


ASBOs and Behaviour Orders:

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Abstract

This paper argues that the introduction of Behaviour Orders in Ireland creates a legal mechanism which facilitates the imposition of the majority conception of order within the community on its more marginalised members such as children and young people, much as has happened with ASBOs in the UK. The paper begins by suggesting that order/disorder is defined and imposed in the community by the more powerful elements within it and that what constitutes order/disorder is necessarily variable according to the experiences and perceptions of community members. A close legal analysis of the new Irish legislation governing Behaviour Orders is presented, and parallels with the British legislation are highlighted, with a view to examining the ways in which the law institutionalises the majority conception of order. The social and legal aspects of the paper are drawn together in the argument that the ambiguity surrounding the definition and interpretation of anti-social behaviour renders Behaviour Orders an imprudent response to anti-social behaviour amongst young people in the community.

Keywords

Behaviour Orders; ASBOs; youth; community; conceptions of disorder.

Introduction

With the passage of the Criminal Justice Act 2006 and the introduction into Irish law of the 'Behaviour Order', first cousin to the 'Anti-Social Behaviour Order' (ASBO) introduced in England and Wales under the Crime and Disorder Act 1998, the well established Irish art of imitating British legislation has continued. To borrow the phrase of the late John Kelly TD, it is one in a long line of legislative ideas 'taken over here and given a green outfit with silver buttons to make it look native'¹, with little thought being given to our less severe crime problem and cultural differences. A Behaviour Order is an order made by a court to protect the public from anti-social behaviour. Although it is designated as civil in nature, breach of a Behaviour Order does not invoke the normal contempt of court procedure for breach of a civil order, but in fact constitutes a criminal offence. In Britain, ASBOs may be made with respect to any person aged 10 or over but they have had particular implications for children and young people as they are the most likely recipients (Burney, 2002). Recent Home Office statistics have revealed that out of a total of 4,649 ASBOs which have been issued since their introduction in 1999, 2,057 have

been applied to children aged 10–17 (Cowan, 2005). This may account in large part for the doubling of the number of children in custody in England in the past decade, when statistically their offending has reduced.

This article provides a socio-legal perspective on the introduction of Behaviour Orders for children aged 12–17 years in this jurisdiction (the legislation makes separate provision for those aged 18 and over). It suggests that the introduction of Behaviour Orders creates a legal mechanism which facilitates the imposition of the majority conception of order within the community on its more marginalised members such as children and young people. The first part of the article argues that order/disorder is defined and imposed in the community by the more powerful elements within it and that what constitutes order/disorder is necessarily variable according to the experiences and perceptions of community members. Having considered the argument that the nature of order in the community is often discriminatory against young people and others who do not readily conform to societal norms, the second part of the article examines the ways in which the law institutionalises the majority conception of order. Overall, it is argued that the ambiguous social interpretation and legal definition of ‘anti-social behaviour’ combined with the low evidential standards required in the application process will result in the door being left open to abuse by the ‘moral majority’ in the community. While not under-playing the impact of anti-social behaviour on the community, the paper argues that Behaviour Orders are unlikely to be the most equitable, effective or just way of responding to anti-social behaviour based on the principles which underpin them and the experience in other jurisdictions. It concludes by proposing that an alternative response that engages with communities in a positive and inclusive manner is a more appropriate way of addressing anti-social behaviour amongst young people.

The Social Construction of Order/Disorder

In examining the social construction of order/disorder, four main areas are discussed below. The first focuses on the notion of ‘community’ by highlighting its non-egalitarian nature and the manner in which individuals, particularly young people, come to be defined and constructed as the ‘disorderly’ or the ‘outside’ other. Secondly, young people’s interaction with their community is examined through the lens of their daily activity in the community, their occupation of public space and its impact on their relationship with other community members. The differing perceptions of young people’s behaviour across communities and community types is discussed in the third section thereby highlighting the arbitrary nature by which some young people come to be labelled and responded to as ‘anti-social’. The final section focuses on the implications of the way in which order/disorder is defined and imposed, examining the balance between responsibility, accountability and support and the role of the community and civil society in managing problematic, disorderly and criminal behaviour.

