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Riddle Me This, Riddle Me That: Anti-social Behaviour, Vagueness and Judicial Discretion in the United Kingdom

by

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Abstract

Earlier this year, the UK Parliament passed an Act aimed at redesigning the legislative landscape in the field of anti-social behaviour.

It is no secret that, when anti-social behaviour legislation first came into force, a lot of doubts were raised as to the dangerously arbitrary nature of these measures given that, while imposing heavy limitations on freedom of movement and other fundamental rights and freedoms, the conditions for granting them were unclear, as were the requirements to which respondents had to attune to.

In that context, judges played a crucial role in attempting to define the scope of anti-social behaviour measures.

During the Bill's passage, parliamentary debates emphasised the issues of vagueness and broadness but, nevertheless, the enacted legislation still poses serious questions concerning the scope, efficacy, and legitimacy of measures dealing with anti-social behaviour.

This paper proposes to analyse the difficult balance between protecting communities and social groups, on the one hand, and maintaining safeguards for individual rights, on the other, that the measures in question attempt to achieve; and discusses whether the new legislation is capable of doing so without sacrificing one to the other.

To that effect, it analyses a few pivotal judgments where the difficulty of maintaining this balance has become apparent.

Key-words

Anti-social behaviour, injunction to prevent nuisance and annoyance, criminal behaviour order, civil preventive measures

1. Anti-social Behaviour in Britain: A brief history

Upon its introduction, the anti-social behaviour order (ASBO) immediately stood out for its peculiar features, even though it belonged to a long-standing tradition which scholars usually refer to as "anti-social behaviour and disorder law".

In order to understand the social significance of such anti-social behaviour in British legal history, it is necessary to look back to the 14th century, when judges would impose sanctions on entire communities for a crime that was referred to as "breach of the peace". Basically, these sanctions dealt with widespread social unrest, susceptible of challenging the King's authority, and the disparate conducts they were aimed at included prostitution, drunkenness, brawling, defamation, foul language and so on. Lords entrusted their local sheriffs with the power to try all conducts perceived as illicit in order to uphold public order.

While the very concept of public order was originally designed to reconcile small communities with authority, it evolved in such a way that by the 16th century breach of the peace was a punishable offence, targeting single nomadic individuals who lingered in rural communities - the professed "vagrants" - in order to expel them. It is no coincidence that for around this time a great number of so-called "poor laws" are documented for the first time, even though it is believed they had been around for a few centuries, providing for a peculiar kind of "forced repatriation" of vagrants to the communities they had originated from.

At the same time, behaviour perceived as "anti-social" was progressively ascribed to the field of morals: on the one hand, it was dealt with by ecclesiastical courts prosecuting single offences by establishing the accused's moral indignity and consequent estrangement from the communities they were part of; on the other hand, various organisations sought to prevent such conduct by promoting morality within British society, a task made particularly arduous by the increasing urbanisation and industrialisation of Britain.

During the Victorian Era, public policy was regulated via byelaws, i.e. local regulation, which is interesting given that in the relevant contemporary legislation local authorities are designated as the preferred applicants for obtaining IPNAs[I]. In order to maintain public tranquillity, borough policemen were endowed with the task of avoiding mass insurgence,

especially where labourers' quarters were concerned. The crucial point of the arrangement in question was to reprimand conduct susceptible of ripping social cohesion apart because of its "anti-social" or "aggravating" nature, the same logic at the heart of the breach of the peace mechanism.

2. The Evolution of Anti-social Behaviour Legislation

In the British legal system, the category of ancillary orders is comprised of three sub-categories: reparative orders, merely preventive orders, and punitive and preventive orders. Punitive and preventive orders are non-retroactive, their scope is precise, and they are subject to the criminal standard of proof[II]. Merely preventive orders are not subject to such heavy safeguards.

Anti-social behaviour orders were conceived of as merely preventive orders, but they undoubtedly have the potential to include punitive aspects, especially since the Police Reform Act 2002 introduced a distinction between so-called "stand-alone ASBOs"[III], which fell into the category of civil preventive measures and were obtained in civil proceedings, and criminal anti-social behaviour orders – so-called "CrASBOs"[IV] –, which could be granted following a criminal conviction in addition to the imposed sentence or a conditional discharge.

In 2012, the conservative government led by David Cameron announced plans to thoroughly reform ASBO legislation[V]. The Anti-social Behaviour, Crime and Policing Act 2014 came into force earlier this year and replaced stand-alone ASBOs with injunctions to prevent nuisance and annoyance (IPNAs) and CrASBOs with criminal behaviour orders (CBOs), but some of the key issues that had come up over the years still remain.

