In the civil law world, the supreme value is certainty, whilst flexibility is seen as a problem for the administration of justice. There exists an underlying concern that if judges are not carefully controlled in the way they interpret and apply legislation, the law will be rendered more uncertain. In other words, the conviction exists that to give discretionary power to the judge threatens the certainty of the law.³⁵⁶

c. The idiosyncrasies of the continental judge

As Merryman and Pérez-Perdomo point out, the picture that emerges of the judicial process in the civil law world is therefore one of a routine activity. The judge becomes a kind of expert clerk. He is presented with a factual matrix to which a ready legislative response will be found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact pattern, and approve the solution that is more or less automatically applied. In the uncommon case where some more sophisticated intellectual work is demanded of the judge, he is expected to follow carefully drawn directions about the limits of interpretation. The overall image is of the judge as an operator of a machine designed and built by legislators. His function is a

³⁵⁶ Merryman and Pérez-Perdomo (n 231) 49.

mechanical one.³⁵⁷ While the common law judge is somehow expected to judge, in the civil law tradition, although there may be some decision-making in determining the facts of the case, the statute is supposed to have already judged.³⁵⁸

The image of the civilian judge is reflected on the structure of the judicial career. In most civil law jurisdictions candidates for judicial positions must first attend a special school for judges at the beginning of their careers and are appointed by the state after passing the necessary examinations. While judges in common law systems are generally selected from the ranks of the bar, the judges in civil law systems typically serve a professional lifetime as judge.³⁵⁹ Lateral entry into the judiciary is rare. Judges of the highest courts receive public respect, but it is the kind of public respect earned and received by persons in high positions elsewhere in the civil service.³⁶⁰

³⁵⁷ Merryman and Pérez-Perdomo (n 231) 36. See also Jean Louis Goutal, 'Characteristics of Judicial Style in France, Britain and the U. S. A.' (1975) 24 *American J of Comparative L* 43, 45; Jean-Louis Baudouin, 'Impact of Common Law in Louisiana and Quebec' in Joseph Dainow (ed), *The Role of Judicial Decisions and Doctrine in Civil Law and mixed Jurisdictions* (Louisiana State UP 1974) 15.

³⁵⁸ Mitchel de S-O-l'E Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' (1995) 104 *Yale L J* 1326.

³⁵⁹ ALI/UNIDROIT (n 200) 6.

³⁶⁰ Merryman and Pérez-Perdomo (n 231) 35. See also von Mehren and Gordley (n 231) 1148; H Fisher, *The German legal system and legal language* (Clarus Press 2013) 303; Foster and Sule (n 232) 104; Eva Steiner, *French law: A comparative approach* (OUP 2010) 131; Kate Malleson and Peter H Russell, (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006) 183; Bell, Boyron, and Whittaker (n 231) 63; René David and John E C Brierley, *Major Legal Systems in the World Today* (3rd edn, Carswell Legal Publications 1985) 247

Moreover, although prior judicial decisions may be consulted and have persuasive influence, they are not binding. The study of cases in civil law systems is intended to only illustrate how the law operates in practice, but the essence of the law will necessarily remain abstract.³⁶¹ Abadinsky indicates that in civilian systems it is the text of the law rather than prior judicial interpretation of that text that is authoritative. Unlike the common law judge who has been trained to find law in most areas in both statutes and cases, the civil law judge is trained to look primarily in the legislation in order to find answers to issues before the court. Cases will be used only to reinforce his arguments or as illustrations of what other judges have done in analogous situations.³⁶²

The great names of the civil law tradition, say Merryman and Pérez-Perdomo, are not judges but legislators (Justinian, Napoleon) and scholars (Gaius, Bartolus, Pothier, Savigny). The civil law judge is not a cultural hero or a father figure. His judicial opinions are not read in order to study his individual ways of thinking and his apparent preconceptions and biases. The decisions of higher courts in civil law jurisdictions are announced as the decision of the court, without enumeration of votes pro and con among the judges. The idea is to think of the court as a faceless unit. The opinions rendered are unsigned and

³⁶¹ George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer 2014) 304.

³⁶² Abadinsky (n 340) 20; Thomas Mackay Cooper, 'The Common Law and the Civil Law — a Scot's View' (1950) 63 *Harvard L Rev* 468, 471.

there is typically an absence of dissent even in appellate cases. In fact, most continental systems prohibit the publication of dissenting opinions.³⁶³ All things considered, the contemporary continental judge inherits a status and serves a set of functions based on a tradition going back to the *iudex* of Roman times, which is reinforced by the doctrine of strict separation of powers.³⁶⁴

d. What happens in practice?

To sum up the forgoing, in theory, continental legal ideology assumes that systematic legislation is clear, complete, and coherent, reducing the function of the judge to one of merely applying the law to the facts. It could be argued, however, that this is a simplistic view of the judicial process in the civil law

³⁶³ Abadinsky (n 340) 22. See also J Zekoll and M Reimann (eds), *Introduction to German Law* (Kluwer Law International 2005) 26; Michael Chesterman, 'Contempt: in the Common Law, but not the Civil Law' [1997] ICLQ 521, 556; Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 54. In the civil law tradition, Pekelis explains, a judge who would dare to reveal publicly or in private conversation that he disagreed with his brethren on the bench would be guilty of grave misconduct, liable to impeachment and removal. The court is considered a unity, its voice is the *viva vox juris*, and it must be assumed that the can speak but in a unisonal chorus. Pekelis (n 230) 691. Moreover, regarding the length of opinion, a fifteen line case in the civil law tradition is nothing unusual, while a common law case is sometimes forty or eighty pages long. Jean Louis Goutal, 'Characteristics of Judicial Style in France, Britain and the U. S. A.' (1975) 24 *American J of Comparative L* 43, 56.

³⁶⁴ Merryman and Pérez-Perdomo (n 231) 36. Immanuel Kant denied the legitimacy of the courts of equity, on the ground that they violate the republican principle of the separation of powers. It seemed to him that a judge empowered to overrule the provisions of strict justice according to the law was empowered to trespass on the proper functions of the legislation. Immanuel Kant, *Metaphysical elements of justice* (John Ladd tr, Hackett Publishing 1965) 39.

tradition.³⁶⁵ The variety and complexity of interacting elements affecting the operations of the judicial process in a legal tradition suggest that sweeping generalisations cannot be accurate.³⁶⁶ Professor Martin Shapiro notes that in practice, no civil law system is so complete as to make judicial discretion unnecessary. A judge would be completely bound by the statute if the code were complete, consistent, specific, produced by a single authoritative legislator, and capable of rapid amendment by that legislator to meet changing circumstances. No code, however, can *fully* meet these requirements.³⁶⁷

The ideal of certainty in the law, say Merryman and Pérez-Perdomo, becomes impossible in the face of the uncertainty that exists in fact, and the sheer amount of factual situations and variations that can occur. Although the legislature tries to provide a clear and systematic response for every problem that may arise, legislative practice falls far short of this objective. As a result, it seems after all that continental judges have a lot of interpreting to do. They frequently find themselves confronted with problems in which the only applicable legislation is so general that it is useless, is unclear or contradictory in application, or is obviously the product of a legislature that did not foresee the problem now facing the judge. Since in all jurisdictions judges are required to

³⁶⁵ Merryman and Pérez-Perdomo (n 231) 42.

³⁶⁶ von Mehren and Gordley (n 231) 1160.

³⁶⁷ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986) 126.

decide the cases before them and cannot give up on the ground that the law is unclear, judges in civil law jurisdictions, too, continually exercise their discretion. Given inadequate legislative direction, on the one hand, and the need to decide the case, on the other, they improvise.³⁶⁸

For instance, prior to the Revolution, jurisprudence was an important source of French law, but the ideology of the Napoleonic Civil Code embraced judicial formalism rather than judicial activism. However, practicalities produced in France a legal system that has increasingly demanded judicial interpretation to be employed, thereby circumventing inefficient qualities of the Code.³⁶⁹ Specifically, according to Abadinsky, the French Civil Code was never a complete and exhaustive body of statutory law and during the 200 years of its existence, judges have adjusted the rules of the code in line with changing economic and social conditions. This task of the court had been reinforced because the principles of the Code are often unclear, the concepts used are frequently indefinite and ambiguous, many individual rules are incomplete, and the systematic interplay of different provisions is often faulty. In fact, the Code expresses only broad general principles laid down in simple terms.³⁷⁰

³⁶⁸ Merryman and Pérez-Perdomo (n 231) 83.

³⁶⁹ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 256.

³⁷⁰ Abadinsky (n 340) 18; Mauro Bussani and Anthony J Sebok, *Comparative Tort Law: Global Perspectives* (Edward Elgar 2015) 200.

Indicatively, French judges have played a central role in the development of civil liability because the abstract wording of articles 1382ff of the Code gives considerable scope for creative interpretation.³⁷¹

Moreover, according to Merryman and Pérez-Perdomo, initially, an important aspect of the strict separation of legislative and judicial powers was the notion that judges should not interpret incomplete, conflicting, or unclear legislation themselves. Instead, they should always refer such questions to the legislature for authoritative interpretation. However, the defects and inconveniences of total reliance on such authoritative interpretations were apparent in revolutionary France. The legislature would find itself flooded with difficult requests for interpretation, and it would find the work of responding to such requests tiresome.³⁷²

The solution, continue the same authors, was the creation of a new governmental organ by the legislature, which was given the power to quash incorrect interpretations by the courts, indirectly signifying that interpretation at first instance was possible. In the legislative debates and in the law that was

³⁷¹ Simon Taylor, *Medical Accident Liability and Redress in English and French Law* (CUP, 2015) 70; Efstathios Banakas, 'Tender is the Night: Economic Loss—The issues' in Efstathios Banakas (ed), *Civil Liability for Pure Economic Loss* (Kluwer Law International 1996) 16; Régis Lanneau, 'To What Extent Is the Opposition Between Civil Law and Common Law Relevant for Law and Economics?' in Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer 2013) 33.

³⁷² Merryman and Pérez-Perdomo (n 231) 36, 39.

eventually promulgated, it was made clear that this new organ was not a part of the judicial system, but rather a special instrument created by the legislature to protect legislative supremacy from judicial usurpation. Initially it was called the Tribunal (rather than Court) of Cassation. Later on, that court evolved and it would not only indicate that the judicial decision was wrong; it also explained what the correct interpretation of the statute was. During the same period, the tribunal's non-judicial origin dropped from view, and it came to be called the Court of Cassation.³⁷³

Germany took a different path from that of France with the development of the institution of 'revision', as distinguished from the French 'cassation'. The French system stopped at the second step: the Supreme Court of Cassation could quash a decision based on an incorrect interpretation of law and it could instruct the lower court as to the correct interpretation. Still, the case had to be sent back to the lower court for decision. By the time Germany was united under Bismarck, the French system of cassation did not seem practical and seemed to complicate matters unnecessarily. Therefore, the Germans created a supreme court, the Federal Court of Justice (*Bundesgerichtshof* or BGH), with the power to review the decisions of lower courts for legal correctness, to quash incorrect decisions, to indicate the correct answer, and importantly, to revise the incorrect decision accordingly. The evolution from compulsory referral to the

³⁷³ Merryman and Pérez-Perdomo (n 231) 40. See also George A Bermann and Etienne Picard (eds), *Introduction to French Law* (Kluwer Law International 2008) 9.

legislature for interpretation, through referral to a legislative tribunal, to emergence of a court with the power to review and correct interpretations by lower courts has necessarily been accompanied by a gradual acceptance of a power of interpretation being held by the ordinary judiciary.³⁷⁴

Furthermore, the institution of judicial review of the constitutionality of legislation in some civil law countries where constitutional courts have been established, is another indication that the powers of judges in the civil law tradition are not as trivial as they may be presented in theory.³⁷⁵ In fact, some constitutional courts in civil law jurisdictions, like the German and the Spanish, have great power and national prestige.³⁷⁶

Additionally, as Abadinsky explains, while the civil law judge may avoid citing previous cases, it is possible to discern which prior cases are being followed and some decisions will contain references to prior cases. While the

³⁷⁴ Merryman and Pérez-Perdomo (n 231) 41. See also Mary Ann Glendon, Paolo G Carozza, Colin B Picker, *Comparative Legal Traditions in a Nutshell* (3rd edn, West Academic Publishing 2008) 104.

³⁷⁵ Merryman and Pérez-Perdomo (n 231) 37. Equally, in those common law countries, such as the United States, Australia and Canada, where a written constitution places limits on legislative powers, a further reinforcement for the eminence of judges is provided by the doctrine of judicial review. The assumption of judicial power, stemming from the decision of the Supreme Court of the United States in *Marbury v Madison* 5 US 137 (1803) to strike down legislation on the ground of incompatibility with an overriding constitution, gives special power and prestige to the small group of judges who make the final decisions on constitutionality. See Cappelletti, *The Judicial Process in Comparative Perspective* (n 184) 115; Chesterman (n 363) 555.

³⁷⁶ As statistics show, constitutional courts in civil law countries are intervening in legislative processes at an increasing rate. See Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (OUP 1997) 238.

importance of jurisprudence is not given official recognition as there is no formal rule of stare decisis, there are hundreds of volumes of published decisions, lawyers frequently cite them when presenting their arguments in court, and the practice is for judges to be influenced by prior decisions.³⁷⁷

For instance, in France, in many fields of the law, the cases decided by the Court of Cassation have great authority. In general, respect for decided cases is a growing element in modern French legal method. Similarly, in Germany, decisions of the Federal Court of Justice are much more than merely persuasive for the lower courts. Whatever the continental ideology may say about the value of precedent, as Merryman and Pérez-Perdomo stress, the fact is that courts do not act contrary to reported decisions. It is argued, therefore, that those who contrast the civil law and the common law traditions in that there is a supposed non-use of judicial authority in the former and a binding doctrine of precedent in the latter, exaggerate the position on both sides. Everybody knows that civil law courts do make use of precedents. Everybody knows, also, that common law courts distinguish cases they do not want to follow and sometimes overrule their own decisions.³⁷⁸

³⁷⁷ Abadinsky (n 340) 20.

³⁷⁸ Merryman and Pérez-Perdomo (n 231) 47. See also B S Markesinis and H Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart Publishing 2002) 10; Zekoll and Reimann (n 363) 26; Jan M Smits, *Elgar Encyclopedia of Comparative Law* (2nd edn Edward Elgar 2012) 346 and 362; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP 1998) 102; James Holland and Julian Webb, *Learning Legal Rules: A Students' Guide to Legal Method and Reasoning* (8th edn, OUP 2013) 358; Carleton Kemp Allen, *Law in*

The way in which the legislature exercises its power to develop the law, and the resulting effect on the judiciary, highlights the contrast between the theory and the practice in the civil law tradition. The theory is that the legislature exercises its power by enacting rules granting a supposedly confined discretion to the judge. This action, however, usually transfers, in effect, a large segment of undefined discretionary power to the judge. It is true that the legislature's command is binding on the judge, but the terms therein are usually so broad that the judge is hardly constrained by the legislative formulation. For instance, article 157 of the German Civil Code provides that agreements must be interpreted in accordance with the requirements of good faith (*Treu und Glauben*, literally, fidelity and faith), having regard to business usages. The practice of delegating power to courts through legislation that employs general clauses of this sort is a common one in the civil law world, although the extent to which judges have consciously exercised that power varies widely.³⁷⁹

In any event, however, there is always an overarching appeal to certainty and, accordingly, a continuing distrust of judicial discretion within the civil law. This fact exemplifies the fundamental difference in the ideology between the

the Making (7th edn, OUP 1966) 181; Raimo Siltala, *A Theory of Precedent: From Analytical Positivism to a Post-analytical Philosophy of Law* (Hart Publishing 2000) 133; Nigel Foster and Satish Sule, *German legal system and laws* (4th edn OUP 2010) 105.

³⁷⁹ Merryman and Pérez-Perdomo (n 231) 52. See also Bell, Boyron, and Whittaker (n 231) 18; H C Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP Archive 2015) 97; Martijn W Hesselink, 'The Concept of Good Faith' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (Kluwer Law International 2004) 480.

two legal traditions. In the orthodox civil law tradition, the judge is theoretically assigned a comparatively minor, inglorious role as a mere operator of a machine designed and built by scholars and legislators, which is in absolute contrast with the role of the common law judge.³⁸⁰ The reality, however, is different. The civilian judge usually has a relatively large scope of action similar to that of his common law counterpart, although he is not bound by precedent in the same way as the latter.

e. Less space for a policy-conscious approach and the modern trend

Despite the above, it is hard to say that in practice the civil law and the common law traditions have no differences vis-à-vis the exercise of judicial powers. As Slapper and Kelly argue, given that the common law system is largely case-centred and heavily reliant on the judges' interpretation and development of general principles, it allows scope for a policy-conscious approach to the particular problems that appear before courts. The law can be developed on a case-by-case basis. On the other hand, because the civil law system tends to be a codified body of principles, it does not ordinarily allow judges to use any

³⁸⁰ Merryman and Pérez-Perdomo (n 231) 47, 54.

criteria for interpretation apart from the rules provided by the legislation, even though the latter may be broad.³⁸¹

Von Mehren and Gordley argue that, other things being equal, courts feel less free when the individual judge's psychology is such that he has a sense of limitation and is not encouraged to act creatively and originally. The more mechanical a system's conception of the judicial process, the more restricted is its idea of the judicial function.³⁸² Civil law judges, Faulk says, may not make decisions on the basis of 'social values' or 'comparative costs or benefits' unless such an approach is specifically authorised by statute. This limitation is critical to the structure of civil societies, where legislative bodies, rather than judges, are entrusted with responsibility for resolving large economic and political issues affecting social welfare.³⁸³

Attempts in the civil law world to introduce the jurisprudence of interests, the law and society approach, law and economics—to mention several coherent attacks on the traditional model—have encountered resistance, while this is not usually the case in the common law world. On the Continent, these have not been ignored, but they have not penetrated deeply into the legal consciousness.

³⁸¹ Gary Slapper and David Kelly, *Law: The Basics* (Routledge 2012) 11.

³⁸² von Mehren and Gordley (n 231) 1145.

³⁸³ Richard O Faulk, 'Armageddon through aggregation? The use and abuse of class actions in international dispute resolution' in Rickett and Telfer (n 342) 342.

All these approaches would call for more interdisciplinary analysis, for a reevaluation of the role of judges in society, and the questioning of many of the assumptions underlying the civil law tradition.³⁸⁴

Ehrlich indicated, however, that even in the courts of the Continent, the principle that the courts must base their decisions exclusively upon rules prescribed by the legislature is a matter of degree. The law itself, they argue, continually refers them to other social norms. It will tolerate no abuse of the law which violates morality or ethical customs, it forbids immoral contracts, and it demands performance of contracts according to good faith. It entrusts the decision about these requirements to the free discretion of the judge, which is often not based on purely legal considerations.³⁸⁵

Supporting Ehrlich's point of view, Merryman and Pérez-Perdomo suggest that the dogma of legislative infallibility in the civil law world has been

³⁸⁴ Merryman and Pérez-Perdomo (n 231) 84. cf Markesinis who says that to an outside observer, the German courts have, in recent times, set themselves on a course which has proved them more literally-minded. B S Markesinis, *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (OUP 1994) 17.

³⁸⁵ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers 1936) 130. Ehrlich argued that in a primitive stage of development, there was so little differentiation between law on the one hand and morality, religion, ethical custom, and decorum on the other, that the administration of justice utilised them all indiscriminately. All of these are bound by the ever recurring limitation that non-legal norms may be used only to eke out the positive law, to act as stop-gaps; the judge therefore is not authorised to disregard the legal norms in favour of the non-legal ones. However, there are legal propositions which grant an unlimited discretion to the judge. Examples of this kind in private law are the legal propositions on abuse of a legal right, on good faith, on unjust enrichment. In these cases, the legal proposition does indeed appear to contain a norm for decision; actually, however, it is merely a direction to the judge to find a norm for decision independently. It is as if the legal norm left the decision to the free discretion of the judge. Ehrlich (n 385) 124.

fundamentally shaken. Undoubtedly, the image of the judicial function steadily expands. Jurists are asking themselves whether ideas about the legal process that emerged from the peculiar conditions of revolutionary France and nineteenth-century Germany are necessarily valid nowadays. It seems, they argue, that the folklore is losing its power: the traditional image of the civilian judge is fading and the trend is towards increased judicial scope and power.³⁸⁶

f. The impact of the continental tradition on asset preservation orders

It is suggested that the absence of judicial discretion in the area of civilian in rem asset preservation orders is not a characteristic of those orders per se, but one that emerges from the civil law tradition. For one thing, this is evident from the fact that in the United States, where, as explained above, in rem pre-judgment attachment orders are used extensively, while some state statutes provide that the court *shall* issue attachment orders when the statutory requirements are satisfied,³⁸⁷ statutes in other states use discretionary language.³⁸⁸ For example, in New York, section 6201 of the Civil Practice Law

³⁸⁶ Merryman and Pérez-Perdomo (n 231) 38, 84.

³⁸⁷ For example in California (see section 484.090 (b) of the California Code of Civil Procedure) and Illinois (see section 4-104 of the Illinois Code of Civil Procedure).

³⁸⁸ Masayuki Tamaruya, 'The Anglo-American Perspective on Freezing Injunctions' (2010) 29 CJK 350, 366. The grounds for pre-judgment attachment orders in the United States vary from jurisdiction to jurisdiction. Typically, an order will be granted, inter alia, when the debtor is not a resident of the state, he has concealed himself or stands in defiance of a court officer so that

and Rules ('CPLR') states that 'an order of attachment *may*³⁸⁹ be granted' if the relevant conditions are fulfilled.³⁹⁰ This shows that the common law tradition is 'responsible' for the remedy being discretionary.

A quick look to the statutes providing for asset preservation orders on the Continent suffices to see that the power given to the judge is very limited. In Germany, the applicant for an *Arrest* must first show that there is a probability of success on the merits of the case as dictated by section 920 of the ZPO.³⁹¹ In addition, the applicant must demonstrate that there is the concern that without an *Arrest*, the enforcement of his judgment would be frustrated or be significantly more difficult (section 917). This condition is open for interpretation. The primary purpose of the *Arrest* is not to improve the applicant's position with respect to the respondent's assets but merely to prevent deterioration of that

process cannot be served, he is about to depart from the state with the intention of having his assets removed from the state, etc. Michael L Morking and Ethan A Berghoff, 'United States' in Lawrence Newman (n 239) USA-14.

³⁸⁹ (emphasis added).

³⁹⁰ Even if the plaintiff shows that his case fits within one of the statutory grounds for attachment of section 6201 of the CPLR, the granting of the motion lies in the court's discretion. See David D Siegel and others, *McKinney's Consolidated Laws of New York Annotated* (Thomson West 2016) CPLR § 6201 and comment by Vincent C Alexander, and case law cited there. See also Marvin G Pickholz and James Bernard, *Civil Disclosure and Freezing Orders: Recovering Property From Overseas* (1995) 13 Dickinson J Intl L 479. However, even in the states where the discretionary nature is recognised, judges, apprehensive of the harsh nature of the remedy, have insisted on strict compliance with the statutory requirements. See eg *Kornblum v Kornblum* 34 AD 3d 748, 749 (NY App 2006).

³⁹¹ Jens Grunert, 'Interlocutory remedies in England and Germany: a Comparative Perspective' (1996) 15 CJK 18, 21; Jonathan Warne, *International Commercial Dispute Resolution* (Bloomsbury Professional 2009) 307.

position.³⁹² Usually, grounds for an order include apparent wasteful dissipation of the respondent's assets through unfavourable conduct of business, the specific likelihood of sale or encumbrance of the respondent's property, frequent changes of the respondent's abode, and similar developments which would endanger the prospects for satisfaction of the applicant's claim.³⁹³

However, there is absolutely no room for judicial discretion in granting or refusing an *Arrest*. Discretion is limited to choosing the exact form of relief, ie to choosing the terms of the order.³⁹⁴ The conditions of the application are strictly stipulated by law. Once the applicant has laid down the abovementioned

³⁹² Peter L Murray and Rolf Stürner, *German Civil Justice* (Carolina Academic Press 2004) 435; Gerhard Dannemann, *An Introduction to German Civil and Commercial Law* (British Institute of International and Comparative Law 1993) 107. In LAG Baden-Württemberg Urteil vom 23 März 2011 Az 13 SaGa 2/10 the mere fact that the *Arrest* defendant deposited a large sum of money in an account in Switzerland was no reason to believe he concealed his financial circumstances. In OLG Celle Urteil vom 24 März 2005 Az 11 U 170/04 it was said that the sale of a single asset was often mistaken as an adequate justification for supporting an *Arrest*. In OLG Celle Beschluss vom 16 Juli 2007 Az 13 W 77/07 it was said that an untruthful statement by the defendant was adequate proof to show that the defendant was trying to hide his financial circumstances, and, thus, this behaviour justified an *Arrest*. In OLG Nürnberg Beschluss vom 16 April 2013 Az 2 Ws 533/12, 10–11/13, 2 Ws 533/12, 2 Ws 10–11/13 it was said that although service of criminal proceedings to the defendant can be an indication of the concern that future enforcement will be made impossible or substantially more difficult, it did not have the effect of a rebuttable presumption.

³⁹³ Murray and Stürner (n 392) 434; Zekoll and Reimann (n 363) 384; Theo Rauch, 'Germany' in Peter Kaye (ed), *Methods of execution of orders and judgments in Europe* (Wiley 1996) 123.

³⁹⁴ Jens Grunert, 'Interlocutory remedies in England and Germany: a Comparative Perspective' (1996) 15 CJQ 18, 20; William Tetley, 'Arrest and other Maritime Law Procedures' (1998–1999) 73 Tulane L Rev 1895, 1956.

requirements for the relief sought, the court has to issue the order. This element is attributed to the lack of judicial discretion found in the civil law tradition.³⁹⁵

Although the decision on whether or not to grant the order is not discretionary, other, less important issues surrounding *Arrest* orders, are. First, it is in the discretion of the court to deal with the application with or without notice to the respondent. The applicant may state his wish that the court should refrain from an inter partes hearing but he cannot force the court to do so.³⁹⁶ Depending on the circumstances of the case, the court may enter a decision ex parte. Furthermore, although the statute (section 922) leaves the question of whether to order an oral hearing to the discretion of the court, the principle whereby everyone is entitled to a fair and public hearing requires that the hearing is only dispensed with for good cause.³⁹⁷

Moreover, the courts have discretion as to the posting of security by the applicant (section 921). Security may be required if the court deems this to be necessary because the outcome of the process is uncertain or where the

³⁹⁵ There are not any reported cases or any reference in the literature showing that the lack of discretion has led to unfair decisions against the respondent. However, the absence of references does not mean that there have not been any instances and this could be attributed to the German mode of legal thought and ideology, which are accustomed to the lack of discretion and are also, arguably, somewhat pro-creditor.

³⁹⁶ Jens Grunert, 'Interlocutory remedies in England and Germany: a Comparative Perspective' (1996) 15 CJK 18, 26. See also Alexander Layton, Stephen O'Malley, and Hugh Mercer, *European Civil Practice* (2nd Edition, Sweet & Maxwell 2004) vol 2, 202.

³⁹⁷ Murray and Stürner (n 392) 435.

respondent may suffer considerable loss if it turns out that the order was unjustified. The court may grant the order and ask the applicant to lodge security regardless of whether the applicant fulfils the conditions.³⁹⁸

Finally, the judge, as Schlosser explains, does not have any discretion as to how to draft an order, let alone how to adjust the order to the particular circumstances of the case. He cannot allow the defendant debtor to dispose of any part of his assets which are attached. In particular, the debtor may not use his bank accounts to make payments in the ordinary course of business nor for the purpose of obtaining legal advice.³⁹⁹ Overall, it seems that the German *Arrest* does not in any way give to the judge the extent of discretion which his English counterpart enjoys in the context of freezing injunctions.

The French statute regulating the *saisie conservatoire* is similar to the German vis-à-vis judicial discretion in granting or refusing an order. Article

³⁹⁸ Jens Grunert, 'Interlocutory remedies in England and Germany: a Comparative Perspective' (1996) 15 CJK 18, 33. See also Murray and Stürner (n 392) 436.

³⁹⁹ Peter F Schlosser, 'Jurisdiction and international judicial and administrative co-operation' in Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 2001) vol 284, 160. Restrictions to funds that can be attached only apply if the defendant is a private person. The current earnings of the defendant may not be attached if they do not exceed €930 per month, as stipulated by section 850c of the ZPO. This amount may be increased if the defendant has to support a family, as defined in the ZPO. Pensions and certain other allowances are also exempt from attachment. Peter Bert, 'Germany' in Lawrence Newman (n 239) GER-12. In the common law world, as explained above, a judge granting a freezing injunction has discretion to allow the defendant to use a reasonable sum to pay his ordinary living expenses, to pay any legitimate trade debts as they would be paid in the ordinary and proper course of business, and to pay the costs of litigation of the present proceedings. Kay, Sime, and French (n 293) paras 38.22–38.24. As decided in *PCW (Underwriting Agencies) Ltd v Dixon*, a defendant is not dissipating his assets by living as he always lived. *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (Comm).

L511-1 of the French Code of Civil Enforcement Procedures (*Code des Procédures Civiles d'Exécution*, 'CPCE') provides that any person whose claim appears to be well-grounded will be granted a *saisie* if he demonstrates circumstances likely to endanger the recovery of a debt. Whether the circumstances are such as to endanger the applicant's chances of debt recovery are to be determined by the court, but usually these involve a risk that the respondent may dissipate or conceal his assets so as to frustrate the execution of a judicial decision on the merits.⁴⁰⁰ The grant of an order is more or less automatic and only if the statutory conditions are not met can the judge refuse to grant or release the order (article L512-1).⁴⁰¹

The French judge's hands are even more tied than his German counterpart's. As Paul de Drée explains, the attachment of assets is granted only in *ex parte* proceedings. Only after granting an order the judge may decide that the matter will later be heard in *inter partes* proceedings as well (article R511-5). Moreover, the judge will grant an order attaching assets corresponding

⁴⁰⁰ Paul de Drée, 'France' in Lawrence Newman (n 239) FRA-7. In Case No 13-26262 Cour de Cassation Chambre Civile 2, 8 January 2015 the Court ruled that the transfer of the headquarters of a company was not a threat to recovery of the alleged claim. In the Case No 15-21408 Cour de cassation Chambre Civile 2, 23 June 2016 the Court said that the fact that a debt was not extinguished was also not a threat to recovery of the claim, and, therefore, a *saisie conservatoire* was erroneously granted by the Court of Appeal. Finally, in the Case No 13-22588 Cour de Cassation Chambre Civile 2, 4 September 2014, the Court said that the fact that the defendant did not establish that the plaintiff company may recover all amounts due to it in case the defendant company is liquidated was not a reason for the Court of Appeal to grant a *saisie conservatoire* by reversing the burden of proof.

⁴⁰¹ See eg Case No de RG: 15/02205 Cour d'Appel de Paris, pôle 4, chambre 8, 10 March 2016 where the Court confirmed these provisions and said that the burden of proof is on the plaintiff.

to the exact amount of the debt to be recovered and as identified by the applicant in his application. In other words, the judge cannot determine the value of the assets to be attached (article R511-4).⁴⁰² Furthermore, the judge has no discretion regarding the provision of security since the applicant for a *saisie* does not have to provide security in order to obtain an order. Some discretion is granted to the French judge to substitute the order originally granted with any other measures necessary to safeguard the interests of the parties (article L 512-1).⁴⁰³ On the whole, however, as one would expect to find in a civilian jurisdiction, judicial discretion in the area of asset preservation orders in France is very limited.

From the comparative analysis thus far, several underlying themes can be identified: it seems that differences in methodology between the two legal families unavoidably have consequences in the structure of provisional and protective measures.⁴⁰⁴ More specifically, the different emphasis on legal certainty between the two systems reflects on the law governing asset preservation orders. It is evident that in civilian jurisdictions, where legal certainty is sacrosanct, the grant of an asset preservation order is automatic.

⁴⁰² In case of attachment of a bank account, a minimum amount is left unattachable. Paul de Drée, 'France' in Lawrence Newman (n 239) FRA-12.

⁴⁰³ Paul de Drée, 'France' in Lawrence Newman (n 239) FRA-8. See also Alexander Layton, Stephen O'Malley, and Hugh Mercer, *European Civil Practice* (2nd Edition, Sweet & Maxwell 2004) vol 2, 167.

⁴⁰⁴ Jens Grunert, 'Interlocutory remedies in England and Germany: a Comparative Perspective' (1996) 15 CJK 18, 19.

The judge is only allowed limited discretion prescribed by the legislature in deciding satellite issues. Unlike the common law judge, the continental judge does not have inherent discretion and when he is given discretion by the legislature, he looks for the answer in the statute—which regulates almost all issues—and does not make decisions on the basis of policy concerns.

7. The tension between legal certainty and flexibility and the merits of discretion bound by limitations

a. Legal flexibility and financial development

A good argument in favour of judicial discretion is the connection between flexibility in the law and financial development.⁴⁰⁵ This is supported by the law and finance theory.⁴⁰⁶ As Beck and Levine explain, the law and finance theory

⁴⁰⁵ Economic analysis of law applies the tools of microeconomic theory to the analysis of legal rules and institutions. Ronald Coase, 'The Problem of Social Cost' (1960) 3 J of L and Economics 1 and Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale L J 499 are generally identified as the seminal articles but Commons (with John R Commons, *Legal Foundations of Capitalism* (MacMillan 1924)) and Hale (with Robert L Hale, *Freedom Through Law: Public Control of Private Governing Power* (Columbia UP 1952)) among others had brought economic thinking to the study of law in the 1910s and 1920s. Richard Posner (with *Economic Analysis of Law* (Little Brown and Company 1973)) brought economic analysis of law to the attention of the general legal academy.

⁴⁰⁶ The law and finance theory has been supported recently by various scholars such as La Porta, López-de-Silanes, and Andrei Shleifer. See mainly Rafael La Porta and others, 'Legal determinants of external finance' (1997) 52 The J of Finance 1131; Rafael La Porta and others, 'Law and Finance' (1998) 106(6) J of Political Economy 1113; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The economic consequences of legal origins' (2008) 46(2) Journal of Economic Literature 285.

emphasises that the different legal traditions that emerged in Europe over previous centuries and were spread internationally through conquest, colonisation, and imitation, help explain cross-country differences in financial development today. More specifically, this theory argues that the legal traditions differ in their formalism and ability to evolve with changing conditions, and that legal traditions that adapt efficiently to the needs of the economy, foster financial development more effectively than more rigid systems.⁴⁰⁷

The efficiency of the common law was first highlighted by Posner and was based on the idea that the decentralised creation of common law mimicked how the market worked, leading judges to unconsciously pursue an efficiency standard.⁴⁰⁸ As Beck and Levine indicate, countries which are more likely to admit judicial decisions as a source of law adapt more efficiently to changing financial conditions, and this element, was positively associated with stock market development, bank development, and private property rights protection.⁴⁰⁹ Moreover, using data from 71 countries, La Porta and others constructed empirical measures of judicial independence and examined their

⁴⁰⁷ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 251.

⁴⁰⁸ Richard A Posner, *Economic Analysis of Law* (first published 1973, 9th edn, Wolters Kluwer Law and Business 2014). See also Paul H Rubin, 'Why is the Common Law Efficient?' (1977) 6(1) *The J of L Studies* 51.

⁴⁰⁹ Thorsten Beck and Ross Levine 'Legal Institutions and Financial Development' in Ménard and Shirley (n 233) 272.

impact on economic freedom across countries. Their conclusion was that, consistent with theory, judicial independence is an important source of economic freedom, which explains part of the persistent finding of greater such freedom in the common law countries.⁴¹⁰

On the other hand, Arruñada and Andonova point out that the civil law tradition is also thought to have some advantages, perhaps being more innovative than common law. It is much more grounded on statutes than the common law is, which, if we presume that statutes are made frequently enough to deal with problems as they arise, they may be easier to create than case law. This argument indicates that civil law has the potential to be flexible despite often being perceived as rigid. Moreover, as indicated above, it has been observed on numerous occasions that, when the efficiency of a codified rule is doubtful, civil law courts end up circumventing it, usually by stretching the interpretation of flexible standards such as ‘good faith’, ‘reasonably,’ ‘fairly’, and so on.⁴¹¹

⁴¹⁰ Rafael La Porta and others, ‘Judicial checks and balances’ (2004) 112(2) *J of Political Economy* 18, 18.

⁴¹¹ Benito Arruñada and Veneta Andonova ‘Market Institutions and Judicial Rulemaking’ in Ménard and Shirley (n 233) 242. Cooter and Ginsburg argue that as legislative resistance increases, judicial discretion also increases. Robert D Cooter and Tom Ginsburg, ‘Comparative Judicial Discretion: An Empirical Test of Economic Models’ (1995) 16 *Intl Rev of L and Economics* 295, 308. By analogy, it could be argued that as judicial discretion decreases, as happens in the civil law jurisdictions, legislative resistance also decreases. In other words, the legislature is more active in countries where judicial activism does not exist.

Furthermore, some scholars have argued that legal formalism can slow legal processes, increase legal costs, and hinder the ability of courts to arrive at fair judgments due to the rigid adherence to bright-line rules, with it bringing a risk of corruption. They also argue that formalism is less prominent in common law countries.⁴¹² Moreover, another study examined the impact of legal formalism on financial development. The study showed that legal formalism appeared to affect the form of financial intermediation.⁴¹³

Overall, it may be said that, although in examining the characteristics of the different legal traditions some generalisations are possible, legal origin may not be the whole story. As shown above, variable balancing acts such as codified law versus case law, judicial dependence versus judicial discretion, and rigid versus flexible rules of judicial procedure, are undertaken by all legal systems, are mixed in different proportions, and are managed differently through history.⁴¹⁴ Put differently, efficiency may not be strictly speaking a common law or a civil law trait.⁴¹⁵ Rather, the dilemma is between the flexibility

⁴¹² See Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) *The Q J of Economics* 117 (4) 1193; Simeon Djankov and others, 'Courts' (2003) 118(2) *The Q J of Economics* 453. A study by Djankov and others measured the exact procedures used by litigants and courts to evict a tenant for non-payment of rent and to collect a bounced check in 109 countries.

⁴¹³ Daron Acemoglu and Simon Johnson, 'Unbundling Institutions' (2005) 113(5) *J of Political Economy* 949.

⁴¹⁴ Benito Arruñada and Veneta Andonova 'Market Institutions and Judicial Rulemaking' in Ménard and Shirley (n 233) 246.

⁴¹⁵ See the article by Paul H Rubin, 'Common Law and Statute Law' (1982) 11 *J of L Studies* 205.

of the law and judicial discretion on the one hand, and rigid rules and distrust of judges on the other.

b. Justice in the individual case

In any event, justice does not operate only for the benefit of financial development but also for its own sake. Taking into account the analysis above, it is argued that the freezing order of the common law tradition is a remedy that, apart from being efficient, is also effective and just.⁴¹⁶ It is further argued that these characteristics are attributable, inter alia, to its discretionary character.