Defining Order in the Community

Crawford (1998) critically defines ‘community’ as a complex web of relationships, structures and power relations organised not on egalitarian lines but upon the basis of age, sex, gender, ethnicity and class as well as a range of other identities (Campbell, 1993; Crawford 1999b). The conflicting and perhaps more common perception is the

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view that community is synonymous with common interest: 'a group of people, sharing a common bond or tradition, who support and challenge each other to act powerfully, both individually and collectively, to affirm, defend and advance their values and self-interest' (Miller, 2002: 32). This notion of community as homogeneous reflects the communitarian view in which consensus is assumed (Worrall, 1997) and moral order is taken for granted 'rather than constructed through nuanced and complex negotiations' (Crawford, 1998a: 244). The communitarian perspective argues that communities have obligations to be responsive to their members but equally demands recognition from those members of their responsibility to the community. It is assumed that homogeneity in the value consensus of the community 'will manifest itself in a sense of mutual responsibility' (Worrall, 1997:46) to community members. It also stresses the 'rights' of the community to require certain standards of behaviour from its members and, ultimately, to exclude members in the interests of the whole community (ibid., 1997: 47). However, as James and James (2001: 215) note, children have few rights and therefore demands to live up to their responsibilities as community members is problematic 'in the absence of any necessary or taken-for-granted commitment by children to the adult value consensus'.

Crawford (1999b:164-165) asks, 'what is it that constitutes disorder ... [and] whose definition of 'order' should be accorded priority?' In other words, in the hierarchy of power relations in the community whose interests are responded to? The way in which responsiveness to one section of the community (the more powerful group) can lead to the repression of another (the less powerful group) is highlighted by a case in Miami involving a challenge to the police attempts to clear homeless individuals off the streets.² Following a complaint which emanated from the local business community, the police responded by arresting the homeless for 'quality of life infractions' (Coombs, 1998: 1373): sleeping, drinking, urinating in public and littering. The impact is best indicated by police practice that deemed the placing of a piece of cardboard on the ground by the homeless person so as to avoid sleeping on the cold concrete as 'an instance of littering worthy of a custodial arrest' (ibid., 1998: 1374). Brown (1995: 47) describes how young people like adults living in economically deprived areas experience 'all the anxieties induced by deepening inequalities' but unlike adults they have no one to exclude as they are the excluded group. Young people therefore often exist at the bottom of the scale of power in the community and as a result are more likely to have norms, rules and definitions of order imposed upon them. Assuming community is homogeneous in the sense that members hold common beliefs leads to the justification of exclusion on the basis of the community good or in the interests of the community (Crawford, 1999a: 515). Community is viewed as something that must be protected from outside 'others' who threaten it i.e. those who deviate from what is defined as normal. In this typology, such individuals are viewed not as community members, as brothers, sons, sisters or spouses, but as outsiders against whom the 'community' needs to defend itself' (Crawford, 1999b:159). This approach silences 'very real intra-community conflicts' which when not tackled allow 'the policing of, and interventions against, certain individuals and groups of people' (Crawford, 1999b: 161) by the more powerful interest groups. It is the type of order maintenance advocated by Wilson and Kelling (1982) whereby individual rights are squandered in lieu of community expectations of order.

Youth, Public Space and Perceptions of Disorder

To compound the existing relative absence of power amongst young people identified above, they also experience a disadvantaged position by nature of their 'public lifestyle'. Youths hanging out on the street infringe community expectations of what constitutes appropriate social behaviour (Kelling, 1987). Burney (2002:73) argues that young people hanging about 'have become the universal symbol of disorder and, increasingly, menace'. Even if not engaged in illegal behaviour their activities may be perceived as disrupting the 'order' of the community. Worrall (1997:138) documents the scenario for young people whereby 'respectable citizens and figures of authority ... are increasingly demanding that they be known about, watched and moved on'. Studies of offending youth in Northern Ireland found that many lived out their daily routine on the public stage of the street corners and public parks of their communities (Ellison, 2001; Seymour, 2003). In one of the studies, over one-third of offending youth who consumed alcohol said they drank in public places such as parks, the streets and street corners in their own community. It was therefore not difficult to conclude that the location of young people's drinking, as much as the consumption of alcohol itself, had the potential to be perceived as problematic and disorderly by the community (Seymour, 2003).

