Hague Journal on the Rule of Law (2023) 15:263–282
https://doi.org/10.1007/s40803-023-00194-0

ARTICLE

Was There a Rule of Law in Early Modern Amsterdam? Mercantile Customary Law as a Test

Marco in 't Veld[1]

Accepted: 17 July 2023 / Published online: 24 July 2023

Abstract

This contribution intends to shed light on the development of the rule of law, particularly by questioning the existence of such rule of law in early modern Amsterdam. In literature, thinner and thicker definitions are given, mostly presented as a continuum. This contribution will focus on mercantile customary law as it is a legal source that hardly fits in the literature-based categories. The importance of customary law seems to have decreased parallel with the bureaucratization of law; similarly this legal source can be considered as relatively democratic as it was based on the consent of a certain community. This ambiguity was also part of an old debate among legal historians. Some have indeed argued that custom was indeed solely based on the tacit consent of communities while others claimed that custom was a legalistic source in the sense that it provided formal rules of decision often written down in a way very similar to law books. This debate runs parallel to the question to what extend merchants made use of public institutions in the organisation of their trades.

With regard to early modern Amsterdam, this contribution argues on the basis of a variety of primary sources that lawyers and proctors had a relatively advanced legal system at their disposal in which moral convictions played an important role. The example of the city's weigh house will be used to elaborate on the precise way the institutional and legal frameworks were applied in mercantile practice. It will be

This paper is very much inspired by the discussion with Prof. Dr. David Deroussin (Université Jean Moulin Lyon III) and Prof. Dr. Niels van Dijk (Vrije Universiteit Brussel) during the defense of my dissertation: Commerce and Customs in the Courts—A Comparison of Mercantile Customs, Jurisdictions, and Institutions in Amsterdam and Lyon (early eighteenth century). I would like to thank them for his very insightful and thought-provoking questions. I would also thank Maurice Adams and Maurits den Hollander for their useful remarks on earlier versions of this contribution. Lastly, I am thankful to Marjolein van der Plas for their help with the translation of some early modern terminology.

✉ Marco in 't Veld
C.M.intVeld@tilburguniversity.edu

[1] Tilburg University, Tilburg, The Netherlands

concluded that many mercantile customary norms can be linked to institutions like the weigh house, but that this institutionalisation was not necessarily at odds with a continuation or even development of democratic elements. Especially the guilds functioned as a vehicle that helped to articulate tacit customs while having a great influence on Amsterdam politics at the same time. For this reason it should be seriously considered that Amsterdam already had a relatively advanced legal system that was dependent on bureaucratic institutions in the early modern period. Such system should be considered as an important step towards the presence of the rule of law.

1 Introduction: Concepts of the Rule of Law

As of the beginning of the seventeenth century until deep into the eighteenth century, Amsterdam was one of the world's leading cities of commerce. A French travel guide from 1701 mentions a forest of masts and ropes with the sun has difficulty to penetrate.[1] Obviously, this is an exaggeration, but it is true that every year several thousands of ships, full of cargo from all over the world, visited the port of Amsterdam.[2] This turned the city into 'the warehouse of the world' or 'the world's fair'.[3] From an economic point of view, this was truly a 'golden age' for the city. The market power of the city also made Amsterdam one of the leading political factors in the Dutch Republic: it was responsible for almost half of the revenues of the province of Holland.[4] In the States of Holland, 18 of the 19 votes were reserved for representatives from the cities. Those representatives were strictly bound to the instructions of their home cities.[5] This way they controlled important appointments in Holland and the Republic. Conversely, the central and provincial bodies of the Republic had little to say in the cities. Cities had far reaching privileges which were fiercely defended. They had their own administration, legislative instruments, taxes, and jurisdictions, and they fiercely defended their privileges and local customs. This makes Amsterdam a very interesting target for urban constitutionalist inspiration.

Economic historians have been in search of causes of economic growth of the city. Often they have studied the institutional framework of the city, broadly defined as the 'humanly devised constraints that structured political, economic, and social interaction'.[6] In this paper I propose to further this economic analysis by connecting it to the concepts of the rule of law and customary law. In literature, the rule of law is believed

[1] Anonyme, *Le guide d'Amsterdam, enseignant aux voyageurs et aux négociants sa splendeur, son commerce et la description de ses édifices* (Amsterdam, Daniel de la Feuille, 1701), 2, 81.

[2] C. Lesger, 'Vertraagde groei. De economie tussen 1650 en 1730' in W. Frijhoff and M. Prak, *Geschiedenis van Amsterdam. Zelfbewuste stadstaat, 1650–1813,* (Amsterdam, SUN, 2005), 23.

[3] Anonyme, *Le guide d'Amsterdam,* op. cit., 1–2.

[4] M Hell, 'De oude geuzen en de opstand. Politiek en lokaal bestuur in de tijd van oorlog en expansie 1578–1650', in W. Frijhoff and M. Prak, *Geschiedenis van Amsterdam. Centrum van de wereld 1578–1650,* op. cit., 247. See also A.T. van Deursen, 'Staatsinstellingen in de Noordelijke Nederlanden 1579–1780', in D.P. Blok et al. (eds.), *Algemene Geschiedenis der Nederlanden* (vol. V) (Haarlem, Fibula-Van Dishoeck, 1980), 350–387.

[5] R. Fruin, *Tien jaren uit de 80-jarige oorlog* (Utrecht, Het Spectrum), 1659, 34–35.

[6] D.C. North, 'Institutions', (1991) *Journal of Economic Perspectives*, 97.

to produce a variety of social and economic goods and is therefore considered a key precondition of a prosperous society.[7] However, the precise definition of the rule of law is up to fierce debate. Tamanaha has proposed a continuum of thinner and thicker definitions of the rule of law, beginning with the rule-by-law principle and formal legality, while ending with the social welfare state.[8] A comparable approach is offered by Møller and Skaaning, distinguishing aspects concerning the shape (core), sanctions (control), source (consent), and substance (content) of the rules.[9]

In this paper the continuum of thinner and thicker definitions is used as a tool to provide insight in the degree to which early modern Amsterdam could be considered to have had a rule of law. At the same time the Amsterdam situation and the concept of customary law are used to criticise the continuum as presented by Tamanaha.[10] The starting point of the paper is a relatively thin concept of the rule of law, namely the formal legality that is so prominent in the works of Hayek, Fuller, and Raz. It basically requires laws to be capable of guiding the behaviour of its subjects. Therefore these laws should be prospective, general, clear, public, and relatively stable. An extra argument for choosing this thin concept as a starting point can be found in the law and economics literature, where Posner argued that formal legality would suffice for setting the legal preconditions for economic growth and welfare, while thicker forms of the rule of law should be regarded as luxury.[11]

Joseph Raz has argued that the formal legality conception of the rule of law has its ultimate foundation in the idea that system and doctrine are requirements for fairness.[12] He therefore labelled this model as 'bureaucratic'. The law should be publicly laid down so that people are able to plan their lives accordingly. In disputes they can present their point of view before impartial judges who provide public reasons for their decisions. 'This view of justice is bureaucratic because it concerns the conduct of bureaucratic institutions, in their relations with isolated individuals. So understood, the doctrine concerns law-making and dispute resolutions by anonymous strangers inhabiting impersonal institutions based on abstract principles and elaborate procedures. It does more than presuppose this bureaucratic context. It positively requires it'.[13]

[7] S. Haggard et al., 'The rule of law and economic development', (2008) *Annual Reviews of Political Science*, 205–234.

