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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.

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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

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