

# A legal space for the representation of danger

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Since Occam, analytic knowledge has been understood as knowledge about the meaning and relationships of concepts. Wittgenstein and J.L. Austin transposed analytic knowledge on a new platform. Instead of concepts' correspondence with reality and their intensive and extensive consistence, they focussed on the *practice* of concepts, that is, their use in ordinary life. 'What *we* do', said Wittgenstein, 'is to bring words back from their metaphysical to their everyday use'.<sup>1</sup> Austin, in turn, was interested in the use of language as *performance* rather than as statement-making: 'if a person makes an utterance of this sort we should say that he is *doing* something rather than merely *saying* something' (Austin 1979, 235).

As for the law,<sup>2</sup> *contestation* seems to be the most important enduring characteristic of this new platform. Unlike the dogmatic law, the practice of law does not fix the meaning of a legal concept. Fixing is impossible because the meaning of a concept is always relative to the situation at hand, and even more to the expected real effect the practice of the concept is capable of bringing about. While constantly determining meanings of concepts, the legal practice is nonetheless always ready to reopen and revision them.

The business of legal practice is to make legal concepts effective in the world, which brings visible to research the flux of rivalry among contesting theories (social theories, legal theories, moral theories, radical, moderate and conservative theories...) that prevail, not in the academia, but in the practice. In this paper, I would like to bring this contestation as well as the ensuing (re)formation of legal concepts, the breathtaking consequence of which is that realities emerge, to the attention of legal research. This text is intended as a case study on con-

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<sup>1</sup> 'Wir führen die Wörter von ihrer metaphysischen, wieder auf ihre alltägliche Verwendung zurück.' Wittgenstein 2001, §116.

<sup>2</sup> For Austin, the practice of law was a perfect example of doing things with words.

cept-formation and reality-emerging in the legal mind. I will discuss specific and concrete legal materials that present a particular discourse on the issue of danger. In short, I will discuss the ‘law-inculcated belief about what is to be feared’ (Plato, *Republic* IV, 430b).

### **Symbolic power: thought regimes**

The footage for my presentation is the analyses I have made on a number of ECJ cases.<sup>3</sup> My materials comprise 21 cases from 1974 to 2003; in this paper, I will scrutinise the first three: *van Duyn*, *Bonsignore* and *Rutili*. The cases are about ‘special measures’ taken by the EU/EC Member States that restrict the freedom of movement of EC nationals. The special measures involved individual decisions that had prohibited one’s entry, ordered one’s deportation, or restricted one’s permit to reside in a determined territory. According to EC law, such decisions must be justified on grounds of *ordre public* or public security, and moreover, these grounds must be based on the personal conduct of the individual in question. The core of it is that the individual must constitute a genuine and sufficiently serious danger to society.

The overall prospect for me is that the theme of danger/security present in these cases provides a perspective on legal philosophy. With their help, I will try to show the way in which different thought-regimes coexist and clash in law. I believe that this is not only a matter of one special branch in EC law, but a phenomenon that also appears in law in general. The thought regimes in question are about ways of relating to human beings, which they do differently: the one regards humans as objects, the other as subjects.

It is important to distinguish between the construct of human being (i.e. as object or as subject) that a regime brings forth, and what the regime does to all who incorporate its constructs into their thinking and acting. In the first case, people are affected directly by the fact that the regime imposes its models on them. In the latter case, people are affected indirectly; they internalise the regime by becoming carriers (*Träger*) of the regime. The carriers, on whose minds the

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regime's ethos, in the sense of a *conscience collective*, is diffused, are exposed to a more intimate, penetrating and even total influence of the regime. Contestation between the regimes takes place in the minds of the carriers, and the regime's formative power over ethical character is therefore much stronger in the case of carriers.

The regimes of thought concerned here are social in nature, *faits sociaux*, realities external to the individual. Yet they have their reference points in the faculties of the human mind. A subject uses the faculty for knowledge when he/she constructs and projects objects onto the material world, according to the mind's cognitive schemata, while the moral faculty is used when a respectful and consulting relation to other human beings is created. Following Martin Buber, for instance, one could use the notions of *I-It* and *I-Thou* (*Ich-Es* and *Ich-Du*) that designate the different ways in which a subject experiences and relates with the world around (Buber 1923).

The basic contention underlying this paper is that these regimes of thought, as social facts, are reflected in the organisation of the legal field. The law of aliens that concerns all kinds of migrants (asylum seekers, migrant workers, returnees, second generation expatriates) is of the type that views human beings as objects. In this case, the law merely legitimises the powers of the governing authorities. The law may *endow* certain entitlements to foreigners, but never *recognises* their rights as a matter of principle. The other 'branch' of law (placed within quotation marks because it, in a way, encompasses all the rest) is fundamentally based on the recognition that people are conscious subjects. Their individual will is often decisive (for instance in contract law, but also in criminal law in its requirement of *mens rea*) and, in all cases, at least attended to (administrative law, company law).

In contrast to the law of aliens, this other 'branch' could be called the citizens law, although this is not really about branches of law. Rather, I should like to suggest, with no other empirical evidence but the work done here, that the regimes represent coexisting thought-schemes that pervade the law on the whole. The regimes coexist with and contest each other, and are effective in different ways in the various loci of law so that sometimes the one dominates, sometimes the other. The purpose of studying 'Europeans' as a hybrid legal category, oscillating between the law of aliens and the citizens law, is precisely to make visible this regime contestation.

## Style and ambition of the research

I put forward here a research-reporting style that aims to preserve the polyphonic nature of the legal case-materials. In other words, I attempt to avoid lifting the Court's rulings, and thereby the judges' perspective, above the perspectives of other participants. I also attempt to avoid reconstructing for myself, in the privileged position of an author, any right answers to the legal questions with which the practitioners work. After all, this is not my business.

Rather, I endeavour to *open* and to *vivify* the different perspectives voiced in the proceedings, to engage in a dialogue with these perspectives, as if they were my real interlocutors. I must, of course, balance this with my task of providing the 'voiceover' that will fill in gaps and tie things together in the story.

The law bears a certain monologising dynamic walled into the structure of the practice. The 'legal condition', so to say, is that everyone participating in the practice must struggle to demonstrate that his/her interpretation is the only one that accords with the existing law. I believe that such a monologue-fortifying structure has developed in law in a counterfactual manner. The legal practice, the basic business of which involves conflict, is constantly face to face with the polyphony of social life. This continuous encounter with *the fact* of diversity has created an especially strong monologising dynamic in *the norm* structure of the legal practice. Yet in the meantime, it has also afforded the legal practice a peculiar awareness of the fundamental heterogeneity of social life.

As regards today's topical and burning questions (terrorism, counterterrorism, torture, Guantánamo, Abu Ghraib, etc.), I find that security and danger are currently regarded as the prime challenges of contemporary law and legal theory. I will discuss materials that stem from the pre 9/11 world, but the well-known post-9/11 developments could perhaps be held as the 'reflective origin' of my researches (Canguilhem 1991, 63).

All the cases studied here are from the first half of the 1970s, which of course is in many respects a different world from ours. Within the space of this presentation, I cannot elaborate on any sufficient description of the differences. The following short historical note is, nonetheless, appropriate.