[8] B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambride, CUP, 2004), 91–113.

[9] J. Møller and S.E. Skaaning, 'Systematizing Thin and Thick Conceptions of the Rule of Law', (2012) *The Justice System Journal*, 136–153.

[10] Tamanaha himself, especially later in his career, criticized legal positivism with use of arguments from history and anthropology. He is perfectly aware that can be valued for being law of the community, but he seemed to have overlooked that this is at odds with the continuum he presented. See Tamanaha, *On the Rule of Law,* op. cit., 23–25, 28–31; B.Z. Tamanaha, *Insights about the Nature of Law from History* (Stuttgart, Franz Steiner Verlag, 2017), 17–45; B.Z. Tamanaha, 'The history and elements of the rule of law', (2012) *Singapore Journal of Legal Studies*, 232–247.

[11] R.A. Posner, 'The Law and Economics Movement', (1987) *The American Economic Review*, 1–13; R.A. Posner, 'Creating a Legal Framework for Economic Development', (1998) *The World Bank Research Observer*, 1–11. Cf. Haggard et al., 'The rule of law and economic development', op. cit., 205–234.

[12] J. Raz, 'The Politics on the Rule of Law', in *Ethics in the Public Domain* (Oxford, Clarendon Press, 1994), 371.

[13] *Ibidem.*

Historically, the presence of bureaucratic institutions have functioned as a main driver of the development of the rule of law as governors and officials became increasingly restraint by the rules and daily routines of such bureaucracy.[14]

In contrast with this bureaucratic model, Raz also described a tradition-oriented approach to the rule of law. This approach resonates well with, for example, later beliefs of Hayek (as expressed in his *Law, Legislation, and Liberty* (1973)) in which he develops the idea of law as *catallaxy,* a spontaneously grown order that even could transcend the level of state or particular community.[15] Following Hayek, Raz argues that it is also possible to think of a rule of law in which law is rather a set of practices which evolved over time and withstood the test of time. Community law is the ideal of this model: promulgation of the law of a community is believed to be no more than a clarification of its details. The law is applied by people who share the tradition of local knowledge and of the community, which can hardly be proved in court nor fully articulated in a reasoned judgement. As such, it does not meet the standards of formal legality in the sense that laws are prospective, general, clear, public, and relatively stable. On the other hand, community members are still perfectly able to plan their lives according to the rules. The model also scores on the consent-criterium of Møller and Skaaning.

Jurists of international commercial law have sometimes projected this tradition-oriented model of the rule of law on the medieval and early modern periods, as their theory of the *lex mercatoria* was basically built on the same presumptions as the tradition-oriented model. The idea of the law merchant is that a select group of internationally operating merchants spontaneously developed, without intervention of any particular legislator, a uniform, coherent, and universal set of norms, in order to overcome the difficulties of legal diversity and cheating in long distance trades.[16] This universal set of norms—developed at annual fairs and in cities—was believed to be customary and written in nature.[17] Growth of the customary system was a rapid but organic process of trial and error, in which efficient rules tended to be selected over time, whereas inefficient rules were ignored.

In opposition to the proponents of the *lex mercatoria,* this paper argues that the early modern city of Amsterdam was well underway in its development towards a bureaucratically applied rule of law. I will use the concept of the rule of law to contribute to our understanding of history and vice versa. This contribution will assess the historical situation on a grassroots level by focusing on the role of customary

[14] Tamanaha, 'The history and elements of the rule of law', op. cit., 238.

[15] F. Hayek, *Law, Legislation, and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy* (London, Routledge, 1993), 77–84. See also Tamanaha, *On the Rule of Law,* op. cit., 69–70.

[16] Among the many authors on the *lex mercatoria* are: B. Goldman, 'Nouvelles réflexions Sur la Lex Mercatoria', in Ch. Dominicé et al. (eds.), *Etudes de Droit international en l'honneur de Pierre Lalive*, (1993), 241–255; C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Dordrecht, Nijhoff, 1988); L.E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Rothman, 1983); B.L. Benson, *The Enterprise of Law. Justice Without the State* (Oakland, The Independent Institute, 2011); H.J. Berman, *Law and Revolution. The formation of the Western Legal Tradition* (Cambridge, Harvard University Press 1983).

[17] J. Hilaire, *Introduction historique au droit commercial* (Paris, PUF, 1986), 18–32.

norms within the legal system of the city. The main historical sources are not theoretical treatises, but published opinions of lawyers in ongoing lawsuits and handwritten summaries of pleadings of proctors in the bench of aldermen (the city's main court). I will use these documents as a yardstick to measure the rule of law on 'Tamanaha's scale' while similarly criticizing this scale. I will not go as far as that the city already met all requirements of legal legality. Especially the lack of a coherent codification prevents from concluding so. However, the remnants of the tradition oriented-model make the city score higher on the democracy/consent-criterium.

In Sect. 2, I will relate the most commonly used definitions of customary law to two different approaches to law in general: the practice-oriented approach of legal sociologists, and the positivist approach of Herbert Hart.[18] The latter's arguments on customary law and the legal system are studied in detail in order to grasp the central ideas of the bureaucratic model of the rule of law. Section 3 gives a brief overview of the developments of the legal system in Amsterdam, including an analysis of customary law on the basis of the consulted sources. This section will argue that lawyers and proctors both had a relatively advanced legal system at their disposal in which moral convictions played an important role. In Sect. 4 some further arguments are developed. I will use the example of the city's weigh house to elaborate on the precise way the institutional and legal frameworks were applied in mercantile practice. It will also shed light on the consent-criterium of the rule of law. The paper conclude arguing to what extend everyday dealings with customs in some of the institutions in early modern Amsterdam did comply with the bureaucratic model of the rule of law (conceived as legal legality whether or not combined with democratic elements).

2 Two Sides of Customary Law

Throughout legal history, the medal of customary law, had two different manifestations: the 'behaviour-custom', and the 'law-custom'.[19] What the middle ages concerns, Emily Kadens has argued that 'medieval historians tend to assume that custom was legalistic, in the sense that it provided formal rules of decision, and the most accessible sources—collections of supposed customs that look very much like books of law—encourage this assumption'.[20] In contrast with this approach, she stresses, particularly with regard to commerce, the importance of the tacit consent of communities that was shown by their shared patterns of conduct.

In the classical period of Roman law, Salvius Julianus argued that the absence of law could be supplemented by *mores* and *consuetudines* (D.1.3.32). What people had approved should be considered as law, even if it remained unwritten. In the middle ages, precisely this tacit consent was emphasized by Bartolus of Sassoferato, as

[18] H.L.A. Hart, *The Concept of Law* (London, OUP, 1961), although he has stated in the preface that his positivism may be regarded as 'descriptive sociology'.

[19] E. Kadens, 'Custom's Two Bodies', in K.L. Jansen et al. (eds.), *Center and Periphery: Studies on Power in the Medieval World in Honor of William Chester Jordan* (Leiden, Brill, 2013), 239–248.

