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Rights as principles of adjudication -  
Ronald Dworkin's model of principles as  
a legal interpretation device applied to  
the problem of self-incrimination in  
Community competition law procedures

Master thesis  
20 points

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# PREFACE

## 1. INTRODUCTION

Prior to the publication of the Dworkinian productions *Taking Right Seriously* in 1977 and *Law's Empire* in 1986, Anglo-American jurisprudence tended to stock on theories that rejected the general possibility of legal interpretation. By the assistance of Ronald Dworkin, the target of scrutiny shifted from searching for answers to the question as to "What is the law?", to settling the dilemma as to "What is the proper perception of statutory law?". Dworkin directly addresses the problem areas that relate to the powers and the duties of the judicature. It is the shaft of the Dworkinian theory of law that, by granting and charging adjudication to make use of underlying principles of law in the process of legal argumentation, justice is principally and generally more effectively served. I dear to say that he marks a significant turnabout in legal philosophy.<sup>1</sup>

In the following study I am pre-occupied with the search for answers to two major questions. It is my intention to produce a substantial answer to the recently put question. The issue brings about the need to formulate the second question I believe. I will assuredly have to provide a practicable answer to the question as to what considerations guide adjudication in the process of rights discovery. I will proceed my analysis in accordance with the main thesis that the answer to the second question includes more than the law in its conventional sense.

I find it most plausible that the resolution to the second dilemma actually is the key to the genuine insight into the nature of law, why I aspire to look for a crucial point at which the two questions are inseparably connected to each other. My attempt to broaden the outlook on the intrinsic character of the law benefits from taking the point of view of a progressive theory of law. I consequently intend to seek justificatory arguments by employing well-founded theses that presume, illuminate and elaborate the similar point of unity that I trust exists.

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<sup>1</sup> Dworkin, 1977, pp. 345-350, Guest, p. 1, Lyons, Preface, p. XI.

## 2. THE OBJECT OF MY STUDY

My study is a sincere endeavour to shed light on the model of principles as pronounced by the legal theorist Ronald Dworkin. Dworkin presents a distinct program that touches the area of principled-based individual rights. I intend to examine the Dworkinian proposal for a correlation of legislation, adjudication and compliance. These judicial elements engender a normative system that seeks to explain the procedure of sound legal argumentation. Dworkin's threefold composition of interdependent factors is a structure of great complexity. It is a sophisticated idea of how judges had better settle hard legal cases. The operational mechanism is the spearpoint of my study. I intend to demonstrate that the Dworkinian program of law presents a descriptive scheme of rights as principles of adjudication, but also that it is a normative model that states the criteria of legal interpretation.

The clear delimitation of my study is somewhat problematic. The subsequent examination of a prospective right against self-incrimination in Community competition law proceedings calls for a thorough illustration, explanation and evaluation of Dworkin's theses of law. It is my resolute opinion that any well-founded conclusion about the existence and the scope of the subject matter can but only emanate from the genuine understanding of the theory of Dworkin on a whole. I consequently present an abundance of terms and conceptions. All the same, I try to give attention only to those theoretical components that I am convinced bring in their train the clarification of the principle of silence.

It is not my intention to produce a report on the model of principles, but rather on the law itself by putting on the eyes of Dworkin. As a consequence of my choice of demarcation, my analysis is rather concise. My study throughout takes the shape of a mixture of free rendering, analysis, criticism, elaboration and supplementation. I deliberately choose to integrate my own reflections into particular issues of controversy as soon as the problems are posed by the original theses. I resolutely maintain that this way of accomplishment serves my reader the best. In my opinion, any other course of procedure leaves the essay badly arranged. I make effort not to delve into issues that are not essential to the chase for answers to my put major questions. The vital points of my study are found in the epilogue.

Throughout my analysis I try not to take up a stand as to whether or not the Dworkinian plan of legal reasoning is an appealing line of action for judges to pursue. However, I am most aware of that an appreciating view with respect to the progressiveness, flexibility and justness of the mode of procedure permeates my scrutiny. I hence make effort to create an argumentative balance by putting forward notes of criticism. Whenever I am able to, I bring about counterarguments that in my opinion are persuasive enough to sap the scepticism of opposing legal scholars.

### **3. THE LAY OUT OF MY STUDY AND THE DEFINITION OF PROBLEMATIC ISSUES**

#### **3.1 AN ANALYSIS OF THE MODEL OF PRINCIPLES AND ITS SUB-THESES**

The mode of procedure of the Dworkinian model of principles is my main target of focus. If I am to take up a stand to the attractiveness of the mechanism, it is important to understand how principles intervene and work in adjudicative argumentation. I initially describe the features of the program quite thoroughly. My point of departure is the positivistic approach to law. Legal positivism is said to be the doctrine that the Dworkinian scheme seeks to disclaim or, according to some theorists, to elaborate and supplement.

I next make use of the idea of utilitarianism as another basis for my study of rights as principles of adjudication. The Dworkinian proposal for pre-existing political rights opposes economic utilitarianism, as it takes no account of any aspects of general welfare. Individual rights are according to Dworkin political trump cards that can not be challenged. By making a serviceable distinction between rights and goals, I endeavour to strengthen a favourable approach to fundamental rights. And by dismembering the legal materials to components that exist at a principled level, I hope to point at the risks that individuals face in rights controversies.

Sometimes two or more underlying principles of law compete or conflict. Duelling values may pull into different directions. Balancing acts might generate tie judgements, which are convenient results of the argumentation, though hardly proper outcomes of adjudication in lengthening. I hence continue my analysis by pondering over if the mere identification of competing principles means that judges perform accordingly. I claim that they must for certain decide on how to resolve the conflict. My rendering points at the prominent qualities of the technique of legal interpretation as a guiding device, as well as its boundaries.

I further represent the most compelling grounds to why specific requirements of justness and fairness can steer the decision maker towards the right judgement in hard cases. Judges are told to enforce but only political beliefs that they are sincerely convinced can make part of a coherent whole of the legal and political system of their community. This crucial constraint aids the discovery of the best theory of law. The Dworkinian program unfortunately does not prescribe a mechanical process. The plan but only intimates that there evidently will be hard cases for judges to settle, and that disagreements about the existence, scope and force of individual rights will be frequently brought to the fore. The practicable function of principles as guiding elements to legal reasoning is thoroughly reviewed.

### 3.2 AN ANALYSIS OF THE PROBLEM OF SELF-INCRIMINATION IN COMMUNITY COMPETITION LAW PROCEDURES<sup>2</sup>

Following my analysis in respect to the relevant features of the Dworkinian program, I apply the principle-based model to a rather delicate legal dilemma. The problem of self-incrimination concerns all court proceedings wherein individuals are made subjects of inquiry. I work by the thesis that the community has made a commitment to the citizens within its area of jurisdiction to ensure a certain minimum standard of constitutional protection. I presuppose that constitutional safeguards are enshrinements of foundational values and that principled standards engender universal political rights.

Fundamental rights relate directly to the integrity of private subjects. Above that, I believe that they are most significant to the very existence of western law-governed democracies. I reckon that it is not possible to disregard the symbolic value of these principled rights. They clearly aim at putting private parties at an equal footing with the superiority. My study presupposes that it is a duty of the legal machinery to ensure that parties of dispute, no matter their qualifying weight, are able to maintain their privileges, and in lengthening their natural interests.

The scheme of underlying principles of law within the system of European Community law reflects a semi-judicial plan in the sense that it does not consolidate most underlying norms as statutory rules. The Community charters do not support a principle-based right against self-incrimination. Such a procedural guarantee can nevertheless be confirmed by making a detour to the European Convention on the Protection of Human Rights and Fundamental Freedoms, to which each and every Member State of the European Union is a signatory.<sup>3</sup> The operational catalogue of individual rights is elaborated by the assistance of precedents from the Court of Human Rights in Strasbourg. The rights formulas are *prima facie* valid judicial terms of reference within Community law. The European Convention is the utmost guarantee against public violation of the integrity of citizens that live within the European Union.

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<sup>2</sup> See "En unions identitet", *Sydsvenska Dagbladet*, 2 October 2000, p. 2, "Stadga om medborgerliga rättigheter möter kritik", *Sydsvenska Dagbladet*, 15 November 2000, p. 4.

<sup>3</sup> Articles 6(1) and 6(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, Dated 4 November 1950.

## **4. LEGAL SOURCES AND LITERARY MATERIALS**

### **4.1 THE ORIGINAL PRODUCTIONS OF RONALD DWORKIN**

I have chosen the original publications of Dworkin as the points of departure for my analysis. This means that the focus of my attention are the productions *Taking Rights Seriously* and *A Matter of Principle*. I firmly believe that no commentary literature is ever able to provide the genuine understanding of the Dworkinian conception of law as Dworkin is himself by means of his own references. Accordingly, these sources of inspiration are given pre-eminence in my work. The weakness of my stance is of course that my reader must especially critically review the relevance, logics and reasonableness of my conclusions with respect to the original theory and with respect to its application to the dilemma of self-incrimination.

I am fully aware of that some of my own inferences are easy targets of attacks, since they do not take recourse to well-founded opinions of the legal doctrine. Yet, I claim that a sensibility to criticism must not necessarily be to my disadvantage. I believe that a fresh approach to conventional ideas is always a contribution to the legal discourse, as long as it is sincerely and conscientiously formulated and properly supported by stringent criteria. I am sure that personal convictions are valuable to the reader only if these are logical, and thus forceful enough to generate the reader's own reasonable conclusions about the persuasiveness of the original idea.

### **4.2 THE COMMENTARY LITERATURE ON THE DWORKINIAN THEORY OF LAW**

I make use of a large quantity of commentary literature in order to put forward criticism as well as supplementation to the Dworkinian model of principles. It is important to at first notice that the rendered evaluations are almost always loaded with political judgements. I have consequently aspired to present a discriminatory review of the commentary notes. In my opinion, it is inappropriate to make assumptions about the nature of law if one indiscriminately accepts each and every stated conception of the Dworkinian program.

The major benefit of making use of an abundance of analysing materials that represent conceptions of utter extremes, is that my own attitude to the Dworkinian idea can not be dismissed as merely a feeble impression of the common approach to the master theory. Another benefit is that the heterogeneous set of sources facilitates the discovery of structural weaknesses that I might had run the risk to overlook if I had but only reviewed the grand thesis from my own dogmatic point of view.

I have made references to legal adversaries that represent different aspects of political morality as well as different professions and different nationalities and cultural contexts. Still, I must admit to that my attention is devoted the views of contemporary polemics. These analysts are often American scholars, why they in general advocate a legal tradition that does not all willingly approve of legislative measures. They assuredly maintain a more progressive stance to adjudication than the conventional European jurists in the sense that they promote legal interpretation as the superior measure for detecting the sense of law. It is further reasonable to claim that my choice of influence means that certain conservative and liberal moral values are given a prominent position in my analysis.

In plain, I have utilized, rendered and supplemented the well-reputed productions of Rolando Gaete, Stephen Guest, Paul Gaffney, David Lyons, Joseph Raz and John Usher. The supplementary analysis of Hedwig Burg has been of great assistance to my rational elaboration of the thesis of legal interpretation within the model of principles. I make express references to these polemics whenever comments and conclusions evidently are of such originality that the originator himself must rightfully be given credit. References are made also when my own confirmations and rejections or supplementary theses are substantiated by the stated literary materials to such an extent that I can not rightfully claim their distinctive character.

### **4.3 THE LEGAL MATERIALS AND THE LITERARY NOTES WITH RESPECT TO THE PROBLEM OF SELF-INCRIMINATION**

Some notes must be stated concerning the legal and literary sources that assist my analysis of the problem of self-incrimination in Community competition law proceedings. My primary focus is on the precedents of the European Court of Justice and of the Court of First Instance respectively, and on the decisions made by the European Court of Human Rights.

I have given emphasis to two complex legal situations, that is the Orkem case and the Funke case. I reckon that these legal situations satisfyingly illuminate the Dworkinian mode of legal interpretation within the model of principles. The rulings depict the weak points of the implementation of principles into complex states. They hint at supplementary mechanisms that might provide judges with more accessible tools for rational decision making. I will penetrate the judgements thoroughly.

In regard to the domain of Community law, I have made references to commentary literature with the similar criteria and objectives as previously stated concerning the analysis of the Dworkinian model of principles, in mind. The quantity of commentary notes on the issue is extensive to say the least. Especially the views of C.S. Kerse, Koen Lenaerts, Luis Ortiz-Blanco and Takis Tridimas with respect to individual rights to be included in a Community catalogue, have been of utter most value to my study. The well-established legal theorist Walter Van Overbeek has been of particular assistance to my chase for a review and a revision of the Orkem formula of silence.



## PART I. THE MODEL OF PRINCIPLES AS THE DETERMINANT OF LAW

### 1. THE CONCEPTS EMPLOYED WITHIN THE MODEL OF PRINCIPLES<sup>4</sup>

The model of principles as presented by Ronald Dworkin is a liberal theory that consolidates the commitment of the community to protect the autonomy of every individual within its area of jurisdiction. The ideas of Dworkin are evidently coloured by his position as a jurist in general and as a judge in particular. I believe that they present an internal view of law that aims at justifying judicial activism. The argumentation is closely entailed with his own function within the legal profession. I am sure that it is not improper to claim that Dworkin's program depicts the work that the legal decision makers envisage themselves to be performing. I maintain that his approach to law is imaginative, well-informed and practical. Any aspects of intuition are, in my opinion, substantiated by a sincere endeavour to produce a stringent, logical and persuasive theory of law.

The essential term for Dworkin to engage is the *nature of law*. The history of the legal institutions is the progressive expression and accomplishment of the less distinct moral values of the community. The law can not be understood by scrutiny of its pedigree, that is its historical and demonstrable facts. True knowledge emanates from the examination of its content, why the legal system must be evaluated from a moral point of view. The Dworkinian program asserts that objective moral principles exist. These standards justify the law and challenge the judicial institutions. Proper legal interpretation links to a perspective of *law as integrity*. By pursuing this view, Dworkin personifies the legal system in the sense that he awards it a moral character.

In order to establish the underlying principles of law, Dworkin makes use of a set of explanatory concepts. *Interpretation* seems to be a key word to Dworkin. He clearly refutes the less meaningful method of merely describing what the law implies. The procedures of decision making, principles and moral and political values are rather steered by our own *judgement*. If judgement is accepted and allowed to play a vital part in an argumentative process that seeks to make the best sense of common practises, then judges need to sophisticate their skills of judgement.

The Dworkinian comprehension of law is obviously the one that provides the law with the best moral sense. Dworkin clearly presuppose that individual rights and obligations do make moral sense. It is a prerequisite of the model, or perhaps even the ultimate aim of the theory, that a master principle ensures that individuals are treated with *equal concern and respect*. This absolute right relates to the logically sound nature of the law. The law must always be thought of as giving diverse vent to the equality of man. Aims that concern common welfare are for certain not able to trump the grand principle. By not letting policy, as a utilitarian concern, violate individual rights, the judicature *takes rights seriously* according to Dworkin.

Not every legal dilemma can be resolved by reference to express rules. Dworkin denominates these states as *hard cases*. Adjudicators must unconditionally accept the presupposition that

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<sup>4</sup> Dworkin, 1977, pp. 98-100, 294-327 commenting on the reflections of the theorist Richard Posner, Gaffney, preface, i, pp. 1-4, Guest, pp. 9-13.



there is always *a right answer* to every put legal question. That specific answer might not always be demonstrable however. In complex situations, Dworkin requires judges to argue by means of *principles*. Unlike *rules*, principles do not steer judges towards the correct decision, but provide compelling grounds for one particular judgement. I accentuate that the underlying principles of law to most parts directly relate to specific *individual rights*.

In all, these statements indicate to me that hard case adjudication is always, and utterly, a perpetual arguing pro and con conflicting claims of *political morality*. I lay stress on that moral premises must be elaborated in the light of *coherence* of legal reasoning. Legal practise is preferably to be thought of as the penning of a *chain novel*. Each and every legislative and adjudicative measure of the past connects in an integral circuit to all legal decisions henceforth to be made.

## **2. AN ILLUMINATION OF THE UNDERLYING STANDARDS OF LAW; THE RULE-PRINCIPLE DISTINCTION AND ITS ENGENDERED PRINCIPLE-POLICY DISTINCTION<sup>5</sup>**

### **2.1 THE RULE-BOOK CONCEPTION OF LAW VERSUS THE THEORY OF RIGHTS<sup>6</sup>**

Dworkin makes a distinction between two types of conventional ideals that define the rule of law. The first is a rule-book conception of the legal system. This black-letter notion impedes the state from exercising powers in relation to individuals when no express legal standards are enacted in documents to which all citizens have access. Rules are valid until they are changed accordingly. The doctrine puts comfort in the predictability of the system. Dworkin describes its character as one dimensional. According to Dworkin, this positivistic conception of law does not guarantee justice, since also rules that do not relate to the underlying principles of law enjoy legal force. The rule-book forms the exclusive embodiment of the endeavour of the community to recognize foundational rights.

The opposite conception of the rule of law is defined by Dworkin as a theory of rights. He lays stress on its ambitious character and great complexity. The rights thesis presupposes the existence of moral rights and duties of individuals with respect to each other and to the superiority. As far as possible, these rights are enforced by adjudicative means. Courts and other legal institutions reason by arguments of principle when they consolidate individual rights. Dworkin rejects that judges ever appeal to arguments of policy, since such points promote the general welfare or public interest at the expense forceful individual privileges.

The preference to read off clauses from the point of view of rules or principles respectively, affects the stance to hard case adjudication. The ultimate question for the leader of the rights conception is whether or not the plaintiff enjoys the moral right to achieve what he demands in court. The defender of the plain-fact attitude to law on the other hand, awards individuals merely a prima facie privilege to achieve the end that the legislator has previously fixed.

When the rights conception of law awards individuals powers, the rule-book view does not. The former notion enables individuals to call the need for a review of their feasible rights. Dworkin confirms that minorities will gain more from accepting the rights conception of law, since the transferring of decision making from the legislator to the judiciary puts them on an equal footing with the majority.

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<sup>5</sup> Dworkin, 1977, pp. 22-28, Dworkin, 1985, pp. 11-23, Dworkin, 1986, pp. 5-7, Burg, pp. 79-81, Lyons, pp. 87-90.

<sup>6</sup>Dworkin, 1977, p. 348, Burg, pp. 24-31, Gaete, pp. 30-31, 65-66, Gaffney, pp. 9-13, Guest, pp. 108-112, 117-127.

## 2.2 THE DWORKINIAN CONCEPTION OF RULES<sup>7</sup>

Rules are identified by their pedigree rather than by their content. These norms get the benefit of legal force by reference to themselves. Dworkin perceives rules as applicable in an all-or-nothing fashion. They point out specific judgements in a decisive manner. In other terms, rules are in themselves conclusive grounds for action by the decision maker. Their dictating answer to legal questions must be accepted by the court and by the public. Judges do not rule *de jure* if they do not follow the stipulations of law. Judges have to take notice of the possibility of exceptions to rules before confirming a lack of applicable statutory standards. Every exception to a rule can, at least in theory, be enumerated. By means of an enlarged list of exemptions, the completeness of rules enhances. I reckon that their value as legal mechanisms thereby improves.

Rules within the same legal order are not intended to conflict with each other. This is the utter aim of any legal system that aspires to be properly constructed. It causes great inconvenience to legal administration when more than one statutory rule makes itself heard, assuming of course that they express competing interests. Dworkin looks upon duelling rules as occasions of emergency. These rare occasions imply that a future decision will come to change the set of standards thoroughly.<sup>8</sup>

Contradictory rules simply can not coexist within the same theory of political morality. A conflict of rules indicates that one of the rules is not valid. The particular rule must be pointed out and removed or revised. The mode of procedure works by means of the norms that underlie the rules. The statutory rules themselves remain passive.

