The Story of the ASBO

'Anti-social behaviour' has doubtless been with us for a very long time, even if not under that name. The lexicographer, Eric Partridge, has attributed the word 'hooligan' to a rumbustious family called Houlihan who lived in Southwark in the late nineteenth century, and they must have had many precursors. The Anti-Social Behaviour Order (ASBO), familiar as it has since become, is, however, a relatively recent addition to what the Government terms its toolkit. It was the principal innovation in the Crime and Disorder Act, 1998.

It is perhaps not surprising that it was the incoming Labour Government which invented the ASBO. Public opinion surveys have persistently shown that it is the residents of the poorer neighbourhoods who are most anxious about manifestations of anti-social behaviour. Labour M.P.s, in particular, were all the time picking up in their surgeries neighbour disputes - sometimes centred on one particular family - and complaints about gangs of children running wild, or of young men disturbing the peace with their motor-bikes. There was also a rather toxic dialogue going on about 'sink estates' and 'feral youth'; the tabloids continue to run this whenever the occasion presents itself, as with the riots in London and several other cities in 2011.

It might be helpful to set out briefly how this came about. Prior to the 1960s the poorest fifth of the working population were underrepresented among Council tenants. This was chiefly because these households could not afford the rents. Even those who found themselves in designated slum clearance areas often chose for this reason to take their chances in the still extensive private rented sector. There was no national housing allowance scheme, and whereas some local Councils had instituted rent rebate or differential rent schemes, many others had not: they employed the bricks-and-mortar subsidies provided by the Central Government to bring down the level of all their rents to some extent, thus making life difficult for their poorest tenants, especially when they were not on benefit. During the '60s and early '70s this situation became widely seen as discriminatory, and indeed intolerable. A national scheme for adjusting rents to available income was introduced. 'Housing need' became the principal, indeed the sole major, criterion for allocating Council accommodation: this was epitomised in the priority given to the homeless in legislation of the '70s. Councils began to house many more poorer people, more single mothers, more other kinds of household without an adult of working age in employment. A twist to the tale is that many of the more desirable houses on the more desirable estates were sold to their tenants under the Right to Buy legislation of the early 1980s. As a consequence of these developments, some estates of social housing - now often built and managed by providers other than local Councils - became associated in the public mind with anti-social behaviour. Often, this may have been more a matter of reputation than of reality, but it has certainly coloured the debate.

In the introduction to its Consultative Document (February 2011) the Government cites the topics raised with respondents by the British Crime Survey as marking the parameters of the anti-social:-

noisy neighbours or loud parties
teenagers hanging around on the streets
rubbish or litter lying around
vandalism, graffiti and other deliberate damage to property or vehicles
people using or dealing drugs
people being drunk or rowdy in public places
abandoned or burnt out cars

Actually, the official view is more elaborate: it comprehends an astonishingly wide variety of types of action, and in some cases inaction. The Government's classification - shared with the Public Accounts Committee of the House of Commons in 2006-07 - contains no fewer than 65 categories in headings or sub-headings. Among the items listed which have not so far been mentioned - and this is only a selection. although an extensive one - are: drinking in the street; sniffing volatile substances; aggressive begging; prostitution (with such sub-headings as soliciting and discarded condoms); kerb crawling; urinating in public; persistently ringing or malfunctioning alarms; noise from pubs, clubs and industrial activities; hoax calls; cycling or skateboarding in pedestrian areas; animal-related problems (including both bad-tempered and defecating dogs); stalking and intimidation; obscene and nuisance phone-calls; fly-posting; dumping rubbish in one's own garden; and damage to trees, plants and hedges. Britain would become very civil and tidy if only a few of these problems were successfully addressed. It should be emphasised that many of them are encountered universally, and are certainly not restricted to depressed areas of towns and cities. Rowdy teenage drinking on Friday and Saturday nights, for example, seems to be especially a problem in otherwise respectable market towns. And aggressive Leylandii hedges (the subject of a further legislative intervention in 2005) are more usually to be found in outer suburbia than in the inner city.

