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## **REGULATION OF INCIVILITIES IN THE UK, ITALY AND BELGIUM: COURTS AS POTENTIAL SAFEGUARDS AGAINST LEGISLATIVE VAGUENESS AND EXCESSIVE USE OF PENALISING POWERS?**

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### **Abstract**

In recent years, the legislators in the UK, Italy and Belgium have progressively empowered local authorities to subject sometimes already criminalised and harmful, but also some relatively harmless uncivil conduct to intrusive and punitive measures deeply affecting individuals' rights. However, judicial action in these three countries has been recently trying to restrain the (illegitimate) use of penalising powers of local authorities by delivering interesting liberty-safeguarding decisions. This paper firstly describes the (expanded) regulation of incivilities in the three aforesaid European countries. Secondly, it focuses on two criteria that inform judicial review of legislative and administrative action, namely the principle of legality and the principle of proportionality. Thirdly, it examines the case law of English, Welsh and Scottish courts, along with Italian and Belgian courts, and shows how courts can safeguard the individual's rights and freedoms against (illegitimate) penalisation of conduct that is deemed anti-social or uncivil at the local level.

### **Keywords**

Incivilities; Regulation; Public Order; Judicial Review; Legality; Proportionality

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### **1. Introduction**

In recent years the regulation of incivility has undergone a significant (punitive) expansion. According to some scholars (Beck, 1992; Hollway and Jefferson, 1997; Taylor, 1999 etc.), the (extended) penalisation of uncivil or disorderly behaviour can be explained in light of increasing societal feelings of insecurity and fear of crime, which have been registered in a number of European countries of the late-modern society. Long-standing evidence on fear of crime has underscored the link between perceived (physical and social) disorder with the perceived risk or threat of being victimised (Burney,

2005; Sampson and Raudenbush, 2004). However, the perception of the risk of becoming a victim of a crime does not often correspond to the actual risk of crime (Bottoms and Wilson, 2004; Peršak, 2014 etc.). According to Mackenzie et al. (2010), moreover, such perceptions are just partly driven by direct and personal experiences or visual cues; they are also influenced by mechanisms of stereotype and metaphor. Through such mechanisms people learn to associate anti-social behaviour (henceforth: ASB) with, for example, the presence of certain groups of people on the streets, and as a tangible indicator of a wider social breakdown, poor formal/informal social control and general moral decline. Based on people's anxieties and widespread insecurities, policy-makers in both Europe and the US have adopted laws and regulations which respond to the problem of crime and crime control in (at least, partly) an emotional fashion, often adopting populist views, which serve the purpose of gathering political consensus and ensuring re-election.

Some types of uncivil behaviour, to be sure, may involve serious harm, persistent intimidation and harassment, resulting in serious consequences. As such, they are (in many countries) properly already criminalised. The definition of "uncivil" behaviour is in itself a very problematic or controversial issue. In general, we observe that the behaviour often defined as nuisance, incivility or anti-social behaviour is the sort of behaviour which offends, alarms or upsets individuals or communities. It can include physical and social disorder, which (when serious, intrusive and persistent) may result in a grave impairment of the quality of life of individuals and entire communities. However, it may also consist of relatively minor and occasional environmental disturbances (e.g., littering, fly-tipping, noise nuisance etc.) as well as harmless conduct, such as teenagers with hoods just "hanging about", who nevertheless seem to alarm some people. As many scholars contended (Ashworth et al., 1998; Burney, 2002, 2005; Cornford, 2012; Millie, 2008a, 2008b), the definition of uncivil behaviour is very much dependent on (social and individual) subjective interpretations. On Millie's (2008a, 2008b) account, what accounts as anti-social or uncivil varies very much in time and place, and is dependent on what he calls the 'behavioural and aesthetic expectations' of the (powerful) majorities. While the same conduct may be celebrated and praised by some people in certain times and settings, it may be only tolerated or, worse, censured by others (or even by the same ones) when it occurs under different (time and space) conditions (see also Burney, 2006).

In his book 'The Culture of Control' (2001), Garland argues that in conditions of late modernity the discourse on crime and crime control has increasingly become expressive and instrumental, often leading to the enactment of measures deeply impacting on individuals' liberties and autonomy. This is especially the case for the regulation of incivilities, since local authorities have progressively been empowered to subject sometimes already criminalised and sometimes quite harmless and long tolerated conduct to intrusive and punitive constraints affecting individuals' rights and freedoms. According to criminal law scholarship (Feinberg, 1984; Simester and von Hirsch, 2006b; Peršak, 2007; etc.), behaviour ought not to be penalised unless it causes (wrongful) harm or, in some cases and under certain conditions, offence to [\[p. 342\]](#) others. However, the assessment on whether a conduct is harmful or sufficiently offensive to others in order to legitimate punitive intervention is not always a clear-cut exercise. In one of his recent works, Millie (2011) notes that the assessment of the acceptability of behaviour depends on the values underpinned by the individual or group holding decision-making power. Those who have sufficient political capital are in the position to assess whether certain behaviour will result in a perceived or actual harm or offence to them, and to impose such value judgments on other people. As a result of these assessments, relatively minor and occasional behaviour may be penalised by powerful majorities on the basis of their moral reasons or their conception of the quality of life. Not alone, the visibility of certain groups of people in public spaces is often attacked also on the basis of economic and aesthetic judgments of the mainstream culture, when the former do not (sufficiently) conform to the economic (consumerist) expectations and aesthetic canons of the majority. These value judgments may, however, have a detrimental impact on the enjoyment of individual rights.

In response to the widespread regulatory trend to steer people's lifestyles through the employment of punitive measures, judicial action in some European countries has recently kept a check on the (illegitimate and excessive) use of penalising powers of local authorities by delivering judgments aiming to safeguard individual rights and liberties. This article will firstly describe the (expanded) regulation of incivilities in three European countries, namely in the UK, Italy and Belgium. Secondly, it shall focus on two criteria that inform judicial review of legislative and administrative action,

namely the principle of legality and the principle of proportionality. Thirdly and lastly, it will look into the case law of English, Welsh and Scottish courts, along with Italian and Belgian courts, to assess whether (and how) judicial action can provide a ‘safety net’ to protect individual rights and freedoms against (illegitimate and disproportionate) penalisation of behaviour considered uncivil by (often local) authorities..

## 2. Incivility regulation in the UK, Italy and Belgium

### 2.1. The UK

A reinforced trend in the regulation of incivilities can be witnessed in several European countries. In the UK, the Magistrates’ and County Courts, in England and Wales, and Sheriff Courts, in Scotland, have been since 1998 empowered to issue civil injunctions (Anti-Social Behaviour Orders or ASBOs), whose breach renders the offence criminal and may result in up to 5 years of imprisonment.<sup>1</sup> As Burney (2005: xi) put it, the ASBO legislation developed by New Labour in the 1990s is all about a ‘right idea that went wrong from the start’. The right idea that triggered the enactment of such legislation was to deal with difficult situations affecting hard-to-manage neighbourhoods of social housing, whereby individuals ‘were living daily with abuse, intimidation and disorder that seriously undermined their quality of life and that of their locality’. From the outset, however, the exercise of such (newly introduced) regulatory powers has been brought too far, as ASBOs have been applied to counter a broader spectrum of behaviour than what was originally intended. ASBOs, moreover, rely on punitive measures deeply affecting individual rights and freedoms (Burney, 2008; Crawford, 2009 etc.) [p. 343] and by placing emphasis on the expulsion of the anti-social from local communities pursue a ‘selective social exclusion’ (Squires, 2006: 162).

As noted by Donoghue (2007, 2010), courts have well contributed to increasing of the application of ASBOs. According to the 1998 Crime and Disorder Act (CDA), in fact, Magistrates’ Courts, County and Sheriff Courts may apply ASBOs in the course of a civil proceeding upon request from local authorities, police forces, registered social landlords (RSLs), and housing action trusts (HATs). A two-stage test must be satisfied by the applicant authority in order to obtain the issuance of an ASBO. The first is that the defendant has behaved in an anti-social manner, that is, ‘in a manner that caused or was likely to cause harassment, alarm or distress’ (s. 1(1) (a)). The second-stage of the test requires the order to be necessary in order to protect persons from further anti-social behaviour of the offender (s. 1(1) (b)). As noted by the House of Lords in 2002 in its leading judgment *McCann*,<sup>2</sup> since no limits can be set to the prohibitions that may be imposed by courts as long as they are found to be necessary, ASBOs can rest on measures that may deeply ‘interfere with the defendant’s private life, his freedom to express either by words or conduct and his freedom to associate with people’ (26).

Individual behaviour is then labelled as criminal and subjected to adjudication in a criminal proceeding when the order is breached by the offender. Pursuant to s. 1(10) CDA, a person who without reasonable excuse does anything which he or she is prohibited from doing by an ASBO, he or she is guilty of an offence and liable either (a) on summary conviction, to imprisonment for a term not exceeding six months and/or to a fine not exceeding the statutory maximum, or (b) on conviction on indictment, to imprisonment for a term not exceeding five years and/or to a fine. Clearly, both the definition of ASB and the range and type of punishment have been defined in quite elastic terms, thus giving the judiciary an ample degree of discretion when it comes to applying ASBOs as well as to determining the amount of punishment to be imposed on individual offenders.

Four different types of ASBOs have been introduced by the 2003 Anti-social Behaviour Act. ‘Interim orders’ can be issued by Magistrates’ and County Courts on a temporary basis and in the case of danger to the public, while pending the determination of the main application. Magistrates’ and County Courts can respectively impose ‘stand-alone’ ASBOs, which can be unrelated to any other pending legal proceeding, and ‘County Courts orders’, which may be connected to other proceedings

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<sup>1</sup> During the submission procedure of this paper, the legislative framework on ASBOs has been changed. Currently, pursuant to the 2014 Anti-social Behaviour, Crime and Policing Act, only breaches of Criminal Behaviour Orders (previously CRASBOs) qualify as criminal offences.