[20] *Ibid.,* 239.

he argues that customary law is the repeated behaviour to which the relevant majority of the community had tacitly consented to be bound to perform.[21] In another commentary, Bartolus, on the basis of older texts of Azo and Jacques de Révigny, underlines the unwritten nature of custom: '*consuetudo est ius non scriptum*'.[22] Contrary to other fields of law in which the influence of custom was rather marginalized during the middle ages, this definition of customary law would, according to Kadens, have been widely applied in mercantile law.[23]

This interpretation fits perfectly into both the tradition-oriented model of the rule of law as well as the law merchant theory. Given the requirement of tacit consent only, custom could consist of any type of rule as long as the members of the community felt themselves bound to obey, mainly for the reason that they believed their community had always done so. First of all, interpreted in this way, custom has in common with both the law merchant and the tradition-oriented model that law is produced from the bottom up. Customary law is the result of interaction between people on a grassroots level. Secondly, customary law should be considered as a community product. In the case of the law merchant, this community consisted of a relatively small group of international traders who operated from annual fairs or cities of commerce. They were repeat players who knew that they could trust their partners from previous transactions. They stood on the shoulders of previous generations and were formed through apprenticeships within the community. During their time as apprentice they familiarized themselves with the prevailing business practices and customs which they could later continue.

At this point, some parallels with legal sociological approaches of the late nineteenth and early twentieth century stand out. Sociologists as Emile Durkheim and Max Weber tried to understand society from the perspective of mechanic rationalization versus organic solidarity.[24] These theories were applied on law by legal scholars as they became interested in how law operated as a practice. Eugen Ehrlich developed the concept of 'living law' (as opposed to public and juristic law). According to him, the legal facts of the living law where the most important manifestation of law since they 'dominate law itself, even though they have not been posited in legal propositions'.[25] Custom and usage were considered as important forms of living law.[26] He investigated the people's consciousness in order to see which norms they

[21] Bortolus of Sassoferato, *In primam digesti veteris partem commentaria* (Turin, Nicholaus Beuilaquam, 1574) f. 19r (ad D.1.3.32, §6–7).

[22] Bartolus of Sassoferato, *Commentaria in Secundam codicis Partem C.8.52* (Lyon, 1555), f. 138. See also G.C.J.J. van den Bergh, *Wet en gewoonte. Historische grondslagen van een dogmatisch geding* (Deventer, Kluwer, 1982), 38–39, 71.

[23] Kadens, 'Custom's Two Bodies', op. cit. 241; E. Kadens, 'The Myth of the Customary Law Merchant' (2012) *Texas Law Review*, 1153–1206; E. Kadens, 'The Medieval Law Merchant: the Tyranny of a Construct (2015) *Journal of Legal Analysis*, 251–289.

[24] C.M. in't Veld, 'Conservatism among merchants? Codification and the Ideas about Customary Mercantile Law in the Netherlands (nineteenth century)' (2020) *Revue Noesis*, 230–239.

[25] E. Ehrlich (transl. W.L. Moll), *Fundamental Principles of the Sociology of Law* (London, Routledge, 2017 [1936]), 418.

[26] B. van Klink, 'Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen', in M. Hertogh (ed.), *Living Law. Reconsidering Eugen Ehrlich* (Oxford, Hart Publishing, 2009), 128.

considered important as 'various classes of norms release overtones of feelings, and we react to the transgression of different norms with different feelings'.[27] These feelings are expressions of what we now are used to call the *opinio necessitatis:* the tacit conviction that something ought (not) to be done.

Returning to Kadens, a custom could remain solely consent-based as long as no disputes arose that required the expression of the custom as a formal rule. A court would convert the tacit custom into a legally-acknowledged rule. This was the process of selection among slightly variant behaviours and the construction or even invention of articulated rules that constituted the distance between the existing anthropological reality of consent and the legal reality of customary law. In the law merchant theory it is believed that this process of selection was preferably conducted from within the mercantile community itself: by laymen in specialised courts. Additionally, merchants would have relied on private institutions (like contract enforcement mechanisms) in order to avoid outside interference.[28] In this way, the mercantile traditions and practices which already endured the test of time were secured for the future.

What Kadens calls the process of selection, construction, and invention, is very similar to what Hart has labelled as 'recognition' some decades before. In *The Concept of Law* (1961) he addressed the problems with certain borderline categories of law, such as international and primitive law. For Hart, the legal system consists of primary rules and secondary rules. He developed this distinction in reaction to command theories of law, especially commenting on the work of John Austin. With regard to customary law, these theories have argued that authoritative custom is ultimately an order of either the sovereign or his subordinate who acted on his behalf.[29] Sometimes this order is tacit, and in these instances a custom becomes a rule after application by a court. Only then it receives the required legal recognition. Hart disagrees with this view and asks: 'Why, if statutes made in certain defined ways are law *before* they are applied by the courts in a particular case, should not customs of certain kinds also be so?'[30] According to Hart, command theories of law fail to grasp the essential element of law, namely that it consists of rules.[31]

As stated, those rules are of two types. The first impose duties on legal subjects: human beings are required to do or to abstain from certain actions, whether they wish or not. Hart sketches the main problems of a primitive society that only lives by these primary rules. Such a regime would be characterised by uncertainty, fixity, and inefficiency.[32] The problem of uncertainty about rules can be resolved by

[27] Ehrlich, *Fundamental Principles,* op. cit., 151.

[28] P.R. Milgrom, D.C. North & B.R. Weingast, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs', (1990) *Economics and Politics*, 1–23; A. Greif, 'History Lessons. The birth of impersonal exchange: the community responsibility system and impartial justice', (2006) *Journal of Economic Perspectives*, 221–236; A. Greif, 'Contract Enforcement and Institutions among the Maghribi Traders: Refuting Edwards and Ogilvie', (2008) *CESifo Working Papers/9610*.

[29] Hart, *The Concept of Law,* op. cit., 45.

[30] Ibid, 46.

[31] Ibid, 78.

[32] Ibid, 93–95.

the introduction of a 'rule of recognition': 'in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity'. The rules of change, empowering certain individuals to introduce new primary rules, can prevent static quality of a regime of primary rules. The third supplement, establishing more efficient dispute resolution, consists of rules of adjudication, entitling individuals to make decisions on questions whether, on a particular occasion, a primary rule has been broken. Hart argues that among those three types of secondary rules, the rule of recognition is the 'ultimate' rule, as it is presupposed by both the rules of change and adjudication. These distinctions make Hart's concept of law very dependent on the quality of the legal system, which is essential in distinguishing moral rules, primitive law, and mere customs, from legal rules.[33] In this regard, Hart formulates two minimum standards for the legal system: the rules of conduct are generally obeyed, and secondary rules are effectively accepted by officials.[34]

Returning to the theory of the law merchant, the literature contains two basic lines of criticism. The first line, most prominently expressed by Kadens, is very much indebted to Hart's arguments for the alleged uncertainty, fixity, and inefficiency of primitive law.[35] It is argued that the instrument of customary law was unsuited to achieve the goal of regulating complex international trade. The second line argues, as for example articulated by Sheilagh Ogilvie, that merchants were not solely reliant on their private-order solutions, but were using public order solutions as well.[36] This line of argumentation stresses the role of public courts at annual fairs and in cities, and was therefore more inclined towards the 'law-side' of custom. For as far as the rule of law is concerned, this reasoning would rather presuppose a bureaucratic than a tradition-oriented model. Internationally operating merchants were part of a larger society—a society witnessing the rise of written court-traditions, and the advancement of procedural regulations and bureaucratic institutions.

In France, to mention the clearest example, customs were homologated by the court, which had a deep impact on the nature of customary law. Article 126 of the Ordinance of Montil-lès-Tours, issued by king Charles VII in 1454, stated that customs, usages, and styles (understood as procedural usages) should be written down in order to improve litigation.[37] The procedure of homologation was refined in 1493, and again in 1497, before

[33] N. MacCormick, *H.L.A. Hart* (Stanford, Stanford University Press, 1981), 20.

