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Identity, Identity Management and Law in the Information Society: Some Basic Issues Applied to Internet Banking

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Citation

Schmidt, A. H. J. (2008). Identity, Identity Management and Law in the Information Society: Some Basic Issues Applied to Internet Banking. *International Conference Of The Turkish Bar Association*, 1-23. Retrieved from <https://hdl.handle.net/1887/12559>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

Identity, Identity Management and Law in the Information Society: Some Basic Issues Applied to Internet Banking (v0.1-January 11, 2008) *

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*Contribution to the International Conference of the Turkish Bar Association in Ankara, January 8-11, 2008. Gratefully acknowledging its inspiration from the master thesis of Peter van Schijnjel (Peter van Schijnjel, *Identiteitsdiefstal*. Master's thesis, Leiden University Law School, 2007). To be published in the proceedings - until then, this is work in progres. The author welcomes comments.

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Abstract

It is a great honour for me to attend this conference and to address you on some aspects of Identity, Identity Management and Law in the Information Society. As I am a professor of Law and Information Technology in the Netherlands, at Leiden University, I must begin by confessing that I know next to nothing about Turkish law, and, consequently, even less about Turkish banking law. Consequently, my contribution cannot be an essay in traditional legal scholarship, as traditional legal scholarship is related to the interpretation and understanding of contingent legal arrangements in contingent legal systems. It is rather an attempt in looking at and understanding law as an inescapable, natural phenomenon in any social system that needs organization - also in our worlds, as they are rapidly being invaded by Internet and as they are increasingly dependent on it. It is my plan to start with a few definitions, and a few examples, illustrating the problematic nature of 'Identity' and 'Identity Management' in the Information Society. Thereafter I will focus on a few legal intuitions concerning Identity Management, Internet and Internet banking. There will be a few conclusions. Finally, by way of an appendix, the approach chosen is accounted for.

1 Conceptualization**1.1 The identity of the Information Society**

Let me begin by looking at the context, by looking at the positions of our legal systems in the information society.

In 1948, sixty years ago, the Manchester Mark II, the first operational general computing device, entered into this world. In 1958, the chairman of IBM, Tom Watson, is quoted to have said that he thought that the world market for computers to be no more than five. At that time, IBM was on its way to become the first power player of the computing industry. In the 1970s, Codd's logic for relational databases spread over the world, supporting reliable administrative computing. In the same era, TCP/IP, the communication protocol of the Internet was developed by Kahn and Cerf and some

basic network services, like file transfer and email, became applicable. In the 1980s, personal computing got introduced and word processing became the first ‘killer application’ of the computing industry, that saw software (Microsoft) take the lead over hardware (IBM).

In the 1990s we see Internet network services emerge that really take off after the year 2000. Google, file sharing, internet banking, Wikipedia, Hyves, Youtube, Second Life - none of these is more than 10 years of age.

It would be astonishing indeed if today, 9 January 2008, these innovations would be at an end. We are taking part in a society that we may call ‘the Information Society’ but that we must expect to be only at the very beginning of its development. My first proposition is this:

(1) The ‘identity’ of the ‘Information Society’ is not yet formed.

Thus, I consider a phrase like ‘the identity of the information society’ a contradiction in terms for practical purposes. This indicates that there are some serious issues at stake when we think about law in the information society. If we want to reap the fruits Internet offers, we need our aptness at recognizing what means what, and what *is* what, in and outside Internet as best as we can.

To illustrate the issue I have printed a snapshot of my 15-months-old grandson reacting to a TeleTubbie television show, seeing it for the first time in his life. He liked it. He wished to take part in it and apparently assumed this might be realized by climbing into the television set.

I think that the problems many foresee concerning our ability to distinguish between fact and fiction in the information society may be illustrated by this snapshot. I am confident, however, that my grandson will learn to appreciate the differences between a television show, a picture show, a stage play, a news show, a computer game and many other virtual services. And, like my grandson, *we* will undoubtedly learn to apprehend (i) the differences between Internet-mediated services *and* real life as well as (ii) the separate uses of Internet-mediated services *in* real life.