James et al. (1998: 39) argue that 'social space is never a merely neutral location'. This resonates with the argument of Brewer et al. (1997: 136) that young people are associated with most visible crimes and other visible problems in the community, thereby 'raising people's sense that young people are behind most ordinary crime'. Crawford (1999b) suggests that there is an assumption in the community that danger occupies public, not private space. Young people living in poor and sometimes overcrowded housing, expelled from school, youth and community facilities have little choice but to occupy public space. In this sense they are a marginal group and are perceived as dangerous or at least as having the potential to create disorder (Crawford, 1999b). It is not so much that the marginal member of society is seen as intimidating but rather it is 'the visible presence of marginal people within prime space that represents a threat to a sense of public order and orderliness' (Wardhaugh, 2000:113)

Constructions of Order/Disorder: Variance across Communities

Crime and disorder have an impact on individuals in communities to varying degrees and in different ways (Crawford, 1999b; Loader et al., 1998). The level of (in)tolerance is likely to vary depending on a number of factors including one's relationship to the community and one's perception and experience of 'disorder' in the area. Loader et al. (1998) argue that those with a stake in the community, for example a business or family links, are more likely to want to elicit a response to disorder than individuals temporarily living in the area. Similarly, Young (1999:121-2) highlights attempts to evoke a sense of nostalgia for the secure past as a factor in the demand for a quick fix, all-embracing solution to crime and disorder 'in order to conjure back the secure streets and backyards of childhood memories'. Results from the Northern Ireland Community Crime Survey (O'Mahony et al., 2000) illustrate that wide disparities exist between how respondents in working-class urban communities rate crime and disorder problems in their community compared to middle class and rural respondents. However, it is also reported that perceptions of anti-social behaviour vary within

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similar community types and differences exist between Catholic and Protestant urban working class areas with the former reporting problems such as underage drinking and public drunkenness at a higher rate than their Protestant counterparts (O'Mahony et al., 2000:22).

Without question the individual and collective previous experience of 'disorder' in the community is likely to impact strongly on the response of a particular community to 'anti-social behaviour'. The concern however is that those young people from socio-economically deprived communities with few resources are more likely to be targeted for interventions like ASBOs or Behaviour Orders, not necessarily because their behaviour is more anti-social than their middle-class counterparts, but simply because the community has insufficient alternatives including youth and family support services to respond to such behaviour. Furthermore, such communities may be more at risk of being identified as anti-social behaviour hot-spots through 'the physical presence of "investigatory" people and technology [who] ensure that it will be found' (Brown 2004: 210; cited in Squires and Stephen, 2005b: 193).

The Community Construction of Order/Disorder: the Implications

Numerous commentators have argued that the problem of disorder has been conceptualised as the problem of disorderly behaviour amongst young people (e.g. Burney, 2002). By adopting this discourse of 'disorder' (namely the behaviour of youth) it individualises the 'problem', limits the scope for effective interventions and places responsibility solely at the level of the individual young person and often the parents and family: '... through the rhetoric of "responsibilisation" (e.g. Flint 2002), society becomes absolved and individuals, already essentialised as 'thugs' ... are held solely culpable' (Squires and Stephen, 2005b: 187).

However, this is inherently problematic and contradictory given that young people are punished 'as a legitimate response to their wrongdoings against the citizenship of others (i.e. adults)' while at the same time the state is 'simultaneously denying or suppressing the reality that young people themselves are barely accorded citizenship rights' (Brown, 1998:82). Furthermore, Muncie and Hughes (2002: 10) argue that the rhetoric underlying the rationale for ASBOs of poor parenting and out-of-control children ignores consistent research suggesting that young people who offend often have 'complex and systematic patterns of disadvantage which lie beyond any incitement to find work, behave properly or take up the 'new opportunities' on offer'. Gray (2005: 947) reiterates this argument suggesting that:

In the new culture of control, there is a presumption that reintegration is an individual moral endeavour which will miraculously occur once young offenders have accepted responsibility for their actions ... without any attempt to either combat structural inequalities (Muncie 2002; Pitts 2003) or, at the very least, provide young people with sufficient social support.