[34] Hart, *The Concept of Law,* op. cit., 113.

[35] See especially Kadens, 'The Myth of the Customary Law Merchant', op. cit. and A. Cordes', 'The search for a medieval lex mercatoria', (2003) *Oxford Comparative Law Forum*, 2.

[36] S. Ogilvie, *Institutions and European Trade. Merchant Guilds, 1000–1800* (Cambridge, CUP, 2011); S. Ogilvie & A.W. Carus, 'Institutions and Economic Growth in Historical Perspective', in P. Aghion & S. Durlauf (eds.), *Handbook of Economic Growth* (vol. 2A) (Amsterdam, North Holland, 2014), 403–513.

[37] See on the Ordinance of Montil-lès-Tours and the homologation process: R. Filhol, 'La rédaction des coutumes en France aux XVe et XVIe siècles', in: J. Gilissen (eds.), *La rédaction des coutumes dans le passé et dans le présent*, (Brussels, 1962), 63–85; A. Lebrun, *La coutume. Ses sources – son autorité en droit privé*, (Paris, Librairie générale de droit et de jurisprudence, 1932); M. Grinberg, *Écrire les coutumes. Les droits seigneuriaux en France*, (Paris, Presses Universitaires de France, 2006); H. Klimrath, *Etudes sur les coutumes*, (Paris, Levrault, 1837); M. Seong-Hak Kim, *Custom, Law, and Monarchy, A Legal History of Early Modern France,* (Oxford, Oxford University Press 2021).

the definitive procedure was finally established in 1499. By the middle of the sixteenth century, most French customs had been homologated: the ordinance of Villers-Cotterêts (1539) marks the endpoint of the homologation of styles. For the concept of custom, homologation had far-reaching consequences, as the meaning of the terms *coutume* and *usage* underwent profound changes.[38] Before the homologation, *coutume* and *usage* were both seen as unwritten, although only the first was supposed to be normative and had authority almost equal to enacted law. After homologation, *coutume* was considered as a written custom, whereas *usage* was a binding unwritten custom. Custom had developed into a form of written law that derived its authority not only from the consent of the people, but from the king as well. Custom was no longer the product of the grassroots community only: it was selected and approved by higher authorities.

This second line of reasoning against the law merchant theory seems to have important implications for the theory and history of the rule of law. Theoretically, it joins Møller and Skaaning empiricist criticism on Tamanaha's continuum of concepts of the rule of law. From a democratic point of view homologation was a loss since influence on legislation shifted from the community to the monarch while from a legal legality perspective it was a win since the homologated rules were more clear and public. It seems that it is possible to meet the consent-criterium before meeting (all) requirements of legal legality. Historically, this reasoning urges us to seriously consider an early existence of some bureaucratic idea of the rule of law. However, before we reach this conclusion it is necessary to assess the early modern institutions and prevailing conceptions of customary law in further detail. Such assessment should concentrate on the process of recognition as the pivot point between the two sides of custom and the two models of the rule of law. Recognition is essential in differentiating between the types and levels of normativity in the different manifestations of custom. Recognition is equally fundamental for distinguishing the bureaucratic and tradition-oriented models of the rule of law. In the latter model, recognition takes place on a grassroots level among members of a certain community, whereas in the first model recognition is performed by impersonal institutions.

3 Historical Sources: Customs at the Bench of Aldermen

In the seventeenth and early eighteenth century, Amsterdam was an important centre of commerce. The roots of its legal infrastructure related to commercial dispute resolution can be traced much further back into history. In 1413, the town magistrate ruled that not only conflicts between inhabitants, but between foreigners, as well should be brought before the bench of aldermen (the main court in Amsterdam).[39] It

[38] J. Moreau-David, 'La coutume et l'usage en France de la redaction officielle des coutumes au code civil: les avatars de la norme coutumière', (1997) *Revue d'histoire des facultés de droit et de la science juridique*, 125–157; V. Simon, 'L'inscription des usages commerciaux dans l'ordonnancement juridique moderne' (2016) *Revue historique de droit français et étranger*, 275–298; Grinberg, *Écrire les coutumes,* op. cit. 67–72; C.M. in 't Veld, 'The Conservation in Lyon and the long tradition of coutume and usage', (2019) *Studia Iuridica*, 405–419.

[39] J.C. Breen, *Rechtsbronnen der stad Amsterdam* ('s-Gravenhage, Martinus Nijhoff, 1902), 10.

took until 1517 before a written procedure was first introduced.[40] Early on, there was no clear separation of administrative and judicial powers: the aldermen were both judges and administrators at the same time. They originally had the right to issue ordinances and thus to regulate all facets of urban life.[41] As the city council took over several of these tasks, the aldermen concentrated more on their judicial activities. Together with the bailiff and four burgomasters, the nine aldermen formed the city's magistrate.

During the economic boom that took off after the fall of Antwerp in 1585, the organisation of the civil jurisdiction became increasingly complicated. The annually elected aldermen could barely cope with the workload. That is why parts of their jurisdiction were delegated to commissioners, later organised in subaltern benches.[42] In 1594 a system was created that divided the cases of the bench of aldermen over several cause lists.[43] This is an indicator for standardised court organisation. Other procedural regulations point in the same direction: they were building forth on the elaborate romano-canonical procedures, except for some local peculiarities.[44] Summoning, for example, was done without prior permission of either the masters of the requests (as in the Brussels Council of Brabant) or a command of the judges (as in the High Court of Holland). Instead, the summoning was normally performed through court bailiffs, who derived their authority directly from the burgomasters by whom they were appointed.[45] This explains why the plaintiff could summon without intervention of the aldermen. These peculiarities demonstrate that, although having a common historical origin of procedures, styles could vary from city to city. This is one of the major reasons why merchants preferred to use legal representatives in court.[46]

The ordinance of 1517 allowed parties the representation by a proctor or lawyer.[47] This changed in 1644, as legal representation became required for litigation at most cause lists.[48] During the sixteenth century, no explicit difference was made between proctors and lawyers. Ordinances mostly referred to the legal representatives with terms like *voorspraeken* or *taalluyden*. Those terms were synonyms and applied to

[40] H. Noordkerk, *Handvesten ofte privilegien ende octroyen, mitsgaders willekeuren, ordonnantien en handelingen der stad Amstelredam* (vol. II) (Amsterdam, Van Waesberge & Schouten, 1748), 581.

[41] J.P. Monté Verloren and J.E. Spruit, *Hoofdlijnen uit de ontwikkeling der rechterlijke organisatie in de Noordelijke Nederlanden tot de Bataafse omwenteling,* (Deventer, Kluwer, 1982), 167.

[42] J. Wagenaar, *Amsterdam in zyne opkomst, aanwas, geschiedenissen, voorregten, koophandel (…) en regeeringe* (vol. III) (Amsterdam, Yntema & Tieboel, 1767), 366–471.

[43] Noordkerk, *Handvesten* (vol. II), op. cit., 584.

[44] For a more detailed investigation, see C.M. in 't Veld, *Custom and Commerce in the Courts. A Comparison of Mercantile Customs, Jurisdictions, and Institutions in Amsterdam and Lyon,* (dissertation VUB, 2022), 67–86.

[45] Noordkerk, *Handvesten* (vol. II), op. cit., 632; G. Rooseboom, *Recueil van verschyde Keuren en Costumen mitsgaders Maniere van Procederen binnen de Stadt Amsterdam,* (Amsterdam, Amsterdam, Jan Hendricks, 1656), 68.