<sup>2</sup> *R. (on the application of McCann) v Manchester Crown Court* (2002 WL 31257284).

or actions. Lastly, post-conviction Criminal ASBOs (or CRASBOs), may be made upon conviction in a criminal proceeding by County Courts, Magistrates' Courts and the Youth Court. These four types of ASBOs do not, however, exhaust the list of tools at the disposal of local authorities to penalise uncivil and disorderly behaviour. Other remedies include Acceptable Behaviour Contracts (ABCs), Anti-social Behaviour Notices (ASBNs), Penalty Notices for Disorder (PNDs), Sexual Offences Prevention Orders (SOPOs), along with parenting contracts, demoted tenancies etc. With a few exceptions, ASBOs (as well as the other similar remedies referred to above) are measures that tailor individual response to ASB to the personal circumstances of those subjected to regulation. Generalised regulations have, however, also been adopted with local authorities setting out prohibitions that impact on the whole segments of the population. An example is the Dispersal Order, envisaged by s. 30 of the 2003 Anti-Social Behaviour Act, which entrusted local authorities to designate certain areas of heightened ASB concerns as 'dispersal order zones'. Within these zones, groups (especially of youths and drunk people, as reported in Millie [p. 344] (2008a)) may be dispersed by the police and community support officers when they have a reasonable ground to believe that their presence or behaviour has resulted, or is likely to result, in any member of the public being harassed, alarmed, or distressed. Refusal to cooperate by the concerned individuals or groups may result in them being arrested and summarily charged. The 2001 Criminal Justice and Police Act (in force since 1 September 2006), moreover, granted to local authorities the power to designate 'alcohol-free zones' through Designated Public Place Orders in an attempt to restrict anti-social behaviour connected to drinking in certain public spaces at nights.

The normative framework on the regulation of ASB has been altered in March 2014, as the Anti-Social Behaviour, Crime and Policing Act (Home Office, 2014) has entered into force. Among the changes brought about by the Act, the most striking one is the replacement of a number of existing ASBO tools (including "stand alone" ASBOs and Anti-Social Behaviour Injunctions) by the Injunction to Prevent Nuisance and Disorder (IPNA) (s. 1 (1)). As argued by several commentators (Home Affairs Committee, 2013; Strickland et al., 2013), this new Act (and previously, the Anti-social Behaviour, Crime and Policing Bill) still contains some very problematic elements, despite re-framing ASBOs as a fully civil law mechanism.<sup>3</sup> In this Act CRASBOs are also replaced by Criminal Behaviour Orders, whose breach leads to a criminal proceeding. Other changes include (among others) the introduction of new powers for local authorities to deal with environmental anti-social conduct (i.e., public drunkenness, barking dogs, littering, the phenomena of graffiti and of fly tipping etc.), as well as the introduction of tools that aim to ensure a better protection of victims and communities (through, for example, the adoption of the Community Trigger and the Community Remedy).

## 2.2. Italy

By evoking the need to 'appease the profound sense of insecurity and fear of local criminality highly widespread across the country' (Italian Council of Ministers, 2008b: 3), the Italian centre-right government designed in 2008 a normative framework that awarded mayors the possibility to issue orders<sup>4</sup> 'also [italics added] contingent and urgent [...] for the purpose of preventing and removing grave perils threatening public safety and urban security'.<sup>5</sup> The presence of the conjunction 'also' in the text of the statute allowed for an extensive interpretation of the confines of the public order mandate on the part of local authorities, which then on the regular basis issued orders *extra ordinem*, i.e. regardless of whether the requirements of urgency and necessity were actually met (Benvenuti et

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<sup>3</sup> For a critical view on, for example, the newly introduced lower standard of proof and on the power to arrest following a breach, see Home Affairs Committee (2013).

<sup>4</sup> In Italy, orders (or ordinances) *extra ordinem* are administrative measures that can be taken by any public administration to deal with public order issues. Orders should be issued in situations of *urgency* and *necessity*, protect the 'tick' public interests of urban security and/or health, have a temporary effect etc. They can impose (positive and/or negative) obligations on individuals, and deviate from the general rules and ordinary procedures of the legal system.

<sup>5</sup> Art. 54 par. 4 of the legislative decree N. 167/2000, as amended by art. 6 of the decree N. 92 of 23 May 2008 reads as following: *Il sindaco, quale ufficiale del Governo, adotta con atto motivato provvedimenti anche contingibili e urgenti nel rispetto dei principi generali dell'ordinamento, al fine di prevenire e di eliminare gravi pericoli che minacciano l'incolumità pubblica e la sicurezza urbana.*

al., 2013; Parmigiani, 2008).<sup>6</sup> Any breach of such orders was, moreover, considered a contravention (criminal offence *lato sensu*) [p. 345] and led to a criminal proceeding potentially resulting in the imposition of criminal sanctions (article 650 of the criminal code).

At the local level, this extensive interpretation led to an arbitrary and uneven regulation of public order issues, resulting in a scattered regulatory scenario, where various types of conduct have been differently disciplined across the territory (Benvenuti et al., 2013; Capantini, 2011). Various phenomena have been regulated by mayors through administrative orders *extra ordinem*, stretching from harmless and long tolerated conduct (such as public drunkenness, soliciting of and procuring for prostitution, begging, littering, etc.) to behaviour already falling within the ambit of criminal or administrative law (e.g., vandalism, drug dealing etc.) (Campioni et al., 2009).

In Italy, this expanded regulatory trend has also been facilitated by a wavering jurisprudence, irresolute on whether to grant legitimacy to such measures.<sup>7</sup> To resolve the judicial dispute, the Constitutional Court in 2011 issued a judgment in which the exercise of local regulatory powers in the area of urban security has been re-connected to the situation of (strict) urgency and necessity.<sup>8</sup> Currently, however, in spite of the Constitutional Court's ruling, the issuance of orders *extra ordinem* to counter daily incivilities does not seem to be on the wane.<sup>9</sup> Recent judgments of courts, overturning mayors' decisions to issue administrative orders on the basis of the Constitutional Court's ruling, show a slightly reduced but still present trend to expand the traditional ambit of the public order mandate to counter daily (often, harmless) uncivil and disorderly behaviour.<sup>10</sup>

### 2.3. Belgium

In Belgium, from 1999 onwards municipalities have been delegated the power to impose administrative sanctions (the so-called 'Gemeentelijke Administratieve Sancties' or G.A.S.) on individuals that behave in a way that is considered uncivil. As pointed out by relevant scholars (Devroe, 2012; Meerschaut et al., 2008; Vander Beken and Vandeviver, 2014), the way to the adoption of the municipal system of administrative sanctions has been paved by a number of scandals that occurred in the country from the 1980s onwards, along with the burst of protests in some municipalities of Brussels (Vorst, St. Gilles) and the electoral swing to the extreme right-wing party (*Vlaams Blok*) in 1991. All these factors have contributed to the raised feelings of insecurity related to nuisance, which in the years that preceded the enactment of the G.A.S. [p. 346] legislation reached alarming levels (Vander Beken and Vandeviver, 2014). To appease the fear of crime highly widespread across the country (Vander Beken and Vandeviver, 2014), the federal state enacted in 1999 the law on the implementation of municipal administrative penalties,<sup>11</sup> which empowered local authorities to punitively regulate behaviour defined as uncivil by imposing administrative fines. Competence to decide on the appeal against such fines has been allocated to criminal courts (*Politie rechtbank*).

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<sup>6</sup> After the enactment of the ministerial decree aimed to specify the jurisdiction of municipal authorities (Italian Council of Ministers, 2008b), the then Home Secretary Roberto Maroni urged mayors to be creative in designing administrative orders. A detailed list of bizarre orders can be found in Parmigiani (2008).

<sup>7</sup> An example of judicial decision expressing its favour for the exercise of local powers is R.A.T. (Regional Administrative Tribunal of first instance) Lazio, Sect. II, 22 Dec. 2008, n. 12222. For an example of a restrictive interpretation of the provision see R.A.T. Toscana, Sect. II, 21 Jan. 2009, n. 71.

<sup>8</sup> Const. Court, 7 April 2011, n. 115.

<sup>9</sup> For instance, the mayor of Perugia has recently issued an administrative order prohibiting the soliciting of and procuring for prostitution. See <http://www.umbria24.it/perugia-scatta-lordinanza-anti-prostituzione-inserite-anche-via-canali-e-via-campodi-marte/169641.html>, accessed on 22 September 2013.

<sup>10</sup> For some examples, see R.A.T. Piemonte Turin, Sect. II, 09-02-2012, n. 172; R.A.T. Sardegna Cagliari, Sect. I, 10-02-2012, n. 110; R.A.T. Calabria Catanzaro, Sect. I, 14-03-2012, n. 262; R.A.T. Puglia Lecce, Sect. I, 22-03-2012, n. 525; R.A.T. Campania Napoli, Sect. V, 24-05-2012, n. 2433; Council of State (C.S.), Sect. V, 25-05-2012, n. 3077; R.A.T. Liguria Genova, Sect. II, 13-07-2012, n. 1016; R.A.T. Toscana Firenze, Sect. III, 27-08-2012, n. 1484; R.A.T. Toscana Firenze, Sect. III, 27-08-2012, n. 1484; R.A.T. Lombardia Milan, Sect. III, 13-09-2012, n. 2308; C.S., Sect. V, 19-09-2012, n. 4968; R.A.T. Abruzzo Pescara, Sect. I, 02-10-2012, n. 396; R.A.T. Toscana Firenze, Sect. II, 19-10-2012, n. 1669; R.A.T. Lazio Latina, Sect. I, 22-10-2012, n. 792; C.S., Sect. V, 06-03-2013, n. 1372; R.A.T. Campania Salerno, Sect. I, 15-05-2013, n. 1098; Supreme Court (civ.), Sect. VI - 2, 25-07-2013, n. 18073 etc..

<sup>11</sup> Law on municipal administrative sanctions of 13 May 1999.