2.1. The introduction of Anti-social Behaviour Orders: A question of community

The main ideas behind ASBOs started acquiring political standing only near the end of the 20th century – in the 1980s, to be precise. The fundamental inspiration for ASBOs is the so-called "broken windows theory"[VI], according to which certain conducts, including minor illicit acts, actively contribute to the dissolution of social unity and the degradation of quality of life and living conditions within communities because they are widespread and constantly reiterated.

The Crime and Disorder Act 1998 formally introduced anti-social behaviour orders. Section 1(1) defines the kind of conduct that justifies applying for an ASBO as a manner that has caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.

The apparent lack of clarity and finiteness in this definition posed an immediate challenge to the judiciary. Based on that definition alone, the natural conclusion would have been to dismiss the provision in question as being too broad, given that the conduct the provision seeks to punish was unspecific with regard to both the manner and means by which it was supposed to be fulfilled.

The only finite aspect of the provision was that it required an assessment of causality with regard to the alternative outcomes of anti-social behaviour, described as "harassment, alarm or distress".

"Harassment" refers to a wide range of behaviour, spanning from random provocations to constant vexation, but its consistency can be appreciated from an objective, matter-of-fact standpoint. However, the other two elements hinge on the appraisal of a subjective condition, which consists either of a state of profound apprehension, in so far as "alarm" is concerned, or of pure, unadulterated anguish, where "distress" comes into play, almost as if hinting to a sort of "psychological climax".

During the Bill's passage[VII], Lord Goodhart, in an attempt to mitigate the vagueness of the provision's wording, noted that a further requirement ought to be introduced; this would have resulted in a "reasonableness test" with regard to victims of anti-social behaviour, basically making sure that they were of sound judgement and not easily impressionable. The Solicitor General rebuked his remarks by stating that introducing such a requirement would be redundant, given that insignificant or negligible conducts were already left out of the relevant legislation by employing existing parameters[VIII].

Nevertheless, the lack of a clear distinction between relevant and irrelevant conducts allowed for ample judicial interpretation, to the extent that, in some cases, it veered dangerously on the arbitrary, as ASBOs were sometimes granted for inappropriate reasons or unsupported by sufficient evidence.

In truth, scholars did not seem too concerned with issues relating to causality, perhaps because ASBOs were designed to oppose behaviour affecting entire communities rather

than a single individual, at least to some degree, and yet they did concern themselves with the particularly elusive expression "likely to cause" that appeared in section 1(1).

The prevailing opinion, which had its strongest supporters in those who promoted the introduction of ASBOs into the UK's legal system[IX], was that adding probability as a requirement for granting an ASBO justified the inclusion of so-called "professional witnesses", i.e. local authorities, police officers and so on, among those who could legitimately apply for it.

Consequently, victims of anti-social behaviour would not be forced to give evidence in order to lodge a complaint. Had it been otherwise, they would have felt discouraged; respondents would in turn be able to provide specific evidence as to the reasonableness of their conduct with regard to the circumstances in which it occurred.

As for the requirement that complaints be not from members of the same household as the respondent's, it was probably introduced so that the specific judicial remedies against domestic violence listed in Part IV of the Family Law Act 1996 would not be restricted in scope as a result of the new, less explicit ASBO legislation. Moreover, leaving intra-family disputes out of anti-social behaviour legislation served the purpose of underlining the scathing "ripple effects" anti-social conduct has on a community's general wellbeing, or lack thereof, thus making its punishment a question of public policy.

Determining the legal nature of anti-social behaviour orders is of crucial importance since the newly introduced measures are of the same nature and, unsurprisingly, the issue was at the forefront of political debate upon their introduction. The legal provision itself is of little use, given its aptitude to encompass any kind of contrary attitude, even unintentional, that is likely to cause an emotional reaction in a third party. Evaluating whether or not the allegedly anti-social conduct is unreasonable given the circumstances is a task reserved for judicial interpretation, which makes the ruling even more arbitrary, however much endowed with common sense judges may be.

In a 1995 Labour policy paper, "A Quiet Life: Tough Action on Criminal Neighbours", there is mention of a "Community Safety Order", the aim of which would have been to punish prolonged violations of public peace and tranquillity in residential areas, not by considering each single violation separately, but rather the persistence of anti-social behaviour over a certain period of time.

Therefore, single offences, against which judicial remedies capable of preventing the offender from reiterating them would not normally be granted, would be susceptible of judicial consideration as a whole, thus assuring that communities would be protected from the constant threat of anti-social behaviour.