[46] N. Duijsentdaelders, *Notae op de ordonnantie ende maniere van procederen voor den Geregte der Stadt Amsterdam* (Amsterdam, Isaac de la Tombe, 1659), 37.

[47] Noordkerk, *Handvesten* (vol. II), op. cit., 582.

[48] Ibid, 587. See also art. III.5 of the Procedural Ordinance of 1656.

proctors and lawyers the like. In the seventeenth century, the city counted twelve proctors—who were held in high esteem and were responsible for the procedural side of the case (including the pleadings in court).[49] Halfway through the eighteenth century, the city administration sought to reduce the number of proctors because of the many complaints about their misbehaviour.[50] The proctors were believed to be one of the major causes of procedural delay and display a lack of commitment to truth and justice.[51] These developments show that the rise of a legal tradition accelerated parallel to the economic boom between 1590 and 1650. Complaints on the performances of the bench of aldermen are of much later date, especially the later eighteenth century.[52] In contrast to what one would expect on the basis of the *lex mercatoria* theory, there are no indications that merchants were hostile towards the introduction of elaborate procedures (which were neither the product of the mercantile community nor of any specific mercantile tradition). Procedures were generally applied and were impersonal in nature.

The rise of the legal tradition did not lead to extensive homologation efforts within the city. In 1570, the duke of Alva requested a written compilation of customs. In the chaos of the Dutch Revolt, this request was answered by the burgomasters and the city council with a hastily composed collection of only eighteen customary rules, which were sent to the High Court of Holland.[53] Thereafter, several collections of customs and bylaws were published, but these collections (although widely used) were never officially approved. As a result, several loose and changing collections with more or less authority circulated within the city.[54] On closer inspection, the use of various collections of local regulations and customs fits perfectly with the application of mercantile law in handbooks and opinions of jurists active in the field of commercial law. Lichentauer has emphasized the existence of a coherent legal system, encompassing all facets of mercantile law and created by 'pragmatics' (thus distinct from the learned doctrine taught at universities).[55]

Lichtenauer's argument can be illustrated by published work of lawyers, like Jeronimo Barels' two-volume *Advyzen over den koophandel en zeevaert* (1780). This work mainly consists of various documents, like consultations and turben, from the legacy of his grandfather, the eminent notary, proctor and lawyer Abraham van

[49] Duijsentdaelders, *Notae,* 37.

[50] In't Veld, *Custom and Commerce in the Courts,* op. cit., 77.

[51] M. Lindemann, *The Merchants Republics Amsterdam, Antwerp and Hamburg, 1648–1790,* (Cambridge, CUP, 2017), 46.

[52] E.g. the first Dutch legal journal: *De rechtsgeleerde in spectatoriale vertogen* (Amsterdam, Houttuyn, 1967), particularly the issues of 1767 (p. 49) and 1771 (40–41). See G.C.J.J. van den Bergh and C.J.H. Jansen, 'De regtsgeleerde in spectatoriale vertogen: het eerste Nederlandse juridische tijdschrift', (1987) *Nederlands Juristenblad*, 1181–1185.

[53] Noordkerk, *Handvesten* (II), op. cit., 445.

[54] E.g. Rooseboom, *Recueil van verschyde keuren;* Anonymous, *Handvesten ofte privilegien, handelingen, costumen, ende willekeuren der stadt Aemstelredam …* (Amsterdam, Wachter, 1639); H. van Borculo, *Handvesten ofte privilegie van Amstelredam* (Amsterdam, 1597).

[55] W.F. Lichtenauer, *Geschiedenis der Nederlandsche rechtswetenschap – geschiedenis van de wetenschap van het handelsrecht in Nederland tot 1809* (Amsterdam, Noord-Hollandsche Uitgeversmaatschappij, 1956), 56.

den Ende (1646–1723). In these sources, custom is often mentioned as an authoritative source that is applied in conjunction with a great variety of other legal sources. To the modern reader, familiar with precisely demarcated codifications, it is striking that rules are often applied outside their strict legal scope. Regulations of one city were apparently relevant in other cities as well. The French *Ordonnance sur le commerce* (1673) and *Ordonnance de la marine* (1681) were held in high esteem by lawyers in Amsterdam, despite the fact that the Dutch Republic was at war with France for a large part of the late seventeenth and early eighteenth centuries. These legal sources are viewed as elaborations of general normative principles and therefore strategically used to argue for a specific interpretation of those principles.[56] Regulations were seen as emanations of, for example, the principle of reasonableness and fairness. Those principles were fundamental in the early modern system of mercantile law. Authors in favour of the law merchant theory have therefore correctly claimed that merchants preferred dispute resolution on the basis of equity, but they overlooked that merchants used lawyers to flesh this out by means of legal sources. This means that in publications on mercantile law, custom generally appears as a legal source embedded in a well-developed system of mercantile law based on general principles.

On the 10th of December 1706, Van den Ende provides an opinion on the question whether the shipmaster Jan de Bruyn could claim the stranded goods of his wrecked ship, the *Juffrouw Maria,* when he—after his vessel was salvaged by others—did only care about his shipping tools, and the stranded merchandise had been collected by others.[57] (Between the lines, one can taste the disapproval of the shipmaster's lack of care.) The stranded goods were handed over to their owners who paid the salvage fees. Van den Ende advices that the shipmaster could not claim the stranded goods, because of the placard of Philips II (issued in 1563) and Roman laws according to which the carrier that fails to adequately deliver some merchandise should as well deliver the remaining merchandise to the owners (since there is no excuse of *cas fortuit* because of the lack of good faith (with reference to the Rota of Genoa)). Van den Ende takes the effort to rebut some counterarguments. In this regard he provides a detailed analysis of art. 16 and 37 of the Sealaws of Wisby, and art. 40 of the Ordonnance of Charles V on maritime issues (which are quoted as counterarguments). Firstly, he rejects the validity of those articles on the basis of the priority rule *lex posterior derogat legi anteriori* (with reference to Grotius' *Inleidinge tot de Hollandsche rechtsgeleerdheid*). A second argument is based on a close reading of the respective articles and argues for their inapplicability because it was not the shipmaster himself who ordered the salvage of the ship, but this order was given by others. Van den Ende connects the strict reading of the articles to the interpretation provided by some 'experienced practitioners' who are considered as voices of 'practice and rationality', and to the *Ordonnance de la marine* of Louis XIV. At

[56] See on this so-called *Prinzipienansatz* D. De ruysscher & C.M. in 't Veld, 'Der dogmatische Handelsbrauch in den Niederlanden und Belgien (19.-21. Jahrhundert)', (2018) *Zeitschrift für Neuere Rechtsgeschichte*, 180–183.

[57] J.M. Barels, *Advyzen over den koophandel en zeevaert mitsgaders verscheidene turben, memorien, resolutien, missiven, enz. enz. daer toe behorende* (vol. I) (Amsterdam, Gartman, 1780), 179–194.

the end of his opinion, he stresses the importance of fairness, reasonableness, and mercantile interests, leaving the reader the impression that his advice was ultimately based on these principles rather than the wide range of cited sources.