Society, says Hudson, has become particularly complex, creating insecurity and fear for individuals. For this reason, a legal system must be able to cater for this complexity in a way that is both principled and sensitive to context. On the one hand, human beings crave order and are fearful of chaos. This tendency expresses itself in law-making by means of a leaning towards legal certainty.⁴¹⁷ On the other hand, however, as Hart explains, viable legal systems must compromise between two social needs: the need for certain rules which can safely be applied by judges, and the need to leave open issues which

⁴¹⁶ See also Marion Hetherington, 'Mareva After Thirty Years' (2004) 8(1) U of Western Sydney L Rev 21, 21.

⁴¹⁷ Hudson, *Equity and Trusts* (n 206) 1108.

can only be properly appreciated and settled when they arise in a concrete case.⁴¹⁸

It is suggested that an equity-style discretion ensures equality of outcome in individual cases so that justice is done between litigants. This kind of discretion is the power to treat unlike cases in unlike ways.⁴¹⁹ Equitable discretion is a tool of social justice, which, as the Welsh politician Aneurin Bevan said, enables us to ensure that ‘not even the apparently enlightened principle of “the greatest good for the greatest number” can excuse indifference to individual suffering.’⁴²⁰ Discretion forces us to consider the individual in this complex world and to save that individual from being caught up in the legal machine or exposed to irremediable suffering.⁴²¹ In this modern world, each circumstance is different from every other and each person demands—and deserves—to be recognised as a unique individual.⁴²²

One of the drafters of the French Civil Code, Jean-Étienne-Marie Portalis, made a speech when presenting the draft Code to the government, the so-

⁴¹⁸ Hart (n 160) 130.

⁴¹⁹ Alec Stone Sweet and Margaret McCown, ‘Discretion and Precedent in European Law’ in Wiklund (n 153) 86.

⁴²⁰ Aneurin Bevan, ‘In Place of Fear’ in David Reisman (ed), *Democratic Socialism in Britain: Classic Texts in Economic and Political Thought, 1825–1952* (Pickering & Chatto 1996) vol 10, 200.

⁴²¹ Hudson, *Equity and Trusts* (n 206) 34.

⁴²² Hudson, *Equity and Trusts* (n 206) 1110.

called '*Discours préliminaire du Code civil*' (preliminary discourse on the Civil Code), in which he warned against simplistic ideas regarding the effect of the code. 'You can make a code as perfect as you like', he said, 'but a thousand unexpected questions will crop up that have to be examined by the courts'. He explained this as being because '[t]he laws, once drafted, remain as they were written. Men, on the contrary never rest; they always act: and this movement, which does not stop, produces at each time some new combination, some new fact, some new results', and these new results demand an updated response.⁴²³

Nowadays, Alain De Botton said, there is a great emphasis on justice in every aspect of life. Whilst justice can be achieved in the abstract, in reality it is elusive, because at the end of the day every case has an element of the haphazard. This should not discourage us from doing everything we can to pursue justice. In so doing, however, we really need to leave room for the unpredictable.⁴²⁴ As Isaiah Berlin put it:

The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. The knowledge that it is not merely in practice but in principle impossible to reach clear-cut and certain answers—even in an ideal world of wholly good and rational men and wholly clear ideas—may madden those who seek for final

⁴²³ Jean-Étienne-Marie Portalis, *Discours, rapports et travaux inédits sur le code civil* (Joubert, Libraire de la Cour de Cassation 1844) 8. See Thijmen Koopmans, 'Methods of Interpretation' in Wiklund (n 153) 77. As Roscoe Pound said, the law must be stable, but it must not stand still. Pound (n 236) 1.

⁴²⁴ Alain de Botton, 'A Kinder, Gentler Philosophy of Success' (TEDGlobal, Oxford, July 2009).

solutions and single, all-embracing systems, guaranteed to be eternal.⁴²⁵

Roots of equity-style discretion, as Hudson explains, and also mentioned earlier, are to be found in Aristotle's discussion of justice. Aristotle calls equity 'justice that goes beyond the written law'.⁴²⁶ What we are left with by Aristotle's determination is that circumstances must determine the appropriate rule and that concrete rules cannot always be set out in advance and then applied without pause for reflection. On the one hand, says Kerr, the judge is in the fortunate position of having parties to a case before him: he hears the evidence, sees the witnesses, and feels the human impact of the case. On the other hand, the legislator must extrapolate, imagine, and examine the wider impact of his decisions.⁴²⁷

Any suggestion that the solution to questions of justice can be decided by reference to a single formula of rules to be applied is doomed either to failure or to generate injustice. For Dworkin's fictional figure Hercules, who is a judge 'of superhuman skill, learning, patience and acumen',⁴²⁸ it is discretion that offers the possibility of a judge being sufficiently free to reach the 'right answer' and so

⁴²⁵ Isaiah Berlin, *Four essays on Liberty* (OUP 1969) 170.

⁴²⁶ Aristotle, *Rhetoric*, para 1374a13.

⁴²⁷ Kerr (n 172) 37.

⁴²⁸ Dworkin, *Taking Rights Seriously* (n 161) 132; Dworkin, *Law's Empire* (n 167) 239.

to do justice between the parties to any particular case in the broadest possible sense.⁴²⁹

It is argued that the use of discretion is socially useful. It provides a capacity to operate creatively within the confines of a legal order so as to reach a solution that ideally accomplishes seemingly diverging aims. Discretion also reinforces the authority of the judiciary and of the legal system whilst striking a balance between competing interests and claims put forward by the parties. Furthermore, it gives the opportunity for the reinterpretation of legal norms with new meaning allowing for innovation, and, thus, increasing the flexibility and adaptability of the system and its acceptability.⁴³⁰

Alongside the demands for legal certainty, Hudson suggests, there is a need to create a space in which the law can achieve fair results in individual cases. Here, human beings can be recognised as individuals with their own very personal motivations, commitments, and beliefs, and not simply be dealt with just as litigants against whom abstract rules are to be enforced. In other words, we must resist the temptation to force narrow doctrines and impose too much order on what will remain a fundamentally diverse and chaotic society.⁴³¹

⁴²⁹ Alastair Hudson, *Equity and Trusts* (8th edn, Routledge 2014) 43.

⁴³⁰ Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 57. See also Anna Pratt and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24 CJLS 301, 308.

⁴³¹ Hudson, *Equity and Trusts* (n 206) 1119.

As it has been argued, '[d]iscretion is a vehicle of good far more than of evil. It is the only means by which the intelligence and good will of a society can be brought to bear directly upon the solution of hitherto unsolved problems'.⁴³²

Geyh submits that the best way for judges to resolve certain difficult policy questions is to give them the discretion to apply flexible principles that meet the unique circumstances of individual cases. Judicial discretion gives the judge the ability to be sensitive to unintended consequences of the core rules or difficult policy choices in individual cases. This reflects a wise, pragmatic approach to policy-making that leaves the task of fine-tuning statutes to judges.⁴³³

Protecting individual rights is always the core concern in dispensing justice. Thus, in the case of the EAPO, what matters most in granting or refusing an order is the protection of the parties' competing rights. Legal certainty—and perhaps speedier adjudication that may come with it—although

⁴³² Henry M Hart, Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of the Law* (William N Eskridge, Jr and Philip P Frickey (eds), The Foundation Press 2006) 158. As Canale and Tuzet argue, the requirement of legality does not entail the requirement of uniqueness. The subject of legal predictability cannot be the single right answer to a legal question but the fact that this answer will be correctly justified as to the particular case. Damiano Canale and Giovanni Tuzet, 'Judicial Discretion and the Rule of Law' in Eveline Feteris and others (eds), *Legal Argumentation and the Rule of Law* (Eleven International Publishing 2016) 27.

⁴³³ Charles Geyh, *What's Law Got to Do With it?* (Stanford UP 2011) 94. Arthur Miller said: 'I love judicial discretion. I know some judges on the Courts of Appeal—we won't use names—want to rein that discretion in, but I think one of the beauties of the United States District Judge is his or her discretion. We have to give that judge some elbow room, objectively, individualistically, and contextually.' Arthur Miller, 'Remarks at the Public Hearings of the Third Circuit Task Force on the Selection of Class Counsel' (1 June 2001); Richard L Marcus, 'Slouching toward Discretion' (2003) 78 *Notre Dame L Rev* 1561, 1561.

being extremely important, comes second. As explained in the beginning of this chapter, an erroneously granted EAPO may leave the defendant without funds for no reason. To this end, courts should combine adherence to strict rules and exercising their discretion on a case by case basis. Each case has to turn on its own facts, balancing the harm on each party if the order is granted or not. Balancing makes it clear that each litigant's legal interest is a legitimate one, that the court nonetheless must make a decision by weighing each side's interest against the other, and that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.⁴³⁴

Zuckerman argues that one should be careful to distinguish between established checklists with factors which highlight the relevant considerations to be taken into account by the judge, and the exercise of discretion involved in using a checklist.⁴³⁵ Checklists exist where the law is most in danger of being applied in a partisan way.⁴³⁶ They are a convenient way of making sure that the court has all the information that it needs as regards the will of the legislature.⁴³⁷ Trial judges, therefore, need to be aware of them and make sure that they have

⁴³⁴ Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004) 11. See also Alec Stone Sweet, 'Judicial Authority and Market Integration in Europe' in Tom Ginsburg and Robert A Kagan (eds), *Institutions & Public Law: Comparative Approaches* (Peter Lang 2005) 106.

⁴³⁵ Zuckerman (n 269) para 2.43.

⁴³⁶ Sweet, *The Judicial Construction of Europe* (n 434) 11.

⁴³⁷ *Glaxo Group Limited v Genentech Inc* [2008] EWCA Civ 23 [62].

given attention to all the material factors on such a list. From that point on, however, they are free to reach the conclusion that is most appropriate in the context of that particular case with which they are dealing. Thus, although certain statutes may sometimes indicate what the main consideration in a particular occasion is, it is the particular context, *not* the statute, which will normally indicate to the judge the factors carrying the most weight in exercising his discretion.⁴³⁸

Arguably, the justice of the individual case as regards the EAPO regulation can be achieved mainly in two ways: First, by explicitly—ie by using the word ‘may’ instead of ‘shall’—granting the national judge discretionary power when allowing or refusing the order. Second, by introducing terms which are open to interpretation such as ‘good faith’, ‘prevention of abuse of rights’, etc.⁴³⁹ It will be suggested that the former solution, accompanied by certain jurisdictional conditions and a balancing checklist that will limit the scope of discretion, is more advisable as it will be less confusing—and tempting—for judges. This model is the one followed in English freezing injunctions, as explained above. The necessity of limiting judicial discretion and the relevant checklist guidelines that will constrain discretion will be discussed below.

⁴³⁸ *Glaxo Group Limited v Genentech Inc* [2008] EWCA Civ 23 [63].

⁴³⁹ See Alan Uzelac, *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 229. For instance, the statute may indicate that an order shall not be granted if the respondent has acted in good faith.

c. Policy-conscious judgments

As explained earlier, in the common law tradition, in contrast with civilian legal systems, judgments are often policy-conscious. Lord Denning was among the first to acknowledge this state of affairs in *Dutton v Bognor Regis UDC*:

It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing. In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. (...) Nowadays, we direct ourselves to considerations of policy. (...) In short, we look at the relationship of the parties: and then say, as matter of policy, on whom the loss should fall.⁴⁴⁰

It is argued that it is an error to posit a dichotomy between law and policy. Instead, as Geyh indicates, law and policy are not opposites but rather complementaries.⁴⁴¹ Lord Cooke of Thorndon, then the President of New Zealand's Court of Appeal and later a member of the United Kingdom's House of Lords, spoke in a similar way:

From the point of view of an appellate judge hearing cases day by day it seems more than a decade since the pretence of legal formalism was abandoned and much more open emphasis began to be placed on working out a philosophical approach—to use a somewhat pompous term to describe conscious value judgments. Direct debate of policy considerations, and with an eye to interests

⁴⁴⁰ *Dutton v Bognor Regis Urban DC* [1972] 1 QB 373 (CA) 397 (Lord Denning MR).

⁴⁴¹ Geyh (n 433) 51.

transcending those of the immediate parties, has become commonplace.⁴⁴²

In doctrinal debate, as Pollicino explains, we often come across the belief that a clear distinction exists between judicial discretion and judicial activism. According to this distinction, the former is considered a legitimate expression of judicial function whilst the latter is its degeneration, involving a judge's arbitrary intrusion into the political arena by giving priority to values other than legal ones. It must be emphasised that this belief is misplaced, being based on an old and reductive concept of judicial function, whereby the judge was seen as an inanimate, robot-like spokesman of the law. This concept retained the idea that by purely deductive logic the judge could determine the law without personal responsibility or creative input.⁴⁴³

Rather, Pollicino continues, it must be underlined that the judicial function involves not only the application of the law but also its interpretation and development, at least where the judge is allowed to exercise his discretion. If one accepts this fundamental observation, judicial discretion on the one hand and judicial activism on the other are not contradictory notions.⁴⁴⁴ As Lord Bingham suggests, 'the opposite of active is passive, and the opposite of

⁴⁴² Sir Robin Cooke, 'The New Zealand National Legal Identity' (New Zealand Law Conference, Christchurch, October 1987) 171.

⁴⁴³ Oreste Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint' [2004] 5(3) German L J 283, 285.

⁴⁴⁴ Pollicino (n 443) 286.

activism is inertia. (...) In the law, nothing is the work of one Court or one man'.⁴⁴⁵ In other words, the law is the creation of both the legislature and the judiciary.

But if it is true that law is suffused with judicial discretion when considering policy objectives, Geyh asks, do we not have to confront the dilemma that bedevilled the realists, ie how could the subjectivity of judicial decisions be squared with the doctrine that free men should be subject only to known and established law? It is submitted that such an exercise of judicial discretion exists in part because social needs demand some measure of flexibility in the application of legal rules. Judicial discretion, thus, complements the law in that it resolves indeterminacies through the mediating influence of a judge who knows the facts of the specific case and takes into account the policy considerations as assessed by the legislature.⁴⁴⁶

In this sense, continues Geyh, judges frequently issue decisions based on policy considerations. This is not only inevitable, it is a wise process. Judges should not feel unduly constrained by legal materials, whether those are

⁴⁴⁵ Bingham, *The Business of Judging: Selected Essays and Speeches: 1985-1999* (n 236) 34. cf Lord Devlin, *The Judge* (OUP 1979) 5: 'The disinterested application of the law calls for many virtues, such as balance, patience, courtesy, and detachment, which leave little room for the ardour of the creative reformer'.

⁴⁴⁶ Geyh (n 433) 54.

statutes or prior judicial precedents. A measure of judicial discretion based on policy considerations is consistent with good governance.⁴⁴⁷

It may be argued against this, Geyh explains, that policy considerations transform judges into mere politicians and courts into political agencies.⁴⁴⁸ However, this conclusion oversimplifies the judicial process. Judges are a different kind of politician to legislators, and their decisions are subject to a different set of constraints. Judges are influenced by the law, as well as by political concerns. Judicial decisions should of course place greater importance on the statute, ie they should be seeking answers within the law. Policy considerations, however, play an important role when the law is less determinate.⁴⁴⁹

d. New breed of intellectually ambitious judges

If judges are to be given discretion to deliver policy-conscious judgments, what skills and what kind of guidance do they need? It is argued that in this emerging

⁴⁴⁷ Geyh (n 433) 110. That judges must apply the law cannot mean that they should behave as the imaginary mouth of the law according to the famous metaphor of Montesquieu (*la bouche qui prononce les paroles de la loi*, ie the mouth reproducing the words of the law). Montesquieu, *De l'esprit des lois* (Pierre Didot et Firmin Didot 1803) 57. See Maurice Adams and others, 'Introduction: Judging Europe's Judges' in Maurice Adams and others (eds) *Judging Europe's Judges* (Hart Publishing 2014) 1.

⁴⁴⁸ See Terri Jennings Peretti, *In Defense of a Political Court* (Princeton UP 2001).

⁴⁴⁹ Geyh (n 433) 110.

'new order of things' judges will need to have the proper intellectual background. Apart from being equipped with a checklist of factors that will guide them, they need to fully understand the relevant policy considerations.

Lando argues that there are two typical ways of solving a legal problem: Way 1, the loyal legalistic approach, which obeys statutes and precedents; and Way 2, the creative and imaginative approach. Those judges who take Way 1 follow the rules even when their sense of justice tells them not to. They are the servants of the law and they see it as their task to be loyal to the legislator, to obey the precedent, and to provide certainty and predictability. Those who take Way 2 follow their sense of justice and they alter the existing rules when they need to. It is argued that we do not need judges who fail when they are faced with a problem that the statute or precedent does not solve and which demands a horizon beyond the known. On the contrary, we need judges who, when faced with a dilemma, they examine it from all sides, weigh all the relevant elements against each other, and make a sound decision.⁴⁵⁰

Adams and others suggest that adjudication has nowadays become more challenging than ever before, since the law is increasingly interlinking different sets of interests so as to address ever more complex societal problems and issues. Consequently, in individual cases, courts can no longer confine

⁴⁵⁰ Ole Lando, 'Some Remarks on Adjudicators' Reasons' in Henning Koch and others (eds), *Europe: The New Legal Realism* (Djøf Publishing 2010) 382. Koch and others (n 450)

themselves to applying the legal rules as established by the legislator. Rather, they are increasingly expected to weigh and reconcile the relevant interests themselves. Also, increasingly frequently, courts must derive appropriate standards to serve as benchmarks when assessing how conflicting interests should be protected. For this reason, the process of adjudication is necessarily dynamic and judges have to correspond to this need, at least, if the law itself is to remain a valued means for channelling social developments.⁴⁵¹

At this juncture, it is interesting to set out Mirjan Damaška's contribution to the comparative procedural law literature. Damaška has rejected the traditional dyad of comparative procedure, which equates common law with adversarial process and civil law with inquisitorial process.⁴⁵² Instead, as Koh explains, he offers a more nuanced descriptive framework, organised along two different axes. Damaška's 'hierarchical-co-ordinate' axis reflects the way a state has organised its judicial officials, with hierarchical states structuring their judicial branches with stratified authority and rigid role definition, in contrast to co-ordinate states, who organise their judges loosely, with overlapping spheres of authority and concentrated, informal decision-making processes. Damaška's

⁴⁵¹ Maurice Adams and others (n 447) 1. As Geyh argues, a legal system does not want judges to be like computers who simply take in the facts, apply the law stored in the computer, and press enter while at the same time ignoring all other surrounding factors. In the scope of their judicial discretion there are considerations other than the law that judges should be able to make use of. Geyh (n 433) 334.

⁴⁵² Damaška (n 203).

second, 'state activism' axis, considers as 'activist' those states that seek to implement substantive values through many vehicles, including the judicial process, while reactive states endorse no specific substantive vision of the good life, with their judiciary playing the role of a neutral arbiter of private disputes, enforcing contestants' bargains and deferring to party autonomy.

Any procedural system, Damaška argued, can be located along these two axes. Viewed in this light, the classic Anglo-American model is more or less co-ordinate/reactive, while the classic continental approach is hierarchic/activist. The particular rules of procedure that develop within these systems reflect an organisational structure that captures the society's preferred view of the state. Thus, Damaška views procedural rules as reflections of complex sociopolitical attitudes and choices about the social ends that legal systems are designed to achieve.⁴⁵³

According to Bruce Ackerman, Damaška's framework pinpoints the legal tensions that predictably arise as Anglo-American systems try to negotiate the transition from a reactive state to a more activist liberalism. Damaška predicted that the Anglo-American tradition of reactive governance by legal notables would be challenged by a rising breed of technocrats charged with the task of

⁴⁵³ Harold Hongju Koh, 'Mirjan Damaška: A Bridge Between Legal Cultures' in John Jackson, Maximo Langer, and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (Hart Publishing 2008) 31.

correcting market failures and providing millions of citizens with the prerequisites of social justice.⁴⁵⁴

The rise of the activist state, Ackerman points out, coincided with the development of a new form of scientific policymaking that was quite distinct from the nineteenth century legal science developed in Europe. The key sources for the new legal science were the 'law and economics' movement and liberal philosophy. Law and economics was providing a fundamentally new way to describe the factual dimension of the problems confronting the legal system. The new analytic scheme permitted lawyers to liberate themselves from 'common-sense' descriptions of problems and to substitute them with a system that would impress a new class of legal specialists trained in the use of quantitative methods. Liberal political philosophy was used by judges to implement principles of social justice within an empirical understanding of problems using cutting-edge social science. This distinctive mix of liberal political philosophy and law and economics is, in short, providing the rising activist state with the analytic tools it needed for the responsible pursuit of social justice and economic efficiency in a liberal political order.⁴⁵⁵

⁴⁵⁴ Bruce A Ackerman, 'My Debt to Mirjan Damaška' (2009) 118 Yale L J Pocket Part 171, 173. 1. Robert Kagan said: 'Compared to most national judiciaries, American judges are less constrained by legal formalisms; they are more policy-oriented, more attentive to the equities (and inequities) of the particular situation.' Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Harvard UP 2009) 16.

⁴⁵⁵ Bruce A Ackerman, 'My Debt to Mirjan Damaška' (2009) 118 Yale L J Pocket Part 171, 174.

Ackerman argues that, up until now, continental lawyers and scholars largely have been bemused observers. Whatever this debate may mean for the United States and the rest of the common law world, the Europeans have been more or less content to continue relying on the older forms of legal science they inherited from the nineteenth century. However, he believes that liberal law and economics will have a much more general appeal to all nations struggling to define a 'third way' between simplistic forms of laissez-faire and equally simplistic forms of governmental command and control. He suggests that, although continental bureaucrat-judges of the nineteenth century were rule-followers, the bureaucrat-judges of the twenty-first century will be more intellectually ambitious. Utilising the methods of law and economics, and liberal philosophy, they will be in a position to move beyond rules to a bolder form of decision-making, using political philosophy to gain a more refined understanding of the legal requirements of social justice and economic efficiency in a liberal state.⁴⁵⁶

To sum up, it may be argued that continental legal thinking is turning from a hierarchical to a co-ordinate ideal and the common law from a reactive to an

⁴⁵⁶ Bruce A Ackerman, 'My Debt to Mirjan Damaška' (2009) 118 Yale L J Pocket Part 171, 175. Hubert Legal, Legal Adviser to the European Council and Director-General of the Council Legal Service said that the cultural impact of justice needed to be considered before major changes were introduced. What makes a judge legitimate, he continued, is the number one question anyone should ponder before tampering with how justice works. In his view, legitimacy was based on the judges' ability to deliver judgments that were socially acceptable. This cannot be achieved unless they constitute an educated emanation of the sensitivities of the peoples on whose behalf they judge, he insisted. Joshua Rozenberg, 'Legal the EU's new legal eagle demands justice for all' *The Guardian* (22 November 2013).

activist one, thus transforming modern legal systems into hybrids that wish to implement policy objectives through the courts but with less reliance on strict rules. We are, of course, at an early stage in this larger reorientation of legal theory and practice. The new challenges will be resolved over the course of the next few generations, leading to many surprising hybrids and intellectual experiments over the course of the next centuries.⁴⁵⁷

The bottom line is, however, that no matter what the policy objectives each time are, the courts' role is changing. A judge needs to analyse and understand the societal, economic, and political objectives of the state in which he operates in order to generate policy-conscious opinions. It is very hard to form a reliable picture of what is actually at stake without an adequate understanding of the background.

e. Quality of judges

Ultimately, one could argue that the acceptable scope of judicial discretion depends solely on the quality of the judges.⁴⁵⁸ But what are the qualities that a

⁴⁵⁷ Bruce A Ackerman, 'My Debt to Mirjan Damaška' (2009) 118 Yale L J Pocket Part 171, 176.

⁴⁵⁸ Ami Barav, 'The European Court of Justice and the Use of Judicial Discretion' in Wiklund (n 153) 149.

judge should have in order to be entrusted with discretion? Sir Joseph Jekyll said in *Cowper v Cowper* that proceedings in English equity are *fecundum discretionem boni viri* (in the ample discretion of good men), yet, *vir bonus est quis?* (who is a good man?).⁴⁵⁹ A ‘good man’ is someone who is neither biased nor corrupt, and, instead, has integrity. As it was stated in *Rooke’s Case*:

[D]iscretion is a science of understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit* [ie such discretion confounds discretion].⁴⁶⁰

Lord Bacon, Hudson explains, while serving as Lord Chancellor in the 17th century, was found to have accepted ‘presents’ in office, which today would be considered to be bribes. The Earl of Macclesfield, when Lord Chancellor, was also convicted by the House of Lords of embezzling court funds⁴⁶¹ in the early 18th century. By today’s standards, the courts exercising equitable discretion in

⁴⁵⁹ *Cowper v Cowper* [1734] 24 ER 930, 942 (Ch). The answer given by the judge was one given by Horace: ‘*qui consulta partum, qui leges juraq servat*’ (the one who keeps the decrees of the fathers, and maintains the laws and justice); see Horace, *Epistles*, para 1.16.40. See also Henry Ballow, *A Treatise of Equity* (John Fonblanque ed, W Clarke and Sons 1793) 20. Clause 45 of the Magna Carta guaranteed that the King would only appoint as judges ‘such men that know the law of the realm and are minded to keep it well.’ See A E Dick Howard, *Magna Carta: Text and Commentary* (University of Virginia Press 1988) 47.

⁴⁶⁰ *Rooke’s Case* (1598) 5 Co Rep 99 b, 210.

⁴⁶¹ See Julia Rudolph, *Common Law and Enlightenment in England, 1689–1750* (Boydell Press 2013) 203.

that period were corrupt.⁴⁶² The words of Alexander Hamilton seem here appropriate:

[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.⁴⁶³

As Pannick said, we need judges who are trained for the job, whose conduct can be freely criticised and is subject to investigation by a judicial performance commission; judges who abandon wigs, gowns, and unnecessary linguistic legalisms; judges who welcome rather than avoid publicity for their activities.⁴⁶⁴ Furthermore, Jeremy Bentham, who was in favour of judicial discretion, tried to explain how judges could remain responsible in order to be prevented from acquiring arbitrary power. Bentham wrote:

For minimizing evil, the main caution is, in no case, on no occasion, to lay down inflexible rules (...)—rules of which on any occasion the effect may be to prevent the minimisation of evil in the individual case calling for decision at the hands of the judge. The pretence in this case is, the avoiding to place arbitrary power in the hands of the judge. But the good thus sought is illusory. In the hands of a judge, power, in whatsoever degree arbitrary, is no otherwise an evil, than in so far as its effect is to produce evil in a tangible shape—to wit, human suffering—in the breasts of individuals. But where an inflexible rule (...) is laid down, the chances against its not producing evil in excess, are as infinity to one. Against abuse of power, the only effectual, or efficient security, is composed of responsibility:

⁴⁶² Hudson, *Equity and Trusts* (n 206) 14, 16.

⁴⁶³ Alexander Hamilton, James Madison, and John Jay, *The Federalist: With Letters of 'Brutus'* (Terence Ball ed, CUP 2003) 383.

⁴⁶⁴ David Pannick, *The Judges* (OUP 1987) 205.

substantial, punitive, and dislocational responsibility, legal and moral.⁴⁶⁵

Someone would rightly wonder why we should trust judges nowadays. In the words of Lord Denning, '[s]omeone must be trusted. Let it be the judges.'⁴⁶⁶ As Posner said, judges are less likely to be drunk with power if they realise they are exercising discretion than if they think they are just a transmission belt for decisions made elsewhere and so bear no responsibility for any ugly consequences of those decisions.⁴⁶⁷ Furthermore, an unquestioning faith in the judiciary is desirable, because the distress experienced by disappointed litigants and persons is often exacerbated if the general climate of opinion is one of suspicion of the impartiality of the courts.⁴⁶⁸

Discretion is exercised daily by persons in a position and with the capacity to misuse it. Are we to suppose, Kerr wonders, that judges, promoted to their

⁴⁶⁵ Jeremy Bentham, *The Works of Jeremy Bentham* (John Bowring ed, William Tait, 1843) vol 2, 31. As John Sorabji explains, Bentham's theory could neither adopt an absolutist, nondiscretionary approach, nor could it adopt a simple discretionary approach. He could not adopt either of these approaches, because both were inconsistent with his utilitarianism. A non-discretionary approach would fail to maximise utility in those cases where the price to be paid for enforcing substantive justice outweighed the benefit to be derived from enforcing the substantive law. A subjective discretion might also result in the enforcement of substantively just decisions in circumstances where doing so produced greater disutility than utility. In order to maximise utility, a specific kind of discretionary approach was necessary: one that relied on no presumption in favour of any of the ends of justice and relied on the utility principle to determine the outcome of the competition between them. John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (CUP 2014) 90.

⁴⁶⁶ Alfred Denning, 'Misuse of Power' (The Richard Dimbleby Lecture, 1980) 19.

⁴⁶⁷ Richard A Posner, *How Judges Think* (Harvard UP 2010) 252.

⁴⁶⁸ Alexander McCall-Smith, 'Allegations of Judicial Partiality and the Phillimore Report' (1975) 24(4) *Intl & Comparative L Q* 862, 870.

rank on ability, clarity of thought, and fidelity to law, ought to be suspected of routinely misusing their power? Whilst there is certainly capacity for discretion to be misused, a judge's opinions are subject to the scrutiny of other judges. Additionally, wrong decisions are subject to appeal; a judge who exercised a discretion *contra bono mores* (against good morals) would find his decisions overturned by his superiors.⁴⁶⁹ But is the integrity and skill of judges enough to guarantee that judicial discretion is exercised justly?

f. Boundaries on judicial discretion

The Roman poet Juvenal famously wondered '*quis custodiet ipsos custodiet*'⁴⁷⁰ (who will guard the guards), referring to the troubling question of who can be trusted with power. In recent times, these discussions have acquired a new momentum and the debate appears to elicit much stronger sentiments than ever before, with hardened pleas for placing fetters on judges' discretionary powers.⁴⁷¹ Justice William Douglas sitting in the Supreme Court of the United States exclaimed in *Joint Anti-Fascist Refugee Committee v McGrath* that the

⁴⁶⁹ Kerr (n 172) 30.

⁴⁷⁰ Martin Madan, *A New and Literal Translation of Juvenal and Persius* (London 1789) vol 1, 276.

⁴⁷¹ Maurice Adams and others (n 447) 1.

integrity of judges does not suffice for giving unequivocal discretion to judges.

He said:

It is not enough to know that the men applying the standard are honourable and devoted men. This is a government of laws, not of men.⁴⁷² The powers being used are the powers of government over the reputations and fortunes of citizens.⁴⁷³

It is true that on the one hand judges must not be reduced to ‘law-finding puppets’, but on the other hand, they must not be allowed to act like ‘red-robed kings’ either.⁴⁷⁴ After all, as Lord Acton said, ‘power tends to corrupt, and absolute power corrupts absolutely.’⁴⁷⁵ The way judges should handle their powers was explained by some of the most emblematic figures serving as Justices in the Supreme Court of the United States. First, Chief Justice John Marshall wrote the following in *Osborn v Bank of the United States*:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When [courts] are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the

⁴⁷² This phrase is attributed to David Hume (David Hume, *Essays, Literary, Moral, and Political* (Alex Murray & Son 1870) 53), who said: ‘It may now be affirmed of civilised monarchies, what was formerly said in praise of republics alone, that they are a government of Laws, not of Men.’

⁴⁷³ *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123, 177 (1951).

⁴⁷⁴ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff Publishers 1986) 513.

⁴⁷⁵ John Emerich Edward Dalberg-Acton, *Historical Essays & Studies* (John Neville Figgis and Reginald Vere Laurence eds, Macmillan and Co Limited 1907) 504. ‘Absolute discretion, like corruption, marks the beginning of the end of liberty’. Justice William Douglas in *State of New York v United States* 342 US 882, 884 (1951).

purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.⁴⁷⁶

One century later Judge Benjamin Cardozo commented in a similar tone in his book '*The Nature of the Judicial Process*' first published in 1921:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.⁴⁷⁷

More recently, during his Senate confirmation hearings in 2005, the later Chief Justice John Roberts famously compared the function of a judge making each decision with that of a baseball umpire calling each pitch a ball or a stroke.⁴⁷⁸ Then, he went on to say:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.⁴⁷⁹

⁴⁷⁶ *Osborn v Bank of the United States*, 22 US 738, 866 (1824).

⁴⁷⁷ Cardozo (n 182) 56.

⁴⁷⁸ Mentioned in W William Hodes, 'Bias, the Appearance of Bias, and Judicial Disqualification in the United States' in H P Lee (ed), *Judiciaries in Comparative Perspective* (CUP 2011) 384.

⁴⁷⁹ John Roberts, 'Confirmation Hearing' (US Supreme Court Confirmation Hearings, 12 September 2005). On the other hand, as Reeves said, judges are not simply umpires, impartially enforcing the fair rules of a voluntary and morally benign sporting event. Anthony R Reeves, 'Do judges have an obligation to enforce the law?: Moral Responsibility and Judicial Reasoning' (2010) 29(2) L and Philosophy 159, 186.

There is a paradox about judicial discretion, Hudson argues. On the one hand, we can be confident that discretion exists so as to dispense justice where a statute would act in some way unfairly. On the other hand, we might be nervous of discretion as a means of permitting judicial legislation beyond the democratic control of the legislature.⁴⁸⁰ The control of discretion through limitation of its scope reflects a trade-off between the informational advantage of discretion—that adjudicators can act on information not included in rules—and the disadvantage of discretion—that decisions may deviate from the desirable because adjudicators' objectives are different from those of the society.⁴⁸¹

A court in a democracy is charged with interpreting and applying the law without regard to the judge's own personal preferences. Mattli and Slaughter argue that there are two principal constraints that ought to guarantee this principle: First is the requirement of minimum fidelity to the demands of legal discourse: reasoned interpretation, logical deduction, systemic and temporal coherence. Reasoning and results that do not meet these requirements may be challenged as unfounded in law, or as indicative that a court is acting *ultra vires*, in excess of its mandate and powers.⁴⁸²

⁴⁸⁰ Hudson, *Equity and Trusts* (n 429) 43.

⁴⁸¹ Steven Shavell, 'Optimal Discretion in the Application of Rules' (2007) 9(1) *American L & Economics Rev* 175, 176.

⁴⁸² Walter Mattli and Anne-Marie Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Court & National Courts* (Hart Publishing 1998) 266.

Second, Mattli and Slaughter continue, is a constraint of minimum democratic accountability: the requirement that a court does not stray too far from majority political preferences. Although judges cannot be directly accountable to the voters, judicial decisions that consistently contradict majority policy preferences are likely to undermine perceptions of judicial legitimacy. In many cases the correct legal outcome will be clear due to the weight of legal materials, the need to be precise, or the potentially disastrous social, political, or economic consequences attendant on the alternative options. In other cases, however, there may be equal prospects for creating evils and benefits however the court comes out. In these close cases, judicial outcomes that consistently stray too far from perceived majority opinion as expressed through the legislature are likely to trigger suspicions that judges are applying their own policy preferences.⁴⁸³

Put differently, judicial discretion may vary in how rigorously it follows the law, but in no case does it overturn legal rules, principles, and policy.⁴⁸⁴ For reasons that span the legal landscape, from the predictability and even-handedness that a well-functioning market economy requires, to the respect for

⁴⁸³ Walter Mattli and Anne-Marie Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in Slaughter, Sweet, and Weiler (n 482) 267. As Dahl argued, '[w]hat is critical is the extent to which a court can and does make policy decisions by going outside established 'legal' criteria found in precedent, statute, and constitution'. Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' in Kermit L Hall (ed), *The Supreme Court in American Society: Equal Justice Under Law* (Taylor & Francis 2001) 279.

⁴⁸⁴ Story (n 205) vol 1, 13.

law-making institutions that democracy requires, judicial discretion needs the restraining influence of the law.⁴⁸⁵ A judge must never call on his own personal values in deciding a case. As Freund puts it:

Much of law is designed to avoid the necessity for the judge to reach what Holmes called his 'can't helps', his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards.⁴⁸⁶

As suggested earlier, in practice, both common law and continental legal systems leave a large and important area open for the exercise of discretion by courts in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing rules only broadly communicated by authoritative precedents. Nonetheless, Hart argues, these activities must not disguise the fact that both the framework within which they take place and their chief end-product is one of rules.⁴⁸⁷

⁴⁸⁵ Charles Geyh, *What's Law Got to Do With it?* (Stanford UP 2011) 54.

⁴⁸⁶ Paul A Freund, 'Social Justice and the Law' in Kenneth E Boulding and others, *Social Justice* (Richard B Brandt ed, Spectrum Englewood Cliffs 1962) 110. The then former Chief Justice of New South Wales, Murray Gleeson, who then became Chief Justice of the High Court of Australia, said in a similar tone: 'The greater the scope for the exercise of individual discretion and the application of subjective value-judgments, the less will be the assurance, essential for public confidence, that the outcome of the case depends as little as humanly possible upon the identity of the Judges who decide them. This is not to suggest that the law was ever capable of working in a fashion that is unaffected by the views and attitudes of individuals. But, other things being equal, the object ought to be to minimise the effect of this element of the system, not to maximise it.' Murray Gleeson, 'Individualised Justice: the Holy Grail' (1995) 69(6) *Australian L J* 421, 431.

⁴⁸⁷ Hart (n 160) 136.

For MacCormick, the primary objective of legal theory is the development of rules which, in essence, allow for the evaluation of arguments used in judicial decisions as good or bad, acceptable or not acceptable, rational or arbitrary.⁴⁸⁸ In the common law world, courts are flexible in approaching the different factual situations as they arise. As it emerges from the analysis above, flexibility has a positive effect. We must not, however, give in to the temptation to use the term 'flexible' as a cloak to conceal a lack of analytical rigour and to escape the need to find a doctrinal and principled basis for every legal remedy.⁴⁸⁹ Otherwise, there would be no point in having statutes which can be so readily defeated. As Abbé de Mably exclaimed, '[a]ll is lost if the judge wants to be smarter than the statute'.⁴⁹⁰ We are thus led to the realisation, as Benjamin Cardozo said, that the ostensibly absolute freedom granted to judges in the form of discretion is fictitious:

Given freedom of choice, how should the choice be guided? Complete freedom—unfettered and undirected—there never is; a thousand limitations—the product some of statute, some of precedent, some of vague tradition or of an immemorial technique—encompass and hedge us even when we think of ourselves as ranging freely and at large. (...) Narrow at best is any freedom that is allotted to us.⁴⁹¹

⁴⁸⁸ Neil MacCormick, *Legal Reasoning and Legal Theory* (2nd ed, Clarendon Press 1994) 12.

⁴⁸⁹ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 (High Court of Australia) 403.

⁴⁹⁰ See H Drost, *Das Ermessen des Strafrichters* (Keip 1930) 88, quoted in Damaška (n 203) 64.

⁴⁹¹ Benjamin N Cardozo, *The Growth of the Law* (Yale UP 1924) 60.

Any legal remedy which rests in the sound discretion of the court must not be exercised under circumstances or in a manner so as to operate oppressively or inequitably, since it is established to promote the purposes of justice.⁴⁹² For when exercising discretion the court must be bold and principle-centred.⁴⁹³ In other words, discretion must be bound by limitations.