Militant revolutionary organisations were flourishing in Europe in the 1970s. The conflict in Northern Ireland was in its most drastic phase in the early 70s. The year 1972 saw the Bloody Sunday on 30 January, and during that same year the IRA killed 281 people. In Spain, the ETA was at the peak of its social support against the Franco regime which was already on the wane. In December 1973, the ETA carried out its most successful operation: the assassination of Admiral

Luis Carrero Blanco, Franco's would-be successor. In Germany, the RAF leaders captured in June 1972 were hunger-striking in the prison of Stammheim while awaiting trial, which generated enough popular sympathy to engender a second generation of RAF leaders. Finally, in Italy the 70s are referred to as 'the years of lead' (*gli anni di piombo*), which alludes to the accelerating violence perpetrated by both the fascist and communist groups during that period. The Italian situation culminated in the kidnapping and murder of ex-prime minister Aldo Moro by the *Brigate Rosse* in 1978.

Now let us focus on my actual commission. I will first explore the legal norms at issue in these cases, norms which create a particular space in the legal universe for the representation of security/danger. I will then move into that space in order to find out what was actually happening there, that is, what was represented there as a danger to society and how legal actors responded to this.

### The space created in law

Article 48 (currently Article 39) of the Treaty establishing the European (Economic) Community (TEC) compromised something that used to belong to the sovereignty of the States. Namely, Article 48 took away their power to determine and to decide freely who is allowed to enter and remain in their territory.<sup>4</sup> Article 48 established the 'freedom of movement for workers', entailing a list of concrete rights conferred to the nationals of the Member States of the EC. These rights include the *right to move freely and to stay* in the Member States while being employed or looking for employment, and under certain conditions even the right to remain in a Member State after the end of the employment. Migrant worker-nationals should be treated on equal footing with the nationals of the host Member State. This is considered an expression of the more general principle of non-discrimination in the EC (TEC Article 7, now Article 12).

The rights entailed by the freedom of movement are, however, subject to 'limitations justified on grounds of *ordre public*,<sup>5</sup> public security or public health' (TEC 48.3, now 39.3). Member States may derogate from the free movement

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<sup>4</sup> This power was not completely unlimited: ostracism of a state's own citizens is prohibited by *ius cogens*, and the international treaty-law on refugees binds the states acceded to it.

<sup>5</sup> I use the French word *ordre public* throughout for what in the EC context is rendered as 'public policy' in English. I transgress the academic rule of exact citation by making this change inside quotations as well.

rights and non-discrimination, and take measures against migrant workers if they can justify these by *ordre public*. This means, in the present context, that society is in danger and must be protected. *Ordre public* thus relates to the discourse that operates with the secure/dangerous distinction. When such a discourse takes space within the derogation clause, there is a representation of danger emerging into the legal system.

Yet the derogation clause does not mean that Member States are again free from the constraints of EC law and back in their full sovereignty. Action justified by the derogation clause is nonetheless legally controlled. Member States are not exempt from the law *tutti totalmente*; there is a space for maneuver but only within legal limits. One of these limits appears in Article 3.1 of Directive 64/221/EEC (now Article 27.2 of Directive 2004/38/EC): ‘Measures taken on grounds of *ordre public* or of public security shall be based exclusively on the personal conduct of the individual concerned.’ The *personal conduct requirement* means, essentially, that alien authorities seeking to banish an EC national must be able to provide evidence that attests to the likelihood that precisely this particular individual constitutes a danger to society.

Lastly, there are the procedural requirements which purport to guarantee adequate remedies for EC nationals. Articles 5-9 of Directive 64/221 (now Articles 30-32 of Directive 2004/38/EC) establish the procedural system to which Europeans are entitled if threatened by exclusion. I will not go into details in this respect, but for the purposes of this paper, the requirement given in Article 6 is crucial: ‘The person concerned shall be informed of the grounds of public policy, public security, or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved.’ Let us call this the right to information.

Let me recap and summarise what we have here:

- first, the right to move freely among and to remain in Member States;
- second, the derogation justified by *ordre public*;
- third, the personal conduct requirement that limits derogation; and
- fourth, the right to information on the reasons/grounds for exclusion.

In this manner, we have now drafted a reductive exposition of the piece of law, consisting of particular requirements placed before Member State authorities, that forms for us a legal space for the representation of danger. Let me now turn to actual cases.

## van Duyn

The opening case is *van Duyn*, in which the ECJ gave its preliminary ruling on 4 December 1974. The case involved Scientology: Does someone's association with Scientology form 'grounds of *ordre public*' on which his/her exclusion is justified?

In reading *van Duyn*, I aim to show how these two basic notions, 'personal conduct' and '*ordre public*', develop into a rough conceptual framework within which the legal discourse holds (if loosely) to the idea of the socially dangerous individual. In this case, the legal discourse did not yet produce its own version of the socially dangerous individual; it rather made some ground work for that. I will divide my exposition into two main parts, the first of which concerns *ordre public* and the second personal conduct. After describing the facts, I will proceed by way of presenting, one after another, the views of each participant in the proceedings. The participants in *van Duyn* include Ms van Duyn herself, the UK Government, the Commission, Advocate General Mayras, and, of course, the judges of the ECJ as a collective.

The report on the facts and procedure in *van Duyn* begins by reproducing the statement on Scientology made by the British Minister of Health in the House of Commons in 1968. This statement is worth citing at length here:

'Scientology is a pseudo-philosophical cult ... The Government are satisfied[,] having reviewed all the available evidence[,] that Scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well-being of those who submit to them. There is evidence that children are now being indoctrinated.[...]' (*van Duyn* 1339.)

According to the Minister, the trouble with Scientology was that '...[t]here is no power under existing law to prohibit the practice of Scientology' (1339). Nonetheless, he said, the Government was convinced that Scientology is 'so objectionable' that it is 'right to take all steps within [the Government's] power to curb its growth' (1339). Therefore, it had decided that '[w]ork permits and employment vouchers will not be issued to foreign nationals ... for work at a Scientology establishment' to prevent foreigners coming to the UK 'to study Scientology and to work at the so-called College in East Grinstead.' (1340.)

Five years later, in May 1973, Ms Yvonne van Duyn from the Netherlands sought entry to the UK at Gatwick airport. The immigration officials could there determine that she was precisely the kind of foreigner that the Minister had in-

tended. She was on her way to the College in East Grinstead to begin working there as a secretary for the Scientologists. Thus, the immigration officers at the airport followed the directions of the UK government by barring her from entering the UK and turning her back home.

In the meantime, however, the UK had joined the EEC, which, as the treaty says, was founded on the non-discrimination of individuals on grounds of nationality and on the free movement of workers. Thus, the question that arose was as follows: Does it not constitute palpable discrimination on the part of the UK, if the UK does not intervene in the practice of Scientology by the UK citizens, but nonetheless endeavours to 'curb its growth' by acting against foreigners practicing Scientology?

Ms Van Duyn initiated proceedings in the High Court of Justice, England. The High Court was to determine whether discrimination had occurred that constitutes a breach of Community law, or whether the policy and the action implementing it were within the limits of the permitted derogation. The High Court relied on the ECJ and asked it to clarify the meaning of Community law.

The situation according to the UK law, before any consideration of the Community law, was quite clear. Legally, any foreigner could be refused entry if such refusal is 'conducive to the public good'. The Secretary of State could give personal directions on this, but in any case the immigration officers had relatively wide independent discretion: he/she may exclude anyone if it 'seems right' to do so 'for example, in the light of the passenger's character, conduct or associations.' (1340.)