Fig. 1: Joining the Tubbies

In order to learn what the information society actually represents, we, like my grandson, will have to bump our noses, experiment and be creative. From this perspective Internet is part of real life, just like theatres, like football stadiums, like gambling halls, like literature, like banks, like computer programs, like schools, like presidential PR men, like legal Acts and like essays are. It helps, I think, to see the information society as a collection of institutional services. I suggest the following definition:

(2) *The information society is the space where our institutional services live, of which more and more get Internet-mediated.*

Again, this is a definition of a moving target. It does not provide identity, as an important aspect of 'identity' is understood to be a quality of 'sameness.' And, as I just stipulated, our information society is not going to have much 'sameness' in the coming years. Consequently, our information society is a contingent phenomenon and does not (yet) have identity (or only for very short periods of time).

Yet, the definition does, at a higher level of abstraction, allow for identity: in its structure. At the moment, I think that the most fruitful mechanism

to understand phenomena in the information society is to interpret them as social services and to employ some analysis of what goes on there in terms of IT-mediated, institutionalized games.¹ These institutional games all have a playing field (a jurisdiction), players, collective interests, collective beliefs, rules, elites (umpires, legislators), props, publics, room for input from the players and feedback mechanisms. And if an institutional game gets complex, it may organize itself in hierarchical clusters of sub-games. My claim is that any social phenomenon - even this conference! - can be described in these terms and that anything that can be describe in these terms is an institutional game. Thus, my propoosition is that institutional games and social phenomena have the same structure (or abstract identity).

(3) Social phenomena (law systems also) have, being institutional games, structural identity.

I consider this of importance, as we may use this structure as an analytical tool when legally facing the new social phenomena of our information society as they develop together with our law systems.

It is also important, where it suggests that material law, as a set of valid rules, is an inescapable part of social phenomena, that material laws are not impartial or independent ‘outside things.’ Thus, material law is an inescapable part of social phenomena like Internet payments, Wikipedia community member commitment, the Radiohead price-discriminatory approach, the RIAA-copyright enforcement efforts, file-sharing copyright infringement, telecom data retention policies, SPAM, government data warehousing and the services mentioned earlier. Consequently, as these services change laws may change with them, just like when laws change these services may change with them.

¹ Somehow, games (as in game theory: Johan van Benthem, Cognition as interaction. in: Gerlof Bouma, Irene Krämer and Joost Zwarts, editors, *Cognitive Foundations of Interpretation*. Royal Netherlands Academy of Arts and Sciences, 2007), language games (as in philosophy: Ludwig Wittgenstein, *Philosophical Investigations*. Blackwell, 1953), conceptual models (as in computer science: R.J. Wieringa, *Requirements Engineering: Frameworks for Understanding*. Wiley, 1997) and institutions (as in economy: Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*. Cambridge University Press, 2006) seem to have serious family likeness and are able to provide similar generic frameworks for understanding of social phenomena as moving targets.

Yes, if *law systems* are social phenomena themselves, they are themselves institutionalized services. My suggestion is, that their ideal structure is natural. That it makes sense, from this perspective, to think about healthy and unhealthy law systems, as material laws may corrupt the ideal natural structure of law systems. And that it may make sense, from this perspective, to take the issue into account when legally facing new phenomena in our societies.² One basic issue stands out here: security in institutional services is largely provided by member (or participant) commitment.

1.2 Law principles

Identity of structure by no means implies identity of content. For legal systems this is, empirically, a no-brainer. Dutch law systems are different from Turkish law systems, and Chinese law systems are - so I assume - different from Mogadishu law systems.³ The languages of law systems are many, and a unified body of knowledge about all different law systems in the world is not available.⁴ Translation is next to impossible. If I would translate the Dutch legal concept of '*onrechtmatige daad*' in English, either literally (into: 'unlawful act') or to its conceptual next neighbour (into: 'tort') - in both cases I would generate confusion. Translation of local legal concepts requires extensive circumscription. To overcome some of these problems, we may look

² It makes sense - for instance when facing regulatory problems in Second Life - to remember Coase (Ronald H. Coase, *The Nature of the Firm*. *Economica*, 4 November 1937:16), Douglas (Mary Douglas, *Purity and Danger: an Analysis of the Concept of Pollution and Taboo*. Routledge (Classics 2002), 1966), Williamson (Oliver E. Williamson, *The Economics of Governance*. *American Economic Review*, 95 2005:2), Olson (Mancur Olson, *Power and Prosperity: Outgrowing communist and capitalist dictatorships*. Basic Books, 2000), Frey (Bruno S. Frey, *Not Just For the Money: an Economic Theory of Motivation*. Keagan Paul, 1997), Fuller (Lon L. Fuller, *The Morality of Law, revised edition*. Yale University Press, 1967), Ellickson (Robert Ellickson, *Order without Law: How Neighbors Settle Disputes*. Harvard University Press, 1991) and Montesquieu (Jean-Louis de Secondat (Montesquieu), *De l'Esprit des Lois*. Constitution Society, 1748 (URL: <http://www.constitution.org/cm/sol.htm>)). My notion of 'natural law' is derived from their work.