While assessing this example one could clearly see some problems with the formal legality of the law, especially in the application of foreign legislation. The call on 'experienced practitioners' can probably be best explained from the tradition-oriented model of the rule of law. However, it is also possible to distinguish several bureaucratic elements in the case and to argue that the example still meets the standards of a legal system. In the first place, one should note that the text concerns a lawyers' opinion (unclear if addressed to a plaintiff (planning to) litigate or the judges themselves). In both cases Van den Ende developed his sophisticated reasonings since he was convinced that the aldermen were sensitive to such arguments. In other words, it is an example of what Hart called the insider perspective on the validity of legal rules: one naturally accepts 'the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid'.[58] As an insider, Van den Ende assumed the recognition of the cited rules. Moreover, it is possible to identify some specific rules of recognition applied in the advice, particularly the priority rule that later rules should prevail over older ones. Such rules allow to provide an order of subordination of sources. In this order, customary law is positioned on a relatively low level. In another opinion, Van den Ende admits that cumulation of sources is especially important with regards to custom or the *style mercantile*. He verifies a custom with reference to mercantile case law (*'in foro mercatorio'*) for epistemological reasons, and refers to a placard of Philips II for reasons of authority.[59] (Note that he did not believe court confirmation alone transformed a custom into a legal rule!).

One could, however, develop a counterargument based on the fact that the use of sources is structured around deeply-rooted convictions of equity. This counterargument can be stressed with examples from the pleadings of the proctors. Those pleadings are still available in the Municipal Archive of Amsterdam.[60] An analysis of these pleadings for the years 1700 to 1730 shows that these pleadings were used to clarify the facts of the case, to provide a testimonial on the character of the litigant, and/or to present a proposal for a solution.[61] Just like lawyers do today, proctors tried to frame the facts in favour of their clients. However, in between the 'objective facts' and those presented 'subjective facts' was a layer of personal perceptions, deeply rooted beliefs, and moral convictions. On the one hand, the adversary is accused of not having complied with those standards, while on the other hand the proctor argued that his own client has done much more than he was strictly obliged to. Sometimes the former was portrayed as dishonest, as someone who slandered, served himself with devious and insulting language, or cheated by faking evidence. The latter, on the other hand, was honest, kind, truthful, reliable, patient, and willing

[58] Hart, *The Concept of Law,* op. cit., 99–100.

[59] Barels, *Advyzen* (vol. I), op. cit. 135–136.

[60] Amsterdam Municipal Archives, 5061 (archief schout en schepenen), inventory 1585–1732 (registers van dingtalen).

[61] See for a detailed analysis In 't Veld, *Custom and Commerce in the Courts,* op. cit. 89–100, 182–185.

even to excessive fairness. Not surprisingly, good and bad faith were important factors, as they were considered expressions of the litigants character: someone who wasted his time in 'brothels and bars' would have a hard time proving that he had acted in good faith.[62]

These recurring moral connotations of the facts have led Simona Cerutti in a paper on the city of Turin to the allegation that customary law was primarily a matter of (morally loaded) factual conduct.[63] I would rather argue for the opposite: the strong link to shared expectations and virtues indicates that customary law was closely connected to general principles of equity that functioned in the context of a legal system. Given the legal context in which they are expressed, references to legal principles by lawyers and to moral convictions by proctors are resonating with Ronald Dworkin's critique on Hart's positivism. Dworkin argues that lawyers, when reasoning about legal rights and obligations 'make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards'.[64] He defines a principle as a standard that is to be observed because it is considered as a requirement of justice or fairness or some other dimension of morality.[65] Those principles differ from rules in the sense that they do not operate in an all-or-nothing fashion, but rather have a dimension of weight or importance as they point towards the general direction of a solution of a hard case.[66] It is argued that this Dworkinian critique is only a form of internal criticism: he sticks to the idea of law as a coherent system that largely functions within the sphere of bureaucratic institutions.[67] In other words, Dworkin still adheres to the bureaucratic model of the rule of law. It also explains why the use of open-ended norms in modern legal systems

[62] AMA 5061, 1621 (1724, Schaep vs Kuijnder), f. 96r. For the mercantile court in Paris a similar conclusion is reached by A.D. Kessler, *A Revolution in Commerce. The Parisian Merchant Court and the Rise of a Commercial Society in Eighteenth-century France,* (New Haven, Yale University Press, 2007).

[63] S. Cerutti, 'Faits et « faits judiciaires» Le Consulat de commerce de Turin au xviii siècle', (1999) *Enquête*, 145–174.

[64] R. Dworkin, *Taking Rights Seriously,* (London, Bloomsbury, 2018 [1977]), 38. See on the Hart-Dworkin debate in the Netherlands: R.W. Brouwer, 'Rechtsbeginselen en rechtspositivisme', (1991) *Ars Aequi*, 757–772; A. Soeteman, 'Hercules aan het werk. Over de rol van rechtsbeginselen in het recht', (1991) *Ars Aequi*, 744–756; A. Soeteman, 'Rechtsbeginselen en rechtspositivisme?!', (2009) *Rechtsfilosofie & Rechtstheorie*, 5–10. The *Ars Aequi* issue of 1991 dedicated to legal principles also contained a contribution on the usefulness of Dworkin's distinction for the study of (classical) Roman Law: L. Winkel, 'De rol van algemene rechtsbeginselen in het Romeinse recht', (1991) *Ars Aequi*, 785–794. He argues that what Dworkin called 'principles' were abundantly present in classical Roman Law, but that in a legal-historical analysis the idea of a principle should be connected to a theory of legal sources (which was lacking in Roman Law). The increasing attention for legal principles was therefore one of the products of the legal humanism (sixteenth century) and the historical school (nineteenth century). It was especially Rudolf Stammler who emphasized in his *Die Lehre von dem richtigen Rechte* (1902) the role of '*die Idee des richtigen Rechtes* ' as a principle for the interpretation of positive law. Paul Scholten, for example, was heavily influenced by the work of Stammler. It would be very interesting topic for further research to compare the approaches of legal principles in the Roman Law tradition to the early modern *Prinzipienansatz* in commercial law.

[65] Dworkin, *Taking Rights Seriously,* op. cit., 39.

[66] Ibid, 40–45.

[67] W. van der Burg, 'Two Models of Law and Morality', (1999) *Associations*, 69.

does not run contrary to the formal legality of the rule of law.[68] The same goes for the early modern situation: it seems that 'Dworkinian' principles were dictating the direction of argumentation and the use of legal sources among early modern lawyers and proctors.

4 The Weigh House: The Rule of Recognition at Work?

Amsterdam witnessed a rise of a legal tradition including court officials following elaborate procedures and applying a patchwork of legal rules based on broad legal principles. The pleadings of the proctors contain yet another aspect that stresses the presence of a bureaucracy supporting the rule of law. Custom is not only related to moral convictions, but also to the decisions of officials in the city's institutions as well.[69] This is particularly apparent from references to branch related customs, like customs on tares, discounts, and standardised quality levels of merchandise. It often happened that such customs were approved in semi-public, yet authoritative institutions, like the weigh house. In this section I focus on the authority and practice of the weigh house while arguing that custom was closely connected to both bureaucracy and the consent of the people.

In Amsterdam it was obliged for all merchandise heavier than 50 pounds to be first delivered in the weigh house of the city in order to be properly weighed.[70] This obligation makes sense given the role of the weigh house in taxation. The weighing of goods enabled the determination of the imposts to be paid (on the basis of published tariff lists). In the city's accounts, the tenant of the weigh house had to publish the farmed tax revenues. The other purpose of the weigh house was to prevent from cheating in trades. Therefore the weigh house was viewed as main symbol of the economic success of the city.[71] The first weigh institution was probably established by count Albrecht van Beijeren in 1389, in order to levy taxes on Baltic trades.[72] In 1561, the weigh house got a new building at Dam Square. During the seventeenth century, when volumes of bulk trades continued to grow, two other buildings were equipped with weighing facilities: the *Sint Anthoniswaag* in 1617 and the *Regulierswaag* in 1668.