Conflicting rules are either revised or removed from the judicial system according to Dworkin. Sceptics are dubious about the invalidity of a conflicting rule. They assert that rules are not always remodelled in practise and that they sometimes remain part of the legal system after all. At times, different meta-standards allow rules, which Dworkin ascribes no force, to prevail within the area of law. The hierarchy of rules, as arranged for instance by the set of norms of *lex specialis*, *lex superior* and *lex posterior*, calls for reasons not to apply a particular stipulation, but not for its remodelling or its abandonment.

## 2.3 THE DWORKINIAN CONCEPTION OF PRINCIPLES<sup>9</sup>

When rules are standards that develop points of law in a sense of realism, the underlying principles of law are ideals. Dworkin confirms that principles are always propositions that define individual rights. It is illuminating to my analysis to describe rules as real ought statements and to define principles as ideal ought statements.<sup>10</sup>

Principles tend to conflict also within well-constructed legal machineries. This does not indicate that they are contradictory however. They are all the same fully capable of living together within the same theory of political morality. They do not compose evidence of

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<sup>7</sup> Dworkin, 1977, pp. 17-22, Burg, pp. 24-31, 79-81, 92-98, Gaete, pp. 30-31, 65-66, Gaffney, pp. 9-13, Guest, pp. 108-112, 117-127.

<sup>8</sup> Dworkin, 1977, p. 73.

<sup>9</sup> Dworkin, 1977, pp. 46-48, 57-64, 71-80, 90, see p. 47, note 1, Gaffney, pp. 43-51, Guest, pp. 60-64.

<sup>10</sup> Burg, p. 98.

default of the legal order. In the administration of justice, conflicts call for compromising resolutions by means of balancing acts. Principles accordingly have to be inserted to schemes of costs and gains. Dworkin disclaim that that a competition between principle-based costs and gains leaves adjudication with an occasion of emergency. Duelling principles are if anything part of life.<sup>11</sup>

Underlying points of law constitute pure promotions of good or aims to protect valuables.<sup>12</sup> I assume that by the term pure statement is meant that the points are free from exceptions. The function of the clues is to manifest the objectives of the law, which themselves work on a principled level. In other words, principles are legal standards that must be upheld, not because they will advance or secure desirable economic, political or social ends, but because it is required on grounds of fairness, justness or morality.<sup>13</sup>

Principles pleasingly regulate real dilemmas with the points of law in mind. They show no indications of linguistic restraints. On the contrary, they attractively predict future controversies. In my opinion, principles serve as menders of non-ideal flaws such as legal gaps and obscurities, conflicts between provisions and contradictions of rules with moral values. In addition, I state that they set out the objectives of the legal order by reference to political morality. This is a quality of utter most importance to legal evolution<sup>14</sup>

Principles can not be identified, interpreted or enforced mechanically. Even so, they enable the right answer to a legal dilemma to get a foothold in law itself, also at times when statutory rules have been exhaustively scrutinized and legal formulas can only be justified by a non-deductive arguing. I maintain that principles at the least offer parameters that facilitate judges' structuring of reasonable options. Principles never prescribe specific predestined or imperative resolutions. I say that principles rather argue in favour of certain points of direction or produce indispensable reasons for a specific stance to a controversial right. Judges must necessarily and sincerely consider the principles that call for attention.

Albeit constituting a part of the judicial order, vivid principles must not automatically intervene a final formula. When adjudication does not let itself be guided by principled values, it does not mean that the course of legal reasoning is defective. Dworkin asserts that incorrect rulings but only appears when judges do not show that they have conscientiously considered the applicable principles. It seems to me as if principled standards provide adjudication with prima facie arguments for specific judgements.

According to Dworkin, the law does not rest upon one superior meta-principle that is capable of overruling each and every statutory standard. I assert that the plurality of principles is actually a fundamental conception within of his program.<sup>15</sup> I suppose that several compatible top-level principles exist in consensus in one and the same theory of political morality. They do not need to be officially declared valid. Nor do they call for any informal recognition in the sense that they must be acknowledge by the political life of the community. I expect that Dworkin claims that their acceptance is often the result of accident.<sup>16</sup>

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<sup>11</sup> Burg, pp. 99, 101.

<sup>12</sup> Burg, p. 100.

<sup>13</sup> Dworkin, 1977, p. 22.

<sup>14</sup> Burg, p. 104.

<sup>15</sup> Burg, p. 13, see note 8 referring to Raz who expresses doubts as to whether or not a plurality of principles at the top is actually intended by Dworkin.

<sup>16</sup> Burg, pp. 12-14.

## **2.4 PRINCIPLES' DIMENSION OF WEIGHT<sup>17</sup>**

Principles have a dimension of weight or importance that rules are devoid of. In the case of thwarting principles, their relative weight must be sought and found. The exact proportions of importance can not be demonstrated of course. The notion of a dimension of weight seems to me to be a mechanism of less specification. Albeit controversial, it works as an indicator of which principle is the more important one. Dworkin maintains that it will render meaningless if not some principles objectively bear more weight than others. It is not for judges to discretionary prefer some standard to another.

Even less weighty principles form part of the legal system. The validity of principles remains even if the principles do not prevail the pertinent course of reasoning. The weight of principles can render differently under other factual circumstances. Dworkin evidently perceives principles as important elements of something good waiting, in an unqualified shape, to be realized by adjudication.

## **2.5 COMPATIBLE AND INCOMPATIBLE PRINCIPLES<sup>18</sup>**

The Dworkinian model of principles captures but only principles that are compatible in the sense that they live together within one coherent theory of political morality. Incompatible principles are fundamentally irreconcilable in this aspect, why one must be invalid and removed from the judicial order. To the observant reader this situation reminds very much of the situation of conflicting rules. Dworkin lets us know that inconsistent principles are useless to sound courses of legal reasoning.

Dworkin refers to the two clusters of principles as competing and contradictory principles of law respectively. The Dworkinian view is most fundamental I believe, since it does not automatically entail incompatibility of values with the sacrifice of interests. Adjudication might for instance have to sacrifice the efficiency of prosecution to the procedural right of individuals to remain silent in public inquiries. I assert that the exemplified values are not contradictory within the model of principles, because they can logically coexist within one coherent theory of political morality. They appear to be compatible. They nevertheless compete for adherence. I adduce that this goes for most underlying principles of law.

## **2.6 INCOMMENSURABILITY OF PRINCIPLES<sup>19</sup>**

Incommensurability must be kept separate from incompatibility. The former conception refers to the lacking of a common unity in terms of which elements can be weighed at each other. The definition settles that no standards can be found to even make a comparison between the principles at issue. Incommensurability surely does not indicate incompatibility. Even if two norms can not be put in the same scale, they can coexist within one coherent theory of

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<sup>17</sup> Burg, p. 85-87, Dworkin, 1977, pp. 26-28, 35, Gaffney, pp 46-47.

<sup>18</sup> Burg, pp. 87-88, Dworkin, pp. 268-269.

<sup>19</sup> Burg, pp. 116-119, Gaete, p. 142.

political morality I believe. I accentuate that the adverse comprehension is true as well. Incompatibility does not mean incommensurability. Albeit not able to live together within the same theory of law, there might be standards that fix the relative weight of the principles. It is then practicable to conclude which one political morality preferably promotes.

I say that judges are required to designate an exact weighing device or even one single measuring instrument in order to confirm the commensurability of competing principles. A ranking device ought to be a sufficient and an efficient measuring tool. If my inference is correct, it indicates that principles can be regarded as commensurable if they can be ranked relative to each other in terms of less and more appreciable. If my conviction on the other hand is erroneous, it implies that principles generally are incommensurable, since they call for the need for one single measuring unit that is capable of resolving the conflict of disparate interests.

It is not a matter of course that adjudicators must choose either line of action. Rationality does not have to be preferred to cardinal or ordinal ordering or vice versa. I trust that in the context of my analysis, it is not that important to take a stand. It is however of uttermost importance to disclaim that a single underlying scale exists, on which all possible conflicts of principles can be positioned. My disavowal links to the important Dworkinian rejection of a meta-principle in terms of which every value can be evaluated. I expect that Dworkin tries to prevent courts from taking the easy way out when managing complex rights issues.

## **2.7 THE POWERS OF PRINCIPLES<sup>20</sup>**

The core of positivistic consideration is that principles do not bear the capacity of being binding standards. According to Dworkin this statement is false. A principle might not be binding in a particular case due to its irrelevance to factual circumstances or because it does not need to be observed by the specific settling public official. Dworkin confirms that no qualities in the logical nature of principles do on principle intimate the incapability of principles to be binding elements of law.

According to Dworkin there is no need to complicate the analysis of principles in a manner that is not done when rules are objects of review. A binding rule must be recognized by judges. If rules are neglected, a mistake has been done. On that issue, legal positivists and advocates of the model of principles can agree. Though Dworkin pushes the limits somewhat further. He does not only morally, or even institutionally, constrain the judiciary to acknowledge relevant principles, but he hints also at an obligation to enforce principled rights and duties. He surely calls in question why the coercion to secure individual rights differs from the constraint to impose obligations that are stipulated by rules. Seeing no difference, he is dubious about why principles and policies should be considered as extra-legal codes and not as components of the law.

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<sup>20</sup> Dworkin, 1977, pp. 28-31, 35-39.

## 2.8 THE PRINCIPLE-POLICY DISTINCTION<sup>21</sup>

According to Dworkinian terminology, policies embrace standards that fix community goals of achievement. Generally they are set out to facilitate economic, political or social aims. Positive ends are usually sought. Though negative goals, that seek to protect previously established features of the community, are not unlikely to work as prompters of policies. Dworkin admits to that his discrimination miscarries when a principle can be depicted as stating a policy. A law-governed society in which individuals need not contribute to their own conviction in court procedures might for instance be desirable.

A policy can likewise be thought of as stating a principle. The official objective to ascribe individuals a procedural guarantee can be considered as commendable and thus state a principle. It is even plausible that principles are actually covert community goals. I lay stress on that invokeable rights can certainly initially have been created due to some policy standard, only to have become outlined in accordance with specific principles that justify the safeguards. I observe that this approach calls for a praise of the utilitarian precept of safeguarding the greatest number of happiness in some form or the other.

In the chase for political morality, the judiciary must make a distinction between, not only rules and principles, but also between arguments of principle and arguments of policy. The rights thesis holds that legal formulas on principle generate out of principle, and not out of policy. When recourse is taken to arguments of policy, the political decree is justified in the sense that the rights formula secures a particular collective end of the community. On principle, Dworkin repudiates every decision that circumscribes an individual right in order to improve the benefits of the bulk of society. Aspects of economic policy or public efficiency are not able to play trumps at the expense of principle-based privileges.

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<sup>21</sup> Dworkin, pp. 20-24, 82-90, Gaete, pp. 65-66, 142, Gaffney, pp. 64-70, Guest, pp. 60-64.

### **3. THE RIGHTS THESIS**

#### **3.1 A CONSOLIDATION OF INDIVIDUAL RIGHTS<sup>22</sup>**

An individual right works as a political trump-card against utilitarian programs according to Dworkin's rights thesis. This indicates a stance of priority to principles that secures their survival in conflicts with the general welfare of the community. Rights prevail even if it is in the general interest to deny the rights or to circumscribe them in some sense. To let individual rights overrule political objectives is what judges do by means of legal interpretation; I say it is what we all do.

Dworkin entails individual rights with an immunity against claims of the political majority. Albeit some privileges are absolutes, and hence untouchable to attempts of circumscription, most rights can be placed on a scale of strength. In a balancing act, some fundamental rights yield to others or even to arguments of emergent policy. No rights are ever so powerless that they can be outplayed by just any collective end. If their nature was that susceptible, I expect that they would not be meaningful.

#### **3.2 THE RIGHTS-GOALS DISTINCTION<sup>23</sup>**

Rights are statements of principles. A political right is described by Dworkin as an political end that is individualized. A right is powerful even if it happens to favour a political decision that works either as a promoter of, or as an impediment to, public affairs. A goal, on the other hand, is a political aim that is non-individuated. The end to be met does not indicate any corresponding opportunity for individuals. Collective goals are subjects to trade-offs, seeing that they emanate from utilitarian arguments concerning public welfare. Two or more ends are likely to be strived to attain at once. They often result in delicate compromises. I say without doubt that collective goals are not necessarily absolute.

Dworkin makes the point of remark that no right on principle yields to a collective goal. Special urgency must be at hand if goals are to play trumps. In order to cut the edges off this exception, the rights thesis proposes that only privileges that state a certain threshold weight against collective ends can be denominated as genuine rights.

#### **3.3 THE DISCRIMINATION BETWEEN ABSTRACT RIGHTS AND CONCRETE RIGHTS<sup>24</sup>**

If rights relate to principles, and if principles are either abstract or concrete, then rights can presumably be either abstract or concrete. Dworkin explains the difference as a distinction of degree, rather than of nature. At the same time, abstract rights provide a context for concrete rights. The term of abstractness best pertains to grand political aims in general, for instance the right of each man to free speech or the right to dignity. The character of abstraction

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<sup>22</sup> Dworkin, 1977, p. 82-92, 269, Gaete, p. 142, Gaffney, pp. 64-66, 72-73, Lyons, p. 94.

<sup>23</sup> Dworkin, 1977, pp. 90-94, Gaete, pp. 65-66, 142.

<sup>24</sup> Dworkin, 1977, pp. 93-94, 100, Gaffney, pp. 84-87, Guest, pp. 66-67.



indicates that the influences of the rights on a particular social situation are left aside by the concept. I point at that it is not intimated when proclaiming abstract rights, that these are absolute. Their content and scope is not distinct enough to make them serviceable instruments in complex contexts. Abstract rights do not take account of competing rights.

Concrete rights are, more or less, distinctly outlined political aims. They are practicable elements of law. Unlike rights of abstraction, concrete privileges take notice of competing rights. They can be placed on a balancing scale. Concrete rights are often the result of a compromise between competing abstract values. Decision makers tend to refer to the threat to a specific abstract right when an other abstract rights is favoured, that is when the latter safeguard eventually takes the shape of concretion.

### **3.4 THE DISCRIMINATION BETWEEN POLITICAL RIGHTS AND CIVIL RIGHTS<sup>25</sup>**

Dworkin points at the difference between individual rights that assume obligations of the state and of private subjects respectively. Political rights force a particular public institution to put on a duty, why civil rights justify a verdict that places burdens to private parties. The right to free speech for instance, is a right that corresponds with responsibilities to both subjects. I reckon that the rights thesis here suffers an important mechanical restriction. Decisions in hard civil cases must be formulated in the light of the presumption that one of the parties of the dispute holds the right to win the controversy. The rights thesis can be said to apply symmetrically.

The geometry apparently differs as regards cases that do not concern competing rights. Criminal proceedings against individuals are perhaps the most illustrating example. These legal states do not demonstrate any opposing rights. I suspect that the rights thesis works asymmetrically. I maintain that the decision maker can not rest upon the assumption that one party has a right to win. Albeit the party of scrutiny enjoys the right of acquittal if he is not guilty of the alleged crime, the public authority does not hold a corresponding right of conviction if the accused party is indeed found to be guilty.

The rights thesis settles that some political and civil privileges are so fundamental to man that they are claimable by each. Above that, they are enforceable within all communities and at all times. It takes rather extreme situations to circumscribe universal rights. The incapacity or punishment of an individual might for instance involve the loss of these foundational rights. I expect that Dworkin propounds his rights thesis from the presumption that all political rights are universal.<sup>26</sup>

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<sup>25</sup> Dworkin, 1977, p. 94, see note 1, p. 100.

<sup>26</sup> Dworkin, 1977, p. 94, see note 1.

### 3.5 THE RECOGNITION OF MORAL RIGHTS AGAINST THE STATE<sup>27</sup>

It does not go without saying which rights are powerful. Even if the majority in a democracy consolidates the legal rights of the minority, it is not an incontrovertible truth that it at all times correctly fixes the content and scope of those rights. The hint at imperfectness of the system intimates that individuals do not have rights merely to the extent that constitutional rules stipulate. By reference to Dworkin, I propose that individuals can claim foundational privileges that go beyond the political and judicial sphere and farther into the domain of morality.

The linguistic formulation of fundamental rights does not indicate whether or not they are legitimate claims. Dworkin seems to appreciate the attempt of constitutional lists to consolidate the political rights of individuals, though he does not find the statutes protective in any real sense. He does not even look upon them as good enough statements of individual rights.

The rights thesis spots a difference in nature between legal rights and moral rights. Not all constitutional privileges compose rights that are morally claimable. The common feature of moral rights is that their differences in weight are not scattered about. As fundamental values they all share the capacity of being important. It is not the fact that some cease to count when others are brought to the fore.

One objection to the absolutism of moral rights calls for immediate attention. Strong arguments of community welfare or extreme situations can assist the circumscription of moral rights. I recollect that Dworkin disclaims collective goals as comparison material to principle-based rights. In the eyes of Dworkin, the political rights that emanate from moral principles obviously constitute individual rights in a strong sense. The arguing from points of emergency seems to rest upon the given assumption that individuals either enjoy a fundamental right for certain, or that they do not.

Any abridgement of a moral right involves the wrong-doing of the individual. The inflation of such a right, beyond what is called for by arguments of justice, on the other hand means that the community as an entity is done wrong. To balance out errors is all the same a false technique of legal interpretation, seeing that it is argued out of a mistake. Dworkin confirms that the mistake of the prescribed mechanism is that that the interests of the community are confused with the interests of its members.

When moral rights are called in question, judges should act with sensitivity. They must ensure that individuals are treated respectfully in concurrence with the notion of human dignity and the idea of political equality of man. Dworkin depreciates any claim that no values are really at stake in marginal cases. Adjudicators can never argue that the societal cost will be extremely unmotivated if a specific moral right is consolidated. It is further incorrect to argue that the cost is in fact so high that any abridgement of human dignity or political equality of man is justified. In my opinion, the defectiveness of the reasoning relates to the difficulties entailed with the predictions that it calls for. The costs and benefits are merely exercises of speculation, trial and error. I disclaim that judges take rights seriously if they take recourse to arguments with a too high degree of uncertainty.

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<sup>27</sup> Dworkin, 1977, pp. 184-205.

#### **4. THE RELATIONS OF THE ABSTRACT LEVEL OF PRINCIPLES TO THE CONCRETE LEVEL OF LEGAL ARGUMENTATION<sup>28</sup>**

##### **4.1 FROM THE MODEL OF PURPOSES TO THE MODEL OF PRINCIPLES<sup>29</sup>**

The model of purposive interpretation generates from the rule-book notion of law. According to the program, stipulations are read in the light of their underlying purpose. It does not consolidate the conventional linguistic meaning of statutory provisions as the moral sense of the norms. It is in general suggested by advocates of positivistic theories that the core of a legal rule must be read by conventional means and that clear cases are always embraced by that core. In the penumbra of legal rules, the linguistic conventions are said to be inconclusive, why standards can be interpreted differently in different contexts.

In penumbral legal states, the law does not speak to the defender of purposive interpretation. The decision maker must then detect the inward sense of the rule. The intelligible purpose of the stipulation is conventionally suggested to be the underlying and justifying rationale of the standard. I reckon that the purpose concerns the good that the rule attempts to promote or the evil that it aims to avoid. The arguing implies that each and every rule of law is the embodiment of a purposive action. The instruct to adjudicators is quite simply to let the purpose of the rule trump its plain meaning. I should like to point out that this pointer for certain leaves a variety of possible decisions to be made.

Dworkin describes of notion of purposive interpretation as narrow and impracticable. He disputes that it engenders a genuine understanding of the nature of law. In his opinion, the mode of operation but only represents the standards that immediately underlie the applicable rule itself. The measure is clearly not attractive even to easy case adjudication as it looks upon the rules that apply to simple contexts as obvious and valid by reference to themselves.

What specifically makes the model of purposive interpretation unpleasing to legal argumentation I ask Dworkin. Dworkin replies that it is essential that each and every legislative and adjudicative act governs the outlining of rights formulas in general. The elements that are found outside the scope of the local rule are not less vital to the procedure of rights drafting. Dworkin expressly refutes that a global approach to the legal order is either inappropriate or even superfluous. It is more precisely those positivistic theories of law which proclaim the soundness of the model of purposive interpretation that Dworkin makes his main targets of attack when he draws his own principled-based technique of legal reasoning.

