The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany

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At first sight, the vastly different litigation frequencies in West Germany and The Netherlands present a riddle, as both countries have a legal system tradition in common and their baseline of potentially litigious conflicts is very much alike. This study tries to find an explanation by disaggregating various kinds of civil procedures. The distinguishing variables are found in the presence or absence of institutions filtering disputes at the pretrial stage. While in The Netherlands plaintiffs are offered a bigger set of alternatives for dispute resolution, the German court system, being very cost efficient, attracts masses of petty claims. Thus, it is unnecessary to look for attitudinal differences or even different "litigation mentalities" in the neighboring cultures. The institutional infrastructure is sufficient to explain why it is rational for Germans to use the courts and for the Dutch to avoid them.

In the American debate about litigation rates, litigiousness is seen as the result of rights consciousness and attitudes toward claiming. Thus, Americans view their own legal culture as adversarial, leading to high litigation rates, while viewing that of others as more relationship-oriented and thus less litigious. I present here the results of a study that challenges the premise that differences in litigation rates result from differences in attitudinal cultures. The research examines the litigation rates in The Netherlands and Germany. These two countries are much alike in social and economic terms; nor is there any reason to assume major differences in attitudinal cultures. Among civil law countries, their legal traditions are considered closely akin. When actual litigation behaviors are compared, however, there is a clear difference between the two, West Germany ranking very high in terms of frequency of litigation, The Netherlands ranking at the other end with the lowest litigation frequencies on the European continent. The puzzle is increased by the fact that The Netherlands developed the most elaborate legal aid system on the European continent. Contrary to plausible allegations that this would open

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Law & Society Review, Volume 28, Number 4 (1994)

the gates to more actions in court, legal aid has eased access to law by facilitating the handling of complaints in pre-court institutions. The research described here explores the reasons for the extreme differences in litigation rates notwithstanding the similarities between the two countries.

The social similarities together with the commonalities of the Dutch and German legal systems provide an ideal setup for a sociolegal comparison. The comparison undertaken here and described below shows that the differences found in the litigation rates cannot be explained in terms of the codified law or purely in terms of the mentality of legal actors. Instead, to explain the differences, it is necessary to look at the totality of the interrelationships among institutional factors which I call "legal culture." Many unique institutional developments have created an infrastructure for avoiding litigation in The Netherlands. In particular, potential repeat players use alternative ways of pursuing their rights rather than resorting to courts. The German tradition, on the other hand, tends to draw conflicts into the courts by discouraging alternative legal services and optimizing the efficiency of their courts.

Defining Cultures of Legal Behavior Comparatively

If we were to compare legal systems by looking at their formal characteristics alone, as is the practice of the long research tradition in comparative law, we might conclude that the "legal cultures" of The Netherlands and the Federal Republic of Germany are nearly identical.

The legal histories of The Netherlands and of West Germany have much in common. In the 19th century, the codifications of German and Roman Dutch laws were inspired by the French Code Civile after having undergone judicial and administrative reforms during and immediately following the Napoleonic occupation. The French influence in both cultures superseded a practice of rather decentralized local legal cultures. These changes established many commonalities among the northern German states and the Low Countries that Dutch legal scholars viewed as being "traditional law," not a response to French codifications. Transfers continued throughout the period of national codifications that came to The Netherlands somewhat earlier than to the German Reich. But cultural and legal commonalities were strong enough for Dutch legal scholars to continue orienting themselves to German scholarship as far as dogmatic refinements are concerned. Many Dutch judicial institutions are a composite of the French and the German traditions: all have a two-tier jurisdiction of civil courts of first instance. They provide the civil litigant with two courts of first instance, the local courts handling small claims up to a set amount in controversy as well as all matters of

landlord and tenant law and, in Germany, of family matters; district courts handle matters with higher value at stake and, in The Netherlands, all family matters. Appeals from each of the two first instance courts decide cases de novo, and the uniformity of decisions on legal issues is guarded by a high court of appeals treating cases exclusively on their legal merits (Hoge Raad in The Netherlands and Bundesgerichtshof in Germany).

