



**IDENTITY CRIME IN DIGITAL ENVIRONMENT: A
COMPARATIVE STUDY BETWEEN THE COMMON
LAW AND THE SHARIAH AS APPLIED IN
MAURITANIA**

BY

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**A dissertation submitted in fulfilment of the requirement for
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**Ahmad Ibrahim Kulliyyah of Laws
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ABSTRACT

The study was devoted to the problem of identity related-crime in the digital environment from the common law and the Shariah perspectives. The study attempted to capture the words used to describe the phenomenon (identity crimes) in different branches of knowledge in order to provide a sufficient definition to the phenomenon. In this regard, the study found that the term ‘identity crime’ is a term used to describe all unlawful activities that target personal identity. This study also touched upon the impacts of the crimes and the tools used by criminals to commit the offences. The study critically discussed and examined identity crimes in the light of the existing laws in the UK and Malaysia. The discussion revealed that both countries have piece of legislations that can be employed to curb various crimes related to identities. For the UK, the provisions relating to identity crimes can be found in Theft Act 1968, Computer Misuse Act 1990, Identity Documents Acts 2010, Fraud Act 2006 and Data Protection Act (DPA) 1998. Regarding Malaysia, the study found that some provisions in Penal Code, Computer Crimes Act 1997, Passport Act 1966, the Births and Deaths Registration Act 1957, the Official Secret Act 1972, Financial Services Act (FSA) 2013 and Islamic Financial Services Act (IFSA) 2013 and Personal Data Protection Act (PDPA) 2010 can apply to identity crimes. Islamic perspective on the matter was also discussed in the study. Therefore, the study proved that specific Shariah rules such as rules relating to theft, forgery, sanctity of property can apply to identity crimes in the digital age. In addition, general Islamic rules such as those relating prohibition oppression, mischief be used to fight against the phenomenon. Regarding Mauritanian perspective, the study revealed that the Penal Code and other piece of laws could apply to the crimes in the absence of special laws in the country. Finally, the study recommended for enacting or creating special provisions to deal with crimes of identity in the digital environment as the traditional law seems to be not ready to accommodate new crimes such as identity crimes. It also urged for raising awareness among the citizen about the danger of identity crimes.

ملخص البحث

هذا البحث خصص لدراسة الجرائم المتعلقة بالاعتداء علي المعلومات الخاصة بالاشخاص أو ما اصطلح علي تسميته ب"جرائم الهوية" في البيئة الالكترونية في ضوء الشريعة الاسلامية والقانون الموريتاني وبعض قوانين الدول الانكلوسكسونية مثل بريطانيا وماليزيا. حاولت الدراسة تعريف إشكالية البحث تعريفا شاملا من خلال حصرألفاغه المتداولة بين الباحثين في مجالات مختلفة من مجالات المعرفة الانسانية. إضافة إلي ذلك تكلمت الدراسة باختصار علي تأثيرات جرائم الهوية علي الضحايا وكذلك تكلمت علي الوسائل التي يستخدمها المجرمون لاقتراف تلك الجريمة. ناقش البحث نقاشا معمقا جريمة الهوية في ضوء القوانين المعمول بها حاليا في بريطانيا وماليزيا, ومن خلال ذلك النقاش توصل البحث إلي نتيجة مفادها أن بعض القوانين السارية في هاتين الدولتين (بريطانيا ومليزيا) يمكن أن تنطبق علي بعض جوانب جرائم الهوية وبالتالي يمكن أن تستخدم كأداة لمحاربة هذه الجرائم. وفي ما يتعلق بالشريعة الاسلامية أثبت البحث أن بعض جرائم الهوية يندرج تحت جرائم محددة في الشريعة الاسلامية مثل جرائم السرقة والتزوير وانتهاك حرمة مال الغير مثلا. إضافة إلي ما سبق, وجد البحث أن أحكاما شرعية عامة مثل تحريم الظلم والاعتداء والفساد يمكن أن تستخدم كوسيلة فعالة لمحاربة جرائم الهوية وغيرها من الجرائم المستحدثة. وبالنسبة للجانب الموريتاني وجد البحث أن بعض القوانين المعمول بها في البلد الان مثل قانون العقوبات وقانون الحالة المدنية وغيرها تحتوي علي أحكام يمكن أن تنطبق علي جرائم الهوية في غياب قانون خاص يحكمها. وختاما أوصي البحث بضرورة إصدار أو استحداث قوانين خاصة بهذا النوع من الجرائم لأن القوانين القديمة غير مناسبة أو علي الاصح غير ملائمة لكثير من جرائم عصر المعلومات. وأوصي البحث كذلك بأهمية التوعية وتنبيه المواطنين إلي خطورة جرائم الهوية وما قد تلحقه بالفرد والمجتمع من أضرار فادحة.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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Hunud Abia Kadouf
Dean, Kulliyyah of Laws

