

Tackling anti-social behaviour and homelessness with exclusion orders in the Netherlands, Belgium, England and Wales

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1 Introduction

Local governments throughout the world have been tackling anti-social behaviour for years.¹ Homelessness and nuisance on the streets are often bracketed together. They are typically associated with drug and alcohol addiction, anti-social behaviour and crime.² The anti-social behaviour consists of begging, answering the calls of nature in porches, sleeping in public, leaving syringes lying around and theft.

Many local authorities see this anti-social behaviour as being so unacceptable that they seek to intervene. Thus, for example, in the Netherlands local government councils have issued regulations prohibiting begging.³ In Belgium, England and Wales local government has also taken measures.⁴ A popular measure is to impose an exclusion order on homeless people after they have disturbed the public order or violated a local regulation.⁵ The exclusion order is a ban imposed on an individual prohibiting him or her from being in a specific area within the local authority or from being within a particular distance from some object within the local authority.⁶

Local government does not impose the exclusion order under criminal law. In the Netherlands and Belgium the order is imposed under administrative law and in England and Wales under private law. Local authorities do not consider criminal law to be effective in

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1. See K. Beckett & S. Herbert, *Banished. The new social control in urban America*, New York: Oxford University Press 2009; J. von Mahs, *The Sociospatial Exclusion of Single Homeless People in Berlin and Los Angeles*, *American Behavioral Scientist* 48 2005, p. 928-960; B. Belina, *From Disciplining To Dislocation: exclusion orders in Recent Urban Policing in Germany*, *European Urban and Regional Studies* 14 2007, p. 321-336.
 2. See E. Lindeman e.a., *Daklozen in Amsterdam*, Amsterdam: Dienst O+S 2004, p. 53-59; A.M Donley, *The perception of homeless people: Important factors in determining perceptions of the homeless as dangerous*, Ann Arbor: Proquest 2008.
 3. See ECLI:NL:HR:2010:BL3179;
 4. See E. Devroe, *A swelling culture of control? De genese en toepassing van de wet op de gemeentelijke administratieve sancties in België*, Antwerpen & Apeldoorn: Maklu 2012, p. 427; Raad van State 14 February 2012, no. 217.930; P. Butler, *Westminster council U-turn saves soup runs for homeless people*, *The Guardian* 2 November 2011.
 5. See ECLI:NL:GHSGR:2006:AV6352; ECLI:NL:HR:2008:BB4096; ECLI:NL:RVS:2011:BQ3446; S. Moore, *Street life, neighbourhood policing and the community*, P. Squires (ed.), ASBO Nation, Bristol: Policy Press 2008, p. 182-184; Beckett & Herbert supra note 1, p. 14.
 6. See A. Millie, *Anti-social Behaviour*, Maidenhead: Open University Press 2009, p. 109. Cf. A. von Hirsh & C. Shearing, *Exclusion from public space*, in A. von Hirsh e.a. (eds.), *Ethical and social perspectives on situational crime prevention*, Oxford: Hart Publishing 2000, p. 77-96.

tackling anti-social behaviour.⁷ Non-criminal procedures make it possible to bypass strict procedural requirements. Criminal law generally still has a part to play in the enforcement of the exclusion order.

The use of the exclusion order comes in for some criticism. Critics argue that an exclusion order is a 'criminal charge' and that all the conditions under Article 6(2) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) should be met.⁸ By applying administrative law and private law essential legal safeguards are bypassed: the presumption of innocence, the right to be informed promptly of the nature of the charge, the right to adequate time and facilities for defence, the right to legal assistance, the right of confrontation, and the right to an interpreter'.⁹

Local authorities maintain that an exclusion order is not a criminal charge. They base their argument on the criteria applied by the European Court of Human Rights when assessing whether there is question of a criminal charge: the legal qualification of the criminal fact according to national law, the nature of the violation and the severity of the punishment.¹⁰ This has mixed success in the national courts. In the Netherlands, England and Wales the local authorities manage to convince the highest courts that an exclusion order is not a criminal charge. In Belgium they are not so successful: the Belgian *Raad van State* (Council of State) considers the exclusion order to be a criminal charge.