³ Legal systems (as related to nation states) are law systems, but not all law systems (as related to institutional services) are legal systems.

⁴ Thomas S. Ulen, A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law. *University of Illinois College of Law Review* 2002:4

at what we call ‘principles,’ material-law concepts of a very general nature and often widely accepted, also internationally. As I need a few of them later, I mention them here: the freedom (not) to transact is one, *pacta sunt servanda* is another, as is ‘privity of contract,’ the principle that requires that private dealings between parties do not to have legal consequences for whom do not take part in the contract. Some⁵ stipulate that as soon as we step over the privity-of-contract line, we are leaving the area of private law and enter the realm of administrative law, where completely different principles apply. Competition laws, Intellectual property laws, Consumer protection laws, Privacy laws, Insurance laws and Banking laws are both borderline and trans-border cases in this respect.

1.3 Problems with identity

Let me, against this background, turn to the concepts of identity and identity management. These two concepts are changing rapidly under the influence of new services in the information society.⁶ Let us look at a few examples and just pose a few question.

A glass of water. Has a glass of water identity? I think so - as long as it is left alone. However, water evaporates. How much has to evaporate, before it has lost its identity? And, if I add a vitamin tablet to the glass of water, does it lose its identity? What if I take a tiny nip? What if I throw the water back in the decanter and immediately refill it from the same decanter: does it lose and regain identical identity? What these questions show is that:

(4) *Objects have internal identity.*

⁵ *E. g.*, Ernest J. Weinrib, *The Idea of Private Law*. Harvard University Press, 1995

⁶ Much has been written about the subject. Let me mention just two interesting examples: Bert-Jaap Koops and Ronald Leenes, ID Theft, ID Fraud and/or ID-related Crime: Definitions Matter. *Datenschutz und Datensicherheit*, 2006:9 and Beth Simone Noveck, Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity. *Washington University Law Quarterly*, 83 2005, and the website with publications of the FIDIS-project (on the future of Identity in the Information Society): <http://www.fidis.net/publications>.

Traditionally, the identity of a thing is in the thing itself - the identity of an object is internal to it. When Internet is brought into play, and we are visiting a website to buy an object, the internal identity of the object cannot be investigated directly. To overcome this problem, in the information society we get to inspect the *description* of the thing in stead of the thing itself. This description is its external identity. External identities are of paramount importance to the legal issues related to reputation, proof (evidence) and trust. On Internet, we often have to make do with whatever external identity of an object is available. Thus:

(5) Objects have internal and external identities

Here is, where the trouble with identities starts. That is, whenever internal and external identities diverge in a transaction. In banking, a well-known and extreme problem of this kind is presented by counterfeit money. Counterfeit - in this sense - has the external identity of an object (*in casu*: monetary value) that simply isn't there. And, allowing for the platitude that the whole concept of cash rests on an assumption of trust, we will get into real trouble as soon as banks, or automated teller machines, would start turning out counterfeit. My next proposition is that

(6) Identity problems arise from internal-external identity anomalies

And, of course, the same goes for persons. Persons too do have internal and external identities. And again, the trouble starts as soon as internal and external identities diverge. In banking, the trouble of credit-card forgery is an apt example. Then, an external identity is stolen and related to a false internal identity.

And, again, the same goes for 'groups' or 'communities.' It is a public secret that some banks use zipcodes in their deliberations on credit. Then, a zipcode is used as part of the external identity of a group, that is applied to one of its members.

There are big differences between the internal and the external identities of things and persons. Internal identities cannot be objectified - they are already objectified, they exist only in the original; external identities, however, can.⁷

(7) external identities can be objectified themselves and thus can be managed

Consequently, external identities may have value - reputations are external identities - they can be sold, bought, forged and managed. (Generally, we mean external-identity management when we use the term 'identity management'). As identity management is becoming very important in our information society, we may expect it to become an important and interesting new industry.