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<sup>28</sup> Burg, 47-48, 112-116, Gaete, p. 104, Lyons, p. 216.

<sup>29</sup> Dworkin, 1977, p. 23, Guest, p. 212.

## **4.2 THE DISCRIMINATION BETWEEN CLEAR CASES AND HARD CASES<sup>30</sup>**

There are legal states that can not be doubted. The time for a defendant party to lodge an appeal in a legal process is one example. Clear rules have a paradigmatic status as law, though this is not similar to constituting plain facts of law. Clear cases are resolved by means of compelling arguments that demonstrate the one right resolution to the issue. The produced formula is indisputably the correct one. Reasonable men will agree on a single unequivocal ruling. Clear legal situations can further be defined as easy cases. In easy cases, the judiciary is faced with an immediately evident answer to the put legal question.

The model of principles is equally at work in clear cases as well as in hard cases. Judges are however not always aware of its effectiveness as it works behind the scenes. In clear cases, decision makers are not required to actively search for underlying points of law or to apply these to the case at hand. They are all the same obliged to make sure that a legal rule does not have an inward sense that does not tally with its wording.

The law is not meaningless. That is why Dworkin asserts that penumbral decisions are not linguistically penumbral, nor phenomenologically penumbral. If anything, they are most significant. Hard cases illuminate the arguments to why clear cases ought to be accepted as clear. As a consequence of the established definition of clear states, hard cases can be described as referring to all those other states that do not fall within the scope of the clear ones. In hard cases, conscientious judges produce persuasive arguments that indicate a number of reasonable formulas. I reckon that it is important to notice that a legal state does not automatically qualify as a hard case simply because it does not compose a clear case. Cases must not pertain to either definition.

## **4.3 THE TECHNIQUE OF ADJUDICATIVE INTERPRETATION IN THREE PHASES<sup>31</sup>**

The preface to the distinction between hard cases and clear cases within the models of principles relates to a thesis concerning three phases of legal reasoning. In the first period, the pre-interpretative phase, positive law is identified and court decisions are made by means of the linguistic meaning of provisions. At this stage, conscientious judges discover the preliminary content of the law. I draw the inference that some sort of interpretation obviously takes place already in the beginning of the adjudicative procedure, since it is not obvious to judges which specific standards apply to the issue.

In the following interpretative stage, a theory of political morality is created by adjudicators in order to deepen and broaden their understanding of the nature of law. Decision makers must now be prepared to produce arguments of fit and general justification. By demonstrating the fit between the judgement and its institutional history, they confirm that they act as competent interpreters of legal standards and not as a creators of law. In the final reforming stage of the argumentative procedure, the vivid rules are outlined in a manner that brings them into agreement with the principle-based theory of law. According to Dworkin, hard cases produce

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<sup>30</sup> Dworkin, 1986, pp. 255, 353-354, Guest, pp. 212-214, 221.

<sup>31</sup> Burg, pp. 48-53, Dworkin, 1986, p. 229.

more than one prominent and defensible answer at one or several stages of the interpretative procedure. The time for discovery of resolutions is an important point of legal comprehension if we trust Dworkin.

Legal dilemmas cause particular hardship if problems relate to the adjustment of the positive law. Judges might have regarded the issue of dispute as clear up until the reforming stage of reasoning. The variance relates to whether or not adjudicators are actually required to modify rules in a manner that makes them fit the best rights formula. The obstacle is not seen when the positive law is vague or ambiguous of course. It is rather brought to the fore when the best theory of law calls for an inflation a particular stipulation or when the smoothest theory does not align with the scope or the wording of the statutory rule.

## **5. THE DWORKINIAN PARADIGM CASE OF RIGGS VERSUS PALMER; A DEMONSTRATION OF THE WORK OF PRINCIPLES IN HARD CASE ADJUDICATION<sup>32</sup>**

The American citizen Elmer Palmer was aware of that his grandfather Riggs had left him most of his estate in his will. The grandfather remarried and Palmer murdered him when he feared that he would be left without any share. Palmer was found guilty of murder by the American Court system. Relatives of Riggs contested the will which confirmed Palmer as an heir.

The New York State Court of Appeals was faced with the legal question as to whether or not Palmer was to inherit the property of his grandfather. American law settled that the will was perfectly valid by reference to the underlying principle of respect of the wants of the testator. Palmer was regarded as a beneficiary. The wording of the applicable statutory provisions was not vague, nor ambiguous to this point. No statutory rule excepted individuals that were found guilty of murder of the testator from inheriting their victim.

The majority of the American judges refused to resolve the case in accordance with the letter of the law. They did not argue out of moral considerations, but out of legal reasons. Recourse was taken to a general principle of law, which implied that no man must make profits of his own fraud, or take advantage of his own wrong. Above that, the global point indicated that no man must found any claim upon his own iniquity, nor must he acquire property by means of his own crime. Palmer was by arguments of principle not allowed to obtain his inheritance.

The case of Riggs versus Palmer is a theoretical moot question by means of which Dworkin takes a most progressive standpoint as compared to most legal polemics. Dworkin's analysis pursues the view that courts discover the law rather than remodel it. What Dworkin is trying to prove by making reference to the Palmer case, is firstly that adjudication is influenced by standards that live beyond the statutory clauses. Secondly, he points out that the clarification of the case is due to the importation of general principles of law and not due to any appeal to immediately underlying principles of the local stipulation. By this way of accomplishment, American adjudication brings the local rule in line with principles of justice that are assumed elsewhere in law. The judiciary discovers a significance that assists coherence of legal reasoning.<sup>33</sup>

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<sup>32</sup> Case 22 N.E. 188-190, Riggs v. Palmer, Dworkin, 1977, p. 23, Dworkin, 1986, pp. 15-20, Burg, pp. 35-36, , Gaffney, pp. 17-22, Guest, pp. 167-168, Lyons, p. 93.

<sup>33</sup> See for instance the clash between Raz and Dworkin as referred to by Lyons, p. 93.

## **6. THE THEORY OF LEGAL INTERPRETATION; HOW TO DISCOVER THE CORRECT RIGHTS FORMULA<sup>34</sup>**

### **6.1 INTRODUCING THE WORK OF A CONSCIENTIOUS ADJUDICATOR<sup>35</sup>**

I expect that there is no exact method for discovering the right answer to a legal question. Dworkin agrees, but posits the imaginary ideal judge Hercules as a pointer to the procedure of sound decision making. By understood prerequisites, Dworkin charges Hercules to produce the best theory of law. I say that Hercules is required to do more than that. He must also find each and every sub-thesis attendant to the principle-based theory.

The prominent superhuman judge Hercules is charged to administrate the law with justness and fairness in mind. He is superior to all adjudicators when comes to legal and worldly skill, learning and patience and he operates in full awareness of his role as a guardian of individual rights. He must necessarily assent to one standard as an absolute principle, that is the foundational right of man to be treated as an equal.

Hercules is told to respect the ideal of pragmatism. He must justify his decisions by arguments that represent the legal institution in the best light. The requirement goes even if it involves a departure from former decisions. Yet, Dworkin does not let rigid conventionalism affect the actions of his superhuman adjudicator. Integrity of law steers Hercules towards articulate consistency, which involves the non-isolation of adjudication. Hercules must ensure that his judgements fit the institutional history. Hercules must not underestimate the difficulty, or even the impossibility, to act principally consistently when hard cases call for balancing acts in regard to competing rights.

The work of Hercules posits conditions that I reckon are almost unattainable in practise. Decision makers must come into the position of having unlimited time, unrestricted freedom of reasoning, an immense knowledge of facts and beliefs and, not the least, a tremendous want to find the best theory of law.<sup>36</sup>

### **6.2 WRITING THE CHAIN NOVEL OF LAW**

#### **6.2.1 The idea of a legal chain novel<sup>37</sup>**

As far as hard cases go, Dworkin acknowledges that legal arguments often emanate from a tension between the dimension of fit with the institutional history and the dimension of substantive matters of political morality. Hercules is consequently charged by Dworkin to consider every judicial question put to him, not only as an issue of fit between his theory and the rules of his institution, but as an issue of political philosophy too. He must apparently choose the resolution that brings about the most pleasing elaboration of the particular value of enforcement. I am convinced that this is the point at which the thesis of legal interpretation

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<sup>34</sup> Gaffney, pp. 119-135, 225, Guest, pp. 46-60, Lyons, p. 95.

<sup>35</sup> Dworkin, 1977, pp. 79-80, 87-88, 105-106, Dworkin, pp. 171-174, Dworkin, 1986, pp. 58, 63, 154, 226, Gaffney, pp. 157, 179-183, 190-191, 196-197, Guest, pp. 132-137.

<sup>36</sup> Peczenik, 1995, p. 92.

<sup>37</sup> Dworkin, 1977, p. 107, 1985, pp. 158-159, Gaffney, pp. 161-179, Guest, pp. 49-53.

faces its greatest challenge. Dworkin sheds light upon the issue by means of his idea of the chain novel of law.

Dworkin compares adjudicative interpretation of the law to the writing of a chain novel wherein Hercules is only one author. Every author must write succeeding chapters in accordance with what has previously been written down by other novelists. Hercules must integrate previous information with the chapter that he is presently writing. He must make sure that he smoothly adds to, and unifies, the content in a manner that makes sense also to the next author of the novel.

Every writer of the chain novel, except for the first one, is responsible for interpreting and creating the text in accordance to the already prescribed materials. Every originator must determine the features of every character, what their motives are and what theme the novel intends to present to its readers. The author must calculate how the structure, consciously or unconsciously, contributes to the process of writing. He must further estimate if the conception calls for inflation or improvement or even abandonment in order to enable a particular development of the story. It seems to me as if Hercules is imposed progressively accumulated material constraints if he writes a chapter further on in the institutional novel, as compared to if he is the author of earlier parts of the text.

## **6.2.2 Fit and justification; Two dimensions of the legal chain novel<sup>38</sup>**

Hercules is both free of and constrained by the chain novel of law. The notions of fit and justification provide the constraints by necessitating articulate consistency. The latter premise forces Hercules to exclude from the text all interpretations that contradict previous lines of action. I assert that Hercules must recall the principle-policy distinction. When he takes account of previous chapters of adjudication, he must remember that his work is in no way steered by a duty to ensure previous decisions that are argued out of policy. I lay stress on that a judgement has to fit the institutional practise, not only because the community is supposed to speak with one voice, but because that voice must speak in a principled manner. Hercules knows for sure that previously stipulated legal formulas hold gravitational force, why he can justify legal administration merely by assuming that the rights thesis is true.

The novel of the legal institution survives some inconsistency in the procedure of its penning. Even so, Hercules is not free to regard any incompatible part of the story as an institutional mistake that does not affect his theory of law any further. The components of the institutional history that Hercules is sincerely convinced constitute mistakes are not less authoritative, but they lack gravitational force. I suggest that Hercules discriminates between embedded mistakes and corrigible mistakes. The former kinds of defaults survive any loss of gravitational force due to their specific authority. The latter ones do not survive this loss of powers.<sup>39</sup>

The requirement of justification has to be observed by Hercules if he apprehends that more than one formula fits the previous chapters of the legal chain novel. I maintain that Hercules must support the outlining that benefits the further writing of the text the most, all things

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<sup>38</sup> Dworkin, 1977, pp. 112-113, 115, 1986, p. 230, Guest, p. 55.

<sup>39</sup> Dworkin, 1977, p. 121.



considered. If he pursues any other course of action, I say that his contribution to the legal chain novel is parasitic on the history of the legal institution.<sup>40</sup>

I must make the point of remark that not even the writing of Hercules is incontestable. The evaluation of interpretative argumentation is always a matter of controversy. The strength of the notion of a legal chain novel is that it actually lives off the clashes between jurists about how to accomplish an attractive context of individual rights.<sup>41</sup>

### **6.3 THE CHASE FOR A CORRECT RIGHTS FORMULA**

#### **6.3.1 The sources of rights formulas<sup>42</sup>**

Hercules' arguing starts off in the constitution of his law-governed society. He must find an answer to why the act is powerful enough to formulate rights as well as to destroy rights. He must find an answer to why the constitution allows some privileges to advance from being background rights to being legal rights. Hercules realizes that the constitution is the embodiment of political morality on grounds of justness. It seems as if a non-fixing of constitutional values implies unfairness to the individuals of the community.

If Hercules finds two theories that can reasonably explain a given situation, he must decide which one is the soundest. I say that he must choose the vision that best aligns with the constitution in its entirety. He needs to be aware of that the theory of choice is not for certain concrete enough to be applicable to each and every factual case. The reason for inapplicability might be that the thesis does not provide distinct definitions of rights.

Genuine background rights can exist even if statutory rules do not correspond to the privileges or grant them only partly. Hercules avoids all calculations with respect to legislative intent. He does not present any supplementary thesis to the prospective actions of the framer. The analysis of the superhuman judge rather takes account of how the decision maker at present time and under present circumstances ought to argue in order to detect the soundest rights formula. What Dworkin tells his conscientious judge to do, is obviously to discover a rights concept that assents to the wording of the statute as the outer limit to political morality. A correct definition of the legal formula should on principle go no further than that limit, as every argument beyond that point of reference is uncertain.

Some individual rights can not be confirmed simply by taking recourse to statutes. The conscientious judge must then turn to judgements that were previously produced by other jurists within his legal order. The problem of legal reasoning by reference to case law is that precedents do not provide wordings that set limits to the present rights drafting as distinct as statutes do. I am sure that it does not assist Hercules if a former decision states that it is for legal practise henceforth to elaborate the rights formula. All the same, I say that the apprehension is not likely to cause hardship. I expect that the technique is not very common.

It goes without saying that some of the decisions that influence Hercules' calculations are legal answers supplied by himself. If they are not statements of his personal convictions, but components of the general scheme of law, they form part of his present theory of law. He

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<sup>40</sup> Dworkin, 1986, pp. 231, 421-422.

<sup>41</sup> Dworkin, 1977, pp. 81, 106-115, Dworkin, 1985, pp. 171-174.

<sup>42</sup> Dworkin, 1977, pp. 106-107, 116-118.

must note that a judgement of his that has been called in question by his colleagues, tends to be an expression of his personal opinions on the subject matter. Hercules can not trust that decision.

### **6.3.2 The denouncement of institutional mistakes<sup>43</sup>**

What especially makes Hercules' process of legal interpretation delicate is assuredly that no matter his intellectual capacity, he will not find any set of principles that align with each and every statute and with each and every precedent. He will have to accept a notion that declares some aspects of the institutional history as pure mistakes. Dworkin states that legislative and adjudicative mistakes assuredly will be spotted by Hercules, since conventional judges and legislators do not argue out of utmost insight or out of the similar convictions as Hercules does.

The features of individual rights must be demonstrated to be plausible and not merely causes by chance. Hercules can for certain find explanations to why certain directions in the past were chosen as means to pursue some collective goal, that is the proclaimed formulas were generated out of policy. If Hercules, by virtue of the rights thesis, agrees on the nature of the decisions, he must point at the conflict between the former concept and his principle-based theory of law. If the propositions do not tally, Hercules must consider the historical decision as an institutional mistake and ignore it.

Hercules' theory of institutional mistakes holds two properties. First, it must be able to predict the result of claiming legislative and adjudicative decisions made in the past as legal mistakes. Second, the thesis must be able to present qualifying criteria that restrict the number and defines the features of those situations that plausibly can be put off as mistakes. Hercules acknowledges the first aspect by discriminating between the specific authority and the gravitational force of a prospective mistake. Institutional mistakes are denied force because of aspirations of principled consistency of legal reasoning. Hercules next makes a distinction between embedded mistakes and corrigible mistakes. The former defaults prevail irrespective of any loss of gravitational force. The latter blunders do not, since they depend on that power.

Hercules' idea in respect of institutional mistakes proceeds to second level. At this stage Hercules demonstrates that his fresh arguing is more apropos than those lines of reasoning that either completely repudiate the existence of institutional mistakes or propose other sets of historical mistakes. Dworkin asserts that the judge can not mechanically prove his point here. He must instead present persuasive arguments out of fairness. Hercules must be especially cautious to ascribe decisions made by higher legal authorities the feature of susceptibility. The similar degree of precaution is not called for as far as judgements of the court of first instance go.

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<sup>43</sup> Dworkin, 1977, pp. 118-123, Burg, pp. 40-45, Hart & Sacks, p. 1375.

### **6.3.3 The acknowledgement of political morality as an implement of legal interpretation<sup>44</sup>**

Conscientious adjudicators can trust the soundness of their own convictions. This does not mean they are convinced that their belief in regard to the subject matter is true, but that they are sure that it represents a generally sound idea. If judges consider the moral position of their colleagues as unsound, they must not subordinate to it simply to achieve points of coherence. If Hercules does not assent to the opinion of the ordinary man, he does not rule in accordance with it. He knows for sure that a decision by reference to popular opinion does not compose a just decision. If he did rule contrary to his conviction, he would withhold an individual his legitimate right.

Adjudicators must look beyond popular opinion and settle their own convictions about what morality demands out of justice. This does not mean that judges must produce a general moral theory or present a moral principle by which they act consistently. They rule in accordance with their moral position and never out of prejudice or personal preferences in regard to what is right and what is wrong. If they did, the administration of justice would in my opinion sustain heavy losses of respect amongst individuals within their area of jurisdiction.

The basal rules of conventional reasoning are violated if judges rely on emotional reactions. The moral rights of individuals evidently touch matters that are of an emotionally tinged nature, but Dworkin maintains that it is the moral position of the decision maker that justifies his emotional reactions and not vice versa. So judges have better not put forward their personal phobia or obsessions if they wish to stick to the rules of arguing.

A moral position can never generate out of grounds that aim at rationalizing supposed facts that are most implausible. The moral positions of other people can not be adduced in order to justify adjudicators' own convictions. I maintain that judges all the same can take recourse to beliefs that they themselves hold for true after having observed the work of colleagues.

### **6.3.4 Tie judgements as a confirmation of a one right answer thesis<sup>45</sup>**

Some notes have to be made considering a one right answer thesis. It is actually not a Dworkinian concept, but a notion that can be attributed him. The acknowledgement of morality as an implement of legal interpretation implies that any relevant argument is as good as the next. If adjudication is a matter of subjectivity, is not legal reasoning a matter of opinion? If true, is it then not impossible to demonstrate which decision is the right? From the point of view of Dworkin, a rights formula can not be considered as 'not right' simply due to the fact that it can not be proven to be correct.

When Dworkin requires adjudicators to search for the right answer to a legal dilemma, he actually charges them to deliver a judgement that is correct by virtue of being in conformity with the true proposition of law. It does not go without saying that the majority of judges depicts individual rights correctly. If they did, I guess that the system of appeals to higher courts would be a superfluous mechanism. Besides, it is possible to keep different parts of a ruling separate from each other. In some parts judges might have interpreted the statutory rule

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<sup>44</sup> Dworkin, 1977, pp. 124-130, 248-258.

<sup>45</sup> Dworkin, 1977, pp. 145, 285-290, Guest, pp. 137-147, Peczenik, 1995, pp. 92-93.

accurately, and in some parts they might not have. It is even successful to maintain that the right answer has been identified, but for the wrong reasons. Conversely, the decision might not be right, though it was made for the right reasons.

Dworkin settles that different courses of adjudicative reasoning can not be regarded as either true or false, but simply as correctly or incorrectly pursued. I maintain that if jurists disagree on the degree of appropriateness of a specific legal formula, they are at least likely to discern the point at which they do not share the same conviction. The sense of this statement is that reasonable men by all means can disagree on the final formula, but that they nevertheless will agree on that the very divergence of defensible options is not decisive to whether or not the established concept is forceful.