The weigh house was leased from the city governance and had its own personnel. In 1524 the burgomasters appointed four weighers in the Weighing House. They had to swear an oath in front of the burgomasters. Halfway the seventeenth century this number of weighers has been grown to ten. A century later there were eleven. Apart

[68] Tamanaha, *On the Rule of Law,* op. cit., 98.

[69] In't Veld, *Commerce and Customs in the Courts,* op. cit., 93–100. See e.g. AMA 5061, 1621 (1724, Louwen vs Lulofs; Grieland vs Louwen), f. 19sq on the delivery of 5.000 pound whalebones. In this case Jurrian Uijtermarks, staff member of the weigh house, had checked the quantity of the bones.

[70] Noordkerk, *Handvesten* (vol. I), op. cit., 214. See, more extensively on the weigh house also C.M. in 't Veld, 'Fraude en rechtstoepassing binnen de muren van de Amsterdamse waag (17e en begin 18e eeuw)', forthcoming.

[71] A.F. Simonsz, *Historie van de Waag te Amsterdam* (Amsterdam, Hendrik Gartman, 1808), iii.

[72] Ibid., 2.

from these weighers, there were two bookkeepers in the weigh house at Dam square and one extra in each of the other weigh houses of the city. They were supported by a clerk and a deputy-bookkeeper. Moreover, there were people who carried the merchandise to the weigh house and others who lifted the goods onto the scales.

The weighing process itself was strictly regulated. Part of the rules can be found in the founding ordinance of the weigh carriers guild of 1616.[73] According to this ordinance, the weigh house personnel was not allowed to weigh its own goods first (art. 5). They should prevent damage and inconvenience among merchants as much as possible (art. 4). It was forbidden to place goods in the proximity of the scales in order to not hinder the weighing process (art. 7). Instead it seemed to have been customary to temporarily store goods near the windlass in front of the nearby horse stable.[74] In later ordinances it was added that the use of scales and other instruments outside the weigh house should be administered properly.[75] No close family ties were allowed between the overseers of the weigh carriers guild.[76] Between the lines of the guild regulations one can read that they were expected to serve and support mercantile activity as much as possible (as such was believed to be very profitable to the general welfare of the city). More regulations can be found in the ordinances on taxation and in contemporary historiography. The personnel of the weighing house was obliged to keep the scales clean and to calibrate them every morning (and in circumstance of bad weather even more frequent).[77] One time a year the weights used were calibrated with the help of the originals kept at the town hall.[78] During the weighing process it was forbidden for the weighers to touch the scales.[79] The weighers read the weighing results and wrote it down on a blackboard after which it was officially administered by the bookkeepers.[80]

Despite all regulations, there remained conflicts between merchants on the quantity or quality of the goods delivered. If the buyer believed he had been shortchanged, he had to immediately object to the delivery of the goods. The bookkeepers of the weigh house, according to a mid-seventeenth century chronicler, were the first to try to settle such disputes.[81] A century later, another writer observed that available brokers could also act as mediators. In case they were unable to find a solution, two arbitrators (*goede mannen*) were appointed for dispute resolution. Mostly, parties negotiated a discount rate (in fact the application of the Roman *actio quanti minoris*), but the buyer also had the right to restitute the merchandise

[73] Anonymous, *Ordinantien en willekeuren voor het waagdragersgilde,* (Amsterdam, Pieter Mortier, 1780), 2.

[74] AMA 366 (guild archives), 1617, f. 2–3.

[75] Anonymous, *Ordinantien en willekeuren,* op. cit. 57.

[76] Ibid., 8.

[77] Noordkerk, *Handvesten*, (vol. II), op. cit. 214.

[78] Le Moine de l'Espine, *De koophandel van Amsterdam,* op. cit., 136.

[79] Van Donselaer, *Beschryvinge van Amsterdam,* op. cit. 181. Evert de Marre, *Bericht van maaten en gewichten te Amsterdam in gebruik,* (Haarlem, Walre, 1781), 9.

[80] Van Donselaer, *Beschryvinge van Amsterdam,* op. cit., 181.

[81] Ibidem. His statement is later copied by C. Commelin, *Beschryvinge van Amsterdam,* (Amsterdam, Wolfgang et al., 1693), 632.

(*actio redhibitoria*).[82] Some of the conflicts nevertheless reached the bench of aldermen. In the analysed cases, however, parties did not cast doubts on the official weighing results but rather debated general and frequently occurring matters of non-conformity.

Non-conformity in trade was a constant point of concern for the Amsterdam city administration and they battled it by the creation of a bureaucratic system of specialized officials. In the mid-eighteenth century, the burgomasters were in charge of some 3.200 positions within the city.[83] Apart from the almost 300 weigh carriers, approximately 107 of these positions have to do with monitoring quantity or quality of merchandise. Twenty of them were busy assaying and marking barrels. Even more were concerned with the weighing process itself: except from the eleven weighers at the weigh house there were eight bread weighers, a weigher of bones, coal, and linen and woollen yarn. They got administrative support from bookkeepers and clerks. The remainder consisted of inspectors (*keurmeesters*), (wine) gaugers (*(wijn)roeiers*), and measurers (*meters*). Some of them were provided with far reaching powers. The sworn city assayer, for example, was even legally entitled to enter people's houses in order to inspect alle weighing and measuring instruments present.[84] The weights and instruments used by hawkers, shopkeepers, grocers and pharmacists were checked by the guild of hawkers (*kramersgilde*) (and not by the sworn assayer). They were, however, not entitled to rule in disputes, but had to bring observed abuses before the court instead.[85]

The practices at the weigh house underline exactly the point of this paper. There was a transition from the tradition-oriented approach towards the bureaucratic model of the rule of law. The informal dispute resolution by weighers, brokers, or arbitrators can be interpreted as a remnant from the past with its community-based solutions. However, in the seventeenth century, the weighers were city officials. Brokers were members of the brokerage guild and official lists of arbitrators were circulating in the city.[86] The fact that negotiations were structured by Roman Law also points in favour of a bureaucracy-driven rule of law. The other important point concerning the rule of law is the role of the guilds. Many among the personnel of the weighing house were connected to one of the guilds, like the weigh carriers guild or the coopers guild. In popular culture, guilds are regarded as medieval relics, although it were mainly merchant guilds that witnessed their heydays in the middle ages. Craft guilds are of much later date, especially in Amsterdam, where many were only established in the sixteenth and seventeenth centuries.[87] In literature it is argued that these craft

[82] R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, Clarendon Press, 1996), 318. An example of such negotiations can be found in AMA 5061, 1621 (1724, Velthuijs vs Ockers), f. 113–114. See also In't Veld, *Custom and Commerce in the Courts,* op. cit., 82.

[83] The following is based on an analysis of Th. Bussemaker, 'Lijst van ambten en officiën ter begeving staande van burgemeesteren van Amsterdam in 1749', (1907) *Bijdragen en mededeelingen van het historisch genootschap*, 474–518.

[84] Noordkerk, *Handvesten* (vol. I), op. cit., 364, 449.

[85] Ibid, 493.

[86] Lists of arbitrators are still available in the archives: AMA 5061, 1813–1820.