DECLARATION

I hereby declare that this dissertation/thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Sidi Mohamed Ould Mohamed

Signature.....

Date

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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Praise be to Allâh, the Lord of the world. Allâh says in the Holy Qur'an (Ibrahim 14: 34): "And if you count the Blessings of Allâh, never will you be able to count them."

Peace be upon the Prophet Muhammed (S.A.W) who says; "He who does not thank people, does not thank Allah." (Tirmidhi).

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

Advances in technology in contemporary time have made people's lives better and easier and have provided them with myriad benefits. This improvement is pervasive in the economic, health, educational and social sectors and so on. Nonetheless, some unscrupulous elements have misused the technology and consequently, made it harmful to other people. Identity crimes are not new but there is no doubt that the usage of technology and employing it in our daily lives have opened the doors to criminals and enabled them to easily commit old offences and even invent new ones. Among the serious crimes that flourished in the digital age are 'identity-related abuses' which can be committed by computer-savvy criminals without accessing physically to their victims' chattels. Furthermore, the incidents of identity crimes are various and "there is widespread agreement that identity theft causes financial damage to consumers, creditors, retail establishments, and the economy as a whole."¹ Specific laws have been enacted in several countries to regulate computer-related crimes. However, others still rely on their traditional laws to deal with the digital age crimes.

Considering the above information's, this study takes its importance as a comparative study of rules or laws governing identity crime in the digital environment in two major legal systems, namely: the Islamic law system and the Common Law system. The study aims to highlight and examine how identity crime and its derivative crimes are combated or responded to by the Shariah and Common Law.

¹ Chris Jay Hoofnagle, "Identity Theft: Making The Known Unknowns Known" Vol. 21, no. 1 Fall (2007) *Harvard Journal of Law & Technology* at 98.

Since identity crimes, as Allen Hammond asserted “have fascinated the world and generated a strange feeling composed of admiration and fear”,² further profusion of studies and research of the phenomenon are needed and thus, the present study attempts to fill a portion of the hiatus (gap).

1.2 SUMMARY OF THE STUDY

This study is carried out to explore; firstly, the definition, nature and scope of identity crimes in the context of IT advances and secondly, to comparatively discover how Islamic and the common Law systems each deals with identity crimes in digital environment. For this matter, the common law rules relating to identity crime and its following offences will be discussed in chapter three of this dissertation. In addition, the UK and the Malaysian legal frameworks for solving or handling the crimes will be employed as instances of the common law system. Additionally, the Shariah attitude and perspective to identity matter will be elaborately highlighted in chapter four. Again here, as an Islamic legal system based, the Mauritanian legal framework regarding identity crime will be examined and researched in a bid to ascertain or test out its ability to prevent or react positively to the drawback of identity offences (in chapter five). This dissertation culminates in chapter six, by comparing the aforementioned legal systems in order to discover their weakness and strength and suggest solutions thereon.

² Allen Hammond, The 2001 Council of Europe Convention on cyber-crime: an efficient tool to fight crime in cyber-space, *Cédric J. Magnin* June 2001, at 1.
<<http://www.magnin.org/Publications/2001.06.SCU.LLMDissertation.PrHammond.COEConvention.Cyber-crime.pdf>> viewed on 13 December, 2013.