Thus, under British law, 'conducive to the public good' described the *ordre public* condition. In effect, the powers of the immigration authority remained practically intact in the UK law on immigration, except for providing these powers formal legality.

In fact, it was the position of the UK government in the proceedings of *van Duyn* that the Community law changes nothing about the definition of *ordre public*. The meaning of the *ordre public* requirement (that restrictions to free movement must be 'on grounds of *ordre public*'; TEC 48, now 39) would be essentially the same as the 'requirement' in UK law that the restriction should be 'conducive to the public good'. Along these lines, the UK government's representative referred to Scientology as something 'sufficiently undesirable' which 'a Government may consider contrary to public good' (1345).

The Commission, in turn, submitted that *ordre public* is a concept of Community law: It 'must first be interpreted in the context of Community law,

and national criteria are only relevant to its application'. Freedom of movement, in the Commission's view, can only be maintained 'on the basis of uniform application in all Member States'. Thus the UK Government's interpretation, according to which the Community concept of *ordre public* means the same as the UK concept of 'public good', was an incorrect way to deal with EC law. The idea is not that patterns of national law are pounced on Community law, but vice versa. (1344.)

In his Opinion on *van Duyn*, Advocate General Mayras remarked that Member States have undeniably retained their powers 'to ensure [...] the safeguarding of their *ordre public* and, in particular, of public security within their territory'. According to the Advocate General's judgment, no Community concept of public security exists ('it is [not] possible to deduce' that concept, he said) despite the fact that the concept appears in the texts of the Treaty and of the Directive. (1356.)

The way Mayras saw it is that 'if a "Community *ordre public*" exists [...] it can only be an economic *ordre public*', that is, it should be related, for example, to market, trade, customs or competition. What comes to the *ordre public* qua 'public security', therefore, the Community does not act in that area at all: 'Member States have the sole power [...] to take measures for the safeguarding of public security'. Moreover, said Mayras, Member States have the sole power 'to decide the circumstances under which that security may be endangered'.<sup>6</sup> (1357.)

Thus, unlike the Commission, the Advocate General found that the 'concept remains, at least for the present, national, and this conforms with reality inasmuch as the requirements of public security vary, in time and in space, from one State to another' (1357).

The judges of the court, finally, found themselves with the task of striking a delicate balance. On the one hand, they should be capable of guaranteeing that the *ordre public* derogations do not vitiate the freedom of movement altogether; individuals do have enforceable rights that the courts must protect. On the other hand, these rights are 'subject to limitations' and the Member States may derogate if there exists a case of *ordre public*. But what circumstances fall within this concept?

Well, 'the particular circumstances justifying recourse to the concept of *ordre public* may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national

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<sup>6</sup> Except for the citations from the Minister's speech, this is in fact the only reference to danger in the whole *van Duyn* dossier.

authorities an area of discretion' (1350). Nonetheless, the Court insisted that the concept 'must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State' (1350). In the future, the Community institutions, including the Court itself, will have to control the application of the *ordre public* limitation.

As for the case presently in hand, the Court ruled that if Member State authorities have 'clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities' they may 'rely on the concept of *ordre public*' (1350).

I will sum up the discussions thus far. The UK Government claimed that the *ordre public* requirement is essentially the same as the requirement that one should consider what is conducive to the public good. The Commission insisted that *ordre public* is a Community concept which must have the same uniform application in all Member States. In contrast, the Advocate General maintained that *ordre public* is a national concept with which the Community has virtually nothing to do. The Court declined defining *ordre public* as a Community concept substantially, but nevertheless ruled that it should be interpreted strictly in the Community context. Member States do not have the sole power to qualify anything as *ordre public*, to say the least.<sup>7</sup> All in all, substantially the concept remained *non liquet* for the time being, and the contestation over its meaning was to be continued.

Let us now turn to the discussion of 'personal conduct' in *van Duyn*: How would the topic of dangerousness emerge in the frames of that concept? In *van Duyn*, the question would be recast in the form: Does association with Scientology form a part of the individual's 'personal conduct'? Let us remember that the Directive requires that the exclusion 'be based exclusively on the personal conduct of the individual concerned' (Article 3.1 Dir 64/221/EEC).

According to the report on facts, an immigration officer at the airport interviewed Ms van Duyn. On the basis of the facts given there at that time, the immigration officer regarded Ms van Duyn's presence in the UK 'undesirable' and decided to return her to the Netherlands. These facts were as follows:

[S]he had worked in a Scientology establishment in Amsterdam for six months, she had taken a course in the subject of Scientology, she was a practicing

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<sup>7</sup> Speaking analytically, the Court indeed 'said the least'; it said the absolute minimum, the next to not saying anything.

Scientologist and she was intending to work at a Scientology establishment in the United Kingdom. (1340.)

In its request for a preliminary ruling, the British court wanted to know whether a Member State is ‘entitled to take into account as matters of personal conduct’ one’s connections with Scientology. More precisely, Ms van Duyn’s *association*, on the one hand, with Scientology, which is an organisation considered contrary to the public good, but not unlawful, and, on the other hand, her intention to take up *employment* in that organisation.

Let us now examine what the different participants had to say about this matter.

According to Ms van Duyn’s statements in the proceedings, her past activity had been blameless. She emphasised that both the activities of the Church of Scientology itself and of the people working for it are perfectly legal in the UK. Moreover, she submitted that ‘[m]erely belonging to a lawful organization, without necessarily taking part in its activities cannot [...] amount to “conduct”, because ‘conduct implies activity’. (1343.)

The Commission did not deny that association with an organisation generally belongs to the personal conduct of an individual, but this is not the point of Article 3.1 of the Directive. The Commission insisted that the unacceptability of that association is the decisive factor. For example, ‘a membership of a militant organization proscribed in the host Member State’ would be a relevant element in assessing someone’s personal conduct. But if the association is acceptable to British nationals, as in this case, it cannot be unacceptable to others, said the Commission. (1344.)

The UK government submitted that association with an organisation is relevant if the organisation in question is ‘sufficiently undesirable’ and if the association of the person in question is ‘sufficiently close’ to that organisation. ‘Whether, in any given case, such exclusion is justified will depend on the view the Member State takes of the organization.’ This view by no means needs to be expressed by making the organisation illegal in the country; ‘as is common knowledge’, said the representative of the government, ‘the United Kingdom practices a considerable degree of tolerance in relation to organizations’. What comes to the separate question of employment, the UK government held that it indeed ‘is a very material aspect of the individual’s personal conduct’. (1345.)

For Advocate General Mayras, ‘there is no doubt’ that the facts of the case ‘fall within the concept of “personal conduct” [...] and that mere association [...] with the Church of Scientology is an element of a person’s conduct’. The per-

sonal conduct requirement raised for him no philosophical problems concerning agency. The idea of that requirement is merely that the grounds of each exclusion decision are examined individually, he said, and the courts may review these grounds. (1358.)

The Court went further than the Advocate General, however, by producing a concise but full statement on personal conduct in relation to associations. The following can, of course, be contested from all sides, but as a position is nevertheless crystal clear:

Although a person's *past association* cannot[,] in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that *present association*, which reflects *participation in* the activities of a body or of the organization as well as *identification with* its aims and its designs, may be considered a *voluntary act* of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited. (1349, emphases added.)

After this agency-theoretical feat, the Court concludes that Member States need not make the activities of the organisation unlawful to take into account someone's membership in it. Rather, it is enough that a Member State has clearly defined its standpoint and taken administrative measures to counteract the activities of that organisation. (1350.)