This is relevant inasmuch as it reveals that the original intention behind the 1998 Act was not that of punishing single actions that might have caused offence to someone, but rather the idea of protecting communities from consistent anti-social conduct. It follows that while single acts may be labelled as "anti-social", they must be severe enough to justify granting a preventive measure originally imagined as a remedy against persistent delinquency. This seems to be confirmed by the provision in section 1(1), which states that an ASBO can be granted only if such an order is necessary to protect the relevant persons from further anti-social acts by the respondent. The requirement was meant to steer judicial discretion, but it was also the clearest indication of the preventive nature of the ASBO, which could be granted on the sole basis of a prognosis concerning the threat that a person might pose to a community at some point in the future, irrespective of actual considerations about the seriousness of previously committed offences. It should also be noted that while the provision stated that an ASBO had to be granted to prevent "further anti-social acts", it did not specify whether these "further acts" were assumed to be of the same nature as previous offences or if the issue was irrelevant, in which case the type of punishment would not necessarily have to mirror the nature of previously committed offences.

Such uncertainty made it quite difficult to distinguish between ASBOs that contained mere preventive measures and those including a *de facto* punitive measure, especially since the most recurring type of obligation involved hefty limitations on the freedom of movement.

The distinction is hardly trivial, given that the two alternatives would require different standards of proof and that the criminal standard didn't mix well with the swift judicial procedure culminating in an ASBO, which was supposed to provide immediate protection against anti-social behaviour based on a relatively low standard of proof.

The shifting nature of the ASBO made it difficult to understand its place within the justice system and courts were of little help in placing it[X].

ASBOs could also be granted as standalone preventive measures or as supplementary measures within other judicial proceedings. However, where criminal acts and proceedings were concerned, it is important to remember that the content of anti-social behaviour orders might well have been completely unrelated to the offence being prosecuted. This is a key issue given that, under the 1998 Act, the minimum duration of an ASBO was two years from the moment it took effect, and that the breach of such an order was punishable with up to five years in jail, irrespective of the legal nature of the conduct that had resulted in the ASBO.

2.2. Criminalizing ASBOs: The Police Reform Act 2002

The Police Reform Act 2002 formally introduced the so-called CrASBO[XI], which could be granted if upon conviction the prosecution had proof, beyond reasonable doubt, that the offender had engaged in anti-social behaviour and that it was necessary to protect others from further anti-social acts by him. Therefore, the order could be granted as a supplementary punishment or, hypothetically, also as an alternative measure to detention, but it was not specified whether the relevant behaviour was supposed to be somehow connected to the one that had received a criminal conviction. In either case, the ASBO procedure and the criminal trial were conducted separately.

For this reason, it was believed by many that the offender ought to be allowed to challenge the facts that had been brought as evidence for obtaining an ASBO without necessarily defying the merits of the principal criminal charge. As a result, an inquiry ought to be held before a judge in order to resolve issues not directly related to the principal charge, much like the so-called "Newton hearing"[XII].

CrASBOs took effect upon conviction, thus acting as a *de facto* ancillary order even though it was granted via a separate procedure. It follows that, while the criminal conviction came first, both logically and temporally, it ought to have no bearing on the outcome of the CrASBO procedure.

3. ASBOs and judicial interpretation

Judicial practice has shown that there is little doubt as to the preventive nature of anti-social behaviour orders, an observation that is in turn tied to the workability of the civil

standard of proof.

In the crucial McCann ruling (2002), the Appellate Committee of the House of Lords was tasked with determining the legal nature of stand-alone ASBOs given that, despite the allegedly civil nature of the measure in question, the ruling often resulted in a heavy limitation on individual liberty and that the law provided for the breach of an ASBO to be punished with a prison sentence. The Law Lords resolved the matter by stating that the legislator's aim had been to structure ASBOs in accordance with the statutory injunction model, i.e. basically prohibiting someone from doing something, the violation of which begot a criminal sentence, and that ASBOs had an undoubtedly preventive purpose that made the use of the civil standard of proof appropriate, while they were not directly set up to constitute a surrogate prison sentence, nor to contribute to an increase in the duration of the main punishment.

This is significant considering that the civil standard implied admitting hearsay evidence to ASBO rulings, free of the restrictions that apply to criminal proceedings, such as cross-examination. From a broader perspective, hearsay is perhaps the most recurring evidence when it comes to proving anti-social behaviour, given the peculiar "communal" danger the conduct in question poses, projecting itself beyond offences committed against single individuals and assuming a pronounced social significance.