8. Discretion in EU law and the exercise of discretion in an application for an EAPO

a. Discretion in EU law

Let us now return to the relevance of the concept of discretion in the context of EU law and the EAPO. For what purposes do judges applying EU law use discretion? The treatment of discretion in the wider EU, and not just the judicial context, is particularly interesting. This is because the Treaties have a complex built-in system of discretion that governs the relationships between the Union

⁴⁹² Joseph Story, *Commentaries on Equity Jurisprudence* in James Philemon Holcombe (ed), *An Introduction to Equity Jurisprudence* (Derby, Bradley & Co 1846) 149.

⁴⁹³ Uzelac (n 439) 147.

and the Member States, or between the Member States in the Union, or between the different EU institutions.⁴⁹⁴

Additionally, the margin of appreciation is a doctrine with a wide scope in international human rights law, developed by the European Court of Human Rights ('ECtHR') and now used in the context of EU law. The doctrine allows the Court to reconcile practical differences in implementing the articles of the Convention by granting limited scope for contracting parties 'to derogate from the obligations laid down in the Convention'.⁴⁹⁵ The CJEU adopted the terminology and it is accustomed to granting margin of appreciation, ie discretion, to national authorities in a number of areas; this has been the case, for instance, regarding the interpretation of public policy exceptions and other national notions.⁴⁹⁶

⁴⁹⁴ Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 48.

⁴⁹⁵ *Greece v UK* App no 176/56 (Report of the European Commission of Human Rights, 26 September 1958) vol 1, paras 135, 143.

⁴⁹⁶ See Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case 131/79 *R v Secretary of State for Home Affairs, ex parte Mario Santillo* [1980] ECR 1585; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 4; Nina-Louisa Arold Lorenz, Xavier Groussot and Gunnar Thor Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Brill 2013) 69; Marton Varju, *European Union Human Rights Law: The Dynamics of Interpretation and Context* (Edward Elgar Publishing 2014) 252. See also suggestions in Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 32(2) *Eur L Rev* 230. The CJEU usually uses the term 'margin of discretion' instead of 'margin of appreciation'.

It is further argued that *judicial* discretion in EU law is also relatively wide. Interpretation is normally seen as the classical domain of judicial discretion in EU law.⁴⁹⁷ Wiklund explains that the interpretative strategy for EU law seems to be based on the idea that gaps in the rules do exist. Indeed, gaps are more likely to arise in EU law than in any other legal system since it is a new legal order in relative flux.⁴⁹⁸ Moreover, there are numerous norms that have yet to be defined. The power to interpret the Treaties and the acts of the organs of the EU belongs to the CJEU, which has jurisdiction to give preliminary rulings after a reference by a national court.⁴⁹⁹ The CJEU will resolve the case by deducing from existing rules, a rule or principle which conforms to the substantive and structural premises underlying the EU legal system.⁵⁰⁰ In interpreting hard cases, the CJEU has developed guidelines, and by setting out criteria against which it can itself be evaluated, it has somewhat fettered its own discretion.⁵⁰¹

⁴⁹⁷ Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 63.

⁴⁹⁸ Ola Wiklund, 'Preface by the Editor' in Wiklund (n 153) 9.

⁴⁹⁹ Based on article 267 of the Treaty on the Functioning of the European Union [2012] OJ C326/47. See eg Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (OUP 2014) 1.

⁵⁰⁰ Ola Wiklund, 'Taking the World View of the European Judge Seriously – Some Reflections on the Role of Ideology in Adjudication' in Wiklund (n 153) 41.

⁵⁰¹ Most notably Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415; Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 55. Nevertheless, as Canor noted, the hard truth is that the Court has not developed an intelligible and generally accepted theory of interpretation. Iris Canor, *The Limits of Judicial Discretion in the European Court of Justice* (Nomos Verlagsgesellschaft 1998) 12. Judge Kutscher said that 'to some degree the Court just progresses from case to case.' H Kutscher, 'Methods of

Judicial discretion in EU law can also be found elsewhere, apart from interpretation. There are situations where EU legal instruments explicitly call upon the national judge to exercise discretion in choosing between alternative legal consequences.⁵⁰² This is very common in the case of directives, which bind the Member States only as to the results to be achieved,⁵⁰³ but it is also true for regulations, which are binding in their entirety.⁵⁰⁴ As explained in the

Interpretation: As Seen by a Judge at the Court of Justice' (Court of Justice of the European Communities Judicial and Academic Conference, Luxembourg, 27–28 September 1976) 6.

⁵⁰² Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 58.

⁵⁰³ For instance article 4(4) of the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, stipulates that Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account certain conditions [2003] OJ L26/41. Moreover, article 5(1) of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3, provides that a court before which an action is brought, may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

⁵⁰⁴ For instance, article 19 of the Regulation on the service of documents (Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L324/79) provides that, notwithstanding insufficient service of the writ of summons, the judge may order, in case of urgency, any provisional or protective measures. Also, articles 33 and 34 of the Brussels I Regulation (recast) provide Member States' courts with discretion to stay proceedings, taking into account proceedings involving the same cause of action and the same parties pending before the courts of a third state. Another example is article 15 of the Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1), which provides that the courts of a Member State having jurisdiction as to the substance of the matter, may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case and where this is in the best interests of the child, stay the case and invite the parties to introduce a request before the court of that other Member State, or request a court of another Member State to assume jurisdiction. Finally, the European Small Claims Procedure Regulation (Regulation (EC) No 861/2007 of the

beginning of this chapter, however, in EU procedural legislation a margin of discretion is rarely available to the judge in granting or refusing relief.

b. Introducing equity-style discretion into the EU legal system

Based on the above analysis on legal certainty and flexibility, it is suggested that a national judge examining an EAPO application—and any future EU-wide provisional and protective measure—should have a certain amount of discretion in granting or refusing an order. Discretion should be granted to judges explicitly by the statute, and not indirectly in the form of open-ended phrases subject to wide interpretation. Narrowing the above general discussion on discretion⁵⁰⁵ to the available methods of exercising discretion in granting relief, it is suggested that there are two main types, as described earlier in this chapter: The first model, is open ended discretion centred around a list of values. Secondly, there can be a two-stage process, where at Stage 1 certain pre-conditions must be

European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1) states in article 5 that procedure shall be a written procedure, but the court may hold an oral hearing if it considers this to be necessary or if a party so requests. The court or tribunal may refuse a request for oral procedure if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings.

⁵⁰⁵ In order to understand how historical events, the development of the law, and the role of judges have played a role towards the differences that exist between the common law and the civil law as regards judicial discretion, the above discussion on discretion has included any instance where a judge can determine anything in a particular case. The broad discussion on discretion was also necessary in order to argue that judges need to take into account policy considerations in interpreting statutory provisions so that, inter alia, the statute is applied in a uniform way by different courts.

fulfilled, and, if the pre-conditions are fulfilled, there is a Stage 2 discretion to refuse relief, based on a list of factors.

As it has been argued above, the jurisdictional conditions of the first stage are useful to indicate the rationale of the remedy and make sure that relief is not granted in an arbitrary manner. This type of exercising discretion, which is also used for interim remedies in English law, seems to be more advantageous. In any event, as also indicated above, the current text of the EAPO regulation, and specifically article 7, already provides for *minimum* pre-conditions for issuing an order and it seems adequate in order to reach fair results in the *majority* of cases. Therefore, those should be kept. What is needed, is a relatively narrow margin of discretion to refuse relief where it will be unfair.

This will be achieved by allowing judges to be able to refuse relief, after the pre-conditions have been satisfied. However, as explained in the above discussion on the tension between certainty and flexibility, discretion is necessary, but it must be principled-centred. Thus, the statute should identify specific factors, upon which judicial discretion should be exercised. In other words, the provision must be flexible, but it should not bend much either. It is further suggested that the list of factors should be exhaustive. As Higgins argues, the circumstances surrounding a case may be infinite, but the factors

that are relevant in deciding whether or not to grant relief are not.⁵⁰⁶ Additionally, if the relevant factors are numerous, it will be preferable to indicate an explicit preference to some of them, ie the relative weight to be given to each of them. It is argued that this type of equity-style discretion is adequate to meet the unique circumstances of individual cases and also secure legal certainty where a provisional and protective measure, such as an EAPO, is sought.

Finally, policy considerations should also be taken into account by judges to secure that the provisions of a regulation providing for a provisional and protective measure, such as the EAPO, will not have a different meaning in different jurisdictions. This should take place in the process of interpretation of the statute during which judges should give attention to the societal, political, judicial, and economical objectives of the EU.⁵⁰⁷

Before articulating the specific factors upon which discretion to refuse relief is to be exercised in EAPO applications, and the relevant policy considerations, it is useful to examine the way courts of the Member States should consider policy considerations. At the outset, it is suggested that if a matter of interpretation occurs in an application for an EAPO in the courts of the

⁵⁰⁶ Andrew Higgins, 'CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don't make for good case management' (2014) 33 CJK 379, 392.

⁵⁰⁷ It must be stressed that the suggestions made in this work describing the way discretion should be exercised in the case of a judge hearing an application for an EAPO or a provisional and protective measure in general, are indicative; such a matter will always be debatable. The suggestions are made here just to show that such a venture would be feasible.

Member States which the latter cannot resolve, it should be referred to the CJEU for a preliminary ruling. It is further suggested that just as the CJEU resolves the issues in preliminary rulings based on relevant rules, principles, and policies of the EU, similarly, national courts should make use of the same values in interpreting statutory provisions. In other words, the methods and strategy of national courts should be very close to those of the CJEU. This ensures the uniform application of EU law throughout the Union. In attempting to set out the exact method whereby national courts will have regard to policy considerations in applications for provisional and protective measures, including EAPOs, the way the EU legal system works must be briefly analysed.

Firstly, as Pollicino argues, there is a distinct judicial attitude that courts within the EU should have. The two main reasons are the EU institutional framework and the Treaties' language and nature. With regard to the former, EU judges sometimes find themselves compelled to apply the law from the standpoint of the existential necessities of the EU. In particular, the well-known European democratic deficit—where the role of representative bodies in the legislative process is hard to define and where, more generally, the link between voters' wishes and political decisions is vague—confers a distinct character upon the adjudication process, different from a developed democratic system.⁵⁰⁸

⁵⁰⁸ Pollicino (n 443) 287.

In relation to the second reason, Pollicino continues, the nature of the Treaties encourages creative judicial attitude. On the one hand, because they are the products of a compromise between states which may share ultimate goals, but still represent different economic, social, political, and legislative backgrounds, and may hold strongly divergent views on specific policy areas. On the other hand, the Treaties are by nature programmatic, outlining policy in general terms without giving precise definitions. Therefore, EU courts are forced to exercise a highly creative role in weighing up such puzzling and vague rules, concepts, and values. Additionally, the multilingual nature of the EU must be taken into consideration, which implies that the expressions contained in EU law are snowed under by the difficulties involved in expressing their meaning in various linguistic versions.⁵⁰⁹ To sum up, a distinct approach in adjudication is unavoidable in a pluralistic, open, and dynamic system of law such as the EU legal order.⁵¹⁰

As Fennelly suggests, the Treaties and the laws made by the institutions conferred rights and imposed obligations on the Union's institutions, the Member States, and individuals. They constituted an independent corpus of law—the law of the EU—but they needed to be respected and effectively applied. The CJEU had neither the power nor the means of giving them effect.

⁵⁰⁹ Pollicino (n 443) 288.

⁵¹⁰ Miguel Poiares Maduro, 'Interpreting European Law—On Why and How Law and Policy Meet at the European Court of Justice' in Koch and others (n 450) 471.

An effective judiciary, with constitutionally guaranteed independence, was indispensable for the performance of that task. From an early date, in its judgment in *Van Gend en Loos*,⁵¹¹ the CJEU empowered the national judges to do so. The Court favoured private enforcement of EU law by means of actions by individuals before their national courts. This was called the ‘direct effect’ of EU law.⁵¹²

The national courts, in a dynamic co-operation with the CJEU, have contributed to the establishment of the *acquis communautaire* (Community acquis), and the promotion of respect for the rule of law and for fundamental human rights at Union level and in the Member States.⁵¹³ Since *Costa v ENEL*,⁵¹⁴ it was clear that the entire body of EU law, commencing with the Treaties and comprising all acts such as regulations, directives, and decisions, as well as general principles of EU law developed by the CJEU, became ‘an integral part of the legal systems of the Member States’ which their courts were

⁵¹¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁵¹² Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Allan Rosas, Egils Levits, and Yves Bot (eds), *The Court of Justice and the Construction of Europe* (Springer 2013) 62.

⁵¹³ Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Rosas, Levits, and Bot (n 511) 61.

⁵¹⁴ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593.

bound to apply. A logical corollary of this principle is that provisions of EU law, take precedence over any inconsistent provisions of national law.⁵¹⁵

Furthermore, in accordance with a principle which is frequently called ‘indirect effect’ of EU law, national courts are obliged, when applying national law, to bear in mind, where relevant, the objectives of the measure of Union law which the national law implements.⁵¹⁶ Similarly, in the *CILFIT* case,⁵¹⁷ the CJEU stated that every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof, and to its state of evolution at the date on which the provision in question is to be applied. Moreover, in the *ERT* case,⁵¹⁸ the CJEU stated that national measures within the field of EU law ‘must be interpreted in the light of the general principles of law and in particular of fundamental rights’.

Another important principle, as Fennelly explains, is that of ‘national procedural autonomy’, which is the means by which claims under EU law benefit from, but are also subject to, national rules. It is a matter for national law

⁵¹⁵ Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Rosas, Levits, and Bot (n 511) 66.

⁵¹⁶ This was established in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891. See also Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Rosas, Levits, and Bot (n 511) 68.

⁵¹⁷ Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 20.

⁵¹⁸ Case C-260/89 *Elliniki Radiophonia Tileòrassi AE (ERT) v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925.

to establish courts with jurisdiction to provide remedies under national law and to lay down procedural rules and time limits for the pursuit of claims arising from EU law. Closely associated with the principle of national procedural autonomy, is the possibility that a national judge may be required *ex officio* (of his own motion) to take cognisance of, and to rule upon, an issue of EU law. Moreover, the national judge is required to exercise the jurisdiction conferred upon him by national law to the greatest extent possible so as to enable the court to give effective protection to rights conferred by EU law.⁵¹⁹

Finally, as Dickson and Eleftheriadis point out, the principle of primacy and the obligation of national laws to provide effective remedies for the protection of EU rights, commit the national courts to follow the rulings of the CJEU. The interpretation of EU law is accepted by the national courts, not because it emerges effortlessly from the ultimate principles of the Treaties and written EU law, but because it is derived from them by the CJEU.⁵²⁰

Getting back to the question of how exactly national judges should take into account the relevant policy considerations in an application for a provisional and protective measure, it is suggested that the preferred method is the

⁵¹⁹ Nial Fennelly, 'The National Judge as Judge of the European Union' in Rosas, Levits, and Bot (n 511) 69–72.

⁵²⁰ Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP 2012) 310.

teleological or purposive method.⁵²¹ This kind of approach, as mentioned above, was first declared by the CJEU in the *CILFIT* case. As Conway explains, the teleological approach indicates a process of standing back from the ordinary meaning to identify the aim or purpose of a legal provision. Purposive and teleological are essentially synonyms, although the term ‘teleological’ is typically used in EU law, where judges often operate at a ‘systemic’ level rather than in a more localised way.⁵²²

It is argued that in seeking to reach a decision in applications for EU-wide provisional and protective measures, such as an EAPO, judges should ask what the Union’s purpose is. This is a difficult question to answer, Pollicino explains, because, on the one hand, the Member States and the institutions of the EU

⁵²¹ Pollicino (n 443) 289. According to Savigny, the four main interpretation methods are the following: grammatical (using the literal meaning of the statutory text), historical (using the legislative history to reveal the intent of the legislator), systematic (considering the context in which a provision is found), and teleological (considering the purpose of the statute from different observations). Friedrich Karl von Savigny, *Juristische Methodenlehre* (Gerhard Wesenberg ed, Stuttgart 1951) 18. For the teleological practices of the CJEU, see J Bengoetxea, *The legal reasoning of the European Court of Justice: towards a European jurisprudence* (OUP 1993) 181–270; Anna Bredimas, *Methods of interpretation and community law* (Elsevier Science 1978) 70–105 (calling it the ‘functional method’); Giulio Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10(5) *German L J* 537, 555 (calling it the ‘dynamic criteria of interpretation’). As Barak notes, the teleological approach has been recognised by both Anglo-American and continental legal scholars as an important criterion for legal interpretation. See Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi tr, Princeton UP 2007) 86.

⁵²² Conway (n 161) 19. Lord Bingham said: ‘The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used, but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires’. *Comrs of Customs and Excise v Samex ApS* [1983] 1 All ER 1042 211 (Comm).

often leave their final intention open and obscure; on the other, these objectives obviously cannot be the result of the opinions of EU judges. In any event, the teleological method of interpretation is perfectly consistent with the dynamic and evolving nature of the EU, which over the years has changed its objectives and its plans from a purely economic approach to a broader system of values, which affects social and environmental issues, and the protection of human rights. Consequently, EU courts have to adapt the original meaning of EU legislation in accordance with the new values and aims that have become part of the European dimension.⁵²³

Maduro argues that the teleological reasoning in EU law does not refer exclusively to a purpose-driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that takes into account all its rules. It is not simply the *telos*⁵²⁴ of the rules to be applied that matters but also the *telos* of the legal context in which those rules exist.⁵²⁵

Teleological reasoning, Maduro continues, reinforces the courts' accountability by increasing transparency as to its normative choices. In the context of ambiguous or conflicting provisions, *telos* signifies a higher constraint

⁵²³ Pollicino (n 443) 289.

⁵²⁴ A *telos* (from the Greek 'τέλος' for 'end', 'purpose', or 'goal') means an end or purpose, in a fairly constrained sense used by philosophers such as Aristotle.

⁵²⁵ Miguel Poiares Maduro, 'Interpreting European Law—On Why and How Law and Policy Meet at the European Court of Justice' in Koch and others (n 450) 462.

than pure reference to wording. It binds courts to a consistent normative reading of those provisions. Teleological reasoning can be seen as more faithful to the democratic outcomes, since it prevents textual manipulation of the legal rules. While teleological reasoning favours a debate among alternative normative preferences in the application of a rule, a simple appeal to text would hide those alternatives and preclude a debate among them.⁵²⁶

Teleological reasoning is also a way to achieve coherence within the legal system. Coherence, Bengoetxea argues, is not just a matter of avoiding contradictions in the legal system; it further means making sense of law as embodying a set of principles and values. It implies making connections between the different parts of the law, placing them under a common purpose, and making them hang together.⁵²⁷

In the context of the EU, the appeal to central policy objectives fulfils two other important purposes: The first, says Maduro, is that of allowing agreement on a delicate and controversial question by deferring its practical effects to a legal solution to be derived from a unanimously agreed principle. The second is that of providing an instrument for the continuous adaptation of the EU legal

⁵²⁶ Miguel Poiares Maduro, 'Interpreting European Law—On Why and How Law and Policy Meet at the European Court of Justice' in Koch and others (n 450) 467.

⁵²⁷ Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 69. As MacCormick argued, consistency and coherence as between related legal rules in similar areas of law is an important legal value, being one aspect of justice, of treating like cases alike and refraining from arbitrary differentiation of cases. MacCormick (n 488) 179.

order to its fast moving context of application. The teleological approach maintains the legal text updated. In particular, it offers a rational and legitimate basis to solve legal conflicts in the increasing number of cases where the political, economic, and social reality of the Union is not matched by the available legal rules.⁵²⁸

A union can only work properly when certain rules are not only uniform, but when they are also uniformly applied.⁵²⁹ Reasoning through *telos*, says Maduro, is an increased necessity in the context of a pluralistic legal order. Such pluralism, tends to increase the textual ambiguity of legal provisions and to enhance the potential for conflicting legal norms. In the EU legal order, this is, first and foremost, a consequence of its plurality of languages and different legal traditions. In a context of this type, it is argued that teleological reasoning is the more appropriate form of guarantying a uniform application of EU law at national and Union level.⁵³⁰

As Maduro further notes, although teleological adjudication is important because of the particular nature of the EU legal order, it does not give free reign to the courts. Instead, teleological reasoning has a very clear set of constraints.

⁵²⁸ Miguel Poiares Maduro, 'Interpreting European Law—On Why and How Law and Policy Meet at the European Court of Justice' in Koch and others (n 450) 468.

⁵²⁹ Thijmen Koopmans, 'Methods of Interpretation' in Wiklund (n 153) 81.

⁵³⁰ Miguel Poiares Maduro, 'Interpreting European Law—On Why and How Law and Policy Meet at the European Court of Justice' in Koch and others (n 450) 465.

The courts' teleological approach must always be combined with other legal arguments, ie text (the normal departing point) and context. These are the three methods indicated early on in the *Van Gend en Loos* judgment by the reference to 'the spirit, the general scheme, and the wording' of the legal provisions.⁵³¹

As mentioned earlier, judicial discretion is always limited by the mere existence of legal norms. The norms create a reality that affects the options open to the judge and the options that are closed to him.⁵³² When a judicial decision entails the choice between two or more conceivable lawful alternatives, says Bengoetxea, it has to be justified in the law. Justification consists in providing reasons for a decision or an action. A valid justification of the courts' use of discretion will be one which invokes valid legal rules and principles as the ultimate reason for the adjudication.⁵³³ The choice has to be based on a valid legal norm.⁵³⁴ Accordingly, the first point of inquiry for a judge in examining an application for an EU-wide provisional or protective measure such as an EAPO, should be the statute.

⁵³¹ Miguel Poiaras Maduro, 'Interpreting European Law—On Why and How Law and Policy Meet at the European Court of Justice' in Koch and others (n 450) 461, 470.

⁵³² Aharon Barak, 'The Nature of Judicial Discretion and its Significance for the Administration of Justice' in Wiklund (n 153) 21.

⁵³³ Joxerramon Bengoetxea, 'The Scope of Discretion, Coherence and Citizenship' in Wiklund (n 153) 67.

⁵³⁴ Ola Wiklund, 'Taking the World View of the European Judge Seriously – Some Reflections on the Role of Ideology in Adjudication' in Wiklund (n 153) 35.

As Wiklund argues, although a judge should first act conformably with the principle of formal justice ('treat like cases alike') and base his decision on some rule which settles that type of case, his work does not end there. He then ought to evaluate that ruling and any possible rival rulings in the light of the consequences which would follow from adopting it as a ruling. That evaluation should be made by reference to legally appropriate policy considerations. Thirdly, that ruling must be shown to be coherent with the rest of the EU legal system or the relevant branch of it.⁵³⁵ Put in the context of provisional and protective measures, a judge confronted with an EAPO application, must first consider the rules and principles found in the statute and then interpret them in the light of the broader policy considerations of the relevant regulation and EU law in general.

c. Rules and principles upon which discretion is to be exercised

Based on the above analysis, had the EAPO regulation allowed discretion in granting or refusing an order, it should make immediately available to the judge the relevant rules and principles that, on the one hand would guide him, and on the other hand would control his exercise of discretion. While there should be

⁵³⁵ Ola Wiklund, 'Taking the World View of the European Judge Seriously – Some Reflections on the Role of Ideology in Adjudication' in Wiklund (n 153) 43.

sufficient generality to allow the necessary flexibility in the exercise of discretion, the statute must provide a satisfactory level of certainty.⁵³⁶

First of all, as explained above, article 7 of the Regulation, read together with recital 14, indicates that there are basically two conditions in granting an EAPO. These should be retained in the statute as pre-conditions. However, it is argued that the first condition, ie the possibility of *intended* nefarious or unusual dissipation of assets on behalf of the respondent that puts the enforcement of a judgment at risk, may be too narrow, considering that in the case of common law freezing orders, proof of a nefarious intention is not essential, while the basic condition for granting civilian asset preservation orders is even broader, ie there must be a risk of frustration of a future judgment. Furthermore, the requirement that the applicant must satisfy the court that he is likely to succeed on the substance of his claim should be kept. The above two conditions, ie that there is a real risk that the enforcement of a judgment may be impeded because of asset dissipation by the respondent, and that the applicant is likely to succeed on the substance of his claim, should be the *minimum* threshold for the applicant. From that point on, it should be in the discretion of the judge whether to grant or refuse an order.

⁵³⁶ Alan Dashwood and Angus Johnston, 'Synthesis of the Debate' in Alan Dashwood and Angus Johnston (eds, *The Future of the Judicial System of the European Union* (Hart 2001) 65.

The specific factors upon which discretion is to be exercised must also be set out in the statute exhaustively. The central principle that should arguably direct the judge in an EAPO application is the balance between the rights of the applicant and the rights of the respondent. If the judge decides to grant an EAPO, he must make sure that freezing the respondent's bank account will cause him less harm than the harm that would have been caused to the applicant had the order not been granted. In assessing the likely harm to the parties, it is argued that the trial judge must add to the equation the strength of the parties' cases. Striking a balance between the rights of the parties is in accordance with the principle of proportionality provided by article 5 of the Treaty on European Union, in the sense that an order should not go beyond what is necessary in order to achieve its objective.

The European Commission, in its Impact Assessment for the EAPO regulation, stated that, given the severe potential consequences of preserving a debtor's assets, a balance clearly needed to be struck between the applicant's rights and those of the respondent enshrined in the provisions of the European Convention on Human Rights ('ECHR') and the EU Charter of Fundamental Rights of the European Union.⁵³⁷ The balance between the interest of the applicant in obtaining an order and the interest of the respondent in preventing

⁵³⁷ Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-border Debt recovery in Civil and Commercial Matters' SEC (2011) 937 final, 71.

abuse of the order, was finally inserted in recital 14 of the Regulation, but only to be used as a standard for setting out the conditions for obtaining an EAPO and not as a guiding principle for the judge in granting or refusing an order.

Apart from the balancing of rights, which must be given more weight than other factors, it is suggested that other guiding principles should include the impact of the order on third parties and the behaviour of the parties in the litigation up to that point. Moreover, the judge should take into account relatively less important factors, such as whether the applicant has delayed unreasonably to apply for an order, and whether the value of the funds to be preserved is very small compared to the size of the claim. The judge should be able to refuse an EAPO even when the basic pre-conditions are fulfilled, if the above factors indicate that an order should not be granted.

d. Relevant policy

Normally, the statute will be sufficient to guide the judge in exercising his discretion in an EAPO application. It is argued, however, that regardless of whether the rules and principles provided by the text are adequate or not to assist the judge in reaching a decision, the judge, in interpreting the relevant rules and discretionary factors, should consider the bigger picture which consists of the relevant policy objectives. This task need not be expressed in

the statute and should eventually become a normal intellectual process of judges applying EU legislation, if this is not happening already.

The policy considerations involved in the area of provisional and protective relief, and specifically asset preservation orders, are by nature transectorial and have legal, social, and economic aspects; in other words they cannot be restricted to a single field of inquiry.⁵³⁸ At the same time, as also indicated above, the EU legal order represents not only the advancement of market integration, but also of the rule of law, and of fundamental human rights.⁵³⁹

Along these lines, firstly, judges should take into account the objectives surrounding the EAPO regulation as those are advanced by the EU. The overall objective of the EAPO initiative as set out in the Commission's Impact Assessment is to contribute to the development of the EU's Internal Market and to the creation of a genuine European area of civil justice in the area of enforcement. The general objectives of the initiative are related to the administration of justice, namely to improve the efficiency of enforcement of judgments in cross-border civil and commercial matters, and, therefore, facilitate the recovery of cross-border claims for citizens and businesses. Additionally, the general objectives are also of economic nature, and specifically

⁵³⁸ Pollicino (n 443) 283.

⁵³⁹ Nial Fennelly, 'The National Judge as Judge of the European Union' in Rosas, Levits, and Bot (n 511) 78.

to increase confidence of traders and improve the payment behaviour and creditworthiness of debtors in cross-border situations, reduce the risks involved in cross-border trade, and, thus, encourage more cross-border business activity.⁵⁴⁰ The underlying message of these objectives is that judges should examine equally the judicial, societal, and financial consequences of their judgments on EAPO applications.

Furthermore, the specific objectives of the EAPO regulation as indicated by the EU are to increase effectiveness of the procedure for cross-border preservation orders by enabling litigants to obtain preservation orders on the basis of the same conditions irrespective of the country where the competent court is located and to reduce costs and delays for creditors seeking to obtain and enforce a preservation order in cross-border situations.⁵⁴¹ In other words, the effectiveness and expeditiousness of the recovery of a cross-border claim should be among the judges' considerations in reaching a decision on an application for an EAPO.

⁵⁴⁰ Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-border Debt recovery in Civil and Commercial Matters' SEC (2011) 937 final, 29.

⁵⁴¹ Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-border Debt recovery in Civil and Commercial Matters' SEC (2011) 937 final, 30.

The aforementioned policy objectives surrounding the EAPO are affirmed by statements made by EU officials. For instance, when the Commission's proposal for the EAPO regulation was revealed in 2011, the then EU Justice Commissioner Viviane Reding stated:

I want to make recovering cross-border debts as easy as recovering debts domestically. Companies lose around 2.6% of their turnover a year to bad debts. This is a weakness of our single market which we must remedy swiftly and energetically! Businesses need a simple solution—an account preservation order effective Europe-wide—so that the money stays where it is until a court has taken a decision on the repayment of the funds. In these difficult economic times, companies need quick answers. Every euro counts, especially for small businesses.⁵⁴²

Another aspect that has to be taken into account by judges in EAPO applications is the policy considerations of the individual Member States. Specifically, it is suggested that the judge considering an application must respect any domestic public policy of the Member State, the citizens or the banks of which will be affected by an EAPO. Striking an appropriate balance between the requirements of EU integration and due consideration of the Member States' legitimate interests, is a challenge well-known in EU law. For a long time now, explains Fennelly, the case law of the CJEU indicates a clear change in the understanding of its function in the relation between the Union and its Member States. While the Court's role can still be described as 'guardian of the constitution,' it no longer serves solely as an 'engine of

⁵⁴² Commission, 'European Commission to help businesses recover an extra €600 million in cross-border debts' (Press release, 25 July 2011).

European integration’ but rather as an arbitrator between the respective interests of the Member States and the Union.⁵⁴³ It is argued that this shift in the CJEU’s approach must be adopted by national judges in examining EAPO applications. The following words of Joseph Weiler reinforce this argument:

It is precisely on these occasions that I rejoice most that I am not a judge on the Court. What would I do if I felt, as Mancini did, that the European Community suffered from this deep democratic deficit which he described so unflinchingly and which according to him could only be cured by a European State? Would I want to give effect to a principle which rendered the Community’s undemocratic laws—adopted by ‘numberless, faceless and unaccountable committees of senior national experts’ and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? If democracy is what I cared about most, would I unambiguously consider much of the Community edifice a major advance? (...) I imagine I would say and do what some Constitutional Courts already said, albeit in more elegant ways: that until the European Union becomes a State which according to Mancini, barring a miracle, is its only way of become democratic, the ultimate repository of legitimate authority which flows from democracy must, after all, be the Member State; that supremacy cannot but be a contingent and limited concept subject to Member State control; that if too much power has been transferred to the Union in that national controls, as Mancini argued, have become ineffective, then it would be my duty to declare unconstitutional any new transfer of power and maybe even to claw back some powers already transferred.⁵⁴⁴

However, this does not mean that a court considering an EAPO application should be required to have regard to policy considerations apart

⁵⁴³ Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Rosas, Levits, and Bot (n 511) 258. The legal culture of each Member State has always had a marked effect upon the approach judges take in various matters. See Thomas de la Mare and Catherine Donnelly, ‘Preliminary Rulings and EU Legal Integration: Evolution and Stasis’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 382.

⁵⁴⁴ Joseph H H Weiler, ‘Rewriting Van Gend & Loos: Towards a Normative Theory of ECJ Hermeneutics’ in Wiklund (n 153) 162.

from those of the Member State in which it is sitting (described in the Regulation as the Member State of origin), ie it should not be required to have regard to policy considerations of the Member State of enforcement. Such a proposal would be unrealistic given that, historically, statutory requirements to take into account policy considerations are traditionally restricted to those—policy considerations—pertaining to the judge’s own jurisdiction.⁵⁴⁵ An examination whether an EAPO is contrary to the public policy of the Member State of enforcement is possible under the second paragraph of article 34 of the EAPO regulation, which provides that the respondent may file an application to the competent court in the Member State of enforcement for the termination of the enforcement of an EAPO if such enforcement is manifestly contrary to the public policy of that Member State. Thus, in this way, a court in the Member State of enforcement will evaluate whether the order granted is in any way contrary to its own public policy.

Finally, it is argued that the EU Charter of Fundamental Rights as well as the ECHR may give right answers in hard cases. On the one hand, as Muir explains, the ECHR has considerable symbolic authority in the EU. On the

⁵⁴⁵ For example the case law interpreting the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards both in common law and civil law jurisdictions makes clear that foreign policy is not likely to hinder the enforceability of international arbitral awards. See Thomas E Carbonneau, *Carbonneau on Arbitration: Collected Essays* (Juris Publishing 2010) 125; Ihab Amro, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries* (Cambridge Scholars Publishing 2013) 157.

other, the Charter results from a constitutional process giving it strong legitimacy.⁵⁴⁶

It is argued that after considering the rules and principles provided by the Regulation, the policy considerations surrounding the EAPO, and those of the Member States and the EU in general, as well as the fundamental rights, the judge examining an EAPO application will probably be well-equipped to exercise his discretion and reach an informed decision. Undoubtedly, legal certainty is very important in this area of the law. Therefore, there might be a concern that judicial discretion would introduce too much uncertainty and delay in an area where the regulator's policy objective is to promote greater harmonisation across the EU, and, thus, greater certainty and speed, in order to support a litigant's efforts to successfully enforce his rights, ie recovering debts. On the other hand, as explained, flexibility is even more important in order to adequately safeguard the parties' rights.

Certainty, predictability, and effectiveness will be achieved with the statutory pre-conditions, the exhaustiveness of the list of factors upon which discretion must be exercised, and by attributing greater weight to the balancing of rights between the litigants between the factors to be considered. Flexibility

⁵⁴⁶ Elise Muir, 'The Court of Justice: a Fundamental Rights Institution Among Others' in Bruno de Witte, Elise Muir, and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 82.

will be achieved by attaching discretionary character to the remedy as well as require regard to policy considerations in interpreting the rules and the factors upon which discretion is to be exercised. As Lord Reid put it, it is a matter of balancing certainty and flexibility:

People want two inconsistent things; that the law shall be certain, and that it shall be just and shall move with the times. It is our business to keep both objectives in view. Rigid adherence to [the rules] will not do. (...) On the other hand too much flexibility leads to intolerable uncertainty. It is a question of balance.⁵⁴⁷

⁵⁴⁷ Lord Reid, 'The Judge as Law Maker' (1972) 12 J of the Society of Public Teachers of Law 22, 26. This suggestion could be parallelised with the term 'flexicurity' in the field of labour economics (a portmanteau of flexibility and security), which refers to the combination of labour market flexibility in a dynamic economy and security for workers.

III. Sanctions against non-compliance in asset preservation orders

1. Introduction

Many years ago, Lord Coke stated that '*[q]uando lex aliquid alicui concedit, concedere videtur id, sine quo res ipsa esse non potest*',⁵⁴⁸ 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, explain Jackson and Spencer, 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.⁵⁴⁹ 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

⁵⁴⁸ *Franklin's Case* (1594) 5 Coke 46 (b), 47(a); 77 ER 125, 126.

⁵⁴⁹ R M Jackson, *Jackson's Machinery of Justice* (J R Spencer ed, 8th edn, CUP 1989) 86.

order of the court. Indeed, coercion is central to the very idea of the rule of law.⁵⁵⁰

Most judgments that create legal obligations are money judgments, under which a person is ordered to pay a sum of money. All legal systems provide for enforcement mechanisms to force people to render their available assets for the satisfaction of such judgments. Things get more complicated, however, in the case of non-money judgments, ie 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 guide human conduct, 'jurisdictional power would be an empty illusion'.⁵⁵¹

⁵⁵⁰ 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). Jeremy Bentham and John Austin claimed that sanctions are essential to the idea of legal obligation. In *The Concept of Law*, Hart examined the coercion-based theories of Bentham and Austin. He argued that the law is a constitutive force rather than an exclusively coercive one. Hart claimed, in addition, that the law creates an obligation to follow its requirements, which is independent of any sanction that would apply if the law is violated. In Hart's language, people have an internal point of view vis-à-vis legal obligations; that is, they accept the rules as guides to conduct, and they believe that they ought to follow the rules irrespective of whether or not there is a sanction. For these reasons, the Hartian tradition asserts that coercion is not essential to the concept of law. See Jeremy Bentham, *Of Laws in General* (HLA Hart ed, The Athlone Press 1970) 2941; John Austin, *The Province of Jurisprudence Determined* (J Murray 1832) 6; Hart (n 160) 82ff.

⁵⁵¹ John Dobbyn, *Injunctions in a Nutshell* (West Publication Co 1974) 216. See also Bell, Boyron, and Whittaker (n 231) 116. As Hans Kelsen indicated, coercion is achieved through sanctions which are provided by the law to bring about certain desirable human behaviour. Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd 2007) 50. See also Gernot Biehler, *Procedures in International Law* (Springer 2008) 5.

A court of justice, said Oswald, without power to vindicate its own dignity, to ensure 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 lose their hold on public respect, and the maintenance of law and order would be rendered impossible.⁵⁵²

The subject matter of this chapter, is the sanctions against non-compliance, regardless of whether money or non-money judgments and orders are involved. More specifically, the chapter is concerned with the legal consequences that follow the violation of an EAPO either by the respondent, or by any other third party who holds funds on behalf of the respondent, such as a bank. The aim here is to consider the appropriate regime of sanctions for protecting the enforcement of EAPOs—and possibly other EU-wide provisional and protective measures that may follow—from unacceptable interference.

The chapter begins by setting out the relevant provisions of the EAPO regulation. It then analyses the contempt of court doctrine found in the common law tradition. This is followed by an examination of analogous procedures which exist in the civil law systems. For its enforcement in civil law systems, the EAPO relies on the *in rem* effect of the measure, as distinguished from the *in*

⁵⁵² James Francis Oswald, *Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process* (George Stuart Robertson ed, 3rd edn, Butterworth & Company 1910) 9.

personam effect backed by contempt of court sanctions of the common law. Thus, the chapter goes on to scrutinise the relative advantages and disadvantages of the different methods of enforcement and concludes that a contempt of court-type process should be introduced in the EAPO, exercised within certain boundaries.

2. Failure to comply with an EAPO

With a view to respecting national procedures for enforcing and implementing equivalent orders in the Member States, the EAPO regulation does not impose any specific consequences 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 explains the rationale behind this provision. It states that enforcement structures for preserving bank accounts vary considerably in the Member States. According to the recital, duplication of those structures should be avoided and national procedures should be respected to the extent possible. Therefore, it indicates that the Regulation should make use of the methods in place for the enforcement and implementation of equivalent national orders in the Member State in which an order is to be enforced.

Amounts exempt from preservation are also left to be regulated by the Member State of enforcement. Specifically, article 31 and recital 36 of the Regulation, stipulate that amounts that are exempt from seizure under the law of the Member State of enforcement, such as amounts necessary to ensure the livelihood of the debtor and his family, shall be exempt from preservation under the Regulation. In other words, the ability to use frozen funds for reasonable expenses is not a free-standing right under the Regulation as is the case in English law, but depends on whether the law of the Member State of enforcement allows it.

