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DISOBEYING COURTS' ORDERS— A COMPARATIVE ANALYSIS OF THE CIVIL CONTEMPT OF COURT DOCTRINE AND OF THE IMAGE OF THE COMMON LAW JUDGE

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ABSTRACT

The aim of this article is to briefly tackle, from a comparative viewpoint, an academically quite overlooked topic: techniques of enforcement of lawful judgments. Despite a gradual convergence in many fields of law, common and civil law jurisdictions still maintain a striking diversity in the ways in which they react to non-compliance with court judgments. Whilst in common law tradition, failure to comply with a judicial order is considered civil contempt of court, in civil law countries this legal institution is simply unknown. Furthermore, it is only in civil law systems that failure to comply with a

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court judgment cannot be punished by imprisonment. My key question is: what are, if any, the "cultural" reasons that could explain this divergence of approach? First, discussing Mauro Cappelletti's comparative methodology, I explore whether, and to what extent, civil contempt of court and its civilian counterparts are comparable. Then, focusing my attention on the common law model, I argue that many contemporary features of civil contempt can only be fully understood by looking at the particular image and unique social perception of the judge within the common law legal tradition.

Keywords: enforcement of rights, contempt of court, comparative law methodology, comparative civil procedure, common law, civil law

" *. . . ne pas regarder comme semblables des cas réellement différents; et ne pas regarder manquer les différences de ceux qui paroissent semblables.*"[1] *–Montesquieu*

I. INTRODUCTION

Over the past few decades, the comparative study of civil procedure and, more specifically, that of the techniques of enforcement of legal judgments—a topic almost completely neglected in legal academia—has become of increasing importance.[2] The reason underpinning this turn lies in the fact that legal scholars have become

1. Charles de Secondat Montesquieu, *Préface* to 2 DE L'ESPRIT DE LOIS 229 (Roger Caillois ed., Gallimard 1951).

2. The starting "block" of this field of research can be found in the publication of the collection of essays titled TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS AND ORDERS (Ulla Jacobson & Jack Jacob eds., Kluwer L. Intl. 1988). *See also* Konstantin D. Kerameus, *Enforcement of Non-Money Judgments and Orders in a Comparative Perspective*, *in* LAW & JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 107 (James AR. Nafziger & Symeon C. Symeonides eds., Transnational Publishers 2002); Konstantin D. Kerameus, *Enforcement Proceedings*, *in* XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE 19 (Mauro Cappelletti ed., Brill 2002); Michael Chesterman, *Contempt: in the Common Law, But Not in the Civil Law*, 46 INT'L & COMP. L. Q. 521 (1997); Carlandrea Cremonini, *An Italian Lawyer Looks at Civil Contempt: From Rome to Glastonbury*, 3 CIV. JUST. Q. 133 (1984). Less recently, but still useful, Alexander Pekelis, *Legal Techniques and Political Ideologies*, 41 MICH. L. REV. 665 (1943).

more and more aware of the importance that all legal systems governed by the rule of law *must* provide some effective remedy to enforce the rights that are provided by the substantive law itself.

"Treaties are nothing but scraps of paper!"[3] Indeed, the same could well be said for judicial decisions. Except for the cases in which judge's statements have—as analytical philosophers would say—a "performative" effect,[4] in the sense that they directly create or change a legal relationship (e.g., determining personal *status*, such as a divorce decree or annulment of marriage[5]), judgments creating obligations always demand acts of compliance. Self-evidently, this compliance is not always spontaneous. If it is not, the legal system must find a way to win the not-surprising judgment debtor's reluctance to comply with the pronouncement of the court, and to realize, therefore, what the famous Italian civil procedure scholar Giuseppe Chiovenda used to call "*la volontà concreta della legge*" ("the concrete will of the law").[6] From a more philosophical viewpoint, it is a common claim that coercion is central to the very idea of law, and that coercive enforcement inevitably accompanies the concept of rule of law.[7]

Technically speaking, while judgments requiring the defendant to pay a sum of money to the claimant simply involve the first being

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3. This anecdotal phrase is said to have been exclaimed by German chancellor T. Von Bethmann Hollweg, in relation to the Treaty of London, shortly before the World War I.

4. JOHN AUSTIN, HOW TO DO THINGS WITH WORDS (Harv. U. Press 1962). More recently, *see* MARIANNE CONSTABLE, OUR WORLD IS OUR BOND: HOW LEGAL SPEECH ACTS (Stanford U. Press, 2014) and specifically chapter 1: How to Do Things with Law.

5. These types of judgments are defined "transformational" by FLEMING JAMES JR., GEOFFREY C. HAZARD & JOHN LEUBSDORF, CIVIL PROCEDURE 30 (5th ed., Foundation Press 2001), or "self-effectuating" by ADRIAN ZUCKERMAN, ZUCHKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE, 1096 (Oxford U. Press 2011), in the sense that they do not require enforcement proceedings (in Italian, *sentenze costitutive*; in French, *jugement constitutive*; in German, *Gestaltungsurteile*).

6. GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE 249 (Jovene 1960).

7. Recently, re-stressing this point, FREDERICK SCHAUER, THE FORCE OF LAW (Harv. U. Press 2015).

forcibly stripped of his assets to pay his debt, things get more complicated in the case of non-monetary judgments, i.e., those judicial decisions that order the defendant to do, or to abstain from doing, a specific act ("orders of specific performance" and "prohibitory" or "mandatory injunctions"). In those cases, without an adequate apparatus of coercive tools able to force human conduct, jurisdictional power—as it has been wryly noted—"would be an empty illusion."[8]

Before proceeding further, let me first define what I mean, broadly speaking, by "coercive tools" in civil proceedings. It is well-known that the jurisprudential definition of a legal institution can take two forms: that of the *function* and that of the *structure*.[9] From the former perspective, coercive sanctions are procedural tools that aim to oblige the judgment debtor (i.e., the party who has to give performance) without the intervention of the enforcement machinery of the State with the judicial order. From the perspective of the structure, they act by inflicting monetary or even personal penalties (incarceration) on the claimant. In short, the *rationale* of coercive means is to make non-compliance with the judicial order less convenient than compliance.