However, the Law Lords recognised that, given the heavy limitations on personal freedom ASBOs brought about[XIII], the standard for evaluating previously committed offences which constituted the basis for an application ought to be the same as for criminal proceedings, whereby judges would have to discretionally consider whether granting the measure was opportune. On one hand, it thus follows that a double standard was put forth, by which judges could consider evidence that would normally be excluded according to the criminal standard when deciding whether the requested measure was necessary; on the other hand, introducing a new version of the criminal standard via judicial interpretation defeated the very purpose of anti-social behaviour orders, i.e. providing immediate and effective protection by allowing for a lower threshold than the criminal one[XIV]. It is possible that the Law Lords thereby meant to soften the "tailor-made" aspect of anti-social behaviour orders, which prompted heavy limitations on personal freedom based on *ad hoc* rules tailored to meet the specifics of a case and not necessarily derived from a primary source of law, therefore running the risk of retroactive measures.

Nevertheless, the merely preventive nature of ASBOs cannot be affirmed with absolute certainty because of the serious consequences their breach gave rise to, not to mention the fact that ASBO rulings were publicised, as were respondents' personal information and photographs, a practice that was chastised by the Council of Europe, especially with regard to minors[XV].

Moreover, there was no legislative provision requiring the orders to be drafted so as to ensure that the relevant obligations were outlined in a clear and precise manner. It is no surprise then that most ASBO critics pointed out the vague and excessively broad terms by which judges granted orders, which made it impossible for respondents to conform and for authorities to keep track of them[XVI]; and the fact that ASBOs had a minimum duration of two years made the chances of breaching them quite substantial.

Breach of an ASBO resulted in a prison sentence of up to five years and, while the conduct that the order was based upon could be relevant when assessing the violation in question, this was not necessarily so when it came to establishing the length of the punishment to be carried out upon determining this breach, since the judge who granted the order was mainly concerned with determining whether the person against which the application had been made had the potential to create further damage and, if so, which was the most appropriate remedy to contain it, irrespective of the kind of anti-social behaviour that had originally taken place.

Furthermore, in the relevant legislation a criminal sentence was described as the *ipso facto* effect once a breach had been committed, without any regard to the nature of the violation, which made the issue of vagueness an especially significant one, not to mention that the conduct in breach of an ASBO may not have been criminal in itself, nor even anti-social by the standards set in the 1998 Act, for that matter.

By contrast, if the conduct in breach of an ASBO constitutes a criminal offence in its own right, irrespective of the ASBO violation, an entirely different sort of problem arises, i.e. double jeopardy.

Judicial practice shows that there has been much concern over this particular aspect. In Boness (2005) the Court of Appeal recognised that, while the conduct in breach of an ASBO could amount to a criminal offence regardless of the violation in question, the main function of anti-social behaviour orders was to prevent respondents from having further opportunities to commit anti-social acts. Therefore, if a breach had occurred and the

underlying conduct amounted to a criminal offense, it was necessary to determine whether the same could be characterised as anti-social in accordance with the requirements set out in the 1998 Act, otherwise the punishment for breach of an ASBO would result in an underhand addendum to the main criminal conviction. In Morrison (2005), the violation of a disqualification from driving order was considered and an analysis into ASBO statistics showed that this kind of measure was often employed to boost the maximum statutory penalty for the principal offence, in contrast with their declaredly preventive aim. As to the specifics of the case, the Court ruled that even though the offender had driven after having been prohibited from doing so, he had not acted in an anti-social manner. Finally, in Wadmore and Foreman (2006), a list of requirements meant to preserve the preventive nature of ASBOs was clearly outlined: the measure ought to be necessary to protect communities from further anti-social acts by the respondent; the obligations placed upon the respondent ought to be clear, precise and practicable; and they ought to be controllable by the relevant authorities and proportional to the actual conduct described as anti-social. Moreover, it was said that "the purpose of an ASBO is not to punish an offender. This principle follows from the requirement that the order must be necessary to protect persons from further anti-social acts by him. The use of an ASBO to punish an offender is thus unlawful" (Hooper L.J. in "Boness", paragraphs 28-29).

As a matter of fact, while standalone anti-social behaviour orders could not be considered in the same manner as aggravating circumstances in light of the fact that the former were granted as a result of a self-supporting civil procedure that bore no tether to a criminal trial, the fact that the breach of an ASBO resulted in a prison sentence, despite being ascribed to the general category of civil preventive measures, made it hard to place ASBOs into a given branch of the UK's legal system.

Interestingly, the Sentencing Guidance Council established a few guidelines for ASBO rulings[XVII]: if a conduct in breach of an ASBO consisted of a criminal offence that was punishable with a lower maximum penalty than the breach itself, the former had to be decided separately, even though nothing prevented the court in the latter procedure from taking this fact into account in order to determine the extent of the punishment.