To conclude this part, let me ask: What exactly about Ms van Duyn's personal conduct constituted a danger to the society? In my reading of the UK Minister of Health, Scientology is dangerous because it brainwashes people ('its authoritarian principles and practice are a potential menace to the personality and well-being of those who submit to them'). Granted, Scientology is dangerous, but is not, then, Ms van Duyn herself a victim of Scientological brainwashing, someone whose capacity for autonomous action is muted? If this is true, then perhaps it was precisely *this* fact that made her dangerous – that is, the fact that she could not 'act voluntarily' at all. Was her behaviour not 'personal conduct', but personal enactment of Hubbard's *dianetics* ('the modern science on human health', as he describes it)? Was she dangerous simply because she was *not* a free person?

Freedom of religion was out of the question in regard to Scientology, and far be it from me to claim that. The whole *van Duyn* dossier is carefully silent on the topic of religion. Nevertheless, it is clear that toleration of religious pluralism in liberal political societies formed the legal context of the case. As the Advocate General explains, the problem in *van Duyn* 'is one consequence of a particularly liberal government' in the UK (1359). While *van Duyn* could not in practice be

directed on legal-conceptual landing strip of the freedom of religions, it nonetheless directs our attention there. The more suppressed the question is in the discourse of *van Duyn*, the more exciting it becomes for a researcher. At a sub-textual level, if you will, the dangerousness of Scientology in *van Duyn* hints at the dangerousness of the proper religions too. They all undermine the autonomy of the personal conduct of an individual, do they not? On the contrary, someone might reply, religion always potentially legitimises ‘civil disobedience’ as truly personal conduct that is prohibited by secular norms but demanded by moral norms.

I will have to postpone the issue of religion for the moment. At this point, let me just note that the possibility that Ms van Duyn’s *forum internum* had been in such a way transformed by Scientology that she no longer acted voluntarily was clearly inconceivable to the Court, as it would have been to any court. This brings to mind that Ms van Duyn as an individual perhaps was not the dangerous thing in the case; the truly dangerous thing maybe was the suppressed anomaly underlying ‘voluntary action’. Because of its fear for that (that is, for the necessary suppression of the legally inapt anomaly accidentally brought visible in *van Duyn* by the UK Minister of Health) the Court misrepresented the problem and imposed on Ms van Duyn something that she apparently did not possess: the capacity to act according to her own will – that is, subjecthood. Does any of us genuinely possess this, or is it merely postulated by the legal system, is yet another big question.

## Bonsignore

*Bonsignore* was a case from Cologne, Germany, on which the ECJ ruled on 26 February 1975, less than three months after deciding *van Duyn*. In *Bonsignore*, the question confronted was the relation between exclusions in the law of aliens and convictions in the penal law. In this connection, Article 3.2 of Directive 64/221 (now Article 27.2 of Directive 2004/38/EC) provides that ‘previous criminal convictions shall not in themselves constitute grounds’ of *ordre public*. This does not mean that such convictions are insignificant, but merely that they do not constitute sufficient ground, because they do not necessarily say much about a person’s (present) dangerousness. What is it, then, that one must hold as constituting one’s ‘personal conduct’ if not his or her past deeds? Perhaps it is one’s future deeds?

I will again proceed by presenting each participant’s view one after another after a brief description of the facts. The participants in *Bonsignore* were

the *Oberstadtdirektor* (Chief Administrative Officer) of the City of Cologne, the Representative of the Public Interest before the Cologne Administrative Court, the Italian Government, the Commission, Advocate General Mayras, and the judges.

As in *van Duyn* case, I will divide the presentation into two parts: one part that deals more or less with '*ordre public*' and another part that deals with 'personal conduct'. In *Bonsignore*, however, the issue is not so much the clarification of a legislative text that refers to the external reality. Rather, in *Bonsignore*, Community law confronts the reality of the police and security services, to which the aliens authorities feel they belong. This creates, in *Bonsignore*, the need to draw boundaries between the 'system' that upholds that reality and the legal system.

Carmelo Angelo Bonsignore, a 20-year-old immigrant from Sicily, had accidentally shot to death his younger brother using a gun for which he had no permit. The Criminal Court of Cologne (*Amtsgericht*) found him guilty of causing death by negligence, but imposed no punishment because of mitigating circumstances. For his offence against the Firearms Law, he was fined.

The *Oberstadtdirektor* deemed Mr Bonsignore a threat to the *ordre public* and decided to deport him. Mr Bonsignore appealed this decision in the Administrative Court of Cologne.

The Administrative Court recognised that, according to Article 3.1 of Directive 64/221/EEC, deportations must 'be based exclusively on the personal conduct of the individual concerned'. This it took to mean that deportation is lawful only if 'there was a risk of repetition'. With regard to Mr Bonsignore no such risk was at hand, so the court held that 'the deportation order must be clearly "vitiated by error"'. Despite of that, the *Regierungspräsident* (Chief District Administrative Officer), who was the next to deliberate on the matter, declared that the risk does exist, and confirmed the deportation decision. Mr Bonsignore then returned to the Administrative Court to have the decision finally annulled. (310.)

The Administrative Court decided to request a preliminary ruling from the ECJ on two counts. Firstly, is it possible to exclude someone 'for the purposes of deterring other foreign nationals' (criminal law 'general prevention')? That question can be viewed as one about the interpretation of the meaning of '*ordre public*'. Secondly, need there be 'clear indications' that a convicted person 'will commit further offences or will in some other way disregard public security or *ordre public*' (criminal law 'special prevention')? That question, in turn, can be viewed as one about the meaning of 'personal conduct'. (300.)

If in *van Duyn* virtually no manifest discussion of danger occurred, in *Bonsignore* danger came from every side, especially in the submissions of the national authorities. This is how the *Oberstadtdirektor* saw the duties of the authorities handling the *ordre public* (*öffentliche Ordnung*):

The task facing the administrators of the police and security services is not only to put an end to existing disturbances, but also and primarily to provide a preventive defense against dangers threatening public security and *ordre public*; such a 'danger' may consist in the possibility of harm which the competent authorities, on the basis of their experience, consider likely to occur. (300.)

Let us see now what the representatives of the police and security services said in the proceedings of *Bonsignore*.

The *Oberstadtdirektor* first drew upon the German aliens legislation that according to him regarded offences against firearms regulations 'as of particular danger to the peaceful, secure coexistence of Germans and foreigners' (300-301). This was indeed the way in which the German Federal authorities instructed the German aliens authorities to apply the national aliens law: certain offences, such as the illegal possession and trafficking of guns and narcotics, 'must, in principle, result in the deportation of aliens who are responsible for them' (312). According to the *Oberstadtdirektor*, foreigners who commit these offences 'constitute a particularly serious threat to the peaceful coexistence of a large population which is concentrated – in the large towns – in a restricted area' (301).

The *Oberstadtdirektor* explained, however, that people such as Mr *Bonsignore* must be expelled primarily because the acts for which they are convicted 'are of particular danger to the population', while the 'desirable consequence that news of such a [deportation] measure spreads and has an unquestionable deterrent effect' is only a subsidiary ground for taking this measure (301).

The Representative of the Public Interest, intervener in the action before the Administrative Court, held that the concept of *ordre public* is 'developed in legal systems based on Roman law' and embodies 'all provisions drawn up in the general interest' (301). The crucial part of that general interest is 'an interest in maintaining the respect of foreign workers for the German system of law and order' (301).