2 A few examples

Let me, before I try to present a taxonomy of anomalies between internal and external identities (and relate them to the law in the most abstract manner) show you a few other examples:

A family from Iran in- and out of the Netherlands. My first example concerns contingent Dutch Asylum law. On November 11, 2005, the Dutch Supreme Court has ruled null and void a Ministerial Decree of November 6, 1997, which awarded Dutch citizenship to an Iraqi family of five: two parents and three children. What had happened? The Iraqis had, on entrance into the Netherlands in 1992, provided incorrect birth dates, (which they corrected two months later). The Ministerial Decree carried the wrong dates. Somehow - presumably through governmental data warehousing - the anomaly between the Decree and the Iraqi passports was brought to the attention of the government agency involved. The Minister reasoned as follows: as the Iraqis were not born

⁷ The distinction between internal and external identity can get very complex: in IT-lore, we might consider meta-data to represent (parts of) the external identity of the data concerned. Thus: data (as a description of something) gain identity by being objectified and can get external identity themselves. Nevertheless, in ICT, data are always *also* external to the things they describe.

on the dates of the Decree, the Decree did not belong to their external identity, but of other, presumably imaginary people. The Iraqis have been sent back Iraq. In this example, the relationship between internal and external identities is interesting: the Minister concerned (her name is Verdonk, perhaps you have heard of her) managed to conclude that the Iraqis were 'counterfeit' in the light of her Decree, instead of the other way around - which would have obliged her to repair the Decree. (It must be mentioned that our supreme court has since (in 2006) embraced the latter view.)

Child Porn in Second Life. My second example concerns child porn in second life. As you all know, Second Life is some sort of virtual stage where you can create characters (which are called 'Avatars'), dress them up and make them move and communicate. Some sick minds make mature and childlike Avatars and make them join in sexual acts in Second Life.

Do these Avatars have internal identity? Do these Avatars belong to the external identities of the individuals that made or make their own Avatars 'play' with them? Can their actions be understood, investigated and prosecuted as child porn? What if the 'owners' of the Avatars are children themselves? These are serious legal questions, especially if our legal intuition tells us that this type of behaviour should be considered criminal and (some of) our contingent legal systems do not have adequately defined appropriate criminal acts. The example shows that how we interpret external identities and whose responsibility they are to be of serious legal concern.

An entry in wikipedia. My third example concerns Wikipedia. Let me quote a message from the local Dutch Reuters, the ANP - and yes, I am almost embarrassed to be Dutch:

"THE HAGUE, November 17 - Approximately 30.000 civil servants, subservient to the Dutch Minister of Justice have been forbidden to surf to the digital Internet encyclopedia Wikipedia. Thus has been confirmed by a spokesman of the Department. Jokes and offensive changes introduced into Wikipedia by civil

servants, using their workstations at the Department caused the ban.”

The example shows several things. First, that external identities may be used to vandalize serious collaborative services. Second, that it is more difficult to hide one’s IP-address than some people apparently thought. Third, that the actions of subordinates were interpreted as being so harmful to the external identity of the Dutch Minister of Justice, that he took serious and generic action. And, finally, that at least some Dutch civil servants tend to Internet vandalism for fun.

As you will know, Wikipedia is a social phenomenon of very open and liberal nature. It almost completely rests on the vigilance of its community to guard and keep its quality and worth. It also gets in trouble through attacks by Internet users who do not comply with its policy, either aiming for cheap advertisements or just for ‘the fun of it.’ It is interesting that community commitment and community vigilance may suffice as a defence mechanism. Up till now, it has managed. It is to be feared, however, that, as soon as the intensity of attacks grows, these defence mechanisms will lose the battle.

A target for advertisements. My fourth example concerns automatic profiling of your Internet search behaviour by Google and the related, focused targeting of internet ads.

Here, a part of your external identity is automatically created and used. The interesting thing here is that you have to curb your Internet search behaviour to influence your profile, while you not even know how these profiles are made.