1.3 STATEMENT OF THE PROBLEM

The advance of technology and using it daily stimulate criminals' appetites and give them an opportunity to commit crimes and be in breach of legal rules. Rightly, identity crime is not newborn neither is it a recent matter; therefore, it is known since time immemorial. However, there is no doubt that identity crime in the digital environment becomes a public concern that can probably affect the whole societies and their systems. Nowadays, people depend on the technology almost for all aspects of their lives and as a result, countless information has been collected and stored in digital devices. Unfortunately, this information can be misused or disclosed in ways that would affect persons and their interests. Thus, it is tremendously useful to study the problem of identity crimes in the digital environment and point out different solutions from different legal systems.

1.4 RESEARCH QUESTIONS

The study attempts to answer the following queries:

- (1) What is identity crime in the digital environment? How is it committed by the criminals?
- (2) How is the problem resolved by the common law?
- (3) What is the Shariah perspective from identity crime in the digital environment?
- (4) Can the Mauritanian Law which is based on Islamic Law combat identity crime in the digital age or the country has to enact and create new laws?

1.5 OBJECTIVE OF THE STUDY

As a comparative research, the main objective of this study is to explore the legal rules relating to identity crime in digital environment and its generated offences in the Common law and the Shariah. Thus, this study seeks to take up the following:

- (1) Identifying identity crime, its derivative crimes, impact and harm etc;
- (2) Studying rules and regulations relating to identity crime particularly in the UK and Malaysia;
- (3) Examining the Shariah rules that can be applied to identity crime;
- (4) Generally examining the Mauritanian laws pertaining to identity crime and discussing their adequacy or otherwise, to the concerned matter.

1.6 HYPOTHESIS

Identifying the nature and scope of identity crimes is one of the greatest challenges faced not only by the academicians but also by the law enforcement agencies. Examining and exploring the phenomenon of identity crimes and analyzing the provisions of the existing laws relating to this crime would be an estimable contribution to the academic debate as well as to the legislative bodies. In the absence of special laws relating to identity crime, some provisions of the existing laws in some Common law countries such as the UK and Malaysia can be used to curb identity crimes. As a divine and timeless law, Islamic laws and rules are pertinent to all issues regardless of their newest or oldest. As such, since the Shariah has flexible and general rules, it can apply to new crimes such as identity crimes in the information epoch. Meanwhile the Mauritanian existing law, which is based on the Shariah, can be used to combat identity crime but it is advisable to enact and create new laws relating to computers and processing data in the digital environment.

1.7 LITERATURE REVIEW

Identity crime is one of the grave offences of digital era that have an effect on society. Many writers have touched upon identity crime in the digital environment and others have discussed it in detail. The literature review of this study encompasses the Quran and the Sunnah as they are considered the main sources of the Shariah. For instance, provisions (verses and Hadith) related to theft, spying, the sanctity of humans and property are pertinent to the objectives of this study. In addition, Legal maxims such as “Necessity renders prohibited things permissible” in addition to the opinions of Islamic jurists are included in the literature review. Additionally, relevant laws and acts relating or applicable to identity crime and its generated offences in the UK, Malaysia and Mauritania are amongst the major references of this study. Furthermore, due to the fact that identity crime is a worldwide crime, the literature review is extended to include legal sources relating to the matter from other countries.

Emily Finch defined identity as a complex and multi-faceted concept that is best understood by a division into three categories: personal, social and legal.³ The legal identity, as she explained, serves dual purposes; it enables individuals to authenticate themselves and provides their historical continuity as individuals ‘here and now’ by connecting them with events in their past, e.g. credit, employment history. Emily added that the aim of legal identity is to create a relationship between the physicality of a person and the collected information pertaining to them and as a result, the primacy and tenacity of legal identity may encourage identity theft.

³ Emily Finch, “The Problem of Stolen Identity and the Internet” in *Online Crime*, ed. Yvonne Jewkes, UK: Willan Publishing, 2007, at 29.