At the outset, the nuisance legislation proved to be an empty barrel for local administrations (Devroe, 2008; Vander Beken and Vandeviver, 2014), as it allowed municipalities to react only to conduct, which was not (already) regulated at the federal level or by regional Parliaments (on the basis of the principle of subsidiarity of local powers). Things changed during the years 2004 and 2005,<sup>12</sup> when the statutory framework on the regulation of nuisance was amended by the Federal Parliament and some (until then) criminal offences have been decriminalised. By allowing municipalities to regulate behaviour previously criminalised at the national level, the newly enacted regulatory framework has, in fact, broadened the original reach of the G.A.S. legislation. The two laws of 2004 and 2005, moreover, allocated new powers to local authorities in the area of the so-called ‘mixed violations’, which refer to conduct that qualifies both as a criminal offence and (potentially, if the municipality decides so) as a local incivility. In essence, under the heading of ‘mixed violations’, municipalities have been entitled to adopt the regulation that sanctions conduct already covered by (federal) criminal law offences and *in addition* to the criminal sanction imposed therein.<sup>13</sup> In the area of ‘mixed violations’, however, local sanctioning powers are not unlimited. Administrative fines can, in fact, be imposed when the prosecutorial body has either failed to communicate its positions on the case within one month after receiving the police report (this is the case for the so-called *lighter* ‘mixed violations’) or issued an official statement in which it devolves the matter to the competence of local authorities (i.e., when *more serious* forms of ‘mixed violations’ are concerned) (Devroe, 2008).

Whilst seldom implemented up till 2006 (Ponsaers *et al.* in Devroe, 2008: 156), municipal nuisance regulations seem to be on the rise from 2008 onwards (Association of Flemish Cities and Municipalities, 2008).<sup>14</sup> Moreover, the regulation of incivilities in Belgium has recently been tightened as the Parliament has on 30 May 2013 passed a law which entrusts local authorities with the power to impose (a higher amount of) GAS fines on individuals aged 14 years or older (thus, lowering the age limit previously set to 16 years old), and to issue orders in case of urgency and necessity.<sup>15</sup>

#### **2.4. Legal objections to (old and newly expanded) forms of incivility regulation**

In all these countries, both (reinvigorated) regulatory powers and the (punitive) measures they rely on have been subjected to severe criticism. In the UK, ASBOs have been denoted as [p. 347] a means of ‘indirect criminalisation’ (Cornford, 2012: 17), which is deemed to evade the traditional due process requirements of criminal law. Simester and von Hirsch (2006b) described the ASBO system as a ‘two-step prohibition’, as the criminalisation of behaviour occurs in two steps: first, a certain conduct is defined as anti-social (for it causing (or likely to cause) harassment, alarm or distress) and subjected to prohibitions within a civil-law order; second, the breach of any of the conditions included in the order is criminal. As argued by the two authors, such mechanism of criminalisation is rather problematic, especially when it refers to a behaviour (defined as anti-social) that is perfectly legitimate (e.g., youths hanging about on the streets). In the words of Mr Alvaro-Gil Roberts, European Commissioner for Human Rights (2005: 34), such civil orders look like ‘personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community’. ASBOs have also been criticised for the ‘potentially arbitrary character of definitions of ASB’ (Squires, 2006: 159), which has led some scholars to attempt to put forward sharper definitions of the notion of anti-social conduct (for examples, see Cornford, 2012 and Ramsay, 2009).<sup>16</sup>

In Italy, administrative orders have been challenged for creating ‘micro legal systems’ (Parmigiani, 2008: 149-150), which, by introducing unacceptable differentiations within the national territory, clash with the primary values of legal certainty and equality (Benvenuti *et al.*, 2013; Carluccio and Finocchi

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<sup>12</sup> Laws of 17 June 2004 and of 20 July 2005.

<sup>13</sup> The act of 2005, moreover, broadened the list of behaviour falling within the category of ‘mixed violations’ (including, for example, damage to goods and chattels, night time noise nuisance etc.).

<sup>14</sup> Currently, the implementation of such regulations is quite widespread. As noted by Vander Beken and Vandeviver (2014), by clicking on the link <http://www.vvsg.be/veiligheid/bestuurlijke%20handhaving/gas/Pages/WelkomGAS.aspx> it is possible to observe the geographical application of G.A.S. regulations across municipalities in the Flemish region of Belgium at present times (municipalities that are green coloured are those that have implemented the local administrative sanction legislation).

<sup>15</sup> Law of 24 June 2013.

<sup>16</sup> A more recent positive assessment on the ASBO system can be found in Donoghue (2010).

Gherzi, 2011; Cosmai, 2012 etc.). Here, domestic doctrine has also questioned orders *extra ordinem* in light of the (excessive) effects they likely bring about in people's lives (Musolino, 2011).

In Belgium, the system of G.A.S. fines has been criticised for the excessive vagueness of the statutory category of 'public nuisance', whose hazy contours have prompted different interpretations of the notion at the local level (Cools, 2004; Peršak, 2014 etc.). As noted by Peršak (2014), the delegation of powers to local communities (upon conviction that they are best suited to deal with social and criminal phenomena bothering community's members) may have repercussions for legal certainty (particularly for people not ordinarily living in a certain local community/municipality), as the regulation of nuisance varies across municipalities, which also renders compliance with a patchwork of different rules more troublesome. Emblematic in this respect is the case of Brussels with its 19 municipalities, which provide different interpretations of the concept of nuisance and rely on various modalities for the application of G.A.S. fines (Meerschaut et al., 2008).<sup>17</sup>

Overall in the three concerned countries, mechanisms of regulatory control are deemed to blur the boundaries between the civil/administrative and the criminal spheres. Regardless of their formal label as civil or administrative, in fact, such measures operate in close combination with the criminal law, without, however, being encumbered by the traditional criminal law principles of legality, proportionality, last resort etc. Moreover, (both novel and reinforced) regulatory powers are based on vague legislative definitions, which grant local authorities a considerable amount of discretion when it comes to spelling out the parameters of the acceptable rules and the behaviour to which the individuals must conform. Since it is the failure to comply with civil/administrative directions which triggers individual criminalisation, the question arises as to whether incivility regulation conforms to the principle of legality. [p. 348] Furthermore, civil/administrative measures that rely on punitive constraints on individuals' autonomy pose the question of the proportionality of the punishment in relation to the seriousness of the offence committed, especially when the latter consists of minor, insignificant or harmless forms of behaviour.

### 3. (Principled) judicial review of legislative and administrative action

In modern democracies deeply grounded on the liberal idea of individual autonomy, the use of the criminal law as a means to deter and punish human behaviour has to be cautious and always justified. Criminal law is the most intrusive and condemnatory form of coercion exercised by the state, which deeply interferes with individuals' rights and freedoms (Ashworth, 2003; Peršak, 2007; Simester et al., 2013). Therefore, any attempt to constrain behaviour that involves the (direct or indirect) employment of the criminal law arsenal should be thoroughly examined from the outset by the legislator in order to determine whether the intervention is morally legitimate (Feinberg, 1984), or, put it another way, whether the targeted behaviour carries 'penal value' (Jareborg, 2004: 527). Moral or "substantive" (Peršak, 2007) reasons for criminalisation address the content of criminal law provisions, i.e. the question as to *what* behaviour the legislator can legitimately criminalise (Feinberg, 1984; Jareborg, 2004; Peršak, 2007, 2014; Simester and von Hirsch, 2006a, 2011 etc.),<sup>18</sup> as opposed to formal principles, which instruct the policy-maker on *how* to properly criminalise human behaviour (Peršak, 2007, 2014). Such formal principles are, for example, the principles of legality, proportionality, last resort, which often have independent constitutional significance in all western legal system.<sup>19</sup> Their

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<sup>17</sup> The municipal plan to fight incivilities (which rests on both police and tax regulations) is available at <http://www.brussels.be/artdet.cfm?id=4034&highlight=administrative%2Cfines>, accessed on 20 September 2013. Six categories of incivilities are thereby spelled out, including the problematic category of 'other incivilities'. See also Peršak (2014).

<sup>18</sup> For example, the harm principle and the offence principle are currently the most accepted and recognised grounds for criminalisation.

<sup>19</sup> In some countries, general fundamental principles as such have been inferred by Supreme Courts from those that are explicitly enshrined in Constitutional Charters. In Italy, this is the case for the principle of proportionality, which has been inferred by the Constitutional Court from article 3 of the Constitution, which refers to the equality principle (Fiandaca and Musco, 2007; Manes, 2012 etc.). For the impact of such principles on the role of the judiciary in the UK after the enactment of the ECHR, see for instance Henham (2000), Jackson (2000), Nijboer (2000), Dine et al. (2006) etc..

adherence to both the legislative and the administrative levels can be questioned by courts through the (judicial) revision of their action.

### 3.1. The legality principle (legislative vagueness)

The legality principle is reflected in the maxim credited to Paul Johann Anselm von Feuerbach ‘*nullum crimen, nulla poena sine praevia lege poenali*’ (transl.: no crime and no punishment without a pre-existing penal law), which imbues all western legal systems, their Constitutional Charters, and rule of law (Martyn et al., 2013). The first section of the maxim, no crime without a pre-existing penal law, assumes that a human conduct can be regarded as criminal only by way of a law enacted by parliamentary assemblies before its commission. Secondary legislation (e.g., ministerial decrees, as well as administrative regulations, orders etc.) can only discipline elements of the offence, which are already specified in their essential and constitutive elements by way of primary legislation.

Another component of the *nullum crimen* principle, the legal certainty, requires criminal law provisions to be stated clearly by the legislator in their essential elements in order to provide a [p. 349] fair warning to citizens.<sup>20</sup> If the criminal law is to deter individuals from behaving in a certain (harmful) way, it should contain (at least, a certain degree of) predictability and certainty. Only if individuals understand the law and its precepts, and are aware in advance of the risks of incurring criminal sanctions by their prospective actions, they are in the position to properly decide in which conduct to engage or not engage, or what “costs” await them in case they violate the law. All these components of the legality principle (i.e., the requirement of (primary) legislation and of legal certainty) inform the judicial revision of legislative provisions and of administrative measures.

### 3.2. The proportionality principle (excessive use of penalising powers)

The principle of proportionality, even though not always incorporated in the Constitution, is a widely recognised fundamental value in (modern democratic) legal systems. The European Court of Justice has given it the status of the general principle of law, which, according to Gény (in Harbo, 2010: 159) is ‘an ideal of reason and/or of justice, which (accords with the permanent basis of human nature and) is presumed to form the basis of the very institution of law’.