Any similarities between the two legal systems, however, hold up only if we compare the laws in the books. Dutch scholars and legislators have always looked to the legal doctrines of the bigger neighboring countries before drafting their statutes. However, the legal practitioners in and out of courts have not. Even with very similar legal systems on the books, Dutch practitioners have developed amazingly different legal cultures in action. Apparently the gap between doctrine and practice is so great that doctrinal comparativists who have studied both systems in detail have overlooked most of the differences that are unveiled by looking at indicators of litigation frequency.

Substantive law, even procedural codes, might be alike from one country to the next, but they are bad predictors of how the law is employed in practice. Comparisons between measures of actual use of the courts lead us to the view that it is important to compare not only the formal legal systems but also to extend our view to what I call "cultures of legal behavior." This terminology deviates from what many law and society scholars have agreed on. They define "legal culture" as comprising "attitudes, beliefs and values with respect to law." It has been a useful definition as long as studies were concerned with popular as well as professional ways of approaching the legal system; normative expectations, trust in legal institutions, and attitudes toward using (or avoiding) them certainly shape the practice of law. Often such an underlying "belief culture" will be taken as a source of law, and regularly it will shape the institutions that make it work (or just prevent it from working) (Savigny 1840–49). When legal systems are compared, however, this definition may carry a misleading connotation. Commonly it is assumed that legal rules are rooted in social norms and that the legal system expresses the notions that a dominant group in society has about what is "just." Unfortunately, however, the reality of such an assumption is hardly ever tested. It would take a very sophisticated combination of qualitative interviews and survey technique to do so in a meaningful way. Legal scholars and judges have therefore developed a practice of making assumptions about what the general public might consider to be "true justice"; by that venerated method not only do they project their own "sense of justice" as being the general one, they also legitimate a highly sophisticated moral dogmatic as representing a public belief. Thus, even though the term is already "occupied" in various ways, "legal culture" is used

here for polemic reasons: many authors assume that national differences not to be found in doctrine must be attributable to "folk mentalities." Attitudes alone, however, do not explain the data we found but they do explain their interrelationship with law, institutions, and behavior patterns.

We apply the term *culture* to the set of all interrelationships occurring at three levels: (1) the level of substantive law and procedural codes, (2) the level of institutions such as the courts and the legal profession, and (3) the level of legal behavior and attitudes toward the law. Each level might form a complex pattern by itself, but only a comparison of the relationships between all of them can lead to a comparison of *legal cultures.* It should be evident that comparing them is a much more ambitious undertaking than comparing *legal systems,* which focuses mainly on understanding the differences of law as it is in the books. In looking at litigation frequencies, we try to approach "cultures of law" from a different angle than that of the comparativists. By gathering indicators on litigation, courts, and lawyers, we try to discover different characteristics of *legal action.*

Indicator Comparisons

Measuring the interrelationships between the three levels remains crude, however, because for comparisons between countries we are restricted to empirical indicators available simultaneously in all the countries I want to compare. Thus, the research is restricted to such indicators as numbers and types of legal personnel (e.g., lawyers and judges) and litigation frequencies.[1]

Only a few law and society studies[2] have so far ventured to measure litigation differences between countries, and fewer still have attempted to explain them in relation to other empirical indicators.

[1] Both size of staff and litigation have increased considerably since Galanter's (1983) work and continue to increase in both countries. However, as growth rates are similar, the relative frequency differences remain.

[2] Compare, however, Fitzgerald (1982), who followed the entire funnel of "naming-claiming-blaming" for a number of areas of civil dispute in Australia compared with the United States. While he finds Australians to be significantly less litigious than U.S. Americans, much bigger differences would be found in comparisons with other countries (which might in socioeconomic respects be much like each other). A lead to fruitful hypotheses has already been found in a comparison of rather crude indicators that Johnson et al. (1977) assembled. Galanter (1983, 1992) undertook some brave attempts to establish rank orders of legal indicators for several countries; however, his data for a number of countries still contain misinterpretations. Unfortunately, rather than overcoming the obvious incomparabilities of institutions in various countries, such attempts have raised more questions about the validity of indicators such as courts (Clark 1990), cases (cf. Ietswaart 1990), and who makes up the legal profession (Berends 1992). While it is evident that "lawyers" and "courts" have different functional boundary definitions from one country to the next, there is no way, if we ever want to describe precisely how functions differ, other than to start from indicators of their activities. The comparison of legal cultures that I propose tries to overcome incomparability by a multilayered concept of "legal culture" while keeping socioeconomic factors constant as far as possible.