Foreigners, especially, need to be integrated 'into the existing order', that is, 'into the way of life of the Federal Republic' (302). This involves 'instilling an awareness of the importance of public security and order, in particular in large industrial centres', said the Representative of the Public Interest (301). In cases such as Mr *Bonsignore*'s, deportation 'is necessary as a collective deterrence', and

the collective deterrence in general is an important means ‘in the context of the maintenance of order’ (302).

Moreover, deportations of foreigners, including deportations of Europeans, ‘are objectively justified [...] when they are capable of fulfilling their purpose of acting as a deterrent’. This fact of purposiveness is what makes them also ‘lawful according to the directive, as being measures taken on grounds of *ordre public*’ (302). In other words, in the context of *ordre public*, ends and expediency justify the means.

In their defense before the Cologne Administrative Court, the national authorities had also drawn on the fact that ‘offences by aliens involving the use of arms had risen to a substantial degree.’ Therefore, in their view, ‘a further increase in these crimes of violence must be *countered* by the immediate expulsion of aliens who [commit these crimes and] had come to the notice of the authorities’ (310).

This suffices for the presentation of the views of the aliens authorities; let us now turn to the responses of the other participants.

The Italian government, an intervener in the proceedings, said that the meaning of the personal conduct requirement is precisely that such things as general prevention, that is, the use of deportations of individual foreigners as a means to deter/integrate other foreigners, are not permitted as grounds for exclusions. In addition, Italy was of the opinion that exclusions of Europeans in order to deter other foreigners in the country would be ‘both contrary to principles of justice and equity and incompatible with the very foundations of the Community legal system’ and ‘might lead to a real discrimination based on nationality’ (303).

The Commission, in turn, held that the personal conduct requirement in Article 3.1 of the Directive, which for the Commission means that each case must be examined individually, ‘is also valid as regards the objective sought by such measures’. Therefore, ‘the desire to deter other foreigners [...] must be [...] irrelevant’ (303). ‘This interpretation’, said the Commission, ‘corresponds to the spirit and objective of the directive’ (304).

It is clear that neither the Commission nor the Italian government engaged in the discourse started by Cologne authorities. The basic parameters within which the Commission and the Italian government moved were not those of security and danger, but the principles of justice and equity, the foundations of a legal system, discrimination, the spirit and objectives of the law, etc. These matters were not at all the concern of the alien authorities. Their presumption was, perhaps, that these other parameters just do not count because one simply *derogates* from what they constitute, that is, from the law *qua justice*. Would such exit

from the law then be an entrance to a free space of juridical indiscernibility? Or is it rather an entrance to another kind of law, that of law *qua order*?

By contrast, Advocate General Mayras did engage in a discourse with the authorities of Cologne. First of all, he recognised the ‘fact that in the industrialized countries which provide employment for large numbers of foreign workers, statistics [...] show that certain forms of criminal behaviour are peculiar to the immigrant population’ (312). This is explained by what ‘[s]ociologists would term [...] a feeling of alienation’, that is, a failure to adapt due to a variety of structural causes that amplify the ‘feeling that in practice they remain outside society in the host country’ (312).

Consequently, AG Mayras envisioned a possibility that the system for derogation from the freedom of movement could have been created differently from what it was, and more in the way of the German *Ausländergesetz*. Thus, one could imagine a list of offences likely to be ‘contagious’, that is, a list of the types of misbehavior that threaten to spread throughout the population as infectious diseases travel from one body to another. Were the Community authorities to promulgate in public such ‘offences which are considered to involve [...] a risk of “contagion”’, it would secure uniform application of the derogations from the freedom of movement in Member States. As good as this may sound, it ‘is not the system employed by the Council directive’. (313.)

Instead, the system requires that each person’s conduct be assessed individually ‘to remove any possibility of [...] taking security measures of a collective nature in respect’ of Europeans. Moreover, AG Mayras considered it ‘necessary to go still further [...] by acknowledging that the concept of personal conduct and the desire to act for reasons of a general preventive nature are *incompatible* and *irreconcilable*’ (315, emphasis added).

This may suggest that incompatibility and irreconcilability indeed also lie between the two ‘systems’, the legal system and the system of police and security services (or alternatively between *the law qua justice* and *the law qua order*). As for Mayras, this seems *not* to be the case: he is well prepared to imagine another kind of *legal* arrangement based on a promulgation by Community authorities of a defined variety of misbehaviour, and that establishes the sanction of exclusion thereupon in a more formalistic manner. Notably, this solution, warmly recommended by Mayras for the future, would accord with the positivist logic of the legal norm: delict-imputation-sanction.

Mayras was convinced that the EC legislator should move in this direction: then ‘the grounds of deportation would have to be based on Community criteria

which would be uniformly applicable'. This would in Mayras' mind represent a considerable step in the progress of integration:

At least we will then have abandoned once and for all the old concept of deportation, which is a security measure available at the discretion of the administrative authorities and which gives them the power to expel 'undesirable' aliens from their territory, and was in practice, until quite recently, not subject to an effective review by the courts. (316.)

As for the idea that deportations of individual foreigners would deter other foreigners, Mayras was sceptical. He reckoned that exclusions bear something that 'satisfies the feeling of hostility, sometimes verging on xenophobia, [...] in the indigenous population' rather than any sincere efforts at governing life in society towards peaceful coexistence (315).

Finally, the ECJ judges provided little discussion of the concept of *ordre public* this time. In their ruling, they merely stated that derogation from the freedom of movement 'cannot be justified on grounds extraneous to the individual case', and therefore Community law 'prevents the deportation [...] if such deportation is ordered for the purpose of deterring other aliens' (307).

To sum up the foregoing, one could say it is confusing that the *legal system* of TEC Article 48 and Directive 64/221, based on a combination of *ordre public* and personal conduct, seems somehow to undermine what one is used to having as the heart of hearts of all law: the formalistic logic of imputation. Instead, *ordre public* derogation based on personal conduct seems to establish a kind of Khadi-justice system in which one decides things on a case-by-case basis, not according to publicly promulgated rules of law. One becomes even more puzzled as it also seems that the representatives of the police and security services, who should follow another kind of rationality than that of the legal system, really emphasise the importance of the pre-established categories of offences that would automatically effect the administrative consequence of deportation.

At this point, we must shift the focus to the problem of 'personal conduct' in *Bonsignore*. This problem further illustrates the difference between the ideal-typical systems of law and security service, as well as the real confusion between them that is at hand in *Bonsignore*. To begin with, the Advocate General provides us with a brief, but still relatively detailed description of the concrete event that triggered the whole process:

Mr Carmelo Bonsignore, an Italian national born in Sicily in 1950, arrived in Germany in October 1968. He was employed at the Ford works in Cologne as a chemical worker. In May 1971 he unlawfully purchased from an unknown

person a 6.35 calibre automatic Beretta pistol and cartridges. He did not possess a firearms permit.

Several days later, on 30 May, during a family meal at his sister's home he produced the pistol which he had just obtained, wishing to show how it was fired. He removed the magazine and found that a cartridge remained in the breech. He attempted to remove it but was unsuccessful. Being unfamiliar with the handling of firearms he unintentionally pulled the trigger and his young brother, Angelo, who had recently arrived in Germany, was fatally injured in the head by the bullet. (309.)