Even the attempt to keep the two proceedings separate is notable, since it is difficult to imagine that an ASBO granted in strict relation to offences that were the object of a criminal trial did not amount to a form of supplementary punishment, however woven in,

especially since the preventive aim of the measures in question was hardly to be found once the defendant had been convicted. The same could be said if ASBOs had been granted as a sort of alternative punishment to detention, given that their nature was supposed to be merely preventive.

Whatever the case, anti-social behaviour orders had the potential to absorb every other preventive measure because of their inherent vagueness[XVIII].

4. Changing course… slowly: the Anti-social Behaviour, Crime and Policing Act 2014

Under the Anti-social Behaviour, Crime and Policing Act 2014, anti-social behaviour is dealt with through a variety of measures.

The first newly introduced measure is the injunction to prevent nuisance and annoyance (IPNA), which is granted if the following requirements are met[XIX]: the court must be satisfied on the balance of probabilities that the respondent has engaged or intends to engage in anti-social behaviour; and it must also recognise that it is just and convenient to grant the injunction in order to prevent the respondent from committing further anti-social acts.

Obviously, the first critical issue is defining what amounts to anti-social behaviour. Even though a definition had been provided in section 1(2) of the Bill as brought from the Commons[XX], it deviated so much from both the established legislative framework and judicial practice that it was fervently and resiliently challenged by the Lords on the grounds that, while the mechanics of the new injunctive procedure were clearly laid out, the threshold test, which represented the necessary foundation upon which everything else was built, had not been thoroughly appraised.

The Bill described anti-social behaviour as a conduct capable of causing nuisance or annoyance to any person and required that the court be satisfied on the balance of probabilities that such behaviour had taken place or that there had been a threat to engage in it.

In the report stage, Lord Dear tabled an amendment concerning the threshold test[XXI], expressing concerns about the lack of certainty, precision, and clarity affecting the "nuisance and annoyance" test, as well as pointing out that existing ASBO legislation

defined anti-social behaviour by employing the less ambiguous "harassment, distress or alarm" threshold, and that it had done so without having been challenged for being too restrictive in scope[XXII]. He also brought up the US Supreme Court's Winters v New York judgement of 1948 as one of the most notable examples that clearly outlined the jurisprudential principle according to which the law should be clear, precise and unambiguous.

Clearly, the "nuisance and annoyance" threshold had been lifted from the context of existing housing legislation, where it was considered appropriate to have a lower test given that it involved neighbours living in close proximity, which made evidence especially hard to obtain, and which was aimed mainly at facilitating the landlord's management functions. The provision this test was based on was designed to have a very limited scope and did not include open public spaces, as Lord Dear duly pointed out[XXIII], or else any expression of free speech would be hindered. As an example of the serious effects the lower threshold could have on fundamental rights, especially free speech, Lord Dear referred to the difficulty both practitioners and courts were faced with in defining the scope of the word "insulting" in the Public Order Act[XXIV].

Another interesting point was made by Baroness Mallalieu, who observed that most anti-social behaviour was already regulated by existing criminal law offences under criminal damage, public order and harassment laws[XXV]. She also noted that the Bill did not provide for defence of necessity or lack of intent, which in turn entailed that there were no compensation provisions for wrongful injunctions or any other safeguards normally attached to a civil injunction, despite the fact that the respondent was not going to be present at the initial hearing.

In the debate the "just and convenient" condition for granting an injunction was also brought into play, since it added nothing to reduce the deficiencies in the substantive provision and was found too vague when compared to both the existing necessity test and the criminal test of proof beyond reasonable doubt; also, it could not be dealt with by guidance notes as the Government had originally intended, since it would be of doubtful constitutional propriety that courts should receive instructions from the former[XXVI]. However, it was also pointed out that the term "convenient" had been long employed in judicial practice and that it incorporated reasonableness, proportionality and appropriateness at the same time[XXVII].

Lord Faulks, who had tabled an amendment introducing a reasonableness requirement into the Bill in light of the Joint Committee on Human Rights' views, observed that applications could only be made by agencies that would be required to employ proportionality and reasonableness, which in his opinion provided an appropriate filter[XXVIII]. He also noted that anti-social behaviour could have ruinous effects on a person's life without amounting to the quasi-criminal conduct described by the existing threshold and, as a consequence, hearsay evidence was vital in order to make sure victims would not be terrified of being identified as the source of a complaint. Agencies would be tasked with a *de minimis* assessment before proceeding any further, and judges would need to be satisfied of the complaint's substantiality as well as the reliability of the anonymous source. Moreover, while IPNAs could be obtained on the balance of probabilities, the criminal standard of proof beyond reasonable doubt would still have to be satisfied in order to establish a breach. Finally, he observed that, with regard to housing, the introduction of a higher hurdle for non-social housing-related offences would result in a two-tier test based on whether victims were private tenants or in social housing which, in his view, was not coherent[XXIX].