The principle of proportionality assists the judge in inspecting the legality of legislative or administrative interventions restricting (fundamental) individual rights. Such interventions are to be confirmed insofar as the contested measure passes the threefold test of effectiveness, necessity and proportionality *stricto sensu* (Alexy, 2010; Barak, 2012; Harbo, 2010 etc.).<sup>21</sup> For our purposes, the third element of the test, i.e. the proportionality *stricto sensu* is of particular importance. This part of the test requires the judge to check whether the chosen (legislative/administrative) measure (albeit being suitable and necessary) imposes an excessive burden on individual’s autonomy. According to Rivers (2006), the courts are during this assessment given a certain margin of appreciation, meaning that the level of judicial deference and restraint (which is usually higher in the former two tests) changes according to the degree of state intrusion into individual rights: the more pervasive and

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<sup>20</sup> Of course, certain terminological broadness is inherent in legislative texts and may sometimes be even advisable so that judges can exercise a certain margin of appreciation (see the next section).

<sup>21</sup> More precisely, these three authors maintain that the judicial revision of legislative and administrative action constraining individuals’ rights should be based on a threefold test of effectiveness (rationality and/or suitability), necessity (or subsidiarity) and proportionality *stricto sensu*. For example, in its book ‘Proportionality: constitutional rights and their limitations’ (2012), Aharon Barak named the three tests as ‘rational connection’, ‘necessity’, and ‘proportionality *stricto sensu*’ (or balancing). In short, they require judicial authorities to, first, check whether state intervention is based on measures that are suitable to effectively fulfil the legally valid aims they wish to pursue (*effectiveness*). Second, they impel judges to address the question on whether such measures are necessary to achieve the same relevant legal interests, in the meaning that the chosen measure is the least coercive and intrusive to individual rights and freedoms (*necessity*). In criminal law, necessity is closely related to the principle of *ultima ratio*, which maintains that criminal law offences should be used as a last resort. Third, they require courts to inquire whether the chosen measure imposes an excessive burden on individual’s autonomy (*proportionality stricto sensu*). If judicial review is to follow these criteria, legislative and administrative action constraining individuals’ autonomy is to be allowed to the extent that is suitable and needed to achieve the relevant legal objectives, under the condition that such measures have no excessive or disproportionate impact on the interests of persons.



substantial the limitations to individual liberties, the more thorough the judicial review. In the words of the author, “[i]n the case of the most serious limitations of rights, the court’s constitutional duty is to ensure to its own satisfaction that the decision is correct all things considered” (Rivers, 2006: 207). [p. 350]

The proportionality principle is also relevant in the judicial phase of sentencing, with the view to orienting the degree of discretion that judges can properly exercise in that stage. In the process of sentencing, the court may take into consideration a number of factors, such as the type of offence involved and its seriousness, the timing of any plea of guilty, the defendant's character and antecedents, including his/her criminal record, with a view to imposing a punishment whose severity reflects the seriousness of the offence committed. By contending that the severity of the punishment should be in proportion with the seriousness of the offence, the proportionality principle places limitations on the amount of coercion that may be properly exercised by the state (i.e., on the *amount* of punishment). On Ashworth’s account (2003: 69), the core of this principle lays in the assumption that ‘no individual, even an offender, should have his or her interests sacrificed except to the extent that it is both absolutely necessary and reasonably proportionate to the harm committed or threatened’.

## 4. Case law analysis

### 4.1. Criteria of analysis: legislative vagueness and excessive use of penalising powers

In order to describe and subsequently (comparatively) analyse the relevant case law on incivilities, the criteria of ‘legislative vagueness’ and of ‘excessive use of penalising powers’ will be utilised in this article. The first criterion of ‘legislative vagueness’ refers to judicial review of vague legislative definitions of either the behaviour that instigates the local (civil/administrative) regulatory response (e.g., *anti-social or uncivil behaviour*) or of the local regulatory competences (e.g., which have often been framed with the use of a vague terminology (*also*) or concepts (*public nuisance*)). The second criterion of ‘excessive use of penalising powers’, relates to judicial cases where the exercise of regulatory powers has been questioned regarding the extent (or amount) of coercion imposed on individual autonomy by way of civil/administrative measures and/or (in case of a breach) of criminal sanctions. In other words, while the first speaks about the legal (un)certainly of the behaviour that justifies the exercise of regulatory powers or the legality of such powers, the second criterion focuses on the (proportionate/disproportionate) effects of such powers on people’s lives. In the description of the case law that will follow, only the most relevant cases will be mentioned.

### 4.2. Case law selection

To select the relevant case law in the UK, the database Westlaw has been used. Cases have been sorted under the keyword ‘*anti social behaviour ASBO*’, which has resulted in 112 hits. All these judgments have been reviewed in order to leave out those that did not question the merit of ASBOs (i.e., question the substantive requirements for an ASBO). This resulted in 82 cases, selected for the final analysis.<sup>22</sup> In Italy, the database Leggi d’Italia (Repertorio di Giurisprudenza) has been entered with the keywords ‘*sindaco ordinanza sicurezza pubblica*’ (transl.: mayor order public security), and resulted in 34 hits. In Belgium, the relevant case law has been retrieved through the database Jura, by using ‘*openbare orde overlast*’ (transl.: public [p. 351] order nuisance) as keywords. That resulted in 13 hits. Moreover, to include in the case law analysis also decisions on the so-called G.A.S. fines, the database has been searched for the keywords ‘*gemeentelijke administratieve sanctie*’ (transl.: administrative municipal fine), which resulted in 16 documents (i.e., total of 29 decisions).<sup>23</sup>

In all three cases, the selection of the case law has been limited to judgments issued in the 6 years stretching from 1 January 2008 to 1 September 2013 (in all, the number of hits reflect those available

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<sup>22</sup> A total of 30 decisions were excluded: in 24 decisions courts did not assess ASBOs (or similar measures) into the merit, whereas in 6 of them judges addressed just their formal (and not substantive) requirements. The remaining judgments (82) were sorted under the two categories of ‘legislative vagueness’ (22) and of ‘excessive use of penalising powers’ (60).

<sup>23</sup> Just one decision was found to meet the requirements of both research entries (i.e., Const. Court, nr. 62 of 27 May 2010).

in the three databases on 30 September 2013).<sup>24</sup> The year 2008 has been selected as a starting point of the analysis for a number of different reasons. In England and Wales, national official statistics report a steady (and substantial) decrease in the number of issued ASBOs from 2006 up till 2011 (Home Office, 2011).<sup>25</sup> Notably, in 2008 the number of issued ASBOs (2027) halved the peak levels reached in 2005 (4122). In Italy, the year selection is justified in light of the enactment of the so-called ‘Pacchetto Sicurezza’ (transl.: ‘Security Package’) (Italian Council of Ministers, 2008b), which in 2008 expanded the law on public order mandate by empowering local authorities to adopt orders *extra ordinem* against incivilities on regular basis. In Belgium, although the G.A.S. legislation was enacted already in 1999, its implementation at the local level started to take place only from 2007-2008 onwards (Association of Flemish Cities and Municipalities, 2008).

## 5. Judicial action in the UK

### 5.1. Legislative vagueness

To reduce the vagueness of the legislative definition of ASB, (English, Welsh and Scottish) courts have in their judgments provided (narrower) interpretations of this notion. The first guidance regarding the content of the behaviour that qualifies for an ASBO was provided by the House of Lords in the leading judgment *McCann* in 2002, where it held that ‘[s]ection 1 is not meant to be used in cases of minor unacceptable behaviour but in the cases that satisfy the threshold of persistent and serious anti-social behaviour’. According to the court, ‘persistent and serious’ ASB occurs when the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary ‘to protect the public from serious *harm* [italics added] from him’ (11).<sup>26</sup> In this judgment, ASBOs have been recognised as ‘quasi punitive’ in nature: although the applying for an ASBO is a civil process, the consequences in case of the breach of an ASBO are criminal. Based on this consideration, the House of Lords made ASBO application an exception from the normal standard of proof in civil proceedings by requiring a heightened civil standard equivalent to the criminal standard of proof (Donoghue, 2010; Slapper and Kelly, 2013).

Starting from this judgment, courts have progressively devoted attention to the need to preserve individual rights against (illegitimate) interferences of local authorities, which tends to occur [p. 352] when little to no (caused or threatened) harm to others is involved.<sup>27</sup> In the recent case of *Perry*,<sup>28</sup> for example, the Court of Appeal held that the ‘necessity test’ should be applied when assessing the risk of further social harm that the person concretely poses and this risk weighed against the need to preserve (as much as possible) her rights and freedoms. The case concerned the postings made by Mr Perry on the blog ‘Woldseyview’ about the residents of the community of Wetwang in Yorkshire, which included the publishing of unsubstantiated statements and photographs regarding community members, their residences and personal belongings. Accusations were directed at several members of the community, such as a former mayor, police officers, small entrepreneurs and a reverend. In first instance, the behaviour of Mr Perry was deemed anti-social in light of a number of actions (including a face to face threat, making phone calls and direct contact to people) that caused individuals to experience harassment, alarm or distress. To ground its decision, the court made a combined reference

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<sup>24</sup> This notwithstanding, references to preceding relevant or leading judgments have been made along the text.

<sup>25</sup> Similar documents referring to Scotland have not been found (for statistics referring to the three year period 2003-2006, see Annex 1 of the ‘Use of Anti-social Behaviour Orders in Scotland’ published in 2007 by the Scottish Government).

<sup>26</sup> This narrower definition of ASB can be found also in other previous judgments, such as in *The Queen on the Application of S M, J M, M M (Proceeding by their Mother and Litigation Friend M M) Applicants v Manchester Crown Court, The Chief Constable of Greater Manchester* (2001 WL 171972).