It will be readily observed that some of the listed activities, such as dealing in drugs, are clearly criminal, while at the other end of the spectrum is behaviour which it is difficult to imagine anyone trying to turn into a criminal offence. This is a very important distinction, and later we will need to spell out its ramifications and the dilemmas to which it gives rise. But first we need to note that the legal definition of ASB, as contained in the 1998 Act, is "acting in a manner which caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household". This also is couched very widely, and it reflects a persistent tendency in the thinking of both the present administration and its predecessor to draw a sharp distinction between perpetrator and victim. This is despite the fact that in many cases, in neighbour disputes for instance, it is more often than not a matter of six of one and half a dozen of the other. This again presents problems to which we shall return.

The Labour Government was keen to involve the whole community in the struggle against ASB. The 1998 Act set up Statutory Crime and Disorder Partnerships - now known as Community Safety Partnerships (CSPs) - with memberships designed to include not only other public sector bodies (sometimes compulsorily, as with Health Authorities) but also a whole raft of other groups which it was recommended should be invited to participate - established local voluntary organisations, the business sector, neighbourhood watch, and those representing, or held to represent, ethnic minorities, gays and lesbians, and young people. Nevertheless, local Councils and the police are the authorities entitled to apply for ASBOs, although registered social landlords may also take the initiative in housing-related cases. It is impossible to know whether the legislation got off to a flying start or not, in the absence of any framework which would allow us to assess the true incidence of any of the variegated phenomena classed as ASB. What is certain is that take up was, and has remained, patchy. Some authorities, Manchester City Council, for instance, adopted their new powers with alacrity, but other Councils and police forces have made proportionately much less use of them.

The statistical record is interesting. The most recent Ministry of Justice figures were made available late in 2010. They cover the period from the 1st. of April 1999 to the 31st. of December 2008. Over these years 16,999 ASBOs in total were issued in England and Wales. The number grew steadily to reach a peak of 4,122 in 2005; thereafter, however, it declined year after year, and in 2008 stood at only 2,027. There are two types of ASBO: those granted on application (which might be called ASBOs proper) and those consequent upon, and as part of the penalty for, a criminal conviction (CRASBOs). Now considerably more of the latter than the former are granted each year; 64% of those issued in 2008 followed a conviction. Furthermore there are often one or more further stages in the judicial proceedings, since many ASBOs are breached. Breaches occur because perpetrators persist in the behaviour which gave rise to the ASBO, or are caught in an area from which they have been barred, or have infringed some other condition of their order. 9,247, or 55%, of the 16,895 ASBOs issued after 31 May 2000 - information is not available for the period before that - were breached at least once, and 6,804 were breached more than once. Individuals aged between 10 and 17 were more likely to breach than were adults. The number of breaches largely accompanied the number of original grants of ASBOs, going up when they went up, down when they went down.

What explains this pattern of rise and fall? It is hard to be sure in the absence of suitably targeted research. The present Government, in its 2011 Consultative Document, attributes the decline in popularity of the ASBO to practitioners choosing "not to use it, among other reasons, because they found the cost and associated casework for applicant authorities too cumbersome". This is in line with the administration's characteristic tendency to blame 'bureaucracy' for a large number of the ills it perceives. However the complexity of the procedures currently required owes a great deal to a thoroughly justified decision of the House of Lords in October 2002. *(House of Lords - Regina v Crown Court at Manchester Ex p McCann (PC) and others*

(FC)). The Law Lords determined that the standard of proof in ASBO cases should be the higher criminal one (beyond reasonable doubt) rather than the lower civil one (balance of probabilities). This would apply both to application in the first instance and when breach of the ASBO was alleged.

In the case of the ASBO, Parliament adopted in 1998 a civil remedy backed up by criminal penalties. There is no doubt that this was fully intended. ASBO hearings may take place in Magistrates Courts or the Crown Courts, but the former is usually where initial applications are lodged - in the criminal divisions of Magistrates Courts, however, not in the civil ones. Indeed, this continues to be the case, but it was more incongruous when only the civil burden of proof was required, and must have contributed to the fact that only a tiny proportion of applications were turned down. With the Crime and Disorder Act Labour was determined to show that not only was it as tough as the Conservatives on crime as universally understood in this country, but also that it had discovered an ingenious mechanism to counter the low level, non-criminal civil disorder which so worried both the Press and its working class constituency. The technique was not new. Breach of a civil injunction has always been contempt of court, and subject to heavy fines or, in some cases, imprisonment. However ASBOs extended the practice on a hitherto unprecedented scale. Whole swathes of behaviour which had not before been thought to be within the scope of the criminal law were effectively, or at least potentially, criminalised. This was, and is, made much more serious by the finding that 53% of the ASBOs breached at least once between June 2000 and January 2009 resulted in an immediate custodial sentence.