A credit card owner in the USA. My fifth example concerns a personal experience in the USA. I brought my credit card, as that is the way things are payed over there. I was roaming the country from one appointment to another and had to find a hotel in Newport for one night. I made a reservation by phone and wondered why the reservation had apparently not been processed as the Hotel didn’t expect me. Anyway, they had a room and all seemed well. However, a few days later, my creditcard

was no longer accepted anywhere and I was sure that this could not be due to lack of funds. I was with a friend and managed - but I could not easily repair my American credit (as a first attempt lead to an administrative quigmore). And, as my only American dealings concerned Amazon.com (who did no longer accept my card either) I let things rest. Until two hotel bookings on the same night of a Holiday Inn hotel in two different Newports emerged. While making my reservation, I had underestimated the number of cities called Newport in the USA and had apparently slept in one and reserved in another.

What is interesting here, is that one mistaken hotel booking in the USA may suffice for your credit to be blocked without further notice and without an easy procedure for repair. Dealing in the USA may be dangerous to the health of your external, credit-card related identity.

2.1 A taxonomy of identity problems

So far my examples. Let me now try to sketch a taxonomy of possible internal-external identity anomalies. There are three possibilities: (1) the anomaly is positive, that is, the external identity overestimates inherent value; (2) the anomaly is negative, underestimating te inherent value and (3) the anomaly is complete, that is, the external identity does not refer to anything with inherent value at all.

(8) Identity anomalies are value-related and positive, negative or complete

Thus, identity anomalies are context dependent. Let us first look at a simple case regarding the objects on offer via an internet service, say eBay - focusing on sales-relationships and direct pricing effects:

Anomaly	Author	Winner	Loser
Positive	Seller	Seller	Buyer
Negative	Survey	Buyer	Seller
Detached	Fraud	Fraud	Buyer & eBay

To show that in a different context there are differences in winners and losers, let us look at two more tables. First we focus on credit relationships:

Anomaly	Author	Winner	Loser
Positive	?	Client, Seller	Bank
Negative	Hotel	-	Client, Seller & Bank
Detached	Fraud	Fraud	Client & Bank

and, lastly we focus on stock value and the Enron case:

Anomaly	Author	Winner	Loser
Positive	CEO	Stockholders & Enron	-
Negative	Consultant	-	Stockholders & Enron
Detached	Fraud	Fraud	Stockholders & Enron

I want to point out three issues, that show in these tables.

First, when we consider external identities to lead up to something like reputation, it is easy to imagine contributions to it by parties that have no relationship to the objects or individuals the reputation is about. I had no contract whatsoever with the hotel in the USA, allowing it to infringe my external identity concerning credit. In this sense, legal issues on identity anomalies are not of pure private law character.

Second, it seems to me that positive and negative anomalies are the types of failures, we have to live with in real life all the time. Lets be honest regarding reputations, they are almost never completely right. There is a big difference, though, between positive and negative anomalies on the one hand, and complete anomalies on the other. Complete anomalies, if created with intent, intuitively belong to the realm of criminal law, while many issues concerning the other anomalies may be appropriate for private and/or administrative regulation and may be left to play their roles in markets and administrations.

Third, as identity anomalies induce risk, we want to manage them. In this sense, identity management equals striving to keep down positive, negative and complete failures.

3 A last example

But how? Here we turn back to our institutional-game approach and, again, use an example.

Second Life is a virtual world, with virtual dollars, called Linden dollars. Sometimes, these dollars get stolen. It has happened. One interesting aspect of these Linden dollars is, that they have real value, in the sense that they can be converted into real dollars. Thus, fraud with Linden dollars translates to fraud with the equivalent monetary value - even may lead to deminishing the 'currency' of the Linden dollar in general. This leads to the following question:

(9) Are Linden dollars equivalent to dollars?

Our general legal intuition seems to be that stealing Linden dollars in Second Life is a criminal act. There have been scholarly articles, urging our legislators to bring Second Life banking under general banking law - which is currently not possible, as Second Life banks are no financial service providers in the banking law sense whatsoever. Banking and 'Second Life banking' are different institutional games. And the main difference is in the external identities or reputations of dollars and Linden dollars. Maintaining the reputation of dollars has become a public affair, at least in part, supported by administrative and criminal laws. The reputation of Linden dollars is in a different ballpark. Linden dollars are for fun - even if fun sometimes turns serious. We should understand the risks involved. And we should respect its potential for the development of innovative services in laboratory conditions, still free of administrative licensing and control. If anywhere at all, new mechanisms and procedures for keeping identity-anomalies under control will be developed and tested in virtual institutional games like Second Life.