What I want to draw attention to in this article is that common and civil law jurisdictions—despite their undeniable gradual convergence in many legal aspects[10]—still radically differ in the ways in which they react to non-compliance with court judgments. While in common law failure to comply with a binding legal decision or order is considered civil contempt of court, in civil law countries this concept is totally unknown. In the common law world, willful disobedience of court orders represents a sort of offence (as the word

8. JOHN F. DOBBYN, INJUNCTIONS IN A NUTSHELL 216 (West 1974).

9. This dichotomy to define legal institutions is owed to the great Italian legal philosopher NORBERTO BOBBIO, DALLA STRUTTURA ALLA FUNZIONE. NUOVI STUDI DI TEORIA GENERALE DEL DIRITTO (Laterza 2014) (1977).

10. On this trend, *see* THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Basil Markesinis ed., Oxford U. Press 1994). For a critical view, *see* Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L. AND COMP. L. Q. 52 (1996).

"contempt" literally indicates) against the court itself or the public administration and proper functioning of justice, and as such it has to be, in a certain sense, "punished." This becomes clear especially if we look at the United States, where the line of demarcation between civil and criminal contempt is not so sharply drown. Conversely, in the civil law legal family, non-compliance is a matter of significance for the enforcing party only. Breach of civil orders is not considered a question of "public policy." As it has been correctly pointed out, "to the non-common lawyer the contempt power is a legal technique which is not only unnecessary to a working legal system, but also violates basic philosophical approaches to the relations between government bodies and people."[11]

Undoubtedly, also civil law systems have some forms of sanction or threat to compel compliance with judges' orders—the *astreintes* in France,[12] the *Geldstrafen* in Germany,[13] the "coercive measure" introduced for the first time in 2009 in the Italian Code of Civil Procedure,[14] and so forth—but they are never regarded as ways

11. Ronald Goldfarb, *The History of the Contempt Power*, 1 WASH. U. L. Q. 1, 2 (1961).

12. *Astreintes* are notoriously court orders for the payment of a fine for each day the debtor delays compliance with the judgment. They are for the benefit of the creditor. This model has been transplanted—in Europe—in Luxemburg, Belgium, and the Netherlands. For the French model, *see* ANNE LEBORGNE, VOIES D'EXÉCUTION ET PROCÉDURES DE DISTRIBUTION 288 (Dalloz 2009); *Astreinte*, VOCABULAIRE JURIDIQUE (Gérard Cornu ed., Press Univ. France 2005). In Belgium, *see* JACQUES VAN COMPERNOLLE & GEORGES DE LEVAL, L'ASTREINTE (Larcier 2007).

13. Zivilprozessordnung [ZPO] (Code of Civil Procedure) § 888, 890 (Ger.). The sum of money, unlike in the French model, is to be paid to the State (and not to the plaintiff). For an examination of this model, *see*, in German, OSCAR REMIEN, RECHTSVERWIRKLICHUNG DURCH ZWANGSGELD: VERGLEICH – VEREINHEITLICHUNG – KOLLISIONSRECHT (Mohr 1992).

14. Italian Code of Civil Procedure, article 614-*bis*. For an English-language overview, Elisabetta Silvestri, *The Devil is in Details*: *Remarks on Italian Enforcement Procedures*, *in* ENFORCEMENT AND ENFORCEABILITY. TRADITION AND REFORM 207 (Remco van Rhee & Alain Uzelac eds., Intersentia 2010). In Italian-language, Sergio Chiarloni, *L'esecuzione indiretta ai sensi dell'art. 614 bis c.p.c.: confini e problemi*, GIURISPRUDENZA ITALIANA 731 (2014); for some comparative remarks, *see also* Michele Taruffo, *Note sull'esecuzione degli obblighi di fare e di non fare*, GIURISPRUDENZA ITALIANA 744 (2014).

to "vindicate" the court's authority or its dignity. Rather, as the historical evolution shows, these kinds of coercive tools are simply designed to overcome the Roman-Latin maxim "*nemo precise ad factum cogi potest*" ("nobody can be forced to do a specific act"[15]). Thus, in contractual matters, they guarantee the continental principle of the supremacy of specific performance over the obligation to pay damages.[16]

Furthermore, in the continental legal tradition (France, Italy and Spain, for instance), it is not possible to commit the unwilling debtor to prison. In this respect, the German model is quite problematic as it had followed a slightly different trajectory. While refusing a "personalized" and non-bureaucratic concept of judge—as it is, on the contrary, in the common law tradition (see section V.)—in Germany, imprisonment as a way of enforcement is theoretically still possible, although in very few and strictly limited cases, and only when the obligation is *infongible* or strictly personal (i.e., when it can be performed only by the debtor in person *unvertretbare Handlung*). The reason of this enduring possibility has been discussed by historians of civil procedure. It probably represents a residual institution from the Middle Ages, and, in particular, from the fact that

15. This rule was embedded, for instance, in former article 1142 of the French Civil Code (before the 2016 reform of contractual obligations) ("*toute obligations de faire ou de ne pas faire se résout en dommages et interêts en cas d'inexécution de la part du débiteur*," *i.e.*, every obligation to do or not to do is converted in the obligation of paying damages in case of nonperformance). However, both in common and civil law tradition it is not possible to coerce the defendant into complying with orders that involve personal activities (like contracts of employment), such as "contracts of personal service." *See generally* J. Lewis Parks, *Equitable Relief in Contract Involving Personal Service*, U. OF PA. L. REV., 251 (1918) or, in the French legal system, "*obligations à caractère personnel*," *see* Antoine Lebois, *Les obligations de faire à caractère personnel*, JCP 2008, 210.

16. SOLENE ROWAN, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE (Oxford U. Press 2012). A classic account of this topic is that of GUENTER H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT (Oxford U. Press 1988). *See also* Shael Herman, *Specific Performance: a Comparative Analysis*, 7 EDINBURGH L. REV. 8 (2003). For an earlier, but still valid, analysis, John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 516 (1958).

the contumacy, in its broader sense, was then considered as an offence to the authority of the king (*Verletzung des Königs*[17]).