However, Baroness Smith of Basildon observed that a one-off event causing nuisance and annoyance to any person could, on the balance of probabilities, equally result in an injunction, thus moving away from the punishment of persistent behaviour[XXX].

Lord Dear's amendment[XXXI] was agreed to and, despite the Government's initial resistance, became final during parliamentary ping-pong[XXXII]. The amended provision defines anti-social behaviour as a conduct that has caused, or is likely to cause, harassment, alarm or distress to any person[XXXIII], thus basically reverting to the same substantive provision that came into force when ASBOs were first introduced. As for housing-related anti-social conduct, it is described as capable of causing nuisance or annoyance to a person in relation to the latter's occupation of residential premises[XXXIV] or capable of causing housing-related nuisance or annoyance to any person[XXXV].

Perhaps the most interesting aspect of the 2014 Act is that it brought about a clear-cut terminological distinction between stand-alone orders (IPNAs) and those related to criminal conviction by introducing a new measure, the criminal behaviour order (CBO), which may be granted exclusively upon application by the prosecution if the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused

or was likely to cause harassment, alarm or distress to any person and that the order will prevent the offender from engaging in such behaviour[XXXVI]. While the new provisions concerning criminal behaviour orders are similar to those concerning CrASBOs, the fact that they no longer bear the same acronym as their non-criminally-related counterparts is significant, as it should allow for more case-appropriate obligations to be placed upon respondents, in the case of IPNAs, and offenders, in the case of CBOs. In other words, obligations placed upon respondents should be less constraining than those placed upon offenders given that, logically speaking, the types of conduct carried out by the latter ought to be much more serious so as to prompt a criminally-related order.

Irrespective of this terminological improvement, however, the key issues that were previously discussed still remain.

For one, the Act does not require that obligations stemming from an IPNA or CBO be proportional to the goal that is pursued, nor to the conduct which resulted in such a measure in the first place, leaving this decision completely up to judicial discretion. Nevertheless, the number and scope of the obligations laid upon the respondent or offender must not be so broad as to compromise fundamental rights, such as, for example, the right to respect for private and family life that is found in article 8 of the ECHR[XXXVII], but there is no legal requirement making sure judges grant measures that are in accordance with the 1998 Human Rights Act[XXXVIII] and other laws and charters protecting individual rights and freedoms.

Moreover, the requirement which comes with the expression "just and convenient" is even more elusive than its predecessor, since, while previous anti-social behaviour legislation required that the order be necessary to prevent further anti-social acts in a means-to-end perspective, however tenuous, the present legislation does not provide any indication as to what the evaluation in question is supposed to be based on. Judicial practice has shown that ASBOs were often issued against individuals who had not caused harm *per se*, but who had put themselves in a position which might have led them to cause harm to others: a prime example of this is Lamb (2006), where a graffiti painter was prohibited from accessing the entire Tyneside metro system on account of the fact that he had repeatedly sprayed graffiti on trains serving that system. In cases such as this one, the respondent is clearly not treated as a responsible agent, by imposing obligations that could be defined as "overbearing", to say the least, like an overprotective parent constantly

second-guessing their child's understanding of the ways of the world. The more extensive the obligations, the more likely a breach will occur.

If an anti-social behaviour order was breached and the conduct in violation was not unlawful in itself, as it did not cause or was unlikely to cause harassment, alarm or distress, the respondent was convicted of a criminal offence for defiance of a court order. In case of breach the criminal standard was of little help, given that the only pending issue at that point would have been whether the respondent had a reasonable excuse not to comply with the injunction since, by that point, any other outstanding question would already have been resolved according to the civil standard of proof. Therefore, courts could impose a *de facto* personal punitive statute on the respondent, irrespective of the rule of law, since Parliament's law-making powers were in fact given away when it came to anti-social behaviour.

That being said, the new law does not provide for a criminal conviction in the event of a breach of an IPNA, but it can still result in imprisonment for contempt. This is probably the biggest step that has been taken so far towards shifting civil preventive measures away from their quasi-criminal implications, but it must not be forgotten that a lot of these measures still carry the "ASBO blueprint".

As for CBOs, despite the fact that the courts' sentencing powers are quite extensive and might therefore make this particular kind of measure obsolete, the question of proportionality is yet to be resolved given that, in the event of a breach, the offender is convicted of a criminal offence which is liable of imprisonment, a fine, or both[XXXIX], irrespective of the nature of the conduct in violation of the order. Moreover, the law in question introduces a new element with regard to criminally-related orders, given that it provides for the possibility of imposing positive requirements rather than prohibitions[XL]. For this reason alone, the nature of the conduct violating the order should be taken into account, given that the type of obligation placed upon an offender is not entirely insignificant.