When we remember that our information society is still in its infancy, the most important conclusion my analysis leads up to is simply this: we need room for learning by doing, also for internet banking, and internet services can provide this room, as long as we refrain from fencing them in, in traditional legal constraints we declare applicable prematurely.

4 Conclusions for Internet Banking

This brings me to my concluding remarks. Identities are inherent to objects, persons, companies and communities. Their *external* identities serve as (amongst other legal trivia like evidence) their reputations, as derived from administrative representations of identity behaviour. External identities have meaning in the context of institutional games. External identities are, looking *e.g.*, at Google,⁸ becoming the commodities for a whole new industry, focusing on identity management.

As a matter of fact, the banking industry is dependent on identity management. As its services are also of public importance, traditional legal arrangements for essential issues here have been put in place for some time now. These arrangements are presumably beneficiary, but they also reduce leeway for innovation, and neither are they without problems (as discussed elsewhere in this conference; the focus in material-law issues seems currently on asymmetric banking-services contracts and on due diligence concerning to anticipation of evidentiary good practices). My focus lies elsewhere, however.

Institutional games thrive by participant commitment - Internet services have shown us at least that. Security measures may interfere with participant commitment. There is a balance to be struck. Information technology may support the optimum; it may also support over-, as it may support under-protection. In this, we may investigate and learn from the track records of successful Internet services like Google, eBay, Wikipadia, Second Life, Hyves, YouTube, the "Peer-to-Patent" initiative and what not.⁹ We may try to find methods that adequately support the right security-commitment equilibrium for Internet banking.

Virtual financial services outside the thoroughly regulated Banking sector may prove beneficiary to it from the innovation perspective. It may be worthwhile for banks to watch what is happening on that front (and to explore the

⁸ Echelon-like enterprises by intelligence organisations and trusted third parties in eCommerce are other examples.

⁹ See for an interesting discussion of democratic government in this vein: Beth Simone Noveck, Wiki-Government. *Democracy*, winter 2008:7 (URL: <http://www.democracyjournal.org/printfriendly.php?ID=6570>)

available space for laboratory experiments themselves).

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5 Appendix: A few background postulates accounted for

‘Law sciences’ In this, I use ‘law science’ to distinguish from mainstream legal scholarship, which is mainly concerned with interpretation of material laws in individual cases, often evaluating material laws against constitutional and (international) human rights legislation. I consider mainstream legal scholarship to be positivist inclined in its focus on promulgated rules. My need for ‘law science’ stems from the assumption that regulation *also* is an inescapable, natural result of organization, while organization is inescapable when life gets more complex, as it all the time does.

Scientific relevance I adopt a special approach to ‘law science’, harvested by analogy from economics and medicine. Like economics (with its invisible hand working towards welfare) and medicine (considering health a natural state), I assume a ‘natural, invisible moral hand’ to be simply there, working our societies towards the optimums that express themselves in optimal rule-of-lawness when nursed appropriately. In economics, like in medicine, failures tend to stare one in the face. So do rule-of-law failures. Basically, I am looking for causes and remedies for rule-of-law failures of the self-evident kind, and will not focus on what the optimum rule of law might be. Adopting this perspective not only allows considering freedom to be part of natural optimums, it also allows for descriptively framing research results, independent of contingent legal systems and thus allows for a Popperian approach,¹⁰ contributing to the growth of knowledge about rule-of-law failures, their causes and their remedies.

Moreover, it suggests that a Dutch law professor may discuss some of his ideas on Identity, Identity Management and some basic problems in Internet

¹⁰ Karl.R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge*. Routledge, 1963

banking with a Turkish audience.

My main background conceptual vehicle in this is the Rule of Law. As the rule of law shows itself in different guises over time, within and across law systems, I aim for a generic rule-of-law conceptualization. I assume that “the rule of law” refers not to a thing, but to an inherent quality of law systems.¹¹ I thus acknowledge rule-of-law research to be in need of law-science contributions of the kind Ulen wishes for,¹² that is: of an international law science, based on and growing with Popper’s mechanism of conjectures and refutations.