[87] P. Lourens and J. Lucassen, 'Ambachtsgilden binnen een handelskapitalistische stad: aanzetten voor een analyse van Amsterdam rond 1700', (1998) *NEHA-Jaarboek*.

guilds have really shaped the identity of Amsterdam's institutions during the 'golden age'.[88]

In the introduction of this contribution, it was mentioned that Tamanaha argued that formal legality conceptually preceded the element of democracy. Historically, while mainly focussing on France, he sees bureaucratic development as the main driver of rule of law improvement.[89] In France, the growing royal bureaucracy could easily end up with a loss of 'democracy' (interpreted, like Møller and Skaaning did, only as people's consent) as, for example, artisans were side-lined in municipal 'elections'.[90] For the Dutch Republic and Amsterdam, these developments were not necessarily the same, as especially craft guilds seemed to have gained influence on the city's policies and regulations during early modern period. In history democratic developments do not always chronologically follow bureaucratic developments. Moreover and contrary to what 'Tamanaha's scale' suggests, the historical situation shows that is possible to conceive a rule of law variant in which some form of consent is included that is thinner than the formal legality variant.

Amsterdam's guilds had tremendous influence on the city's policy and regulation. Generally, guilds received privileges from some higher authority and were also supervised by that authority, but as Maarten Prak has stressed, in many respects they regulated themselves: they had their own sources of income, regular plenary meetings allowed ordinary members a say in the administration of their guild, and they could have jurisdiction in trade conflicts.[91] Moreover, in Amsterdam, citizens had the right to submit petitions to the city administration and other governmental bodies in order to propose a certain policy or regulation. Analysis of these petitions by Prak and Van Nierop has shown that 53% of the petitions were submitted by guild officials or individual guild members.[92] Although these demands were never fully satisfied, the Amsterdam government seemed to have looked favourably upon the petitions. In first instance 50% of the petitions was accepted. In a later stadium, the government agreed with another 25%. Even more surprising is that 42% of

[88] C.M. in't Veld and M. den Hollander, 'Citizenship in Early Modern Amsterdam: An Artisanal Identity?', in D. De ruysscher et al., *Commerce, Citizenship, and Identity in Legal History* (Leiden, Brill, 2022), 73–95. A similar point is made by E. Kuijpers and M. Prak, 'Burger, Ingezetene, Vreemdeling: Burgerschap in Amsterdam in de 17e en 18e eeuw', in J. Kloek & K. Tilmans (eds.), *Burger,* (Amsterdam, 2002), 115–132.

[89] See footnote 10.

[90] This happened for example in Lyon where the city council was reduced from twelve councilors to four aldermen and a *prévôt des marchands* by the Edict of Chauny (1595). The *prévôt* was chosen by the king from a nomination of three (made by the assembly of guild masters). However, it often occurred (e.g. in 1605, 1607, and 1609) that the crown imposed its own choice on the city regardless of the preselection. For this reason Maurice Garden, *Lyon et les Lyonnais au XVIIIe siècle* (Paris, Les-Belles-Lettres, 1970), 488 has stated that Lyon's administrative freedom was only theoretical ever since.

[91] M. Prak, *Citizens without Nations. Urban citizenship in Europe and the World c. 1000–1789,* (Cambridge, CUP, 2018), 105.

[92] H. van Nierop, 'Popular Participation in Politics in the Dutch Republic', in P. Bickle (ed.), *Resistance, Representation, and Community* (Oxford, OUP, 1997), 284–287; M. Prak, 'Individual, Corporation and Society. The Rhetoric of Dutch Guilds (18th c.)', in M. Boone & M. Prak (eds.), *Individuals, Corporate and Judicial Status in European Cities (Late Middle Ages and Early Modern Period),* (Leuven, 1996), 255–279.

the petitions led to the introduction of a bylaw which were more or less copies of the once submitted petitions. Prak and Van Nierop have therefore concluded that petitioning was a quite powerful instrument of popular politics. In their footsteps, authors have characterised the identity of Amsterdam's institutions as 'artisanal'.[93]

These popular politics, however, were by no means meeting the modern standards of democracy. They did not work in favour of all inhabitants of Amsterdam equally. The arguments of the applicants often resonated with the values of urban republicanism.[94] This term was coined by Heinz Schilling, and is used to describe the urban grassroots ideology in which a harmonious bond is created between the individual and the local society whereas a counterpoint is found in the outside world of non-citizens. Guild-members portrayed themselves as law-abiding citizens concerned with the well-being of the Amsterdam community. At the same time they portray foreigners as cheating, selfish, and morally abject people endangering the city's welfare. So, with regards to the rule of law the guilds provide some mechanics that would have improved people's consent with the regulations. On the other hand guilds probably worked against the implementation of equality in the city.

5 Conclusion: Was There a Bureaucratic Rule of Law in Early Modern Amsterdam

This paper started with Tamanaha's continuum of thinner an thicker versions of the rule of law. It argued that formal legality, as a thin definition, presupposed bureaucratic backing. However, it is also possible to think of a rule of law without seeking the idea of fairness in a bureaucratic system. A historical example of this would have been the law merchant in which merchants would have reached fair solutions by community-based customary rules only. The presuppositions of this idea, however, are already criticized by Hart, who argues that advanced societies require a legal system consisting of both primary and secondary rules. Historians such as Emily Kadens and Sheilagh Ogilvie have followed Hart in this criticism, while simultaneously pointing at the importance of public institutions in resolving market failures. Our assessment of both the bench of aldermen and the weigh house made clear that economic growth and legal advancements were parallel developments. Examples of sophisticated legal reasonings can be found in the opinions of lawyers practicing commercial law. They clearly used the essential features of the legal system (the existence of both primary and secondary rules) to their advantage. At the same time, however, their reasonings were also based on certain widely accepted general principles. This is even more prominent from the pleadings of the proctors. This should not be very surprising to the modern reader familiar with Dworkin's critique on Hart's concept of law. I have adopted the view that Dworkin's critique should be understood as an internal critique on Hart and perfectly

[93] In 't Veld and Den Hollander, op. cit., 71–95.

[94] H. Schilling, 'Gab es im späten Mittelalter und zu Beginn der Neuzeit in Deutschland einen städtischen „Republikanismus "? Zur politische Kultur des alteuropäischen Stadtbürgertums', in H. Koningsberger (ed.), *Republiken und Republikanismus im Europa der Frühen Neuzeit,* (Berlin, 2009), 101–143; Prak, *Citizens without Nations,* op. cit., 49.

compatible with Raz' bureaucratic approach of the rule of law. According to Dworkin, a legal system consists, apart from rules, also of principles. The lawyer's resort to the general principles can therefore not be interpreted as a break with the legal system of which he was an integral part.

The last part of the paper concentrated on the institutional side of the legal system. A study of the functioning of the weigh house revealed the high-degree of legislation that structured the daily routines of city officials. Many branch related customary norms were applied (and thus recognized in Hartian sense) in this institution on a daily basis. This institutionalisation was not necessarily at odds with continuation or even development of democratic elements. Instead, it is argued that it is hard to maintain 'Tamanaha's scale' (in which legal formality is followed by the democratic element) in the light of the historical facts. Study of the weigh house made clear that many of their staff belonged to guilds, which were influential in Amsterdam politics. Thus applying the recognition process of custom as a test for the prevailing kind of model of the rule of law, one can conclude that it should be seriously considered that Amsterdam already had a relatively advanced legal system that was dependent on bureaucratic institutions in the seventeenth century. Such system should be regarded as an important step towards the presence of the rule of law.