As the German model represents, in this hypothesis, an exception to the general rule adopted by civil law systems, it will not be taken into consideration here. Rather, what I want to stress, from a very general standpoint, is the fact that in civil law jurisdictions (with, indeed, the small exception of Germany, in some cases), courts lack the power to act *in personam* at all. Conversely, in common law countries, the imprisonment of the person found guilty of civil contempt seems to be a common practice, especially in the United States. The famous case of Beatty Chadwick is, to this extent, emblematic: here, an American lawyer was jailed for fourteen years in the county prison of Delaware only because he refused to disclose to the court his assets in a matrimonial proceeding, and it is surprising to note that he would have done less time in prison if he had simply stolen the money.[18]

My key questions are: what are the reasons of this contrast? What are the cultural factors, if any, that are able to explain and justify this discrepancy of approaches?

My article will unfold as follows. In the following part, I will outline the methodological framework of my research, recalling the

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17. In German language, J. KOHLER, *Ungehorsam und Vollstreckung im Zivilprozess*, ARCH. CIV. PRAX. 80, 141 (1893). For the historical analysis of this point, *see* the discussion occurred between the Italian procedural law scholars SERGIO CHIARLONI, MISURE COERCITIVE E TUTELA DEI DIRITTI 68, 72 (Giuffré 1980) and Vittorio Colesanti, *Misure coercitive e tutela dei diritti*, RIVISTA DI DIRITTO PROCESSUALE 601 (1980).

18. Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002). This case is discussed in detail by Mitchell J. Frank, *Modern Odysseus of Classic Fraud—Fourteen Years in Prison for Civil Contempt Without a Jury Trial, Judicial Power Without Limitations, and an Examination of the Failure of Due Process*, 66 U. MIAMI L. REV. 599 (2012). *See also*, on this case, WENDY MCELROY, THE ART OF BEING FREE: POLITICS VERSUS EVERYMAN AND WOMAN 95 (Laissez Faire Books 2012). On a wider perspective, *see* Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185 (1991). To avoid these situations, now, in England, committal by a Superior court may only be for a maximum of two years, and only one month if the order comes from an inferior court—Contempt of Court Act 1981, s.14(1). The superior court power to fine is, however, unlimited.

approach suggested by the Italian-American comparative law scholar Mauro Cappelletti (Part II). I will then explore what is the common function, or common need, which makes the comparison between the civil contempt of court and its civilian counterparts possible (Part III). Then, while focusing my attention upon the Anglo-American model of civil contempt of court, I will illustrate its most distinctive features, contrasting them with the "continental" view (Part VI). Finally, I will argue that those differences can be fully explained only by looking at the different images and roles played by judges and courts in each legal tradition (Part V). As I see it, it is not possible to even partially understand the long-lasting presence and enduring importance of a legal institution such as the (civil) contempt of court without taking into account the particular conception of the judiciary and the particular "symbolic image" and "social perception" of the judge in the common law systems and, I would say, within the Anglo-American society at large.

II. THE "COMPARABILITY" OF LEGAL INSTITUTIONS

Before addressing the problem shortly outlined above, I think it would be useful to premise some short methodological remarks in relation to the comparative law enterprise.

In my view, one of the biggest problems—if not *the* biggest—for comparative law scholars is to determine what can be usefully compared.[19] By and large, comparative law is, in a certain sense, caught in middle of this paradox. On the one hand, it is necessary to respect differences existing between legal systems—without alterity, the comparative law endeavor itself makes no sense.[20]

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19. Catherine Valcke, *Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems*, 52 AM. J. OF COMP. L. 713, 720 (2004) [hereinafter Valcke, *Comparability of Legal Systems*]. *See also* Catherine Valcke, *Reflections on Comparative Law Methodology—Getting Inside Contract Law*, *in* PRACTICE AND THEORY IN COMPARATIVE LAW, 22 (Maurice Adams & Jacco Bomhoff eds., Oxford U. Press 2012).

20. "*Comment, d'ailleurs, le comparatiste lui-même pourrait-il exister sans l'autre?*" wonders PIERRE LEGRAND, LE DROIT COMPARÉ 96 (4th ed., Presses Uni-

On the other hand, we unavoidably need a "contact point"—or, to use Pierre Legrand's evocative expression, an "*interface sémantique*"[21]—for legal cultures to communicate with each other: "[*l'*]*absolument autre ne pourrait être qu'indéchiffrable, c'est-à-dire muet.*"[22] To make a dialogue, we must speak the same language. In short—as Catherine Valcke has summarized—comparative law, to be possible, requires *unity* and *plurality* at once.[23]

But how is it possible to combine respect for alterity and the need for communication? How is it possible to reconcile both those fundamental and to a certain extent, at odds requirements?

Although the literature relating to comparative law methodology is surprisingly huge (comparative law scholars seem to be somehow obsessed with methodological discussions[24]), I would like to employ and discuss here the methodological framework suggested by Mauro Cappelletti—one of the most prominent and internationally-renowned voices of the last century, both in the field of comparative law and civil procedure—as outlined in his book about civil justice systems in comparative perspective.[25] I think his method represents one of the best attempts to fruitfully handle this "tension" between similarity and difference.

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versitaires de France 2011). *See also* Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 144 (Pierre Legrand & Roderick Munday eds., Cambridge U. Press 2003), "[a] planet with one culture would be an impoverished habitat (and a world in which comparatists have very little to do)."

21. LEGRAND, *supra* note 20, at 77.

22. *Id.* at 73.

23. *See* Valcke, *Comparability of Legal Systems*, *supra* note 19, at 720.

24. For an up-to-date and thorough account, *see* COMPARATIVE LAW METHODOLOGY (Maurice Adams, Jaakko Husa & Marieke Oderkek eds., Edward Elgar Pub. 2017); MATHIAS SIEMS, COMPARATIVE LAW (Cambridge U. Press 2014). A helpful critical summary (in French) is provided by Béatrice Jaluzot, *Méthodologie du droit comparé: bilan et prospective*, 57 REVUE INTERNATIONALE DE DROIT COMPARÉ 29 (2005).

25. I am referring to Mauro Cappelletti, *Metodo e finalità degli studi comparativi sulla giustizia*, *in* MAURO CAPPELLETTI, DIMENSIONI DELLA GIUSTIZIA NELLE SOCIETÀ CONTEMPORANEE: STUDI DI DIRITTO GIUDIZIARIO COMPARATO16 (Il Mulino 1994).