Model Criminal Law Officers' Committee in "Final Report Identity Criminal"⁴ defined identity crime and highlighted some of its aspects. The report pointed out that identity crime has financial, psychological, and other intangible impacts in that it may be used to access to citizenship, medical services, etc. Identity related-crimes, as the report stated, have an impact on national security because the crime can facilitate terrorists and criminal organizations. The report also discusses the costs of identity crime to the individuals and nations. For example, it mentioned that from 80, 000 of the victims of fraud in the UK, the victims of impersonation were more than 67,000. Philippa Lawson provided useful information about the phenomenon.⁵ The author discussed among other things the technique used by criminal to commit the crime. As an example, he pointed out that the criminals steal wallets and mail, gather personal data from public sources, bribe employees and hack computers. Regarding needs of the victims, the author mentioned that the victims need assistance to recover from the victimization. For example, they need protection, support, and education about their rights and obligations and how to protect themselves in the future, etc. Ali Hedayati on this part wrote about types of identity theft and its derivative crimes.⁶ The writer, for instance, mentioned that identity theft is considered as means to other types of fraud such as financial fraud, mortgage fraud, immigration fraud, medical fraud, resume and tax fraud and he defined all of these terms. Hedayati mentioned useful techniques that can be employed by individuals to prevent or at least minimize identity theft. For example, he recommended that a person should not disclose

⁴ Model Criminal Law Officers' Committee, *Final Report Identity Criminal* (Commonwealth of Australia) <http://www.sclj.gov.au/agdbasev7/wr/sclj/documents/pdf/identity_crime_final_report_march_2008.pdf> viewed on 21 November, 2013.

⁵ Philippa Lawson, *Responding to Victims of Identity Crime: A Manual for Law Enforcement Agents, Prosecutors and PolicyMakers*, <http://www.icclr.law.ubc.ca/files/identity_crime/00%20Victims%20of%20Identity%20Crime%20Manual.pdf> viewed on 24 March, 2013.

⁶ Ali Hedayati, "An Analysis of Identity Theft: Motives, Related Frauds, Techniques and Prevention" Vol. No. 4(1), (January 2012) *Journal of Law and Conflict Resolution* at 1-12, <<http://www.academicjournals.org/JLC>> viewed on 07 October, 2013.

personal information to anyone in case of doubt on that person authority, the documents should be kept in safe place, memorizing passwords and personal identity numbers like telephone, cards, etc. instead of writing them on papers. The terms used to describe misuse of identities such as identity theft, identity fraud, and identity crime have also been discussed by James Blindell Blindell when he said that the terms seem to be used in different ways and he attempted to help clarify the meaning and scope of identity crime terms towards consistency.⁷ For example, he mentioned that identity theft is used in the USA to cover all crimes related to identities while in the UK the used term is an ‘identity fraud’. In Australia, the term identity crime seems to be used to cover all identity crimes. The author suggested ‘identity crime’ to be used as a generic term to include the offences of fabrication, manipulation, and stealing identity to ease the commission of crimes. David S. Well wrote about the crime and discussed in details the followings: identity theft, creation of false identity, committing identity fraud and what he called new forms of identity crime.⁸ He pointed out laws and regulations relevant to identity crime in the UK such as the UK Fraud Act 2006, the UK Identity Documents Act 2010, and the UK Computer Misuse Act 1990. In fact David’s work is one of the main references that the writer of this thesis relies on when discussing the UK approach. Another reference of this study is a report to the Attorney General of the United States and the Minister of Public Safety of Canada.⁹ This study focused on the following aspects of identity crime: the scope and extent of identity-related crime, categories of victims as well as the criminals. It also discussed

⁷ James Blindell, “Standardisation of Definitions of Identity Crime Terms: A Step Towards Consistency,” *Privacy Law Bulletin*, vol. 3 No. 4/5 (2006). Lexis Legal Research for Academics, via, <<http://www.lexisnexis.com/my/academic/>>. viewed on 20 October 2013.

⁸ David S. Wall, *Future Identities: Changing Identities in the UK – the next 10 years* (Durham University January 2013), < <http://www.bis.gov.uk/assets/foresight/docs/identity/13-522-future-challenges-of-identity-crime-uk.pdf>> viewed on 29 January, 2013.