Moreover, another issue which is relevant to the enforcement of an EAPO, is that, depending on the national law of each Member State, an EAPO may create security interests over the preserved bank account. Article 32 of the Regulation provides that the order will have the same rank, if any, as an equivalent national order in the Member State of enforcement. Recital 28 further explains that if, under national law, certain enforcement measures have priority over preservation measures, the same priority should be given to them in relation to EAPOs. The recital also suggests that, for the purposes of the Regulation, in those legal systems where in personam orders exist, such as freezing injunctions, an EAPO should be considered to be a national order equivalent to those orders. In summary, in those Member States where in rem preservation orders exist, an EAPO will have an equivalent effect as those orders have, ie create a security interest, as explained below, whereas in Member States with in personam orders, the EAPO will not create any security

interests in the preserved asset; its enforcement in the latter will be effected by means of contempt of court sanctions. In other words, the EAPO will not be enforced in the same way in the different Member States.

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 order exists in EU law. The method that stands out from all others, is the contempt of court mechanism, 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.

3. Contempt of court in the common law tradition

a. Definition and rationale

Apart from judicial discretion, a second major distinguishing contribution of equity to the common law tradition is the contempt power. In the common law world, there is an inherent power vested in the courts of justice to make sure

that the administration of justice is not hampered by extraneous action.⁵⁵³ 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 characterised as the power of courts to punish those in contempt.⁵⁵⁴ Moskowitz has described contempt as 'the Proteus of the legal world assuming an almost infinite diversity of forms',⁵⁵⁵ 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.⁵⁵⁶

Contempt of court is of ancient origin, yet of fundamental contemporary importance.⁵⁵⁷ It has always served as a continuing protector of the fundamental supremacy of the law.⁵⁵⁸ Oswald tried to define 'contempt of court'. He said that it primarily signifies disrespect to that which is entitled to legal regard.⁵⁵⁹ However, contempt of court is so diverse in its aspects that it is difficult to lay down any exact definition. It is described as being a disobedience

⁵⁵³ Rajeev Dhavan, 'Contempt of Court and the Phillimore Report' (1976) 5 Anglo-Am LR 186, 187.

⁵⁵⁴ Felix Frankfurter, 'Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts — a Study in Separation of Powers' 37 [1923-24] Harvard L Rev 1010, 1023.

⁵⁵⁵ Joseph Moskowitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43(6) Col L Rev 780, 780.

⁵⁵⁶ *A-G v Newspaper Publishing plc* [1988] Ch 333, 361; [1987] 3 All ER 276 (CA) 294 (Sir John Donaldson MR).

⁵⁵⁷ C J Miller, *Contempt of Court* (3rd edn, OUP 2000) 2.

⁵⁵⁸ K Balasankaran Nair, *Law of Contempt of Court in India* (Atlantic 2004) 8.

⁵⁵⁹ Oswald (n 552) 1.

to the court, an opposing or a despising the authority, justice, or dignity thereof.⁵⁶⁰ To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with, or prejudice parties, litigants, or their witnesses during the litigation.⁵⁶¹

Although there is no unanimity of opinion as to the exact purpose of the law of contempt, its underlying rationale has led both judges and commentators to regret the continued use of what may well be an archaic and frequently misunderstood term.⁵⁶² As Lord Salmon said, the description ‘contempt of court’ no doubt has a historical basis, but it is nonetheless most misleading. Its object, he said, is not just to protect the dignity of the courts but, generally, to protect the administration of justice and the fundamental supremacy of the law.⁵⁶³ Put

⁵⁶⁰ Charles Viner, *A General Abridgement of Law and Equity* (GGJ and J Robinson 1792) 442. Lord Selborne, in introducing the Contempts of Court Bill in 1883, provided a classification of the two separate and distinct types of contempt, which are analysed below. On the one hand, he said, there are contempts of the court itself, committed by strangers or by parties to proceedings, not consisting in disobedience to its orders. Contempts by parties may be contempts in the face of the court and outside the court. On the other hand, contempt of court also includes disobedience to the orders of the court committed by parties. HL Deb 8 March 1883, vol 276, col 1707); John C Fox, ‘The Nature of Contempt of Court’ (1921) 37 LQR 191, 192

⁵⁶¹ Oswald (n 552) 3. Whether the contempt consists in disobedience to an order, interrupting the proceedings, or libeling a judge, the essential vice of the offence is that it obstructs the due course of justice, and it is necessary that the court should have power to remove the obstruction by punishing the offender. Fox (n 560) 201.

⁵⁶² Miller (n 557) 2.

⁵⁶³ *A-G v British Broadcasting Corporation* [1981] AC 303 (HL) 344 (Lord Salmon). See also *Helmores v Smith* (2) (1886) Ch D 449 (CA) 455 (Bowen LJ); Lord President Clyde in *Johnson v Grant* (1923) SC 789, 790; Justice Frankfurter in *Offutt v US* (1954) 348 US 11.

differently, the power to punish for contempt has been vested in the judges, not for their personal protection, but for that of the public, whose interest is that decency and decorum should be preserved in courts of justice and that the orders of the courts should be duly executed.⁵⁶⁴

The rationale for the law on contempt was set out more specifically in the report of the Phillimore Committee, led by 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.⁵⁶⁵

In other words, the law of contempt is designed to ensure that all citizens have access to effective 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 to decide the case fairly or by hindering the enforcement of the courts' judgments.⁵⁶⁶ Lord Diplock began his speech in the so-called *thalidomide* case as follows:

⁵⁶⁴ Oswald (n 552) 10. See also *R v Davison* (1821) 4 B & Aid 329, 333; 106 ER 958, 959 (Abbott CJ).

⁵⁶⁵ Lord High Chancellor and the Lord Advocate, *Report of the Committee on Contempt of Court* (Cmd 5794, 1974) para 1.

⁵⁶⁶ Law Commission, *Contempt of Court (1): Juror Misconduct and Internet Publications* (Law Com No 340, 2013) para 1.3. See also *A-G v Times Newspapers Ltd* [1974] AC 273 (HL) 307;

My Lords, in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decisions of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. 'Contempt of court' is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes.⁵⁶⁷

Throughout different times in history, however, as Goldfarb explains, contempt of court has been used in ways that have provoked the public's interest. Depending upon the time and situation, its status as a manifestation of governmental power over individuals, although it has sometimes triggered praise and demands for its exercise, it also generated condemnation and criticism.⁵⁶⁸

Both in Shakespeare's 'Henry IV', Part 2,⁵⁶⁹ and Campbell's 'The Lives of the Chief Justices of England',⁵⁷⁰ one can read about Prince Hal, later to become Henry V of England, and his notorious brush with the law of contempt.

David Eady and A T H Smith, *Arlidge, Eady and Smith on Contempt* (4th edn, Sweet & Maxwell 2011) paras 2-8 and 2-9.

⁵⁶⁷ *A-G v Times Newspapers Ltd* [1974] AC 273 (HL) 307.

⁵⁶⁸ Ronald Goldfarb, 'The History of the Contempt Power' [1961] 1 Washington U L Rev 1, 4 (1961). See also Ronald Goldfarb, *The Contempt Power* (Columbia UP 1963).

⁵⁶⁹ William Shakespeare, *Henry IV*, pt 2, act 5, scene 2.

⁵⁷⁰ John Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* (John Murray 1894) 125–42.

When Hal was the Prince of Wales, Goldfarb describes, one of his servants was arrested for committing a felony. Chief Justice Gascoigne, delicately, but firmly, ruled that the laws of the realm must be met, and that if the Prince wished his servant to be pardoned, he should secure this from the King, his father. The Prince tried physically to take the servant away, whereupon Gascoigne ordered him again to behave. When the Prince raged, the judge reminded his prince that he kept the peace of the King, to whom even Hal owed allegiance, and suggested that Hal set a good example. When Hal did not heed this advice, he was sentenced for contempt, and committed to the King's Bench prison until the King's pleasure could be known.⁵⁷¹ Chief Justice Gascoigne said characteristically:

Sir, remember yourself: I keep here the place of the King, your sovereign lord and father, to whom ye owe double obedience, wherefore, in his name, I charge you desist of your wilfulness, and unlawful enterprise, and from henceforth give good example to those which hereafter shall be your proper subjects. And now for your contempt and disobedience, go you to the prison of the King's Bench, whereunto I commit you; and remain ye there prisoner until the pleasure of the King, your father, be further known.⁵⁷²

People speculated whether this would be the end of Gascoigne's career. It proved, however, that the King was pleased, and rejoiced that he had both a

⁵⁷¹ Goldfarb (n 568) 4.

⁵⁷² Thomas Elyot, *The book named the governor* (Dent 1962) 114–115. According to Elyot, the King said: 'O merciful God, how much am I bound to your infinite goodness, especially for that ye have given me a Judge, who feareth not to administer justice, and also a son, who can both suffer and obey justice.' Elyot (n 572) 124.

judge who dared to administer justice to his son, as well as a son who obeyed him.⁵⁷³

b. The two types of contempt and the purpose of the distinction

As Zuckerman explains, a distinction is drawn between two kinds of contempt: contempt by interference and contempt by disobedience; these are labelled as criminal and civil contempt, respectively. 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. Contempt by disobedience, or civil contempt, consists in a failure to obey an order of the court.⁵⁷⁴ As analysed below, the major difference between the two types of contempt, relates to purpose, but they also differ as to procedure.⁵⁷⁵

Neville suggests that, to a comparative lawyer, it may seem that the creators of the common law showed a remarkable economy of concepts, making the one concept of contempt cover so broad a field. Perhaps because of their historical emphasis on procedure and forms of action, the common lawyers

⁵⁷³ Goldfarb (n 568) 4.

⁵⁷⁴ A A S Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) para 23.128.

⁵⁷⁵ Walter F Murphy, C Herman Pritchett, and Lee Epstein, *Courts, Judges and Politics: An Introduction to the Judicial Process* (5th edn, McGraw-Hill 2002) 306.

discerned the underlying unity beneath criminal and civil contempts: that both serve to uphold the due administration of justice. The former ensures that the courts may dispatch their business in good order and without any interference; the latter ensures that the authority of the courts is not undermined by disobedience to their solemn commands.⁵⁷⁶ However, there also lies at the heart of *both* civil and criminal contempt, the need for society to protect its citizens' rights and to maintain the rule of law.⁵⁷⁷

More specifically, as Borrie and Lowe explain, 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. Civil contempt comprises the disobeying of court orders and the breaking of undertakings given to the court, since it is essential that the law provides sanctions for the enforcement of the process and orders of a court.⁵⁷⁸

While on the face of it, continue Borrie and Lowe, these distinctions between the two types of contempt are clear, in practice, as it is also explained below, it can be difficult to determine whether a particular act amounts to a

⁵⁷⁶ L Neville Brown, 'Some contemporary problems in the English law relating to contempt of court' (1974) 15(4) *Les Cahiers de Droit* 741, 752.

⁵⁷⁷ Eady and Smith (n 566) paras 3-6.

⁵⁷⁸ Ian Cram, Gordon Borrie, and Nigel Lowe, *Borrie and Lowe: The Law of Contempt* (4th edn, LexisNexis, 2009) para 1.2.

criminal or civil contempt. One of the reasons for this difficulty is that the law of contempt as a whole, is concerned with upholding the due administration of justice, and it is obvious that both disregard of a court order and the interference with the court impairs the effective administration of justice.⁵⁷⁹

Indeed, few legal concepts have bedevilled judges, lawyers, and academics more than the distinction between civil and criminal contempt.⁵⁸⁰ However, a logical question is why the distinction is actually important. Moreover, it also appears that the distinction between civil and criminal contempt, not only lacks utility, but also lacks principle.⁵⁸¹ These issues are analysed in the following paragraphs.

As Arlidge, Eady, and Smith explain, the assimilation of disobedience to court orders with other acts categorised as contempt, may have arisen historically for procedural reasons, in that the same remedy, attachment, had been used for two different purposes: The writ of attachment was used by the common law courts to bring before them for punishment those persons who

⁵⁷⁹ Cram, Borrie, and Lowe (n 578) para 6.72.

⁵⁸⁰ Robert J Martineau, 'Contempt of court: Eliminating the confusion between civil and criminal contempt' (1981) 50 U Cin L Rev 677, 677.

⁵⁸¹ John Laws, 'Current Problems in the Law of Contempt' (1990) 43 CLP 99, 101.

interfered with their proceedings. The court of Chancery used the same writ to secure obedience to its orders made in a particular suit.⁵⁸²

The labelling distinction between criminal or civil, *Arlidge, Eady, and Smith* continue, became especially significant in England and Wales in the years following 1873, when appeals to the Court of Appeal were made available in civil cases of contempt, but not for criminal contempts. Since 1960, however, there has been a right of appeal for both civil and criminal contempt, and, accordingly, there is no temptation to label examples of contempt as civil rather than criminal purely for that reason. This supports the view of, among others, the Phillimore Committee,⁵⁸³ that there is no useful purpose in trying to discern between civil and criminal contempt, and, therefore, the distinction may be abolished.⁵⁸⁴

Furthermore, John Laws argues, a potential distinction must rest in the proposition that civil contempt consists in a wrong done to the beneficiary of the court order which is breached, whereas criminal contempt consists in an interference with the administration of justice, whether generally or specifically. However, this is not a principled distinction, since, as explained above, any

⁵⁸² *Eady and Smith* (n 566) para 3-54.

⁵⁸³ Lord High Chancellor and the Lord Advocate, *Report of the Committee on Contempt of Court* (Cmd 5794, 1974) ch 8.

⁵⁸⁴ *Eady and Smith* (n 566) paras 3-93, 3-94, 3-96.

example of the first is also an example of the second: if the court has made an order, its breach is necessarily an interference with the way in which the court has expressly determined to administer the course of justice.⁵⁸⁵

On the other hand, however, it has been argued that the principal purpose of the distinction, as analysed below, is that, in criminal contempt proceedings, some of the constitutional safeguards of criminal trials are mandated.⁵⁸⁶ As Professor Dobbs commented: 'It is enough to say that a determinate [criminal] sentence cannot be meted out where criminal-type protections are not afforded in the procedure. It is not necessary to say more.'⁵⁸⁷ Moreover, as also examined below, sanctions against non-compliance with court orders are not always considered as criminal sanctions by the ECtHR, and, thus, do not require the safeguards referred to in article 6 of the Convention in civil contempt proceedings. Therefore, the distinction is *not* purely academic.⁵⁸⁸

The next question is how to discern whether a contempt is civil or criminal. In an early decision, the Supreme Court of the United States, said that it is the purpose of the order that serves to distinguish between the two kinds of

⁵⁸⁵ John Laws, 'Current Problems in the Law of Contempt' (1990) 43 CLP 99, 101; See also the comment by Sir John Donaldson in *A-G v Newspaper Publishing Ltd* [1988] Ch 333 (CA) 362 (Sir John Donaldson MR): 'the first category being a special form of the latter'.

⁵⁸⁶ *Martineau* (n 580) 681.

⁵⁸⁷ Dan B Dobbs, 'Contempt of Court a Survey' (1971) 56 Cornell L Rev 184, 282.

⁵⁸⁸ Eliahu Hamon, 'Civil and Criminal Contempts of Court (1962) 25 Mod L Rev 179.

proceedings.⁵⁸⁹ A distinction has been widely accepted, matching a remedial purpose to civil contempt and a punitive purpose to criminal contempt.⁵⁹⁰ Therefore, while civil contempt is forward-looking in the sense that it anticipates future disobedience by the defendant and imposes a sanction until the defendant complies, criminal contempt is backward-looking; the defendant has already interfered with the court proceedings, and is now being punished for its disrespect of the court's authority.⁵⁹¹ However, it is suggested that a civil contempt conviction, though remedial, protects the administration of justice, whereas, a criminal contempt conviction, though punitive, provides the complainant with a degree of satisfaction.⁵⁹²

Ultimately, it seems that the criterion to distinguish between civil and criminal contempt is rather simple, and it goes back to the initial definition of the two kinds of contempt, ie that a criminal contempt is conduct which goes beyond mere breach of a court order or an undertaking, and involves a serious

⁵⁸⁹ *Gompers v Bucks Stove and Range Co* 221 US 418, 441 (1911).

⁵⁹⁰ Joseph Moskovitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43(6) Col L Rev 780, 780.

⁵⁹¹ Margit Livingston, 'Disobedience and Contempt' (2000) 75 Washington L Rev 345, 385.

⁵⁹² Jennifer Fleischer, 'In Defense of Civil Contempt Sanctions' (2002-2003) 36 Columbia J of L and Social Problems 35, 47.

interference with the administration of justice. This has recently been declared by the Supreme Court of the United Kingdom.⁵⁹³

Another important issue is the following: whenever disobedience is to an order of the court by someone who is *directly* bound by it, it will be classified as civil contempt.⁵⁹⁴ A type of contempt, however, which is difficult to classify is a breach of an order by a third party. It can be argued that such an act amounts to a criminal contempt since the act clearly impedes the due course of justice.⁵⁹⁵ On the other hand, it can equally well be argued that the act amounts to a civil contempt, the punishment of the offender being an indirect means of enforcing the court order for the benefit of the plaintiff.⁵⁹⁶ However, it is suggested that, only a party against whom an order is made can be in contempt of court for doing an act which is contrary to the terms of order.⁵⁹⁷ Although support can be found for both views, the weight of modern authority is that a breach of an order

⁵⁹³ *R v O'Brien* [2014] UKSC 23 [39]. It also fits with Sir John Donaldson's comment in *A-G v Newspaper Publishing plc*, that, although the former is a special form of the latter, there is a simple distinction between conduct which involves a breach of a court order, and any other conduct which involves an interference with the due administration of justice. *A-G v Newspaper Publishing plc* [1988] Ch 333 (CA) 362 (Sir John Donaldson MR). Similarly, the Supreme Court of the United States had stated the following in the early decision of *Re Debs*: '[A] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing the suitors the rights which it had adjudged them entitled to.' *Re Debs* 158 US 564 (1885).

⁵⁹⁴ *Eady and Smith* (n 566) para 12-2.

⁵⁹⁵ See *Seaward v Paterson* (1897) 1 Ch 545 (CA) 553 (Lindley LJ).

⁵⁹⁶ *Jennison v Baker* [1972] 2 QB 52 (CA) 64 (Salmon LJ).

⁵⁹⁷ L A Sheridan, *Injunctions and Similar Orders* (Barry Rose Law Publishers Ltd 1999) 281.

by a third party is a criminal contempt.⁵⁹⁸ In *A-G v Times Newspapers Ltd*, Lord

Oliver said the following:

When, however, the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is, however, this essential distinction that his liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a wilful interference with the administration of justice by the court in the proceedings in which the order was made.⁵⁹⁹

c. Origin of contempt of court in general

As with every legal process, in order to appreciate the nature of contempt of court, it is useful to take a look at its origin and history. In England, rules for preserving discipline essential to the administration of justice, came into existence with the law itself, and, contempt of court, is a recognised phrase from the twelfth century to the present time.⁶⁰⁰ In the *Tractatus*, the earliest treatise on English law, written in the late part of the twelfth century, reference is made on several occasions to '*contemptus curiae*', which meant the contempt

⁵⁹⁸ See *A-G v Newspapers Publishing plc* [1988] Ch 333 (Ch) 342 (Sir Nicolas Browne-Wilkinson V-C), 377 (Lloyd LJ); *A-G v Times Newspapers Ltd* [1992] 1 AC 191 (HL) 214 (Lord Ackner), 218 (Lord Oliver). See also Paul McGrath, *Commercial Fraud in Civil Practice* (OUP 2014) 666, 668; Henry Schofield, *Essays on Constitutional Law and Equity and Other Subjects* (The Lawbook Exchange 2002) 730.

⁵⁹⁹ *A-G v Times Newspapers Ltd* [1992] 1 AC 191 (HL) 218 (Lord Oliver).

⁶⁰⁰ John C Fox, *The History of Contempt of Court* (Clarendon Press 1927) 1.

shown by a party to a suit who fails to appear before the court.⁶⁰¹ In the *Almon's Case*, in an opinion which he prepared but never delivered, Chief Justice Wilmot tells us the following:

The power which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it.⁶⁰²

The central position of the King and his connection with the law of contempt is evident from the statement of Seldon in *Stroud's Case*: 'There can be no question made of it but that all contempts of what kind so ever that are punishable by the laws of the realm are against the King and his government'.⁶⁰³ The conception and the juridical basis of the law of contempt in its early history was probably the safeguarding of the King's palaces against

⁶⁰¹ Glanvill; Eady and Smith (n 566) para 1-1.

⁶⁰² *R v Almon* (1765) Wilm 243; 97 ER 94. As Goldfarb notes, an analysis of this case explains the sudden change in the then current law of contempt, and its impact on the future. The legal status of contempt of court was given not only enunciation, but also an authoritative and pervasive application in this much criticised, but more quoted, decision which, though decided in 1765, was not published except posthumously in the notes of Justice Wilmot, the author of the opinion, in John Eardley-Wilmot, *Notes of Opinions and Judgements Delivered in Different Courts* (Luke Hansard 1802) 243. Almon was a bookseller who was tried for publishing an alleged libel about Lord Mansfield. One of the charges Almon had made against Lord Mansfield related to a court action involving a person named Wilkes. When Justice Wilmot's judgment granting an attachment against Almon was about to be delivered, it was discovered that it referred, by some error or confusion, to *The King v Wilkes*, instead of *The King v Almon*. The judges pressed the defendant's counsel to consent to an amendment, but without success. The action was then abandoned and the opinion was never delivered. Goldfarb (n 568) 10. See also John C Fox, 'The King v Almon' (1908) 24 LQR 184, 184; John Eardley-Wilmot, *Memoirs of the life of the Right Honourable Sir John Eardley Wilmot* (J Nichols 1811) 76. In 1802, Justice Wilmot's son published the notes of his father which included the still-born, misnomered opinion, *The King v Wilkes*.

⁶⁰³ *R v Stroud* (1629) 3 St Tr 235, 267.

any disturbances, since courts in those times were held in the King's palace and before the King himself.⁶⁰⁴ The courts were the King's Courts, originally carved out of one Supreme Court, and were divisions of the *Curia Regis*, where the King in person dispensed justice, and the power of the courts to commit for contempt, was an emanation of the royal authority, for any contempt would be a contempt of the Sovereign.⁶⁰⁵

In the law of contempt, traces of the intimate relationship between the King, the judges, and the administration of justice may be easily detected.⁶⁰⁶ Any act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases, is a contempt of court entirely similar in kind to the contempt of the King by insults offered to him.⁶⁰⁷ In the *Almon's Case*, Wilmot J said:

By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. The King is 'de jure' to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King 'concerning his justice.' The arraignment of the justice of the judges, is arraignment of the King's justice; it is an impeachment of his wisdom and goodness in his choice of his judges, and excites in the mind of the people a general dissatisfaction with all judicial

⁶⁰⁴ BI Comm vol IV, 125. See Offences within the Court Act 1541 (33 Hen 8 c 12).

⁶⁰⁵ *R v Lefroy* (1873) 7 LRQB 134, 137 (Cockburn CJ); Oswald (n 552) 1.

⁶⁰⁶ Abdul Samad bin Musa, 'The development of the law of contempt of court and freedom of expression in English law' (1988) IIUM L J1, 4.

⁶⁰⁷ Joseph H Beale, 'Contempt of court, Civil and Criminal' 21 Harvard L Rev 161, 162.

determination, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

As John Fox⁶⁰⁸ explains, in early history, we find the idea of 'Contempt of the King' in the Anglo-Saxon '*oferhyrnes*', which meant contempt of the King, as well as the monetary penalty annexed to such contempt. 'Contempt of justice' is referred to as an offence in the 'Laws' set forth in the first half of the twelfth century. 'Contempt of the King's writs' is mentioned in the Laws of Henry I, written in about 1115. In the same laws we have the '*overseunessa*', also a pecuniary penalty for contempt or disregard of orders. Before the end of the twelfth century, 'contempt of court' is a recognised expression and is applied to the defaults and wrongful acts of suitors.⁶⁰⁹

⁶⁰⁸ Sir John Fox researched the area of contempt of court extensively and presented his results in a series of articles in the Law Quarterly Reviews of 1908, 1909, 1920, 1921, 1922 and 1924: John C Fox, 'Eccentricities of the Law of Contempt of Court' (1920) 36 LQR 394; John C Fox, 'The King v Almon' (1908) 24 LQR 184, 266; Fox (n 560); John C Fox, 'The Practice in Contempt of Court Cases' (1922) 38 LQR 185; John C Fox, 'The Summary Process to Punish Contempt' (1909) 25 LQR 238, 354; John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43. See also Fox, *The History of Contempt of Court* (n 600).

⁶⁰⁹ Fox (n 560) 194.

By the fourteenth century, John Fox further explains, as it emerges from the earliest laws of the kingdom, through the records of the *Curia Regis* and the Parliament, the Year Books, and the first treatises on law, the principles upon which punishment is inflicted to restrain disobedience to the commands of the King and his courts, as well as other acts which tend to obstruct the course of justice had become firmly established. The idea that every contempt of court was considered indirectly a contempt of the King is corroborated even by the wording of the writ applied in contempt cases. It read that a contempt had been 'committed against us', 'us' being the court and its King.⁶¹⁰

According to John Fox, before the fifteenth century, all contempts of the superior courts of common law, whether committed in court or out of court, were tried by a jury, and sentence was pronounced in the ordinary course of law, except in the case of officers of the law, over whom the court assumed a limited control, such as sheriffs and jurors, who were punished summarily.⁶¹¹ When contempt of court was confessed by the accused person, the summary process was also used.⁶¹²

⁶¹⁰ Fox (n 560) 200.

⁶¹¹ It has been said that the rationale behind this was that officers were presumed to be always present in court. John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43, 58.

⁶¹² Fox (n 560) 199.

Finally, a word about the origin of the summary procedure for punishing contempt of court: In the fifteenth century and after, John Fox explains, the distinction was drawn between contempts in court and out of court. Contempts in court were punished summarily by attachment and examination, and contempts out of court after trial in the ordinary course of law by indictment or information after a trial by jury.⁶¹³

In the sixteenth century, continues Fox, the attempt was made, but not then persisted in, to introduce the summary procedure in the trial of contempts out of court in the King's Bench. Apart from this attempt, the Star Chamber, exercised a concurrent jurisdiction with other courts of common law to punish contempts out of court against its own or any other court and, its procedure was by attachment and examination.⁶¹⁴

With the abolition of the Star Chamber in 1641, it was legislated that all matters theretofore handled by that court, would be treated 'by the common law of the land and in the ordinary course of justice,' and its summary procedure in contempt also passed into the common law.⁶¹⁵ Thus, says Fox, contempts out of court were tried either by information, or by attachment and examination in

⁶¹³ John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43, 59.

⁶¹⁴ John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43, 59.

⁶¹⁵ The Habeas Corpus Act 1640 (16 Charles 1 c 10); John C Fox, 'The King v Almon' (1908) 24 LQR 184, 273.

the common law courts. The practice continued through the eighteenth century, and the summary procedure for all kinds of contempt was confirmed by the opinion of Chief Justice Wilmot in *Almon's Case*⁶¹⁶ in 1765, and finally established as law by Mr Justice Holroyd in *The King v Clement*⁶¹⁷ in 1821.⁶¹⁸

In the *Almon's Case*, Wilmot J argued that the summary procedure of attachment and examination on oath, committal, and fine instead of a trial in the ordinary course of law as a form of procedure in cases of contempt is as ancient as any other part of the common law.⁶¹⁹ He said:

And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage, as supports the whole fabric of the Common Law; it is as much the '*lex terrae*', and within the exception of Magna Charta, as the issuing any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society.⁶²⁰

John Fox, however, disagreed with the statement that punishment of all kinds of contempt by summary process was coeval with the common law.

⁶¹⁶ *R v Almon* (1765) Wilm 243; 97 ER 94.

⁶¹⁷ *R v Clement* (1821) 4 B & Ald 218.

⁶¹⁸ John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43, 59

⁶¹⁹ John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43, 45.

⁶²⁰ *R v Almon* (1765) Wilm 243 at 254; 97 ER 94 at 99.

Instead, he maintained that the courts of common law began to follow the courts of equity, ie the Court of Chancery and the Star Chamber, with regard to contempts out of court and established the practice which Wilmot J described as based on immemorial usage.⁶²¹

d. Origin of civil contempt of court

Since the subject matter of this work is non-compliance with court orders, more emphasis is given to civil contempt of court, which occurs when a party against whom an order is made breaches it—this being more frequent than the breach by a third party, which is considered to be criminal contempt. In the seventeenth century, as Tripathi explains, an important development took place in the Court of Chancery. The writ of attachment began to be used not merely in the case of those flagrant abuses of the administration of justice with which the common law courts were dealing, but also to compel performances as between parties in a particular suit.⁶²² This development led eventually to the distinction between criminal and civil contempts. As suggested above, perhaps the classification of disobedience to court orders within other acts regarded as contempt has

⁶²¹ John C Fox, 'The Writ of Attachment' (1924) 40 LQR 43, 49.

⁶²² Bibha Tripathi, *Contempt of Court and Freedom of Speech: Exploring Gender Biases* (Readworthy Publications 2010) 29.

probably arisen historically because of the use of the writ of attachment in both purposes.

As Beale argues, contempt of court which consists in mere disobedience to an order of the court is different, both in its nature and in its origin, from criminal contempt, whether in or out of court. From the earliest times, a refusal to obey an order of the King or of his officers, has been regarded as a contempt. *Contemptus brevium* was declared by the laws of Henry I to be an offense subjecting a person guilty of it to amercement.⁶²³ In the thirteenth century Bracton said:

There is no greater crime than disobedience, for a person may be excommunicated for contempt and disobedience, as for a mortal sin, since all persons ought to be subject to the King as supreme, especially in honest things, and to his officers, as if sent by him.⁶²⁴

As Jacob points out, the fact that the failure to comply with a judgment or order in civil proceedings to do or not to do a specified act is treated as a contempt of court, for which the defaulting party may be committed to prison, fined, or his property sequestered, is perhaps the most outstanding feature of the English system of enforcement, and the most coercive and effective weapon that it employs.⁶²⁵

⁶²³ Beale (n 607) 164. After the Conquest, the King's commands were conveyed by means of precepts in writing, which, when relating to matters of justice, they were writs, called in Latin *brevia*, since they were brief. George Crabb, *A History of English Law* (Burlington 1831) 114.

⁶²⁴ Bracton vol 6, 331.

⁶²⁵ Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 191.

Arguably, the origin of this feature of English law, ie that disobedience to an order amounts to contempt of court, is equity. From earliest times, it has been understood that an equity court must have some means of enforcing its orders against the person; some sanction to lend 'a helping hand to a suppliant for aid.'⁶²⁶ As Ashburner explains, there was a fundamental distinction between the judgments of a court of common law and the orders or decrees of a court of equity. The judgments of a court of common law altered the legal title to property as between the parties to the action; the orders and decrees of the Court of Chancery, bound the person only, that is, they directed a party to the suit either to do or to abstain from doing something.⁶²⁷ The relevant decree of the Court of Chancery was issued in the name of the Chancellor and acted in personam on the defendant rather than in rem against the property involved.⁶²⁸ As it was maintained, 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him to prison till he obey, and that is all the chancellor can do'.⁶²⁹

Initially, says Ashburner, the Court of Chancery enforced its orders exclusively by personal compulsion. Little by little, it enlarged the character of

⁶²⁶ Cardozo J in *Fox v Capital Co* 299 US 105, 109 (1936).

⁶²⁷ Walter Ashburner, *Ashburner's Principles of Equity* (Denis Browne ed, 2nd edn, Butterworth & Company 1933) 26.

⁶²⁸ Mohamed Ramjohn, *Unlocking Equity and Trusts* (Routledge 2015) 3.

⁶²⁹ (1535) YB Trin 27 Hen VIII, fo 15, pl 6, a case quoted in Beale (n 607) 169.

the compulsion which it exercised over a recalcitrant defendant, by taking possession of his property through the medium of sequestrators.⁶³⁰ The Chancellor of England was employing coercion of a party against whom an order was written by imprisonment as early as the time of Richard III, ie the end of the fifteenth century.⁶³¹

The Court of Chancery, as Ashburner argues, never assumed to determine a title to property, something which was in the exclusive jurisdiction of the courts of common law. A court of conscience acted on the conscience and on the conscience alone. However, where a court went so far in the relief of conscience as to order a party brought before it to convey land or to deliver chattels to another, and if he failed to do so, imprisoned him, that court indirectly determined in substance the title to property.⁶³²

According to Ashburner, the process of the Court of Chancery, as we find it in the reign of Elizabeth, was based upon two principles: First, the object of the court was, primarily, not to redress a wrong done to the plaintiff, but to purge the corrupt conscience of the defendant, and that object could not be attained unless the court was able to secure the presence of the defendant in person.

⁶³⁰ Ashburner (n 627) 44.

⁶³¹ (1484) YB Mich 2 Rich III, fo 9, pl 22 quoted in Beale (n 607) 169; J H Thornton, 'Contempt as a Coercive Process. A Review' (1946) 32 (5) Virginia L Rev 1010, 1011.

⁶³² Ashburner (n 627) 44.

Secondly, all process of the court, from the subpoena to the writ of execution of a decree, was issued under the Great Seal. Disobedience to a writ under the Great Seal was a contempt, punishable by the imprisonment of the offender until he cleared his contempt.⁶³³

As Beale explains, disobedience of the King's Seal, became of increasing importance from the time the Lord Chancellor adopted it as the basis of his judicial power. The Chancellor had no direct power over property or persons, and no control over any executive officer, sheriff, constable, or bailiff. The decree of his court derived its force from the fact that it was granted by the keeper of the King's Seal, and was executed by means of a writ sealed with that Seal. Disobedience to the order of the court could not be punished, since the order of the court, as such, had no legal force; but disobedience to the King's Seal was a contempt, not to the Chancellor, but to the King. Thus, through the use of the Great Seal, the Chancellor got power over defendants in his court.⁶³⁴

Nevertheless, Beale continues, as this use of the King's Seal became common, and process sealed with that Seal was issued as of course, disobedience to the Seal inevitably and insensibly took on a less serious form.

⁶³³ Ashburner (n 627) 29.

⁶³⁴ Beale (n 607) 166. 'The offense committed is the not paying obedience to the great seal. (...) The mere service of a copy of the decree or order, without such a writ, will not be sufficient.' Edmund Robert Daniell, *A Treatise on the Practice of the High Court of Chancery* (I G M'Kinley & J M G Lescure 1846) vol 2, para 702; Beale (n 607) 166. For a description of this process see C C Langdell, *A Summary of Equity Pleading* (C W Sever 1883) para 38; Beale (n 607) 167.

A King's Seal which is at the service of a private party in a suit, ceases to be a dread symbol of sovereign power, and becomes merely part of the machinery of a court administering justice between party and party. So in the centuries between the Tudor and the Hanoverian, the process of contempt for the disobedience of an order in Chancery, ceased to have any higher significance than that of a step in civil process. While disobedience to process was still punishable as contempt of the King, it was, in fact, a mere method of executing the decree of the court in favour of a successful party to the suit; and it was inevitable that this fact should finally be recognised and given legal effect.⁶³⁵

The need for the law of contempt, says Livingston, has rarely been questioned in English law. It was justified by necessity and history. The judicial system arguably could not survive as an effective institution unless it could punish any interference with court proceedings and, even more so, disobedience of court orders.⁶³⁶ Criticisms of the law of contempt have centred usually on its uncertainty, occasionally on its severity, but scarcely ever on its very existence.⁶³⁷

⁶³⁵ Beale (n 607) 167.

⁶³⁶ Livingston (n 591) 400.

⁶³⁷ Abdul Samad bin Musa, 'The development of the law of contempt of court and freedom of expression in English law' (1988) IIUM Law Journal 1, 7.

e. Criminal and civil contempt examined in more depth

An EAPO might be breached by the respondent, and, thus, amount to the equivalent of civil contempt. Less frequently, as already mentioned, it might also be breached by a third party, and, thus, by analogy, classify as a criminal contempt. Therefore, it is essential to examine in more depth both kinds of contempt, more weight to be given to civil contempt.

Criminal contempt is a criminal offence that extends to such matters as insulting behaviour in the face of the court and conduct which interferes with the proper administration of justice such as scandalising the court and infringement of the *sub judice* principle, as well as aiding and abetting the breach of an order.⁶³⁸ The sanction for criminal contempt is mainly punitive, and is designed to penalise the interference with the due administration of justice, and deter future infringements.⁶³⁹ Regarding the mens rea required to constitute criminal contempt, an intention to interfere with or impede the administration of justice has to be shown.⁶⁴⁰

⁶³⁸ Terence Ingman, *The English Legal Process* (OUP 2010) 299.

⁶³⁹ Zuckerman (n 574) para 23.128.

⁶⁴⁰ See eg *A-G v Sport Newspapers Ltd* [1992] 1 All ER 503 (QB) 519; *A-G v Newspaper Publishing plc* [1988] Ch 333 (Ch) 374; Eady and Smith (n 566) para 3-66. In certain instances of criminal contempt by publication (publication of active proceedings), the strict liability rule applies. See Eady and Smith (n 566) para 4-1ff.

As Arlidge and Eady explain, the law of criminal contempt has certain procedural attributes which distinguish it from other forms of criminal offence. These primarily relate to the summary nature of the procedure, which was initially developed at common law, and was subsequently refined by statutory rules of court.⁶⁴¹

Livingston explains that courts were thought to have inherent power to punish summarily conduct that threatened to interfere with ongoing proceedings. Both the court's inherent punitive power and the summary procedures, are still viewed as necessary to the effective administration of justice. A court must be able to punish shouting, cursing, interruptions, and other disruptive behaviour, to keep control over proceedings. Immediately after the offending action, the judge can make a finding that an individual is in contempt of court, and can order punishment by a fine, imprisonment, or both, or grant a more lenient remedy.⁶⁴²

Fines are payable to the state, and are enforceable as money judgments.⁶⁴³ The primary responsibility for prosecuting criminal contempts

⁶⁴¹ Eady and Smith (n 566) para 3-55.

⁶⁴² Livingston (n 591) 349; *Halsbury's Laws* (5th edn, 2012) vol 22, paras 108ff.

⁶⁴³ See section 16 of the Contempt of Court Act 1981. The present English law on contempt of court is an amalgamation of judicial decisions and the Contempt of Court Act 1981. See also Zuckerman (n 574) para 23.126, fn 204.

belongs to the Attorney General or the court,⁶⁴⁴ and criminal contempt must be proved beyond reasonable doubt.⁶⁴⁵

Turning to the civil contempt power, this occurs when the contempt consists in failure to comply with or carry out an order of a court, made for the benefit of a private party. As Hobhouse LJ said, there is a distinction between orders whose breach is a contempt of court, and those orders or rules whose breach merely give rise to a default. Compulsion of compliance with an order is possible for the former category only.⁶⁴⁶

As Zuckerman suggests, parties are duty bound to comply with court orders that are designed to protect substantive rights. For instance, a defendant who is ordered not to pull down a disputed building pending proceedings, must comply, as must a parent ordered not to take a child out of the jurisdiction. Such orders leave no room for disobedience. Zuckerman further explains that coercive means, are employed in such circumstances as a normal instrument for protecting rights, and not as a way of compelling obedience to process requirements. There is, however, a small group of process requirements

⁶⁴⁴ Zuckerman (n 574) para 23.129.