The onus on parents to be accountable during the period of the new Irish Behaviour Order without additional assistance and support faces similar criticisms to the existing parental control mechanisms introduced under the Children Act 2001. Parental control mechanisms have been criticised on the basis of failing to acknowledge the social factors related to a child's offending behaviour such as poverty and disadvantage

(Shannon, 2004), or providing any 'substantial interventions ... to encourage and enable positive parenting' (Quinn, 2002:679). The role and responsibility of the parenting task is central to the process of addressing anti-social behaviour; however, in relation to the execution of ASBOs in England and Wales, Squires and Stephen (2005a) are also critical of the balance between enforcement action for anti-social behaviour and support for the perpetrators and their families.

Criticism of the Behaviour Order as a mechanism of social control for young people does not imply a denial of the seriousness and impact of anti-social behaviour on the community. Indeed, it is well documented (Graham and Bowling, 1995; Brown, 1998) that young people commit much of the disorder in the community and are often responsible for perpetrating 'those quality of life offences which form the proverbial last straw for people who already have nothing' (Brown, 1998: 94). Rather, what is suggested is that the process by which anti-social behaviour is socially defined is often arbitrary and therefore not wholly just. Furthermore, based on what is known about youth offending and related behaviour, Behaviour Orders are unlikely to be the most effective method of either addressing such behaviour or preventing future criminality. They ignore the structural inequalities at the root of much offending as identified above and place young people at greater risk of being drawn into the formal net of social control. Finally, they are more likely to divide rather than empower communities by further disenfranchising young people and their families and deepening rather than repairing existing social and relational divisions.

Maloney and Holcomb (2001) argue that all citizens should be involved in creating the conditions to promote safety and well-being in the community. Responses to anti-social behaviour need to work towards strengthening the community, not diminishing and dividing it. Goldson (2000: 262) warns against the punitive ethos underpinning much of the discourse on youth crime and argues that 'the problem of youth crime ... does not excuse the contemporary tendency towards simplicity and lazy analysis'. Communities may be far better engaged in the role of identifying prevention strategies and working in partnership with statutory and community agencies to address the issues that underlie much nuisance and 'disorderly' behaviour in the community. The recommendations of the National Crime Council (2003) for a proposed crime prevention strategy in Ireland highlights the need for inter-agency work with young children and their families as well as multi-annual funding for the development and continuation of youth work services. However, such a shift in priority requires both a changed conceptualisation of youth in criminal justice discourse from 'criminals deserving of punishment' to 'citizens entitled to justice' (Brown, 1998: 82) and a commitment to evidence based policy making for young people who come into contact with the law.

Legal Dimensions

As noted in the introduction, the aim of this section of the paper is, through close legal analysis of the new legislation on Behaviour Orders, to demonstrate the ease with which they can be mobilised against the more disempowered members of the community such as young people and the implications of this. It is also proposed to discuss briefly the ways in which the legislation gives expression to the principles of communitarianism as discussed above. It is important to note at the outset, however, that the authoritarianism implicit in the English legislation has been moderated somewhat in the Irish case. Under

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pressure and in the face of criticism from one of the largest and most broadly based coalitions of protesters ever to respond to a criminal justice issue in Ireland,³ the Minister for Justice was forced to revise his original proposals. The new provisions (the Criminal Justice Act 2006 amends the Children Act 2001 to include a new Part 12A) go some way towards ensuring that Behaviour Orders are a measure of last resort, most notably through the introduction of a scheme whereby a child will usually receive a 'Behaviour Warning' and a family conference will be held to discuss the anti-social behaviour before a Behaviour Order is proceeded with.⁴ It is disappointing, therefore, that some of the worst features of the English legislation have been retained: the civil standard of proof applies, with the concomitant increased likelihood of the admission of hearsay evidence, and the word 'harassment' continues to appear in the definition of anti-social behaviour. All these features contribute to uncertainty and vagueness in the application of the law and ultimately, its misuse.

The Definition of 'Anti-Social Behaviour'

Under s.257A(2) of the new Part 12A of the Children Act 2001 (as inserted by s.159 of the Criminal Justice Act) a child behaves in an anti-social manner if he or she:

causes or, in all the circumstances, is likely to cause to one or more persons who are not of the same household as the child:

- (a) harassment,
- (b) significant or persistent alarm, distress, fear or intimidation, or
- (c) significant or persistent impairment of their use or enjoyment of their property.