To decide hard cases within the model of principles means to recognize tie judgements, that is legal situations in which competing arguments hold equal weight. If two points balance equally, one might argue that they are both true. I call in question if this is not an impossible state. It clearly falsifies the *one* right answer thesis. One might on the other hand argue that the two points are neither true nor false. This proposition is most doubtful I reckon, as it falsifies the *one right* answer thesis. According to Dworkin, it is more accurate to trust that the legal order accepts the possibility of ties. From the position of Dworkin, tie judgements assists the integration of a one right answer thesis into hard case adjudication.

Dworkin reminds decision makers to be aware of the special nature of ties. Normally hard case adjudication involves three points at which the final decision can be placed, that is at the proposition of the plaintiff, at the proposition of the defendant or at the centre of an imagined scale in between the extremes. The latter location is the tie point. The tie site is described by Dworkin as a positive decision that demonstrates the very same nature as the extreme locations theoretically could have engendered. Ties constitute no right answer decisions if I understand Dworkin correctly. By this definition I confirm that a right answer does exist, but that neither of the held positions compose that answer; the judgement itself is the right answer. This certainly does not mean that there is no difference between the two maintained positions. The difference is however complicated for judges to make out.

The technique of reasoning implied by the model of principles works with three locations only on the imagined scale. Is there not a fourth possible alternative I ponder over. It is imaginable that the perceivable means are not comparable at all. Collective goals assuredly do not compose comparison material to individual rights according to Dworkin. If interests can not be put in the same scale, no judge can ever, no matter the effort put into the line of reasoning, consolidate the prominent premises. If this fourth situation comes up, I apprehend that no definite answer to the legal dilemma can be delivered. If a decision is supposed to be final, and not merely a product of *prima facie* character, adjudicators must be able to carry through the argumentation by putting relevant elements to a theoretical challenge.

It is worth mentioning that tie judgements are likely to engender controversial rights formulas. I reckon that the enormous quantity of legal sources within highly developed systems of law impedes these decisions from being frequently made. I figure that it is most unlikely that the weight of the adduced reasons that favour one principle-based version, is exactly the same as the weight of the grounds that speak in favour of the duelling version. Even so, the improbability of an equilibrium is hardly in itself any persuasive argument for proclaiming a one right answer thesis.

## **7. CONCLUDING REMARKS**

### **7.1 RIGHTS AS PRINCIPLES OF ADJUDICATION<sup>46</sup>**

To at first summarize the Dworkinian theory of law is no easy task, seeing that it consists of a handful of sub-theses. It presents an objection to the positivistic program of law as it awards the underlying principles of law powers as guiding premises to the procedure of adjudicative arguing. The Dworkinian view settles the evaluative effect of interpretative reasoning. It resolutely rejects the plain meaning of statutory rules that the model of rules hold for true. Dworkin points at a complexity of the legal system that positivistic scholars have previously chosen to neglect.

To Dworkin every legal issue of dispute is uttermost a matter of individual rights. These essential privileges are pre-existent to their official consolidation. Dworkin promotes legal interpretation as a means to discover principle-based rights, and not as an end in itself. Dworkin presents a most progressive concept with respect to the relation of rules to their underlying rationales. According to Dworkin, statutory standards are expressions of points that work behind the scenes. It is the latter norms that control the functions of the legal order. Their work is demonstrated by the Dworkinian paradigm case of *Riggs versus Palmer*.<sup>47</sup>

The nature of principles differs from the nature of rules if we trust Dworkin. Principles almost seem to be the utter conscience of the judicature. Principles are powerful when two conditions are met. They must fit the history of the legal institution, which means that a qualification of fit to statutory standards, precedents and other sources of law must be fulfilled accordingly. Above that, they must enshrine the political morality or values of justice that the legal profession, the public institutions and the citizens of the community hold for genuinely true and hence in general respect.<sup>48</sup>

The underlying principles of law provide individuals with trump cards. Political rights can not be overridden by, or even placed on the same scale, as collective goals. Dworkin evidently fixes an anti-pragmatic approach to the law. Suitability carries no weight in the procedure of legal reasoning. Conscientious adjudicators should consolidate the best rights formula even if it is not the most rational one.

### **7.2. THE ORIGINALITY OF THE MODEL OF PRINCIPLES<sup>49</sup>**

If I can not settle plain connections to conventional theorists or even fix clear divergences from these, how am I then to characterize the model of principles? The Dworkinian theory of law is indeed a notion full of nuances. I state that it simply can not be put in a standard form of definition. It is quite appealing to assess the model of principles by reference to an abundance of terms. I reckon that it is less important to determine which adjective best describes the sophisticated conceptions of Dworkin.

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<sup>46</sup> Gaffney, pp. 219-222.

<sup>47</sup> Peczenik, 1995, p. 92.

<sup>48</sup> Peczenik, 1995, p. 92.

<sup>49</sup> Gaffney, p. 221.

It has been my immediate intention to point at the obvious complexity of the Dworkinian model of principles. The distinctiveness, but also the originality, of every sub-thesis is obvious. After a thorough scrutiny, I conclude that the sub-theses jointly perceived compose a sharply demarcated plan of law. They present a stringent attack on the plain fact view of law. They further pronounce an approval of the unity of political morality and the concord of human practises and public attitudes. The purity of the political thesis of equality of man envisages a clear feature. So does the theory of legal interpretation, seeing that it palpably outlines the qualifying criteria of hard case adjudication.

The sub-theses of the model of principles supply adjudication with well-founded instructs. I disclaim to that the conceptions are not thoroughly outlined or left halfway established. I note that the uninitiated probably perceives the ideas quite differently. It is imaginable that the Dworkinian program calls for an insight that only jurists have, or even explicitly wishes to confirm. In my opinion, it is not a question of doubt that Dworkin leaves jurisprudence in the centre of the discussion.

I dispute that Dworkin too easily dismisses the schemes of positivism, utilitarianism, conventionalism and pragmatism in his principle-based depiction of law. I believe that his maintained preconditions to the plan of legal interpretation are substantially motivated and adequately derived. Irrespective of producing a fresh or a supplementary theory of law, it does not go without saying that Dworkin awards contradicting theories of law, or previously proposed legal theories, insufficient observation.

Dworkin upholds liberalism by proclaiming equality as the master principle that concurs each and every other valid interest. He even appears to be an advocate of libertarianism in some senses, as he takes account of the aspirations of individual parties. A socialist feature shows off when he disavows the claim of individuals to a disproportionate distribution of rights relatively to other subjects. I further assert that Dworkin can be thought of as an economic modernist when he speaks in terms of free market concepts. I recollect however that he in substance does not vindicate welfare arguments as valid implements to legal interpretation.

It is my resolute conviction that it is not a weakness of the model of principles that it feeds fresh questions. It is of course the aspiration of all theories to provide persuasive arguments that point to a specific resolution to a delicate problem. To me it seems as if Dworkin contributes in the advancement of the legal discourse. He implies answers to legal dilemmas that have puzzled jurists for a long time. After all, as long as legal cases have had to be settled, judges have struggled with the difficulty to adjust the statutory rules and their engendered precedents to political morality. Adjudicators have at any rate been concerned with the issue as to whether or not they ought to let that accommodation influence their judgements. I am sure that the theoretical aspirations of Ronald Dworkin have been realized within the administration of justice. My supposition credits the sensible soundness and the cogency of the model of principles.

**PART II.**  
**THE PROBLEM OF SELF-INCRIMINATION IN COMMUNITY  
COMPETITION LAW PROCEEDINGS;  
LETTING THE MODEL OF PRINCIPLES SERVE AS THE  
INDICATOR OF THE RIGHT FORMULA OF SILENCE**

**1. INTRODUCTION<sup>50</sup>**

Rights serve as principles of adjudication within most court systems of western democracies. I am inclined to believe that principles of law have fundamentally increased their significance to adjudicative argumentation over time. From being more or less perceived as gap filling measures, they nowadays work behind the scenes also when explicit answers to legal questions are set out by the positive law.

I suggest that the soundness of the legal reasoning of the European Court of Justice and its sister institution, the Court of First Instance of the European Communities, rests to a large extent upon the acknowledgement of principled norms. Political morality forms an integral part of the conceptual means that legal decision makers make use of in hard cases. It is my resolute conviction that underlying points henceforth will function as indispensable directions to the Community administration of justice, as the political claims of individuals that live within the European Union are more often brought to the fore.

The evolution of economic, social and political domains can assuredly be anticipated within the area of Community jurisdiction. The internationalisation of law and polity is inevitable and also the target aimed at by this order. The Community Courts are in need of legal sources that are less definite than conventional statutory rules, if not the further progression of the internal market is to be impeded or delayed. If rigidity of integrant law is not a desire, I adduce that the general principles of law form an integral part of an interpretative technique that ensures tangible results, which in turn align with the overarching objectives of the collaboration.

Community adjudication must comply with the criteria of good law. The general principles of law secure certain sets of protective standards that European political and civic trends and public spirit for sure endorse. Since the statutory rules of Community law seldom enshrine the absolute rights of individuals, I propose that the judiciary of the European Community constitutes the guardian and catalyst of political rights.

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<sup>50</sup> Koopmans, p. 34.

## **2. THE PREREQUISITES OF THE RIGHT AGAINST SELF-INCRIMINATION**

### **2.1 THE INCORPORATION OF THE HUMAN RIGHTS CATALOGUE IN THE COMMUNITY LEGAL ORDER<sup>51</sup>**

The European model of protection of individual rights is two folded in the sense that two supranational legal orders share, or possibly compete for, the role as safeguards of privileges. The European Court of Justice is the interpreter of Community law. It interacts with the Court of Human Rights, which acts as the primary decision maker as far as the European Convention on the Protection of Human Rights and Fundamental Freedoms<sup>52</sup> is concerned. I assert that the two judiciaries coexist as a result of the fact that all Member States of the European Union are signatories to the present agreement.

I should like to point out the lack of any operational list of constitutional rights in primary Community legislation. My statement calls for some modification however. The Human Rights Convention enumerates principle-based rights that must be observed in the administration of Community law. Foundational rights that are of significance to the very existence of the European Union, and common to Member State traditions, thereby enjoy a more or less powerful protection. Explicit references to the Convention is seen already in the Treaty on the European Union.<sup>53</sup>

The operational catalogue of individual rights as established by the Human Rights Convention is acknowledged by the European Court of Justice as a primary part of the constitutional corpus of the Community legal order. While possessing a character of special significance, the Convention in itself places a burden of consideration on the Community judiciary when ruling by means of Community law.<sup>54</sup> I notice that the agreement is not the only constitutional statute that is awarded legal force by the Community institutions. Each and every international treaty to which the Member States are signatories is on principle ensued by the equivalent capacity. Even so, the Human Rights Convention is given a unique attention by the Community Courts. The embodiment of foundational values has been closely observed by subsequent practise, which has almost granted the act direct effect.<sup>55</sup>

The hotbed of political rights appears to me to have been firmly riveted since the European Court of Justice has declared that any means that does not tally with the principles enshrined in the Human Rights Catalogue, can not be accepted. Serious and persistent non-compliance with the pronounced privileges at a national level makes just cause for suspension of a Member State. To me this indicates a prima facie sincerity to principles. The grounding of a minimum rights standard through out the domestic legal systems also hints at the importance attached to individual rights.<sup>56</sup>

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<sup>51</sup> Brown, pp. 307-310, Hartley, pp. 139-149, Koopmans, pp. 31-34, Lenaerts, pp. 367-389, Sjödin, p. 246, Tridimas, pp. 202-215, Van Overbeek, pp. 131-133.

<sup>52</sup> The European Convention on the Protection of Human Rights and Fundamental Freedoms, Dated 4 November 1950.

<sup>53</sup> Articles 6(1) and 6(2) of the Treaty on European Union. See recitals 3 and 5 in the preamble to the Single European Act.

<sup>54</sup> Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, at para. 18.

<sup>55</sup> See the Joint Declaration of 5 April 1977, Recital 3 in the preamble to the Single European Act, Article 6(2) of the Treaty on the European Union, case 4/73, Nold KG v. Com., see case 36/75, Rutili v. Minister for the Interior were the European Court of Justice for the first time expressly made references to the Human Rights Convention.

<sup>56</sup> Articles 7(1) and 7(2) of the Treaty on European Union.



## **2.2 THE BASIC STRUCTURE OF A RIGHT OF PASSIVITY<sup>57</sup>**

### **2.2.1 The derivation of the right against self-incrimination<sup>58</sup>**

Paying respect to the rights of the defence is not equivalent to awarding the safeguards status as general principles of law. If the right to a fair hearing joins the rights of the defence, and if the right to a fair hearing in turn embraces the right of the subject of scrutiny to remain silent, the right not to disclose self-incriminatory evidence might very well stand on behalf of a general principle of law. I confirm that the importance to individuals of the logic of such a derivation can not be overestimated of course.

From precedents ensue that the rights of the defence can be claimed in proceedings following criminal charges at a national level and in administrative investigations in which pecuniary sanctions might be imposed upon the party.<sup>59</sup> Community administration of justice holds for certain that particular aspects of due process privileges pertain to contentious proceedings only. I say that this statement does not restrict the procedural rights at issue. It is not a matter of course that the principles are not powerful in preliminary investigations as well.

My depreciation of the Community stance to points of due process is not a proposition out of the blue. The inward sense of a principle-based right against self-incrimination is to ensure that the legal position of the subject of inquest is not irremediably impaired already in the preliminary phase of inquiry. The defence is evidently undermined if it is forced to supply self-incriminatory documentation which at a later stage of procedure secures its conviction. To but only recognize a right to remain silent in contentious court proceedings will obviously render meaningless. I maintain that the privilege is useless if it is not consolidated already in the factual, or at least in the formal, initiation of the inquiry.

A thorough outlook on the right against self-incrimination in Community proceedings ought in my opinion to take an external angle of approach. Article 6 of the Human Rights Convention, together with its engendered decisions, should on principle be acknowledged by Community adjudicators. By reference to the statute, I say that subjects of inquest always enjoy the right to a fair hearing. The notion of a fair trial within the meaning of the topical provision, supposedly involves the embodiment of the general principle of equality of arms between the parties in litigation or between the individual and the prosecuting public ministry. Points of political morality seem to imply that a right to evade requests for self-incriminatory evidence is urgent and natural in a state where one party clearly is legally deficient.<sup>60</sup>

### **2.2.2 A chase for the right against self-incrimination within the domain of competition law**

I reckon that the Community adjudicator must be prepared to answer some questions that unmask an initial attitude to the right against self-incrimination in Community investigations. Does the prospective outflow of the right of silence constitute a mere exclusiveness of

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<sup>57</sup> The judgement of 17 December 1996, *Saunders v. the United Kingdom*, Brown, pp. 307-310, Hartley, pp. 139-149, *Lenaerts*, pp. 376-381, *Tridimas*, pp. 202-215, *Van Overbeek*, pp. 127-133.

<sup>58</sup> Also known as the maxim *nemo tenetur se ipsum accusare*.

<sup>59</sup> Joined cases 46/87 and 227/88, *Hoechst*, at para. 15.

<sup>60</sup> *Koopmans*, p. 32.

criminal law? Is it at all justified to discriminate between forms of procedure if individuals all the same risk to sustain heavy losses? Does the pertinent political right exist in administrative proceedings, and if so, does it stretch to preliminary inquiries which happen to form the greater part of the Community proceedings that affect individuals directly? Does Community law recognize the right against self-incrimination as an emanation of a general principle of law? Is it a fundamental right of the defence? Is it applicable to natural persons and legal bodies respectively? The questions go on and on. I am sure that Ronald Dworkin would confirm that it is for conscientious adjudicators to at least ponder over the relevant questions to the best of their ability. No more can rightfully be called upon them.

The nature of a right against self-incrimination can be discovered by turning to rules of procedure within the spheres of competition law and financial law. I have chosen to penetrate two prominent judgements delivered by the supranational judicatures of the European Union and the Court of Human Rights respectively. The European Court of Justice has established a restriction to Commission requests for self-incriminatory data in preliminary administrative proceedings by the Orkem ruling of 1989.<sup>61</sup> The Court of Human Rights has presented its view on the similar issue in the Funke decision of 1993.<sup>62</sup>

I lay stress on that the Court of Justice apparently has produced its Orkem formula of silence in the absence of guide-lines from the Strasbourg Court. The Community Court has withal not acknowledged the Strasbourg stance to the right of silence in subsequent cases. The Orkem formula has anew been established, why the qualified notion of the right against self-incrimination remains intact within the legal order of the European Union.<sup>63</sup>



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<sup>61</sup> Case 374/87, Orkem.

<sup>62</sup> The judgement of 25 February 1993, Funke v. France.

<sup>63</sup> Case C-60/92, Otto v. Postbank. I should like to point out that the case was settled after the delivering of the Funke judgement.

### **3. THE ORKEM FORMULA OF SILENCE<sup>64</sup>**

#### **3.1 THE LEGAL PREMISES OF THE ORKEM SITUATION**

It is incumbent upon the Commission to prove infringements of Community competition law within preliminary administrative proceedings. The Commission acts as a superior guard of the system of competition, a duty charged by the Treaty on the European Union.<sup>65</sup> The institution is empowered by wide means to require information of necessity and significance to the investigation of prospective illegal conducts.<sup>66</sup> If a subject does not comply with a request by a binding decision, pecuniary penalties are imposed upon it. Statutory measures for the achievement of a free internal market are explicitly provided for by primary and secondary legislation.<sup>67</sup>

Community statutes accord few tangible political rights during preliminary inquiries. I assure that no provisions of Community competition law imply any right to evade formal requests for information on the pretext that a submittal might unveil breaches of other legal provisions.<sup>68</sup> Statutory rules actually intimate quite the opposite. The subject of inquest is if anything required to co-operate actively with the Commission by disclosing all documentation of relevance to the issue, and of which it has full knowledge.<sup>69</sup> Statutory rules further give at hand that judges are empowered in general to require from individuals all documentation of relevance and necessity to the settling of the dispute brought to their attention.<sup>70</sup> The specific legal instruments have been industriously employed by the authorities over time.<sup>71</sup>

#### **3.2 THE FACTUAL PREMISES OF THE ORKEM STATE**

The company of Orkem was in November of 1987 required by a binding decision under Article 11(5) of the Council Regulation 17/62 to submit information of relevance to an inquiry concerning its feasible participation in an anti-competitive conduct. The questions put to the undertaking were partly of factual nature, partly directly suggesting the involvement in illegal agreements or concerted practises, such as the attempt to create a system of price fixing. The action of the Commission was challenged by Orkem before the European Court of Justice.

The undertaking argued that the authority had infringed the principle against self-incrimination by withholding Orkem of its procedural right to remain silent in the preliminary administrative investigation. Orkem held for true that a political right against self-incrimination under prevailing circumstances was part of Community law. This aspect of

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<sup>64</sup> Cases 374/87, Orkem, 27/88, Solvay & Cie v. Com., T-34/93, Société Générale v. Com, at paras. 71-74, Kerse, pp. 151-153, 351, Lenaerts, pp. 381-383, Ortiz-Blanco, pp. 109-110 and 116-117, Tridimas, pp 247-249, Usher, pp. 79-80, Van Overbeek, pp. 127-128.

<sup>65</sup> Case 136/79, National Panasonic, recital 3 in the preamble to the Treaty on the European Union, Articles 3(g) (ex. 3(g)), 81 (ex. 85) and 82 (ex. 86) of the EC-treaty.

<sup>66</sup> Case 155/79, AM & S v. Com, at para. 17, Recital 8 in the preamble to the Council Regulation 17/62.

<sup>67</sup> Article 284 (ex. 213) of the EC-treaty, Article 11 in the Council Regulation 17/62.

<sup>68</sup> Case 374/87, Orkem, at para. 28.

<sup>69</sup> Case 374/87, Orkem, at para. 27.

<sup>70</sup> Article 21 of the Protocol on the Statute of the Court of Justice.