⁶⁴⁵ See eg, *A-G v Levenson Magazine Ltd* [1979] AC 440 (HL) 469 (Lord Scarman); *Eady and Smith* (n 566) para 3-43.

⁶⁴⁶ *Prudential Assurance Co Ltd v Fountain Page Ltd* [1990] 1 WLR 756 (QB) 765 (Hobhouse LJ).

enforceable by proceedings for contempt, such as compliance with a search order.⁶⁴⁷

Numerous contempt cases, says Livingston, involve contemnors who strongly believed that the court order directed against them was based on unjust or oppressive laws. A paradigmatic case in the United States is *Walker v City of Birmingham*, in which the defendants declared their intention to disobey the state court injunction, because it was 'raw tyranny under the guise of maintaining law and order'.⁶⁴⁸ In such situations, one might question to what extent the law should punish or coerce recalcitrant individuals motivated by a sincere desire to change what they perceive to be an unjust system.⁶⁴⁹

In dealing with the question of how those who disobey the law out of conscience should be dealt with, Dworkin disagreed with the view that conscientious disobedience is the same as lawlessness. In his words, society

⁶⁴⁷ Zuckerman (n 574) paras 11.218–11.220. In any case, a major objective of the new rules of civil procedure in England and Wales was to tackle the culture of non-compliance with process requirements. As explained in the previous chapter, CPR 3.8 introduced an automatic sanctions regime whereby sanctions would take effect automatically in the event of non-compliance, but the defaulting party could apply to the court for relief under CPR 3.9. Lord Woolf hoped that CPR 3.8 and 3.9 would lead 'to a change of culture, in which judges can make orders confident that parties will not feel that they can ignore orders'. Lord Woolf, *Access to Justice Inquiry Final Report* (HM Stationery Office 1996) ch 6, para 15.

⁶⁴⁸ *Walker v City of Birmingham* 388 US 307, 310 (1967).

⁶⁴⁹ Livingston (n 591) 356.

‘cannot endure’ if it tolerates all disobedience but it does not follow, however, nor is there evidence, that it will collapse if it tolerates some.⁶⁵⁰

However, it is generally no defence that the order disobeyed should not have been made or accepted. Disobedience of an order constitutes a contempt of court and the party aggrieved, should apply to the court for relief. As the United States Supreme Court said in *Walker*, ‘[i]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives’.⁶⁵¹ Similarly, Romer LJ said in *Hadkinson v Hadkinson*:

It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it

⁶⁵⁰ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Academic 2013) 249.

⁶⁵¹ This sort of statement usually refers to judicial bias, but the Court here was referring to disobedience of a court order. The order in this case was enjoining the petitioners from, among other things, participating in or encouraging mass street parades or mass processions without a permit. Mr Justice Stewart went on to say that the ‘Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners’ impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom’. *Walker v City of Birmingham* 388 US 307, 320 (1967). As explained in the same case, the same rule of law was followed in *Kasper v Brittain* 6 Cir 245 F 2d 92 (1957) cert denied, 355 US 834 (1957). There, a federal court had ordered the public high school in Clinton, Tennessee, to desegregate. Kasper ‘arrived from somewhere in the East,’ and organised a campaign ‘to run the Negroes out of the school’. The federal court issued an ex parte restraining order enjoining Kasper from interfering with desegregation. Relying upon the First Amendment, Kasper harangued a crowd ‘to the effect that although he had been served with the restraining order, it did not mean anything’. His conviction for criminal contempt was affirmed by the Court of Appeals for the Sixth Circuit. That court concluded that ‘an injunctive order issued by a court must be obeyed’, whatever its seeming invalidity, citing *Howat v State of Kansas* 258 US 181 (1922).

extends even to cases where the person affected by an order believes it to be irregular or even void.⁶⁵²

If a court lacked the means to enforce its orders, and its orders could be disobeyed with impunity, not only would individual litigants suffer, but the whole administration of justice would be brought into disrepute.⁶⁵³ Moreover, failure by the court to enforce a judgment, could amount to a violation of article 6 of the ECHR. In *Hornsby v Greece* the ECtHR said:

That right [to fair trial] would be illusory if a Contracting State's legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees afforded to litigants—without protecting the implementation of judicial decisions; to construe Article 6 as being exclusively concerned with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law.⁶⁵⁴

⁶⁵² *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA) 569 (Romer LJ). See also *Woodward v Earl of Lincoln* (1674) 3 Swan 627; *Blake v Blake* (1844) 7 Beav 514; *Chuck v Cremer* (1846) 2 Ph 113; *Eastern Trust Co v McKenzie, Mann & Co Ltd* [1915] AC 750 (PC) 761 (Sir George Farwell); *Isaacs v Robertson* [1985] 1 AC 97 (PC) 101 (Lord Diplock). As one Canadian judge put it: 'To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn (...). If the remedies that the courts grant to correct (...) wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result in the destruction of our society'. O'Leary J in *Canadian Metal Co Ltd v Canadian Broadcasting Corp (No 2)* [1975] 48 DLR (3d) 641 (Ontario High Court of Justice) 669. Also, as Rix LJ observed, once it became known that the court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice. *JSC BTA Bank v Ablyazov (No 8)* [2012] EWCA Civ 1411; [2013] 1 WLR 1331 [188].

⁶⁵³ Cram, Borrie, and Lowe (n 578) para 1.3. See also *Australian Meat Industry Employees Union v Mudginberry Station Pty Ltd* (1986) 161 CLR 98 (High Court of Australia) 107.

⁶⁵⁴ *Hornsby v Greece* ECHR 1997-II, para 40.

Nevertheless, if it is impossible to comply with an order, failure to comply with it may be breach of the order, but not contempt.⁶⁵⁵ The rationale behind this is that the defendant cannot be committed for the failure to do something which is beyond his power, as the demonstration of inability to comply is said to be 'the most effectual answer to a contempt order'.⁶⁵⁶ Similarly, since the power to order committal for civil contempt should be exercised with very great care, the court will not order committal where the contempt is of a minor or technical nature.⁶⁵⁷

As Fox explains, the enforcement of an order to do or refrain from doing an act via contempt proceedings is a form of execution. The disobedience deprives the opposing party of the enjoyment of his rights, and, thus, he is entitled to demand a penalty be imposed to enable him to reap the fruits of an order made in his favour.⁶⁵⁸ As it has been suggested, punishment for a civil

⁶⁵⁵ See *Sectorguard pic v Dienne pic* (2009) EWHC 2693 (Ch).

⁶⁵⁶ *Re Von Gerzabek* 58 Cal App 230, 232 (1922) cited in *Maggio v Zeitz* 333 US 56, 74 footnote 7 (1948); *Fleischer* (n 592) 50.

⁶⁵⁷ See *Stark v Stark and Hitchins* [1910] P 190 (CA); *Marshall v Marshall* (1966) 110 Sol Jo 112 (CA); *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 48 (Ch); *Halsbury's Laws* (n 642) vol 22, para 112.

⁶⁵⁸ Fox (n 560) 201. See also *Phonographic Performance Ltd v Amusement Caterers* [1964] 1 Ch 195 (Ch) 199 (Cross J).

contempt of court is not in itself a remedy; it is a means of enforcing a remedy;⁶⁵⁹ its purpose is partly to make the order of the court effective.⁶⁶⁰

At the same time, apart from the enforcement of judicial orders, a civil contempt is also concerned with upholding the authority of the law, and maintaining the rule of law. Such process, Jacob suggests, also aims to protect the public interest in punishing the offender, so that the court appears to have the means of enforcing its own orders. The penalties that may be imposed for a civil contempt, thus, also take on a penal character which satisfies the public confidence in the law.⁶⁶¹

Thus, it emerges that breach of an order is a matter which concerns both the aggrieved party as well as the court. As it will be explained below, the basic view of the continental legal tradition is that the failure to comply with the judgment or order of the court gives rise to a mere conflict between the parties, and is not considered as directed towards the court or judicial authority.⁶⁶² As the Australian Law Reform Commission pointed out, this court-centred, rather

⁶⁵⁹ Maurice Kay, Stuart Sime, and Derek French (eds), *Blackstone's Civil Practice 2015: The Commentary* (4th edn, OUP 2015) para 81.1.

⁶⁶⁰ *R v O'Brien* [2014] UKSC 23 [38].

⁶⁶¹ Jacob (n 625) 207; See also Cross J in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195 (Ch) 198.

⁶⁶² Jacob (n 625) 208.

than plaintiff-centred approach, is foreign to the approach to the enforcement of judgments found in civil law systems.⁶⁶³

Apart from its purpose being coercive and punitive, there is a question whether a civil contempt order can ever, in addition, grant a restitutionary remedy to an individual litigant.⁶⁶⁴ A remedial function is recognised to some extent in the United States, where in appropriate cases the court levies a fine which corresponds to a determination of the aggrieved party's damages and it is payable to that party.⁶⁶⁵ This has never been accepted in modern times in England, where the courts have taken the view that damages are not available for contempt.⁶⁶⁶ In the words of Lord Donaldson, proceedings for contempt 'are not intended to provide solace or compensation to the plaintiff. If the plaintiff wants compensation, she must seek it in other forms'.⁶⁶⁷

Another characteristic of civil contempt is that, as criminal contempt it is dealt with by summary process, on affidavit evidence, and without the process

⁶⁶³ The Law Reform Commission (Australia), *Report no 35 (Contempt)* (Australian Government Publishing Service 1987) 17.

⁶⁶⁴ *Eady and Smith* (n 566) para 3-81.

⁶⁶⁵ See Philip A Hostak, 'International Union United Mine Workers v Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt' (1995) 81 *Cornell L Rev* 181, 183, citing *NLRB v Local 825, International Union of Operating Engineers* 430 F 2d 1225, 1229 (3rd Cir 1970), cert denied 401 US 976 (1971); *Yanish v Barber* 232 F 2d 939, 944 (9th Cir 1956).

⁶⁶⁶ See *Chapman v Honig* [1963] 2 QB 502 (CA).

⁶⁶⁷ *Johnson v Walton* [1990] 1 FLR 350 (CA) 353 (Lord Donaldson MR).

of disclosure or a trial.⁶⁶⁸ As Oswald points out, the summary power of punishing both types of contempt has been given to the courts to maintain their standing ('to keep a blaze of glory around them') and to deter people from committing contempt. This power is given to the judges to facilitate the course of justice, and, thus, is of great importance to society, for by the exercise of it, law and order prevail; those who are interested in wrong are shown that the law is irresistible.⁶⁶⁹ At the same time, judges have been conscientious not to abuse the potentially arbitrary power which the summary process entrusts to them.⁶⁷⁰

As the then Master of the Rolls, Sir John Jessel, declared in 1877,

[t]his jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of the Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject.⁶⁷¹

⁶⁶⁸ Jacob (n 625) 207.

⁶⁶⁹ Oswald (n 552) 9. See *R v Almon* (1765) Wilm 243, 270. As Lord Denning explained '[t]he phrase "contempt in the face of the court" has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power—a power instantly to imprison a person without trial—but it is a necessary power'. *Morris v The Crown Office* [1970] 1 All ER 1079 (CA) 1081 (Lord Denning MR).

⁶⁷⁰ L Neville Brown, 'Some contemporary problems in the English law relating to contempt of court' (1974) 15(4) *Les Cahiers de Droit* 741, 749.

⁶⁷¹ *Clements, Clements v Erlanger* (1877) 46 LJ Ch 375 (CA) 383 (Sir John Jessel MR).

Moreover, as in criminal contempt, in civil contempt the breach of an order must also be proved beyond reasonable doubt.⁶⁷² However, it is interesting to note the observations of Bodey J in *Mubarak v Mubarik* (No 2) that the standard of proof depends on the relief sought. Since a committal application involves potential loss of liberty, the criminal standard of proof is appropriate. Conversely, on a wife's application to debar her husband from participating in an ancillary relief application, the proceedings were essentially civil in character. In the judge's view it was therefore necessary to apply the civil standard of proof in determining whether he was in breach of the order, and, thus, in contempt as alleged.⁶⁷³

Furthermore, regarding the mental element for civil contempt, what was traditionally required was to establish that the contemnor's conduct was intentional, but in the sense that what he actually did, or omitted to do, was not accidental;⁶⁷⁴ and, secondly, that he knew the facts which rendered it a breach of the relevant order.⁶⁷⁵ Yet, there was no need to show that the respondent realised that his conduct would constitute a breach; this means that liability for

⁶⁷² *Re Bramblevale Ltd* [1970] 1 Ch 128 (CA) 137 (Lord Denning MR); *Dean v Dean* [1987] 1 FLR 517 (CA) 520; Zuckerman (n 574) para 23.129; Eady and Smith (n 566) para 12-45; Jacob (n 625) 207.

⁶⁷³ *Mubarak v Mubarik* (No 2) [2007] 1 WLR 271 (Fam) 286 (Bodey J).

⁶⁷⁴ *VDU Installations Ltd v Integrated Computer Systems and Cybernetics Ltd* [1989] 1 FSR 378 (Ch) 394 (Knox J).

⁶⁷⁵ Eady and Smith (n 566) para 12-84.

civil contempt has been treated as though it were strict, that is to say, not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general.⁶⁷⁶

There is, however, at least one decision which coalesced the requirements for mens rea in civil and criminal contempt. This is *Irtelli v Squatriti* where the Court of Appeal said that in order for the appellants to be held liable in contempt, it had to be proved that they had the necessary intention to act in contempt of court.⁶⁷⁷ This approach, however, was not followed by later decisions. In *Masri v Consolidated Contractors Intl Co SAL*, Clarke J said:

In my judgment the power of the court to ensure obedience to its orders for the benefit of those in whose favour they are made would be inappropriately curtailed if, in addition to having to show that a defendant had breached the order, it was also necessary to establish, and to the criminal standard, that he had done so in the belief that what he did was a breach of the order—particularly when a belief that it was not a breach may have rested on the slenderest of foundations or on convenient advice which was plainly wrong.⁶⁷⁸

The intention with which the act was done, will, of course, be of the highest relevance in the determination of the penalty, if any, to be imposed by the court. The *bona fides* of contemnors and their reasons, motives, and states

⁶⁷⁶ *A-G v Times Newspapers Ltd* [1992] 1 AC 191 (HL) 217 (Lord Oliver); *Eady and Smith* (n 566) para 12-84.

⁶⁷⁷ *Irtelli v Squatriti* [1993] QB 83 (CA).

⁶⁷⁸ *Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm) [155] (Clarke J).

of mind, have long been recognised as relevant factors in mitigation.⁶⁷⁹ It seems, for example, that:

[N]o casual or accidental and unintentional disobedience of an order would justify either commitment or sequestration. Where the court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which negative any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, it would not take the extreme course of issuing an order either of commitment or of sequestration.⁶⁸⁰

Unlike in criminal contempt, where the court itself moves to punish persons who seek to frustrate the process of the court, the court generally has no power to punish of its own motion a person for non-compliance with its order: the party who obtained the order must apply to the court to punish the party who breached it for contempt.⁶⁸¹ However, the Attorney General may, as guardian of the public interest, from time to time have a legitimate role in safeguarding the authority of court orders obtained in civil litigation.⁶⁸² Also, where neither the litigant nor the Attorney General commences proceedings, the court itself may act of its own motion in exceptional cases of clear contempt, where it is urgent

⁶⁷⁹ See eg *Re Mileage Conference Group of the Re Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137 (Ch) 1162; Eady and Smith (n 566) para 12-97.

⁶⁸⁰ *Fairclough & Sons v The Manchester Ship Canal Co (No 2)* (1897) 41 Sol Jo 225.

⁶⁸¹ Ronan Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Bloomsbury Professional 2011) 326; Jacob (n 625) 207; Eady and Smith (n 566) para 12-6.

⁶⁸² *A-G v Times Newspapers Ltd* [1974] AC 273 (HL) 293 (Lord Reid), 326 (Lord Cross); *Re Jones* [2013] EWHC 2579 (Fam) [14] (Sir James Munby P); Eady and Smith (n 566) para 12-6.

and imperative for the contempt to be punished immediately, or in cases of past disobedience, where the offence is considered to be of a public nature.⁶⁸³

Regarding the penalties which may be imposed—cumulatively—for a civil contempt, these include imprisonment,⁶⁸⁴ a fine, and sequestration of property.⁶⁸⁵ The court also has power to bind 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.⁶⁸⁶

At common law, superior courts had the power to commit a contemnor to prison for an unlimited time. It was not uncommon, for example, for a person

⁶⁸³ *Re M and others (minors) (breach of contact order: committal)* [1999] 2 All ER 56 (CA); *Clarke v Chadburn* [1985] 1 All ER 211 (Ch) 215 (Sir Robert Megarry V-C); Michael Chesterman, 'Contempt: in the Common Law, but not the Civil Law' [1997] ICLQ 521, 543.

⁶⁸⁴ Until 1965 there were two methods whereby courts could imprison contemnors: committal and attachment. Since 1965 the relevant rules of court have provided only for committal. Eady and Smith (n 566) para 15-5. As Arlidge, Eady, and Smith explain, the primary distinction between committal and attachment, was that committal was enforced by the tipstaff (officer of the court) wherever the contemnor was to be found in the kingdom, whereas attachment was enforced by the sheriff only for the county in which the contemnor was located. Eady and Smith (n 566) para 15-6. See *Re Evans, Evans v Noton* where the distinctions were considered. *Re Evans, Evans v Noton* [1893] 1 Ch 252 (CA). According to John Fox, a writ of attachment, was a writ directing the sheriff to bring into court a person to answer for the contempt he was alleged to have committed. For a contempt done in court, the offender was committed to prison *instanter* by a judge's order and no attachment was necessary. John C Fox, 'Eccentricities of the Law of Contempt of Court' (1920) 36 LQR 394, 400. In the Court of Chancery the general principle was that a man was committed for doing a prohibited act, and attached for neglecting to do some act ordered to be done; in the common law courts, attachment was usually the appropriate remedy for most, but not all, forms of contempt. Eady and Smith (n 566) para 15-7.

⁶⁸⁵ Jacob (n 625) 208; Miller (n 557) 4.

⁶⁸⁶ Eady and Smith (n 566) para 14-1; Kay, Sime, and French (n 659) para 81.18; *Halsbury's Laws* (n 642) vol 22, para 115.

who had disobeyed a court order, or committed a contempt in the face of the court, to be kept in prison until he had ‘purged his contempt’⁶⁸⁷ by apology and an undertaking to obey the order of the court.⁶⁸⁸ The Contempt of Court Act 1981, however, abolished the unlimited prison sentence as a penalty for contempt in England and Wales. Section 14(1) now provides that the term of imprisonment may not exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.⁶⁸⁹

Although committal to prison can only be for a fixed term, the court has the power to order earlier discharge if the contemnor complies with the order.⁶⁹⁰ Thus, it may be argued that, essentially, the duration of the civil sentence is ultimately in the hands of the contemnor, not the court; in other words, civil contemnors ‘carry the keys of their prison in their own pockets’.⁶⁹¹ As Fleischer argues, this control justifies imposing greater sanctions for civil contempts than for criminal contempts. It also partly justifies the greater procedural safeguards in the criminal contempt process, since those found in contempt do not have the

⁶⁸⁷ A notion said to be ‘rooted in quasi-religious concepts of purification, expiation and atonement’. *Harris v Harris* [2001] EWCA Civ 1644; [2002] Fam 253 at [21]. The term ‘purging’ has been held to be ‘inapt’ for cases of criminal contempt. *R v Montgomery* [1995] 2 All ER 28 (CA) 34. See also on the matter of ‘purging’ *CJ v Flintshire BC* [2010] EWCA Civ 393; [2010] 2 FLR 1224 [6].

⁶⁸⁸ Ingman (n 638) 315; Eady and Smith (n 566) para 14-6.

⁶⁸⁹ See Andrew Burrows (ed), *English Private Law* (3rd edn OUP 2013) 1385.

⁶⁹⁰ Zuckerman (n 574) para 23.130.

⁶⁹¹ *Shillitani v United States* 384 US 364, 368 (1966) quoting *Re Nevitt* 117 F 448 (8th Cir 1902).

chance to end their imprisonment.⁶⁹² The main consideration for the discharge is whether the contemnor has been sufficiently punished for the contempt, although the court will also be concerned with whether the contemnor is likely to obey the court's order in the future, and whether the contemnor has shown suitable remorse.⁶⁹³

Fines for contempt may be for an unlimited amount. As a means of enforcing compliance, a fine may be imposed for each day of disobedience.⁶⁹⁴ As with criminal contempt, fines are payable to the state and are enforceable as money judgments.⁶⁹⁵ Fines for civil contempt, should be for an amount high enough to deter litigants from violating a court order. As Sellers LJ said:

It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes no more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it.⁶⁹⁶

A further remedy, not available in cases of criminal contempt, is a writ of sequestration under which the contemnor's property is placed temporarily in the

⁶⁹² Fleischer (n 592) 49.

⁶⁹³ *Enfield London Borough Council v Mahoney* [1983] 1 WLR 749 (CA). See also Stuart Sime, *A Practical Approach to Civil Procedure* (19th edition, OUP 2016) para 48.56.

⁶⁹⁴ Miller (n 557) 52; Zuckerman (n 574) para 23.130. See eg *Australian Meat Industry v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 (High Court of Australia) 107.

⁶⁹⁵ Contempt of Court Act 1981, section 16; Zuckerman (n 574) para 23.126, fn 204.

⁶⁹⁶ *A-G v Harris* [1961] 1 QB 74 (QB) 86 (Sellers LJ).

hands of sequestrators, who manage the property and receive the rents and profits from it until the contempt is resolved. Sequestration is regarded as a drastic remedy and one to be resorted to sparingly.⁶⁹⁷

As Kennett explains, the writ binds real and personal property from the time that it is issued, but creates no charge over land unless registered. The sequestrators, once they have taken possession of the property, they may apply to the court to sell or charge as security the sequestered property so that it can meet the demands of the person who issued the writ.⁶⁹⁸ Therefore, sequestration is both a sanction to compel enforcement, as well as a mechanism whereby an order is actually enforced.

As Ashburner explains, sequestrations date from the end of the sixteenth century in the Court of Chancery, and were regarded by successive chancellors as the most valuable weapon of the court. Sequestrations were used to enforce a decree. The sequestrators were entitled to possession of the property over which the sequestration was granted, and, if possession was denied to them, the court awarded a writ to put them in possession. At law, where a defendant was in custody, the plaintiff could have no other satisfaction during the defendant's life. Sequestrators, however, were often appointed to enforce a

⁶⁹⁷ *Halsbury's Laws* (n 642) vol 22, para 97; Ingman (n 638) 300; Zuckerman (n 574) para 23.132.

⁶⁹⁸ Wendy Kennett, *The Enforcement of Judgments in Europe* (OUP 2000) 296.

decree not only where the defendant could not be found, but also where he had been apprehended and refused to perform the decree.⁶⁹⁹

Another effective sanction for coercing compliance with a court order, deriving from canon law, was the practice that one who was in contempt might not be heard further for his own benefit in the same litigation, unless and until he had purged his contempt.⁷⁰⁰ In the words of Lord Brougham, '[i]t is a general rule of all Courts, that no party shall be allowed to take active proceedings, if in contempt.'⁷⁰¹ However, in *Hadkinson v Hadkinson*, Lord Denning said:

It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. (...) I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.⁷⁰²

⁶⁹⁹ Ashburner (n 627) 31.

⁷⁰⁰ Eady and Smith (n 566) para 12-68. See also Steven Gee, *Commercial Injunctions* (6th edn, Sweet & Maxwell 2016) para 20-035.

⁷⁰¹ *Curtis v Curtis* (1846) 13 ER 487, 489; 5 Moo P C 252, 256 (Lord Brougham).

⁷⁰² *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA) 574 (Lord Denning). This approach was accepted and approved by House of Lords in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) 46 (Lord Bridge) as being in accord with 'contemporary judicial attitudes to the importance of ensuring procedural justice'.

More recently, the House of Lords confirmed that the question should be approached on the basis of a discretion to be exercised flexibly, according to the circumstances, rather than on the basis of a rule. The modern, more flexible approach was echoed in the words of Lord Bingham in *Arab Monetary Fund v Hashim* where he indicated that the preferable course is to ask

whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.⁷⁰³

For sentencing purposes, the courts have articulated a number of factors such as whether the contemnor has ‘contumaciously’ flouted the law,⁷⁰⁴ whether the contemnor already received adequate punishment,⁷⁰⁵ whether he has purged his contempt,⁷⁰⁶ or whether his conduct or omission was deliberate or negligent.⁷⁰⁷ In *Crystalmews Ltd v Metterick*, Lawrence Collins J referred to the relevant factors as follows:

⁷⁰³ *Arab Monetary Fund v Hashim* [1997] EWCA Civ 1298. That formulation was approved by Lord Nicholls in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637 (HL) 641 (Lord Nicholls). In *Motorola Credit Corp v Uzan* (No 2) [2004] 1 WLR 113 (CA), Potter LJ said that ‘[i]t is clear that the right of access to the court which is implied in article 6 [of the ECHR] is not an absolute right but one that is open to restriction provided that the restriction has a legitimate aim in the public interest and that the means employed to realise that aim are proportionate. (...) The test of proportionality is to be applied on a case by case basis.’ 126 (Potter LJ). See also *Mubarak v Mubarak* (No 2) [2007] 1 WLR 271 (Fam).

⁷⁰⁴ See eg *Bhimji v Chatwani* (no 1) [1991] 1 All ER 705, [1991] 1 WLR 989 (Ch).

⁷⁰⁵ See eg *Re Barrell Enterprises* [1973] 1 WLR 19, [1972] 3 All ER 631 (CA).

⁷⁰⁶ See eg *Harris v Harris* [2001] EWCA Civ 1644, [2002] Fam 253.

⁷⁰⁷ See eg *Guildford BC v Valler* *The Times*, 15 October 1993 (CA).

The matters which I may take into account include these. First, whether the Claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy. Second, the extent to which the contemnor has acted under pressure. Third, whether the breach of the order was deliberate or unintentional. Fourth, the degree of culpability. Fifth, whether the contemnor has been placed in breach of the order by reason of the conduct of others. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach. Seventh, whether the contemnor has co-operated.⁷⁰⁸

f. Compliance with injunctions and freezing injunctions

Compliance with injunctions, as with other binding court orders, is enforceable by proceedings for contempt of court.⁷⁰⁹ Indeed, as J H Thornton suggested, contempt as a coercive instrument was the child of equity. Since equity operates in personam, breach of an order based on equity, such as an injunction, does not mean the breaking of a legal rule, but is an act in contempt of court.⁷¹⁰ This is a complete contradiction of that which the Romans declared impossible, ie to coerce a man into a certain behaviour, a principle which still exists in the civil law tradition, as it will be seen below.⁷¹¹

⁷⁰⁸ *Crystalmews Ltd v Metterick* [2006] EWHC 3087 (Ch) [13] (Collins J). For factors to take into account see also *Halsbury's Laws* (n 642) vol 22, para 112; *Burrows* (n 689) 1385.

⁷⁰⁹ *Martin v Bannister* (1879) 4 QBD 491 (CA); *Zuckerman* (n 574) para 10.7.

⁷¹⁰ Gary Watt, *Trusts and Equity* (OUP 2014) 447.

⁷¹¹ *Nemo potest praecise cogi ad factum* (Nobody can be forced to a specific act). See J H Thornton, 'Contempt as a coercive process. A review' (1946) 32 (5) *Virginia L Rev* 1010, 1021; Edward Dangel, *National Lawyer's Manual: Contempt* (National Lawyer's Manual Company 1939) 84.

Livingston maintains that coercive civil contempt is in large part equity's equivalent to the post-judgment enforcement mechanisms available at law. If a judgment creditor of a money judgment is entitled to effective enforcement of its judgment, even though he cannot be held in contempt, similarly, a successful applicant for an injunction should have the same ability to obtain relatively swift and certain enforcement of the court order in his favour. The plaintiff's interests must not be neglected since his need for an injunction may be urgent. An absence of coercive civil contempt would prevent plaintiffs from obtaining the relief in equity to which they are entitled.⁷¹²

As Jacob argues, the dire sanctions of contempt of court, breathes life into, and accounts for, the effectiveness of injunctions. The value of a right to a litigant is no greater than the available remedy, and the remedy, the injunction, is worth no more than its associated sanction, contempt.⁷¹³ There is no empirical evidence to show how many of the injunctions that are granted annually by courts are observed or breached, but the anecdotal evidence is that the great majority of them are duly complied with.⁷¹⁴ Lord Nicholls said in *A-G v Punch Ltd*:

⁷¹² Livingston (n 591) 404.

⁷¹³ Joseph Moskovitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43(6) Col LR 780, 780.

⁷¹⁴ Jacob (n 625) 133.

[I]f a[n] (...) injunction is to be effective the law must be able to prescribe appropriate penalties where a person deliberately sets the injunction at naught. Without sanctions an injunction would be a paper tiger. Sanctions are necessary to maintain the rule of law; in the language of the Convention [the ECHR], to maintain the authority of the judiciary. If the rule of law is to be meaningful, the decision of the court (...) must be respected.⁷¹⁵

As Kuloba suggests, an injunction must be obeyed to the letter. Whatever type of injunction it may be, whether it may have been erroneously or irregularly obtained, so long as it exists and is in plain and distinct language, which no one can reasonably misunderstand, it must be implicitly obeyed, and cannot be disregarded until discharged on a proper application for this purpose.⁷¹⁶

Courts, however, will not lightly hold that a contempt has been committed. As O'Connor J said in *P A Thomas and Co v Mould*, 'where parties seek the power of the court to commit people to prison and deprive them of their liberty there has got to be quite clear certainty about it.'⁷¹⁷ Thus, although persons are under a duty to comply strictly with the terms of an injunction, the courts will only punish a person for contempt, upon adequate proof that the terms of the injunction are clear and unambiguous and compliance was possible, that the

⁷¹⁵ *A-G v Punch Ltd* [2003] 1 AC 1046 (HL) 1054 (Lord Nicholls).

⁷¹⁶ Richard Kuloba, *Principles of Injunctions* (OUP 1987) 17.

⁷¹⁷ *P A Thomas and Co v Mould* [1968] 2 QB 913 (QB) 923 (O'Connor J).

defendant has had proper notice of such terms, and that there is clear proof that the terms have been broken by the defendant.⁷¹⁸

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.⁷¹⁹ 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.⁷²⁰

Firstly, 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.⁷²¹ The reason for this effect, is the principle that a person who, knowing of an injunction, aids and abets the party enjoined 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. The principle was established in *Seaward v Paterson* when one Edwin Murray was committed to prison for a month for putting on a boxing contest at 53 Fetter Lane, knowing that the under-lessee had been enjoined from holding on the premises boxing contests, which

⁷¹⁸ Cram, Borrie, and Lowe (n 578) 6.5.

⁷¹⁹ Gee, *Commercial Injunctions* (n 700) para 19-002.

⁷²⁰ *Z Ltd v A-Z and AA-LL* [1982] QB 558 (CA) 579; Brendan Kirwan, *Injunctions: Law and Practice* (Thomson Round Hall, 2008) 771; Sime, *A Practical Approach to Civil Procedure* (n 693) para 43.42.

⁷²¹ Kuloba (n 716) 19.

had been advertised under the name of meetings of the Queensberry Sports Club Ltd.⁷²²

Secondly, a third party who acts independently, impeding the administration of justice, ie by means which do not involve assisting the person named in the order to breach it, will also be in contempt of court. To establish such a contempt by a non-party, as stated in Blackstone's Civil Practice: The Commentary, it must be demonstrated both that the non-party's acts defeated the court's purpose in granting the injunction, and that the non-party appreciated that what he was doing was what the injunction was intended to prevent. There is no need to prove an intention to thwart the court's purpose.⁷²³

The analysis needs to be more focused when it comes to the relationship between a freezing order and the activities of a third party. The current general consensus, expressed by Kerr LJ in *Babanaft International Co SA v*

⁷²² *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 262, 265.

⁷²³ Kay, Sime, and French (n 659) para 37.73. See *A-G v Times Newspapers Ltd* [1992] 1 AC 191 (HL); *A-G v Punch Ltd* [2003] 1 AC 1046 (HL). See also Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* (Mohr Siebeck 2008) 165; Iain Goldrein, 'Commercial Litigation: Pre-emptive Remedies' (2nd edition, Sweet & Maxwell 2011) 5; Peter Devonshire, 'Freezing orders, disappearing assets and the problem of enjoining non-parties' (2002) 118 LQR 124, 124. A different situation may arise where an injunction is granted *contra mundum* (against the whole world). This jurisdiction is extremely limited. See *Venables and Thompson v News Group Newspapers Ltd* [2001] EWHC 32 (QB); Jeff Berryman, 'Injunctions contra mundum: The Ultimate Weapon in Containment' (2014) 26 Intellectual Property J 289.

Bassatne,⁷²⁴ is that freezing injunctions are orders made in personam⁷²⁵ against respondents, but they also have an effect on third parties, at least to those who have notice of the existence of the order.

First, a person who, knowing of a freezing injunction, aids and abets the party enjoined in breaching it, is guilty of contempt of court. The application of the *Seaward v Paterson* principle to freezing injunctions was considered in *Z Ltd v A-Z and AA-LL*. The efficacy of the order normally depends upon a bank who is not a party to the order freezing the defendant's assets. Lord Denning said the following:

[O]nce a bank is given notice of a Mareva injunction affecting goods or money in its hands, it must not dispose of them itself, nor allow the defendant or anyone else to do so—except by the authority of the court. If the bank or any of its officers should knowingly assist in the disposal of them, it will be guilty of a contempt of court. For it is an act calculated to obstruct the course of justice. As soon as the bank is given notice of the Mareva injunction, it must freeze the defendant's bank account. It must not allow any drawings to be made on it. The reason is because, if it allowed any such drawings, it would be obstructing the course of justice—as prescribed by the court which granted the injunction—and it would be guilty of a contempt of court.⁷²⁶

⁷²⁴ *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA) 25 (Kerr LJ).

⁷²⁵ Even though Lord Denning had said earlier in *Z Ltd v A-Z and AA-LL* that the Mareva injunction operated in rem just as the arrest of a ship does, and like the old process of foreign attachment in England and in the United States, and like the *saisie conservatoire* of civil law countries. *Z Ltd v A-Z and AA-LL* [1982] QB 558 (CA) 573 (Lord Denning MR).

⁷²⁶ *Z Ltd v A-Z and AA-LL* [1982] QB 558 (CA) 573.

Additionally, as in all injunctions, in *Z Ltd v A-Z and AA-LL*, the principle was held to be wider than simply aiding and abetting a person enjoined to breach the freezing order. Thus, it could be a contempt for a bank, knowing of the injunction, to dispose of the defendant's assets, even though the defendant had not himself been served with the order, and, therefore, had not himself committed any contempt to which the bank could be an accessory.⁷²⁷

Furthermore, as McGrath argues, a freezing order is a far more complex order than a simple injunction. Thus, it is crucial to clearly and unambiguously identify what the aim or purpose is behind the freezing order, so as to determine whether or not the conduct of the third party has interfered with that aim or purpose in a manner that undermines the due administration of justice. As explained in the previous chapter, a freezing order is not intended to provide security for judgment, but to prevent a respondent in wrongfully dissipating his assets, with the consequence that they would not be available to meet any judgment that might be obtained in the future. On this basis, if the third party facilitated or assisted the respondent wrongfully to dissipate his assets, that would be conduct which fell squarely within the ambit of interference with the due administration of justice.⁷²⁸

⁷²⁷ Cram, Borrie, and Lowe (n 578) para 6.16; Gee, *Commercial Injunctions* (n 700) para 10-030.

⁷²⁸ McGrath (n 598) 666.

As Arlidge, Eady, and Smith argue, freezing orders usually provide for withdrawals from bank accounts for living expenses and legal costs, and no bank need enquire as to the application or proposed application of any money withdrawn by the defendant, if the withdrawal appears to be permitted by the order.⁷²⁹ On the other hand, if the bank is aware of the genuine purpose for which funds are being withdrawn, and that purpose entails disobedience of the terms of the order, the bank could well be held to have assisted or connived at the wrongful act.⁷³⁰

4. Non-compliance with judicial orders in continental legal systems

a. The historical reasons behind the absence of contempt of court 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

⁷²⁹ Eady and Smith (n 566) para 12-151.

⁷³⁰ *Bank Mellat v Kazmi* [1989] QB 541 (CA); Eady and Smith (n 566) para 12-152.

contempt; the concept is simply unknown.⁷³¹ There are laws therein which prohibit interference with the administration of justice, but an overarching principle that significant interference with the administration of justice is punishable under a broad doctrine such as contempt is not to be found.⁷³² Courts in civil law countries manage without it.⁷³³

Civil law systems also have judicial penalties for non-compliance with court orders. However, comparing those, such as the French *astreinte* and the German *Zwangsgeld* and *Zwangshaft*, analysed in more detail below, with 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 found in the role that courts have had in the respective societies through the years. In other words, these ideological differences, and, consequently, the differences between the methods of ensuring compliance with court orders, are a product of history.

On the one hand, as Pekelis explains, the common law tradition has a strong moralistic character. The Court of Chancery in England, as explained in the first chapter, which had jurisdiction over all matters of equity, had its very

⁷³¹ Chesterman (n 683) 521.

⁷³² The Law Reform Commission (Australia), *Report no 35 (Contempt)* (Australian Government Publishing Service 1987) 17.

⁷³³ Martineau (n 580) 677.

origin in the aim to rectify 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, 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 thus reserved to the moral forum.⁷³⁴

Early in English history, the King was called the Vicar of God.⁷³⁵ James I, in his Defence of the Divine Right of Kings, declared that kings are the breathing images of God upon earth. They are not only God's lieutenants upon earth and sit upon God's throne, he said, but even by God himself they are called Gods.⁷³⁶ It is therefore no surprise that those features were transferred to judges, and that judges still remain today the 'priests' of justice.⁷³⁷ The implied

⁷³⁴ Alexander H Pekelis, 'Legal Techniques and Political Ideologies: A Comparative Study' (1943) 41 (4) Michigan L Rev 665, 676.

⁷³⁵ Jonathan F Scott, *Twilight of the Kings* (Reynal & Hitchcock 1938). See Goldfarb (n 568) 7.

⁷³⁶ Speech to the Parliament of 1609–10 found in Charles Howard McIlwain, *The Political Works of James I* (The Lawbook Exchange 2002) 307; Scott (n 735) 98.