This chapter compares the exclusion order in the Netherlands, England and Belgium for the purpose of finding answers to a number of questions. Will the ECHR also conclude that an exclusion should not be regarded as criminal charge? What are the advantages and disadvantages of an exclusion order not being regarded as a criminal charge? What are the implications of the legal qualification of the exclusion order for respect for the rights of homeless people and the effective tackling of anti-social behaviour?

This chapter is divided into four parts. The first part addresses the exclusion order in the Netherlands. The different statutory bases are analysed and the legal status of the order is examined. The second and third part look at the Belgian and English exclusion orders in the same way. The fourth part is a comparative evaluation of the exclusion orders.

7. See A. Ashworth & L. Zedner, *Defending the criminal law: reflections on the changing character of crime, procedure, and sanctions*, *Criminal Law and Philosophy* 2 2008, p. 23 & 36; M. Vols, *Woonoverlast en het recht op privéleven*, Den Haag: BJu 2013, p. 201-202.

8. See C. Bakalis, *Asbos, preventative orders and the European Court of Human Rights*, *European Human Rights Law Review* 4 2007, p. 427-438. See also A. Ashworth, *Social control and anti-social behaviour: the subversion of human rights?*, *Law Quarterly Review* 120 2004, p. 273; Ashworth & Zedner, *supra* note 7, p. 45; R. M. White, *Civil penalties: oxymoron, chimera and stealth sanction*, *Law Quarterly Review*, 126 2010, p. 593-616.; A. Ashworth & L. Zedner, *Preventive Orders: a problem of undercriminalization*, R.A. Duff e.a. (eds.), *The boundaries of the criminal law*, Oxford: Open University Press 2010, p. 59-87.

9. See Ashworth & Zedner, *supra* note 7, p. 48; M.L. van Emmerik & T. Barkhuysen, *Öztürk. Punitieve sancties en EVRM-waarborgen in AB Klassiek*, Deventer: Kluwer 2009, p. 114-123.

10. See ECHR 21 February 1984, nr. 14949/03 (*Öztürk v. Germany*), paragraph 50.

2 Exclusion orders in the Netherlands

In the Netherlands the mayor is charged with maintaining public order. The exclusion order is one of the tools available to him for performing this duty. The power of the mayor to impose an exclusion order for the purpose of maintaining public order has several statutory bases.

The mayor often derives his authority to impose an exclusion order from a local government regulation.¹¹ The city council can adopt a regulation authorising the mayor to impose an exclusion order on disturbers of public order. Typically city councils have included a provision in the *Algemeen Plaatselijke Verordening* (General Local Regulation) giving the mayor this power. There are two different kinds of provisions that may be included in such a regulation. The first kind gives the mayor the power to impose an exclusion order in the event of a violation of an explicit instruction set out in the regulation. The second kind gives the mayor the power to impose an exclusion order if such is necessary in the interests of public order or to prevent anti-social behaviour.¹²

Another statutory basis for an exclusion order is the power to issue orders contained in Article 172(3) of the *Gemeentewet* (Dutch local government act). Under this article temporary measures of a not too radical nature can be taken. In order to use this power there must be question of a (potential) disturbance of public order. This power is applied less and less frequently because this provision can no longer form grounds for an exclusion order if the statutory basis for the exclusion order can also be found in a regulation.¹³

The third basis can be found in Article 172(a) *Gemeentewet*.¹⁴ This provision has been in force since the introduction of the *Wet Maatregelen Bestrijding Voetbalvandalisme en Ernstige Overlast* (Dutch act on measures to combat football hooliganism and serious anti-social behaviour). On grounds of this provision the mayor can not only impose an exclusion order on an individual or a group in one or more parts of the city, but he can also order an exclusion order against an individual banning him or her from being in or near to one or more specific objects within the local authority. In order to use this power there must be question of repeated disturbance of public order. The exclusion order can be imposed for a maximum period of three months and can be extended for at the most three times, each time for a period of three months.¹⁵

Regardless of the grounds, the consequences of violating the exclusion order are the same. If an individual violates the exclusion order criminal proceedings can be initiated against him or her for violation of Article 184 of the *Wetboek van Strafrecht* (Dutch Criminal Code), for failure to comply with an official order.