A child is defined under the section as a person between the age of 12 and 17 (inclusive) and not above the age of 14 as originally suggested by the Department of Justice. The revised definition may be compared to the English equivalent which refers to behaviour which 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself' and which has been the subject of much criticism for its potentially unlimited ambit. The annotations to the original Government proposals argued that 'the definition is not as broad as the UK equivalent. In particular, the behaviour must have serious consequences for the person or persons affected or the consequences must be persistent and must affect the person's enjoyment of life or property' (Government of Ireland, 2005). Yet, this is simply not the case in the legislation as enacted. At Committee Stage of the Bill, the Minister acknowledged that the three grounds on which a Behaviour Order can be obtained are to be read disjunctively or in the alternative.⁵ If 'harassment' represents a ground for a Behaviour Order in its own right, it becomes the lowest common denominator. The thresholds of seriousness in the legislation will therefore be bypassed and the range of behaviour giving rise to liability to a Behaviour Order considerably expanded. Harassment connotes behaviour which is context dependent and it is defined by reference to the effect or likely effect of behaviour on others. As one guide has commented upon the English definition: '[harassment] does not proscribe certain forms of conduct as harassment per se but enables the victim to determine the parameters of acceptable interaction on an individualistic basis...primacy is given to the victim's interpretation of events' (Finch, 2002: 706).

It remains the case under the Irish legislation that the conduct described may be criminal but it is not limited to criminal behaviour. Some of the behaviour may therefore constitute a civil wrong (most likely nuisance) while other behaviour may not constitute any wrong at all in law. The definition also allows, like the English legislation, for a hypothetical assessment of the effect of the defendant's conduct. The retention of the words 'is likely to cause' in the above definition means that the court may not always be concerned with a situation where the defendant has actually harassed someone or caused serious fear or persistent danger, but may be asked to engage in a risk assessment exercise where no member of the community has in fact been victimised. This shift from the factual to the hypothetical is all the more a cause of concern if this risk assessment is, as contemplated above, entirely context dependent.

In the first part of this paper attention was drawn to the evidence that it is the most powerful members of society who define disorder; that young people are often compelled to live their lives on the public stage of the community (e.g. drinking in public) and that even communities with a similar socio-economic composition may take different views of such public behaviour by young people. Considered together, these factors urge caution in the adoption of legal measures which have the clear potential to institutionalise intolerance towards young people on the behalf of local communities. The provisions of the new Irish legislation with regard to the definition of anti-social behaviour do not go far enough in safeguarding young people and children from abuses by more powerful community members.

Low Evidential Standards

Difficulties with the protean definition of anti-social behaviour are compounded by the low standards of evidence and proof required under the legislation. The standard of proof required as regards the making of a Behaviour Order is the civil standard of balance of probabilities. Section 257D(1) of the Children Act 2001 (as inserted by s.162 of the Criminal Justice Act) provides that a District Court judge must be 'satisfied' as to the anti-social behaviour and the necessity for an order. Further, s.257D(9) puts the matter beyond doubt: 'the standard of proof in proceedings under this section is that applicable to civil proceedings'. The civil designation of the Behaviour Order scheme was to be expected given that one of the aims of the British ASBO as conceptualised by New Labour was to circumvent the perceived difficulties with a criminal trial. The behaviour in question, even if capable of amounting to a criminal offence, will therefore not have to be proved to a standard of beyond all reasonable doubt and the defendant can be placed under a Behaviour Order even if there is reasonable doubt as to the behaviour in question.

This begs the question whether the proceeding is in reality criminal and whether the civil procedure is being used as a means of subverting the strictures of the criminal law, including fundamental legal values such as the presumption of innocence. In a challenge to the legislation in England in *R v. Crown Court at Manchester, ex parte McCann*⁶ this question has been answered by the House of Lords in the negative, albeit with the important proviso that a heightened (criminal) standard of proof apply. The House held that ASBO proceedings were civil, not criminal, both for the purposes of domestic law and the law under the European Convention on Human Rights. This conclusion was based on various factors: proceedings were not brought by the Crown Prosecution Service; there was no formal accusation of a breach of the criminal law; ASBOs did not appear on criminal