As we know already, the Cologne Criminal Court (*Amtsgericht*) held that he was guilty of causing death by negligence, but did not impose punishment on that count due to mitigating circumstances. These mitigating factors were that Mr Bonsignore was 'young and inexperienced' and 'very deeply affected by the death of his brother', had 'in no way attempted to deny his liability', and promised 'never again to touch a gun' (309-310). Therefore, the *Amtsgericht* found 'that no purpose would be served' by punishing Mr Bonsignore 'in view of the circumstances, notably the mental suffering caused to [Mr Bonsignore] as a result of the consequences of his carelessness' (305).

As mentioned earlier, Mr Bonsignore was sentenced to a fine for illegal possession of a firearm.

Thus it appears that the *Amtsgericht* (the Criminal Court) had in fact arrived at a completely different estimation of Mr Bonsignore's person and conduct than did the *Oberstadtdirektor*, who found that Mr Bonsignore 'is not prepared to obey the German system of law and order' (310). Generally speaking, for the *Oberstadtdirektor*, the personal conduct requirement posed no problems in cases such as *Bonsignore*: 'a foreigner convicted of an offence always supplies the reason for his deportation by his own personal conduct' (299). The Representative of the Public Interest supported this by stating that 'Mr Bonsignore invited deportation by infringing upon German firearms legislation, that is, through his personal conduct' (301).

Offences that relate to firearms are not ordinary offences, but are particularly dangerous. Therefore, according to the alien authorities, 'the unlawful acquisition and possession of firearms is a threat to public security and public order and, for this reason, justifies a deportation order' (301). In other words, carrying a gun illegally is an offence 'the very nature' of which 'conceals a potential danger for *ordre public*' (312).

This attitude towards guns is fully agreeable, but the fact remains that the German court had sentenced Mr Bonsignore to nothing more than fines for this

particularly dangerous offence, which was, I believe, in line with the routine way in which Germans themselves were treated for the same offence. Therefore the problem boils down to the different status of German nationals and foreigners, or, in the EC context, to the discrimination of the latter. This is perhaps envisaged by the statement of the German authorities according to which ‘it is intolerable that foreigners enjoying the hospitality of this country should be allowed [...] to become a constant danger to the (national) population’ (310).

Viewing the idea of personal conduct in the framework of social philosophy, the perspective provided by the alien authorities on ‘freedom’ in this connection is interesting. They said that the ‘Community is obliged to acknowledge [the right to freedom of movement] only if it does not adversely affect *ordre public*; the consequences of “*undue*” freedom of movement are contrary to the purpose sought’ by the Community legislator. The ‘achievement of *peaceful freedom* of movement’, which corresponds to aims to integrate foreigners into the German society, requires that deportations be ordered for purposes of the collective deterrence of foreigners. (302 – emphases added.)

The Italian government, in its turn, recalled first of all that previous criminal convictions as such are expressly prohibited as grounds for deportations in Article 3.2 of Directive 64/221. In the view of the Italian government, the personal conduct requirement of Article 3.1 means ‘that a close and special *correlation* must exist between the expected threat to *ordre public* and the conduct of’ the foreigner to be deported. To make it even clearer, the Italian government restated that ‘the directive requires the existence of a *chain of causation* between the conduct of workers and the feared threat to *ordre public*’. (303, emphases added.)

The Commission also recalled Article 3.2, and offered, on its behalf, that the deportation of a convicted person can be ordered ‘only when, after a thorough consideration of all the facts of the case, it may be feared that the foreigner in question will again offend against *ordre public* and public security’ (304). The Commission thereby interpreted the expression ‘personal conduct’ such that it requires an analysis of future recidivism.

Both the Italian Government’s causality argument and the Commission’s recidivism argument bring to mind the classic question: What sort of object does a ‘free mover’ such as Mr Bonsignore become, if his past conduct is so thoroughly examined that one can indeed know, by causal necessity (!), what the person will do in future?

The Advocate General was clearly conscious of the controversies over the possibility of determining the probability of future recidivism. Despite these controversies, he (recalling the express prohibition, in Article 3.2 Directive 64/221,

to ground the deportation solely on a previous criminal conviction) clearly stated that the personal conduct requirement truly does demand an estimation of *the person* on the basis of his/her conduct.

The concept of personal conduct must be examined not only in light of the offences committed, but also in view of the 'potential criminality' of the offender, to use the language of the criminologists. (316.)

Thus the Advocate General held that there must be 'cogent evidence on which to base [the] opinion that there is a serious risk that the individual concerned will commit further offences or, more generally, represent, through his conduct, both past and foreseeable, a danger to the host State' (316). So there is a clear demand for the authorities to probe the inner spheres of the mind of the individual, to be able to estimate his/her future conduct.

Even the most violent crimes, such as murders, are not, if committed in 'a particular psychological context', sufficient evidence of the perpetrator's future conduct, said the Advocate General (311-312). Indeed, if, for example, a wife kills her husband after having been for many years battered, abused and mentally tortured by him, it is therefore not at all likely that she would commit more murders.

All in all, the meaning of what is covered thus far is that imposing punishments on the basis of offences determined in penal law *is completely different* from deliberating on the necessity of deporting these offenders. The one is based on an individual's past action, the other on his/her future action. After all, such a difference in 'rationalities' appears to be common sense, does it not?

The bewildering thing in *Bonsignore*, however, is that in fact it was the *criminal court* that made use of the future-argument in its decision not to impose punishment; the crucial thing about the mitigating factors was, in effect, that they provided a vision of the *future* decency of Mr Bonsignore's conduct. Thereafter, and in contrast, the *aliens authorities*, in their decision to deport Mr Bonsignore, acted on the basis of the 'sole fact' (302) of his *past* conduct regardless of the likelihood of him becoming a recidivist. Thus, an exchange of rationalities, if you like, seems to have occurred between these two powers.

Obviously, none of our criminal laws would ever allow convictions based on 'criminal mind' without the existence of an actual offence. Improbability or probability of recidivism can be considered only in connection with deliberation on the severity of the punishment. Yet there is one more aspect that should be added to the evidence of the vagueness of the distinction between the legal system and the 'system' of security and police service. Namely, the way in which

the aliens authorities lumped together the *ordre public* maintenance technique of *deterrence* and the criminal-law logic of imputation. Precisely this is traditionally meant by ‘general prevention’ that purports to justify coercive criminal law especially, but also reflects an idea behind any normative order that works by means of sanctions. The alien authorities seemingly felt that public sanctions that follow publicly defined delicts are the better way to influence a population, not the way of really trying to discover criminality in people’s minds. The alien authorities did not seem to care so much about their own, future-oriented, ideal-typical logic, but invoked the logic of law and made it serve, as a specific technique, the maintenance of social order. Nonetheless, their concept of law clearly was different from the one that is rooted in the professional habitus of every modernly educated lawyer ... is it not?

Be that as it may, we must now leave this matter and move forward.

The Advocate General also contributed to the action-theoretical discussion on freedom and agency. As one may recall, the aliens authorities discussed the detrimental consequences of ‘undue freedom’ and instead emphasised the importance of ‘peaceful freedom’. The Italian government insisted on ‘correspondence’ and ‘chain of causation’ between the individual’s conduct (the cause) and the social danger (the effect). The Commission, finally, assumed that one’s past personal conduct opens the way for predictions of one’s future personal conduct.