⁷³⁷ '[O]ne soon discovers a persistent alternative view of the judge that casts him in the metaphorical role of a priest'. Philip Soper, 'Metaphor and Models of Law: The Judge as a Priest' (1977) 75 Michigan L Rev 1209. See also Larry Catá Backer, 'Retaining Judicial Authority: a Preliminary Inquiry on the Dominion of Judges' (2003) 12(1) William & Mary Bill of Rights J 117, 123: 'It is well understood that the relationship between Constitution and judge is

syllogism was this: if the Monarch represents the image of God on earth, and judges represent the King, then people have to obey judges as they represent God.⁷³⁸

With the rise of the feudal system in England, explains Goldfarb, accompanying the pre-eminence of royal power after the Norman Conquest, there developed manifestations of the idea of the complete ownership, authority, and power of the King. This was a step away from the sanctity of the leader, the priestly character of royalty, and the Christian concepts of obedience starting in Christian history with papal obedience,⁷³⁹ towards the more secular governments of the Middle Ages. The contempt power, however, is understandable when seen through the perspectives of its age of inception, an age of alleged divinely-ordained monarchies, ruled by a King totally invested with all sovereign legal powers and accountable only to God.⁷⁴⁰

The law of contempt, therefore, continues Goldfarb, has not been the law of men, it has been the law of kings. It did not emerge from legislators

often compared to that of scripture and priest'; Lewis H LaRue, 'How Not To Imitate John Marshall' (1999) 56 Washington & Lee L Rev 819, 836: 'Judges are priest, not prophets'.

⁷³⁸ Giabardo (n 550) 16.

⁷³⁹ The idea that obedience to divine commands was good, and disobedience sinful, has been traced to the assertions of the early Popes, as well as the emperors. See John Neville Figgis, *The Theory of the Divine Right of Kings* (2d edn, CUP 1922) 38; Goldfarb (n 568) 7.

⁷⁴⁰ Goldfarb (n 568) 7. Professional judges were eager to 'please their royal master'. Ralph V Turner, *The English Judiciary in the Age of Glanvill and Bracton, c 1176–1239* (CUP 1985) 294.

expressing the *vox populi*, but it rather evolved from the divine law of kings and its aspects of obedience and respect towards government bodies. This power was preserved and grew by men not adverse to the idea that the ruler must be obeyed at the risk of committing a punishable offense.⁷⁴¹

In contrast to this background of the common law tradition, sanctions for non-compliance with court orders in civil law jurisdictions have a very different history. In France, explains Chesterman, the role of the judiciary in the development of royal absolutism during the Ancient Regime, might well have conferred to it the status and prestige to inflict peremptory punishment, in the style of common law contempt, on those who challenged its authority. However, as it is forthwith explained, the continued existence of such powers was rudely shattered by the French Revolution, for which, as explained in the previous chapter, the judiciary was a special target.⁷⁴²

Useful historical information regarding sanctions for non-compliance in France is provided by John Dawson. In 13th century France, the royal courts were organised in a hierarchy: courts of first instance, intermediate courts of appeal, and high courts of appeal called *Parlements*, of which there came to be thirteen located in different regions of France. Courts of first instance were

⁷⁴¹ Goldfarb (n 568) 7.

⁷⁴² Chesterman (n 683) 555.

clearly empowered to order delivery of specific land or goods involved in litigation, to overcome resistance to such orders through direct action by their own officers, and to punish by fine and imprisonment persons who interfered. The judicial authority of the Crown was vested as a whole in royal judges, who clearly had power to use fines or imprisonment to ensure compliance with their commands. In their role as subordinate legislatures, the *Parlements* asserted in the clearest terms their powers to punish with fine or imprisonment, any disobedience by members of the public to whom their orders were directed.⁷⁴³

The commissions that approved the proposed draft of the Civil Code of 1804, accepted without debate Pothier's statement that, regarding obligations to do something, the obligor could only be forced to pay damages, for *nemo potest praecise cogi ad factum* (nobody can be coerced into a specific act).⁷⁴⁴ Although someone may argue that paying damages is also a specific act, the draftsmen of the Code, Dawson suggests, were uncritical in following Pothier, mainly because of the libertarian ideas that were still in circulation, and the reaction of the Revolution against arbitrary power unregulated by rules of law. But there was also a more specific distrust, a distrust of judges: the high courts

⁷⁴³ John P Dawson, 'Specific Performance in France and Germany' (1959) 57(4) Michigan L Rev 495. See also R Schlesinger and others *Comparative law: Cases, Text, Materials* (5th edn Foundation Press 1998) 235.

⁷⁴⁴ Robert Joseph Pothier, *A Treatise on the Law of Obligations, Or Contracts* (ed and tr, William David Evans, Butterworths 1853) vol 1, 192. Pothier's position was accepted even though 34 years had passed since his death. Ralph A Newman, *Equity and Law: A Comparative Study* (Oceana Publications 1961) 71. See also R Schlesinger and others, *Comparative law: Cases, Text, Materials* (5th edn Foundation Press 1998) 245.

of France before 1789 were oligarchies. Pothier's simple formulas had the virtue, if it was a virtue, of severely restricting judicial powers, both in applying the law, as well as enforcing the law.⁷⁴⁵

Accordingly, article 1142 of the French Civil Code of 1804 provided: 'Every obligation to do or not to do is resolved in damages in case of non-performance by the obligor'. The underlying idea of article 1142 of the French Civil Code is that, man being a free and responsible being, he should not be coerced by the state into behaving in a particular way.⁷⁴⁶

Nonetheless, a mode of coercion began to emerge in the decades after 1804. The judges serving under Napoleon were men who had been trained during the Ancient Regime, and they were apparently not ready to surrender the powers to command, that were a prominent feature of the old procedure described above. Within the first decade after 1804, there were reports of judgments rendered for fixed sums of money to be paid, unless within a specified period litigants performed certain acts. The question was raised before the Court of Cassation whether these judgments could be revoked when compliance occurred after the time limit started. The Court of Cassation approved such revocation, saying that the judgments could be held to be merely

⁷⁴⁵ Dawson (n 743) 510.

⁷⁴⁶ K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 474.

‘comminatory’, ie merely threats, and, the plaintiff should not recover more than the damages he had actually suffered, if there were any.⁷⁴⁷

Then, the objection was raised that French law did not authorise penalties for the misconduct, consisting of mere disobedience of a judicial order, especially not arbitrary penalties, that were fixed at the discretion of judges. The developing practice of cumulative money fines for disobedience allegedly violated the basic idea inherited from the Revolution, *nulla poena sine lege*, which means that nobody can be punished for doing something without a statute fixing a penalty for such behaviour. It was argued that the penalty was not enforceable, because a fine for violating a judicial order was a crime not included in the French Penal Code.⁷⁴⁸

The objection became more pertinent after the Court of Cassation suggested in 1857 that such judgments did not need to have any relation to the plaintiff’s injury. According to the Court, this was because the defendant’s unlawful resistance becomes a more serious wrong, and it is proper, in order to overcome it, to issue a judgment within the court’s discretion in accordance with the interests involved.⁷⁴⁹ Although confusion persisted in many court opinions, it

⁷⁴⁷ Dawson (n 743) 512. See also James Brodeur, ‘The Injunction in French Jurisprudence,’ 14 *Tulane L Rev* 211 (1940) 214.

⁷⁴⁸ Dawson (n 743) 513. See also Boris Kozolchyk, *Comparative Commercial Contracts: Law, Culture and Economic Development* (West Academic 2014) 1180.

⁷⁴⁹ D.57.1.215 (March 25, 1857), which as a child custody case.

became increasingly clear in the opinions of the Court of Cassation that the *astreintes*,⁷⁵⁰ as they were beginning to be called, a kind of private penalty payable by the defendant to the plaintiff for non-compliance, explained in more detail below, were purely threats, coercive in purpose, provisional, and revocable. The result was a strong reaction among doctrinal writers; some condemned the *astreinte* as wholly illegal.⁷⁵¹

The *astreinte*, however, was already too well entrenched in court practice to be threatened by these protests from academic sources. Even amongst academics, things started changing after an article by the well-known historian, Professor Esmein, writing in 1903.⁷⁵² He admitted that it was no longer possible to explain the *astreinte* as a form of damages under article 1142. He defended it, nevertheless, as a necessary means of reinforcing judicial authority. His appeal to history aimed to show that the *astreinte* was a revival of the historic *imperium* possessed by French courts, which emerged from the Roman law power vested in the praetor to see that justice was done to the people. Since this argument, standing alone, could not be accepted by French jurists, he

⁷⁵⁰ The term *astreinte* appeared in French law in 1889, in the Court of Cassation, although the procedure was known since 1809. Ralph Newman (n 744) 73; Nicola Catala, 'Astreintes in French Law' [1959] *Juridical Review* 163, 163. *Astreinte* is a French legal term that defies translation into English. It derives from the verb *astreindre* (from the Latin *stringere*) which means 'to compel' or 'to subject', and is used in French legal terminology in that sense. George E Glos, 'Astreinte in Belgian Law' (1985) 13 *Intl J of L Information* 17, 17.

⁷⁵¹ Dawson (n 743) 513.

⁷⁵² A Esmein, 'L 'Origine et la Logique de la Jurisprudence en Matiere d' Astreintes' [1903] 2 *Revue trimestrielle de droit civil* 5.

unearthed in the French Code of Civil Procedure a vague provision, the then article 1036, now article 24, which authorised courts of their own authority to impose injunctions, suppress writings, declare them defamatory, and order the printing and publication of their judgments. With the help of this article he asserted that damages employed as a means of constraint, were not penalties but merely an expression of judicial power to issue injunctions.⁷⁵³

By 1900, it was becoming clear that the *astreinte* could not be more than a provisional means of constraint that was revocable. This was why the penalty amounts could be so enormously inflated and could even be increased if disobedience continued.⁷⁵⁴ In the end, the *astreinte* would be 'liquidated' and reduced to simple damages. The only object of an *astreinte* was to break the defendant's resistance. If, however, a well advised defendant ignored the initial judicial order, and even the *astreinte*, the court would then only award damages

⁷⁵³ Dawson (n 743) 514; M P Michell, 'Imperium by the Back Door: The *Astreinte* and the Enforcement of Contractual Obligations in France' (1993) 51 U Toronto Faculty of Law Rev 250, 261.

⁷⁵⁴ In 1876, in the famous *Affaire de Bauffremont* case, explains Brodeur, the limit had seemed to be reached. The sum had become so enormous that no one could ever have paid it, and the defendant showed no intention to comply with the order. Princess Bauffremont was ordered to pay to her husband approximately one million gold francs for non-compliance with an order of the Court of Appeal of Paris regarding custody of their children. The decision was affirmed by the Court of Cassation. Cass Civ 18 March 1878, S 1878 1 193. James Brodeur, 'The Injunction in French Jurisprudence' (1939–1940) 14 Tulane L Rev 211, 215. See also Mauro Cappelletti (ed), *International Encyclopedia of Comparative Law* (Mohr Siebeck and Martinus Nijhoff 2014) vol XVI, 109.

up to the amount of the harm caused by non-compliance. Therefore, the *astreinte* was an empty threat since it was not a final judgment for damages.⁷⁵⁵

In 1927, when the Court of Cassation was directly presented with the question whether effectively punitive damages could be granted where no compensable losses were proved, it emphatically denied that such damages were justified under French law. Thus, prior to 1940, although French law shifted increasingly to the use of the *astreinte* as its primary mode of enforcing promises, the *astreinte* was necessarily revocable, a simple threat, that faded away to the extent that it exceeded the amount of compensation, if it was not ambiguous enough to intimidate the recipient into compliance.⁷⁵⁶ But what was the point of a threat that faded away?

The effectiveness of the *astreinte* was unexpectedly tested by events following World War II. The problem stemmed from a severe housing shortage, aggravated by the population movements caused by the war. Owners of residential property secured eviction orders against those whose occupation turned out to be illegal, wartime refugees, and other hold-over tenants. However, the administration refused to issue the necessary documents and authorise the use of local police. Enforcement of eviction orders was thus

⁷⁵⁵ Dawson (n 743) 515. See also James Brodeur, 'The Injunction in French Jurisprudence' (1939–1940) 14 *Tulane L R* 211, 215.

⁷⁵⁶ Dawson (n 743) 516.

paralysed all over France. Exasperated by the weakness of the executive and by what they believed to be a betrayal for political advantage, the courts undertook to enforce their own eviction orders by using the *astreinte*.⁷⁵⁷

The crisis seemed great enough to some to threaten the legal order itself. The academic profession rallied in support of the courts. The view of Esmein now prevailed. No one seriously believed that the power to issue 'injunctions', tucked away in the Code of Civil Procedure, had been originally intended to convey much more than the power to maintain courtroom order. In any case, it plainly offered the only hope of preserving the respect for judicial authority, which the weakness of the executive had undermined.⁷⁵⁸

Nevertheless, it was a great shock to discover that the whole technique was anyway most ineffective when needed most. Tenants all over France, who should have been evicted, remained in possession, secure in the knowledge that ultimately the owner could recover no more than damages. The more the courts expressed their exasperation by pushing the money awards higher and higher, the more secure the tenants would be. Therefore, the trial courts shifted to another approach, declaring that their money awards were final judgments for damages. At this point, the legislature intervened, siding with the executive, and

⁷⁵⁷ John P Dawson, 'Specific Performance in France and Germany' (1959) 57(4) Michigan L Rev 495, 519.

⁷⁵⁸ Dawson (n 743) 520.

passed the statute of 21 July 1949, which declared that every *astreinte* attached to an order for eviction from housing was necessarily merely comminatory, and must be reduced to simple damages after the tenant had finally left.⁷⁵⁹

However, it was generally agreed that in practice, where some damages were proved, the judges would throw something extra into their final liquidation against disobedient defendants. This additional sum was sometimes called a 'moral prejudice', ie what the plaintiffs had suffered through seeing court orders flouted. Yet, it was also agreed that punitive damages were intolerable, thus, whatever money penalties were imposed had to be disguised as damages, though these damages could be rigorously assessed based on the notion that civil liability has a repressive, as well as a compensatory function.⁷⁶⁰ The decisions after 1950 came to roughly the same result. The Court of Cassation had repeatedly said that an award of damages must be justified. It announced that it will not tolerate in civil judgments any private penalty that the Court itself is able to detect.⁷⁶¹

Since punitive damages were inadmissible under French law, says Dawson, someone may wonder why money fines payable to the state as punishment, rather than to the private party, were not imposed whenever a

⁷⁵⁹ *ibid* 521.

⁷⁶⁰ D.1948.35 and Sem. Jur. 1951. Doctrine 910.

⁷⁶¹ Dawson (n 743) 522.

court order was not complied with. The draftsmen of a revised Code of Civil Procedure included such a proposal in an early draft. A critic of this proposal, writing in 1953, expressed the view that penalties, regardless of to whom they are paid, are arbitrary and cannot be subjected to any kind of definite rule. It did not seem advisable, the critic said, to require the state thus to intervene between the judgment debtor and the judgment creditor, when a simple measure of constraint, the *astreinte*, so readily—of course, in his own opinion only, since the *astreinte* had obviously failed in its purpose—assured performance.⁷⁶²

To sum up the foregoing, while fines and imprisonment were widely used to enforce court orders in France under the Ancient Regime, the reaction of the Revolution against arbitrary penalties must in part be explained by the extensive and unrestrained power of French courts before 1789.⁷⁶³ It seems, therefore, that there is nothing congenital about Frenchmen that makes them prefer weakness or paralysis of judicial authority. Indeed, on 20 October 1959, the Court of Cassation established the proposition that *astreinte* damages awarded to put pressure on the defendant to comply, can be enforced even if they exceed the amount of loss actually caused to the plaintiff by the breach of an

⁷⁶² Dawson (n 743) 523. See also P Kayser, 'L' astreinte judiciaire et la responsabilité civile' (1953) 51 *Revue trimestrielle de droit civil* 209, 243–244; Zweigert and Kötz (n 746) 479.

⁷⁶³ Dawson (n 743) 534.

order.⁷⁶⁴ The Court said that since the *astreinte* was basically a means of compulsion, the defendant's financial means and the reasons for his resistance to the court's mandate could properly be taken into consideration. In 1972, as it will be explained below, these developments were confirmed by legislation.⁷⁶⁵

Conversely, in medieval England, as Chesterman explains, with the royal justices appearing to local communities to represent the Monarch in rendering once-and-for-all justice in open court between disputing citizens or between the state and alleged offenders, it was natural for acts constituting a challenge to their authority, to be interpreted as challenges to the authority of the Monarch, and, thus, be summarily and severely punished. While during the last 400 years the monarch ceased to enjoy absolute power,⁷⁶⁶ and Parliament was elevated to a position of legislative sovereignty, the aura and prestige of the superior court judge was not significantly diminished by these developments. There was no single traumatic revolutionary event, as happened in France, which, with its anti-judicial ideology, disturbed the continuity of the special status and prestige

⁷⁶⁴ *Soc X v P* Cour de Cassation Cass Civ 20 October 1959, [1959] DJ 537, 538.

⁷⁶⁵ Arthur Taylor von Mehren and James Gordley, *The civil law system: an introduction to the comparative study of law* (2nd edn, Little Brown 1977) 1121, fn 91; Konstantinos D Kerameus, 'Enforcement of non-money Judgments and Orders in a Comparative Perspective' in James A R Nafziger and Symeon S Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T Von Mehren* (Transnational Publishers 2002) 111; Peter Herzog and Martha Weser, *Civil Procedure in France* (Springer 2014) 558.

⁷⁶⁶ In a symbolic way, however, all these can still be seen today: Members of the English judiciary act in the Queen's name, the courts are the Queen's Courts, and judges are Her Majesty's judges. Giabardo (n 550) 15.

of judges as the declarers, and to a significant extent the makers, of the law, and as the dispensers of justice. As it turned out, the contempt powers of judges were not impaired by the demise of absolutist royal authority.⁷⁶⁷

The contrast between the French and the German treatment of coercing the enforcement of judgments is one among many demonstrations of the differences between civil law systems. Despite their long exposure to ideas derived from Roman law, each civil law system is the product of independent and conscious choices, since each has drawn important values and objectives from the history of the society it purports to regulate.⁷⁶⁸

Indeed, the Germans who drafted and adopted the Civil Procedure Code in the 1870's, made a conscious choice between the claims made before them in favour of individual freedom, and those in favour of an essential kind of societal obedience. They concluded that even the severest penalty, personal arrest, which had been eliminated for other breaches of civil duty, was—although very rarely—justified in order to protect private rights conferred by law and established after fair hearing. The adequacy test adopted by the German draftsmen, explained in more detail below, seems rational: bodily arrest and

⁷⁶⁷ Chesterman (n 683) 553.

⁷⁶⁸ Dawson (n 743) 525.

money fines shall be used as modes of coercion only when all other measures will be inadequate.⁷⁶⁹

b. Compliance mechanisms in Germanic legal systems

The current legal framework of sanctions against non-compliance with court orders in Germany and France will now be examined. German law, Jann explains does not have any distinct concept of contempt of court as found in the common law world, nor does an equivalent term for contempt of court exist in the German legal language. The German judge does not possess the wide powers of punishment for contempt of court, which in the common law are given to a judge. However, German courts do have certain powers which could be considered similar to a common law court's judicial function to punish for contempt.⁷⁷⁰

The execution proceedings, continues Jann, involve steps that resemble the common law civil contempt procedures and are designed to enforce the civil rights or remedies established in the trial by some form of constraint. The state, and, by extension, courts, however, have much less interest in vindicating their

⁷⁶⁹ Dawson (n 743) 534. All the preceding paragraphs in this section, where the article by Dawson is cited in the end, are mainly a summary of the information provided in that article. The author's name is not mentioned in every paragraph so that the flow of the text is not interrupted.

⁷⁷⁰ Edmund Jann, 'Contempt of court in Western Germany' (1959) 8 American U L R 34, 34.

authority than in common law countries. Rather, the state puts certain elements of its power at the disposal of the creditor, to force the debtor to fulfil his obligations.⁷⁷¹

German law provides for remedies, called *Geldstrafen*, which can be compared to the consequences of the common law contempt of court on two occasions, and both concern the enforcement of non-money judgments.⁷⁷² The first is when the judgment debtor does not perform an action which depends exclusively on him and cannot be taken by a third party (*unvertretbare Handlung*, section 888 of the 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).⁷⁷³

Upon an application by the judgment creditor, in the case of section 888, the court can order the payment of a coercive fine (*Zwangsgeld*), in the case of section 890, an administrative fine (*Ordnungsgeld*), and, in either cases,

⁷⁷¹ Edmund Jann, 'Contempt of court in Western Germany' (1959) 8 American University L R 34, 40.

⁷⁷² Ulla Jacobsson and Sir Jack I H Jacob, 'Trends in the enforcement of non-money judgments and orders: the First International Colloquium on the Law of Civil Procedure' (Kluwer Law and Taxation Publishers 1985) 40.

⁷⁷³ Moreover, another provision that punishes an act which would be punishable under contempt of court and is more relevant in the context of asset preservation orders, is section 136 of the German Criminal Code (*Strafgesetzbuch* or StGB). This provision stipulates that whoever destroys, damages, or entirely or in part removes an object under lien or otherwise under official seizure, shall be liable to imprisonment or fine. However, no reference of this provision having been used for the purposes of an *Arrest* is made in the literature as it is the case with contempt proceedings for the violation of freezing injunctions in English law.

coercive detention (*Zwangshaft, Ordnungshaft*), or both fine and detention. The detention may not be for a period longer than six months for each violation of an order. Furthermore, in the case of section 890, the detention may not be for a total period longer than two years. In all instances, fines for each violation are also limited to a maximum amount, but the total amount may be unlimited. Fines are paid to the state.⁷⁷⁴ In Germany, a creditor of a non-money judgment has no ability to receive money if the debtor disregards the judgment as is the case with the French *astreinte*, unless he is able to prove damages in fresh proceedings.⁷⁷⁵

As Remien and Paulus explain, in Germany, any other means of enforcing a non-money judgment, have priority over coercive measures. Any indirectly coercive measure, ie fines and detention, are only permissible when there is no possibility of direct enforcement. Coercion against the person of the judgment debtor should be as minimal as possible. In general, although they are theoretically available, German law tries to refrain from coercive measures

⁷⁷⁴ Zweigert and Kötz (n 746) 474; J Zekoll and M Reimann (eds), *Introduction to German Law* (Kluwer Law International 2005) 383; Ralph Newman, *Equity and Law: A Comparative Study* (Oceana Publications 1961) 75; Edmund Jann, 'Contempt of court in Western Germany' (1959) 8 *American U L Rev* 34, 41; Howard D Fisher, *The German legal system and legal language* (Clarus Press 2013) 224.

⁷⁷⁵ Peter F Schlosser, 'Jurisdiction and international judicial and administrative co-operation' in Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 2001) vol 284, 159. A debtor will not receive money either in the context of contempt proceedings under English law in the case of a breach of an order.

which aim to change a person's will.⁷⁷⁶ The use of civil fines is also used in other legal systems belonging to the Germanic family, but has in fact ultimately found a restricted application in those jurisdictions as well.⁷⁷⁷ Moreover, another important characteristic 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.⁷⁷⁸

But what does the ZPO specifically provide for the enforcement of an asset preservation order? One could argue that for the enforcement of final judgments, both monetary and non-monetary, at least in concept, Germany and England use quite similar procedures. However, they differ significantly in the enforcement of provisional and protective measures and, thus, asset preservation orders. Contrary to English law, which, as Kennett explains, has devised enforcement mechanisms for provisional and protective measures different from those of final judgments, the commonest approach for the enforcement of provisional and protective measures in most legal systems is for procedural codes simply to refer to the procedures used for the execution of—

⁷⁷⁶ Oliver Remien, *Rechtsverwirklichung durch Zwangsgeld* (Mohr 1992) 10; Christoph Paulus, *Zivilprozessrecht* (5th edn, Springer 2013) paras 672, 889, 894.

⁷⁷⁷ Kennett (n 698) 291.

⁷⁷⁸ Gerhard Dannemann, *An Introduction to German Civil and Commercial Law* (British Institute of International and Comparative Law 1993) 106.

final—judgments identifying, where relevant, the modifications therein that apply to provisional and protective measures. This is also the case in Germany.⁷⁷⁹

Specifically, section 928 of the ZPO indicates that the rules governing the enforcement of a judgment (sections 803ff of the ZPO) also apply to the enforcement of an *Arrest*. Section 930 of the ZPO further provides that an *Arrest* of movable assets, including money which is the matter here examined, is effected by way of attachment as described in sections 803ff of the ZPO.⁷⁸⁰ Thus, an *Arrest* is enforced on the basis of a money judgment. Attachment is a procedure whereby compulsory enforcement against movable assets is effected. It is directed against the asset itself and the debtor can no longer dispose of the asset.⁷⁸¹ Consequently, a legal basis for contempt of court-type penalties such as fine or imprisonment, is totally lacking with regard to *Arrest* since it is not an order to perform or refrain from doing an action, but rather an order to block specific assets.⁷⁸²

⁷⁷⁹ Kennett (n 698) 164. See also Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 131.

⁷⁸⁰ Howard D Fisher, *The German legal system and legal language* (Clarus Press 2013) 224; Stefan Rützel, Gerhard Wegen, and Stephan Wilske, *Commercial Dispute Resolution in Germany* (2nd edn, C H Beck 2016) 114.

⁷⁸¹ Zekoll and Reimann (n 774) 381.

⁷⁸² Peter F Schlosser, 'Jurisdiction and international judicial and administrative co-operation' in *Hague Academy of International Law* (n 775) vol 284, 159.

As Professor Harald Koch explains, the function of a freezing injunction is virtually the same as that of an *Arrest*, but the two remedies differ in one very important aspect: the *Arrest* is enforced by attachment in rem, instead of an indirect threat of punishment in personam, ie contempt of court. He argues, however, that a freezing injunction-type of order with sanctions similar to those of contempt of court, could be possible in Germany through the use of an injunction (*Einstweilige Verfügung*), which is provided by section 935 of the ZPO, whereby the respondent may theoretically be ordered to refrain from dissipating his property. In that case, if the respondent does not comply with the injunction, then a fine or imprisonment may be imposed under sections 888 and 890 of the ZPO.⁷⁸³

As a rule, an *Arrest* order operates in rem. The targeted asset is directly attached and any transaction by the debtor related to the asset that violates the order, is deemed to be invalid against the judgment creditor. The basis for this rule is found in sections 135 and 136 of the BGB, which regulate prohibitions against disposal set by statute or ordered by a court. It is provided that the disposition of assets in violation of a restraint of alienation, is invalid against the protected person, in this case against the judgment creditor. This is contrary to

⁷⁸³ Harald Koch, 'Grenzüberschreitender einstweiliger Rechtsschutz' in Andreas Heldrich and Toshiyuki Kono (eds), *Herausforderungen des internationalen Zivilverfahrensrechts* (Mohr 1994) 99. Schlosser disagrees that this is possible, but says that it should be possible for an *Arrest* to be accompanied by an injunction ordering the respondent to disclose the existence and location of assets and to refrain from dealing with them. Peter F Schlosser, 'Coordinated Transnational Interaction in Civil Litigation and Arbitration' (1990) 12 Michigan J Intl L 150, 160.

the common law approach where freezing orders to refrain from dissipating assets operate in personam, and any transaction disposing of the frozen asset remains legally possible, and is, in most of the times, perfectly valid.⁷⁸⁴

Section 930 ZPO provides that the creditor of an *Arrest* order obtains a security interest—basically a lien—over the seized assets, which has the effects set out in section 804. According to that provision, the priority principle applies, meaning that any claims on the specific asset are enforced according to their respective ranking depending on when the seizure takes place, if, of course, the debtor subsequently obtains judgment on the merits.⁷⁸⁵ This approach contrasts with that adopted by the common law. There, a freezing injunction confers no security interest on the asset, nor does it create any rights in rem,⁷⁸⁶ and leaves issues of priority among creditors untouched.⁷⁸⁷

⁷⁸⁴ Burkhard Hess, 'Minimum Procedural Standards for Enforcement of Provisional and Protective Measures at European Level' in Mads Andenas, Burkhard Hess, and Paul Oberhammer (eds), *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) 267; Peter F Schlosser, 'Jurisdiction and international judicial and administrative co-operation' in Hague Academy of International Law (n 775) vol 284, 160, 170. In common law jurisdictions, actions done in defiance of an injunction, may rarely be void. See eg *Clarke v Chadburn*, where a purported change of rules by the National Union of Mineworkers, in contravention of an injunction against the union making the change, did not validly alter the rules. *Clarke v Chadburn* [1985] 1 All ER 211 (Ch).

⁷⁸⁵ See William Tetley, 'Arrest and other Maritime Law Procedures' (1998-1999) 73 Tulane L Rev 1895, 1956; Peter F Schlosser, 'Jurisdiction and international judicial and administrative co-operation' in Hague Academy of International Law (n 775) vol 284, 197.

⁷⁸⁶ An unsecured creditor cannot convert himself into a partially secured creditor merely by bringing an action against an alleged debtor, and then, pending the outcome of the action, seeking to freeze his assets by injunction. *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA, The Siskina* [1979] AC 210 (HL) 261 (Lord Hailsham); *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966 (CA) 974 (Buckley LJ); Andrew Dickinson, 'English Private International Law Aspects of Provisional and Protective Measures' in Andenas, Hess, Oberhammer (n 784) 288; Neil Andrews, *Andrews on Civil Processes*

Moreover, as Schlosser explains, since contempt of court committed by persons not individually addressed by a court order does not exist in Germany, the impact of *Arrest* orders on third parties, is only that which a money judgment and ensuing attachments would have. In order to facilitate execution proceedings, the judge granting an *Arrest* may simultaneously attach the claims of the debtor against third parties. Specifically, section 829 of the ZPO, which applies pursuant to section 930, provides that in cases in which a monetary claim is to be attached, the court is to prohibit a third-party debtor from making a payment to the debtor. Should a claim against a third party (eg a bank) be blocked by a court order pursuant to an *Arrest*, any payment made by the third party to the *Arrest* debtor is not valid against the *Arrest* creditor, by virtue of sections 135 and 136 of the BGB.⁷⁸⁸

(Intersentia 2013) 590; Sheridan (n 597) 213; FD Rose 'The Mareva Injunction—Attachment in Personam—Part 1' [1981] 1 LMCLQ 1, 1. Thus, a freezing injunction usually allows a defendant who is engaged in trade to pay any legitimate trade debts as they would be paid in the ordinary and proper course of his business, and the philosophy behind this is that a freezing injunction is not intended to confer priority over other trade creditors. A defendant should be allowed to pay a trade debt, if the defendant is acting in good faith and in the ordinary course of business, even if the debt is not strictly enforceable. *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65 (QB); Kay, Sime, and French (n 659) para 38.23.

⁷⁸⁷ *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (Comm). See Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004).

⁷⁸⁸ Paul F Schlosser, 'Jurisdiction and international judicial and administrative co-operation' in Hague Academy of International Law (n 775) vol 284, 160. See also C Kessedjian, 'Note on provisional and protective measures in private international law and comparative law' (Hague Conference on Private International Law, Prel Doc No 10 of October 1998, 1998) 24.

c. The French *astreinte*

French law also possesses no law of contempt of court for compelling compliance with court orders and has had to develop other mechanisms for the enforcement of judgments and other court orders.⁷⁸⁹ 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. The origin of the *astreinte* was explained above. But how exactly does it operate? 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.⁷⁹⁰ The *astreinte* is basically a private remedy

⁷⁸⁹ John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (OUP, 2008) 116. See also Catherine Elliot, Eric Jeanpierre and Catherine Vernon, *French Legal System* (2nd edn, Pearson/Longman 2006) 183; Bernard Schwartz, *The Code Napoleon and the Common-law World* (The Lawbook Exchange Ltd 1998) 129; Horatia Muir Watt, 'Injunctive Relief in the French Courts: a Case of Legal Borrowing' [2003] CLJUK 573, 575. As Chesterman explains, the absence of a general doctrine of contempt of court from French law does not mean that conduct which at common law is punishable as criminal contempt will never attract a penal sanction under French law. Many of the forms of conduct which the common law treats as criminal contempt, would, if committed in France, constitute an offence under one or more provisions of the French Criminal Code or Code of Criminal Procedure. For example, article 434-25 of the Criminal Code establishes a broad offence of seeking publicly, by acts or spoken or written words, to cast discredit on an official act done in the administration of justice, or on a judicial decision, in such circumstances as to undermine the authority or the independence of the system of justice. Chesterman (n 683) 532. Moreover, as regards civil contempt, and within the context of asset preservation orders, article 314-6 of the Criminal Code Code provides that the destruction or misappropriation, by a person whose property is attached, of an object attached, while in his possession to secure the rights of a creditor and entrusted to his keeping or to the keeping of a third party, is punishable by imprisonment and fine. However, as with the equivalent provision in German law, no reference of this provision having been used for the purposes of a *saisie conservatoire* is made in the literature.

⁷⁹⁰ Chesterman (n 683) 545.

that the defaulting party will have to pay to the aggrieved party and not to the state.⁷⁹¹

Up to 1972, the law of *astreinte* was judge-made and was initially employed as a method of ensuring compensation for the injured party, and only gradually developed into a more independent legal device. Its final separation from damages came about with the law of 1972 which was later amended by Law 75-596 of July 9, 1975, then by Law 91-650 of 9 July 1991, and finally by Law 92-755 of 31 July 1992. The *astreinte* is now regulated by the French Code of Civil Enforcement Procedures (*Code des Procédures Civiles d'Exécution*, '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, and attempts to ensure execution of this by threatening the judgment debtor with the forfeiture of a sum of money, if he does not comply.⁷⁹² Put differently, the *astreinte* is more a pressure than a

⁷⁹¹ George A Bermann and Etienne Picard (eds), *Introduction to French Law* (Kluwer Law International, 2008) 234.

⁷⁹² George E Glos, *Astreinte in Belgian Law* (1985) 13 Intl J of L Information 17, 17. See also Edward Yorio and Steve Thel, *Contract Enforcement: Specific Performance and Injunctions* (Aspen Publishers Online 2011) 24-13.

sanction, intended to achieve enforcement of a court order, which may be awarded to the plaintiff together with, and on top of, actual damages.⁷⁹³

According to article L131-1 of the CPCE, an *astreinte* is ordered at the request of the judgment creditor or on the court's own initiative and—strangely for a civilian law jurisdiction—it is purely at the discretion of the court.⁷⁹⁴ Its original area of application, is the execution of judgments ordering non-delegable performances or prohibitions, but it may also be imposed to enforce a judgment for a sum of money.⁷⁹⁵

There are two kinds of *astreinte* as Bermann explains. One, the more frequently used, is the provisional (*provisoire*) *astreinte*. Here, the judge may readjust the initial amount after the end of a certain period. The *astreinte* is definitive (*définitive*), if the judge, from the start, announces that he will not revise the initial amount, and that this will be collected if the order is not complied with, unless the judgment debtor shows a case of force majeure. The

⁷⁹³ Konstantinos D Kerameus, 'Enforcement of non-money Judgments and Orders in a Comparative Perspective', in Nafziger and Symeonides (n 765) 112.

⁷⁹⁴ See Bell, Boyron, and Whittaker (n 789) 117, George E Glos, 'Astreinte in Belgian Law' (1985) 13 *International J of Legal Information* 17, 19.

⁷⁹⁵ Mauro Cappelletti (ed), *International Encyclopaedia of Comparative Law* (Mohr Siebeck and Martinus Nijhoff 1972) vol XVI, 109. See also Peter Herzog and Martha Weser, *Civil Procedure in France* (Springer 2014) 562; Cappelletti, *International Encyclopedia of Comparative Law* (n 754) vol XVI, 16; Kennett (n 698) 291.

choice between the two kinds of *astreinte* is in the discretion of the court.⁷⁹⁶ According to article L131-2 of the CPCE, a definitive *astreinte* can only be imposed after the court has already imposed a provisional *astreinte*.⁷⁹⁷

Following the developments in the literature and the jurisprudence, as those were described above, since the *astreinte* was a threat designed to induce the judgment debtor to co-operate, it was finally decided that the amount he was threatened with having to pay, should not be limited to the harm suffered by the creditor, but should depend on the probable recalcitrance of the debtor and his capacity to perform.⁷⁹⁸ Today, article L131-2 of the CPCE, which regulates the *astreinte*, provides accordingly that the imposition of an *astreinte* is independent of any award of damages. Based on this provision, the *astreinte* is regarded as an independent instrument which operates in its own right to secure enforcement of a judgment.

Where a provisional *astreinte* is imposed together with a judicial order, the court which granted it—or a different court (the *juge de l'exécution* (the execution judge))—must later be asked to liquidate it with a further judgment, in

⁷⁹⁶ Bermann and Picard (n 791) 234. See also Edward Yorio and Steve Thel, *Contract Enforcement: Specific Performance and Injunctions* (Aspen Publishers Online, 2011) 24-13; Marie-Laure Niboyet and Sabine Lacassagne 'France' in Adenas, Hess, Oberhammer (n 784) 161; Chesterman (n 683) 545; Peter Herzog and Martha Weser, *Civil Procedure in France* (Springer 2014) 558; Zweigert and Kötz (n 746) 474.

⁷⁹⁷ Kennett (n 698) 291.

⁷⁹⁸ Zweigert and Kötz (n 746) 474.

the event that the order is breached, ie set the overall amount that the defendant will be called upon to pay.⁷⁹⁹ In reviewing the amount, it may decide to increase or decrease it in light of the defendant's behaviour and the difficulties encountered in complying with the judgment as article L131-4 of the CPCE provides.⁸⁰⁰

The possibility, however, that the plaintiff may be unjustly enriched because the amount awarded significantly exceeds the loss caused by the delay in compliance, has caused some concern.⁸⁰¹ Moreover, as Chesterman notes, whilst this award is accumulating as the disobedience becomes more serious, it may well be effective when the disobeying party has assets which may be seized in execution to satisfy it. But if the disobeying party has dealt

⁷⁹⁹ Peter Stone, *EU Private International Law* (2nd edn, Edward Elgar 2010) 227; Maxence Bloch, 'France' in Peter Kaye (ed), *Methods of execution of orders and judgments in Europe* (Wiley 1996) 100.

⁸⁰⁰ In the Case No 15-17028 Cour de Cassation Chambre civile 2, 23 June 2016, the Court said that the judge had disregarded the legal nature of the *astreinte* by deciding to merely order the payment of damages for the obligation in question without ascertaining whether non-payment of the initial order was not because of a difficulty in the execution of the order. In Case No 15/06054 Cour d'Appel de Rouen Chambre de la Proximité, 29 September 2016, although a building permit was issued, the defendants built at least three meters within foreign land. A judgment was issued to demolish the illegal construction along with an *astreinte*. The Court said that the *astreinte* can be abolished in whole or in part if it is established that the failure or delay in the execution of the judge's initial order is attributed, in whole or in part, to an external cause. However, in this case, the existence of an earlier building permit was not an external cause preventing the execution of the judgment. Therefore, the Court said that there was no reason for non-compliance other than the desire of the defendant not to respect the court's decision, and, therefore, the *astreinte* should be liquidated. Finally in Case No 15-13122 Cour de Cassation Chambre civile 2, 17 March 2016, it was held that negotiations between the parties before the initial judgment was issued, were not a reason not to comply with it, and, thus, not susceptible to be taken into consideration in assessing the behaviour of the debtor in liquidating an *astreinte*.