To put it roughly, according to his view, two or more legal institutions can be said "comparable" (and the comparative law endeavor can be, thus, meaningful) *not* when the final legal solutions adopted by each country are similar, but when the problem or social need the normative intervention intended to address is the same. It is quite evident here the reference to the functional method, the main assumption of which—as Zweigert and Kötz famously wrote—is that "in law the only things which are comparable are those which fulfill the same function."[26]

Attempting to bring unity to comparative law research, Mauro Cappelletti's first assumption is that before comparing, we first need to find out what is the shared social problem or need legal institutions aim to respond. Secondly, in his desire to *insist* on differences, he explicitly states how a purely technical description of a legal state of affairs between two or more foreign countries does not mean comparative law. Comparative law in its most authentic sense always involves an in-depth research of historical, sociological, ethical, ideological (in one word: cultural) reasons that can somehow explain the divergence of legal solutions, and everyone sees how these reasons can only be found outside the strict legal domain.[27]

Admittedly, this kind of methodology also has a weak part. Indeed, the final stage of the comparative research is said to consist in an assessment of the different legal solutions in terms of efficiency.

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26. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (Oxford U. Press 1998). For a critical discussion, Ralph Michaels, *The Functional Method of Comparative Law in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., Oxford U. Press 2006); Michele Graziadei, *The Functionalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 144 (Pierre Legrand & Roderick Munday eds., Cambridge U. Press 2003). Recently, on functionalism, *see* James Gordley, *Comparison, Law, and Culture: A Response to Pierre Legrand*, 65 AM. J. COMP. L. 133 (2017) (special issue: *What We Write About When We Write About Comparative Law*: *Pierre Legrand's Critique in Discussion*).

27. Cappelletti, *supra* note 25, at 17–18. Those elements are dubbed the "invisible forces" by Bernhard Grossfeld & Edward J. Eberle, *Pattern of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L. J. 291 (2003).

Since this claim can no longer be accepted—as it has been proven wrong by the most recent comparative law scholarship, and by the notion of "incommensurability" of legal traditions[28]—my goal in this article is not to say which model of coercive sanction (the civil law or the common law one) is the *best*. I think that both have their advantages and drawbacks. For one thing, continental models are too "soft," and could in fact lead to the "monetization" of all entitlements. On the contrary, the common law system could repress various kinds of legitimate revendications in order to preserve the legal *status quo*—as it happened in those cases in which the English and American judiciary, through the threat of contempt of court, prevented or stopped picketing and striking by trade unions in industrial disputes.[29] Rather, I want to simply analyze and give value to the existing enriching cultural distance between common and civil law traditions in this academically quite overlooked legal field.

III. IN SEARCH OF THE COMMON NEED: THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION AND ITS SIGNIFICANCE

In the case of coercive sanctions in civil proceedings, it is not difficult to see what their core function is. Basically, it is to convert judges' words into facts. By preventing that court decisions will not be followed by actions, coercive sanctions enforce the "rule of law," generally understood as the supremacy of the law (in the case here at stake, as embodied in a binding legal judgment) over the personal will of people.[30]

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28. H. Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 AM. J. OF COMP. L. 133 (2001).

29. This matter is discussed in JOHN A.G GRIFFITH, THE POLITICS OF THE JUDICIARY 63 (5th ed., Fontana Press 1997); *see also* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (Macmillan 1930) and William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989).

30. *See*, *e.g.*, Sherry v. Gunning [2014] IEHC 411 (H. Ct.) (Ir.): "The jurisdiction of the courts to enforce their own orders is an essential aspect of the rule of law;" United Nurses of Alberta v. Alberta (A.G.) [1992] 1 S.C.R., 901 at 931 (Can.):

In a more detailed way, the task of all coercive tools is to enhance the so called principle of "effective judicial protection." This principle is not only provided now, in Europe, by art. 6(1) of the European Convention on Human Rights—which generally protects the right of a fair trial—but it is also a general rule which is part of the very foundation of any system ruled by law.[31] In the narrow sense and for my current purposes, this principle means, amid many other things, that every legal order *must* provide effective means to enforcing its judgments (especially non-pecuniary ones) and that the remedies that courts deliver must be *effective*. All this has been clearly stated by the European Court of Human Rights for the first time in its path-breaking decision *Hornsby v. Greece*.[32] In this case, Greek authorities refused to give the permission to two British citizens to open up an English language school because they did not have Greek nationality. The Greek Supreme Administrative Court held that this refusal was contrary to the European Law, which prevents nationality-based discriminations, and finally ordered to grant the "specific remedy" (i.e., the permission to open up the school). However, Greek administrative officials did not comply with this order, and the British citizens were then only awarded damages, i.e. a sum of money for their actual loss. The European Court of Human

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> The rule of law is at the heart of our society; without it, there can be neither peace, nor order, nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

31. *See* Anthony Arnull, *The Principle of Effective Judicial Protection in EU Law, An Unruly Horse?*, 36 EUR. L. REV. 51 (2011).

32. Hornsby v. Greece, App. No. 18357/91, 1997-II Eur. Ct. H.R 613. For a discussion of this case, GERANNE LAUTENBACH, THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS 146 (Oxford U. Press 2013). On the rising of a real right to an effective judicial enforcement of binding judgments, in French language, Jacques Normand, *L'émergence d'un droit européen de l'exécution*, *in* MÉLANGES EN L'HONNEUR DE JACQUES VAN COMPERNOLLE 458 (Bruylant 2004); Jacques Van Compernolle, *Le droit à l'exécution: une nouvelle garantie du procès équitable*, *in* LE DROIT PROCESSUEL ET JUDICIAIRE EUROPÉEN 475 (Georges De Leval & Marcel Storme eds., La Charte 2003).

Rights then condemned Greece on the basis that Article 6 of the Convention requires final judgments to be *exactly* enforced. The Court persuasively argued that the right of access to court "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party"[33] and more importantly that the "action for damages" provided by Greek statutory legislation "cannot be deemed sufficient to remedy the applicants' complaints" as "compensation for non-pecuniary damage . . . would not have been an alternative solution."[34] Here, the mere monetary compensation was found to be a qualitatively *inadequate* remedy compared to the specific relief.