The Advocate General, in turn, grasped the idea of freedom and rights from the perspective of ‘the system established’ (314). That system is the Common Market:

[...] individual rights [...] are essential to the realization of the Common Market which, far from being limited to unhindered trade of goods, necessarily involves individual mobility and guaranteed access to the territory of each Member State for the purpose of employment there. (314.)

Thus, in this view, ‘rights are fundamental to the system’ (314) which explains the meaning of the rights: to enhance the ‘individual mobility’ (314) that carries on the life, the bloodstream, of the Common Market. This grasp of the matter, of course, is something quite different from the romantic idea of, say, constitutional and human rights, which, as is commonly suggested, recognises the intrinsic and invaluable autonomy (= reason + freedom) in every individual human being. From the perspective of the ‘system established’, rights and freedom, as well as, of course, the ‘workers’ themselves, exist to keep the engines of the Common Market roaring.

Finally, the judges of the ECJ were terse, but precise in their contribution to the issue of personal conduct. In their judgement, the Court stated that ‘the concept of “personal conduct” expresses the requirement that a deportation order may only be made for breaches of peace [i.e., of *ordre public*] and public security which might be committed by the individual affected’ (307; interestingly, ‘*gefährdungen der öffentlichen Ordnung*’, or ‘*des menaces à l’ordre public*’, translates, this time, breaches of *peace*, not of ‘public policy’). The Court thereby established a rule according to which the *future* conduct – ‘breaches that might be committed’ – is indeed significant and decisive.

In conclusion, one realises that all the participants in the proceedings of *Bonsignore* show in some way or other a tendency to view immigrants as objects: predictable, causally determined, etc. In fact, the most humane perspective on this plane seems to be that of the aliens authorities: they at least believe that immigrants are subjects enough that the authorities must try to *deter* them rather than to sophisticate with the inner conduct-determining mechanisms of their immigrant personalities. By far the roughest of these perspectives is that of the ‘system established’ (i.e., the Common Market), represented by the Advocate General. In this system, the migrant worker is not even a distinguishable object really, but a fluid, mere refill in the tanks of the supranational economy. Hopefully, the next case will change everything.

## Rutili

The next case is that of Roland Rutili, ruled by the ECJ on 28 October 1975, involving the events of May 1968 in France. As is well known, protest actions all around the country created considerable public disorder, which evidently was precisely what the participants hoped for. The existing French social order was, at least on the level of public discourse and cultural hegemony, shaken for a couple of weeks in a manner that was half carnival, half subversive.

The *Rutili* case changes considerably the direction of our story. Surely, the change occurred in *Rutili* not because of the time that had passed (there is only eight months between *Bonsignore* and *Rutili*), but because in *Rutili*, the participants were faced with a problem complex that very fruitfully combined political rights and procedural rights. Both types of rights assume a speaking subject. As specific question asked by the national court in *Rutili* was the meaning of the word ‘justified’ in the Article 48.3 (now 39.3) of the TEC, the case provides us with

an opportunity to reflect upon the justice aspect of the law, to elaborate on the *law qua justice* against the *law qua order*.

The participants in *Rutili* were the French Government, the Italian Government, the Commission, the Advocate General, and the judges. I shall again proceed by roughly presenting the perspectives of the participants one by one, but will not attempt to organize the exposition into parts about *ordre public* and personal conduct. These words do appear in the dossier of *Rutili*, but the participants themselves did not really speak of these concepts. Let us now explore what they did speak of.

Mr Roland Rutili was an Italian national who had lived in France all his life, worked there, had a French wife and three children with her. Mr Rutili participated in the political and industrial actions of the summer of 1968. Some weeks afterwards, the authorities decided to deport Mr Rutili from France, but soon revoked their decision, replacing it with another one which ordered Mr Rutili to stay in Puy-de-Dôme, one of the three *Départements* surrounding Paris. After two years of more bureaucratic hassle, Mr Rutili eventually received a residence permit that ordered him to avoid the district of Lorraine where he had thus far lived and worked, and where his family continued to reside.

Mr Rutili initiated proceedings in an administrative court (*Tribunal administratif*) in Paris to annul the decision that set limitations on his residence in France. In those proceedings, he invoked the rights enshrined in the EC law that should have guaranteed his freedom of movement anywhere in France. The Parisian court decided to request a preliminary ruling from the ECJ. In the request, the second question addressed to the EC court is of interest to us, namely, ‘what is the precise meaning to be attributed to the word “justified” in TEC 48.3 (now 39.3), which provides that rights of freedom of movement are subject to limitations justified on grounds of *ordre public* and public security?’

The alleged facts behind the decision to deport Mr Rutli were according to the French administration the following:

- Mr Rutili participated in the election campaign for the 1967 Parliamentary elections;
- he took part in subversive activity which occurred during the events of May 1968;
- finally, he played an active part in a political action during the 14 July demonstrations at Audun-le-Tiche in 1968. (1238.)

It is important to note that Mr Rutili himself was not informed of these reasons before the appeal proceedings in the administrative court. Let us now turn to the submissions of the participants in *Rutili*.

In its submissions before the ECJ, the French Government was apparently of the opinion that the *Rutili* case presented nothing new to the existing case law (*van Duyn* and *Bonsignore*). Thus, the French Government confined itself to reiterating some of the contents of the previous judgements. Accordingly, the word ‘justified’ means that restrictions on the freedom of movement must be based on *ordre public* which, crucially, is a concept that applies to different circumstances. These circumstances may vary from time to time and from country to country. The ECJ had recognised that national authorities have an area of discretion in determining what constitutes such circumstances. The personal conduct requirement was certainly fulfilled in *Rutili* in the view of the French Government, no doubts or problems arose from that issue. (1224.)

The Italian Government, an intervener in the proceedings, stated that ‘the term “justified” in the first place means that there must be an exhaustive explanation of reasons’ for the decisions, which is something that ‘seems manifestly not to have been done’ in Mr Rutili’s case. The Italian Government raised the issue of the importance of the requirement that ‘the person concerned shall be informed of the grounds [...] upon which the decision is taken’ in Article 6 of Directive 64/221. Needless to say, this is a prerequisite for the realisation of the rights of appeal, and, in Italy’s view, the decision cannot be regarded as properly ‘justified’ if these rights of appeal are not guaranteed. (1224.)

The Commission held the word ‘justified’ to mean that the decision ‘must be reasoned’. But the objective fact that such reasoning occurred is insufficient by itself; such reasoning must be explained to the person in question ‘to enable him to make use of the legal remedies’. Thus, guaranteeing the individual’s right to obtain information about his case is essential in ‘justifying’ a decision. In addition, the Commission opined that the grounds of *ordre public* can ‘be resorted to only in particularly serious cases’, since this constitutes a restrictively interpreted exception to the free movement of persons, which is ‘one of the underlying principles of the Community’. (1225.)

In its estimation of Mr Rutili’s personal conduct, as described by the French authorities, the Commission was of the opinion that it ‘can scarcely be considered to affect adversely the *ordre public*’. In fact, the Commission regarded Mr Rutili’s conduct as nothing but a ‘legitimate exercise of a freedom enjoyed by the public’. This freedom is established in the form of ‘fundamental human rights’ and recognised by all the Member States. The legally determined limitations to ‘public

freedoms' (that is, political rights) enable the simultaneous exercise of these and other rights, as well as the protection of society. The limitations are laid down in national laws and in international conventions: there can be no others. "These limitations form a basic criterion for determining at what point an activity may be regarded as constituting "a danger to society".' (1225.)