Finally, the minimum and maximum periods for which IPNAs and CBOs must or may be in effect are also an issue, given that the relevant provisions state that the maximum duration of the measures in question must be specified by the courts[XLI].

All things considered, it does not seem like the new legislation has managed to tackle the big issues related to preventive measures and their "hybrid" nature. It certainly has

moved forward with regard to the aspect of breach of an injunction or order, but the pivotal point concerning the ostensible irrelevance of the conduct which justifies the application when it comes to establishing the obligations to be included in the measure still stands, as well as the ample discretion afforded to the courts. Regulating the breach of an injunction or order in a more reasonable way is commendable, but it is of little use when the foundation upon which both measures are built is riddled with uncertainty. It is therefore still up to the courts to decide which conducts are relevant when it comes to ruling on preventive measures and, given that judicial practice has shown the potentially unlimited breadth of obligations placed upon recipients of such measures, it is highly unlikely that the newly enacted legislation will offer more effective tools to tackle anti-social behaviour.

Ironically, while the Government's intention was to guarantee effectiveness by providing more flexible tools rather than specific solutions to deal with specific problems[XLII], the very lack of specificity is likely to prevent the newly introduced measures from being effective, given that it affords the judiciary excessive discretion. As long as the relevant legislation remains incapable of providing workable standards for establishing the anti-social nature of certain conducts, courts will undoubtedly struggle to determine the appropriate punishment for each new case that is brought before them, much like a riddle waiting to be solved with no decisive clue to lead the way.

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[I] Section 1(a) of the Anti Social Behaviour, Crime and Policing Act 2014.

[II] Privatory orders, i.e. those consisting of the deprivation of one or more assets from the offender, are a prime example of this category.

[III] Section 1 of the Crime and Disorder Act 1998.

[IV] Section 1C of the Crime and Disorder Act 1998, introduced by the Police Reform Act 2002.

[V] See Home Office White Paper "Putting victims first: More effective responses to anti-social behaviour", 22 May 2012.

[VI] As the name itself suggests, if a single broken glass in a building's structure is not repaired, sooner or later the whole building will be without windows. While the theory is not the only one that contributed to the conceptualization of anti-social behaviour within New Labour, it is certainly the one that had the strongest impact. For more on the subject, see Wilson and Kelling, 1982.

[VII] A Bill's passage through Parliament is comprised of the following stages, irrespective of the House where it starts: first reading, which is usually a formality culminating in an order for the Bill to be published for the first time; second reading, which constitutes the first opportunity to debate the main ideas behind the Bill and its chief purpose; committee stage, where each clause and any amendments to the Bill may be discussed; report stage, where further amendments may be suggested and considered; third reading, in which the now final version of the Bill, at least where the House where it started is concerned, may be debated further and is voted on. Once third reading has been completed, the Bill goes to the other House for its first reading and the other aforementioned stages follow suit. Once the Bill has passed through its third reading in both

Houses, it is returned to the House where it started so that the other House's amendments may be considered. At this point, the Bill may go back and forth between each House until the final draft is agreed on: this is referred to as parliamentary ping-pong. If both Houses are in accord, the Bill can receive Royal Assent, thus becoming an Act of Parliament; if not, the Bill falls. However, in some cases the Commons may invoke the Parliament Acts to pass the Bill in the following parliamentary session without the Lords' consent.

[VIII] HL Deb vol. 587, col. 584-586.

[IX] The ASBO was a byproduct of the crucial importance that New Labour and, notably, its leader Tony Blair placed on the concept of law and order. This is apparent in a few of Blair's speeches, such as the one on crime reduction (30 March 2004) and the one on anti-social behaviour (28 October 2004).

[X] See paragraph 3 for more details.

[XI] Section 1, subsection (c) of the Police Reform Act 2002.

[XII] A Newton hearing generally occurs when there are substantial factual issues relating to a case that have to be resolved between the prosecution and the defence and the conflicting evidence is examined by a judge sitting alone, based on testimony and submissions.

[XIII] Judicial practice has shown that most ASBOs have been granted in order to exclude respondents from their day-to-day social context.

[XIV] In the Community Safety Order Consultation Paper it is suggested that, if a person is unable to provide evidence that would satisfy the criminal standard and therefore allow them to seek protection via a criminal trial, they ought to be able to apply for an ASBO, which is considered a necessary and appropriate alternative measure.

[XV] The respondent needs to be at least ten years old to be eligible for an ASBO.