I think it is quite clear that, especially after this judicial decision, all coercive procedural devices are expected to play a crucial and unique role in every contemporary legal system. They are, in some ways, *necessary*. Without them, as Calabresi and Melamed stressed in their influential study, "property rules" granted by law would be converted into mere "liability rules" if the defendant can only be forced to pay a "substituted" sum of money for having failed to comply with his/her primary duty.[35] If things were so, we could say that the right to disobey a non-monetary judgment is obtainable by the mere payment of a monetary penalty.[36] It is worth noting, incidentally, that this is what always happened in Italy before the ultimate introduction of the general coercive tool in 2009 in the Code of Civil Procedure, especially in the case of judgments ordering the abstention from doing something or ordering an activity that could be done only by the defendant in person (i.e., *infongible*).

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33. Hornsby v. Greece, *supra* note 32, at para. 40.
34. *Id.* at para. 37.
35. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972): "we impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules."
36. "The right to disobey the law is not obtainable by the payment of a penalty …." Francome v. Mirror Group Newspapers Ltd. [1984] 2 All ER 408 at 412 (UK).

IV. CIVIL CONTEMPT OF COURT AND THE PRIVATE/PUBLIC DIVIDE

After having tackled the problem of the comparability between civil contempt of court and the continental coercive tools, I would like now to stress the divergences existing between the two, and try to explain them.

Coherently with the approach initially adopted and focusing on the Anglo-American model, I will leave apart the most technical aspects as well as the examination of procedural requirements or of operating rules of civil contempt of court, and I will explore its essential characteristics, its fundamental principles, and its most "ideological" or "political" features. Indeed, contempt of court has to be essentially seen, at least in my opinion, as an ideologically loaded notion.

To begin, it is well-known that the purpose of civil contempt of court (or contempt in procedure, or contempt by disobedience) is to provide a sanction for non-compliance of theoretically any court order (interlocutory or provisional as well final, for the discovery or production of documents, as well on the merit of the case), not only by means of monetary penalties (i.e., sequestration of assets and fines), but even through the incarceration of the contemnor.[37] This possibility derives from the fact that all equity instruments (and in particular orders of specific performance, and mandatory and prohibitory injunctions, that in ancient times only the Lord Chancellor

37. Civil contempt of court is a legal institution that exists in every common law jurisdiction. For monographic accounts focusing on the English model, *see* DAVID EADY & A.T.H. SMITH, ARLIDGE, EADY & SMITH ON CONTEMPT 892 (4th ed., Sweet and Maxwell 2011); C. JOHN MILLER, CONTEMPT OF COURT (3d ed., Clarendon Press 2000); NIGEL LOWE & BRENDA SUFRIN, THE LAW OF CONTEMPT (3d ed., Butterworths 1996); *Contempt of Court*, *in* 22 HALSBURY'S LAW OF ENGLAND (5th ed., Adrian Zuckerman ed. 2012). For the analysis of some distinctive aspects of civil contempt in the United States, *see* Paul A. Grote, *Purging Contempt*: *Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1269 (2011); Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345 (2000); Earl C. Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempt*, 79 VA. L. REV. 1025 (1993).

could grant), do not act *in rem* (i.e., against assets), but *in personam* (i.e., directly against the debtor's person).

"A court without contempt power is not a court."[38] I think this short phrase perfectly captures the main feature of the English civil sanction, a feature that does not exist in civil law jurisdictions at all. It expresses the very idea that the contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an "oxymoron." Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer's eye, the power of contempt "is inherent in courts, and automatically exists by its very nature."[39]

The legal origins of the contempt of court are well rooted in history.[40] In *R. v. Almon*, judge Wilmot wrote: "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."[41] Of course, such a statement must be understood as part of that broad, now debunked, "narrative" aiming to affirm that common law has always existed, and that the English judge do not invent, but rather find out and declare pre-existing laws (that is the so called "declaratory theory"). Nevertheless, in this case there is some truth. Yet in the very first essay on common law, the *Tractatus de legibus et consuetudinibus regni Angliae* (the famous *Tractatus of Glanville*), there is a reference to the *contemptus curiae*, i.e., the disregard of the party who failed to appear before the King's court, or his justices (*Curia Regis*).[42]

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38. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 342 (1998).
39. Goldfarb, *supra* note 11, at 16.
40. On contempt of court history, *see* SIR JOHN CHARLES FOX, THE HISTORY OF CONTEMPT OF COURT. THE FORM OF TRIAL AND THE MODE OF PUNISHMENT (Oxford U. Press 1927).
41. R. v. Almon 97 E.R. 94; (1765) Wilm 243.
42. EADY & SMITH, *supra* note 37, at 1.

Historically speaking, and in more detail, the contempt power can be further explained by the development and stabilization of the notion of "inherent jurisdiction" of English Superior Courts, a concept completely extraneous to the habits of thought of civil lawyers, academically educated in the shadow of the *dogma* of the strict separation of powers. By inherent jurisdiction I mean that "reserve or fund of powers," without statutory foundation, "which the court may draw upon as necessary whenever it is just or equitable to do so" in order to preserve their own authoritativeness.[43] It follows that to affirm that civil contempt of court is mainly serving the plaintiff interest means to profoundly misunderstand the real nature of this institution. The main value here protected remains that of the "due administration" of justice: "civil contempt cannot be considered therefore merely as a means by which individuals litigants can enforce orders in their favour."[44]

Common law judges often use the concept of "public policy" to indicate this strong public interest toward the punishment of noncompliance with their orders. As Lord Diplock clearly wrote in his decision *Attorney-General v. Times Newspapers Ltd.*, there is always "an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court could be disregarded with impunity."[45]

In the common lawyer's legal mentality, the presence of civil contempt of court is then fundamental to the maintenance of social order and its hypothetical elimination is often depicted in rather apocalyptical (and often irrational) ways:

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43. These words are those of Isaac H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBLEMS 23, 51 (1970). Now also in ISAAC H. JACOB, THE REFORM OF CIVIL PROCEDURAL LAW 221 (Sweet and Maxwell 1982). More recently, on this issue, Martin S. Dockray, *The Inherent Jurisdiction to Regulate Civil Proceedings*, 113 L. Q. REV. 120 (1997).