11. See for example ECLI:NL:RBAMS:2011:BV1671.

12. See J.G. Brouwer & A.E. Schilder, *Gebiedsontzeggingen in het systeem van het openbare-orderecht*, *Jurisprudentie Bestuursrecht plus 2007*, p. 12.

13. See ECLI:NL:HR:2008:BB4096; J.G. Brouwer en A.E. Schilder, *Wijken voor orde: over nieuwe geboden en verboden*, *Regelmaat 2008*, p. 91-93.

14. See for example ECLI:NL:RBLEE:2012:CA2962; ECLI:NL:RBAMS:2012:BW1140.

15. See J.G. Brouwer & A.E. Schilder, *De Voetbalwet. Ongekende mogelijkheden*, *Tijdschrift voor Sport & Recht 2009*, nr. 3, p. 89-100.

2.1 Qualifying the exclusion order

The highest Dutch courts exclude the exclusion order from being regarded as a criminal charge. This is apparent from a case in which a drugs dealer appealed against an exclusion order. Criminal proceedings are also involved in the same case because the drugs dealer failed to comply with the exclusion order. In both proceedings the drugs dealer argues that the exclusion order is a criminal charge.

In the administrative proceedings the *Afdeling Bestuursrechtspraak van de Raad van State* (Administrative Jurisdiction Division of the Dutch Council of State) ruled that the exclusion order is not a criminal charge. The exclusion order is intended to prevent serious disturbance of the public order, such as openly possessing hard drugs or loitering with the intent to obtain hard drugs. For the qualification of the exclusion order the fact that criminal proceedings have been initiated for failing to comply with the ban is not relevant.¹⁶

In the criminal proceedings the Amsterdam Court of Law qualified the exclusion order as 'a measure of order that has become necessary due to the recurrent behaviour of the suspect'. The fact that the freedom of movement is restricted does not make this a criminal charge. Should the exclusion order indeed be considered a criminal charge, then, according to the court it would not be incompatible with the ECHR to charge a local authority with the prosecution and the punishment of specific violations, as long as the defendant has the opportunity to have the ruling pronounced against him heard by a court that provides the guarantees stipulated in Article 6 ECHR.¹⁷

In cassation the *Hoge Raad* (Dutch Supreme Court) does not address whether or not the exclusion order is contrary to the ECHR. According to the *Hoge Raad* this complaint cannot lead to cassation because it is directed 'against a superfluous consideration'.¹⁸ The advisor of the *Hoge Raad* (the Attorney General) does address this question. According to the Attorney General it is not always certain whether an exclusion order is a preventive measure of order without a punitive character. The Attorney General, however, does not conclude that Article 6 ECHR has been violated because the suspect has the opportunity to have the exclusion order assessed by a court providing the guarantees stipulated in Article 6 ECHR. According to the Attorney General the administrative assessment of the exclusion order complies with Article 6 ECHR.¹⁹

3 Exclusion orders in Belgium

In 2005 the city council of Antwerp adopted a regulation authorising the mayor to impose an exclusion order in the event of recurrent anti-social behaviour. Whereupon a human rights organisation petitioned the *Afdeling Bestuursrechtspraak van de Raad van State* (Belgian Administrative Jurisdiction Division of the Council of State) to declare the regulation null and void. The *Raad van State* (Belgian Council of State) ruled that the Antwerp exclusion order is

16. See ECLI:NL:RVS:2007:BB6297. See also ECLI:RVS:2011:BQ3446; ECLI:NL:RBAMS:2011:BU9162.

17. See Court of Appeal Amsterdam 2 January 2008, no. 23/002206-05.

18. See ECLI:NL:HR:2009:BK3254. See also ECLI:NL:HR:2007:AZ6007; HR 23 April 1996, *Nederlandse Jurisprudentie* 1996, 541, paragraph 7; ECLI:NL:RBAMS:2007:BH4020.