The McCann judgement has by no means settled all the procedural and juridical problems thrown up by ASBOs. First, what has to be proved in the Courts, by whichever standard is adopted, is not the committing of a relatively precisely codified criminal offence, but whether some activity falls within the much vaguer, loosely worded, definition of anti-social behaviour. Then there is the question of hearsay evidence, debarred in criminal prosecutions, but declared permissible in ASBO cases by the Law Lords in a parallel judgement to McCann. Difficulties arise, too, with regard to the public identification of the juveniles who appear in ASBO proceedings: recent Governments have had an unseemly, if fortunately sporadic, love affair with 'naming and shaming'.

There were some developments in the late 2000s. The Labour Government conducted a public consultation in 2007, as part of its 'Respect' agenda. The document which accompanied it was pretty self-congratulatory: it referred to ASBOs as "an unqualified success". Both the then Prime Minister and the then Home Secretary in introducing the Consultative Document used the phrase "rebalancing the criminal justice system in favour of the law abiding majority", a good example of sheep and goats thinking. In view of that, it is not surprising that the title of the document was *Strengthening Powers to Tackle Anti-Social Behaviour*. The most startling suggestion, which greatly exercised housing charities and civil liberty organisations, concerned repossessions. It was proposed that the power to close down crack-houses - or, more correctly, premises used for the processing or distribution of Class A drugs - should be extended to the closure of properties where other kinds of persistent anti-social activity had been conducted. Despite the critics, who feared it could be used in cases of drunken parties, or where residents were alleged to be intimidating their neighbours, this new power was swiftly enacted. Premises Closure Orders became available to the police and the local authorities in December 2008. Unlike most of the existing legislation on repossessions they are 'tenure neutral', i.e. may not only be applied to tenants of social housing. Properties may be closed, wholly or partly, for up to three months and it is an offence for anyone, including an owner or someone with a right of abode, to enter the premises during this period. So far the orders have been deployed sparingly, apparently in pretty extreme cases. One can imagine the anxiety or even outrage, particularly among owner occupiers, if they were to be used more widely. Plans were also included in the Consultative Document to strengthen the dispersal powers of the police, fuelling fears that the ASBO regime could be used against peaceful protestors. In fairness, it ought to be noted that it also contained some creative suggestions for measures preventative of ASB and for early intervention.

The Coalition Government's own consultation started in February 2011 and closed for public comment in May. The document - *More Effective Responses to Anti-Social Behaviour* - did not refer to the Labour Government's 2007 consultation: indeed it was pretty disparaging about its predecessor's efforts in the field of ASB, commenting unfavourably on the 'centralising' and 'top-down' nature of the stance it took and the measures it implemented. The Government's most startling new proposal is to abolish the ASBO - at least in name. In support of this, the document advances the old tale - or perhaps canard, since it depends on anecdote rather than evidence - that ASBOs have become 'a badge of honour' in some localities and among some groups of young people. ASBOs and CRASBOs would be superseded by two new instruments. The first of these - and the ordering is significant - is the CRASBO replacement, the Criminal Behaviour Order (CBO) attached to a conviction. This could forbid offenders from entering certain places or engaging in certain activities, and at the same time could mandate such requirements as drug treatments or anger management courses. The second instrument would be the Crime Prevention Injunction (CPI). This would carry a civil burden of proof, "making it quicker and easier to obtain than an ASBO". However, breaches of the injunction would have to be proved "beyond reasonable doubt" (the criminal test) but "would not be a criminal offence and would not result in a criminal record". For an adult, a breach would be a contempt of court, punishable by a fine or custody. For under 18s there would be "a menu of sanctions, including curfews, supervision, activity requirements and detention". Whether these changes, taken together, would bring about much difference from the ASBO regime is disputable - they seem to be mainly a matter of moving around the furniture.