<sup>27</sup> The requirement of necessity has been specified in a number of cases, such as in *R v John Millwood* (2008 WL 4916185); *R v Lewis Colley* (2009 WL 4666944); *R v Charles Francis Boyce* (2009 WL 3805390); *R v Dwayne Worrall, Philasande Bunkwane Ngilana* (2009 WL 3171895); *R v Ian Andrew Clegg* (2009 WL 6043818); *R v Lewis Thomas Gilbertson* (2009 WL 2392208); *R v Sharon Briggs* (2009 WL 1949643); *Regina v “A”, Brandon Adams* (2009 WL 635040); *F v Bolton Crown Court* (2009 WL 6146); *R v Constantine Brown* (2009 WL 4552908); *R v James Lima* (2010 WL 605806); *R v Richard Parsons* (2010 WL 3166695); *R v Kahdel Levon Robert Henry* (2011 WL 6329025); *R v Brzezinski* (2012 EWCA Crim 198); *R v Darren Pryce* (2011 WL 2748273); *R v Tashan Akeen Atkinson* (2013 EWCA Crim 1102) etc..

<sup>28</sup> *Perry v Chief Constable of Humberside Police* (2012 WL 4866945).

to *McCann*, as well as to the ‘Guide to Anti-Social Behaviour Orders’ published by the Home Office (Home Office, 2006), which emphasises that orders are to be directed only at serious (harmful) ASB. On this basis, the Court of Appeal found that the District Judge had been ‘perfunctory and dismissive’ (6) in his consideration of Mr Perry’s right of freedom of expression under Article 10 of the European Convention of Human Rights (ECHR), and quashed the decision to impose a ten-year ASBO as the judge ‘did not identify the particular risk of social harm which the appellant presented’, neither did he ‘go on to strike the balance between that need against the particular risks identified so as to ensure that any interference with his rights was necessary and proportionate to the risks which he presented’ (6). In this judgment, therefore, the court acknowledged that the decision whether to impose an ASBO or not involves a balancing exercise, within which the judge weighs the ‘pressing social need’ to have individual rights limited against the need to preserve the same individual (fundamental) rights and freedoms. The balance’s scale tilts in favour of the former whenever a serious risk of social harm may be foreseen in the actor’s behavioural patterns, upon condition that the degree of dangerousness presented by the offender is proportionately reflected in the restrictions of his personal autonomy. By contrast, if the behaviour did not cause any harm, nor does it provide grounds to believe that severe harmful consequences will be brought about by the future behaviour of the actor, the imposition of limitations to the (lawful) exercise of individual fundamental rights should not be justified. In this case, as Lord Pitchford put it, despite the fact that the (defamatory and unsubstantiated) entries made in the blog by the defendant may well be regarded as both offensive, troublesome and even anti-social, they do not justify the imposition of ASBOs (but, perhaps, of other civil injunctions), as they ‘could not reasonably have given rise to the suspicion that the appellant would resort to threats of violence or disorder’ (6-7). Again, the court suggested that if not grounded on the need to prevent the particular risk of social harm that the person concretely poses, restrictions of defendants’ fundamental freedoms cannot be validly invoked by local authorities.

This argument has been taken even further by the Sheriff Court in *Debidin*.<sup>29</sup> This recent case concerned an ASBO prohibiting a man from owning or keeping dogs on his property for [p. 353] the period of two years, issued as a response to the annoyance caused to the neighbours by the barking of his 46 German shepherd dogs during daily hours and at night-time. After having ordered an expert noise measurement and arranged an on-site visit, the judge was satisfied that the noise episodes emanating from the pack of dogs did not cause any alarm (defined by the judge as fear or apprehension of danger) or distress (i.e., emotional reaction that involves some form of suffering beyond being upset, annoyed, irritated or a mere inconvenience), thus rejecting the applicants’ claim that the conduct of Mr Debidin was anti-social. In its decision, moreover, the Sheriff Court asserted the importance of avoiding the use ASBOs to intrude on people’s lifestyles by making overt reference to article 8 of the ECHR (right to respect for private and family life), unless it is grounded on serious (harmful) ASB whose restriction is necessary to prevent future harm posed by the actor. In its conclusions, the judge held that (18):

“The respondent’s lifestyle choice is not “pro-social” in the sense that for the respondent his community is his pack of dogs. In my view, however, the respondent’s lifestyle is deserving of respect whether or not it falls within the legal definition of “family life” and in my considered opinion, there is no justification for interference with the respondent’s lifestyle. [...] I cannot help but wonder not only whether the application was made without full and proper regard being had to the statutory framework but whether it was made as a device by which to try to remove from this jurisdiction one man and his dogs”.

## 5.2. Excessive use of penalising powers

Judicial revision of ASBOs also investigated the question of whether behavioural restrictions have an excessive or disproportionate impact on the interests of the person.<sup>30</sup>

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<sup>29</sup> *The Moray Council v Andrew Deshwar Debidin* (2012 WL 4050220).

<sup>30</sup> Here, as Donoghue (2010) points out, the leading case for proportionality of the restrictions contained in the orders is *Boness* (R v Boness [2005] EWCA Crim 2395). In this decision, the Court of Appeal posited that any prohibitions included in orders must be necessary for the purpose of protecting persons from further anti-social acts by the defendant and proportionate to the ASB in question. The proportionality of the prescriptions has been dealt with also in *Shane Tony* (R v P

For example, in *Allan*,<sup>31</sup> a list of nine ASBO prohibitions was made against a young boy responsible for generally rowdy and anti-social behaviour related to congregating with a group of youths and to (unlawfully and dangerously) riding a scooter. One of these restrictions, which was aimed to prohibit the actor from associating with (a list of named) young men anywhere in a public place in the London Borough of Croydon (which covers an area of 87 km<sup>2</sup> and is the largest London borough by population), including meeting, going to meet or going around with any of them in Croydon or Bromley borough (par. H), was quashed by the Court of Appeal as it was found to be both unnecessary and disproportionate. As Mr Justice Simon put it (5), this prohibition was too broad, ‘disproportionate to the offence and an insufficiently justified interference with his rights to a private life’ (5).<sup>32</sup>

[p. 354] Also in *Williams*,<sup>33</sup> the court placed emphasis on the proportionality of ASBO’s behavioural restrictions. Here, the case concerned an appeal against a Sexual Offences Prevention Order (SOPO), which prohibited a 21-year-old offender from possessing a computer or accessing the Internet unless supervised by a responsible adult. This restriction was quashed by the court as it ‘deprive[s] the appellant of a standard means of communication and quite likely restrict[s] his ability to gain meaningful employment in the future’ (3). As reflected in the court’s reasoning, no matter however unacceptable and reprehensible the offences may be, any prohibition to individual behaviour should not be ‘disproportionate in its effects’ (3) and, thus, excessively affecting the exercise of individuals’ rights.

Courts in the UK have applied the proportionality principle (as supplemented by the principle of totality) also in the judicial stage devoted to sentencing of the breach of ASBOs, in view to adapt the severity of the sanction to the degree of seriousness reflected in the offence committed.<sup>34</sup> In *Rose*,<sup>35</sup> *Savage*,<sup>36</sup> *Meade*,<sup>37</sup> as well as in a number of other cases,<sup>38</sup> the Courts of Appeal, after having regarded the punishment imposed as being manifestly excessive, replaced it by imposing another, more lenient, sanctioning regime.<sup>39</sup> In *Rose*, for example, the court underscored the importance of reviewing the total amount of the sentence to be inflicted on the individual offender before issuing the order, with a view to ensuring that the punitive treatment is proportionate to the offending behaviour and properly balanced.

At this stage, the proportionality principle has also been applied by courts to select the *type* of punishment to be inflicted to individual offenders. In *Willoughby*,<sup>40</sup> for example, the Court of Appeal

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(Shane Tony) [2004] EWCA Crim 287), *McGrath* (R v McGrath [2005] EWCA Crim 353) and *DPP* (W v DPP [2005] EWCA Civ 1333).

<sup>31</sup> *The Queen on the Application of Allan v London Borough of Croydon* (2013 WL 1563198).

<sup>32</sup> In a number of cases, courts have held that ASBOs should be commensurate with the risk of social harm to be guarded against, and thus not be too wide or indeterminate. For some examples, see *The Queen on the Application of Joseph McGarrett v Kingston Crown Court* (2009 WL 1504458); *R v Gregg Avery, Heather Shirley Nicholson, Natasha Constance Avery, Gavin Matthew Medd-Hall* (2009 WL 4113898); *R v Ronald Nepean* (2009 WL 4113766); *Circle 33 Housing Trust Ltd v Kathirkmanathan* (2009 WL 1949608); *R v Julio Dyer* (2010 WL 3166729); *R v Kevin Douglas* (2011 WL 5105244); *R v Darren Paul West* (2013 WL 3810982) etc..

<sup>33</sup> *R v Damian Williams* (2009 WL 3197564).

<sup>34</sup> The 2008 definitive guideline of the Sentencing Guidelines Council, stipulates that the sentence for breach needs to be commensurate with the seriousness of the offence, being the requirement of seriousness determined by assessing the culpability of the (alleged) offender and any harm which the conduct has caused, was intended to cause or might foreseeably have caused.

<sup>35</sup> *R v Andrew James Rose* (2012 WL 5995853).

<sup>36</sup> *R v Gary Savage* (2012 WL 2065112).

<sup>37</sup> *R v Olive Meade* (2013 WL 3550365).

<sup>38</sup> E.g., *R v AR* (2011 WL 719496); *Kirk Jordan Barclay, Noah Ntuve, Francis Cowan, Trevor Junior Prince Campbell v R* (2011 WL 291587); *R v Durant Monfries* (2011 WL 664648); *R v Anthony Peters* (2011 WL 719524); *R v Amy Carter* (2011 WL 5077746); *R v Anthony Marshall* (2011 WL 4832453); *R v Mark Picton* (2011 WL 6329737); *Robbie Batchelor v Procurator Fiscal, Dundee* (2011 WL 5903092); *R v Tomasz Adam Brzezinski* (2012 WL 382758); *R v Flaviano Silva* (2012 WL 1555408); *R v “R”*, *Sam Winston Taylor* (2012 WL 1854414); *R v “G”* (2012 WL 1684789); *R v Iftikhar Aslam* (2012 WL 3491918); *R v Stuart McGhie* (2012 WL 3963741); *R v Stephen Christopher Bell* (2012 WL 4888722); *R v Amir Khan* (2012 WL 4888566); *R v Sharma Ahmed Younis* (2012 WL 6774745); *R v Daniel Lawrence Allen* (2013 WL 552339); *R v Liban Jama* (2013 WL 2628707) etc..