<sup>71</sup> See for instance the Commission Decisions of Fabbrica Pisana and Fabbrica Sciarra as referred to by Kerse, p. 151.

passivity was said to be justified by reference either to the common legal traditions of the Member States or by reference to the operational catalogue of fundamental rights in the Human Rights Convention.<sup>72</sup>

### **3.3 THE LEGAL REASONING OF THE ADVOCATE GENERAL DARMON**

#### **3.3.1 The repudiation of a right against self-incrimination**

The Advocate General Darmon concludes that the alleged principle against self-incrimination is not claimable in the given context. He maintains that the right does not exist at all within the area of Community law. He makes appeals to the wording of statutory rules. He even argues that the relevant provisions if anything express the political aim of the Council to exclude a similar due process privilege from this particular sphere of law.<sup>73</sup>

The Advocate General further emphasizes that no uniform standpoint in regard to the enforceability of the principle of silence in preliminary administrative proceedings can be discerned in the legal traditions of the Member States. He renounces that the relevant statutory rule of the Human Rights Convention, that is Article 6 of the act, intimates any political right in the alleged form. The Advocate General reads the provision strictly linguistically and detects no express recognition of a principle against self-incrimination in competition law proceedings.<sup>74</sup> Above that, the Advocate General states that a right against self-incrimination would anyhow be insignificant in the preliminary phase of inquest.<sup>75</sup>

#### **3.3.2 A closer look at the soundness of the reasoning**

What can be said about the soundness of the reasoning of Advocate General Darmon if one puts on the eyes of Dworkin? I lay stress on that that the Advocate General Darmon appeals primarily to statutory law. Positive rules do not in his opinion aid a privilege against self-incrimination. He looks beyond the explicit clauses by pleading to locally underlying standards, which according to the Advocate General argue in favour of totally excluding, or at least gravely restricting, the alleged right.

The Advocate General evidently awards the efficiency of Commission administration of competition law considerable weight. In lengthening this means that he acknowledges the significance of the maintenance of free market access and the non-distortion of the system of free competition. I reckon that he considers it to be the utter charge of the communion to create an internal market, and not to act as a guardian of individual rights. He seems to act by arguments of policy. Since an apropos judgement lives off a moral position argued out of principle, I depreciate the correctness of his inferences.

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<sup>72</sup> Case 374/87, Orkem, at para. 18.

<sup>73</sup> See the opinion of AG at paras. 88-93.

<sup>74</sup> See the opinion of AG at paras. 96-125.

<sup>75</sup> See the opinion of AG at para. 142, case 136/79, National Panasonic, at para. 21.

The most troublesome default of the reasoning of the Advocate General Darmon is that he pays too much attention to the specific nature of competition law. His argumentation relates but only to this demarcated area of Community law. He does not pursue any global search for a principle of passivity. I question the depth of his analysis. He apparently chooses to neglect any course of action that may build up on other dimensions of Community law, and which may pave the way for the discovery of the principle against self-incrimination.

The Advocate General hasty, and quite insufficiently, mentions common judicial traditions as relevant sources of law. His statement somewhat intimates an attempt to broaden his approach to the problem of self-incrimination. At its best, I expect that he aspires to achieve points of coherence. He unfortunately closes his analysis before asking the right questions. Summing up, I say that the Advocate General does not after all broaden his mind as he steps a bit into the area beyond the immediately perceptible sphere of Community competition law. Whether or not the passivity of Orkem constitutes a genuine claim, is an issue left open.

### **3.4 THE JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE<sup>76</sup>**

#### **3.4.1 The definition of the moot question in the Orkem case**

The reasoning of the European Court of Justice with respect to the procedural right of Orkem not to disclose self-incriminatory documentation differs from the arguing of the Advocate General Darmon. The Court defines the moot question as to whether or not the public official is empowered by statutory law to request answers from individuals, that in lengthening bring about an obligation to submit evidence of their own illegal conducts, which are incumbent upon the state to prove.<sup>77</sup> The Court is aware of that Community legislation requires subjects of inquests to co-operate actively.

The Court of Justice confirms the lack of directions in secondary legislation that fix an institutional right to evade formal questions in preliminary administrative inquiries. The absence of an express principle leads the Court to ask if such a right all the same exists by virtue of the general principles of law. It is the resolute comprehension of the judiciary that the discovery of a political right will have take recourse to standards that underlie the Community legal system as a whole.

I ascertain that the Court of Justice favours a susceptible approach to individual rights. It appears to take rights seriously when it sets out to ask the right questions in order to deliver a smooth rights formula. Albeit intimating some sort of superiority of, and preference to, black letter law by implicitly declaring it as the primary source of adjudication, it does not fail to recognize other dimensions of Community law. The institution acknowledges the imperative necessity to ponder all general principles of law.

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<sup>76</sup> Case 374/87, Orkem, at paras. 26-28, see the confirmation of the Orkem formula in case T-34/93, *Société Générale v. Com.*, at paras. 71-72.

<sup>77</sup> The Court of Justice refers specifically to Article 11 in the Council Regulation 17/62.

### **3.4.2 The search for a principle against self-incrimination in the common legal traditions of the Member States<sup>78</sup>**

In the absence of applicable Community rules, the eyes of the European Court of Justice initially turn to the consensual legal traditions of the Member States. The Court apparently perceives the need to ask the question whether or not the domestic judicial orders support the present claim for passivity. If a principle against self-incrimination can be sketched out, I assume that the judiciary is willing to consolidate it either in its original form or in a remodelled shape.

What is most appreciable is that the Court of Justice poses the problem of self-incrimination by chasing an underlying principle of silence beyond the immediate sphere of Community competition law. It clearly steps even beyond the domain of Community law in its entirety. I reckon that the judiciary aspires to pursue a deep and broad analysis of the dilemma. I presume that it penetrates domestic legislative standards and precedents, and that it also looks further beyond these. Due to the summarily nature of the original Orkem decision, I admit to that my supposition is not for certain justified.

### **3.4.3 The search for a principle against self-incrimination in international treaties<sup>79</sup>**

The European Court of Justice chases a principle against self-incrimination in international treaties. The Human Rights Convention is given a position of significance of course. Article 6 of the statute enjoys the focus of attention of course. A linguistic interpretation of the clause does not discern the tenor of the right against self-incrimination. All the same, I say that it is of vital momentous that the Court of Justice aspires to broaden its analysis by scrutinizing a cluster of external legal sources.

By not being satisfied with an answer in the negative, the European Court of Justice ponders over if not Article 6 of the Convention ought to be perceived in the light of its wording, structure and aim. I believe the Court intends illuminate the issue as to whether or not a principled norm assists a reasoning by arguments of purpose and suitability. I say that it is not surprising that the institution answers the question affirmatively, since it tends to reflect, and actively promote, pragmatic aspirations.

The thorough examination of the Human Rights Convention give at hand that neither the explicit wording of its clauses, nor its engendered precedents hint at an absolute right of silence. The similar conclusion is made after a rather moderate scanning of yet another international covenant adopted by the Member States; the International Covenant on Civil and Political Rights does not aid an inflation of the right to remain silent to clienteles other than natural defendants, and to forms of procedures other than criminal proceedings.<sup>80</sup>

The Community Court reasons proportionately plentiful in respect of the applicable statutes. It holds a liberate approach to a plurality of modes of legal interpretation. I detect a genuine want to produce a correct rights formula of silence. Still, one must not forget that the

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<sup>78</sup> Case 374/87, Orkem, at para. 29.

<sup>79</sup> Case 374/87, Orkem, at paras. 30-31.

<sup>80</sup> Articles 14, 3(g) of the International Covenant on Civil and Political Rights.

discovery of a principle against self-incrimination would in lengthening deaden the powers of the superiority when relating to the affairs of individuals. A restriction of power is on one hand no just cause for sapping the proper course of argumentation. The moral position of the Community judicature can on the other hand not be criticized as long as it is logically derived.

#### **3.4.4 The Orkem formula<sup>81</sup>**

Albeit choosing a different course of reasoning with respect to the Orkem situation as compared to the arguing of the Advocate General Darmon, I adduce that the argumentation of European Court of Justice takes the character of a slowcoach as far as the present liberal stance to individual rights goes. The judgement confirms that a qualified right against self-incrimination exists by virtue of an underlying principle of silence. The defence enjoys a guarantee not to be irremediably impaired during the preliminary phase of investigation if the procedure might result in the imposition of penalties, fines included.

The reason for supporting a political right against self-incrimination in the topical context is evidently that the preliminary stage of inquiry can be decisive for the revelation of evidence that demonstrates illegal conducts on behalf of the private subject and for which it rests with liability. I reckon that the Community decision maker attempts to extract a due process privilege that is enforceable in preliminary inquests before administrative public ministries and still is powerful in contentious proceedings before a court.

I suppose that the Orkem formula of silence at a first glance seems favourable to the individual. But even if restrictions to the powers of the investigative superiority are set out by arguments of principle, the right against self-incrimination does not stand without qualifying provisos that are argued out of policy. The claim of Orkem is after all not recognized as untouchable.<sup>82</sup> This is the crux of the matter. This is what makes the Orkem formula controversial. I am positive about that the judiciary gives prominence to the efficiency of Commission administration of the system of competition. The court takes exception to an absolute principle of silence by pleading to the practicability of competition law standards. It is the opinion of the Court of Justice that the Commission as far as possible must be able to compel an individual to supply information even if the data incriminates another subject or the subject of scrutiny itself.

I should like to point out that the Commission is never empowered to undermine the rights of the defence. This means that questions that compel the applicant to admit to its participation in an alleged illegal action that aims at distorting the Community system of free competition are vitiated by the court. It implies in text en clair that questions that do not simply intend to reconstruct facts, violate the principle of silence. Questions that purely seek factual clarification meet the principle and are hence admissible. The Orkem formula does certainly not imply a moral right against self-incrimination.

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<sup>81</sup> Cases 374/87, Orkem, at paras. 32-33, 35-36, 38-39, 41, case 322/82, Michelin v. Com, at para. 7, joined cases 46/87 and 227/88, Hoechst, at para. 15, case Solvay & Cie. v. Com., at para. 2, see case T-34/93 Société Générale, at paras. 73-76.

<sup>82</sup> See the preamble to the Council Regulation 17/62.

## **4. THE RIGHT TO REMAIN SILENT AS HELD BY THE FUNKE JUDGEMENT<sup>83</sup>**

### **4.1 THE LEGAL PREMISES OF THE FUNKE SITUATION**

The Court of Human Rights is the competent interpreter of the Human Rights Convention. The Member States are all signatories to the statute by virtue of their membership in the European Union. The right to remain silent in criminal proceedings finds explicit embodiment in Article 6 of the act. It is an individual right against the state. The superiority holds no competing right.

### **4.2 THE FACTUAL PREMISES OF THE FUNKE STATE<sup>84</sup>**

Mr Funke, who was a German national, lived and worked in France when three French customs officers on the 14 of January in 1980 made a house call with the intention to procure specifics of his means abroad. The bank accounts were not an issue of dispute, as Funke admitted to having these. He denied however to possessing any bank statements, yet such documents were found among his belongings during a subsequent house call.

As a result of the discovery of bank documents, Funke was requested by French public officials to supply statements for the three previous years relating to specific German and Swiss banks. He agreed to disclose the information, but he later changed his mind. French authorities initiated national proceedings against Funke in order to compel him to submit to the request. The applicable French Customs Code stipulated liability on the pain of imprisonment and fines in case of failure to supply the materials.

According to the domestic judicial decision, Funke was fined because of his refusal to cooperate with state officials. An injunction ordered him to disclose the documentation or pecuniary sanctions would be imposed upon him. Funke lodged an appeal with reference to the Human Rights Convention, but a judgement delivered by a higher domestic court found his appeal inadmissible and altered the amount of fines to his disadvantage. The Cour de cassation finally dismissed Funke's application for appeal by ruling that Article 6 of the European Convention did not apply to the situation. The Customs authority was accordingly not guilty of infringing the right of Funke to remain silent in the preliminary inquest.

In February of 1984 Funke accused the state of France of withholding him his right of silence according to the prescriptions under Articles 6(1) and 6(2) of the Human Rights Convention.<sup>85</sup> He argued that he had been compelled to assist in the prosecution against himself. The Strasbourg Court delivered its judgement in the matter of dispute in 1993 after the decision by the Commission of Human Rights was made.

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<sup>83</sup> The judgement of 25 February 1993, *Funke v. France*.

<sup>84</sup> Van Overbeek, p. 129.

<sup>85</sup> Article 6(1) of the European Convention on the Protection of Human Rights prescribes: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)". Article 6(2) of that same act prescribes: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law."



#### **4.3 THE LEGAL REASONING OF THE COMMISSION OF HUMAN RIGHTS<sup>86</sup>**

The decision of the Commission of Human Rights is to the disadvantage of Mr Funke. It is the conviction of the institution that no individual rights that are embodied in the Human Rights Convention have been violated in the Funke case. The reasoning of the Commission of Human Rights focuses to the most part on the special character of the domestic proceedings against Funke. The direct connection to economic and financial interests of vital national importance is accentuated. Efficiency aims of the French Customs Official are not depreciated by the Commission.

The argument that the domestic inquiry is the procedure that causes the least interference into the affairs of the private subject does not in my opinion constitute a premise of a correct formula of silence. It is possible to maintain that other investigatory measures cause graver violations of integrity, but I claim that this mode of reasoning is less persuasive. The proposition rather implies that the Commission allows public efficiency to override the principle-based right of an individual. I suspect that this line of action contorts the stance to political rights as trump cards.

The legal reasoning in respect of Article 6 in the Human Rights Convention is not impressive. The analysis of the Commission is to some extent both deep and broad. The statutory rule is not examined merely linguistically, but it is read in the light of its practicality and suitability. Still, I must call in question that arguments of policy are allowed to put weight on the scale. I assert that this violation of the rules of principle-based argumentation engenders an incorrect rights formula. I can but only draw the conclusions that the statement made by the Commission of Human Rights in the Funke case is useless to the administration of justice henceforth.

#### **4.4 THE JUDGEMENT OF THE COURT OF HUMAN RIGHTS<sup>87</sup>**

The Court of Human Rights rules in favour of Mr Funke. The judgement settles that the investigative measure employed by the French authority is decisive to the future conviction of Funke in the domestic court proceedings. The customs authority secures the guilt of the plaintiff by making the house call at a point in time when it is not substantially convinced that evidence of the alleged infringement of financial law actually exists. The judgement particularly accentuates the attempt of the State of France to compel Funke to submit to the request for documentation. Co-operation is tantamount to an outright admission of guilt. It is without doubt incumbent upon the state to demonstrate the offence.

The arguing of the Human Rights Court clearly takes recourse to legal premises other than those appealed to by the Commission of Human Rights. The Court repudiates that the special character of economic or financial inquiries composes just cause to circumscribe or disregard the right of the individual to remain silent when he is charged with a criminal offence. The

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<sup>86</sup> The judgement of 25 February 1993, Funke v. France, at para. 43.

<sup>87</sup> The judgement of 25 February 1993, Funke v. France, at para. 44.

Court of Human Rights apparently takes exception to arguments of policy. I say that it at any rate intimates that efficiency aspects do not prima facie trump the topical procedural right.

The soundness of the arguing shows off in yet another aspect I believe. The Human Rights Court clearly refuses to read off Article 6 of the Convention by means of cursory. If it were to linguistically perceive the qualifying premises of the provision, the criterion of criminal offence would put a spoke in Funke's wheel. The statutory rule is read more far-seeing though. A considerable amount of regard is paid to the immediately underlying tenor of the clause. The Court gives the requisite of criminal offence an autonomous meaning within the provision. This means that the Funke situation is tantamount to a criminal charge.

The State of France is found guilty of violating Mr Funke's right of silence as stipulated by Article 6(1) in the Human Rights Convention. Funke enters subparagraph 2 as well, by stating that his right to be presumed innocent is infringed by the French public ministry. The Court leaves this issue open. I reckon that it is quite troublesome to establish whether or not the Strasbourg judiciary at this point discharges its duties. Adjudicators are certainly required to ask the right questions before delivering their final decision.

Does the question as to whether or not the Court ought to examine Article 6(2) in order to detect an even more powerful right of Funke constitute "the right question"? Funke is for certain awarded some protection of integrity when the Human Rights Court grants him a right of silence in accordance with Article 6(1). If the strength of the consolidate procedural safeguard does not correspond to a prospective moral right of silence, I apprehend that the Human Rights Court has not posed the problem accurately. I nevertheless believe that the reasoning of the Strasbourg Court must come to an end. It would otherwise be obliged to examine each and every judicial standard there is, if we go to extremes. That is not practicable of course. Nor is it meaningful or intended for.

I am not surprised by the fact that the Strasbourg administration of justice consolidates a less strict right of silence. The prospective wants of the Human Rights Court make it far more likely to reach a decision that favours principle-based rights of individuals at the expense of state intervention. Even so, I recollect that this judiciary also aspires to achieve points of coherence. The Court appears to be fully aware of that it can not generate legal formulas out of erroneous courses of reasoning simply with the desire to engender advantageous legal positions of individuals.

## **5. GROUNDS FOR A REVIEW AND A REVISION OF THE ORKEM FORMULA; THE INTERVENTION OF THE FUNKE JUDGEMENT<sup>88</sup>**

### **5.1 A REPUDIATION OF THE ORKEM FORMULA AS AN OUTFLOW OF GOOD LAW<sup>89</sup>**

The Orkem formula was delivered by the European Court of Justice in 1987. The qualified privilege to remain silent in administrative preliminary proceedings has since been confirmed by a few Community decisions. Recent judgements have anew ignored the direction prescribed by the Funke ruling.<sup>90</sup> The original concept has for certain prevailed the European evolution of individual rights protection in general. It is a common opinion of the legal doctrine that the inward sense of the principle of silence attracts the claim for a revision of the Orkem formula.

It has been held by jurisprudence that the divergent lines of reasoning pursued by the European Court of Justice in the Orkem case and by the Court of Human Rights in the Funke case respectively, indicate the need for the Community judicature to re-evaluate the Orkem concept. It has further been said that Community adjudication should pay attention to and align with the precedents of the Strasbourg Court in the light of coherence of legal reasoning. The Strasbourg course of arguing is assumed to more properly reflect the objectives of the Human Rights Convention.

Sceptics to a review and the possible revision of the Orkem formula accentuate the appropriateness of discrepancies in decrees. They consider it as a matter of course that the European Court of Justice puts the Community interest to keep up an efficient system of competition up to the Community interest to protect individual integrity.

### **5.2 ADMINISTRATIVE PROCEEDINGS<sup>91</sup>**

The case law of the Human Rights Court has consistently rejected the strict interpretation of Article 6 in the European Convention.<sup>92</sup> It is expressly held by the Strasbourg Court that the application of the statutory rule in a narrow sense contradicts its inward sense. It is the objective of the enacted standard to uphold the integrity of individuals at times when they are especially vulnerable and risk to sustain heavy losses. The Court of Human Rights acknowledges the features of different forms of proceedings, only to stretch out the principle of silence to touch upon criminal inquiries as well as upon administrative inquests.

Competition law procedures are administrative proceedings of a special kind. I say that they can be reflected upon as tantamount to criminal charges, seeing that they can result in the imposition of pecuniary penalties. It is decisive to the prospective revision of the Orkem

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<sup>88</sup> Sjödin, p. 246, Träskman, 1988, pp. 469-470, Van Overbeek, pp. 129-130.

<sup>89</sup> The judgement of 2 May 2000, *Condrón v. the United Kingdom*, the judgement of 8 February 1996, *John Murray v. the United Kingdom*, the judgement of 6 June 2000, *Averill v. the United Kingdom*, SvJT, 1996 pp. 368-369, SvJT, 2000, pp. 573-575, the judgement of 3 May 2001, *J.B. v. Switzerland*.

<sup>90</sup> Case T34/93, *Société Générale v. Com*, compare to case C-60/92, *Otto v. Postbank*.

<sup>91</sup> The judgement of 27 June 1968, *Neumeister*, at para 18, the judgement of 21 February 1984, *Öztürk*, at paras. 48-50, the judgement of 27 February 1980, *Deweert*, at para 46, Sjödin, p. 246, Träskman, 1993, pp. 594-598.