⁹ A Report to the Attorney General of the United States and the Minister of Public Safety of Canada- November 2010, *Identity-Related Crime: A Threat Assessment* <<http://www.justice.gov/criminal/fraud/documents/reports/2010/11-01-10mass-market-fraud.pdf>> viewed on 19 January, 2013).

the methods and techniques that criminals use to commit the offences. Also, Bruce Arnold wrote about the nature of the crime, the cost and response of the laws.¹⁰ For example, he stated that identity crime includes, inter alia, buffing CVs, stolen honour and what he named life after death which means that some criminals pretend to be dead to evade responsibilities or to gain certain benefits (as in the case of life insurance, for example). Sonny Zulhuda examined and analysed identity theft in the Malaysian approach and cited laws and acts that seem to be relevant to identity theft such as theft laws, Computer Crime Act 1997, and Personal Data Protection Act 2010.¹¹ Likewise, Abu Bakar Munir and Siti Hajar Mohd Yasin are another reference of the study. The authors discussed the Personal Data Protection Act 2010 in details.¹² Anita Abdul Rahim and Nazura Abdul Manap in their paper “Theft of Information: Possible Solutions under Malaysian Law” discussed the term of ‘theft’ in the Malaysian Penal Code and UK Theft Act 1968 and pointed out the salient differences and similarities between them. The authors also discussed the applicability of the traditional theft to theft of information and come to the conclusion that provisions of theft as in the Penal Code and Theft Act 1988 cannot apply to theft of information because the elements of the offence especially the element related to definition of property cannot be fulfilled in the case of theft information.¹³

Additionally, some IIUM researchers have discussed different points relevant to the study in their theses and dissertations. To give examples, when discussing

¹⁰ Bruce Arnold, *Identity Crime*, (Management of Serious Crime program Australian Federal Police College), <<http://www.caslon.com.au/publications/mosc2007.pdf>> viewed on 4 February, 2014

¹¹ Sonny Zulhuda, “Legal Redress for Identity Theft in Malaysia: Hope or Hype?,” (Unpublished paper Proceedings of International Conference on Public Policy and Social Science, UiTM Melaka Malaysia, November 2012.

¹² Abu Bakar Munir, Siti Hajar Mohd Yasin, “Personal Data Protection Act: Doing Well By Doing Good,” Vol. 1 (2012) MLJ at lxxxiv. Lexis Legal Research for Academics, via, <<http://www.lexisnexis.com/my/academic/>>.

¹³ Anita Abdul Rahim, Nazura Abdul Manap, “Theft of Information: Possible Solutions under Malaysian Law”, Vol.3 (2000) MLJ at xc. Lexis Legal Research for Academics, via, <http://www.lexisnexis.com/my/academic/>.

economic and financial crimes under Nigerian Criminal Law, Yusuf Ibrahim Arowosaiye mentioned relevant information to identity crime such as forgery, credit card and identity fraud. He also discussed computer related crime such as hacking, cyber piracy, etc, as well as an Islamic perspective towards some of the economic crimes.¹⁴ Other relevant studies have been done in the contexts of privacy in general and privacy in E-Health personal data privacy. Nurbek Kenjebaev has discussed privacy and its different aspects and pointed out the threat of computerization to individuals' privacy. He specifically discussed privacy in Islamic perspective by giving some examples such as the sanctity of houses, prohibition of espionage in Islam, etc. Moreover, Nurbek analyzed the Malaysian approaches by examining the proposed Malaysian PDP and its impact on industry and the common law remedies for transgression of privacy thereafter.¹⁵

Furthermore, the research also has other references which include text books and articles written by experts and academic writers. For instance, Richard C. Hollinger (1997) briefly stated the historical development of laws relating to computer crimes when he mentioned that the crime and deviance committed by means of computers can be divided into at least four distinct focal periods as follows: first, the discovery period (1946-1976). During this time, writers focused on describing the nature of the phenomenon. Second, the criminalization period (1977-1988). This period saw the enactment of computer crimes statutes. For instance, the first computer crime statute was enacted in Florida 1978. Afterward the other States and the Federal Government passed their own computer crime laws as well as most of the Western countries did. Writers on this period concentrated on correcting deficiencies

¹⁴ Yusuf Ibrahim Arowosaiye, "Economic and Financial Crimes and ICT: An Appraisal of the Response of the Nigerian Criminal Law" (Ph.D thesis, IIUM, 2009).