44. EADY & SMITH, *supra* note 37, at 893.

45. Attorney-General v. Times Newspapers Ltd. [1973] 3 All ER 54, 71. For similar considerations, Mid Bedfordshire District Council v. Brown (Thomas), [2004] EWCA Civ. 1709 [2005] 1 W.L.R. 1460.

> To allow court orders to be disobeyed—a Canadian judges argued—would be to tread the road towards anarchy. If the orders of Courts can be treated with disrespect, the whole administration of justice is brought into scorn . . . . Loss of respect for the Courts will quickly result in the destruction of our society.[46]

As a result, throughout all the common law world, the distinction itself between civil and criminal contempt is much hazier than civil lawyers may think.[47] In Jennison v. Backer,[48] Judge Solomon stated that the purpose of vindicating the right of the claimant and the purpose of vindicating the court authority are "inextricably intermixed" and that the divide between the two forms of contempt is "unhelpful and almost meaningless." For Lord Donaldson, in *Attorney-General v. Newspaper Publishing Ltd.*,[49] that distinction even "tends to mislead rather to assist." Furthermore, as one of the most authoritative American books on injunctions says: "contempt are neither wholly civil nor altogether criminal."[50]

That means that the nature of civil contempt of court is always twofold. It has both a coercive and punitive function at once.[51]

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46. O'Leary J., *Canada Metal Co. Ltd vs. Canadian Broadcasting Corporation*, [1975] 48 D.L.R. 3d 649, 669. (quoted in Chesterman, *supra* note 2, at 521). *See also* Sherry v. Gunning, *supra* note 30: "The orders of the court must be complied with. The alternative is anarchy in which the strong will triumph over the weak."

47. "The demarcation [between civil and criminal contempt] may be hazy at best," File v. File, 673 S.E. 2d 405 (N.C. Ct. App. 2009).

48. Jennison v. Backer [1972] 2 Q.B. 52, [1972] 1 All ER 997.

49. Attorney-General v. Newspaper Publishing Ltd. [1987] 3 All ER 276, 294 (CA).

50. OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS 832 (2d ed., Foundation Press 1984).

51. Gompers v. Buck's Stove and Range Co., 221 U.S. 418 (1911). More recently, International Union, United Mine Workers v. Bagwell, 512 U.S. 821 (1994) ("contempt is a civil-criminal hodgepodge"); on this important case, *see* Philip A. Hostak, *International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181 (1995); Linda Mullenix, *Clarifying the Distinction between Civil and Criminal Contempt: Problems of Prospective Penalties and Excessive Fines*, *3 Preview of Supreme Court Cases 87* (University of Texas Law, Public Law Research Paper No. 360, 1993): "Elements of punitive as well remedial punishment are almost invariably present in every civil contempt." Johansen v. State, 491 P.2d 759, 764 (Alaska 1971) (quoting Grote, *supra* note 37, at 1256 n.71).

In other words, one could say that the purpose of civil contempt of court, in most cases, is both backward-looking (used to punish past acts of disobedience) and forward-looking (used to compel obedience). It always has a "punitive" flavour. For these reasons civil contempt is often said to be a "quasi-criminal" wrong, and to "partake of a criminal nature."[52] It coherently follows, for example, that the standard of proof is the criminal one of "beyond any reasonable doubt" and not the civil one of "balance of probabilities."

What it should be emphasized here is that such affirmations would be simply unthinkable in a civil law jurisdiction, where private and criminal (public) law are understood as two legal fields well separated and never overlapping and that is why, for instance, civil law courts cannot award punitive damages.[53] In the civil law legal culture, unlike in the common law one, the distinction between what counts as (private) tort and what counts as (public) crime has always been quite sharply drawn.[54]

Yet from these brief observations it is therefore possible to unveil the profound difference between civil contempt of court and its civilian counterparts. Indeed, the idea that non-compliance with court orders represents, in some ways, a public offence toward the court is simply foreign to civil law scholar's eye. As Alexander Pekelis (an Italian-American civil procedural scholar of the last century) remarked:

> This very concept of contempt simply does not belong to the world of ideas of a Latin lawyer. It just does not occur to him

52. *In re* Bramblevale Ltd, [1970] 1 ch. 128 (C.A.), *per* Lord Denning, M.R. at. 137.

53. On this comparison, Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1804 (1992). Recently, this issue has been investigated from a comparative perspective by Marco Cappelletti, *Punitive Damages and the Public/Private Distinction: A Comparison Between the United States and Italy*, 32 ARIZ. J. INT'L. & COMP. L. 799 (2015). *See also* Helmut Koziol, *Punitive Damages–A European Perspective*, 68 LA L. REV. 741 (2008).

54. For an analysis of the historical roots of such a difference, David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 BUFFALO U. L. REV. 59 (1996).

> that the refusal of the defendant to deliver to the plaintiff a painting sold to the latter . . . may, as soon as 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 willfully disobeyed.[55]

Now, no doubt that in contemporary times, Anglo-American judges do not feel personally "offended" or "insulted" by the debtor's non-compliance with its orders. But nonetheless it is true that only in civil law countries, what happens after the final judgment is conceived as a mere *chose des parties* (i.e., a private matter between the parties) and do not involve the judicial authority in its essence.

V. EXPLAINING THE DIFFERENCES: TWO REMARKS ABOUT THE IMAGE OF THE COMMON LAW JUDGE

My claim is that it is possible to fully understand the nature and character of civil contempt of court only by looking at the high social prestige of the judiciary in the common law jurisdictions, *vis-à-vis* civil law jurisdictions.[56] In the words of Konstantinos Kerameus—one of the few procedural legal scholars that has dealt with the enforcement proceedings in comparative perspective—the regime of civil contempt "transcends the field of the enforcement by … exalting the function of courts within society at large."[57]

I believe, in other words, that there is a sort of correspondence, a connection, or at least an influence, between the, so to say, "zero tolerance" for disobedience with judicial orders (well expressed by the civil contempt of court doctrine) and the symbolic image, or the "social perception," of common law judges. Basically, while in common law jurisdictions judges are characterized by a high social

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55. Pekelis, *supra* note 2, at 668; Chesterman, *supra* note 2, at 541.