19. See ECLI:NL:PHR:2009:BK3254, paragraph 21-25; ECLI:NL:PHR:2007:AZ6007, paragraph 23.

a criminal sanction and declared the regulation to be null and void because the exclusion order is not included on the limitative list of sanctions in Article 119bis of the *Nieuwe Gemeentewet* (new Belgian local government act).²⁰

In 2014 the Belgian federal legislator introduced a new statutory basis for the exclusion order. The *Wet betreffende de Gemeentelijke Administratieve Sancties* (Local Government Administrative Sanctions Act) inserts Article 134e into the *Nieuwe Gemeentewet*. The mayor can impose an exclusion order in the event of a disturbance of public order caused by individual or collective behaviour. He can also impose an exclusion order in the event of recurrent violation of a regulation 'at the same place or at similar events', that involve a disturbance of public order or anti-social behaviour. The exclusion order is valid for a maximum period of one month and can be renewed twice. Failure to comply with the exclusion order is punishable by a maximum local government administrative sanction of EUR 350 euro.²¹

3.1 Qualifying the exclusion order

Belgian administrative law distinguishes between administrative measures and administrative sanctions. The imposition of administrative measures does not require a violation to have taken place, but simply that there is a 'potential danger' to public order and peace. An administrative sanction is a response 'to what is considered to be a violation'.²²

In 2009 the *Raad van State* qualified the Antwerp exclusion order as an administrative sanction and a criminal charge. The mayor can indeed only impose the exclusion order in the event of an offence. In addition, from the local authority's website it emerged that the exclusion order has a punitive character. The exclusion order is embedded in a context of sanctioning, punitive measures that the local government uses to tackle anti-social behaviour as an alternative to criminal prosecution. Finally, the duration of the exclusion order is linked directly to the compliance shown by the offender in the past. That the duration of the sanction depends on the offender's behaviour is characteristic for a punitive measure. The exclusion order does not centre upon the ability to solve the problem but rather on punishment.²³

In 2014 the federal legislator endeavoured to bypass the guarantees in Articles 6 and 7 ECHR by introducing Article 134(e) *Nieuwe Gemeentewet*. The exclusion order is explicitly referred to as an administrative measure and not as a criminal charge. The legislator proposed that the exclusion order is used to tackle order disturbances and is thus not accompanied by any decision at all regarding the grounding of a charge in criminal law.²⁴

Whether this argument can be upheld is doubtful. Indeed, in 2013 the *Afdeling Wetgeving van de Raad van State* (the Legislation Division of the Belgian Council of State) referred

20. Raad van State 23 October 2009, no. 197212.

21. See W. Vandenbruwaene, 'Loopt Joëlle Milquet niet te hard van stapel?', *De Morgen* 2012-4 april, p. 1-2; Vols supra note 7, p. 174-175.

22. Raad van State 23 October 2009, no. 192.212.

23. See Raad van State 23 October 2009, no. 197212. See also S. Brabants, 'Het straatverbod in de Stad Antwerpen: (g)een doodlopende straat?', *Tijdschrift voor gemeenterecht* 2010, 2, p. 139 – 142.

24. Vols supra note 7, p. 174.

to the new exclusion order as a criminal charge. The *Raad van State* concluded that an exclusion order is a response to the violation of regulations and still has a punitive character. The preventive aspect of the exclusion order is, according to the *Raad van State*, insufficiently reflected in the act.²⁵

4 Exclusion orders in England and Wales

An exclusion order can be imposed in both England and Wales since 1998 by way of an 'Anti-social Behaviour Order' (ASBO). An ASBO is imposed on an individual engaged in anti-social behaviour under the Crime and Disorder Act 1998 and contains a ban on the behaviour described in the order for a period of at least two years. The district court imposes an ASBO at the request of a local authority or the police and applies a 'two-stage test'. First the court assesses whether the suspect has behaved in such a way as to cause 'harassment', 'alarm' or 'distress' or is likely to do so, to one or several people outside his or her household. Secondly the court assesses whether the ASBO is necessary to protect these people against the anti-social behaviour. The Crown Prosecution Service can initiate criminal proceedings in respect of individuals who fail to comply with the ASBO. An offender can be punished by a monetary fine and/or a prison sentence of up to five years.