*Basic
conceptu-
alization*

My approach is ambitious in aiming for steps forward in such a law science, it is an exercise in modesty in accepting that there are no complete answers. I aim for modest, incremental steps in an ambitious direction.

My approach further assumes the following. Rule-of-lawness is a theoretical concept that presupposes some sort of reciprocity between levels of government/organization. Generalizing Coase’s point concerning the emergence of firms¹³ in the face of the free market, I embrace the contention that organization may conditionally prove more valuable than unorganized free exchange. And that any law system strikes a dynamic equilibrium of the ‘costs’ of reduced freedoms and the ‘benefits’ of organized governance. The equilibrium is value-based and provides legitimacy to rule-of-law equilibriums. It is assumed that economic values are inherently under-specific¹⁴ for understanding rule-of-law equilibriums. And: as an expression of value equilibriums, the rule-of-lawness of law systems can go wrong both ways: either towards dictatorship, where hierarchy ousts individual freedoms, or towards

¹¹ See, e.g., Fuller (as in n. 2), Brian Z. Tamanaha, *On the Rule of Law*. Oxford University Press, 2004, HiiL, *Rule of Law Inventory Report - Academic Part*. 2007 – Technical report (URL: http://www.hiil.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf), ? , ; Benjamin R. Barber, *Fear’s Empire: War, Terrorism and Democracy*. W.W. Norton & Company, 2003; Ellickson (as in n. 2); Avner Greif; Claude Ménard and Mary M. Shirley, editors, Chap. 28 - Commitment, Coercion and Markets: The Nature and Dynamics of Institutions Supporting Exchange In *Handbook of New Institutional Economics*. Springer, 2005; Werner F. Mensky, *Comparative law in a global context: The legal systems of Asia and Africa*. Platinum, 2000

¹² Ulen (as in n. 4)

¹³ Coase (as in n. 2)

¹⁴ See, e.g., Frey (as in n. 2).

anarchy, where individual freedoms oust hierarchical leadership. My working hypotheses are these:

- Working hypotheses*
- (i) Fuller's eight moralities of duty (being widely accepted as such) provide the 'lean' core definition of rule of law.
 - (ii) Any law system's sustainability/stability relies on its legitimacy *and* the power equilibriums between its endogenous elites.¹⁵
 - (iii) Any law system's legitimacy relies on value equilibriums across and within its hierarchical levels.¹⁶
- Institutions*
- (iv) Institutions¹⁷ are cultural systems of individuals, 'demilitarized zones'¹⁸ and organizations (with collective interests and a domain¹⁹ where these interests are protected and nursed) that generate generalities in behaviour by cultivating rules, policies, norms

¹⁵ In my approach I opt for the minimal combination of (1) a reciprocity-based concept of legitimacy (see for instance: Olson (as in n. 2)) and (2) an organizational equilibrium between executive, legislative and judiciary powers (see for instance: de Secondat (Montesquieu) (as in n. 2)).

¹⁶ In aim for modeling and measuring financial and non-financial administration-civilian value equilibriums (see for instance: A.H.J. Schmidt; Jeroen Donkers et al., editors, *Chap. Ought Computers Adjudicate?* In *Liber Amicorum Jaap H. van den Herik*. MICC, Universiteit Maastricht, 2007 (URL: http://www.cs.unimaas.nl/jaap60/papers/B20_schmidt.pdf), p. 135-137).

¹⁷ I consider 'institution' a kernel concept of my research approach and expect its meaning to be closer to a 'natural' social structure resulting from the necessity to organize, specialize and delegate (as used in 'New Institutional Economics'), than to the formerly popular focal concept of many rule-of-law implementation or -transplantation ambitions.

¹⁸ In my understanding of institutions, they not only can take part in exchanges with others, they also have to provide local spaces for exchange (or: demilitarized zones). From an economic perspective these spaces are reciprocity-based, price-forming markets (see, for instance, Douglass North, *Institutions, Institutional Change and Economic Performance*. Cambridge University Press, 1990). I adopt the other terminology because not all exchanges are for money and the concept of 'market' and its corollaries with it, tends to be transplanted all too easily to non-economic perspectives. Other values may even be crowded out when expressed in currency (see: Frey (as in n. 2)).