56. This idea is not totally new; *see, e.g.*, GILLES CUNIBERTI, Grands systèmes de droit contemporains 124 (2d ed., L.G.D.J. 2011): "[*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*."

57. Kerameus, *supra* note 2, at 117.

prestige, and the judiciary function is strongly "personalized,"[58] on the contrary, in continental legal culture, judges are essentially seen as de-personalized, anonymous, bureaucratic figures that completely lack that "paternal authority" that characterizes their common law counterparts.

Although this point merits a deeper reflection, which goes beyond the scope of this article, I think that at least two kinds of historical justification can be advanced. The first is, I would say, "institutional." It deals with the fact that, in England, the authority of the judiciary is historically derived from the Sovereign's powers. I am aware that this is, in some ways, true also in relation to the civil law jurisdictions, at least at the beginning of their evolution. But whilst the recent developments of the continental legal culture are marked by a complete rupture with the previous legal order, due especially to the French Revolution and its strongly "anti-judicial" ideology, in England there is no a real, commonly-recognized boundary between the Middle Ages and modern times—it is well-known that the gradual development of common law is better described by the idea of "continuity" than that of "separation."[59]

In late Anglo-Saxon times, the King was described as the *fountain of all justice.* According to the famous Blackstone's metaphor,

58. This feature is well exemplified, for instance, by the fact that, in common law legal culture, the style in which legal decisions are written (their "aesthetic") is rich and strongly "recognizable" (think emblematically of Lord Denning's opening lines, like the famous one in Hinz v. Berry [1970] 2 Q.B. 40 at 42: "It happened on April 19, 1964. It was bluebell time in Kent," and in many other judgments). Besides, each common law judge in the decision-making process expresses themselves in the first person, and is entitled to write their dissenting or concurring opinion—to clearly stress how the reasoning is to be intended as the product of their own mind and nothing else. In contrast, a French sentence is short, written in a highly technical and "impersonal" jargon that completely lacks any rhetorical force or literal beauty. Here the message implicitly conveyed is that it is neither a person nor a group of people speaking, but just the invisible will of the law, which has no face. On this topic, *see* Mitchel Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1326 (1995); for a more general discourse, *see* MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY (Oxford U. Press 2004).

59. NICOLA PICARDI, LA GIURISDIZIONE ALL'ALBA DEL TERZO MILLENNIO 53, 61 (Giuffrè 2007).

jurisdiction was lake water: "[t]he course of justice flows from the King in large streams. As those streams run through his courts, justice is subdivided into smaller channels . . . till the whole and every part of the kingdom were plentifully watered and refreshed."[60] Sovereigns themselves could take part personally in their own courts. In this picture, the King delegated his power to carry out justice to judge, that they were nothing but the "impersonification" of the Sovereign in the realm. Although only in a symbolic way, all this can be seen still today. The High Court is *Her Majesty's* High Court. The Law Courts, i.e., the London building that houses the High Court and the Court of Appeal, is called the *Royal* Courts of Justice. The judges are *Her Majesty's* judges.[61] In the United Kingdom, all jurisdiction still formally derives from the Crown, and justice is carried out in its name.[62] In such a legal context, it was quite clear that disregard towards judges meant disregard toward the King himself, and to disobey equity orders issued by the Lord Chancellor (who was dubbed as the "keeper of the King's conscience") meant nothing but an indirect disobedience to the Monarch.[63]

On the contrary, in civil law countries, coercive measures have developed only as means of guaranteeing the specific performance (*exécution en nature* in French, *Naturalherstellung* in German, *esecuzione in natura* in Italian) of every obligation—a principle that descends from the "natural law" and moral maxim "*pacta sunt*

60. These words are quoted by Paul D. Halliday, *Blackstone's King*, *in* RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT ON NATIONAL AND INTERNATIONAL CONTEXTS 175 (Wilfred Prest ed., Oxford U. Press 2014).

61. JACK JACOB, THE FABRIC OF ENGLISH CIVIL JUSTICE 205 (Sweet & Maxwell 1987).

62. The official website of the Royal Family still mentions this; *see* https://perma.cc/K5RS-XZHV.

63. Goldfarb, *supra* note 11, at 8 ("[t]he courts of early England acted for the king through the realm. And their exercise of contempt powers derived from a presumed contempt of king's authority"). This point is highlighted also by John H. Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 162 (1908); remembering that, during the case of the committal of Prince Henry for contempt, the Chief Justice Gascoyn said, "I keep here the place of the king, your sovereign lord and father, to whom ye owe double obedience."

servanda" (literally translated: promises must be kept) and that traditionally do not belong to the common law legal tradition, at least in the field of contract law.[64]

The second observation, in terms of "political theology," has to do with the religious derivation of all legal professions and of the community of jurists as an *élite* in the common law world. Indeed, at least until late in the Middle Ages, the King of England was named as the "earthly living image of Christ" or "Vicar of God."[65] It is no surprise, therefore, if those features were transferred from the Sovereign to judges, who still remain today—in the mode of thought of the common law lawyer—the "priests" of justice (common law scholars often think of judges in theological terms).[66] The implied 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 somehow represent God.[67] Moreover, until the 16th century, the Lord Chancellor, who exercised jurisdiction in civil

64. "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else" is the famous phrase owed to Oliver W. Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 472 (1897).

65. In the Italian legal scholarship, this topic has been thoroughly explored by CRISTINA COSTANTINI, LA LEGGE E IL TEMPIO. STORIA COMPARATA DELLA GIUSTIZIA INGLESE (Carocci 2007). The appellation of "Vicar of God" of early Norman kings, as well its influence of the discipline of contempt are underlined by Goldfarb, *supra* note 11, at 7.