One of the questions which accompanied the consultation asked whether there should be maximum and/or minimum terms for a CPI. Although maximum terms may provide useful guidance and some protection for the accused, the general rule in such cases is that legislators should be chary of circumscribing the discretion of judges. This is particularly important with mandatory minimum sentences, which usually soon after their enactment bring about some glaring distortions of justice: the Government is likely to find this out in relation to the possession of knives. A solitary paragraph in the Consultative Document noted the Coalition's Housing Minister's plan to make a breach of a court order for ASB or a housing related conviction of an indictable offence mandatory grounds for repossession of social housing: Shelter devoted almost the whole of its commentary on the Consultative Document to this one proposal. In August 2011, the Department for Communities and Local Government issued its own Consultation, baldly entitled *A New Mandatory Power of Possession for Anti-Social Behaviour*. This made clear that the proposed power would be available to private as well as social landlords; could be conferred in the event of a whole range of violence-related convictions, against property as well as persons; could be triggered by the conviction of any household member, including (or perhaps especially) a juvenile; could apply because of the actions of a visitor to, not just a resident in, a household, perhaps a separated father coming to see his children; and unlike present legislation would not depend on the offence having been committed within the locality of the occupants' dwelling house. This Consultative Document was published in the immediate aftermath of the August riots. Policy-makers had long been contemplating the core proposal, but much of the detail must exemplify that bane of British policy-making since about 1975, on the hoof reaction to the latest popular and media panic. Shelter observes that recent decisions of the Supreme Court would indicate that the Courts must be able to review and assess the proportionality of an order for possession of a person's home: otherwise Britain could be in breach of Article 8 of the European Convention on Human Rights (the Right to a Family Life).

"The array of tools", says the Government, to deal with "place-related anti-social behaviour" is complex and has been added to piecemeal since 1998. It therefore proposes to consolidate a variety of powers, mostly prohibitions, into "a single civil tool", to be known collectively as the Community Protection Order. There will be two 'levels of severity'. Level One would be a notice from a 'practitioner' requiring a perpetrator to desist from the action which is objected to, and to make good any damage which has been caused. This would be applicable to such nuisances as litter and graffiti, and also the creation of excessive noise when it is held to be deliberately anti-social. Level Two would be a local authority or police power which would "tackle significant and/or persistent anti-social behaviour in a particular place". It would include the closure orders which were referred to earlier, with the additional twist that the maximum period of closure would be raised to six months.

Failure to comply with any of those orders, even those in Level One handed out by an assortment of 'practitioners', would be a criminal offence: the Government points out that this is true of most of those which would be replaced, and indeed what is in prospect here is a kind of rationalisation and nationalisation of bye-laws. Level One misdemeanours would be punishable by Fixed Penalty Notices. For a Level Two breach an on-the-spot financial penalty of £50 is proposed.

The next section of the document is termed the Direction Power, which means the legal ability of the police to act summarily to deal with actual or anticipated low-level civil disorder. This is another area where powers were fashioned and refashioned by the previous Government. The Anti-Social Behaviour Act, 2003, empowered the police to disperse groups of two or more in areas where there was persistent ASB. Two persons scarcely constitute a group: this is an example of a threshold being set too low. The same Act permitted the police to apprehend any young person aged under 16 found in the dispersal zone unaccompanied by an adult and take him or her home. Later measures provided Designated Public Places Orders, which allow for the confiscation of alcohol in such places, and a power given to a uniformed constable to direct any individual over 16 years of age to leave an area, and not return for up to 48 hours.

It should be noted that civil liberties organisations believe that these powers and the ASBO regime more generally, have facilitated the targeting of peaceful protestors.

With the Direction Power the Government again opts for consolidation. It wishes "to combine the most effective elements of these various powers into a single, simpler police power to direct people away from an area where they are committing, or are likely to commit, anti-social behaviour". The power would be exercisable by a police officer or a PCSO only - a wider group, actually, than is provided for in some parts of the present legislation. Refusal to comply with an order to leave an area and not return within 48 hours would, of course, remain a criminal offence. However it says that it is keen that people should be free to continue to enjoy their public spaces, and recommends no specific sanctions. It expresses a desire to discover the views of other organisations and the general public, and it seems that this was a respect in which the consultation was genuinely open-ended.