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records; and there is no immediate imposition of imprisonment. In this latter regard, the House held that proceedings for breach of an order, though undoubtedly criminal in character, should be considered separately from the initial application. It is questionable, however, whether an Irish court would reach the same conclusion. While a superficial reading of the English legislation supports the Lords' conclusion, it is submitted that many of the above elements, such as the absence of a formal charge and criminal record, focus on form rather than substance and as such should not have influenced the decision of the court. Further, it is at least arguable that the original application for an ASBO cannot be so conveniently separated from its criminal counterpart given that the initial civil procedure defines the outer limits of the behaviour which can constitute a criminal offence. Indeed, it is impossible to defend proceedings for breach without harking back to the terms of the original order. The Lords also appear contradictory in their conclusion that the proceedings are civil in nature and therefore hearsay or second hand evidence can be adduced (presented in court), yet the 'seriousness of the matters involved' mandate that the criminal standard of proof apply. Overall, the effect of the judgment is to give free reign to New Labour's policy of simply reclassifying criminal proceedings as civil in order to avoid the protections attaching to defendants in criminal proceedings.

In relation to the cognate issue of the admissibility of hearsay evidence, the House of Lords held that hearsay evidence could be adduced in ASBO proceedings. The Irish legislation is silent on this issue and, given that the proceedings are civil in nature, it would appear that hearsay evidence may be admitted to the extent that it is permitted in civil proceedings. In practice the hearsay rule is applied with less vigour in civil rather than criminal matters, however, and the dangers of such evidence should be noted. The adduction of hearsay evidence means that the defendant is denied the right to cross examine his or her accusers which makes claims very difficult to refute. When a witness's demeanour is not observable during cross-examination, the court is left at a loss as to whether the witness was joking, lying or simply mistaken. In England, applications based solely on hearsay may, and do, succeed with none of the alleged affected persons present or even named (Pema and Heels, 2004: 41). Should this practice be adopted in Ireland, the potential for rumour, conjecture and suspicion about young people to become fact will be heightened. A classic example is the public drinking engaged in by young people discussed above. When relayed second hand such behaviour could easily metamorphose into threatening behaviour.

In this relation, it is interesting to note that the justification offered by the House of Lords for admitting hearsay evidence can be viewed as a clear endorsement of the communitarian approach discussed in the first part of this article. In examining the issue, Lord Steyn explained 'My starting point is an initial scepticism of an outcome which would deprive communities of their fundamental rights'. He viewed hearsay evidence as critical if magistrates were to be adequately informed of the scale of anti-social behaviour and the measures of control required. The views of Lord Hutton also reflect a preoccupation with the needs of the community:

I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the requirements of the protection of the defendant's rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social orders.⁷

As Ramsey (2004: 924) notes communitarian concepts such as the positive duty of citizens towards the community and the justification of exclusion on the basis of the rights of the community as a whole pervade the Lords' judgments. He argues:

Notwithstanding their lordships' preferred terminology of balancing rights, the logic of their argument is that the right of the community not to be caused a particular feeling, and therefore the individual's duty not to cause that feeling, is prior to any procedural right of the defendant to cross examine her accusers.

Ramsey views this as confirming the underlying conceptual basis of ASBOs, which he contends is largely communitarian and at odds with the traditional criminal law. In support of this argument, he points to what he terms 'the underlying attitudinal component' of the legislative provisions on ASBOs, namely, the context dependent nature of 'harassment, alarm or distress' and also the requirement that the court must decide that an order is necessary. This latter requirement creates an exception where the defendant has demonstrated a change in attitude and therefore allows the court to impose an ASBO on the basis of 'a continuing attitude or disposition of indifference or contempt... for the feelings of others' (Ramsey, 2004: 915). Ramsey's argument runs that, once it is accepted that what the legislation is really concerned with is attitudes rather than simply behaviour, the positive nature of the obligation created by the legislation becomes clear as in order not to offend other people's feelings, one must adopt a caring mental attitude. Ramsay's point is well made, if at times a little stretched (he argues for example, that the defence enshrined in the legislation that the conduct is reasonable enhances rather than curtails judicial discretion), and it would appear that the provisions on ASBOs sit well with the basic tenets of communitarian theory. As discussed above, however, such communitarian views are problematic in relation to children and young people. These members of the community are not accorded the same 'citizenship' rights as adult members of the community nor indeed do they necessarily share in the adult 'value consensus'.