⁸⁰¹ Zweigert and Kötz (n 746) 479

with his assets in such way as to keep them out of the reach of execution procedures, there is usually no ‘back-up’ sanction, such as imprisonment, that can be deployed.⁸⁰²

Let us now turn to the matter of enforcing an asset preservation order in France, ie a *saisie conservatoire*. According to article L521-1 of the CPCE, both tangible and intangible assets may be frozen, and these are directly attached by the applicant for a *saisie conservatoire*. According to article L523-1, where the assets are monies owed by a third party to the debtor, including sums deposited by the debtor in a bank account, which is the issue under consideration here, the creditor who first attaches such assets will obtain a privileged right in rem over the funds similar to a pledge—although in this context it would be more accurate to refer to a lien—as regulated in the Civil Code.⁸⁰³ In the Civil Code (articles 2333ff), it is provided that, where there are several pledges on a single asset, the creditors are ranked in the order of their inscriptions in a special registry. A *saisie conservatoire* on funds held by third parties, is therefore executed in the same way as a money judgment would. The first creditor to

⁸⁰² Chesterman (n 683) 545. See also Mads Andenas and Renato Nazzini, Market Integration, The Harmonization Process, and Enforcement Practices in the EU Member States in Adenas, Hess, Oberhammer (n 784) 99; George E Glos, ‘Astreinte in Belgian Law’ (1985) 13 Intl J of L Information 17, 26.

⁸⁰³ Paul de Drée, ‘France’ in Lawrence W Newman, *Attachment of Assets* (Juris Publishing Inc 2014) FRA-13.

obtain a *saisie*, if he is successful in obtaining an enforceable judgment against the defendant, basically obtains priority over others who obtain one later.

As mentioned above, *astreintes* may be used to enforce both money and non-money judgments. Moreover, they can be used in both provisional and protective, as well as final judgments.⁸⁰⁴ Therefore, a *saisie conservatoire*, being an in rem—essentially, a money judgment—protective order, may be combined with an *astreinte*.⁸⁰⁵

The *astreinte* has gradually been adopted in other jurisdictions that have come under the influence of French law.⁸⁰⁶ It is the general consensus among French jurists that the *astreinte* is successful in inducing personal compliance by the defendant.⁸⁰⁷ Through the complicated technique of the *astreinte*, it is put forward that French law fumbled its way to an approximate counterpart of the English civil contempt.⁸⁰⁸ A closer analysis, however, not only shows that in

⁸⁰⁴ Chesterman (n 683) 544.

⁸⁰⁵ Burkhard Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Study No JAI/A3/2002/02, Heidelberg, 2004) 121; Burkhard Hess 'Minimum Procedural Standards for Enforcement of Provisional and Protective Measures at European Level' in Adenas, Hess, Oberhammer (n 784) 267.

⁸⁰⁶ Kennett (n 698) 291.

⁸⁰⁷ Ralph Newman (n 744) 74.

⁸⁰⁸ L Neville Brown, 'Some contemporary problems in the English law relating to contempt of court' (1974) 15(4) *Les Cahiers de Droit* 741, 752. See also Michele Taruffo, *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (Kluwer Law International 1999) 210.

reality its role is altogether incomparable with that of the sanction for contempt, but also illuminates the deep contrast in the political approach taken in the area of enforcement.⁸⁰⁹

5. The advantages and disadvantages of introducing contempt of court into EU law

a. Sanctions against non-compliance in EU law

Before discussing advantages and disadvantages of sanctions against non-compliance with court orders, one needs to look beyond general theory and examine how the different methods work in practice. To do so, it would be useful to consider an example of a fairly typical situation after an EAPO is issued. Let us suppose that a plaintiff domiciled in the Netherlands, files a claim in the Netherlands against two defendants, one domiciled in Ireland and one in Germany, for €2 million in damages, and has evidence which show that there is a risk that the defendants will transfer all their funds (each defendant owns €1 million), located in bank accounts in their countries, to bank accounts of third parties. Therefore, he obtains EAPOs in the Netherlands to preserve these bank accounts located in Ireland and in Germany. The defendants have to meet

⁸⁰⁹ Pekelis (n 734) 666.

mortgage repayments on the houses they have bought, they are buying office supplies on credit, and they also have to pay for business rent, living expenses, and for obtaining legal advice for the purposes of the EAPO.

In Ireland, which is a common law jurisdiction that follows the English law as regards asset preservation orders,⁸¹⁰ the order, as explained above, will operate in personam against the defendant and no security interest will be created on the bank account. The Irish defendant will almost certainly comply with the order because of the threat of imprisonment; if the order is violated, contempt proceedings will follow. The defendant, as explained above, will probably be allowed to continue paying his business rent, living expenses, and legal fees out of the frozen account. Moreover, neither the mortgagee nor the unsecured creditors will file proceedings against the defendant because the defendant will be allowed to continue paying his mortgage repayments from the frozen account as being within his ordinary living expenses, as well as pay his debt for office supplies, being a trade debt incurred before the EAPO, in the ordinary and proper course of his business.

⁸¹⁰ See eg Thomas B Courtney, *Mareva Injunctions and Related Interlocutory Orders* (Bloomsbury Professional 1998); Keane (n 681) 313ff; Law Society of Ireland, *Civil Litigation* (OUP 2013) 286ff; Klaus Reichert and Peter Shanley, 'Ireland' in Lawrence Newman (n 803) IRE-1ff. The Irish law on asset preservation orders, has developed alongside English law, and, further, owing to the overwhelming similarity between the banking laws of Ireland and the United Kingdom, it is thought more than likely that lines of reasoning in respected English cases would be followed in Ireland also. Claire Callanan, 'The obtaining of Mareva Injunctions in Ireland' (1994) 9 JIBL 273, 279.

In Germany, the chances of compliance with the order will be less, because severe sanctions for non-compliance are not readily imposed. If the order is violated, the plaintiff will have to file proceedings to void the transaction which breached the order. Moreover, the German defendant will not be allowed to request any amounts to be exempt from the order as in Ireland, but instead, only a relatively small amount will be immune from attachment. This could cause him to lose the roof over his head, while the existence of his business will be put at risk, as he will not be able to pay for business rent and office supplies out of the frozen account. Finally, the mortgagee and the unsecured creditors of office supplies will immediately file proceedings against the defendant to protect their position, and this will most probably cause insolvency to the defendant. To conclude, it is evident that the EAPO is a fundamentally different remedy when it is used to preserve an account in Ireland than it is when used to preserve an account in Germany; in other words the treatment of the defendants will be different depending on the Member State in which they happen to live and work.

EU law does not provide for any EU-wide sanctions for non-compliance with court orders. However, sanctions against non-compliance should be of interest to EU law. Article 81(1) of the TFEU provides that the EU shall develop judicial co-operation in civil matters having cross-border implications, and that such co-operation may include the adoption of measures aimed at, inter alia, ensuring the mutual enforcement of judgments. Therefore, sanctions to enforce compliance with judgments in cross-border cases is a matter that could be regulated on an EU-wide basis.

As indicated above, in common law systems, civil contempt does not constitute a criminal offence. Moreover, fines ordered to secure compliance with a court order are not considered to be ‘criminal’ under article 6 of the ECHR. However, very few Member States would allow the imposition of imprisonment and heavy fines in cases of violation of an order in civil proceedings, unless the latter constitutes a criminal offence which carries with it those sanctions. Article 83(2) of the TFEU, extends Union competence to establish minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal law proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.⁸¹¹ As Mitsilegas explains, by the introduction of Article 83(2) TFEU in the Treaty of Lisbon, criminal law is perceived as a means to an end, the end being the effective implementation of Union policies. Criminal law is thus used as a tool to achieve the effectiveness of EU law.⁸¹² On this basis, the violation of an EU law court order could—and should—be established as a criminal offence, and its sanctions defined.

⁸¹¹ See Steve Peers, *EU Justice and Home Affairs Law* (OUP 2012) 774; Takis Tridimas, ‘Competence after Lisbon: The elusive search for bright lines’ in Diamond Ashiagbor, Nicola Countouris, and Ioannis Lianos (eds), *The European Union After the Treaty of Lisbon* (CUP 2012) 70; Valsamis Mitsilegas, ‘EU Criminal Law’ in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (John Wiley & Sons 2016) 532.

⁸¹² Valsamis Mitsilegas, ‘Transnational Criminal Law and the Global Rule of Law’ in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2016* (OUP 2017) 71.

At present, EU law recognises sanctions against non-compliance, but only deals with their enforcement from one Member State to another. Specifically, as regards the enforcement of non-fixed monetary penalties for default of compliance with a court order, article 55 of the Brussels I Regulation (recast) provides: ‘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 translation uses the term *astreinte* and the German text the term *Zwangsgeld*. As Gerhard notes, it seems that the Regulation uses terms that are clearly anchored in national law (*‘astreinte’, ‘Zwangsgeld’*) or descriptive (*‘payment by way of a penalty’*). This diversity in wording is unsurprising as sanctions against non-compliance are not found in all EU countries.⁸¹³

The above provision implies that a court which had jurisdiction on the merits, also has jurisdiction to issue a sanction for non-compliance, even though it concerns an extra-territorial order.⁸¹⁴ The jurisdiction to pronounce an extra-

⁸¹³ Frank Gerhard, ‘The extraterritorial judicial penalty—new instrument for the transnational enforcement of extraterritorial injunctions?’ in Petar Sarcevic and Paul Volken, *Yearbook of Private International Law* (Walter de Gruyter, 2001) vol III, 265. See also Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) 511; Emmanuel Guinchard, ‘Procédures individuelles d’exécution’ in Emmanuel Guinchard and Tony Moussa, *Droit et Pratique des Voies d’Exécution* (8th edn, Dalloz 2015) 2124.

⁸¹⁴ Article 24 of the Brussels I Regulation (recast) states: ‘The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (...) (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced’. However, if enforcement is sought by a sanction against non-compliance issued by the Member State which has jurisdiction on the merits, the success of enforcement does not only depend on the authority it is to be enforced by

territorial penalty further implies that an injunction to be enforced in a foreign Member State may be accompanied by a penalty, regardless of whether the imposition of sanctions against non-compliance is unknown in the foreign state.⁸¹⁵ The sovereignty of the foreign state is protected by its recognition rules and by the fact that the enforcement of the sanction will take place pursuant to the rules applicable at the place where the coercive measure is to be effectively implemented.⁸¹⁶ It is argued that sanctions for non-compliance may also be

at a later time. See Frank Gerhard, 'The extraterritorial judicial penalty—new instrument for the transnational enforcement of extraterritorial injunctions?' in Petar Sarcevic and Paul Volken (eds), *Yearbook of Private International Law* (Walter de Gruyter 2001) vol III, 277.

⁸¹⁵ See Matthias E Storme, 'Harmonisation of Civil Procedure and Its Interaction with Substantive Private Law' in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser Press 2012) 147. He is suggesting that there should be a rule in every legal system, stating that nothing in the rules on civil procedure forbids national courts from applying such rules of the foreign law granting remedies, that the court would not grant under its own law in respect of similar legal relationships. As pointed out by Biehler, in *De la Vega v Vianna* (1830) 1 Barn & ad 284, the plaintiff, a Spaniard, had the defendant, a Portuguese, arrested in England for non-payment of a debt contracted in Portugal. The defendant claimed that he should be released on the ground that in Portugal, imprisonment for debt had been abolished by statute in 1774. The then Chief Justice of England and Wales, Lord Tenterden, held that the defendant should remain in prison on the basis of the following reasoning found in page 288: 'A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subject of this kingdom are entitled to.' Without employing the terminology of procedure and substantive law, the rationale of the decision is that everyone subject to the jurisdiction of the forum is also subject to its sanctions, no matter how severe or illegal they may be under the applicable law of the case, which here was Portuguese. The intentions of the applicable law embodied in the statute of 1774 were certainly frustrated. See Gernot Biehler, *Procedures in International Law* (Springer 2008) 9.

⁸¹⁶ Frank Gerhard, 'The extraterritorial judicial penalty—new instrument for the transnational enforcement of extraterritorial injunctions?' in Petar Sarcevic and Paul Volken (eds), *Yearbook of Private International Law* (Walter de Gruyter 2001) vol III, 277. See also Kennett (n 698) 300.

granted by the Member State to which the order is addressed based on article 41 of Brussels I Regulation (recast).⁸¹⁷

In any case, although it may be logical that the imposition of sanctions for non-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 should not have its own uniform procedure for enforcing EU-wide court orders which are granted based on EU legislation. It is argued that the lack of a common set of sanctions in all Member States for non-compliance with orders based on EU legislation, creates confusion and renders EU-wide court orders less effective.⁸¹⁸ An illustration of this situation is the EAPO regulation, which, as explained above does not impose any specific sanctions for not complying with an order and it is to be enforced by virtue of the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement.⁸¹⁹ Moreover, considering that, because of the lack of a uniform

⁸¹⁷ The provision stipulates in paragraph (1) that: 'Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed.'

⁸¹⁸ The argument that the current state of affairs in this area of EU law must change, is reinforced by the UNIDROIT Principles of International Commercial Contracts of 2010 which in article 7.2.4 contain an explicit 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. The UNIDROIT Principles have chosen the model of the French *astreinte*.

⁸¹⁹ Thus, as explained above, if, for example, an EAPO is made in Germany preserving a bank account in Ireland, which is a common law jurisdiction, and the respondent violates the order, he may be held in contempt. If the order is made in Ireland, preserving a bank account in Germany, and the respondent violates the order by removing the funds, the transaction will be invalid against the applicant. Theoretically, though, as also explained above, based on the

system of sanctions against non-compliance, the enforcement of judgments is undermined, it seems that it is not just effectiveness that is undermined, but justice too.

b. Difference of form or of substance?

Based on what has been said so far, let us attempt to compare the character of the common law contempt of court power with the equivalent mechanisms in civilian legal systems. It may be argued that the difference between civil contempt in the common law systems and civilian methods of enforcement is more one of form than of substance, since both systems are providing for sanctions as a means of carrying out enforcement of court orders, particularly civil fines payable either to the plaintiff or to the state. In reality, however, the philosophical basis of the methods against non-compliance with court orders in the two systems remains very different, and this is owed to the nature of the contempt of court doctrine.⁸²⁰

Brussels I Regulation (recast), the court which issued the order, could also impose sanctions available in its legal system to be enforced in the Member State of enforcement.

⁸²⁰ Law Reform Commission (Australia), *Report no 35 (Contempt)* (Australian Government Publishing Service 1987) 17.

Contempt of court is an ideologically-loaded notion.⁸²¹ The most striking difference between common law and the continental legal systems regarding execution, says Kerameus, is that the former considers the enforcement of a judgment or judicial order as a matter of high public interest, and, thus, non-compliance triggers heavy sanctions against the contemnor. This is not the case in the continental systems.⁸²² As Lord Diplock said:

There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity[.]⁸²³

Since there is a public interest in seeing judicial orders being enforced, civil contempt cannot be considered merely a method by which individual litigants can enforce orders in their favour.⁸²⁴ To view civil contempt of court as mainly serving the plaintiff's interest, as in civil law countries, would misunderstand the real nature of this institution.⁸²⁵ The court has an interest, on behalf of the community at large, in ensuring that orders are not disobeyed at

⁸²¹ Giabardo (n 550) 10.

⁸²² Konstantinos D Kerameus, 'Enforcement of non-money Judgments and Orders in a Comparative Perspective', in Nafziger and Symeonides (n 765) 115.

⁸²³ *A-G v Times Newspapers Ltd* [1974] AC 273 (HL) 308 (Lord Diplock).

⁸²⁴ *Eady and Smith* (n 566) para 12-5.

⁸²⁵ Giabardo (n 550) 11. As Wasserman said, although a defendant who violates a freezing injunction may be held in contempt and subject to imprisonment, the sanction will not be available merely for failing to satisfy the final money judgment; it will not be akin to imprisonment for debt. Rather, the defendant will be sanctioned for violating a court order. Rhonda Wasserman, 'Equity renewed: Preliminary injunctions to secure potential money judgments' (1992) 67 *Washington L Rev* 257, 324.

the whim of one party.⁸²⁶ In other words, as indicated above, contempt of court reflects the court-centred approach of the common law as distinct from the plaintiff-centred approach of the civil law.⁸²⁷ It has been said that:

[C]ivil contempt bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest.⁸²⁸

In a remarkable article in 1943, Alexander Haim Pekelis wrote that the individualistic character of the common law is frequently asserted, for which it is sometimes praised, but also sometimes condemned. Individualism is defined as a particular type of relationship between individuals and society, where their respective interests are balanced at a point relatively favourable to the individual. As Pekelis suggested, the aggregate of the means and devices used by a society in order to enforce upon the individual the laws of that society, may be indicative of the degree of individualism existing in that society. In other words, a comparison between the different techniques of enforcement used in

⁸²⁶ Eady and Smith (n 566) para 12-5.

⁸²⁷ Law Reform Commission (Australia), *Report no 35 (Contempt)* (Australian Government Publishing Service 1987) 17.

⁸²⁸ *Halsbury's Laws* (n 642) vol 22, para 67. The summary was quoted with approval in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195 (Ch) 198 (Cross J).

the common law systems and in the civil law systems, may be significant in this investigation.⁸²⁹

It may be said, argues Pekelis, that in the civil law countries, the relation between the courts and the parties is in general far less close, less intimate, than in the common law world. The very concept of contempt, simply does not belong to the world of ideas of a continental lawyer. It just does not occur to him that the refusal of the defendant to deliver to the plaintiff a painting sold to the latter, a purely private matter between plaintiff and defendant, may, as soon as a judicial order is issued, become a matter to a certain extent personal to the court, and that the court may feel hurt, insulted, 'contemned', because its order has been neglected or wilfully disobeyed.⁸³⁰

Instead, Pekelis continues, the civil law conception of the means of enforcement is of a far more mechanical or formalistic character. The court itself is one of the cogs of the mechanism of justice. The court says that the painting belongs to the plaintiff and the defendant does not comply with the order? Very well, let him try to get it. The plaintiff—through the enforcement officer—may look for the painting which should be in the possession of the defendant. If he is lucky enough to find it, he has won. The court may not ask where the defendant

⁸²⁹ Pekelis (n 734) 666. The article was also published in Alexander H Pekelis, *Law and Social Action: Selected Essays of Alexander H[aim] Pekelis* (Cornell UP 1950).

⁸³⁰ Pekelis (n 734) 668.

put the painting. The common law solution here, namely, to send the judgment debtor to jail until he chooses to deliver the painting, simply does not occur to the civilian lawyer. His first reaction to this common law practice is generally: 'Don't you think that this kind of punishment is a little too severe for a simple refusal to deliver?' The answer of the common lawyer, which only adds to the astonishment of the civil lawyer, is that there is no criminal punishment involved; this is simply civil contempt, and the proceeding is not a criminal one. He 'just' disobeyed the court.⁸³¹

In his article, Pekelis concludes that the legal reality of the common law, does not substantiate the contention of the individualistic character of the common law technique, at least in the negative sense of the term. On the contrary, the strength of the enforcement devices and the public character of the disobedience of a court order, if compared with the analogous legal institutions of the civil law countries, seem to suggest that common law systems possess rather a more collectivistic than individualistic character.⁸³²

Overall, although compensation may generate a coercive impact, the compensatory nature of the French measures against non-compliance, which produces additional benefit for the enforcing litigant, reinforces the private

⁸³¹ Pekelis (n 734) 668.

⁸³² Pekelis (n 734) 685.

character and purpose of enforcement, and does not place them in the public law sphere, or suggest concern for the authority and general efficacy of law. In general, as Giabardo says, the idea that non-compliance with court orders represents, in some ways, an offence to the court, is simply foreign to the civil law jurist's eye. In civil law jurisdictions, what happens after the final judgment, is conceived as a private matter between the parties, and coercive measures have been developed only as means to guarantee performance of obligations.⁸³³ The success or failure of procedures for enforcement, Chesterman argues, is essentially a matter of significance for the enforcing party only. It is not considered that the court itself has any interest of its own to assert, by virtue of which it should seek to impose its will on the disobeying party.⁸³⁴

But why is the violation of a judicial order in the common law a matter of public interest? The common law ideology upholds that social cohesion depends upon the authority and effectiveness of court orders, and a court that could not secure compliance with its own judgments is a contradiction in terms.⁸³⁵ Moreover, the idea exists that the only way by which compliance with judgments can be secured is through contempt of court powers, and, therefore,

⁸³³ Giabardo (n 550) 13.

⁸³⁴ Chesterman (n 683) 550.

⁸³⁵ Giabardo (n 550) 10.

as it has been said, a court without contempt power is not a court.⁸³⁶

The sanctions to compel compliance with judges' orders in the civil law systems, are never regarded as ways to vindicate the court's authority or dignity.⁸³⁷ On the other hand, Chesterman suggests, the high prominence which the contempt doctrine gives to the protection of judicial authority, explains the stance that courts can and should impose their will on disobeying parties, even when the dispute giving rise to the disobedience is a purely private one. The rhetoric is one of making judgments effective for the sake of litigants generally, not merely for the enforcing party in the particular case, and affirming the authority of courts generally within the community.⁸³⁸ Cases in common law jurisdictions which examine the contempt power, all take for granted that the order of society's affairs dictates that this power is inherent in judges, and that all individuals sacrifice some portion of their civil liberties to this end when they adopt their social contract.⁸³⁹

An immediate practical consequence of the differences between common law contempt and equivalent provisions in the civil law systems, continues

⁸³⁶ Lawrence N Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, (1998) 72 *St John's L Rev* 337, 342.

⁸³⁷ Giabardo (n 550) 4.

⁸³⁸ Chesterman (n 683) 551.

⁸³⁹ Goldfarb (n 568) 2.

Chesterman, is that, members of the public, are arguably more likely in common law countries to be aware of the possible consequences of defying judicial authority, or of interfering in some other way with the administration of justice. A fear of being held in contempt for violating a court order does not exist within the public consciousness in the civil law world, even though people probably realise that they might in some way be on dangerous ground if, for instance, they insult a judge or disrupt a court hearing.⁸⁴⁰ The regime of civil contempt transcends the field of the enforcement, by exalting the function of courts within society at large.⁸⁴¹

Another interesting observation is that, generally, in a civil law jurisdiction, private and criminal law are understood as two well separated legal fields that never overlap. In France, it does not seem possible to commit a civil litigant to prison for violating a court order; in Germany, that is theoretically possible, but even then it is very rarely used. In the common law, Mann suggests, substantial areas of overlap exist between civil and criminal law. Almost every attribute associated with one category appears in the other, such as imprisonment and fines. Between these two categories, there has always been a middle ground in which the legislature and courts sought punitive ends through nominally civil proceedings, such as criminal penalties where court orders in civil proceedings

⁸⁴⁰ Chesterman (n 683) 547.

⁸⁴¹ Konstantinos D Kerameus, 'Enforcement of non-money Judgments and Orders in a Comparative Perspective', in Nafziger and Symeonides (n 765) 117.

are disobeyed.⁸⁴² On the contrary, the criminal penalties do not seem necessary in civil proceedings in civilian jurisdictions. The assumption is that orders based on individuals' property are sufficient for enforcing judgments, and, thus, ensuring compliance.⁸⁴³

These major ideological differences between the civil law and the common law legal families in the area of enforcement are attributable inter alia, as also stated above, to differing positions of the judiciary in the structure of state power.⁸⁴⁴ There is indeed a connection, or, at least, an influence between the, most of the times, zero tolerance for disobedience with judicial orders expressed by the contempt of court doctrine, and the image, or the social perception, of common law judges.⁸⁴⁵ In Max Weber's sociological account of legal development within different societies, individual common law judges were said to have maintained a notable level of personal authority. Weber quoted Blackstone's description of them as 'the living oracles',⁸⁴⁶ and considered the

⁸⁴² Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) *The Yale L J* 1804, 1871. See also John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (3rd edn, Stanford UP 2007) 123.

⁸⁴³ Merryman and Pérez-Perdomo (n 842) 54. See also Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd 2007) 50.

⁸⁴⁴ Chesterman (n 683) 553.

⁸⁴⁵ Giabardo (n 550) 14.

⁸⁴⁶ *Bl Comm* vol 1, 68.

prestige of individual judges to be a significant factor.⁸⁴⁷ Any image of the individual judge in the common law world might be thought to 'lie deeper in the consciousness of civilisation than the image of the lawmaker'.⁸⁴⁸ Thus, the status of the common law judge, cannot be extraneous to the development of the doctrine of contempt of court.⁸⁴⁹

As Merryman and Pérez-Perdomo explain, the common law judge, being an authority figure, may employ the civil contempt power to order people to act or refrain from acting and punish them if they refuse. The whole proceeding is permeated by a moralistic flavour. In the civil law tradition, by way of contrast, as also described in the previous chapter, judges are important public servants, but they lack anything like the measure of authority possessed by the common law judge.⁸⁵⁰ For one thing, the common law position is inconsistent with the demand for certainty; it gives the judge a great deal more power than civil

⁸⁴⁷ Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Harvard UP 1954) 86, 316.

⁸⁴⁸ Cyril John Radcliffe, *Not in Feather Beds: Some Collected Papers* (Hamish Hamilton 1968) 271.

⁸⁴⁹ Gilles Cuniberti, *Grands systèmes de droit contemporains* (3rd edn, LGDJ 2015) 109 ('[l]a stature du juge anglais n'est peut-être pas étrangère au développement d'une institution propre aux droits de Common law sanctionnant la désobéissance aux ordres judiciaires.').

⁸⁵⁰ It can be maintained that in jurisdictions such as France and other jurisdictions which follow the French model, where a penalty payment flows into the plaintiff's purse instead of the public purse, the legislature may want to signal to citizens that the judge is not the key player in the procedure and that the function of the judiciary in civil law is more a provider of adjudicatory services to the public rather than the enforcement agent vested with exclusive state powers. Willem H van Boom, 'Comparative notes on injunction and wrongful risk-taking' (2010) 17(1) *Maastricht J of Eur and Comparative L* 10, 27.

lawyers think judges ought to have. The civil law tradition is more thoroughly secularised, less moralistic, and more immune to the ethics of the time and place.⁸⁵¹

Over a period of several hundred years, common law judges have enjoyed virtually unchallenged powers to lay down broad principles as to what conduct should be deemed punishable as contempt on the ground that it constitutes interference with the administration of justice, what special procedures for trial should apply in contempt cases, and what sanctions should be imposed.⁸⁵² Common law judges have proclaimed, without encountering significant opposition from other organs of government, or from the community at large, that they possess inherent powers, the justification being that they are essential for the protection of the administration of justice. Judges in civil law jurisdictions have largely been denied such powers.⁸⁵³ The equivalent provisions in civil law jurisdictions are the work of the legislature, and any attempt by a judge to exercise any law-making power on these issues, would be regarded as unconstitutional.⁸⁵⁴

⁸⁵¹ Merryman and Pérez-Perdomo (n 842) 54, 123.

⁸⁵² Chesterman (n 683) 547.

⁸⁵³ Chesterman (n 683) 556.

⁸⁵⁴ Chesterman (n 683) 551.

Another fundamental difference between the two traditions in the area of enforcement is the target of court orders. While common law judicial orders often act in personam, the idea which dominates the civil law, as mentioned above, is that no one can be compelled to act. In other words, there is a belief under a philosophical cloak, that courts cannot use personal coercion on a man to force him to act in a certain way.⁸⁵⁵ This eliminates enforcement in personam, and, therefore, the civil law tradition tends to operate solely in rem. The lack of a power to act in personam, explain Merryman and Pérez-Perdomo, affects every aspect of civil proceedings in the civil law tradition. The power to compel the production of documents and other evidence, or to subject a party or the party's property to inspection, is much weaker than it is in common law jurisdictions. Judicial remedies in civil proceedings are restricted almost entirely to remedies that can be enforced against the property of the defendant or acts that can be performed by a third person and charged to the defendant.⁸⁵⁶

In every society, Pekelis notes, you can punish a man because he *did* something. But in many societies, there is a doubt whether it is proper to punish him in order to compel him to *do* something which theoretically he has a choice whether to do it or not. In other words, the question is whether society has an enforceable claim over someone's specific behaviour and autonomy. For

⁸⁵⁵ Pekelis (n 734) 673.

⁸⁵⁶ Merryman and Pérez-Perdomo (n 842) 123.

everywhere that a contempt sanction exists the answer is 'yes'; where it is missing, the answer is 'no'.⁸⁵⁷

The contempt sanction, continues Pekelis, which is directed against the respondent's person, has its severity determined not by that of the wrong committed or the injury inflicted, but by the expected resistance and the need to bend the reluctant will. The legal significance of punishment is in its etiological character, whereas that of the contempt sanction is in its teleological aspect. Coercion is not a secondary aspect of the sanction, but represents its essential and exclusive function, conditioning and shaping its structure. The sanction for civil contempt stands alone as a pure enforcement device. Its sole and avowed purpose is that declared impossible by continental law, ie to coerce a man into a certain behaviour.⁸⁵⁸

From the above comparison it emerges that there is a remarkable difference in approach between the two legal families regarding coercive enforcement of a court order. This difference is reflected in the area of asset preservation orders as well. The most striking difference is that in civil law systems, sanctions for violating an order do not have the rationale of protecting the administration of justice and the fundamental supremacy of the law, as the

⁸⁵⁷ Pekelis (n 734) 673; As Cremonini noted, there is a difference between a rule which says 'jail if you do this' and a rule which says 'jail *until* you do this'. Carlandrea Cremonini, 'An Italian Lawyer Looks at Civil Contempt—From Rome to Glastonbury' (1984) 3 CJK 133, 161.

⁸⁵⁸ Pekelis (n 734) 674.

contempt of court mechanism does in the common law. Another remarkable difference, is that asset preservation orders, and, thus, sanctions for contempt of court, in the common law operate in personam while the equivalent sanctions in the civil law operate in rem.

It is suggested that these features of the doctrine of contempt of court, which stem from the law of equity, make it a much more suitable mechanism for the enforcement of asset preservation orders, compared to the equivalent measures found in the civil law. This is mainly because the severe penalties for contempt, almost always ensure compliance with judicial orders, and their public character cultivates respect for law and order in general. On the other hand, contempt of court may sometimes go too far, and, therefore, it must be used with caution by setting a very high threshold for imprisonment and imposing fines according to the defendant's behaviour and individual circumstances. All these are analysed below.

c. The effectiveness of contempt of court over other sanctions against non-compliance

The rationale of all coercive means to secure enforcement, is to make non-compliance with a judicial order less advantageous than compliance.⁸⁵⁹ In other

⁸⁵⁹ Giabardo (n 550) 3.

words, to threaten a sanction for non-compliance that outweighs the perceived benefits of obedience.⁸⁶⁰ Nevertheless, as Kerameus said, there are not always clear, effective, and legitimate methods of curbing other peoples' will: you can lead a horse to water, but you can't make it drink.⁸⁶¹

A strong argument against the contempt of court power is that non-compliance with a court order does not have much in common with a criminal offence, and, therefore, criminal-type penalties should not be used to punish it. Although it is obviously important to ensure that courts' decisions are respected by the parties, the argument goes, this does not justify such a 'powerful' and 'heavy-handed' enforcement mechanism as contempt of court.⁸⁶²

Another argument against the contempt of court function is that it is unnecessary. Goldfarb wonders whether without such a power, courts would be merely impotent boards of arbitration without any control or effect. The Supreme Court of the United States, he argues, has never exercised the contempt power, and it has been one of the most effective, powerful, and dignified tribunals around the world. Is this not, he asks, an example of respect and efficacy

⁸⁶⁰ Mads Andenas and Renato Nazzini, 'Market Integration, The Harmonization Process, and Enforcement Practices in the EU Member States' in Andenas, Hess, Oberhammer (n 784) 99.

⁸⁶¹ Konstantinos D Kerameus, 'Enforcement of non-money Judgments and Orders in a Comparative Perspective', in Nafziger and Symeonides (n 765) 108.

⁸⁶² Pierre Tercier, *Post Award Issues: ASA Special Series No 38* (Juris Publishing Inc 2012) 80. See *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*. [1997] CLC 1114 (HL) 1118.

predicated upon, and resulting from, qualities and powers more suited to a democratic society than coercive contempt powers? Furthermore, is justice chaotic outside the common law world, ie where contempt of court powers do not exist or they are used only in limited instances?⁸⁶³

Additionally, one may argue that ensuring respect of the court by compulsion is a contradiction in terms, and the least ideal means for a free, libertarian government. In Justice Black's dissent in *Green v United States*,⁸⁶⁴ heard before the United States Supreme Court, it was opined that respect and obedience in the United States are not stimulated by 'arbitrary and autocratic procedures', as he characterised summary trials for charges for contempt, but ultimately such procedures create only contempt to the courts and the law.⁸⁶⁵

Moreover, Chesterman argues that the common law of contempt seems at key points to subvert the very purposes which it is trying to promote. The modern ideology of the common law judge, he says, is that of a neutral, impartial adjudicator of legal disputes, who operates independently of the executive and legislative arms of the state. What is clear, however, is that when challenges to judicial authority take place, and contempt powers are brought to

⁸⁶³ Goldfarb (n 568) 15

⁸⁶⁴ *Green v United States*, 356 US 165, 218 (1958).

⁸⁶⁵ Goldfarb (n 568) 6

bear, the persona of a neutral referee is displaced and the older persona of an absolutist 'authority figure' reappears.⁸⁶⁶

On the other hand, unsurprisingly, given the potential sanctions of contempt of court, the vast majority of court orders in common law jurisdictions are obeyed.⁸⁶⁷ Contempt of court penalties are seen as the most successful means of ensuring compliance with a court order.⁸⁶⁸ Therefore, someone may ask: 'Without the contempt power, what would deter obstruction to the administration of justice in an equally effective way?'⁸⁶⁹ And, if the administration of justice is frequently obstructed, what respect can a society have for its own judicial system, if the system makes it impossible for decisions of its judiciary to be executed?⁸⁷⁰ A distinguished British international lawyer, F A Mann, said:

However uncertain its definition and scope may be in some respects, contempt of court is undoubtedly one of the great contributions the common law has made to the civilised behaviour of a large part of the world.⁸⁷¹

⁸⁶⁶ Chesterman (n 683) 558.

⁸⁶⁷ Bell, Boyron, and Whittaker (n 789) 116.

⁸⁶⁸ Pierre Tercier, *Post Award Issues: ASA Special Series No 38* (Juris Publishing Inc 2012) 80.

⁸⁶⁹ Goldfarb (n 568) 15.

⁸⁷⁰ Alain Verbeke, 'Execution officers as a balance wheel in insolvency cases' (2001) 9(1) *Tilburg L Rev* 7, 9.

⁸⁷¹ F A Mann, 'Contempt of Court in the House of Lords and European Court of Human Rights' (1979) 95 *LQR* 348, 348.

It is suggested that more lenient sanctions, such as procedural sanctions (eg striking out or orders as to costs),⁸⁷² would allow defendants to weigh their options and determine whether, in the long run, it is more beneficial to accept the imposition of such sanctions than to comply with the orders. This, as Fleischer points out, does not aid the court in its quest for justice. As it has been said, in the area of enforcement, the court has no interest in imposing penalties for the sake of it; it only uses its power in order to coerce compliance. As such, less powerful sanctions may prove ineffectual for this purpose.⁸⁷³ Contempt of court sanctions have the ability to facilitate the fulfilment of the courts' duty to supervise the execution of their decisions.⁸⁷⁴

Furthermore, although there is no empirical evidence about the effectiveness of in rem asset preservation orders, there is evidence that compliance with court orders in general is higher in jurisdictions with contempt

⁸⁷² See Carla Crifò, *Cross-border Enforcement of Debts in the European Union* (Wolters Kluwer Law & Business 2009) 165.

⁸⁷³ Fleischer (n 592) 59.

⁸⁷⁴ Pierre Tercier, *Post Award Issues: ASA Special Series No 38* (Juris Publishing Inc 2012) 80. In an early case (1788), Chief Justice McKean of the United States said: 'Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the court. Some doubts were suggested, whether, even a contempt of the court, was punishable by attachment: but, not only my brethren and myself, but, likewise, all the judges of England, think, that without this power no court could possibly exist; — nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt. But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct: your circumstances are small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.' *Respublica v Oswald* 1 US 319, 329 (788).

powers. Also, the effective enforcement of judicial orders, apart from upholding the confidence of citizens in the legal system, and in the law in general, has arguably financial benefits. By analogy, it could be argued that poor law enforcement has negative consequences on the economy. The above were the conclusions of a study conducted by López-de-Silanes and others, who examined the quality of law enforcement in 49 countries. They found that German law and common law countries have the best quality of law enforcement.⁸⁷⁵ Moreover, the statistics showed that law enforcement is weak in French law countries. They concluded that poor enforcement standards, aggravate the difficulties faced by investors in the French civil law countries.⁸⁷⁶

Regarding the arbitrariness of contempt of court sanctions, some cases around the globe have examined the boundaries of enforcement of civil judgments. In a leading judgment in 1956, the Supreme Court of Japan, dealing with a libel case, considered whether it was constitutionally acceptable to force the defendant to publish a statement of apology containing excuses and corrections which he honestly believed to be untrue. In confirming the order, the

⁸⁷⁵ The exception of German-origin legal systems—although as explained above there are certain powers in German law which, even though not used very often, are similar to contempt of court sanctions—shows that the rates of compliance may not always be a function of the powers available to the court to enforce compliance, but might also be partly attributable to cultural factors. In the study, apart from Germany, German-origin jurisdictions included Japan, Austria, Taiwan, South Korea, and Switzerland, whose peoples—although this being a stereotype, and, thus, often entails the risk of being a false generalisation—are said to be more inclined towards discipline, compared to other nations that were included in the French-origin jurisdictions. Scandinavian countries' scores were also exceptionally good in the specific study.

⁸⁷⁶ La Porta R and others, 'Law and Finance' (1998) 106(6) *J of Political Economy* 1113, 1140.

majority of the court identified that the enforcement of such an order, violated neither the defendant's freedom of conscience nor his ethical will. In his concurring opinion, the Chief Justice Kotaro Tanaka distinguished between desirable morality and attainable legality, and stressed that it is sufficient that one's behaviour conforms externally to what the law orders, regardless of the state of one's inner mind. The law cannot enter into a person's mind to force him to comply with the order from the bottom of his heart.⁸⁷⁷ Accordingly, it may be suggested that, with contempt of court sanctions, no right of the litigant who does not comply with an order is violated; he is only externally led to a behaviour which is aligned with the law.

Focusing on the French *astreinte*, evidently, as analysed above, it is a mechanism substantially different from the English contempt of court. It does not really add to the strength of the courts, at least as seen in the common law countries.⁸⁷⁸ The comparison between them, as Chesterman points out, shows that the two legal systems—the English and the French—take different attitudes to enforcement, as they do not attach the same weight to the various specific aims associated with the broad objective of protecting the administration of justice. Indeed, the French system attributes somewhat lower levels of

⁸⁷⁷ *Okuri v Kageyama* 10 Minshu 785; H Tanaka and M D H Smith (eds), *The Japanese Legal System: Introductory cases and materials* (University of Tokyo Press 1976); Konstantinos D Kerameus, 'Enforcement of non-money Judgments and Orders in a Comparative Perspective', in Nafziger and Symeonides (n 765) 108.