<sup>92</sup> The judgement of 26 April 1979, *Sunday Times*, at para. 55.

formula if the term criminal charges is perceived according to its linguistic meaning or if it is handled in a more suitable manner that looks beyond the conventional idea of the concept. The Court of Human Rights convincingly argues that the requisite of criminal charges must be awarded a self-governed signification in the given context.

The graveness of the deterrent or punitive sanction that can be enjoined, is a relevant element closely related to the premise concerning the nature of proceedings. The formal denomination of the inquiry is of less importance to the legitimate claim for a review. I assert that it is more suitable to estimate the risk of personal damage due to the substantial qualities of the procedure.<sup>93</sup> I must nevertheless admit to that the right of silence does not stand or fall on this premise. After all, the right against self-incrimination derives from a moral position that but only recognizes that criminal charges reasonably and at times bear the similar features as other forms of proceedings.

### **5.3 THE PRELIMINARY PHASE OF THE INQUEST<sup>94</sup>**

I suppose that the striking element of the preliminary phase of investigations is the hitherto lack of evidence of any illegal practises. The Human Rights Convention does not discriminate between different phases of procedure. The Strasbourg Court accordingly does not set out provisos to a right of silence as far as the stage of inquiry goes. The arguing shows off fitness, seeing that it otherwise would render the rights concept nonsensical. I ascertain that there is no underlying principle of law that assists the upholding of an impaired defence if the law in its entirety makes sense, and it does.

The recent premise of the Orkem review makes it necessary to ponder over the tenor of the concept of tribunals. The Community administration of justice has previously disassociated itself from the recognition of the Commission as a tribunal in the conventional sense of the term. I trust that aspirations of principled consistency will ensure that the conception is elaborated to converge with the Strasbourg notion of the requisite tribunal under Article 6.<sup>95</sup>

### **5.4 THE STATUS OF THE SUBJECT OF INQUIRY<sup>96</sup>**

Funke was a natural person. Orkem was an undertaking. The guardian of the Human Rights Convention nowadays tends to approach the political rights under Article 6 of the act likewise no matter the nature of the defendant. Similarly to natural persons, undertakings have a right to a fair trial. The view is acknowledged by the Community judicature.<sup>97</sup> I believe that the recognition is momentous, seeing that Community competition law focuses solely on legal bodies by inflicting penalties upon companies themselves and not upon their senior personnel.

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<sup>93</sup> The judgement of 8 June 1976, Engel, at para. 82.

<sup>94</sup> Sjödin, p. 246, Träskman, 1993, pp. 594-597.

<sup>95</sup> Joined cases 209-215 and 218/78, Fedetab, at para. 81.

<sup>96</sup> The judgement of 1 June 1993, Criminal proceedings against L. Shipping BV Nederlandse Jurisprudentie 1994, the opinion of the Commission of Human Rights in the judgement of 17 December 1968, Church of X v. the United Kingdom as referred to by Overbeek, p. 130, note 39.

<sup>97</sup> Case 136/79, National Panasonic v. Com., Kerse, at 8.11.

It is important to frame the question as to whether or not the status of defendant is an element of crucial significance to the discovery of the right against self-incrimination. I trust that a principle-based theory of law hardly considers the parties of dispute more equal in merit if the defendant is a legal body instead of a natural person. The powers of the public official are all the same overwhelming to private subjects, why the similar legal position is fair.<sup>98</sup>

## **5.5 REQUESTS FOR FACTUAL CLARIFICATION<sup>99</sup>**

The reasoning of the European Court of Justice in the Orkem case and the arguing of the Court of Human Rights in the Funke case differs substantially as regards the importance attached to the characteristics of the questions put to subjects of inquest. The judicatures discriminate between objective questions that seek for factual clarification only and questions that induce self-incriminatory answers. I say that it is vital to call attention to the nature of the put questions if one strives to assist the call for a revision of the Orkem decision.

A principle-based theory of law depreciates the discrimination between different types of questions, since the distinction per se involves a balancing act that places arguments of policy on the same scale as principled values. Qualifying provisos regarding the description of questions do not compose premises of the rights formula and must be removed from the scheme. The defectiveness of the reasoning implies that the Orkem formula scarcely emanates from the best theory of law, which in turn feeds the fairness of a revised, and stronger, political right.

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<sup>98</sup> Sjödin, p. 246.

<sup>99</sup> Sjödin, p. 246, Träskman, 1988, pp. 469-470, Van Overbeek, pp. 129-130.

## **6. THE BEST ORKEM FORMULA IMPLIED BY THE MODEL OF PRINCIPLES**

### **6.1 THE PREREQUISITES OF THE ORKEM FORMULA; THE RELATION OF COMMUNITY LAW TO THE SCHEME OF PRINCIPLES<sup>100</sup>**

#### **6.1.1 The general principles of law**

The European Court of Justice has derived a number of individual rights from the concentric circle of fundamental rights that fence around the Human Rights Convention. The rights of the defence is but only one category of these sets of institutional principles.

I am sure that the general principles of law are not created by means of need. They live within all judicial systems irrespective of official confirmation or concretion. The general principles of law have a threefold function in practise. They feed the interpretation of Community law, they state causes for legal reviews and they arise tortuous liability. Appeals to underlying points of law are recognized either by means of explicit references in primary or secondary Community legislation, that is what is referred to as *renvoi obligatoire*, or by means of the implicit duty of the courts present its moral position, that is what is defined as *reference spontanée*.<sup>101</sup>

It is an obligation of the Community Courts to meet the objectives of Community law when applying and elaborating the provisions of the Treaty on the European Union. The judiciary must moreover acknowledge “the law” of the Community. I surmise that the duty pertains to a wide concept. The sense of the stipulation indicates that Community judges are obliged to observe the general principles of law.<sup>102</sup>

The discovery of the general principles of law means that the political morality that lives within the communion comes to influence Community jurisprudence. The general principles of law may be visible in the domestic legal orders of the Member States and in the international treaties on which the Member States have collaborated. The status of the general principles of law is not dependent on their factual origin.<sup>103</sup> I suggest that the standards are tied to their original appearance in the sense that they can not be remodelled, inflated or circumscribed beyond recognition. The European Parliament takes it for granted that the Community Courts deliver properly derived rights formulas that distinctly outline the prevalent political morality. I expect that it is the prospect of the Parliament that additional principles of law henceforth are expressly embraced by the Community legal order.<sup>104</sup>

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<sup>100</sup> See cases 115/80, *Demont v. Com.*, at para. 12, 155/79, *AM & S v. Com.*, at paras. 18-28.

<sup>101</sup> *Tridimas*, pp. 17, 22-23.

<sup>102</sup> Articles 220 (ex. 164), 230 (2) (ex. 173(2)) and 288(2) (ex. 215(2)) of the EC-treaty.

<sup>103</sup> *Joined cases 63 & 69/72, Werhahn & Others v. Council and Com.*, Hartley, p. 138.

<sup>104</sup> See the European Parliament’s Declaration of Fundamental Rights and Freedoms of 1989, Hartley, pp. 146-147, *Lenaerts*, pp. 383-384, *Tridimas*, pp. 4-5.

## 6.1.2 Fundamental principles<sup>105</sup>

The detection of constitutional rights is almost always an outflow of Community legal usage. Adjudication has established that fundamental rights form an integral part of the general principles of law. The judiciary has proclaimed the institutional force of the foundational principles as long as they are in accordance with the structure and the aims of Community law in its entirety.<sup>106</sup>

When legal dilemmas concerning individual rights are to be resolved by the Community Courts, the Human Rights Convention holds a unique standing as an instrumental medium for the discovery of the sense of law. Community legislation explicitly confirms this view.<sup>107</sup> I note that paying respect to human rights is not tantamount to the direct applicability of the Strasbourg Convention. Regardless of my scepticism, the Community judicature insists on that most fundamental rights are recognized and applied in accordance with their tenor as prescribed by the Strasbourg judiciary.<sup>108</sup>

## 6.1.3 Due process principles<sup>109</sup>

It is the untouchable right of the defendant to be heard in Community proceedings if it is affected by the final decision.<sup>110</sup> The privilege seems to stretch itself to compose a right of applicants and plaintiffs as well. Qualifications with respect to the claim of activity have been seen in Community legal practise.<sup>111</sup> I suggest that the right against self-incrimination relates to a wider notion of the individual freedom of choice to strike an attitude in public inquests. The right of silence offers an option of passivity, or in other words, a right to refuse to cooperate with the prosecution.

The right to be heard can in my opinion by rights be stretched out to touch the right to a fair hearing. This measure allows the party of scrutiny to orally supply information of relevance to the examination. If the primary concept embraces this latter aspect of procedural activity, I say that it is reasonable to assume that the concept engender coupling devices to other fundamental principles. If my supposition is correct, then the derivation of a right against self-incrimination may be fair.

The discovery of an interlink between the right to a fair hearing and the principle to remain silent justifies an attitude of passivity in proceedings where the private subject is charged with an offence. I state that the principle of silence and the principle against self-incrimination to some extent produce overlapping individual rights. To refuse to give evidence of one's own participation in illegal practises can find expression inter alia in the choice to be all quite during the inquest. I admit to that it is not plain whether or not the employment of silence is tantamount to the refusal to supply self-incriminatory documentation in writing.

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<sup>105</sup> Brown & Jacobs, pp.303-310, Hartley, pp. 139-149, Kerse, pp. 348-351, Tridimas, pp. 208-215.

<sup>106</sup> Cases 11/70, Internationale Handelsgesellschaft, 29/69, Stauder v. Ulm.

<sup>107</sup> See the preamble to the Single European Act, Article 6(2) of the Treaty on European Union.

<sup>108</sup> Case 4/73, Nold KG v. Com., at para. 30, Tridimas, p. 249.

<sup>109</sup> The judgements of 21 December 2000, Heaney & McGuinness v. Ireland and Quinn v. Ireland, Hartley, pp. 159-160, Usher, pp. 72-80, SvJT, 2001, pp. 85-86, the judgement of 3 May 2001, J.B. v. Switzerland.

<sup>110</sup> See Article 18 of the Protocol on the Statute of the Court of Justice, see case 17/74, Transocean Marine Paint Ass. v. Com.

<sup>111</sup> Cases 32/62, Alvis v. Council, 374/87, Orkem, at para. 32.

Fresh precedents from the Strasbourg judiciary confirm my recent intimation. Adjudication explicitly confirms by reference to Article 6(1) in the Human Rights Convention that the right of silence and the right against self-incrimination are essential elements of the right to a fair trial. It is furthermore expressly held that the components form a unit with Article 6(2) of the statute and the therein settled right of a presumption of innocence.

## **6.2 A MORAL RIGHT AGAINST SELF-INCRIMINATION<sup>112</sup>**

Principled values sometimes involve moral rights. The status as a moral right hints at the impediment to make the privilege subject to qualifying provisos. Since the moral position of the individual always remains unaltered, I say that his legal position should too.

I am sure that the right of individuals not to disclose self-incriminatory documentation in Community proceedings constitutes a value also in a cost-efficiency community. I reckon that the constitutional safeguard protects defendants against the deliberate initiation of judicial scrutiny without reasonable cause. Above that, it works as an instructing device to public officials. It is not less abominable to violate the principle of silence by mistake, since also accidental infringements can bring about severe losses to individuals.

Economic damages because of a disclosure of information may not be too heavy in practise. Even so, I depreciate the relevance of arguments of effects when moral values are brought to the fore. It is a matter of detest when private subjects are required to co-operate by unjust means. This is a moral harm. It does not matter what brought on the inquest in the very beginning. The defendant is not be exposed to a higher degree of pain if he is not guilty of the charges.

The arguing in regard to moral harm presupposes that the right to passivity proceedings is a genuine political right that overrules any long-term societal benefit. It further implies that the Community administration of justice at all points in time treats individuals as equals. Decision makers must refuse to intentionally impose greater risks of moral harm on certain categories of individuals than others. I say that the concretisation of a moral principle of silence forms an essential part of the best legal theory of idealized measures by means of which the Community legal order defines itself.<sup>113</sup>

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<sup>112</sup> Dworkin, 1985, pp. 79-85.

<sup>113</sup> Gaete, p. 161.



### 6.3 THE COST-GAIN SCHEME; REFUSING TO PUT THE INTEREST OF ORKEM UP TO COMMUNITY EXPENDITURE<sup>114</sup>

From the account of principles, it is erroneous to balance out errors over the long run by adjusting the social costs of the communion and the political right of Orkem in a manner that allows the definition of the right against self-incrimination to be steered to the middle. The cause for rejecting any weighing measure is that the consolidation of a genuine right can never be considered as cheating the Community of common benefits.<sup>115</sup>

I ascertain that it is irrelevant to the review of the Orkem formula that the confirmation of a strong right against self-incrimination impedes the efficiency of the system of competition.<sup>116</sup>

The European Court of Justice can not make the political right subject to qualifying provisos on grounds of policy. Aspirations of fairness are unfamiliar with the issue as to whether or not factors that favour personal integrity on principle outweigh factors that favour European market integration.

I assert that any extra costs to the Community due to the consolidation of an unqualified right against self-incrimination, do not compose a just cause for rejecting a powerful Orkem formula. It only makes sense to withhold Orkem of its due process privilege if an extra societal cost can not be considered as necessary. Since the expenditure most likely would relate to the employment of alternative investigatory measures, I assure that the outlay is requisite.<sup>117</sup> The right against self-incrimination would otherwise be recognized only in so far that it is handy to the public ministry.

Can the Court of Justice produce any compelling counterargument that indicates that the extra cost to the Community is not worth paying I wonder. The anew confirmation of the original Orkem formula may be fair if the Court can prove that the principle of silence is not at stake in the Orkem state, or only to some minor extent. The expenditure of upholding a wide right against self-incrimination will have to be much higher than the cost of upholding a qualified right of silence. The difference in costs must justify just any violation of human dignity or political equality. The Orkem state does not demonstrate these conditions, why I depreciate the persuasiveness of making appeals to the cost-gain scheme.<sup>118</sup>

If the Court of Justice renounces my recent inference, I call upon it to make the practically impossible prediction of estimating the extra cost to the Community. Such speculations will form an analysis of extreme uncertainty of course. I repudiate that the Community judiciary is permitted to experiment on such circumstances. Speculations about third party expenses have no place in legal reasoning. It is not a prerequisite of the fresh rights formula that the silence of Orkem, marginally or prospectively, increases the risk for other unspecified rights of other unspecified subjects to be nibbled at.<sup>119</sup>

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<sup>114</sup> Case T-34/93, *Société Générale v. Com.* confirming cases 374/87, *Orkem*, 27/88, *Solvay & Cie v. Com.*, joined cases 46/87 and 227/88, *Hoechst*, 1/58, *Stork v. High Authority*, at 25-26, case 2/56, *Geitling & Others v. High Authority*, at 438-439, 40/64, compare to *Sgarlata v. Com.*, at 227 concerning the non-recognition of underlying principles per se, see case 29/69, *Stauder v. Ulm* for the recognition of principles of law, see case 11/70, *Internationale Handelsgesellschaft* for the confirmation of principles of law, Brown, p. 304, Hartley, pp. 139-149, Korah, p. 69, Ortiz-Blanco, p. 177, observe particularly note 70.

<sup>115</sup> Compare to the opinion of the AG Warner in case 155/79, *AM & S v. Com.*

<sup>116</sup> Commission Report of 30 May 1991, at paras. 62 and 64.

<sup>117</sup> See for instance the opening to Article 14-investigations by means of Article 14 of the Council Regulation 17/62.

<sup>118</sup> Dworkin, 1977, pp. 200-201.

<sup>119</sup> Dworkin, 1977, pp. 202-204.

I must admit to that arguments with regard to marginal effects can be persuasive. Speculative expenses are duly acknowledged in criminal procedures, where it is preferred that a guilty man is acquitted rather than that a man is convicted of a crime he did not commit. Seeing that preliminary administrative inquiries are tantamount to criminal proceedings from the point of view of Article 6 in the Human Rights Convention, general arguments by reference to incremental effects may appear more defensible.

At a first glance, the less appreciative attitude to the cost-gain scheme seems to fortify the legal position of individuals. I must however put forward a note of caution. If an extensive individual right against self-incrimination intervenes the investigation from its point of departure, I apprehend that the public ministry may try to invoke stricter measures that in lengthening place heavier burdens upon the subjects of inquests. As a suggestion, grave restrictions to Commission powers to request information by a binding decision can bring in its train a substitution by Article 14-investigations in order to chase the desirable documentation.<sup>120</sup> The latter form of scrutiny is in practise a most far-reaching intervention into the affairs of individuals.<sup>121</sup>

#### **6.4 THE APPEAL TO ARGUMENTS CONCERNING THE POLITICAL MORALITY OF THE COMMUNION<sup>122</sup>**

I wonder if not a comparative analysis of the domestic legal orders of the Member States is likely to render a different outcrop than it did in 1987 due to the general evolution of human rights within western law-governed societies. I expect that foundational values are today more distinctly outlined and unified. I assume that the review of the Orkem formula is influenced by the transfer of Member State sovereignty to the Union. The Community explicitly purports to guarantee the equivalent protection of individual rights as the Member States do.

The judicature of the Community must elaborate with the Member State conceptions of underlying principles of law.<sup>123</sup> Community judges should closely observe the political morality that lives within the domestic legal spheres before establishing their own moral positions. The acknowledgement is necessary, not because domestic values are more morally correct than conventional values, but because they form vital elements of Community law. The outcrops of political morality can vary in appearance and still be considered as parts of a general standpoint. It is not necessary for the Community Court to establish any lowest common denominator of the domestic moral schemes.

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<sup>120</sup> Articles 11(5) and 14 in the Council Regulation 17/62, see joined cases 46/87 and 227/88, *Hoechst v. Com.*, at para. 34.

<sup>121</sup> See the opinion of the AG Warner in case 155/79, *AM & S v. Com.*, at 1621.

<sup>122</sup> Cases 1/58, *Stork v. High Authority*, at 25-26, case 2/56 *Geitling & Others v. High Authority*, at 438-439, 40/64, compare to *Sgarlata v. Com.*, at 227 concerning the non-recognition of underlying principles per se, see case 29/69, *Stauder v. Ulm* for the recognition of principles of law, see case 11/70, *Internationale Handelsgesellschaft* for the confirmation of principles of law, 4/73, *Nold KG v. Com.*, at paras. 13-14, 44/79, *Hauer v. Land Rheinland-Pfalz*, at para. 15, 155/79, *AM & S*, at paras. 19 and 21, joined cases 46/87 and 227/88, *Hoechst*, T-34/93, *Société Générale v. Com.* confirming cases 374/87, *Orkem* and 27/88, *Solvay & Cie v. Com.*, *Brown*, p. 304, *Hartley*, pp. 139-149, *Ortiz-Blanco*, p. 177, observe particularly note 70 Cases, *Tridimas*, p. 10, *Usher*, p. 80.

<sup>123</sup> Case 155/79, *AM & S v. Com.*, at para. 18.

If the common legal traditions of the Member States are not paid sufficient attention, I fear that national authorities might take the liberty to circumvent their traditional legal principles simply by ratifying the Treaty on the European Union. Such tactics would gravely undermine the safety of individuals in their relations to public officials. I recollect that political rights at all times must be ensued by a least minimum of standard.<sup>124</sup>

Multilateral agreements tend to reflect the constitutions of western law-governed societies. The Human Rights Convention can assist as a serviceable medium of the principled values that live off the political morality within the Member States. The statute is a pointer to a uniform attitude to the enumerated rights. The fact is that the wording, structure and aim of every established privilege enjoy full acceptance; partly recognition is not an option to signatories of the act. It obviously provides less hardship to the European Court of Justice if it scrutinizes a few tangible legal statutes rather than an abundance of vague domestic trends. I admit to that by explicitly leaving indistinct tendencies out of account, the reasoning attracts criticism. The examining might be accused of being superficial.<sup>125</sup>

## **6.5 THE APPEAL TO ARGUMENTS CONCERNING INSTITUTIONAL MISTAKES<sup>126</sup>**

It is feasible that the rules that call for attention in the *Orkem* situation are the result of institutional mistakes made in history. A principle-based mode of operation charges the European Court of Justice to ponder over if not the provisions have failed to express their underlying points. If they are pure mistakes of the legislator, they might even contradict the general principles of law.