¹⁵ Nurbek Kenjebaev, "Protection of Privacy and the Personal Data in the Information Age: Malaysian Approach" (Ph.D thesis, IIUM, 2008).

in criminal laws relating to computer related abuse. Thirdly, the demonization of hackers-(1988-1992) - this period was characterized by unsuccessful law enforcement efforts to identify and sanction the computer deviant, especially the hackers. During this period few criminals were prosecuted and most of them were employees who wanted revenge on their employers. Fourth, the censorship period-(1993--); at this stage, criminal justice concern has been directed to limiting access of computer users to information and dangerous materials available on the internet.¹⁶

Marco Gercke also analyzed the phenomenon of 'identity theft'.¹⁷ He particularly examined the type of identity related information that the offenders look for, as well as the methods used for the commission of the offences. The writer went further and defined identity theft by taking into cognizance the results of the analysis related to the phenomenon as well as the existing definition. Then he provided an overview of arguments in favour and against the development of a specific approach to criminalize identity theft and highlighted existing approaches. Collected information about identity-related crime in different countries has been gathered by Gilberto Martins de Almeida. The author discussed identity related crime legislation: definition, means of identity-related crime, protection of identity information, identity crime objective and subjective elements. Gilberto presented samples of provisions contemplated in national laws of some countries as follows: personal data, personal status, identity information, identity document or identification document, falsification and issuance or use of incorrect health certificates, false statement for passport, identification code, identification marks, genetic imprints, misuse of electronic

¹⁶ Richard C. Hollinger, *Crime, Deviance and the Computer*, England: Dartmouth Publishing Company Limited, 1997.

¹⁷ Marco Gercke, *Legal Approaches to Criminalize Identity Theft* (UNODC) at 1, <http://www.unodc.org/documents/treaties/UNCAC/Publications/Handbook_on_ID_Crime/10-57802_ebooke.pdf> viewed on 1 October, 2014.

signature, impersonation, forgery of identification document, forgery of identity in document delivered by public bodies, false document, violation of personal data and websites, skimming and offences related to electromagnetic.¹⁸

Marco Gercke and Raluca Simion asserted the importance of international cooperation to combat identity crime and mentioned the development of identity-related crime, impact of the digitalization on the transnational nature of the offence, general aspects of international cooperation in identity-related crime cases, conventions applicable in international judicial cooperation in combating identity-related crime and practical issues emerging from their applications.¹⁹ Judge Mohamed Chawki and Mohamed S. Abdel Wahab defined identity theft and suggested some solutions. For instance, the authors discussed the problem of identity theft, impact and harm generated by the crimes, and factors facilitating identity theft.²⁰ Likewise, Bald De Vries, Jet Tigchelaar & Tina Van Der Linden in their articles discussed the problem of definition of identity fraud and attempted to formulate a general definition of it.²¹

As noticed, the above-mentioned studies highlight some aspects of the present study and give the researcher an opportunity to get the bigger picture. However, since the focus of those studies was on certain topics, they omitted to mention or discuss important points that are purported or intended to be included in the present study. As

¹⁸ Gilberto Martins de Almeida, *Typology and Criminalization Approaches to Identity-Related Crime: Compendium of Examples of Relevant Legislation*, (UNODC), at 55, <http://www.unodc.org/documents/treaties/UNCAC/Publications/Handbook_on_ID_Crime/10-57802_ebooke.pdf> viewed on 1 October, 2014.

¹⁹ Marco Gercke and Raluca Simion *Practical Guide to International Cooperation to Combat Identity-Related Crime*, (UNODC) at 235, <http://www.unodc.org/documents/treaties/UNCAC/Publications/Handbook_on_ID_Crime/10-57802_ebooke.pdf> viewed on 1 October, 2014.

²⁰ Judge Mohamed Chawki, Mohamed S. Abdel Wahab, "Identity Theft in Cyberspace: Issues and Solutions", *Lex Electronica*, vol.11 No.1 (Printemps / Spring 2006), <http://www.lex-electronica.org/articles/v11-1/chawki_abdel-wahab.htm http://www.lex-electronica.org/articles/v11-1/chawki_abdel-wahab.pdf >. viewed on 19 September, 2012.

²¹ Bald de Vries, Jet Tigchelaar, Tina van der Linden, "Describing Identity Fraud: Towards a Common Definition", *SCRIPTed*, vol. 5, Issue 3, (December: 2008), at 482, <<http://www.law.ed.ac.uk/ahrc/script-ed/vol5-3/devries.asp>>, viewed on 19 January, 2013.