In 2013 the 'Anti-social Behaviour, Crime and Policing Bill' was put before parliament. This bill aimed to replace the ASBO with the 'Injunction to Prevent Nuisance and Annoyance' (IPNA). Just as the ASBO, the IPNA is imposed by the court at the request of the local authority. The court will uphold the request if there is evidence of 'conduct capable of causing nuisance or annoyance to any person'. This broad criterion was however rejected by the House of Lords in January 2014. What the new criterion will be is as yet unclear.²⁶

Failure to comply with an IPNA is, like the ASBO, not a criminal offence. Just as with the ASBO non-compliance is considered to be 'civil contempt of court'. Civil contempt of court is punishable by a prison sentence of up to two years or a monetary fine. However a sentence does not lead to a criminal record.²⁷

4.1 Qualifying the exclusion order

To bypass the strict evidence rules under criminal law the English legislator has opted for private law as grounds for imposing the ASBO and the IPNA. Advantage is taken of the flexibility of civil law procedures and the strength of the criminal law'.²⁸ Thus for example hearsay evidence is permitted in the taking of evidence for the imposition of the ASBO.²⁹

25. See Belgische Kamer van volksvertegenwoordigers 2012-2013, nr. 2712/001, p. 63.

26. See Peers block law on being annoying in public, BBC news 9 January 2014.

27. S. Hodgkinson & N. Tilley, Tackling anti-social behaviour: Lessons from New Labour for the Coalition Government, *Criminology and Criminal Justice* 4 2011, p. 301.

28. Home Office, Respect and Responsibility. Taking a Stand Against Anti-Social Behaviour, London: Home Office 2003, p. 3.

29. See S. Macdonald, The Nature of the Anti-Social Behaviour Order -R (McCann & Others) v Crown Court at Manchester, *The Modern Law Review* 4 2003, p. 630-639.

In 2002 the House of Lords decided that an ASBO should not be regarded as criminal charge. This highest court based its statement on four arguments: 'no breach of the criminal law need be proved, no criminal conviction results, the Crown Prosecution Service are not involved, and the purpose of the order is preventive'.³⁰ Nonetheless the House of Lords determined that in the first phase of the two-stage test the more stringent criminal evidence rules apply. It should be beyond reasonable doubt that the suspect has acted anti-socially. In the second phase of the two-stage test the court has more freedom.³¹ Lawyers have continued to criticise the ASBO since this ruling and are hoping the European Court will halt the government.³²

The chance that the European Court will rule on the ASBO has become small since this is likely to be replaced with the IPNA. The criticism however continues. When imposing an IPNA use is also made of private law and less stringent criteria are used than in the past. Although the government is of the opinion that there are sufficient procedural safeguards in the imposition of an IPNA, this is questioned in literature.³³

5 Evaluation of the exclusion orders

In the Netherlands, England, Wales and Belgium local government bypasses the requirements set out in Articles 6 and 7 ECHR when imposing an exclusion order. In each of the three countries reference is made to the preventive character of the exclusion order: the sanction has a repertoire character and is not punitive by nature. The purpose of the exclusion order is to restore public order and to prevent new anti-social behaviour.

It is doubtful whether the European Court will agree to the decriminalisation of the exclusion order. It is not a generally accepted fact that an exclusion order is not a criminal charge. The highest national courts are divided on this issue. On the one hand the highest courts in the Netherlands, England and Wales qualify the exclusion order as a preventive administrative measure. While in Belgium on the other hand the *Raad van Staat* considers the exclusion order to be a criminal charge.

The European Court will judge the exclusion order based on the aforementioned criteria.³⁴ The qualification of the exclusion order under national law will probably not have a significant role to play in this. It all comes down to the nature of the offence and the nature and the severity of the sanction. We do not expect the European Court to regard an exclusion order as a criminal charge, as long as it has a short duration and the repertoire and preventive character is emphasised by the government. If the exclusion order is given a more punitive and deterrent character directed towards the individual circumstances of the offender (as was the case in Belgium), then it is more likely to be qualified as a criminal

30. Ashworth supra note 8, p. 276.

31. Ashworth supra note 8, p. 276-277.

32. See N. Padfield, *The Anti-social behaviour Act 2003: the Ultimate Nanny-state Act*, *Criminal Law Review* 2004, p. 713; Bakalis supra note 8, p. 438; Macdonald supra note 29, p. 637-638.