Comparing indicators of legal activity in The Netherlands and Northrhine-Westphalia presents a challenge: in Northrhine-Westphalia at the end of 1984, there were 12,500 lawyers admitted to the bar, while in The Netherlands there were only 4,800. In Northrhine-Westphalia about 4,700 full-time judges were employed and in The Netherlands only 762. Computed as rates relative to population size, this means that there were 73 attorneys and 28 judges for every 100,000 of the population in West Germany compared to only 33 attorneys and a mere 5 judges in The Netherlands (Blankenburg & Verwoerd 1988; Blankenburg 1985) (see Table 1).

The differences in sizes of the legal professions correspond to those for litigation (Table 2). Whichever type of lawsuits we look at, there is a considerably lower level of litigation in The Netherlands than in West Germany. West German courts were invoked 25 times more often for summary procedures of debt enforcement and 2.5 times more often for civil actions than in The Netherlands.

For anyone who would like to use litigation frequencies as indicators for the degree of regulation that prevails in a society, our Dutch-German comparison must be a puzzle. The Netherlands are known for their elaborate welfare state, they developed detailed regulations on housing and town planning, they enacted statutory rules for tenants protection, labor protection, and consumer protection—in sum they are rightly considered as a highly regulated political, social, and economic system. As a rule, we would expect as a result a large profession of legally trained personnel and a high volume of formal litigation in both public law and private law. And indeed, within the Dutch legal community, the impression prevails that litigation is on an ever increasing growth trend. However, our data on the legal profession as well as on litigation show that among the European countries we can compare, The Netherlands still ranks lowest in the number of advocates, the judiciary, and the caseloads of civil courts. While the number of lawyers and the flood of litigation rise in all countries, they do so at distinct and long-term *relative levels of litigation frequency.*

Keeping the Baseline of Potentially Litigious Conflicts Constant

The riddle of litigation frequencies can be presented even more clearly by comparing The Netherlands with that part of Germany with which in social and economic terms it is most like. To keep social and economic factors constant and to make the comparison between the two cultures of legal behavior even more convincing, we compared The Netherlands and its neigh-

boring German state of Northrhine-Westphalia.[3] They are similar in size: The Netherlands with 15 million population and a land area of 35,500 square kilometers almost matches that of Northrhine-Westphalia with 17 million inhabitants and 34,000 square kilometers. Both The Netherlands and the province of Northrhine-Westphalia are known for their highly industrial but

Table 1. Registered Attorneys and Judges per 100,000 Population, 1970-1990

	Judges[a]			Attorneys[b]		
	1970	1980	1990	1970	1980	1990
Netherlands:						
No	850	1,024	1,490	2,063	3,600	6,381
Rate/100,000 pop.	6.5	7.3	9.9	16	26	43
West Germany						
No.	12,954	16,657	17,392	23,798	37,312	59,446
Rate/100,000 pop.	20	27	29	36	60	94

SOURCE: Statistics of the national departments of justice and bar associations

[a] The number of judges in The Netherlands includes the full-time equivalents of part-time judges. Functionally equivalent to German judges would partly be legally trained secretaries (*griffiers*) who assist professional judges in preparing their cases to a degree which in Germany would be considered professional work. As griffiers do not take responsibility for decisions, however, they are not included in our figure.

[b] The functional equivalents of how strict the lines of the profession are drawn differ somewhat: about one third of registered advocates in Germany hardly do any court work; in The Netherlands our estimate is about 10%. On the other hand, German advocates enjoy a monopoly for legal advice, while in The Netherlands a number of membership associations, legal cost insurance, and legal aid offices render legal services. In both countries attorneys account for only part of the legal profession; what in North America are called "lawyers" would here appropriately be translated as "jurists," including law-trained employees and civil servants. Compare Berends 1992.

Table 2. Litigation Rates, Courts of First Instance, 1970–1990

	The Netherlands			West Germany		
	1970	1980	1990	1970	1980	1990
Civil courts	109,025	146,645	228,480	1,206,750	1,671,089	1,948,151
Rate/100,000 pop.	779	1,047	1,550	2,010	2,770	3,120
Labor courts	[a]	[a]	(9,471)[b]	201,166	302,602	325,969
Rate/100,000 pop.			63	335	503	520

SOURCE: National judicial statistics, population statistics.