<sup>39</sup> In *Rose*, for example, the custodial sentence of 4 years and 6 months has been reduced to 2 years and 4 months. The judge, in fact, while keeping the custodial sentence for robbery (2 years and 3 months), quashed the sentences for the three thefts (12 months) and for the four breaches of the ASBO (12 months) in light of the principle of totality. The sentence of 3 months for breach of the community order was reduced to 1 month.

<sup>40</sup> *Willoughby v Solihull Metropolitan Borough Council* (2013 WL 2628745).



held that not every breach of ASBO deserves a custodial sentence, being this onerous penalty limited to conduct reflecting a higher degree of seriousness. In this case, the court challenged the decision taken by the judge in the preceding instance to impose a longer period of custodial sentence on a woman for her anti-social behaviour (i.e., excessive shouting, screaming and banging attributed to a volatile relations with a men) for the reasons of rehabilitation. The previous judge motivated the longer term of imprisonment on the circumstance that the appellant presented a history of heroin and alcoholic addiction, which could have been properly treated in custody within a rehabilitation programme. However, as argued in the [p. 355] appeal by the Lord Justice, the ‘deprivation of liberty is the most serious sanction available to the court, and the appropriate period of custody is the *least* [italics added] period which the seriousness of the offender's breaches can properly justify’ (5).

## 6. Judicial action in Italy

### 6.1. Legislative vagueness

As mentioned above, in 2011 the Italian Constitutional Court has been tasked with assessing the compatibility of the so-called ‘Pacchetto Sicurezza’ (Italian Council of Ministers, 2008a) with the fundamental principles informing the criminal justice system, and notably with the principles of legality, equality and impartiality of administrative action enshrined respectively in Art. 3, 23, and 97 of the Italian Constitution. The dispute remitted to the court invested, in the preceding instance, the legitimacy of an administrative order issued to thwart the phenomenon of begging in public places, which (at the national level) is referred to as a licit conduct unless it is aggressive, deceitful or involving minors (Art. 670 of the criminal code).

According to the court’s reasoning, norms that provide for a general and not better defined competence of local authorities to deal with urban security issues are unconstitutional in light of the principle of legality.<sup>41</sup> In the judgment, the violation of the principle of legality has been associated with the circumstance that the proscribed conduct has been specified by way of secondary, rather than primary, legislation. Under the regency of the legality principle, in fact, it is not through delegated legislation, but rather via (pre-existing) law enacted by parliamentary assemblies that the requirement of ‘law’ is said to be fulfilled. Having a conduct proscribed at the legislative level with a certain degree of certainty also responds to the need of providing fair warning to citizens, who need to be aware in advance of the standard of conduct that is expected from them by regulatory authorities. Conversely, regulating situations of (social and physical) disorder according to the local and contingent sensitivities and tolerance levels produces a patchwork of prohibitions that may substantially differ from one municipality to another, ultimately rendering individual compliance with rules more troublesome.

The maxim of this judgment aligns with the Court’s jurisprudence on Art. 650 of the criminal code, which qualifies a contravention aimed to punish the non-fulfilment of administrative orders with the sanction of detention (up to three months or imprisonment) or with a pecuniary fine (up to EUR 206). Since the latter provision does not in itself identify the specific content of the conduct that is proscribed, but rather relies on local administrative orders and regulations for this purpose, its compatibility with the principle of legality had long been questioned by domestic jurisprudence and doctrine especially in the 60s and mid-70s (Bricola in Fiandaca and Musco, 2007: 58). The dispute was finally resolved in 1971 by the Constitutional Court, which affirmed the legitimacy of local regulations as ‘conduct definers’ insofar as the characteristics, preconditions, and limits of administrative powers and orders are to be thoroughly envisaged by law.<sup>42</sup> In this instance,

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<sup>41</sup> The court answered the question of the court of appeal in a negative way also from the viewpoint of the equality principle (Art. 3 of the Constitution). In the judgment, in fact, the court held that powers of mayors in the area of urban security clashed with the principle of equality, as a different legal treatment attached to the same pattern of behaviour (which might have been differently regarded as licit or illicit) on the mere basis of its geographical localisation. The legitimacy of such powers was questioned by the court also in light of the constitutional principle of independence and impartiality that governs the exercise of administrative powers and competences (Art. 97 Const.).

<sup>42</sup> Const. Court, 8 July 1971, n. 168.



notwithstanding the enactment of a ministerial [p. 356] decree aimed to specify the jurisdiction of municipal authorities in the exercise of their ‘urban security’ powers in 2008 (Italian Council of Ministers, 2008a), no instruction was given by way of primary legislation.

After a pivotal judgment of the Constitutional Court in 2011 and on the basis of further doctrinal elaboration (Capantini, 2011; Cosmai, 2012; Musolino, 2011 etc.), the power of mayors to issue orders *extra ordinem* within the framework of the public order mandate, as such (potentially) derogatory of conventional legal standards and procedures, has been reconnected to situations of strict urgency and necessity. Such power, therefore, can now be exercised in presence of unexpected situations of (effective and concrete) risk of harm to public security and safety (*urgency*), which cannot be averted through ordinary measures (*necessity*), providing that their effects are temporarily limited and the least detrimental to individual autonomy.

## 6.2. Excessive use of penalising powers

Courts have deemed the (local) exercise of the public order mandate to be (not just legitimate but also) proportionate as long as it is grounded on exceptional situations of *urgency* and *necessity*. This judicial stance clearly emerges, for example, in a decision of the Regional Administrative Court (R.A.T.) of Lombardia of 2010,<sup>43</sup> which inspected the legitimacy of an order imposing to the Roma community the obligation to clear out its camp from the municipal territory upon reasons of public safety. The order was motivated in light of the precarious sanitary conditions of the camp, which resulted in a risk of harm to the safety of the (entire) urban community. In this judgment, however, the court quashed the order as the mayor did not attentively substantiate in his motivation the risk of harm to public safety the act was aimed to prevent (*urgency*), as well as on the basis of the excessive effects on people’s lives that such order brought about. In the same decision, moreover, the court also maintained that powers to issue orders *extra ordinem* cannot be exercised by localities as a means to (further) discriminate marginalised populations, but rather be attached to strict legal grounds attentively laid down in the motivation.

In a number of other judgments administrative courts have overruled orders adopted within the framework of the public order mandate on the basis of the deficiency (or inconsistency) of the requirements of urgency and necessity and/or of the unsubstantiated risk to public safety and security as pinpointed in the motivation.<sup>44</sup> Furthermore, judicial revision of administrative [p. 357] action has also criticised the unlimited temporary effects of such orders,<sup>45</sup> along with the private (rather than public) nature of the interest pursued by them.<sup>46</sup> In all, courts have held that restrictions to individual behaviour need not to be disproportionate in their effects, and thus excessively affecting the exercise of individuals’ rights. In a recent ruling, for instance, the R.A.T. of Potenza maintained that the

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<sup>43</sup> R.A.T. Lombardia, sect. III, 6 April 2010, n. 981.

<sup>44</sup> After the Constitutional Court’s judgment: R.A.T. Calabria Catanzaro, Sect. I, 29-04-2011, n. 561; R.A.T. Lombardia Brescia, Sect. II, 18-05-2011, n. 739; R.A.T. Lombardia Milano, Sect. IV, 23-05-2011, n. 1290; R.A.T. Lombardia Milano Sect., IV, 23-05-2011, n. 1290; R.A.T. Veneto Venezia, Sect. III, 14-06-2011, n. 987; R.A.T. Sardegna Cagliari, Sect. I, 24-06-2011, n. 658; R.A.T. Calabria Catanzaro, Sect. I, 29-06-2011, n. 941; R.A.T. Calabria Catanzaro, Sect. II, 07-07-2011, n. 982; R.A.T. Lazio Roma, Sect. II ter, 26-07-2011, n. 6700; R.A.T. Abruzzo L’Aquila, Sect. I, 08-09-2011, n. 443; R.A.T. Sicilia Catania, Sect. I, 29-09-2011, n. 2371; R.A.T. Lazio Roma, Sect. II ter, 17-10-2011, n. 7991; R.A.T. Veneto Venezia, Sect. II, 11-11-2011, n. 1673; R.A.T. Piemonte Turin, Sect. II, 09-02-2012, n. 172; R.A.T. Sardegna Cagliari, Sect. I, 10-02-2012, n. 110; R.A.T. Calabria Catanzaro, Sect. I, 14-03-2012, n. 262; R.A.T. Puglia Lecce, Sect. I, 22-03-2012, n. 525; R.A.T. Friuli-Venezia Giulia Trieste, Sect. I, 03-05-2012, n. 153; R.A.T. Campania Napoli, Sect. V, 24-05-2012, n. 2433; C.S., Sect. V, 25-05-2012, n. 3077; R.A.T. Emilia-Romagna Bologna, Sect. II, 04-07-2012, n. 470; R.A.T. Liguria Genova, Sect. II, 13-07-2012, n. 1016; R.A.T. Toscana Firenze, Sect. III, 27-08-2012, n. 1484; R.A.T. Lombardia Milan, Sect. III, 13-09-2012, n. 2308; C.S., Sect. V, 19-09-2012, n. 4968; R.A.T. Abruzzo Pescara, Sect. I, 02-10-2012, n. 396; R.A.T. Toscana Firenze, Sect. II, 19-10-2012, n. 1669; R.A.T. Lazio Latina, Sect. I, 22-10-2012, n. 792; R.A.T. Toscana Firenze, Sect. II, 06-12-2012, n. 1973; R.A.T. Abruzzo L’Aquila, Sect. I, 10-01-2013, n. 8; C. S., Sect. V, 06-03-2013, n. 1372; R.A.T. Campania Salerno, Sect. I, 15-05-2013, n. 1098; Supreme Court (civ.), Sect. VI - 2, 25-07-2013, n. 18073 etc..