Applicants for Behaviour Orders

The combination of the civil standard of proof and the possible adduction of hearsay evidence means that the court may impose a Behaviour Order on the basis of unproven evidence from a member of the Gardaí (a Superintendent or member of superior ranking) as to what the defendant's neighbours report. This places a great deal of power in the hands of the Gardaí to determine what non-criminal behaviour may form the subject of a Behaviour Order. Further, in relation to behaviour which actually amounts to a crime, a practice may develop whereby the Gardaí use Behaviour Orders as a short cut to a conviction without actually proving the crime. This is the all the more likely to occur if the very high success rate of ASBO applications in England is any indicator of what will happen in this jurisdiction: of the 2,035 ASBO applications notified to the Home Office up to 30th June 2004, only 42 applications were refused, which constitutes a success rate of 98 per cent.⁸

Breadth of the Order: Made to be Breached?

Concern about excessive discretion does not end with the definition of 'anti-social behaviour' and the use of hearsay evidence. The terms of Behaviour Orders which are imposed by the judge at the initial hearing are not limited to the initial acts complained

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of. Section 257D(1) of the Children Act 2001 (as inserted by s.162 of the Criminal Justice Act 2006) states that an order may prohibit a child 'from doing anything specified in the order if the court is satisfied that ... the order is necessary to prevent the child from continuing to behave in that manner'. In the UK, the requirement of 'necessity' has not been interpreted strictly with defendants being banned from entering areas where they live, from meeting named individuals anywhere and from entering public places. While the additional requirement in the section that the judge must be satisfied that the order is reasonable and proportionate may be regarded as a check on the judge's discretion, it is significant that this assessment must be made 'having regard to the effect or likely effect of that behaviour on other persons'. Thus, the standard is not objective but heavily influenced by the victim: as discussed above in relation to harassment, primacy is accorded to the victim's interpretation of events. This reading of the legislation has been affirmed by the Minister for Justice himself at Committee Stage of the Criminal Justice Bill when he observed that 'the court must be satisfied that it is reasonable and proportionate *when viewed from the victim's perspective*'.⁹

The open-ended nature of Behaviour Orders marks a clear departure from previous statutory orders to which they may be compared such as the barring order or the safety order under the Domestic Violence Act 1996. Under the 1996 Act, a person subject to a barring order may be required not to use or threaten to use violence against, molest or put in fear the applicant or a dependant. It is clear that this order is targeting specific wrongs against named individuals in a domestic context. Similarly with common law injunctions which seek to restrain the specific wrong contained in the plaintiff's statement of claim¹⁰ (Ireland, 2005). Behaviour Orders, in contrast, are not so limited. In the UK, encouraged by the broad scope under the Act and the emphasis on prevention rather than punishment, magistrates have erred on the side of caution and in so doing have made disproportionate orders with conditions so wide ranging as to set the defendant to fail.¹¹ This is supported by the high rate of breach in the UK which currently stands at 42%, of which just over half received custodial sentences (Cowan, 2005). It is to be hoped that, despite the absence of any effective brake on their power, Irish judges will not follow suit.

Behaviour Orders and Up-Tariffing

The sanction of detention for breach of a Behaviour Order flagrantly breaches the principle of proportionality in sentencing which requires that the penalty be proportionate to the circumstances of the 'offence'. Section 257F(3) of the Children Act 2001 (as inserted by s.164 of the Criminal Justice Act) makes reference to the child having committed a summary offence which is punishable by a maximum fine of 800 or detention for a period of up to 3 months or both. While this period is significantly lower than the English maximum tariff of 5 years, the use of the severest penalty in the land to punish acts of nuisance which are not necessarily criminal in nature nor indeed constitute any wrong in law is disproportionate by any standard. As noted by the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, in his recent scathing attack on the wave of 'ASBO-mania', in England, 'boozing in public or hanging around street corners, is no doubt unpleasant. It is not clear, however, whether it ought to be elevated to a two stop criminal offence' (Gil-Robles, 2005: 37). As mentioned above, this activity is often carried out by young people who have little

choice but to spend time in public. It is clearly an inappropriate response to the behaviour of such young people that instead of improving the local community's resources, they are 'brought to the portal of the criminal justice system' and exposed to a risk of imprisonment (ibid: 39).