[a] No labor courts; cases in civil courts.

[b] There are no special labor courts in The Netherlands; however, in dismissal cases there is a special procedure which since the late 1980s is first registered separately in the judicial statistics. Until that change, the volume of cases seemed too insignificant to register nationally.

[3] A number of our own studies demonstrate that we may generalize from court data of Northrhine-Westphalia to those of West Germany. Compare Bundesrechtsanwaltskammer (1974) as well as our predictions of future litigation developments (Prognos 1989), where we have repeatedly shown that there are in West Germany significant urban/rural differences but no regional variations in litigation frequencies. Insofar as it is representative for the German urban/rural relations, Northrhine-Westphalia mirrors exactly the per capita litigation rates of the whole country; in the eastern states of the former German Democratic Republic, we now observe considerably lower litigation figures, mainly due to the development lag of legal institutions (Prognos 1991).

at the same time decentralized metropolitan areas (the Randstad with Amsterdam, Rotterdam, and The Hague in The Netherlands and the Rhine-Ruhr area in Northrhine-Westphalia). Both have thinly populated agricultural regions around the metropolitan areas. Both regions have seen an influx of foreign workers in the last 20 years, The Netherlands from its former colonies as well as from the Mediterranean, the Ruhr area mainly from the Mediterranean. Economically the two are symbiotic. Rotterdam serves as the seaport for the heavy industry of the Ruhr area, and there are numerous ties of trade and multinational entrepreneurship. Consequently, if the Ruhr industry experiences a recession (as has been the case in the recent past), unemployment figures in The Netherlands go up.

The social and economic similarities of the two regions make it easier to examine and eliminate one of the most plausible hypotheses explaining the differing patterns of litigation, namely, that there are more legal disputes in Germany than in The Netherlands. To test that hypothesis, we have expressed litigation as a *rate*—as a ratio of court cases to underlying disputes. The usual difficulty of comparing litigation rates and similar legal indicators between countries is that we do not know enough about the *baselines* of all conflicts that might potentially lead to invoking lawyers and courts. As we know, cases filed in court represent only a small fraction of all potential legal conflicts. Computing litigation rates by relating them to the size of population seems a very crude basis for comparison (taking only the adult population would be even more crude and for many types of cases no more adequate). The problems of obtaining sufficient statistical data for baseline comparisons renders most comparisons between legal behavior cultures of more distant countries unfeasible. The Netherlands, however, and the neighboring German state of Northrhine-Westphalia are so much alike in size, economy, social structure, and mentality of the population that in general we might assume that the baseline of conflicts that could give rise to litigation are about equal. Nevertheless, where we could obtain indicators for baseline comparisons, we did so. To evaluate the relative litigiousness of tort regulation in a legal behavior culture, we took data on serious traffic accidents and other types of accidents. To evaluate the litigiousness in the area of employment protection, we sought the baseline of all employment dismissals. To assess the level of debt enforcement, we looked for data on numbers of sales or service contracts in which credit is extended.

Baseline measures of disputes are most easily constructed for specific areas of law. For example, divorce rates served as indicator in family law, traffic accidents in tort law, the rate of employment dismissals in labor law, and the percentage of rented houses versus home ownership for landlord-tenant cases. Lack-

ing better indicators, in some instances, we also resorted to relating litigation figures to population. By using such baseline measures of disputes, we can compare rates of involvement of courts in similar, potentially litigious social relationships. For many of these specific areas of conflict and litigation, statistics were available that showed litigation in a special judicial department, for example, landlord and tenant court. Where there was no sufficient breakdown by subject matter, we coded court files in a number of places we considered representative for the whole country.[4]