With respect to the secondary Community legislation which requires *Orkem* to actively cooperate with the Commission in the inquiry, I depreciate the thought that the relevant stipulations are emanations of institutional mistakes. It is after all the incontrovertible fact that the Commission must be able to fulfil its duties as fixed by the Treaty on the European Union.

The structure of Article 6 in the Human Rights Convention is another matter though. I say that it is not plain whether or not the prescription demonstrates an institutional mistake. The notion of tribunals has been given a sense that goes far beyond the conventional linguistic meaning. The same can be said as far as the conception of criminal charges goes. The latter term is awarded an autonomous significance within the provision. Any supposition that hints at an institutional mistake must of course be thoroughly looked into. I recollect that the Court of Justice does not enjoy mandate to overrule a legal standard simply by reference to the principle-based theory of historical mistakes. Blunder or not, the rule holds gravitational force.

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<sup>124</sup> See the opinion of the AG Warner in case 7/76, *IRCA v. Amministrazione delle Finance dello Stato*, at 1237, *Tridimas*, pp. 213-215, 238.

<sup>125</sup> Case 4/73, *Nold KG v. Com*, as referred to by Kerse, p. 296, Case C-60/92, *Otto v. Postbank*, at para. 17, see the opinion of the AG at para. 10 in the same judgement, Kerse, at 10.27, case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, *Tridimas*, p. 249, compare to *Overbeek*, p. 133, at note 73, *Van Dijk & Van Hoof*, p. 15.

<sup>126</sup> *Burg*, pp. 42-45, *Dworkin*, 1977, pp. 118-123.

If the Court of Justice discovers an institutional mistakes in regard to the Orkem situation, I suggest that it allows the relevant principles to function in a more modest dampening manner rather than to let them exclusively determine the political right. My arguing indicates that if a legal standard does not fit the best principle-based theory of law in the Orkem case, there is just cause for approaching the rule as narrowly as possible. Arguments of fit call the need for a re-analysis concerning the mildest measures at hand.

## **7. AN ELABORATION OF THE DWORKINIAN TECHNIQUE OF LEGAL INTERPRETATION; A NOTION OF RATIONALITY IN THE IMPLEMENTATION OF COMPETING PRINCIPLES IN THE ORKEM CONTEXT**

### **7.1 THE DEFINITION OF THE ORKEM SITUATION AS A COMPLEX CONTEXT<sup>127</sup>**

It is in my opinion a matter of delicacy to decide whether or not the Orkem situation constitutes a simple or a complex context. If Community administration of justice settles that the relevant legal materials do not relate to more than one enforceable principle, that is the principle against self-incrimination specifically, then the Court of Justice deals with a simple context. If the Court reviews the Orkem formula on grounds of a conviction of simplicity, it does not have to examine what is actually possible under the given circumstances. In other words, Community adjudication can evade the issue of weighing principles relative to each other.

Complexity of legal situations implies that the invoked principles do not point to the same direction and that only one principle applies to the state. If the interest of the Commission is regarded as a genuine outflow of the principle of public efficiency, or as in lengthening an emanation of the principle of economic growth, then a thesis of competing principles must be acknowledged. My rational review of the Orkem formula will presuppose that the Orkem state indeed represents a complex context.

### **7.2 THE DUELLING PRINCIPLES<sup>128</sup>**

It is rarely the case that only one principle of law is defensible and that all others are irrelevant to a legal situation. Usually the decision maker must argue out of many different and competing angles in order to provide a deep and broad examination of the legal materials. But before the evaluation of standards is initiated, the court must confirm which particular principles make themselves heard in the hard case. Only by identifying the principled values at stake, can the adjudicator present a reasonable cost accounting.

Some competing interests can be eliminated on grounds of irrationality. When the European Court of Justice examines the legal elements in the Orkem situation, it supposedly detects a clash between two specific values. The protection of the weak private subject is a political aim, whose fulfilment the Court is obliged to ensure. The defence must not be irremediably impaired during preliminary administrative inquiries, seeing that any impairment might secure a future conviction. The point implies a consolidation of personal integrity.

The efficiency of the prosecution is entailed with the efficient maintenance of the Community system of competition, for which the Commission is responsible. If the system of free market access within the communion is distorted, consumers suffer economic losses. This argument claims the value of economic growth. Reasonable men are likely to disagree about the relevance of this end when individual rights are brought to the fore. If the public interest does put weight on a balancing scale, it should be observed by the Court of Justice. The moral

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<sup>127</sup> Burg, pp. 47-52.

<sup>128</sup> Burg, pp. 58-62, 67-71.

position of the Court would otherwise be erroneously produced and the engendered rights formula would accordingly be most fragile.<sup>129</sup>

If the principles of economic growth and/or efficiency of the prosecution and the principle of silence compose comparison material in the Orkem situation, I reckon that the protection against self-incrimination by rights can be restricted to a degree that is reasonably foreseeable.

### **7.3 RATIONALITY AS THE KEY TO A FORMULA OF SILENCE**

The observance of three filters of rationality can assist judges when they examine legal rules and precedents in the light of the general principles of law. The following proposition on how to resolve the Orkem case hardly contradicts the theory of legal interpretation within the Dworkinian model of principles. My elaborated technique for the sound review of the Orkem formula of silence rather supplements and strengthens the principle-based theory of law in a practical sense of clarity I think.<sup>130</sup>

Claims of rationality can manifestly intervene the Orkem review. Instructs of rationality work as practicable means to present a revised Orkem decision that realizes the highest degree of the principle of silence, which in turn maximizes the protection of the legal position of the private subject. The compliance with requirements of rationality will in my opinion facilitate aspirations of principled consistency of legal reasoning. The mechanism of rationality can be looked upon as an alternative to the model of historical fit I believe. My statement implies that the Community judiciary should not to treat the Orkem situation like other alike legal situations, unless the similar management still means that the Court maximizes the principled-based gains of Orkem.<sup>131</sup>

If the legal consequences of the principle of silence are not implemented to contexts were they apply, the system is defective. Defectiveness of law is seen also when principles are implemented for the wrong reasons, or when the implementation is restricted to some degree, that is when the rights formula does not realize the maximization of political morality. If the Community Court sets out to act rationally in the complex Orkem situation, I say that it must observe a requirement of optimization of resolutions, consistency in principle and a prohibition of disproportionality of weight.<sup>132</sup>

The recently presented criteria of rational legal reasoning require Community judges to do much more than to simply take account of the principle of silence and the principles of efficiency of public administration and economic growth respectively. If adjudicators comply with these rules of legal interpretation, I expect that they most probably discover a right against self-incrimination that is an outflow of good law. If the Orkem context is indeed contemplated as a complex state, I must admit to that the Court of Justice runs the risk to end up with more than one defensible answer to the legal dilemma, seeing that I after all do not prescribe an optimal instrument.<sup>133</sup>

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<sup>129</sup> Dworkin, 1986, p. 269.

<sup>130</sup> Burg, p.172.

<sup>131</sup> Burg, p. 139.

<sup>132</sup> Burg, p. 176.

<sup>133</sup> Burg, pp. 140, 176.

## **7.4 THE DISCOVERY OF THE RATIONAL ORKEM FORMULA**

### **7.4.1 The implementation of principles by means of standards of rationality<sup>134</sup>**

Standards of rationality in the implementation of principles into complex contexts put constraints on Community judges that the legislator did not have to meet. Adjudicators must be prepared to first and foremost produce compelling answers as to whether or not the faults in statutory acts are possible to correct by adjudicative means. The Court of Justice must also ponder over the limits of its powers to inflate the rule at issue. When judges aspire to remodel the positive law in order to make it fit the best theory of law, it goes without saying that they are presumed to take account of institutional restrictions.

The conception of rationality relates to the very connection between the conflicting principles that belong to the principle-based theory of law and the rules and the precedents that belong to the theory. As far as the principles go, it is presumed by the technique that an agreement exists with respect to which principles form part of the smoothest theory. There must hence be a total consent that the principle of silence and the principle of efficiency of prosecution or the principle of economic growth apply to the Orkem situation. Each principle must be regarded as promoting a specific desirable end and their content must furthermore be of one opinion. The principles are finally assumed to be compatible.

Not all complex contexts bring about two duelling principles only. Several principles are usually appealed to in legal matters concerning individual rights. The probability that the Court of Justice finds more than two opposing principles in the Orkem situation is quite plausible I reckon. Even if it at a first glance might seem as if the principles at issue would have to be arranged in a constellation with more than two dimension, I maintain that they ultimately can be put into a two-dimensional structure. I insist on that this plan facilitates the operation without simplifying the process of rational reasoning.

I say it is less important to the procedure of a sound review if the Court of Justice discovers more than two competing principles in the Orkem situation. The principles that allegedly challenge the principle of silence fortunately pull in the same direction. The three principles will consequently let themselves be clustered into two bunches. I believe that the principle of efficiency of the prosecution and the principle of economic growth *prima facie* point out the similar rights formula of silence. They obviously favour the legal position of the Commission and aim at restricting, as much as possible, the claim of private subjects not to submit to formal requests for information.

### **7.4.2 The three requirements of rationality<sup>135</sup>**

The Community decision maker must take account of three criteria of rationality before revising the Orkem formula of silence. The mechanisms each and all provide for different contributions to the reduction of the indeterminacy under principles. The condition of principled consistency requires the European Court of Justice to evaluate previous decisions

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<sup>134</sup> Burg bases the mechanism on the ideas of Alexy, Rawls and Golding to most parts, see the whole body of notes, chapter 5.3., pp. 141-170, 177.

<sup>135</sup> Burg, pp. 170-171.

in regard to the issue. It is essential to settle how the Orkem context more precisely relate to the Funke context. The review of the Orkem scheme is not a self-governing procedure.

The condition of optimization of principled values and the prohibition against disproportionality between principles, allow the Court to review the Orkem situation in isolation. I apprehend that the nature of these pointers might cause the Court of Justice to violate one of the requirements in order to meet the demands of the other. I expect that a prospective infringement is sanctioned by the inner logics of these criteria. I do not assent to that the Community judiciary violates both demands.

### **7.4.3 The requirement of optimization<sup>136</sup>**

The filter of optimality entails to the concept of Pareto optimality, an instrument originally designed to fit the system of economic reasoning. The concept seems to fit the procedure of legal interpretation when principles are concerned. I call upon the European Court of Justice to choose the fresh Orkem formula of silence that is optimal. Schemes that are non-optimal must be left at that. The Community Court should repudiate the version of a right against self-incrimination that, under the given circumstances, is outdone by another outlining that realizes more of at least one of the principles at hand, without realizing less of any other. The Court should hence make a decision that intimates that the result in effects, from Orkem's point of view as well as from the Commission's point of view, is not possible to improve.

Compliance with the requirement of optimization may indicate the superfluousness to make the right against self-incrimination subject to strict provisos. It seems sufficient to uphold less heavy qualifying criteria. The duties of the Commission can probably be carried out all the same. The inflation of the right of silence, to a minor or to a larger extent, realizes the opposing principles of efficiency and economic growth to some degree if the Court of Justice argues by reference to optimization.

### **7.4.4 The requirement of principled consistency**

#### *7.4.4.1 The decisive discrimination between states of resemblance and states of diversity<sup>137</sup>*

Treating law as integrity requires adjudication to speak with one voice. The Orkem situation should be treated similarly to cases that demonstrate resemblance from a principled point of view. With respect to unlike cases, the Orkem state should be treated in accordance with the unalikehood of the contexts.

This stance to hard case adjudication impedes a review the Orkem case in isolation. The relation of the case to external legal situations and previously pronounced concepts of silence must be more precisely chiselled. I reckon that this standard puts high hopes on Community adjudication. Differences and similarities of cases must be thoroughly elucidated by the Court

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<sup>136</sup> Burg, pp. 141, 145, 150.

<sup>137</sup> Burg, p. 151-157, 165.



of Justice. The filter obviously gives rise to a review of hardship. It is true that it is troublesome to establish if it is the similarities between the Orkem state and the Funke situation, or if it is the differences between the two cases, that determine the rights formula. If previously fixed schemes of silence and contemporary conceptions of the subject matter are coherent themselves, their recognition by reference to analogy reasoning or a fortiori reasoning will enhance the probability of a rational right against self-incrimination.

#### 7.4.4.2 *A review of the Orkem formula by analogy reasoning*<sup>138</sup>

I maintain that the Court of Justice will have to take account of the Funke ruling in its review of the Orkem formula in order to achieve points of coherence. The Orkem decision should on principle meet the Strasbourg concept of silence if the Community judiciary detects that the similarities between the legal materials outdo the differences. The re-definition of the political right against self-incrimination involves a call for reasoning by analogy on grounds of strong resemblance.

In order to discern the particular elements that justify a revision of the Orkem decision on grounds of analogy reasoning, the Court of Justice needs to observe a vital condition. Community adjudication must establish that the very same set of principles applies to both situations. Seeing that both states ultimately relate to the implementation of the principle of silence and the principles of public efficiency and/or economic growth, I reckon that the premise is duly met. I lay stress on that the applicability of Article 6 in the Human Rights Convention does not by itself imply that the cases are alike, or that reasoning by analogy forms just cause for altering the Orkem formula. The statutory rule is passive in the process.<sup>139</sup>

If the Court of Justice demonstrates that particular premises of the Orkem case and the Funke case produce similar inferences, I reckon that the elements compose positive analogies. If the Court of Justice makes out premises that show off the faint resemblance of the Orkem state to the Funke situation, these components form negative analogies. Albeit troublesome, the Court of Justice has to be able to point out the exact aspects by which the legal materials converge. That is indeed the crux of the matter.

#### 7.4.4.3 *A review of the Orkem formula by a fortiori reasoning*<sup>140</sup>

Besides providing guidance on how to consolidate rights formulas in cases that are similar from a principled point of view, the requirement of principled consistency can assist the European Court of Justice if it confirms the lack of factual resemblance between the Funke situation and the Orkem state. Argumentum a fortiori works as an amplified arguing by analogy. The technique assists coherence of legal argumentation. The complex procedure of a fortiori reasoning should not be associated with dissimilarity between cases, but rather with a relation due to their unalikehood. It is the inner logic of the method that the Orkem case can be

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<sup>138</sup> Burg, pp 152-157.

<sup>139</sup> Burg, see note 23, pp. 157-158.

<sup>140</sup> Burg, pp. 158-165, Peczenik, 1989, pp. 402f.

treated similarly to the Funke case on grounds that it deserves this treatment in a still higher degree than the Funke situation does.

A fortiori reasoning suggests that the Community Court identifies how the situation of facts in the Funke case is located vis-à-vis the situation of facts in the Orkem state. The mode of procedure requires the judiciary to declare how the cases specifically relate to each other. If the Human Rights Convention recognizes that the Court of Justice inflates the notion of silence, then it also allows the Court to maintain a less wide right of silence.<sup>141</sup> If the statute forbids the Court of Justice to accomplish a less powerful right of silence, then it also forbids the Community decision maker to settle a more powerful due process privilege.<sup>142</sup> I accentuate that the adjudicator should pay attention to the relation 'more-less', at the expense of statements of similarity between the Funke state and the Orkem state.

When reasoning a fortiori, the European Court of Justice takes the Funke situation and the judgement passed, or considered, by the Strasbourg Court as a reference point. The reference point indicates under which conditions and to what extent the requirement of principled consistency can constrain the Community judiciary. I ascertain that it benefits the technique that the very same set of competing principles applies to both issues. The Strasbourg concept of silence will at its best rule out a range of defensible options in the Orkem review. Even so, the mechanism may not point to a specific rights formula. Several notions can be consistent in principle. Argumentum a fortiori may give rise to a controversial decision.

The Community Court must ponder over if the principle of efficiency of the prosecution is involved to a higher degree in the Orkem review than in the Funke situation, while the degree of involvement of the principle of silence is the same or less than in the Funke case. The Community decision maker must furthermore reflect upon if the degree of involvement of the principle of public efficiency is the same as in the Funke situation, while the degree of involvement of the principle of silence is less than in the reference case.

The pursued mode of operation brings in its train that the fresh Orkem formula should agree with the value judgement that the reasoning proclaims. This means that the fresh notion of passivity should either be the same as the Funke concept of silence or it should give prominence to the principle that has gained in weight relatively. If the decision does not completely meet the Strasbourg view, the Court of Justice must promote the principle of public efficiency. The principle of silence should remain at basis. An absolute political right against self-incrimination is accordingly not justified. The arguing implies that qualifying provisos are requisite.

Argumentum a fortiori aids a discrimination between the kinds of questions put by the Commission to Orkem. The individual right to remain silent does not seem to be violated if the subject of scrutiny is required to answer questions that intend to seek factual clarification only. I reckon that the mechanism of a fortiori reasoning here shows off a result of rational legal interpretation that is renounced by the model of principles.

My recent rendering must not leave behind the problem that relates to the extreme complexity of a fortiori reasoning. I fear that the technique brings forth the risk of producing an omnium gatherum of coherent schemes that does not assist the Orkem review.

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<sup>141</sup> The form of argumentum a fortiori that is known as argumentum a maiori ad minus.

<sup>142</sup> The form of argumentum a fortiori that is known as argumentum a minori ad maius.

#### **7.4.5 The prohibition of disproportionality<sup>143</sup>**

The European Court of Justice must meet a third charge of rationality when it re-examines the problem of self-incrimination in Community proceedings. The condition of a prohibition of disproportionality calls for fulfilment. This instrumental filter requires the Court to make sure that the cost to be paid, in terms of the non-realization of the principle of silence, for the gain, in terms of the realization of the opposing principles of efficiency of prosecution and/or economic growth, is not out of reasonable proportion. The same goes for the reversal cost-gain scheme. Unlike the recently rendered filters of rationality, this criterion is apparently less formal.

I suppose that it is trying to the Court of Justice to fix the critical point at which reasonable men agree on proportionality and beyond which the arguing becomes a reasoning of disproportionality. Some extremes must all the same be identified as disproportionate and on that ground be removed from the plan. Some areas are always left open to controversy though. Even so, I claim that there is a fair chance that the condition of a prohibition of disproportionality benefits the review by working as a serviceable pointer of the suitable right against self-incrimination.

### **7.5 A CLOSE-UP AT THE NOTION OF RATIONALITY IN THE IMPLEMENTATION OF PRINCIPLES; THE RANKING CAPACITY OF PRINCIPLES AND THE BLENDING EFFECT<sup>144</sup>**

#### **7.5.1 A refined image of underlying principles of law**

A practicable theory of legal interpretation will have to be sophisticated presuming that no guiding meta-principle exists and presuming that conflicts among principles at the top are to be resolved in a situation-dependant manner. In order to elaborate a notion of rationality in the implementation of principles, I reckon that it is important to at first recollect the two essential components of principled standards. Principles have a scope and they engender a legal consequence. These features induce underlying norms to do more than to simply indicate whether or not they apply to a particular state, and whether or not a judgement assists principled values.

To let requirements of rationality influence the procedure of individual rights discovery is not merely an issue of taking filters of proportionality and principled consistency into consideration. I recommend that the European Court of Justice recognizes flexibility and efficiency as the prestige words of the argumentation. A pragmatic application of the principle of silence means that the due process guarantee is put on the same scale as the principle of efficiency of the prosecution, that is in lengthening the efficiency of the administration of the Community system of free competition. I resolutely state that an absolute right against self-incrimination is not the key to the riddle of individual rights protection. Taking rights seriously is not equivalent to letting the right of silence outdo each and every duelling Community interest. I am actually more inclined to think that a sensible ranking technique, and a succeeding blending procedure, lean on the inner logic of principles.

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<sup>143</sup> Burg, pp. 165-169.