The arbitrary nature of ASBOs in England is well demonstrated by the extreme geographical variations in their deployment against 'anti-social' members of the community. In a critique of ASBOs when they were first introduced, Ashworth et al. (1995: 1502) noted 'given such wide powers, each affected locality is likely to go its own way – with some places making little use of the new powers and others occasionally resorting to drastic interventions'. Their remarks have proved prescient. A recent survey by NAPO has revealed marked disparities in their use between different police force areas leading to them to conclude that the ASBO has been abused in some areas (National Association of Probation Officers, 2005). For example, an individual is over five times more likely to be the subject of an ASBO in Manchester than in Merseyside, an area which, as one commentator noted, is 'not renowned for its genteel behaviour' (Mason, 2005: 129). This may reflect the different levels of tolerance experienced within different communities, even those whose members belong to broadly similar socio-economic groups, and the inherently variable concepts of 'order/disorder'.

Conclusion

It has been the concern of this paper to illustrate that the legal framework which surrounds the Behaviour Order facilitates the institutionalisation of intolerance in Ireland, a process well underway in the UK since the introduction of ASBOs. The civil procedure imposes an order on individuals on the basis of a potentially subjective and variable definition of anti-social behaviour which does not have to be formally proved. This order comes with such open ended conditions that it may rightly be said that 'never before has such a wide range of conduct come within the remit of a single statutory order' (Ireland, 2005: 94). Breach of any one of the conditions attached, however, may result in the imposition of imprisonment. The introduction of Behaviour Orders in the Republic of Ireland is another example of reactionary government policy to deal with the 'problem of youth' and constitutes a blunt tool with which to tackle the issues. The National Crime Council (2003) has identified a number of inadequacies in the current service provision for youth including the lack of accessible and affordable facilities in their communities; the need for more intensive outreach work with 'at risk' youth; the lack of State services outside office hours; the need for drug and alcohol treatment and the need for accommodation provision. In light of these shortcomings, a far more effective approach to the problem of anti-social behaviour is likely to be created through a strategic focus on creating better communities by investing in appropriate services and facilities to meet the needs of young people, provide opportunities for positive engagement with them and reduce the risk of further anti-social behaviour.

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Notes

- 1 John Kelly TD, speaking during the debates on the Criminal Justice (Community Service) Bill 1983: Second Stage, Dail Debates, Vol. 432, 3rd May 1983.
- 2 Pottinger v. City of Miami 810 F. Supp. 1551 (S.D.Fla. 1992).
- 3 The Coalition Against Anti-Social Behaviour Orders was a broad based initiative determined to prevent the introduction behaviour orders as part of the new Criminal Justice Act. From a small core group – which included the Irish Penal Reform Trust, the Children’s Rights Alliance, the National Youth Council of Ireland, the Irish Society for the Prevention of Cruelty to Children and the Irish Council for Civil Liberties – the Coalition eventually grew to include over 50 NGOs, community/voluntary youth organisations, barristers, solicitors and academics from towns and cities across Ireland.
- 4 The legislation appears somewhat confused in this regard in that the child shall be sent to a conference where a Superintendent deems it to be beneficial in preventing further anti-social behaviour by the child. At the conference the child will be expected to enter into a ‘good behaviour contract’ for not longer than six months. However, where this is not deemed appropriate (or where the child will not enter into a good behaviour contract/breaks the contract), the child may be referred to the Garda Diversion Programme where another conference will be held. This is obviously contradictory in that it is difficult to see how a child who is deemed unsuitable for a conference in one context can be deemed suitable for a similar procedure in a different context, and the obvious inference must be that if a child is deemed unsuitable by a Superintendent for a conference, then s/he will apply to the courts for a Behaviour Order in respect of the child.
- 5 Minister for Justice, Equality and Law Reform, Michael McDowell, Criminal Justice Bill 2004: Committee Stage, Dáil Debates, Vol 81, 30th May 2006.
- 6 [2002] UKHL 39.
- 7 [2002] UKHL 39, para 113.
- 8 House of Commons Written Answers Col 1143W, 4th February 2005.
- 9 Minister for Justice, Equality and Law Reform, Michael McDowell, Criminal Justice Bill 2004: Committee Stage, Dail Debates, Vol 81, 30th May 2006. Emphasis added.
- 10 A statement of claim is a document that shows the defendant the case that is being against him or her which s/he must answer in court.
- 11 One example of such an order in Britain is a prostitute in Manchester who was prohibited from carrying condoms in the same area that her drug clinic was based (the clinic provided them to her as part of its harm-reduction strategy).

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