[XVI] There are two emblematic cases of this: the first dealt with a woman with suicidal tendencies who was instructed to keep away from rivers, lakes and bridges overlooking railway lines; the second dealt with a young man who had committed various crimes, including theft, and who was then forbidden to access public parking lots except for work-related reasons, to go to places of education unless he was a student there, and to carry around anything he might potentially employ to cover his face.

[XVII] SGC, "Breach of an Anti-social Behaviour Order", 2008, p. 4.

[XVIII] Just to give a few examples, they could potentially absorb banning orders, disqualification from driving orders, disqualification from working with children orders, risk of sexual harm orders, sexual offender prevention orders, exclusion from licensed premises orders, travel restriction orders, violent offender orders and so on. This is clearly an exaggeration, since the more specific orders are supposedly more effective, but it serves as an adequate example when it comes to the issue of ASBO vagueness.

[XIX] Section 1, subsections (2) and (3) of the Anti-social Behaviour, Crime and Policing Act 2014.

[XX] HL Bill 052 2013-14.

[XXI] At this point the Bill (HL Bill 66 2013-14, as amended in committee stage) still bore the "nuisance and annoyance" threshold. The amendment in question sought to replace it with the existing test and was put forward by Lord Dear (backed by Baroness Mallalieu and Lord Mackay of Clashfern). It read as follows: "Page 1, line 8, leave out from "in" to end of line 9 and insert "anti-social behaviour.( ) Anti-social behaviour is—(a) conduct that has caused, or likely to cause, harassment, alarm or distress to any person, or (b) in the case of an application for an injunction under this section by a housing provider, conduct capable of causing nuisance or annoyance to any person.".

[XXII] HL Deb 8 January 2014, col 1513.

[XXIII] Nevertheless, the inclusion of a separate provision for housing providers in his amendment was criticized because it did not consider the provisions already in force in the Housing Act 1996, which allows for "relevant landlords" to apply for injunctions against tenants who have acted so as to cause housing-related nuisance or annoyance or threatened to do so. Therefore, there was no reason to give preferential treatment to housing providers that did not fall under the definition of "relevant landlords" (HL Deb 8 January 2014, col 1535).

[xxiv] HL Deb 8 January 2014, col 1542. Anti-social behaviour legislation and public order legislation enjoy a fascinating relationship. To observe a clear example of this see Dehal v Crown Prosecution Service [2005] EWHC 2154, (2005) 169 JP 581.

[xxv] HL Deb 8 January 2014, col 1517.

[xxvi] HL Deb 8 January 2014, cols 1519-1521; 1533.

[xxvii] HL Deb 8 January 2014, col 1529.

[xxviii] Based on the Human Rights Act 1998, a judge would have to decide whether an order is proportionate and necessary.

[xxix] HL Deb 8 January 2014, cols 1522-1524.

[xxx] HL Deb 8 January 2014, col 1537.

[xxxi] See footnote xxi.

[xxxii] See footnote vii.

[xxxiii] Section 2 (1) (a) of the Anti-social Behaviour, Crime and Policing Act 2014.

[xxxiv] Section 2 (1) (b) of the Anti-social Behaviour, Crime and Policing Act 2014.

[xxxv] Section 2 (1) (c) of the Anti-social Behaviour, Crime and Policing Act 2014.

[xxxvi] Section 22, subsections (1) and (7) of the Anti-social Behaviour, Crime and Policing Act 2014.

[xxxvii] Article 8 ECHR ("Right to respect for private and family life") state sas follows: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[xxxviii] The Human Rights Act 1998 sets out fundamental rights and freedoms that individuals in the United Kingdom benefit from. For the most part, it codifies the protections in the European Convention on Human Rights into UK law. Interestingly enough, Section 19 states as follows: "1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill. (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate". In the case of the Anti-social Behaviour, Crime and Policing Act 2014, Lord Taylor of Holbeach declared that, in his view, the provisions of the Bill were compatible with Convention rights (HL Bill 52 2013-14). Home Secretary Theresa May had done the same in the Commons (HC Bill 7 2013-14). Given the controversial nature of the Bill's contents, it is clear that what should have been a compelling political safeguard has quickly become a mere formality.

[xxxix] Section 30(2) of the Anti-social Behaviour, Crime and Policing Act 2014.

[xl] Section 22 (5) (b) of the Anti-social Behaviour, Crime and Policing Act 2014.

[xli] According to sections 1(6) and 25(5), respectively, if the respondent or offender is a minor, the maximum period is 12 months with regard to IPNAs and 3 years with regard to CBOs.

[xlii] This is expressed very clearly in a ministerial statement laid in the House of Commons on 7 February 2011 by James Brokenshire MP, who was Under-secretary of State for Crime Prevention at the time.