33. See K.J. Brown, *Replacing the ASBO with the injunction to prevention nuisance and annoyance: a plea for legislative scrutiny and amendment*, *Criminal law review* 8 2013, p. 623-639.

34. See ECHR 21 February 1984, nr. 14949/03 (*Öztürk v. Germany*), paragraph 50.

charge.³⁵ It is thus important that short term exclusion orders are imposed and to choose the arguments for imposing an exclusion order with care.

if the European Court follows the Belgian *Raad van State* and comes to the conclusion that an exclusion order is a criminal charge, the consequences need not necessarily be too great. It is not by definition contrary to Article 6 ECHR if the local government takes punitive action against 'minor offences'. It is however required that 'the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6'.³⁶ The specific requirements the European Court lays down for this legal protection differ per sanction: not all the criminal charge guarantees in Article 6 ECHR apply to minor administrative penalties.³⁷

Defenders of the rights of homeless people should therefore not be satisfied with the formal-legal argument that there is a criminal charge: 'In this sphere, then, European human rights law may not have a great deal to offer'.³⁸ It might be wiser to strive for a balance between, on the one hand, the effective maintenance of law and order and, on the other hand, the observance of the rights of the homeless.

Indeed the advantages of an exclusion order should not be denied. Firstly the exclusion order offers local government the opportunity to tackle anti-social behaviour without being fully dependent on the cooperation of the Public Prosecutor. In the past the Public Prosecutor gave no priority to relatively innocent but anti-social offences, as a result of which victims of anti-social behaviour could not be given effective assistance. With the help of an exclusion order priority can be given now at local level to tackling anti-social behaviour.³⁹

Secondly, homeless people behaving anti-socially also benefit from the use of exclusion orders. There is no criminal record, because it is not regarded as a criminal charge. A homeless person will not be disadvantaged as a result of the exclusion order when seeking work or housing, which is the case if there is a criminal charge.⁴⁰ It should be observed that a criminal charge for violating the exclusion order does usually result in a criminal record.⁴¹

However the disadvantages of the exclusion order suggest that on balance it is unfavourable for homeless people. To start with there is 'net-widening' and 'mesh-thinning': local government acts faster and more forcibly than in the past because there are fewer procedural safeguards.⁴² Where violation of the ban on begging usually tended to result in the case being dismissed by the Public Prosecutor, now the local government imposes an exclu-

35. Cf. H. Hennekens, *De bevelsbevoegdheid van de burgemeester tegen het licht van art. 6 Europees Verdrag voor de rechten van de Mens, De Gemeentestem 1996, 7030; Brouwer & Schilder supra note 12, p. 15-16; ECLI:NL:RBAMS:1996:ZF0329*

36. See ECHR 21 February 1984, nr. 14949/03 (*Öztürk v. Germany*), paragraph 56.

37. See Van Emmerik & Barkhuysen, *supra* note 9, p. 110.

38. Ahsworth & Zedner, *supra* note 7, p. 45.

39. See Hennekens *supra* note 36; Beckett & Herbert *supra* note 1, p. 21.

40. See Ahsworth 2004 *supra* note 10, p. 273; *Kamerstukken II 2013-2014, 33797, or. 3.*

41. See Hodgkinson & Tilley *supra* note 27, p. 301.

42. S. Cohen, *Visions of Social Control: Crime, Punishment and Classification*, Cambridge: Polity Press 1985; Beckett & Herbert *supra* note 1, p. 11.

sion order. For some critics this more active action against anti-social behaviour is the harbinger of the repressive security state⁴³ or the ultimate nanny state.⁴⁴