<sup>45</sup> For instance, see C.S., Sect. V, 30-06-2011, n. 3922; R.A.T. Toscana Firenze, Sect. II, 20-05-2010, n. 1542; R.A.T. Puglia Bari, Sect. I, 29-09-2009, n. 2142.

<sup>46</sup> R.A.T. Toscana Firenze, Sect. II, 03-09-2009, n. 1414; R.A.T. Toscana Firenze, Sect. II, 07-06-2010, n. 1704 etc..

protection of the public interest of security and safety should be pursued with adequate and effective measures, which should not excessively interfere with individual (fundamental) rights and freedoms.<sup>47</sup>

## 7. Judicial action in Belgium

### 7.1. Legislative vagueness

By amending article 135 par. 2 of the existing municipal law, article 7 of the 1999 G.A.S. legislation extended the municipal competences in the area of public order (or ‘substantive public policy’). Pursuant to such provision, municipalities have been allowed to take ‘all necessary measures, including police regulations, to counter *all forms of public nuisance* [italics added]’. Up till then, the exercise of substantive public policy powers by local authorities was subjected to the condition that risk for public peace, public security and public safety had arisen in some cases. As it reads in the explanatory memorandum of the bill (Belgian House of Representatives, 1999), disruption of public peace occurs together with episodes of disorder or disturbances in public spaces, whereas the notion of public security refers to the absence of dangerous (or harmful) situations for people and goods (the latter concept also encompasses the field of crime prevention and the aiding of people in danger). Public safety, conversely, relates to the absence of diseases and thus to issues of hygiene and environmental safety.

The need to thwart (highly disruptive) behaviour not falling within the three aforesaid categories of public order led the government to introduce the new concept of ‘public nuisance’. Such notion, however, finds in the (bill and in the subsequent) law no precise definition. The vagueness of the category of ‘public nuisance’ and the problematic effects on the principle of legal certainty were carefully identified by the Council of State already in 1998,<sup>48</sup> when the latter was asked to issue an opinion on the bill on municipal administrative sanctions. Irrespective of the negative advice that was then given by the Council of State the bill (and its ambiguous category of ‘public nuisance’) was converted into law the year after. Again in the memorandum, proponents, albeit acknowledging that the utilisation of vague legislative notions is an exceptional practice in the country, argued that the broad category of ‘public nuisance’ served the purpose of leaving up to police and local authorities the duty to adjust its meaning to local concerns and issues.

The Ministerial circular of 2 May 2001 (Belgian Ministry of the Interior, 2001), which defined nuisance as ‘largely individual, material behaviour that may disrupt the harmonious course of human [p. 358] activities and which may impede the quality of life of local residents in municipalities, quarters, streets, in a way that oversteps the normal pressures of social life’ (as translated by Devroe, 2008: 149), makes the interpretation of the law by no means easier. The notion of nuisance found in this secondary act employs the (equally vague) concept of ‘quality of life’ of individuals and communities, which rather than reducing the reach of local powers seems to even broaden their scope. As a result, this category may encompass behaviour bearing a highly harmful potential (which is, as such, capable of being experienced by people as seriously disruptive), as well as conduct that may consist of a slight inconvenience, which does not seriously undermine people’s quality of life. Albeit some studies carried out in the country have attempted to operationalize the concept of public nuisance (De Wree et al., 2006; Van Malderen and Vermeulen, 2007), the contours of the definition of public nuisance remain mostly unclear (Cools, 2004). Moreover, although the vagueness of the notion has been regarded as highly problematic and inconsistent with the principle of legality by the

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<sup>47</sup> R.A.T. Basilicata Potenza, Sect. I, 05-12-2012, n. 557, which questioned the legitimacy of an order *extra ordinem* aimed to close down a home for the elderly for reasons of an (unsubstantiated) risk for public safety.

<sup>48</sup> The Council of State is an advisory body (in legislative and statutory matters) and a judicial institution. It has the power to suspend and/or to annul administrative acts that are contrary to existing rules. It is also the Administrative Supreme Court, in charge for reviewing the legality (and not the factual issues, on which it has no jurisdiction) of the decisions of lower administrative courts.

Constitutional Court in 2004,<sup>49</sup> the vagueness of this statutory category has so far not been modified by the Parliament.<sup>50</sup>

Notwithstanding a vague and lax statutory framework on public order mandate, in general, and on G.A.S. fines, in particular, courts have sought to limit the local exercise of regulatory powers aimed ‘to counter all forms of public nuisance’ by making use of the notion of ‘material public order’. Such recent judicial action has found a leading ‘precedent’ in a decision issued in 1994 by the Council of State,<sup>51</sup> in which the court addressed the question of whether a municipal decision to close a disco pub upon reasons of ‘moral public order’ (i.e., moralistic grounds) was legitimate. The court answered the question negatively: moralistic reasons cannot be invoked as grounds for the exercise of powers in the area of urban security, unless the evidence of harm to individuals (the so-called ‘material public order’) can be provided by local authorities (Vander Beken, 1994; Vermeulen, 2004).

After the enactment of the G.A.S. legislation in 1999, the Council of State has increasingly resorted to the maxim contained in its judgment of 1994 to halt excessive interpretations of the public order mandate by local authorities.<sup>52</sup> For example, in a number of decisions the court questioned the legitimacy of municipal regulations prohibiting the selling of alcohol through automatic vending machines during night hours in particular urban areas.<sup>53</sup> In all, the court found that restrictions to the supply of alcoholic beverages were illegitimate, as no evidence of ‘material behaviours which interrupt the harmonious course of human activity and which limit the quality of life of the inhabitants in way that exceeds the normal pressures of social life’ (i.e., ‘material public order’) was provided.<sup>54</sup> Rather, prohibitions as such rested on the need to prevent alcohol abuse by youngsters, and thus on mere moralistic grounds. As clarified by the court in a judgment of 2010, the specific protection of ‘moral public order’ can, moreover, be [p. 359] pursued by municipalities only in the exceptional circumstances when moral concerns are substantiated by states of physical disorder (which, again, recalls the notion of ‘material public order’).<sup>55</sup>

## 7.2. Excessive use of penalising powers

The contested provisions of municipal regulations enacted on the basis of mere moralistic grounds have been found by the Council of State to be also in breach of the proportionality principle. As pointed out by the court in 2009,<sup>56</sup> enacting and enforcing (local) regulations, which have an impact on individuals’ autonomy, involve a balancing exercise, where public policy concerns are weighed against the need to shelter individual rights and freedoms. Even when the former prevail, municipalities should avoid the employment of measures that have an excessive impact on individuals’ autonomy.<sup>57</sup> For example, in a 2010 case, questioning the restrictions to the supply of alcoholic beverages, the Council of State held that the freedom of trade and commerce is not an absolute one and can therefore be subjected to limitations through the administrative action.<sup>58</sup> However, by contending that any restraint on individual’s liberties should not be disproportionate, the court scrapped the contested provision of the municipal regulation as the restriction on the sale of

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<sup>49</sup> Const. Court, 20 October 2004, n. 158.

<sup>50</sup> In that occasion, in fact, the Court just incidentally dealt with the issue of the nebulous definition of nuisance as found in the G.A.S. legislation.

<sup>51</sup> C.S., n. 50.082 of 8 November 1994.

<sup>52</sup> For some examples, see C.S., n. 181.416 of 20 March 2008; C.S., n. 183.739 of 2 June 2008; C.S., n. 187.998 of 17 November 2008; C.S., n. 202.037 of 18 March 2010; C.S., n. 206.209 of 1 July 2010; C.S., n. 217.843 of 9 February 2012 etc..

<sup>53</sup> For example, see C.S., n. 183.739 of 2 June 2008; C.S. (12 Ch.), n. 206.209 of 1 July 2010; C.S., n. 214.699 of 19 July 2011; C.S. (12 Ch.), n. 202.037 of 18 March 2010 etc.

<sup>54</sup> C.S., 206.209 of 1 July 2010, p. 5: “[...] *materiële gedragingen die het harmonieuze verloop van de menselijke activiteiten verstoren en de levenskwaliteit van de inwoners beperken op een manier dat het de normale druk van het sociale leven overschrijdt*”.

<sup>55</sup> C.S. (12 Ch.), n. 202.037 of 18 March 2010, p. 11.

<sup>56</sup> C.S. (12 Ch.), n. 192.904 of 30 April 2009, p. 6: “[...] *de maatregel voorkomt als het resultaat van een afweging, met zin voor maat, van alle betrokken gegevens en belangen. Die afweging moet in de formele motivering van de sluitingsmaatregel tot uiting gebracht worden*”.

<sup>57</sup> For some examples, see C.S., n. 181.416 of 20 March 2008; and C.S., n. 214.699 of 19 July 2011.

<sup>58</sup> C.S., 206.209 of 1 July 2010, p. 3.

alcoholic beverages was not just unlawful but also excessively interfered with the freedom of trade and commerce retained by the owners of such shops.

The proportionality principle has been invoked by the court also in a recent decision of 2012,<sup>59</sup> which addressed the question of the legitimacy of the municipal regulation provision banning people from riding squad bikes within the communal confines. In this decision, the Council of State clarified that municipalities, in order to envisage general and permanent prohibitions within the scope of article 135 par. 2 of the G.A.S. legislation, should provide circumstantial evidence of the actual (noise) nuisance (and risks for urban safety caused by squads) produced in the community. In the absence of evidence of disruption of the ‘material public order’, interferences with individual rights are (not just illegitimate but also) unnecessary and, as such, disproportionate.

## 8. Comparative analysis of judicial action

Normative frameworks awarding local authorities reinforced regulatory powers to penalise uncivil and disorderly behaviour have been recently re-framed by courts in the UK, Italy and Belgium.<sup>60</sup> In the UK, judges have approved the use of ASBOs insofar as they are directed to [p. 360] serious ASB, which refers to the conduct that caused (or was likely to cause) serious harm to others. Here, the proportionality principle has mostly been applied in the phase of sentencing (in case of breach of ASBOs), as the severity of the punishment has been tailored to match the seriousness (i.e., amount of harm) of the offence committed.