⁸⁷⁸ *Pekelis* (n 734) 671.

importance, compared to the common law tradition, to ensuring that court decisions are effective, or that the public generally respects the court system. French law and practice, when looked at through common law spectacles, appear to be notably 'soft' on non-compliance with court orders, particularly when the non-compliance is deliberate and overt.⁸⁷⁹

It has been said multiple times that the lack of any power akin to the common law civil contempt in France, is detrimental to litigants in civil proceedings, irrespective of any damage caused to the courts and their authority.⁸⁸⁰ Professor Esmein, as explained above, has attempted, with the help of historical and political arguments, to prove that French judges do have contempt powers based on the ancient *imperium*,⁸⁸¹ but, as Pekelis put it, his voice has been *a vox clamans in deserto* (a voice crying in the wilderness). The work of Esmein has been largely admired, widely quoted, but universally rejected. In the field of *astreinte*, the French judges could never get rid of a certain timidity.⁸⁸²

⁸⁷⁹ Chesterman (n 683) 557.

⁸⁸⁰ See eg Ulla Jacobsson and Jack I H Jacob, 'Trends in the enforcement of non-money judgments and orders: the First International Colloquium on the Law of Civil Procedure' (Kluwer Law and Taxation Publishers 1985) 39; Dawson (n 743) 535; Chesterman (n 683) 558.

⁸⁸¹ A Esmein, 'L 'Origine et la Logique de la Jurisprudence en Matiere d' Astreintes' [1903] 2 *Revue trimestrielle de droit civil* 5.

⁸⁸² Pekelis (n 734) 671.

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.⁸⁸³ Conversely, as Fleischer argues, 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, as indicated, the aim in the area of enforcement is not to punish, but to induce certain action or inaction from a litigant.⁸⁸⁴

Furthermore—provisional—*astreintes* do not operate in rem either. Judgment creditors, Pekelis notes, cannot collect the provisional *astreinte* that has been assessed by the court; the decision remains merely theoretical. If, despite the judicial threat, the debtor persists in his refusal to comply, the only thing the judgment creditor can do is to go back to the court in order to make the provisional decision final.⁸⁸⁵ In any case, the *astreinte* may simply lead to an increase of non-enforceable debts that the debtor may not want or may not be able to pay.

⁸⁸³ Pekelis (n 734) 669.

⁸⁸⁴ Fleischer (n 592) 57.

⁸⁸⁵ Pekelis (n 734) 669.

It is argued that, without contempt of court sanctions, such as fine and imprisonment, violations of orders to act or to refrain from acting would left to be regulated only by liability rules, if the defendant was *only* ordered to pay a substituted sum of money for failing to comply with his primary duty.⁸⁸⁶ However, as Sir John Donaldson made clear in *Francome v Mirror Group Newspapers Ltd*, no one is allowed to break the law by paying an amount of money:

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 obtainable at all in a parliamentary democracy, although different considerations arise under a totalitarian regime.⁸⁸⁷

Finally, there are two other advantages of the contempt of court mechanism, compared to the in rem effect of an order, and these concern both the French as well as the German model. Firstly, as Stürner argues, sanctions on non-parties for failure to comply with court orders should be sufficient to change a third person's conduct. Such sanctions, at least the type of sanctions provided for contempt, are not available in civilian systems. It is argued that

⁸⁸⁶ See Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 (6), Harvard L Rev 1089, 1124 ('[W]e impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules'). Moreover, if the imposition of the *astreinte* is designed to act as a coercive measure to produce obedience to the original judgment or order, what happens if the defendant is wealthy? Ulla Jacobsson and Jack I H Jacob, 'Trends in the enforcement of non-money judgments and orders: the First International Colloquium on the Law of Civil Procedure' (Kluwer Law and Taxation Publishers 1985) 39.

⁸⁸⁷ *Francome v Mirror Group Newspaper Ltd* [1984] 2 All ER 408 (CA) 412 (Sir John Donaldson MR).

pecuniary sanctions or imprisonment against third parties are the appropriate remedies to prevent the breach of an order by a third party, and these are only possible under the contempt of court regime.⁸⁸⁸

Secondly, as explained above, a common law freezing injunction, operating in personam, does not create any rights in rem and leaves issues of priority among creditors unaffected. On the contrary, as Zuckerman indicates, the continental asset preservation procedure, which operates in rem, stimulates litigation and hastens insolvency, because as soon as one creditor has obtained attachment, others will tend to rush in to protect their positions.⁸⁸⁹ It also forces third parties claiming a right over the attached goods to take legal action.

It was explained above that, as the EAPO regulation is currently drafted, the combination of articles 23 and 32 means that the relevant enforcement mechanism will be governed by local law and the order will have the same effect on the preserved account as an equivalent national order. This means that the EAPO will have an in personam effect in common law jurisdictions and

⁸⁸⁸ Rolf Stürner, 'Fundamental Principles of Transnational Civil Procedure' (UNIDROIT 2001) 884. See also Peter F Schlosser 'Coordinated Transnational Interaction in Civil Litigation and Arbitration' (1990) 12 Michigan J Intl L 150, 160. Rule 20.3 (and similarly Principle 17.3) of the Principles of Transnational Civil Procedure, provides the following: 'An order directed to a third person may be enforced by means authorized against such person by forum law, including imposition of cost sanctions, a monetary penalty, astreintes, contempt of court, or seizure of documents or other things'. ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (CUP 2005) 38, 127.

⁸⁸⁹ A A S Zuckerman, 'Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies' (1993) 109 LQR 432, 453.

an in rem effect in civil law jurisdictions. The fact that the same EU-wide procedure will have different consequences in its enforcement in the different Member States is unsatisfactory.

Should contempt of court sanctions be added to the EAPO regulation, it is suggested that those should stand in place of in rem preservation. In other words, the EAPO should not amount to double-loading of the applicable remedies, ie it must not impose a security interest on the account plus risk of contempt for non-compliance. Moreover, since EAPOs currently have an in personam effect in the common law jurisdictions of the EU, and may be enforced there using contempt of court sanctions, the suggestion made here is merely to impose in personam character to EAPOs enforced in *civil law jurisdictions* in substitution of their now existing in rem effect. The suggestion that the EAPO regulation should make available sanctions similar to those of contempt of court and should not create any security interest on the preserved account, takes into account the advantages of contempt of court sanctions as well as the disadvantages of the in rem effect, both outlined above. In addition, it is argued that the amounts which are exempt from preservation should also be regulated directly by the Regulation.

The practical usefulness of the contempt of court power in the EAPO may be questioned, given that account preservation orders are normally addressed to reputable and regulated financial institutions which are usually expected to comply without the need to use enforcement powers. Firstly, a bank may violate

the order negligently. In the English case *Customs & Excise Commissioners v Barclays Bank*,⁸⁹⁰ the bank carelessly released funds to the respondent from frozen accounts. In such cases, contempt of court sanctions will be useful—not necessarily against the bank, because intention to breach the order is required to establish contempt by a third party,⁸⁹¹ but—to prevent the respondent from withdrawing the frozen funds when the bank acts irresponsibly in complying with the order. Should the asset preservation order have an in rem effect, it is true that the negligence of a bank will not affect the applicant's rights in the funds. However, these rights will not be of great practical value, as the funds may

⁸⁹⁰ *Customs and Excise Comrs v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 AC 181. It must be noted that in this case the applicants did not seek contempt of court sanctions against the bank, but had a claim in damages for negligence. It was held that no duty of care was owed. Since a bank on notification of the order was obliged to comply with it and was exposed to the risk of punishment for contempt if it did not do so, and since there had been no relevant communication or act between the parties or any reliance by the commissioners on the bank, the bank could not be understood as having voluntarily assumed responsibility for its actions so as to give rise to a duty of care. Article 26 of the EAPO regulation provides that any liability of the bank for failure to comply with its obligations under this Regulation shall be governed by the law of the Member State of enforcement.

⁸⁹¹ Contempt will only be found where the financial institution knowingly seeks to undermine the court order and deliberately fails to freeze the account and pays out the sums that ought to have been frozen after receiving notice of the court order. See David A Crerar, 'Banks and Mareva Asset-freezing Orders' (2006) 25 (4) National Banking L Rev 37, 41. As Lord Eveleigh noted in *Z Ltd v A-Z and AA-LL*, it is unlikely that mere negligence on the part of the bank would constitute contempt of court: 'Carelessness or even recklessness on the part of the banks ought not in my opinion to make them liable for contempt unless it can be shown that there was indifference to such a degree that was contumacious.' *Z Ltd v A-Z and AA-LL* [1982] QB 558 (CA) 583 (Lord Eveleigh). A rare example where a bank was held in contempt because of negligence was in *Z Bank v D1*. There, however, the bank was the defendant and not simply a third party served with an order. The defendant was a Bulgarian bank. For five months after receiving notice of the order, the bank continued to withdraw and deposit from the funds that ought to have been frozen. The Court found that the president of the bank, the bank's lawyer, and the senior manager responsible for foreign exchange, were all grossly negligent, leading to a conclusion that the bank was guilty of contempt. It was ordered that if the bank failed to return the funds that would have been in the account but for the breach, it would allow the execution of a writ of sequestration. See *Z Bank v D1* [1994] 1 Lloyd's Rep 656 (Comm).

easily be placed beyond reach. Therefore, it seems that contempt of court will be more effective a mechanism to enforce an EAPO rather than an order which operates in rem.

Additionally, not all financial institutions throughout the EU have a good reputation, neither are they all so zealous in protecting their good name. There might be instances where a local financial institution, or one of its employees, will act to assist a, let us say, multi-millionaire customer to protect his funds, instead of complying with a court order of another EU Member State. Without the threat of a fine imposed to the bank or imprisonment of its employees or directors, the bank will not hesitate to act fraudulently or, at least, violate the order unintentionally.

Furthermore, an intentional breach of an order by a bank, although with no ulterior motives, is also possible. In an English case,⁸⁹² *R (on the application of Revenue & Customs Prosecution Office) v Lloyds TSB Plc*, the claimants obtained in the context of criminal proceedings an order freezing the accounts of a Lloyds Bank client. The order prohibited the client and all recipients from dealing in any way with the frozen funds, but the order permitted the client withdrawals for living expenses. The well-meaning bank manager, seeking to protect the bulk of the frozen funds from withdrawal by the client and to avoid

⁸⁹² Similar examples of cases of breach of asset preservation orders by financial institutions, either negligently or intentionally, presumably exist in civilian jurisdictions as well, but it was not possible to trace them.

monitoring the accounts, proposed to the client that those funds be transferred to another Lloyds account. The client agreed. Neither the client nor the bank informed or obtained consent from the prosecutor or the court for this arrangement. The Court condemned the bank's transfer of the funds as a clear breach of the order, and expressed surprise that the bank would do so without consultation with the Revenue and Customs Prosecution Office or the court. Despite the bank's good intentions, the transfer of the funds was a deliberate act, in knowing breach of the terms of the order, and, therefore, the Court found the bank in contempt of court.⁸⁹³

Finally, EAPOs may at some point be expanded to EU-wide asset preservation orders for preserving assets in general, such as land, ships, other movables, etc, ie assets which will not be in the control of regulated institutions such as banks. In that case, the contempt of court procedure will be even more useful. The argument in favour of contempt of court sanctions will apply with even greater force should the EU decide to introduce other EU-wide provisional and protective measures, such as search orders, injunctions, and asset disclosure orders,⁸⁹⁴ where respondents are very often untrustworthy.

⁸⁹³ *R (Revenue & Customs Prosecution Office) v Lloyds TSB Plc* [2007] EWHC 2393 (Admin).

⁸⁹⁴ Regarding asset disclosure orders, the EAPO regulation has in place a procedure of requesting bank account information when the creditor has reasons to believe that the debtor holds an account with a bank in a specific Member State. As provided by article 14 of the Regulation, the court with which the application for an EAPO is lodged, may be requested by the creditor to order that the information authority of the Member State of enforcement obtains the necessary information to allow the bank account to be identified. The information authority must then use one of the following methods, at least one of which each Member State must

d. Contempt of court exercised with caution

The history of contempt procedures reveals an ongoing and overt tension between the perception of contempt, as an inherent and necessary weapon of courts in enforcing their orders, and the fear that courts will misuse their authority to punish unprotected individuals.⁸⁹⁵ The contempt power, Martineau says, was identified as potentially despotic long ago. Instances of 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.⁸⁹⁶

The plaintiff, as Brodeur points out, who may have suffered real prejudice by non-compliance, should not be deprived of what he deserves. On the other hand, the defendant, whose only 'crime' is non-compliance, must not be unduly harmed.⁸⁹⁷ In other words, plaintiffs' remedial rights must be protected while at

make available in its national law: (a) an obligation on all banks to disclose, upon request, whether the debtor holds an account with them; (b) access to the relevant information where that information is held by public authorities or administrations in registers; (c) an obligation to the debtor to disclose with which bank he holds an account; or (d) any other method which is effective and efficient for obtaining the relevant information. It is suggested that the enforcement of such a mechanism, as well as the enforcement of an asset disclosure order that might be introduced in the future, must be regulated by an EU-wide uniform procedure providing for contempt of court sanctions.

⁸⁹⁵ Livingston (n 591) 356.

⁸⁹⁶ Martineau (n 580) 677.

⁸⁹⁷ James Brodeur, 'The Injunction in French Jurisprudence' (1939-1940) 14 *Tulane L R* 211, 218.

the same time certain measures are necessary to address the potential for arbitrariness in the imposition of contempt sanctions.⁸⁹⁸

An important question is whether proceedings against a breach of a court order may require certain criminal trial safeguards to be observed. 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 warrant 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

⁸⁹⁸ Livingston (n 591) 360. One court aptly described the weighing of interests that should shape contempt procedures: ‘Contempt jurisprudence must attempt to balance the need of a court to enforce its orders with the doctrine that a court’s power to obtain compliance should be tempered by safeguards that ensure fundamental fairness.’ *Pompey v Cochran* 685 So 2d 1007, 1014 (Fla Dist Ct App 1997).

the standard of proof required, the opportunities afforded for legal representation, and the right to be properly heard.⁸⁹⁹

One may argue that the guarantees provided for criminal proceedings, such as a separate prosecution before a different court, with full criminal-type procedural protections, may slow the civil contempt process.⁹⁰⁰ This, however, does not mean that fairness must be undermined in favour of expediency. In other words, it is important that civil contempt exists with full vigour, but it is equally important that it is not open to abuse.⁹⁰¹

As Livingston argues, the inclusion of greater numbers of traditionally civil contempts on the criminal side of the procedural ledger, fails to consider the purposes of coercive civil contempt. The focus on the accused contemnors' rights neglects the legitimate needs of litigants in whose favour a court order has been issued. By requiring that coercive civil contempts in complex injunction cases be tried according to criminal procedures, the courts potentially diminish the effectiveness of the enforcement mechanism.⁹⁰² Indeed, courts appear careful to resist the full assimilation of civil contempt into the framework of criminal safeguards. As Wall J observed:

⁸⁹⁹ Eady and Smith (n 566) para 3-73.

⁹⁰⁰ Livingston (n 591) 360.

⁹⁰¹ *State ex rel A-G v Circuit Court* 97 Wis 1 (1897) 8.

⁹⁰² Livingston (n 591) 501.

I respectfully agree (...) that the analogy with criminal proceedings can be taken too far and that in civil proceedings for contempt the court will introduce those safeguards which are necessary for the protection of alleged contemnors but will not import criminal procedure wholesale or indiscriminately.⁹⁰³

It could be suggested that whether criminal procedural protections should be afforded to the alleged contemnor is determined by the nature of the sanction imposed. In the American Supreme Court case of *United Mine Workers v Bagwell*,⁹⁰⁴ Justice Blackmun said that the character of the sanction is critical for determining whether it is civil or criminal. By character, explains Livingston, Justice Blackmun apparently meant the 'purgability' of the sanction; he concluded that the ability of the contemnor to avoid the sanction once imposed through compliance with the court order is essential for classifying the sanction as civil or criminal.⁹⁰⁵ In other words, Justice Blackmun attempted to express the idea that courts should stop focusing mechanically on the civil/criminal distinction and instead examine the policy justifications for requiring certain procedural protections for specific sanctions.⁹⁰⁶

As Livingston argues, Justice Blackmun's judgment was based on a belief in a basic trait of human nature: It is one thing to contemplate the imposition of

⁹⁰³ *Re B (A Minor) (Contempt of Court: Affidavit Evidence)* [1996] 1 WLR 627 (Fam) 639 (Wall J).

⁹⁰⁴ *United Mine Workers v Bagwell* 512 US 821 (1994).

⁹⁰⁵ Livingston (n 591) 383.

⁹⁰⁶ Livingston (n 591) 386.

a severe fine or term of imprisonment; it is quite another to actually experience the stinging effect of such sanctions. If a contempt sanction is non-purgable, the defendant, if found guilty, will go to prison or suffer a fine. In that case, the alleged contemnor, according to Justice Blackmun, should have the full panoply of criminal procedural protections. If the contempt sanction is purgable, defendants at any time after its imposition can terminate their confinement or the accruing fines by complying with the judicial command.⁹⁰⁷ As such, criminal procedural protections are not necessary.

Justice Blackmun, concludes the same author, carried forward two competing policy concerns: necessity and potential arbitrariness. Indeed, those advocating for more procedural protections for defendants accused of contempt, have been rightly concerned about the absence of effective checks on a judge's power and the inherent potential for arbitrariness and abuse of a power which allows the imposition of severe sanctions by summary process. Since not all civil contempt sanctions are purgable, ie they cannot always be avoided through compliance, perhaps this decision of the Supreme Court of the United States pushed towards more and more civil contempts to require criminal procedural safeguards for their imposition.⁹⁰⁸

⁹⁰⁷ Livingston (n 591) 398.

⁹⁰⁸ Livingston (n 591) 384.

In any event, it is suggested that what matters is not so much the labelling of the wrongful conduct in question. Rather, what matters is the recognition that, where there is a threat of a severe fine or the liberty of the subject is at stake, even though these sanctions are purgable, appropriate evidential and procedural safeguards should be made available to the accused person, provided that they do not defeat the need to maintain the flexibility which the contempt proceedings are intended to afford.⁹⁰⁹ The overarching principle is that care is required to ensure that hearings are fair and, in applying this principle, it is of particular importance that the alleged contemnor knows clearly what is being alleged, and, in fact, has every possible opportunity to meet what is being alleged.⁹¹⁰

Moreover, in cases of criminal contempt, because of the severity of the penalties involved, it has been decided that the contemnor must be dealt with in a way which respects his rights under article 6 of the ECHR, applicable in criminal proceedings.⁹¹¹ However, it is debatable 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

⁹⁰⁹ Eady and Smith (n 566) para 3-89.

⁹¹⁰ Gee, *Commercial Injunctions* (n 700) para 20-001.

⁹¹¹ *Kyprianou v Cyprus* (2007) 44 EHRR 27, para 64; *Zaicevs v Latvia* (2007) 45 EHRR 17 (31 July 2007); William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 283.

Convention.⁹¹² Thus, the guarantees provided by article 6 for criminal proceedings, notably, to be informed with sufficient precision of the charge, to advance available defences, to be offered legal assistance, and examine witnesses do not apply to the imposition of sanctions for failure to comply with a court order.⁹¹³

According to the jurisprudence of the ECtHR, for a sanction to qualify as 'criminal' in the sense of article 6, three factors 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 imposed.⁹¹⁴ 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 domestic decisions denying the 'criminal' nature of sanctions in this context seems questionable.⁹¹⁵ Additionally, the ECtHR does not regard itself as being bound by the domestic characterisation as civil or

⁹¹² See *Krone Verlag GmbH and Mediaprint Anzeigen GmbH & Co KG v Austria* App no 28977/95 (Commission decision, 21 May 1997).

⁹¹³ Georg E Kodek, 'The Impact of the European Convention on Human Rights and Fundamental Liberties on Enforcement Practices' in Adenas, Hess, Oberhammer (n 784) 326.

⁹¹⁴ See *Engel v Netherlands* (No 1) (1976) 1 EHRR 647, para 82; *Schmautzer v Austria* (1995) 21 EHRR 511, para 27; *Öztürk v Germany* (1984) 6 EHRR 409, para 50; *Demicoli v Malta* (1992) 14 EHRR 47, paras 31-34.

⁹¹⁵ Georg E Kodek, 'The Impact of the European Convention on Human Rights and Fundamental Liberties on Enforcement Practices' in Adenas, Hess, Oberhammer (n 784) 326.

criminal.⁹¹⁶ 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 for contempt proceedings.⁹¹⁷

Furthermore, in mature legal systems, committal to prison is most zealously and carefully checked, and reserved only as an extreme measure necessary to preserve or protect rights, when no other effective remedy is available. A court will commit a person to prison, only if justice so requires, and only if the position of the plaintiff has been made worse by the contempt. Where there is another method of doing justice, recourse ought not to be had to imprisonment in enforcing a civil remedy.⁹¹⁸ The label ‘civil’, notes Darling, should not obscure the underlying ‘taking of liberty’. Thus, imprisonment should be limited to cases where it can be shown beyond reasonable doubt, after a fair trial, that the judgment debtor is fraudulently or wilfully refusing to comply with an order and where the plaintiff has been adversely affected.⁹¹⁹

⁹¹⁶ See *Benham v UK* (1996) 22 EHRR 293. In that case, 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.

⁹¹⁷ See *Eady and Smith* (n 566) para 3-4.

⁹¹⁸ *Kuloba* (n 716) 20. As Lord Denning observed in *Danchevsky v Danchevsky*, ‘[w]henver there is a reasonable alternative available instead of committal to prison, that alternative must be taken’. *Danchevsky v Danchevsky* [1975] Fam 17 (CA) 22 (Lord Denning MR).

⁹¹⁹ Chester Darling, ‘Imprisonment for Debt in 1969’ [1968–1969] 4 Portia L J 227, 239.

Finally, as Livingston suggests, 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. When the fines are high enough, they are likely to present a genuine threat to the defendant, and, therefore, result in his immediate obedience. At the same time, however, they must not disregard, and must be proportionate to, the defendant's behaviour and other circumstances.⁹²⁰

In any case, as Fleischer suggests, although one may be inclined to feel sympathetic towards particular persons who breach a court order, it must be remembered that such persons are not at the mercy of the court, but of themselves. It is within their power not to breach an order or to preclude sanctions through compliance. In order to maintain judicial effectiveness, we must demand respect for the court and its authority; and in order to achieve justice, we must compel compliance with orders of the courts.⁹²¹

Persons who violate a court order, continues Fleischer, 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

⁹²⁰ Livingston (n 591) 360.

⁹²¹ Fleischer (n 592) 63. As Lord Neuberger said, in the context of civil litigation, those who take part in a legal activity should expect to abide by the rules, and, particularly importantly, those who are responsible for administering the activity should be expected to enforce the rules. See Lord Neuberger, *Framing a New Procedural Culture* (2015) 34 CJK 237, 242.

some may perceive as severe sanctions against them. Such sanctions are the court's sole means of coercing compliance and ensuring a just result.⁹²² This is why a mechanism analogous to contempt of court should be introduced in enforcing EU-wide provisional and protective measures, such as an EAPO. Moreover, to ensure that the order that has been obtained is more effectively enforced, both the courts of the Member State of origin as well as those of the Member State of enforcement should be able to impose sanctions against non-compliance.⁹²³ This mechanism, of course, must be kept within certain boundaries that secure the respondents' rights. After all, it is England's greatest poet who said: 'Oh, it is excellent to have a giant's strength; but it is tyrannous to use it like a giant'.⁹²⁴

⁹²² Fleischer (n 592) 63.

⁹²³ If the contempt of court mechanism is implemented in EU law, and, therefore, fines are payable to the state, a question would be, whose Member State's treasury would benefit from such situation, the Member State of origin or the Member State of enforcement? This is a policy issue for the EU to decide, although the most logical solution would be the fine to be payable to the Member State the courts of which are dealing with the violation. See Konstantinos D Kerameus, 'Enforcement in the international context' in Hague Academy of International Law (n 25) vol 264, 204.

⁹²⁴ William Shakespeare, 'Measure for Measure' Act 2, scene 2, lines 107–109.

IV. Conclusions

Zekoll has argued that scholarship should gain access to, and have an impact on, the decision-making process of the EU. In recent years, he argues, input has rarely been noticeable in the harmonisation measures that emanate from the institutions of the EU. Instead, EU civil servants and bureaucrats representing the Member States control much of the process. Things ‘get done’ but not necessarily with a view towards the more fundamental questions.⁹²⁵

As Cappelletti said, procedural instruments—such as the EAPO regulation—are the meeting point of conflicts, of policies, and of ideas. It is where rapidity and efficiency have to be combined with justice, and individual liberty has to be combined with equality of opportunities.⁹²⁶ This is why it has been suggested that elements from the law of equity should be introduced in this area. Equity must be understood as a notion not in conflict with the law, since, as it has been explained, equity had come not to destroy the law, but to

⁹²⁵ Zekoll and Reimann (n 774) 1342. ‘Only the true combination of comparative law and legal philosophy can lead us to truly understand what law is.’ Esrin Örucü, ‘Quo tendit comparative law?’ in Andrew Harding and Esin Örucü (eds), *Comparative law in the 21st century* (Kluwer Academic Publishers (2002) 3. Also, as recent experience has shown, the mentality of the majority of people involved within the EU mechanisms, is mainly focused towards trying to find the most favourable solution for their nation instead of the most favourable solution for the EU as a whole. As it has been said in an American case, ‘[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’ *The Bremen v Zapata Off-Shore Co* 407 US 1, 9 (1972).

⁹²⁶ Mauro Cappelletti, ‘Social and political aspects of civil procedure — reforms and trends in Western and Eastern Europe’ (1971) 69 *Michigan L Rev* 847, 886.

fulfil it.⁹²⁷ Undoubtedly, as Zuckerman suggests, a legal system cannot banish all uncertainties or redress all imbalances between the litigants. However, it can attempt to rectify all imbalances of intellect or of financial resources between them.⁹²⁸ In this respect, equity, as a body of principles which rectifies any errors or unfairness caused in individual cases that the law would otherwise have made, is all the more necessary.

As stated in the beginning of this work, the EAPO regulation represents a major shift towards a specific approach in the harmonisation of provisional and protective measures within the EU. However, the elements of equity which have been analysed, namely judicial discretion in granting a remedy and sanctions against non-compliance, are relevant considerations affecting all provisional and protective measures, and, thus, other harmonising attempts which might follow.

In the case of the EAPO regulation, it has been explained that there is no judicial discretion in granting or refusing an order. Although some flexibility does exist because of the open-ended phrases used in setting the conditions for obtaining an order, the rule is applied automatically. This, arguably, stems from the fact that the EAPO regulation has been largely influenced by the civilian

⁹²⁷ The phrase is attributed to Maitland although it probably has an older origin. See Maitland (n 81) 17.

⁹²⁸ A A S Zuckerman, 'Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies' (1993) 109 LQR 432.

tradition, where there is a different emphasis on legal certainty compared to the common law tradition. It has been suggested that discretion should be explicitly given to judges in examining an EAPO application. This will allow judges to inquire into the circumstances of every case which are very important in granting such a draconian remedy. The discretion, of course, must be confined by specific principles set by the statute.

From the models of discretion available for granting or refusing relief, it was suggested that the most suitable for an EU-wide provisional and protective measure, such as the EAPO, is a two-stage process in which at the first stage certain jurisdictional conditions must be satisfied. If the specific pre-conditions *are* satisfied, a second stage should exist where courts will be able to refuse relief, based on an exhaustive list of a relatively small number of specific factors, in an articulated order of priority, provided by the statute. This type of equity-style discretion, also used in the area of injunctions in the common law, was proposed taking into account the argument that discretion must be bound by limitations in order to reach justice in the individual case, as well as legal certainty. In summing up, based on the suggestions made in Chapter II, the relevant provision of the EAPO regulation, article 7, should read as below:⁹²⁹

1. The court *may* issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation

⁹²⁹ The proposed changes are marked in italics. The equivalent changes should also be made to recital 14.

Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult.

2. Where the creditor has not yet obtained in a Member State a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor.

3. Where the above conditions have been met, the court retains a discretion in determining whether a Preservation Order should be granted and its extent. In exercising this discretion, the Court should have regard to the following factors: primarily, the risk and magnitude of the possible impact on the parties if the Preservation Order is issued or not; secondarily, the strength of the parties' cases, the possible impact of the Preservation Order on third parties, the behaviour of the parties in the process up to that point, whether the creditor has delayed unreasonably to apply for a Preservation Order, and the value of the funds held in the account or accounts to be preserved compared to the size of the creditor's claim.

It has also been argued that judges in EU Member States examining applications for an EAPO should also have regard to the relevant policy objectives in interpreting the rules and factors upon discretion is to be exercised, such as the enhancement of the EU's Internal Market and respect of fundamental rights, through a teleological method of judging. In this way, the uniform application of the EAPO Regulation throughout the Union will be ensured. This task need not be inserted in the statute, but instead, should become an ordinary adjudication process for judges applying EU legislation. In other words, beyond the minimum pre-conditions and the list of factors to be used for exercising discretion, a change towards a policy-conscious culture of adjudication, especially in civilian jurisdictions, will secure just results in EAPO applications and in future efforts for other EU-wide provisional and protective

measures, as well as a uniform application of EU law at national and Union level.

As regards the sanctions against non-compliance with an asset preservation order, although some measures similar to the common law contempt of court power do exist in the civil law world, it seems that there is here as well a distinct approach between the two traditions. Specifically, there is a different emphasis on the importance of the enforcement of judicial decisions. The sanctions for violating an order in the civil law tradition, do not have the character of protecting the administration of justice and the fundamental supremacy of the law, as the doctrine of contempt of court does in the common law. The civilian ideology on this matter too, is reflected in the EAPO regulation. It has been suggested that contempt of court sanctions should be introduced to the EAPO, provided of course, as in the case of judicial discretion, that they are kept within certain limitations which guarantee the litigants' rights.⁹³⁰

As explained in Chapter III, contempt of court sanctions accompanying in personam orders are arguably more effective, probably because they have a public nature, whereas sanctions accompanying in rem orders in French law have a private character. Consequently, they are attributed somewhat lower

⁹³⁰ It could be argued that there is a correlation between judicial discretion and contempt of court. Contempt of court makes more sense where the court has discretion whether to make the order as it will probably be more vigilant in supervising its enforcement. It makes less sense where the discretion is more limited.

levels of importance than in the common law. In Germany, even though orders have an in rem effect, there are in place—although rarely used—sanctions for violating court orders. However, no sanctions for non-compliance against third parties are available in Germany, and neither anywhere else in the civil law world. Additionally, in personam orders do not create rights in rem, and, thus, leave issues of priority among creditors unaffected, whereas in rem orders create a security interest on the preserved asset, and, therefore, stimulate further litigation.

Given that account preservation orders are normally addressed to trustworthy financial institutions, the practical relevance of the contempt of court power in the EAPO may be questioned. It was explained that contempt of court sanctions will be useful against respondents in cases where banks inadvertently do not comply with the order. Additionally, it was argued that there might be instances where financial institutions, regardless of whether they have bad motives or not, will intentionally violate an order. Finally, EAPOs may at some point be expanded to EU-wide asset preservation orders for preserving assets in general, while new EU-wide provisional and protective measures, such as search orders, injunctions, and asset disclosure orders, may be introduced. Thus, the importance of sanctions against non-compliance for both the EAPO as well as future orders may be gleaned.

It has also been suggested that contempt of court sanctions should stand in place of the in rem effect in the enforcement of an EAPO. According to the

EAPO regulation as it stands, the enforcement of an order is made according to the law of the Member State of enforcement, and the order will have the same effect on the preserved account as an equivalent national order. Thus, since EAPOs already have an in personam effect in the common law jurisdictions of the EU, and may be enforced there using contempt of court sanctions, the suggestion of this thesis is essentially to impose in personam character to EAPOs enforced in *civil law jurisdictions*. Put differently, the EAPO should not amount to double-loading of the applicable remedies, ie it is not suggested that EAPOs should impose both a security interest on the account, as well as risk of contempt for non-compliance. This proposal is grounded both on the effectiveness of contempt of court sanctions, as well as on the disadvantages of the in rem character of orders. Specifically, it is proposed that article 23 of the Regulation should be amended as follows:⁹³¹

1. Subject to the provisions of this Chapter, *if a person who had notice of the Preservation Order violates it without good cause, the Court which granted it in the Member State of origin or a competent court in the Member State of enforcement, may, of its own motion or following an application by the creditor, impose to the debtor who, not accidentally, or a third party who, intentionally, violated the Preservation Order, up to one year of imprisonment, a fine up to €500.000, or any of these sanctions together.*

⁹³¹ The proposed changes are marked in italics. The equivalent changes should be made to recital 23 as well. It is also suggested that article 31 and recital 36, which provide that amounts exempt from seizure under the law of the Member State of enforcement shall be exempt from preservation under the Regulation, should be abolished. Article 32 and recital 28, which provide that the Preservation Order should have the same rank, if any, as an equivalent national order in the Member State of enforcement, and, thus, set the in rem character of the remedy in civilian jurisdictions, should also be abolished.

2. *The severity of the sanctions shall depend on the sum of funds in the account or accounts preserved, on whether the violation was intentional, on whether the creditor was damaged by the violation, on whether the person who violated the Preservation Order has acted under pressure, and on the seriousness of the violation.*

3. *The court, assessing the relevant evidence provided by the parties involved in the violation proceedings by means of a written procedure in accordance with the law of the Member State the courts of which are dealing with the violation, may impose a fine not exceeding €100.000, and order that the sanction shall be discharged in case of compliance with the Preservation Order.*

4. *If the court, after the written procedure described in paragraph 3, believes that a fine exceeding €100.000 or imprisonment should be imposed, or in case of a violation of the Preservation Order by a third party, a summary criminal trial in accordance with the law of the Member State the courts of which are dealing with the violation for the offence of violation of a court order shall be held.⁹³²*

5. *In all cases, the violation of the order must be proved beyond reasonable doubt.*

6. *The enforcement of the sanctions imposed shall be made in accordance with the law of the Member State the courts of which are dealing with the violation. Fines shall be payable to the Member State which is dealing with the violation of the order.*

7. *A Preservation Order should not confer on the creditor a security interest on the preserved account.*

8. *The debtor may request reasonable amounts to be exempt from preservation for his ordinary living expenses, ordinary and proper course of business, and to fund legal advice to repeal or vary the Preservation Order.*

The suggested changes take into consideration that a respondent who violated the order must have been notified of it beforehand and that the breach

⁹³² The legal basis for the establishment of the violation of an EU law court order as a criminal offence has been set out above.

must not have been accidental or impossible not to happen. Additionally, the type and gravity of the sanctions to be imposed must depend on a series of factors such as whether the breach was intentional. Finally, in cases of violation by a third party, or before imprisonment or a serious fine may be ordered, a trial with full criminal-type procedural protections must be held, while in all cases the standard of proof must be beyond reasonable doubt.

The presence or absence of judicial discretion and the contempt power, as Merryman and Pérez-Perdomo argue, exemplify the fundamental differences in, inter alia, the roles of the judiciary, the historical background, and the mode of legal thought in the two legal traditions.⁹³³ Procedural idiosyncrasy, however, is not, like national costume or regional cuisine, to be nurtured for its own sake.⁹³⁴ Without necessarily having a vision for total uniformity,⁹³⁵ procedural law in the

⁹³³ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (3rd edn, Stanford UP 2007) 55.

⁹³⁴ *Dresser UK Ltd v Falcongate Ltd* [1992] 1 QB 502 (CA) 522 (Bingham LJ). Helen Hartnell said in a similar tone regarding procedural harmonisation within the EU: 'Once upon a time, procedural law in all its peculiarity stayed home in the scullery, while public and even private law went off to attend the European integration ball.' Helen Hartnell, 'A Cinderella Story: Judicial Cooperation in Civil Matters Meets the Prince. Review article of Eva Storskrubb, *Civil Procedure and EU Law: A policy Area Uncovered*' (2010) 29 YB Eu L 483, 483.

⁹³⁵ In an American case, Cicero's quote was mentioned: '*Non erit alia lex romae, alia athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit*' (There shall not be one law at Rome, another at Athens; one now, another hereafter; but among all nations and in all time there shall be a law one and the same). *Swift v Tyson* 41 US 1, 19 (1842). This, however, is an unrealistic approach, especially within the EU. In the movement of globalisation of law, we recognise the rational unification or harmonisation of different rules in certain fields of law on the one hand, and the cultural diversity which leads us to the pluralistic view of coexistence of different systems on the other. Hiroshi Matsuo, 'Reception of Law and Civil Law Tradition' in Guenther Doeker-Mach and Klaus A Ziegert

EU must focus on reducing the divergence between the different legal traditions.⁹³⁶ It is argued that elements of the common law approach, such as the judge's discretion in granting an order and the sanctions for non-compliance with it, should have been considered in the EAPO. This can now be done on the basis of the review clause included in article 53 of the EAPO regulation.⁹³⁷

It is suggested that cross-fertilisation between the common law and the civil law tradition is an on-going process. Pekelis argued that civil law and common law represent, not only the two main legal systems of Western civilization, but also two fundamental trends of human nature. It would be childish, he said, to try to find out which one is better and it is only unfortunate that their mutual contact has so far been rather limited. A greater reciprocal influence of the ideas inspiring the two systems is probably one of the prerequisites for a real understanding between the Anglo-American world and

(eds), *Law, Legal Culture and Politics in the Twenty First Century* (Franz Steiner Verlag 2004) 87.

⁹³⁶ Of course, as Kerameus has said, at the end of the day, procedural unification can hardly go beyond the constraints and limitations that accompany European integration. Konstantinos D Kerameus, 'Procedural Implications of Civil Law Unification' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (Kluwer Law International 2004) 273. See also 'Commission, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law' (Study No JUST/2014/RCON/PR/CIVI/0082, 2017) 240.

⁹³⁷ Another consideration is that, if the EAPO keeps being 'alien' to common law freezing injunctions, a legislative competition between the EAPO and the Worldwide Freezing Order may eventually emerge. This might lead to forum shopping and further legal uncertainty within the EU. In contrast, a mechanism with elements from both traditions will make both common law and continental lawyers more easily familiar with it.

continental Europe.⁹³⁸ Lord Woolf has described the new English Civil Procedure Rules as positioned mid-Channel, meaning that they were heavily influenced by the practices in jurisdictions on the mainland of Europe.⁹³⁹ The EAPO is one of the instances where the continental jurisdictions should cover the other half of the distance.⁹⁴⁰

⁹³⁸ Pekelis (n 734) 692.

⁹³⁹ Lord Woolf, 'The Tides of Change' in B S Markesinis (ed), *The British Contribution to the Europe of the Twenty-First Century* (Hart Publishing 2002) 10.

⁹⁴⁰ Nicolas Kyriakides, 'A European-wide preservation order: how the common law practice can contribute' (2014) 33 CJK 93. As Edward explains, there are various instances where English law has contributed some of its elements to EU law. Two striking examples are found in the practice of the CJEU. First, the members of the Court put questions to the advocates appearing before them, something which was unknown before British accession. Additionally, the influence of the common law tradition can be detected in the judgments of the Court, since it was only after British accession that the Court began explicitly to refer to previous judgments as precedents. David Edward, 'The British contribution to Italian legal thinking' in Markesinis, *The British contribution to the Europe of the Twenty-First Century* (n 939) 31.

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