Secondly homeless people have less legal protection. For example less stringent evidentiary rules apply and less compelling evidence suffices than is the case in a criminal prosecution.⁴⁵ The ban on retroactivity is not in full force.⁴⁶ In addition, the review of the exclusion order by the administrative or civil courts is less intensive than the review by a criminal court.⁴⁷

Thirdly the criteria on the basis of which an exclusion order is imposed are less precise than are criminal law provisions. Vague concepts such as 'public order', 'anti-social behaviour', 'harassment', 'alarm', 'distress', 'nuisance' and 'annoyance' are used. This is not fully in line with the principle of legal certainty.⁴⁸ This objection, however, can be somewhat alleviated by issuing a warning before imposing an exclusion order. In this way homeless people know what behaviour will result in an exclusion order.⁴⁹

Fourthly, using the exclusion order the resultant sanctions are upgraded creating the risk of disproportionality. Thus under Dutch law there is an offence if a homeless person violates a ban on begging in a local regulation. In this case, pre-trial detention is not possible. If however an exclusion order is imposed on the homeless person following a violation of the ban on begging and should this person violate this order, this is a criminal offence. Pre-trial detention is now allowable.⁵⁰ In England the sanction for non-compliance with an ASBO or IPNA is generally much higher than the sanction for the act that led to the imposition of the exclusion order.⁵¹ In Belgium there is no question of upgrading: the violation of a regulation and the violation of an exclusion order are punished by an administrative monetary fine of up to EUR 350.⁵²

Finally when weighing the pros and cons the question of whether or not the exclusion order is a real solution should be addressed. Of course the anti-social behaviour will disappear from the specific area and the residents will have a temporary respite but the anti-social behaviour is likely to go elsewhere.⁵³ Repressive social exclusion will not solve the underlying causes such as addiction, unemployment and psychological problems. It is therefore a good idea to combine a short exclusion order with more solution-oriented legal measures,

43. P. de Hert & K. Meerschaut, *Lettres persanes* 10. De Belgische morele openbare orde beschermd. Vroeger was het vrijer, *Nederlands Tijdschrift voor Rechtsfilosofie En Rechtstheorie* 2007-3, p. 95-103.

44. See Padfield *supra* note 33.

45. See Ahsworth & Zedner, *supra* note 7, p. 30 & 36.

46. See for example ECLI:NL:RBAMS:2012:BW1140, paragraph 4.4. See also Ahsworth 2004 *supra* note 10, p. 279-283; Ahsworth & Zedner, *supra* note 7, p. 36.

47. See Bakalis *supra* note 8, p. 438-439.

48. See Ahsworth & Zedner, *supra* note 7, p. 31; Brouwer & Schilder *supra* note 13, p. 99.

49. See ECHR 4 June 2002 *Landvreugd v. the Netherlands* 37331/97, paragraphs 62-64.

50. See Brouwer & Schilder *supra* note 12, p. 14.

51. See Ahsworth & Zedner, *supra* note 7, p. 30-31.

52. See Vols *supra* note 7, p. 174-175.

53. See Moore *supra* note 5, p. 183-184.

such as "problem-solving courts" and "Housing first" projects, which aim to reduce anti-social behaviour in the long run.⁵⁴

6 Conclusion

The exclusion order is qualified differently in the Netherlands, Belgium and the United Kingdom. The exclusion order is an administrative measure in both the Netherlands and Belgium. In England and Wales it is a civil measure. The decriminalisation of the exclusion order makes it possible for local government to tackle anti-social behaviour without this resulting directly in a criminal record for the offender. On the other hand the offenders have less legal protection. We believe that the exclusion order need not be regarded as a criminal charge if the order is imposed for a short duration and is aimed at restoring public order and preventing anti-social behaviour. The exclusion order is a necessary means for maintaining public order as long as the rights of the offenders and the tackling of the underlying causes are not ignored.

54. See Beckett & Herbert *supra* note 1, p. 17-22 & 149-156; G. Berman & J. Feinblatt, *Good courts. The case for problem-solving justice*, New York: New Press 2005, p. D. B. Wexler, *Rehabilitating lawyers. Principles of therapeutic jurisprudence for criminal law practice*, Durham: Carolina Academic Press 2008.