Comparable judicial developments can be witnessed in Italy and Belgium, where similar legal arguments have been used to inspect the legality and proportionality of incivility regulation. In Italy, the Constitutional Court in 2011 invalidated (a part of) the law on public order mandate by making overt reference to the constitutional principle of legality. Notably, the vagueness of the formulation of such normative framework was found in violation of the component of the legality principle, which requires the proscribed conduct to be regulated by primary legislation. According to the Court’s reasoning, the secondary legislation should only specify non-essential elements of the offence, while its constitutive components should have attentively been laid down by primary legislation. Additionally, the exercise of public order powers, which can also involve a diversion from ordinary measures and procedures, has been re-connected to situations of (strict) necessity and urgency, where the requirement of ‘urgency’ refers to episodes of (effective and concrete) risk of harm to public security and safety. The legal argument based on proportionality here is that if exceptional public order measures do not meet all the established legal requirements, they are not just unlawful but also disproportionate in that they excessively interfere with individuals’ rights and freedoms.

In Belgium, both the Council of State and the Constitutional Court have regarded the category of ‘public nuisance’ as being too broad and inconsistent with the (constitutional) principle of legality.<sup>61</sup> Moreover, according to the consistent jurisprudence of the Council of State, municipalities are entrusted with competences in the area of public order (or substantive public policy) as long as evidence of (risk of) harm to public peace, safety, and security can be provided by the local body. In this legal system (as well as in Italy), the argument of the legality of public order measures is deeply interrelated with the argument of proportionality. In fact, if such measures are not grounded on relevant (legal) requirements and on (substantiated) evidence of harm, they are regarded both as unlawful and as disproportionate.

The circumstance that in the UK the statutory vagueness of the definition of ASB has been “improved” via evolving jurisprudence does not come as a surprise. In the common law legal tradition, the legislative branch as well as judiciary play a role in the (criminal) law-making process. The judiciary thus substantially contributes to shaping of the content of criminal law (Dine et al., 2006;

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<sup>59</sup> C.S., decision n. 217.843 of 9 February 2012.

<sup>60</sup> Interesting developments in terms of judicial action can be found also in Spain, where the Supreme Court has recently declared the unconstitutionality of an order issued by the municipality of Lleida (Catalonia) prohibiting the use of the Islamic burqa upon reasons of public security. The court based its judgment on both principles of legality of sanctions (which stipulates that municipal authorities can impose just the types of sanctions the law allows them) and of proportionality (which is breached when the legislative or administrative authority imposes a disproportionate and discriminatory measure) (Supreme Court, n. 42 of 14 February 2013).

<sup>61</sup> Articles 12 par. 2 and 14 of the Belgian Constitution.

Malleon, 1999). By contrast, in the Italian and Belgian legal systems (as well as in other systems belonging to the civil law legal tradition), prominent role has traditionally been assigned to the Parliament as the (exclusive) law-maker, entrusted with the duty to (politically) select the interests and values that warrant penal protection. Conversely, the task of the judicial branch has conventionally been limited to the mere application and interpretation of statutes and regulations. Progressively, however, as the case of incivility regulation illustrates, judgments emanating from high-ranked or Supreme Courts have increasingly become more relevant in shaping the content of the criminal law, and of legislative provisions, in general (Alvizatos, 1995). This is especially the case when high-level courts are tasked with assessing the compatibility of legislative provisions and administrative action with supra-legislative (i.e., [p. 361] general principles inferred from the legal system) and/or (expressed or tacit) constitutional principles. In judicial daily practice, maxims or principles of law enshrined in the ruling of Constitutional and Supreme Courts are complied with by any court of lower level, even if they are not considered as precedents or sources of law, as they are in common law legal traditions (Marinucci and Dolcini, 2012; Van den Wyngaert, 2003).

In light of these trends of judicial action emerging from the abovementioned European countries, the question arises as to whether judicial intervention is capable of providing individuals with a ‘safety net’ that guarantees their fundamental rights and freedoms against illegitimate interferences of local authorities. The case law described in the three preceding sections may indicate that this may be the case. In the UK, for example, judges are empowered to decide on any application for ASBOs. Here, therefore, the protection of individuals’ rights and liberties against abusive penalisation may (and, indeed, has proven to) be quite prompt and immediate. Evidence of a trend towards a limited application of ASBOs among English and Welsh courts is provided by the statistics published in 2011 by the Home Office (Home Office, 2011), recording the application of ASBOs in England and Wales during the twelve-year period stretching from 1999 to 2011.<sup>62</sup> According to the report, the application of ASBOs, which has been very moderate (although slightly increasing) in the four-year period stretching from 1999 to 2003, soared in the following triennium (with a peak registered in 2005 when 4122 ASBOs were imposed). From 2006 onwards, however, the number of issued ASBOs has substantially and systematically decreased, with the lower level registered in 2011 (the number of imposed ASBOs during this year almost aligned with that of 2003).

In Italy, a number of judicial pronouncements issued after the Constitutional Court’s judgment of 2011 (overturning mayors’ decisions to adopt orders *extra ordinem* in the dearth of the relevant legal requirements), suggests that in this country also judicial action may be effective in the safeguarding of fundamental rights and freedoms. Illegitimate restriction of individual liberties can be questioned by courts upon condition that individuals appeal against the administrative fine. In addition, the power to inspect the legality of administrative action in the context of the public order mandate has recently been devolved to criminal courts, which have been tasked with inspecting the merit of administrative orders when ascertaining their breach.<sup>63</sup> As a result, judicial review of administrative action has now been broadened and may potentially lead criminal courts to play a more powerful role when it comes to the protection of individual’s autonomy.

In Belgium, progressively after the enactment of the GAS legislation, an increasing number of decisions have been issued by the Council of State aimed to halt the excessive interpretation of the confines of the law on public order mandate operated by local authorities. More specifically, the issuance of these judgments, which was relatively low in the 8-year period stretching from January 1999 to December 2006, triplicated during the time span from January 2007 to September 2013.<sup>64</sup> Additionally, starting from January 2014, when the new enacted law [p. 362] amending the G.A.S. legislation has come into force, the jurisdiction of criminal courts will be expanded so as to include the revision of not just police and municipal (incivility) regulations, but also of ‘nuisance orders’.<sup>65</sup>

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<sup>62</sup> As mentioned above, similar documents referring to Scotland have not been found (for statistics referring to the three year period 2003-2006, see Annex 1 of the ‘Use of Anti-social Behaviour Orders in Scotland’ published in 2007 by the Scottish Government).

<sup>63</sup> Supreme Court, Sect. I, judgment of 8 Feb. 2012, n. 9157.

<sup>64</sup> The search engine Jura has been entered the keywords *openbare orde overlust* (transl.: public order nuisance) and resulted into 20 hits referring to the 14-year period stretching from January 1999 to September 2013. While just five decisions refer to the 8-year period ranging from Jan. 1999 to Jan. 2007, 15 judgments have been issued from Jan. 2007 to Sept. 2013.

<sup>65</sup> Orders (or ordinances) in Belgium are measures taken by the municipality in case of urgency or emergency.



Depending on the impact that the new law will bring about at the local level, Belgian courts can begin to play an even more prominent role in the protection of individuals' liberties.<sup>66</sup>

To sum up, in the UK, Italy and Belgium, judges, by questioning the vagueness of legislative definitions and the disproportionate interferences with individual rights and freedoms by an excessive exercise of local regulatory powers, may well be regarded as being fundamental to the safeguarding of individual rights and freedoms.

## 9. A concluding thought

Diversities in the historical and legal contexts of these three countries explain the different dynamics in the exercise of their judicial powers. However, a trend of judicial intervention can be evidenced in all of these three jurisdictions. Generally, in, both, the Anglo-American and Continental legal traditions judges act not only as legal interpreters and mere mouthpieces of the Parliament but also as powerful law-making actors able to correct (illegitimate and disproportionate) legislative and administrative action, ultimately shaping the content of the criminal law and of other relevant (legislative/administrative) provisions. However, despite their importance in correcting the (excessive) use local powers in the regulation of nuisance, their judicial decisions can help only partly in solving the issue of criminalised incivilities. Both, the legality and the proportionality principles cannot provide us with the reasons *for* criminalisation. Rather, these principles provide the legislator with a procedural guide on how to properly criminalise and judges with instructions on their judicial revision of legislative/administrative action. What is also required is a deeper understanding of the substantive grounds for criminalisation at the level of the policy maker (Peršak, 2014), in order to avoid prohibiting relatively minor uncivil conduct, which may only temporarily offend the sensitivities of some people and may therefore be illegitimate to prohibit or punitively interfere with individuals' rights and liberties. The task of inspecting the legitimate grounds for the regulation of social phenomena pertains primarily to the legislator, who is the rightful institution, which should be concerned with selecting the substantive grounds for criminalisation. However, the process of sentencing also bears important implications for the contours of the criminal law (Ashworth, 2003), both in the Anglo-American and Continental legal traditions. Particularly in light of the prevailing legislative "inertia" regarding the articulation of the substantive grounds for criminalisation in this area, the role of courts to define the limits of the criminal law can be considered fundamental to the ultimate safeguarding of individual rights and freedoms.

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<sup>66</sup> As emerges from the case law analysis, the Council of State has been the most active judicial body revising G.A.S. fines in light of both their substantive and formal requirements. Recently, however, Police Courts have also started to question G.A.S. fines with respect to their merit. For example, in three decisions of 22 March 2013, the Police Court of Antwerp rejected the application of G.A.S. sanctions as some procedural guarantees had not been complied with by police authorities in the notification phase (i.e., the right of defence in both oral and written form was not observed) (Police Court of Antwerp, decisions n. 789/790/791 of 21 March 2013). In September 2013, moreover, the Police Court of Vilvoorde stressed the criminal nature of G.A.S. fines and stipulated that article 6 ECHR (right to fair trial) applies to the notified person (Flachet, 2013).

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