66. *See* Philip Soper, *Metaphor and Models of Law: The Judge as a Priest*, 75 MICH. L. REV. 1196, 1209 (1977). *See also* Larry C. Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM & MARY BILL RTS J. 117 (2003) (quoting Lewis H. LaRue, *How Not To Imitate John Marshall*, 56 WASH. & LEE L. REV. 819, 836 (1999): "Judges are priest, not prophets"). *See also* PAUL RAFFIELD, IMAGES AND CULTURES OF LAW IN EARLY MODERN ENGLAND: JUSTICE AND POLITICAL POWER 1558–1660 7 (Cambridge U. Press 2004), where the judicial function is dubbed *secular priesthood*. Judicial function has been defined as *secular papacy* by Ronald Dworkin, *The Secular Papacy*, *in* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 79 (J. Stephen Breyer & Robert Badinter eds., NYU Press 2004). JOHN P. DAWSON, *Introduction* to THE ORACLE OF LAW at xi (U. of Mich. Press 1967) speaks of a "mythic aura of sanctity" of judges.

67. For this line of reasoning, *see* David Marrani, *Confronting the Symbolic Position of the Judge in Western European Legal Traditions: A Comparative Essay*, 3 EUR. J. LEGAL STUD. 45 (2010).

matter, had always been a high ecclesiastic dignitary, and his procedural devices and techniques were those used in ecclesiastical courts.

On the contrary, in civil law jurisdictions, judges are no longer seen as "cultural heroes or parental figures" as "their image is that of a civil servant who performs important but essentially uncreative functions."[68]

In relation to the civil contempt of court, all that has been said can be perceived from the highly revelatory point of view of the language. Words such as "disobedience," "purging" (i.e., that sort of confession of guiltiness, where the wrongdoer must admit before the court his misconduct, acknowledge the breach of the order, express his regret and show a "suitable remorse"[69]), "debarment" (i.e., the formal exclusion of the contemnor from the legal proceeding), all evoke concepts such as "sin" and "redemption," that seem more strongly to belong to the religious sphere (or to that of the "father-son" relationship), than to the field of the administration of justice.[70]

To this extent, John Merryman, one of the most foremost American comparative law scholars, and learned expert of civil law systems, in specifically assessing the absence of the civil contempt of court in the continental systems, lucidly wrote that the parties, in the common law legal proceedings, play out their role before the "father-judge," and that the whole procedure is "permeated by a

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68. JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 37 (Stanford U. Press 2007) (1969).

69. Catherine O'Regan, *Contempt of Court and the Enforcement of the Labor Injunctions*, 54 MOD. L. REV. 385, 397 (1991). For the need of a "suitable remorse" of the contemnor, *see* Enfield London Borough Council v. Mahoney [1983] 1 WLR 749.

70. Pekelis, *supra* note 2, at 669, describing the common law "judicial thinking":

> he just disobeyed—a term that for a Latin lawyer's ear is likely to suggest a parent-child relation, rather than a court-party relation—he has disobeyed the court, he has been a bad boy, and he has to stand in the corner until he changes his mind. Nothing mysterious about it!

moralistic flavour"—and of course the Protestant ethic may have played a great role in this.[71]

On the contrary, in the civil law legal tradition, given that the judge merely is "an important public servant, but he lacks anything like measure of authority and paternal character possessed by the common law judge," parties and witnesses "can disobey his orders with less fear of serious reprisal." This is because the civil law legal culture is "thoroughly secularized, less moralistic, and more immune to the ethic of the time and place."[72]

IV. CONCLUSIONS

In conclusion, my article aimed at demonstrating how civil contempt of court is an institution that cannot exist but in the common law legal tradition, and that its presence in common law jurisdictions, and conversely its absence in civil law countries, is totally *understandable*. Civil contempt is to be understood as a by-product, historically determined, of a particular and unique fashion to conceive and consider the function of the judge and its position within the legal system. In common law legal orders, the judge has always been at the center of the legal experience, and there is no surprise that his judgments and orders are so intensely protected. While in the civil law culture the judge is merely conceived as an impersonal institution applying pre-existing laws, in the common law tradition he has been the creator of legal rules, conceived therefore as a real person, whose pronouncements and orders prompted the advancement and development of the law. The disobedience of his words was therefore a disobedience, and thus a contempt, directed to his persona:

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71. MERRYMAN & PÉREZ-PERDOMO, *supra* note 68, at 124. *See also*, speaking of the common law as a system influenced by Protestantism in this field, Sergio Chiarloni, *Ars distinguendi e tecniche di attuazione dei diritti*, RIVISTA DI DIRITTO PROCESSUALE 768 (1988).

72. MERRYMAN & PÉREZ-PERDOMO, *supra* note 68, at 124.

> *Dans l'imaginaire de common law, la justice est le fait d'une personne plutôt que d'une institution. C'est pourquoi la personnalisation de la fonction judiciaire semble infiniment plus importante que sur le continent, où la justice se conçoit plutôt comme une administration. L'unité de référence n'est pas la même : un individu dans un cas, une institution, dans l'autre* […] *La théorie positiviste, révolutionnaire et antijudiciaire conçoit le juge comme un automate; elle lui refuse toute contribution personnelle à la création du droit* […] *Pour la common law, la justice procède d'une décision rendue par un homme.*[73]

This excerpt, in my opinion, perfectly sums up why in the common law legal tradition failure to comply with judicial decisions is a quasi-criminal wrong, sanctioned even by imprisonment.

Overall, on a more general scale, my short analysis aimed at drawing attention to the fact that, in comparative endeavors, we have to focus not only on the points of convergence between legal institutions but, most importantly, on those of divergence, especially in the field of civil procedure and dispute resolution mechanisms, where legal tools are—more than anywhere else—deeply influenced by historical and cultural conditions. Cultural distance is, indeed, something that should be praised, not eliminated. Cultural distance is an enriching component of comparative research that empowers our mutual understanding of law and legal institutions, and as such it should be emphasized, rather than underestimated or avoided, and explained, rather than taken for granted. This is, I think, the true mission of comparative scholars: "*valoriser la singularité juridique . . . travailler avec acharnement à l'entendement du singulier*," and, at the same time, "*refuser . . .* la *comparaison musarde, mécaniste, calculatrice, affairiste*," always bearing in mind that "*la comparaison des droits sera culturelle ou ne sera pas*."[74]

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73. ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUGER EN AMÉRIQUE ET EN FRANCE : CULTURE JURIDIQUE FRANÇAIS ET COMMON LAW 159 (Odile Jacob 2003).

74. These beautiful words are those of LEGRAND, *supra* note 20, at 125.