The Coalition Government maintains, even more vociferously than its predecessors, that it is essential that the local community is involved in relevant aspects of its policy-making and implementation. The trouble is, the word 'community', perhaps because of the pleasant aroma which it gives out, is seldom knowingly defined. One problem is that the identification (or confusion) of efficiency with economies of scale over the past fifty years has produced structures of local government - Unitary and District Authorities, police forces, Health Authorities of various sorts, Community Safety Partnerships - which cover areas too large for effective responses to anti-social behaviour, where the neighbourhood or estate level would be more appropriate. A degree of internal decentralisation, that is, by and within these organisations, is of course usual, but it far from always acts to facilitate cooperation among the particular individuals who need to cooperate, or to bring in to the policy arena representative members of the local population.

Strong community feeling may be positively associated with nosey-parkerism and many varieties of exclusivity and exclusion, as much as with desirable manifestations of public spirit. This needs to be borne in mind when considering the Government's final recommendation, the 'Community Trigger'. The Consultative Document says that the aim of this would be "to give people more power to shape the way the police and other agencies respond to the issues that matter in their area, particularly those who have experienced sustained, targeted anti-social behaviour". One of two criteria would have to be met: (1) that five individuals, from five different households in the same neighbourhood had complained about the same issue, and no action had been taken; or (2) that the behaviour in question had been reported to the authorities by an individual a minimum of three times, and no action had been taken. The first of these seems almost to invite ganging up on unpopular groups, such as mentally ill persons rehoused with the aim of rehabilitating them, while the second is a good example of another threshold set too low: every M.P. and Councillor knows that there are obsessive and vindictive constituents out there. This is all the more strange because the Government is well aware of the dangers of vexatious and discriminatory complaints, and has built in safeguards to weed them out, mainly through CSPs, at their discretion, declining to take them further (without necessarily giving any explanation, for confidentiality and legal reasons). There seems a real possibility that, if implemented, this piece of would-be populism might misfire, increasing both local suspicion of the authorities and hostility among neighbours rather than alleviating them.

At the time of writing it is unclear whether the present administration will set about refurbishing its anti-ASBO 'toolkit' as frequently and busily as its predecessor. Concentrating on the economy and pressures of Parliamentary time could entail the issue going into the long grass, at least for some time. Legislated, the Coalition's proposals should go some way to regularise the civil law/ criminal law split, although the most objectionable feature would remain, the exaction of criminal penalties for activities which Parliament has never declared to be criminal offences and would be unlikely to do so. This is a problem which is particularly raised by the Crime Prevention Injunction. The Criminal Behaviour Order presents its own difficulties, but it would follow the CRASBO in being clearly attached to a conviction for an acknowledged criminal offence. Not so the CPI. Would it be feasible to get rid of such intermediate rungs in the ladder of official actions and sanctions, and rely, on the one hand, on the designation of crimes, which should clearly be prosecuted as such, and, on the other hand, on a range of informal and out-of-court approaches, such as Acceptable Behaviour Agreements (ABAs) and the methods of restorative justice?

In practical terms, the answer to this is probably no. It is hard to see the authorities, national and local, relinquishing such flexible instruments in the 'toolkit' for attacking neighbourhood social problems as the old-style ASBO or the new-style CPI. The criminal law is not good at addressing a series of infringements of civility, all relatively minor in themselves and below the level which could reasonably constitute a criminal offence, but cumulatively capable of causing considerable distress to individuals and damage to the environment. And there has to be recourse to something when informal methods fail to have effect. Nevertheless it is sensible to advocate that proceeding via injunction be employed as rarely as possible, particularly when it is known that half or more of these injunctions are going to be breached. One statistic ought to be borne in mind: the highest success rate in reducing ASB can be claimed by the simplest and cheapest of all the available remedies, the writing of a warning letter. In 80% of such cases, the perpetrator desists from the behaviour complained of and the nuisance ceases. It does not work all the time, but this is something which should be built upon.

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