<sup>144</sup> The judgement of 8 February 1996, John Murray v. the United Kingdom, the judgement of 3 May 2001, J.B. v. Switzerland, Burg, pp. 136-137.

A refinement of the model of principles presupposes that principles are able to rank situations according to the degree to which the considerations implied by the principles are affected. It further puts trust in that principles are able to rank possible decisions according to the degree to which they accomplish the underlying good. I hold for certain that these characteristics assist the model of principles as they help to elaborate the impracticable instruct to judges to ponder over all applicable principles before making their decision. I suggest that the ranking powers of principles at the best facilitate the discovery of the sensible law.

I admit to that a ranking technique is not simple. Nor is a procedure of blending principles. Complexity may of course impede the successful review of the legal dilemma. I am on the other hand positive about that there is but only pretended security in mechanical schemes. The polished idea of rationality in the implementation of principles is rather characterized by value judgement. It is in my opinion this attribute that more specifically makes the mode of operation attractive to the extraction of individual rights.

### **7.5.2 The capacity of the principle of silence to rank the different situations presented in the Orkem review according to the degree of the involvement of the principle<sup>145</sup>**

The scope of a principle embraces the situations of facts that the norm applies to. This component relates to the first quality of underlying standards which is the capacity to rank the different situations to which the principle applies according to the degree of involvement of the principle. The ranking mode of operation is assisted by analytical conceptions or empirical facts. The property brings in its train for the Orkem review that the principle of silence and the principle of efficiency of the prosecution rank the situations to which they apply according to the degree to which the considerations implied by the norms are affected. It should be noted that it is not the statutory rules in the Human Rights Convention or in primary or secondary Community legislation that do the ranking, but the underlying standards themselves. I suppose that a complete ordering of fact situations can not be done exclusively in terms of effects. The adjudicator may have to establish that some situations involve the very same degree of the pertinent principles.

The prominent quality of a ranking technique is in my opinion that it on grounds of principle renounces the conception of two alternative rights formulas. Legal situations can not be clustered into two categories simply by reference to the argument that a principle either touches a particular state or that it does not. The decision maker should rather give pre-eminence to the degree of requisiteness that a principle is implemented. Chances are that the Orkem situation holds legal materials that clearly indicate the degree of involvement of the principle of silence and the principle of efficiency of the prosecution respectively.

Suppose that the Orkem review involves the principles of silence and public efficiency only and that the two values compete. The principle of silence pulls in the direction of granting the private subject of inquest an absolute right to evade self-incriminatory questions put by the prosecution. The economic interest served by the Commission investigation of prohibited consorted practises works in the opposite direction. The principle of public efficiency favours a less powerful right of individuals to remain silent. Special mention should be made to the

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<sup>145</sup> Burg, pp. 123-129.

fact that passivity under certain circumstances is likely to be sustained by the legislator. It is for the European Court of Justice to decide how the two points more specifically relate to each other.

It is essential that the Community adjudicator does not confuse the question as to whether or not the principle of silence applies to the Orkem situation with the prospective obscurities as regards the scope of such a principle. The first issue is already brought home. The very confirmation of a right against self-incrimination is an irrelevant angle of approach. The dilemma pertains to the force of the due process privilege. It gives an account of whether or not factual questions call for co-operation by Orkem in the preliminary administrative investigation.

The European Court of Justice must search for aspects in the two situations ('asking objective questions' and 'asking non-factual questions') that are relevant in the context of the question 'qualifying criteria with respect to types of questions or not?'. It is true that the non-disclosure of self-incriminatory documentation may frustrate the public investigation. I nevertheless maintain that the non-supplication of factual information does not actually impede the accomplishment of the inquest, since this kind of data ought to be obtainable by other means. The reasoning aids a strong Orkem formula. At the same time, integrity is clearly less affected in a chase for factual clarification. The argument supports a stricter Orkem formula.

### **7.5.3 The capacity of the principle of silence to rank the defensible decisions in the Orkem review according to the degree to which they carry out the principle<sup>146</sup>**

In addition to ordering the fact situations to which a principle applies, an underlying standard defines the decisions that are defensible in a specific context. The European Court of Justice should not implement the principle of silence or the principle of efficiency of the prosecution and/or economic growth in the Orkem review simply on grounds that it is allegedly obliged to maintain one underlying norm or the other. I ascertain that the Orkem situation allows the Community judicature to deliver a number of different judgements which realize the good of principle of silence to different degrees. The possible resolutions can be ranked according to the extent to which they ensure the integrity of the defendant.

The ranking of rights formulas according to effects is the second property of principles. It relates to the component of a principle's legal consequence. The procedural playing field in the Orkem situation is typically very unequal. The inferior private party may certainly be ensured maximum protection of integrity, but the ranking technique just as well supports a lesser degree of protection. By for instance discriminating between the types of questions put in the inquiry, the principle of silence can be carried out to a fixed degree. This qualified version realizes more of the underlying good than if the law were to offer no right against self-incrimination at all.

Sceptics may argue that it puts a spoke in the wheel if the European Court of Justice is not able to rank the various decisions in the Orkem review unequivocally. I am quite ready to admit to that it is not a matter of course that integrity is maintained to a greater extent if the Commission is prevented from fishing for information as compared to if procured self-

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<sup>146</sup> Burg, pp. 129-132.

incriminatory documentation is declared void in the contentious court proceeding. Reasonable men probably disagree as to the threshold value above which the first option starts to carry out more of the principle of integrity than the latter option. Even so, I say that the principle of silence acquires a greater effect if the Community Court arrives at the former decision. Concurrence or not, a considerable number of decisions that can be ranked in relation to one another according to effects, remain for thorough estimation.

#### **7.5.4 A rights formula out of sense and suitability; The blending of the principle of silence and the principle of efficiency of the prosecution<sup>147</sup>**

The Orkem context is intervened by competing values. Each good can be realized to some degree on the basis of a ranking of possible situations and decisions. The possibility of blending divergent principled points is an attractive logical consequence of the antecedent ranking technique. The mode of blending intimates that a black-or-white approach to conflicting principles yields to a more flexible and serviceable notion of legal interpretation.

Advocates of rationality in the implementation of principles are likely to consider the blending of the principle of silence and the principle of efficiency of the prosecution as the most prominent path for the European Court of Justice to pursue in the Orkem review. By blending duelling interests, the Community adjudicator puts the due process privilege of Orkem up to the efficiency of the Community administration of competition law. A fresh Orkem formula of silence is then chiselled out of relevant reflections, each of which carries a considerable amount of weight.

Rationality can be served if the Court of Justice is left with a substantial cluster of decisions that act for different mixtures of public and private interests. Every scheme realizes some of both of the competing principles in a balancing compromise. Adversaries may argue that the ultimate judgement does not assist a mix of opposing principles and that adjudicators must rule that a particular state of affairs is either correct or incorrect. I agree to that legal decisions typically give it all to one principled norm. This does not mean however that the Community judicature does not have the opportunity to recognize both claims or to say that both the Commission and Orkem have a point. I reject that the ultimate decision in the given context is a judgement that demonstrates an all-or-nothing feature by generating a rights formula that allows one of the objectives to take all.

The principle of silence as well as the principle of efficiency of the prosecution are in my opinion legitimate concerns. From the point of view of suitability, I recommend that the European Court of Justice rules in a shade of grey by empowering the Commission to require the disclosure of relevant documentation under the stipulation that Orkem may evade all questions that are not objective and which moreover induce self-incriminatory answers. Questions that purely seek for factual clarification, yet induce self-incriminatory explanations, must be admissible if purpose is a guiding star.

The attraction of blending duelling principles is in my opinion that the engendered rights concept comes to express that each underlying point has carried some weight in the procedure of legal interpretation. From the perspective of individual rights protection as a whole, I reckon that an ultimate decision must not fully accomplish the legal consequences of a more

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<sup>147</sup> Burg, pp. 132-136.

important principle and not give any effect at all to the outweighed standard. I lay stress on that even if Commission interests do not tip the scale, no conscientious adjudicator dears to define its claim as nothing of value. The efficiency of the prosecution is something that does carry a considerable amount of weight in a balancing act. It simply does not get the better of the individual right of silence. In the light of sensibleness and suitability in the implementation of principles, I conclude that the just Orkem formula is the qualified account of the right against self-incrimination which gives some effect to each of the duelling principles.

## **8. CONCLUDING REMARKS; AN INSPIRING INTELLECTUAL EXPERIMENT<sup>148</sup>**

Genuine fundamental rights protection seems somewhat new to the Community administration of justice and sometimes even the result of reluctance and chance. I assert that the European Court of Justice has always given pre-eminence to the efficiency of the administration of Community law at the expense of political rights. Community law has withal settled that the operational list of individual rights against the state, as enshrined by the Human Rights Convention, forms part of the constitutional corpus of the Community. The embodied principles hence afford official confirmation. The recognition of force implies that principles that underlie statutory rules on a global or on a local level afford penetrative power as well, if not the scheme of individual rights is merely a castle in Spain.

I propound that a genuinely deep and broad outlook on the nature of a right against self-incrimination can but only emanate from an interpretative analysis of law that steps beyond the immediately perceptible account of silence. I assure that the sophisticated linking device between the principle of presumption of innocence and the right against self-incrimination can only be unveiled by means of a wide scope of scrutiny. I maintain that it is the interaction between these standards that consolidates the right of subjects of inquest not to participate in the conviction of themselves.

If the right of Orkem not to submit to a formal Commission request for self-incriminatory evidence in preliminary inquiries engenders from a general principle of law, rather than from a point of due process, I reckon that Community adjudication henceforth points to perpetuity and predictability. In order to arrive at the is conclusion, I suggest the following derivation of a right against self-incrimination. It is preferably to be regarded as an intellectual experiment.

An alleged infringement of Community competition rules is incumbent upon the Commission to prove. It is a matter of course that Orkem must not actively demonstrate its own guilt. I ascertain that the subject of inquest is not charged with any *prima facie* obligation to supply self-incriminatory information. It is the free choice of the defendant to pursue an attitude of passivity in all phases of the investigatory procedure. I resolutely maintain that this state of affairs can never be held against him.

The suggested course of reasoning will make for the crucial examination of Article 6(2) of the Human Rights Convention. The stipulation prescribes the presumption of innocence as a right of individuals who are charged with criminal offences. The Strasbourg notion of the concept of criminal charges must assuredly be recognized. The term is given an autonomous meaning within Article 6. In the light of coherence, I say that it is the inward sense of the rule that it applies to administrative procedures also. Proceeding my derivation, I recollect that the right to remain silent is a claim of the defence according to Article 6(1) in the Human Rights Catalogue. All privileges of the defendant party rest upon due process principles, that in turn are at least defined as fundamental rights. Some specific rights of the defence are even more powerful, as they generate out of the general principles of law.

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<sup>148</sup> The judgement of 6 December 1988, *Barberà, Messegué & Jabardo v. Spain*, the judgement of 10 February 1995, *Allenet de Ribemont v. France*, the judgement of 8 February 1996, *John Murray v. the United Kingdom*, the judgement of 17 December 1996, *Saunders v. the United Kingdom*, compare to *SvJT*, 1996, pp. 368-369, the judgement of 3 May 2001, *J.B. v. Switzerland*, *Sjödén*, p. 246, *Tråskman*, 1988, pp. 469-472, *Tråskman*, 1993, pp. 594-597.



Putting the pieces together, I submit the following proposal. The right of Orkem to be presumed innocent until proven guilty, together with its right to remain silent all throughout the inquiry, form principle-based privileges that evidently are so closely weld together that they under present circumstances are incapable of standing without the support of each other. It is thus not principally consistent to define one of the points as a fundamental principle and the other one as a general principle of law, since that discrimination awards them legal force of various kinds.

It is true that the principles at issue overlap. I furthermore state that they interact within a self-regulating mechanism. The right against self-incrimination is in my view inadequately defined if it is not assisted by the principle of silence, as well as by the principle of presumption of innocence. The best Orkem formula should accordingly give expression to the reflection of both standards as general principles of law. I say that the present course of legal interpretation ultimately brings forth Orkem's absolute right to human dignity and political equality. I insist on that my principle-based derivation of the right against self-incrimination provides a firm basis of good law by taking rights seriously.

## EPILOGUE

### 1. THE ELUCIDATION OF THE OBJECT OF MY STUDY

Two questions have been the targets of my study. It has been my aspiration to produce well-founded and serviceable resolutions to the issues as to what is the law and as to what considerations should guide adjudication in the extraction of individual rights. I have already in the very beginning of my essay assumed that the answer to the second question includes more than the law in its conventional sense. By the clarifications made by Ronald Dworkin's model of principles, I am at this final stage of my analysis by rights able to confirm my thesis. My acquired insight into the intrinsic character of the law demonstrates that the answer to the second question is in fact the answer to what the law is.

With this study, I have had two sincere intentions. First, I hope to have contributed to the understanding of the nature of the legal system from the point of view of Ronald Dworkin's model of principles. Second, I hope to have broaden the outlook on the problem of self-incrimination in Community competition law proceedings by reviewing the Orkem formula of silence in the light of rights as principles of adjudication. I have more specifically intended to illuminate a practical dilemma of law by means of the model of principles and its accompanying sub-theses.

I have moreover intended to strengthen the Dworkinian model of principles by adducing a serviceable supplementary technique of sound legal interpretation that works by standards of rationality, yet with the Dworkinian stance to individual rights kept in mind. The underlying motif of my work has throughout been to discover elements, presented by Dworkin or of originality, that are forceful enough to reduce the indefiniteness under principles. At the end of my study, I now say that the application of theses to the dilemma of self-incrimination as much elucidates the functions of the model of principles and its sub-theses, as it enlightens the obscurities of the Orkem formula of silence.

## **2. A FINAL REFLECTION ON THE ANALYSIS OF THE MODEL OF PRINCIPLES**

My analysis started out with a general depiction of the thesis of legal interpretation within the Dworkinian model of principles. The presupposition of the notion is that we can determine what is and what is not implied by the underlying points of the law. Principled standards are presupposed by the positive law and they govern the statutory rules at all times. As was seen, a principle-based theory of law has a plurality of principles at the top. By principles, Dworkin certainly intends all norms that establish rights.

Principles are sophisticated statements of ideals. Since they promote something good, they should be consolidated by the judicature. Their nature can be most abstract, why they often call for elaborations before they can be implemented to concrete situations. The practicability of principles is a moot question. My analysis has shown that they indeed are serviceable instruments to hard case adjudication. Their properties intimate their significance as means. Still, it is important to recollect that they simultaneously are ends themselves.

I say that the role of principles in legal administration is obvious. They indicate the values and interests that are at stake at a level that lies beyond the immediate conflict between the parties. The standards accordingly make grounds for reviews and revisions of previously settled rights formulas. Irrespective of the formal outlining of positive law, principles are capable to inflate the scope of clauses that embody individual rights. Above that, the plan of principles works as a dampening mechanism when institutional mistakes come into sight. Principles do not steer the detection of the inward sense of law exclusively in these situations.

Unlike rules, it is quite possible for principles to compete and still prevail intact within the legal system. The key to the riddle of conflicting principles is situation-dependent. It is never a matter of course which principle is more involved than the other in a hard case. Even if one principle is given pre-eminence to another, the choice to blend duelling principles remains. The standards that fix the tenor of positive rules act behind the scenes in easy cases too, though judges are not always aware of their work.

The crucial point to understanding law when putting on the eyes of Dworkin, is the location at which the theory of legal interpretation meets the rights thesis. The crux of the matter is the hard legal case. Random methods for defining rights formulas are never acceptable, why the requirements on judges are exacting. When more than one possible answer to a legal question can be spotted, decision makers should choose the option that they are sincerely convinced is the smoothest. The best decision is always based upon political morality. Different moral positions can justify a divergence of judgements.

In order to avoid incorrect rights formulas, the judiciary must perpetually identify and implement techniques of sound legal reasoning. I state that it is possible to resolve conflicts of principles in a systematic manner. My study have sought out to elaborate the Dworkinian thesis of legal interpretation within the model of principles. A notion of rationality in the implementation of principles aspires to reduce the indeterminacy under principles that adjudication must endure. In simple contexts, where either one principle applies, or all points pull in the same direction, the decision should maximize the realization of the relevant principle or the set of principles. In complex contexts, where values compete, the standards offer points of views that should be taken account of. Three serviceable elements of rationality pave the way to the pragmatic application of the duelling principles.

The requirements of principled consistency, optimization of values and prohibition of disproportionality are exquisite means to the discovery of suitable rights formulas. The conditions assuredly reduce obscurities by eventually circumscribing the proportions of the competing principles to two. The two-dimensional structure rules out irrational inferences. A notion of rationality benefits from the capacity of principles to rank different situations as well as defensible decisions according to effects. A rights formula out of sense and suitability gives prominence to the blending result of duelling points.

### **3. A FINAL REFLECTION ON THE ANALYSIS OF THE DILEMMA OF SELF-INCRIMINATION**

For the major part of my study, I have been pre-occupied with the problem of employing rights as principles of hard case adjudication. I have in the very beginning resolutely stated that an abstract analysis is rather difficult to access, and that the genuine comprehension of individual rights calls for an elucidating illustration of a tangible rights issue.

The problem of self-incrimination in Community administrative proceedings is a matter of controversy. As an example of an individual right at stake and of principles of guidance to two interdependent judicatures, it poses a most intriguing legal dilemma. From the point of view of Dworkin's model of principles, it demonstrates how individual rights, found in the expressions of constitutional rights, political rights and even moral rights, steer legal decision making. My presentation have exposed the peculiar problems that are attached to the manifold character of the principle of silence. I have properly called for a review of the Orkem formula of silence and claimed the need for its revision.

I have shown that the Dworkinian distinction between rights and goals benefits the objective of my study. I can fairly set out that the right to remain silent is a genuine political right that aims at ensuring the favourable legal position of an inferior party. It can never be perceived as a public goal, seeing that the privilege does not depend on the prevalent popular morality.

The right against self-incrimination shows off specific characteristics if I put on the eyes of Dworkin. I adduce that Orkem enjoys a background right not to disfavour its own position. This is a moral right. Still, it is but only a right in abstractness. Withal, it supports the concrete right not to disclose self-incriminatory information in criminal proceedings before a tribunal. This institutional fit assists the elaboration of a similar concrete right in relation to preliminary administrative inquests. A refinement makes for a certain degree of definiteness that the abstract form does not demonstrate. In order not to deprive the safeguard of its inward sense, it is necessary to protect the integrity of Orkem at all stages of public investigation. Preservation is however not equivalent to the consolidation of an absolute right against self-incrimination. Qualifying criteria with regard to the types of questions put by the Commission do not for certain render the privilege nonsensical.

To strip Orkem of its human dignity and political equality is never justified on grounds of speculative or marginal advantages of the Community. A proportionately wide conception of silence does not immediately inflict additional costs to the public ministry, nor to third men, that is internal market consumers. I say that it is contemptuous to Orkem if the Community judicature tries to cut the edges off its constitutional right by pleading to damages that are disguised in uncertainty. I need not even argue that sufferings without doubt can be prevented by means other than the extensive circumscription of the right against self-incrimination. The right of silence is not a subject of trade off from the perspective of the model of principles.

In order to achieve points of coherence, it is an indispensable prerequisite of the Orkem review to acknowledge the relevant external lines of arguing. The European Court of Justice and the Court of Human Rights are interacting and interdependent guardians of individual rights. Aspirations of fairness make it necessary to thoroughly consider the conception of silence as established by the Human Rights Court in the Funke judgement. I have demonstrated that the schemes of political morality that live within the respective areas of jurisdiction are similar. The produced legal formulas can not by rights be contradictory or

substantially divergent. This is the inevitable effect if individual rights indeed work as principles of hard case adjudication.

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## **RIGHTS AS PRINCIPLES OF ADJUDICATION**

**Ronald Dworkin's model of principles  
as a legal interpretation device  
applied to  
the problem of self-incrimination  
in Community competition law procedures**

Graduate thesis  
20 points

Supervisor: Professor Aleksander Peczenik

Legal theory and European Community law

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