The Commission also discussed the concept of 'political neutrality' that describes the special limitations of political rights applicable to foreigners. The idea of this principle of old-time law of aliens is simply that foreigners are not entitled to participate in the political life of a country. The principle is enshrined in, for example, Article 16 of the European Convention of Human Rights, which provides that 'Nothing in [the] Articles [on political rights in the Convention] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.' In the Commission's view, the concept of political neutrality must 'be handled with care in the context of a Community which is trying to integrate the migrant worker more and more closely into the host country and which likes to emphasize its political aims'. (1226.)

Advocate General Mayras, who had also handled the two previous cases, *van Duyn* and *Bonsignore*, saw that *Rutili* provides the Court 'an opportunity to define more clearly the outlines of the concept of *ordre public*' (1237). He found that the concept is essentially about 'reconciling two different requirements':

- that of the Community which consists in achieving freedom of movement for workers;
- and that of Member States, which is concerned with the maintenance of *ordre public* within their territory. (1242)

Furthermore, the Advocate General held to his earlier views that *ordre public* is 'a relative matter' for which 'it is impossible to provide an exclusively Community definition'. Therefore, instead of attempting such a definition, the Advocate General found it 'more realistic' to discuss 'precisely what limits the Treaty and the directives [...] have set on the powers of the national authorities'. (1242.)

As for these limits, the procedural ones appear to be the most crucial in *Rutili* for the Advocate General. Article 6 of Directive 64/221 is 'an important provision which indirectly but clearly limits the powers of the national authorities in that it compels them to inform the person concerned of the grounds of *ordre public* upon which the decision is based'. Thereby, the decisions 'must contain a precise statement of the grounds relied upon by the Administration'. The

facts ‘must be clearly specified’ and the ‘person concerned [must] be informed of these facts’ (1242).

The Advocate General said that the person in question must be informed of the facts ‘before the decision is put into effect, in other words, at the latest when it is communicated to him’ (1242). This point of time appears in Article 6, according to which one ‘shall be informed of the grounds [...] upon which the decision taken in his case is based’. The Article presumes, however, that the national legal system provides the deportee with adequate remedies in the form of judicial review. If this is not the case, ‘those concerned must be enabled to make effective use of their means of defense before the administration has taken a restrictive decision in their case’ (1240).

The judges began their interpretation of the meaning of the word ‘justified’ in Article 48 of the TEC (freedom of movement shall entail the rights, subject to limitations *justified* on grounds of *ordre public*, public security or public health) by stating what seems to be obvious: ‘only limitations which fulfil the requirements of law, including those contained in Community law, are permissible with regard, in particular, to the right of nationals of Member States to freedom of movement and residence’ (1231). Yet all three cases studied here show that in reality this formulation (the analytic ‘meaning’ of which basically boils down to a tautology: the law requires that the requirements of law are fulfilled) states more than the obvious. In fact, it is a sign of a considerable achievement: the aliens authorities cannot step out of the legal region. In other words, the derogation clause provides them no way back to their normal business, that is, to the wide discretionary powers to act essentially in whatever way they find ‘conducive to the public good’.

The judges discussed the ‘requirements of law’ first from the point of view of substantive law and then from the procedural point of view.

As for the substantive law, the judges first reiterated what they had already said in their previous ruling in *van Duyn*: namely, the ‘Member States continue to be, in principle, free to determine the requirements of *ordre public* in the light of their national needs’, but in the Community context the concept must be interpreted strictly and its determination is subject to control by the Community institutions (1231). To this they added, however, the requirement that the individual’s ‘presence or conduct constitutes a genuine and sufficiently serious threat to public policy’ (1231).

The judges closed their discussion on substantive law by alluding to the European Convention of Human Rights and to its derogation principle of ‘necessary in a democratic society’. According to the Court, the substantive Community

law rules concerning derogations from Article 48 of the TEC 'are a specific manifestation' of this more general principle of human rights law.

The Court then moved on to discuss the procedural stipulations of Directive 64/221. The point to start with is that Europeans should have adequate legal remedies available to them in each Member State (3rd Recital of the preamble). The remedies available to the nationals of the host country should also be provided to Europeans (Article 8). If for some reason this cannot be realised, they may avail themselves of the system of Article 9, according to which the exclusion decision must not be made before the person in question has had an opportunity to make representations before an independent consultative body.

Most fundamental of these stipulations is the Article 6, which requires that the individual concerned be informed of the grounds of the exclusion decision. The Court specified in its ruling on *Rutili* that the Member State must provide the person in question with 'a precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence' (1233).

Why should this be so fundamentally important? There are of course all the important reasons that the participants gave and that I have carefully reproduced in the foregoing text. Yet none of these reasons is what I have in mind.

To explain the importance of Article 6, which also brings us to the conclusion of this paper, I must return to the beginning of this paper. There I suggested that these cases would demonstrate, in their discourse on the socially dangerous individuals, how the different thought-regimes coexist and clash in law. The one regime constructed human beings as objects, whereas the other regime viewed them as speaking subjects.

It is tempting to simply say that Ms van Duyn was treated as an object, Mr Bonsignore's treatment showed a movement towards the regime of subject-making, and Mr Rutili in the end enjoyed full recognition as a speaking subject, a citizen. But this is clearly not the case. Already in *van Duyn*, the Court stubbornly imposed on Ms van Duyn the assumption of voluntary action.

Moreover, one of the basic methodological precepts for me was to restore polyphony and not to let the judges' perspective dominate. This encourages one to go deeper still into other perspectives, herein, into the perspective of France in *Rutili*. One can there realise that Mr Rutili seems to be in fact the only one of these three who openly sought to create disorder, that is, to offend the French *ordre public*. His activity, however, was regarded by the learned lawyers as nothing more than the legitimate exercise of his political rights.

This latter consideration concerning one's political rights brings us to the heart of the problem. One of the things of which Mr Rutili was accused was his participation in the 14 July demonstrations. The date 14 July is the French National Day that commemorates and celebrates the bombardment of the Bastille fortress-prison in Paris in 1789. The events of May 1968 certainly cannot be regarded as comparable to the French revolution, but now that we have read through the *Rutili* case, we can see that there exists a crucial connection. In a way, the republican democracy in which we live and upon which today's legal system relies, was founded in 1789 by upsetting and overturning the *ordre public*. This explains profoundly why the facts of the case (Mr Rutili's participation in the political demonstrations) were legally defined as 'the legitimate exercise of political rights'. In a sense, there is a hidden allusion to the foundation of law (to the law-making violence of the constitutional moment) which forms the sub-text of *Rutili*.

Political rights share a clear affinity with the procedural rights applicable in courts of law. Both recognise the status of the individual as a speaking subject; both are triumphant manifestations of the subjectivising regime of thought. *Rutili* presents these two side by side eloquently in one text.

Yet there remains something more fundamental in Article 6 of Directive 64/221, which, once again, requires that the dangerous individuals be informed of the grounds of their exclusion. What constitutes a *social condition*, on the micro level, is not the mere conversation that people have with each other on subjects great and small (e.g., on the meaning of such tiny details as 'personal conduct' in Directive 64/221; or, more bombastically, on the meaning of the French revolution). Rather, the ground social condition is the condition in which one is *aware of the fact* that others observe and think about him/her. They make representations of me, and I eagerly want to know about these representations. If they conceal the representations from me, I am excluded; if they reveal them to me, I am included.

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68 NoFo 6 [April 2009]

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