¹⁹ I consider the 'domain-of-jurisdiction' and 'scope-of-jurisdiction' concepts characteristic to institutions. During the institutional setting of a football game, for example, on the pitch, forms of behavior are considered as perfectly acceptable which in everyday life would result in arrest and conviction. The conceptualization of institutional domain and -scope, defining the jurisdictional boundaries of institutions is a tool for addressing questions related to the issues of multilevel jurisdictions and the proliferation of jurisdictions.

and beliefs through internal and external feedback transactions.²⁰

Organizations in institutions may be institutions themselves. Thus, *Multilevel* institutions are often embedded in institutional networks. As *theme* such, institutions will often show multilevel jurisdiction.

- (v) Any²¹ institution is (structurally) a law system and can be valued for rule-of-lawness.²²
- (vi) As institutional analysis assumes *generalities of social behaviour* to be motivated by collective beliefs,²³ feedback techniques, connecting communication with collective beliefs are an important issue. I assume that results in media- and communication research²⁴ are significant input for our analyses.

Because the Rule of Law concept is important in my approach, it may be appropriate to provide some further circumscription of how I see it. The concept is central to public international law, where people are looking desperately for legal instruments that may help further world peace and world prosperity - yes, ambitions are high. In this scene, it is considered a received postulate that the Rule of Law will help to achieve these things, which - as

²⁰ Based on Aernout Schmidt, Wilfred Dolfsma and Wim Keuvelaar, *Fighting the War on File Sharing*. T.M.C. Asser Press, 2007, p. 160, which is based on Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (as in n. 1).

²¹ Cf. Fuller (as in n. 2), p. 124-127.

²² For conceptualisation of these valuations, we follow the analytical lead of Douglas (Mary Douglas, *Natural Symbols: Explorations in Cosmology*. Penguin Books, 1978). I adapt Douglas' group-grid framework into a grid-materialist framework for distinguishing value types for the freedom-governance value equilibriums expressing any institution's rule-of-lawness. I identify four prototypical specialized organizations that are conditionally preferred over unorganized individual exchange: *families* (low grid) for the organization for individual values like autonomy, *firms* (high materialist) for the organisation for profit, *foundations* (low materialist) for the organization for ideals/beliefs and *forces* (high grid) for the organization for public order and security (see also: Schmidt, Dolfsma and Keuvelaar (as in n. 20), p. 156-157). In the evaluation of rule-of-lawness, all four value types are combined.

²³ Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (as in n. 1)

²⁴ See for instance Todd Gitlin, *The Whole World is Watching: Mass Media in the Making and Unmaking of the Left*. Univeristy of California Press, 1980 and Stanley Cohen, *Folk devils and moral panics*. MacGibbon and Kee, 1972.

a natural result of continuous failure - leads up to confusion and apparent unending discussions on what the concept may mean.²⁵ Generally, in the Western world, two types are distinguished: a 'lean' and a 'material' concept of Rule of Law. The lean concept coincides largely with the eight moralities of duty as presented by Fuller²⁶ and the material concept of rule-of-lawness is constructed by extending the lean one with additionally requiring the basic set of human rights to be operational. Essentially, the Rule of Law is not a thing, but a quality, it is a reference to that minimal quality of law systems that legitimates the powers of enforcement within.²⁷ The foregoing analysis is written against the background of the postulates mentioned. I consider it especially appropriate in situations where legal analysis is required concerning new phenomena, where material law has not yet found its feet. This seems often the case where internet services are brought to the fore. As such, the approach - although meant to be a scientific one - might be of some use even for legal practice, as it is often the first to be confronted with new Internet-related situations, not yet fit for run-of-the-mill interpretation.

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²⁵ See, for instance, HiiL (as in n. 11).

²⁶ See Fuller (as in n. 2). Wikipedia summarizes the moalties of duty as follows: (1) the lack of rules or law, which leads to ad-hoc and inconsistent adjudication; (2) failure to publicize or make known the rules of law; (3) unclear or obscure legislation that is impossible to understand; (4) retroactive legislation; (5) contradictions in the law; (6) demands that are beyond the power of the subjects and the ruled; (7) unstable legislation (ex. daily revisions of laws); (8) divergence between adjudication/administration and legislation. Some add (9) power-equilibrium and (10) feedback channels as extra requirements to this basic set (See, *e.g.*, Schmidt (as in n. 16)).

²⁷ And as such, the concept is being frequently abused by Rulers, claiming their Law System to have Rule of Law.

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