We started by breaking down overall litigation figures by basic areas of social relations and their respective legal regulation. Not only the jurisdictional differences but also the varying scale of the differences in litigation frequencies from one area of regulation to the next render it nonsensical to compare overall rates of civil or criminal cases without further specification. The main factors that determine selective litigation of potential legal conflicts are specific to the respective areas, among them the degree to which mediating institutions provide a filter of pre-court dispute resolution or the degree to which attorneys and legal aid facilities offer access to out-of-court alternatives. Some areas of social relations and legal regulations are characterized by specific institutional infrastructures; the most obvious of these is labor relations, where courts cannot function independent of industrial relations setups, trade unions, and employers associations. Divorce and especially postdivorce conflicts might be handled by social administration and by family counselors rather than lawyers. Landlord-tenant relations are highly sensitive to the amount of public housing administration and rent control; consumer complaints depend on representative action by consumer boards; and the number of tort cases before courts depends on the amount of discretion insurance companies apply in regulating claims.

We tried to differentiate among the institutional conditions that mitigate conflicts before they become litigious by breaking conflict areas down into specialized fields of law. We stopped short of further specialization whenever we had the impression that a more crude differentiation would provide us with a sufficient explanation of major statistical differences, leaving more refined and detailed comparisons to specialized research (which should in our opinion also include more refined comparative law analysis). Our comparison can direct attention only to the gross differences in the level of litigiousness and to their overall legal cultural explanation. But we think the findings described here

[4] A byproduct of our research (which also helped to finance it) was that we were asked to advise the departments on which categories to use in their official statistics.

provide ample suggestions for more specialized research on fields of law and on semiautonomous fields of social relations.

The Civil Litigation Filter

There is no social or economic explanation why the Germans should have one of the highest rates of *civil litigation* on the European continent and the neighboring Dutch have by far the smallest (Table 3). One possibility would be some vague notion of greater "litigiousness" in the mentality of the Germans as compared with the Dutch. However, first-hand impressions in both countries would not suggest such a hypothesis. Intuitive knowledge would rather suggest that the people from Rhineland and Westphalia and their immediate Dutch neighbors differ more from Bavarians or Prussians than from each other. The fact is that within both countries we find remarkable urban-rural differences in the level of litigation, but keeping those constant we find no further differences from one region to the other. More plausible, perhaps, would be a hypotheses about economic and social variables that contributed to litigation, because economic activity in general has been shown to be related to the use of courts. Job mobility and divorce rates might be suspected to contribute to the use of courts, and certainly the number of welfare regulations could be a factor because the more elaborate the system of collective insurance policies, the fewer the individual claims that must be raised in court. However, with respect to any of these factors which in general can explain the frequency of civil litigation, the two countries are remarkably similar.

Table 3. Litigation Rates, per 100,000 Population for Selected Conflict Areas, 1982–1984

	The Netherlands	West Germany
Summary debt enforcement	705	9,118
Debt enforcement litigation	650	1,570
Landlord-tenant disputes	200	458
Traffic tort	15	247
Labor law cases	69	586

SOURCE: Blankenburg (1988). All data are taken from court file studies; in Germany statistics of Northrhine-Westphalia; the volume in those years is equally high all over the Federal Republic and may therefore be generalized. Compare the comparative report by Blankenburg & Verwoerd (1989:257) on litigation in five European countries.

Social and economic similarities, in any case, would lead us to expect an equally high volume of legal problems to be solved. Also substantive regulation in both countries shows more resemblance than difference. Even procedural law and the organization of courts differ only slightly. And as for "legal consciousness" factors such as individuals' willingness to risk an open conflict, we do not see any difference in general attitudes between the

Dutch and their West German neighbors to explain the observed differences in propensity to litigate.

What else could explain the observed differences in litigation, if neither the law in the books nor demand factors of litigiousness nor social and economic conditions provide an offhand explanation?

Instead of looking for a single explanation for the remarkable differences in the litigation rates of both countries, we must look at *patterns* in the ways legal institutions are used. In our case we find explanations more often on the supply side than on the demand side of legal behavior: the conditions of access to lawyers and courts, the institutions that handle litigation, and possible "alternative" institutions that might help to avoid it. The supply side of the legal culture consists of sets of institutional arrangements and patterns of professional interaction that apparently escape the attention of academics doing comparative studies because they are nowhere laid down in writing. Nevertheless, these patterns of interaction provide an explanation of our riddle: Cultures of legal behavior include sets of institutions that remain "in the shadow" of the legal system, because they help to avoid procedures rather than to invoke them.

Lawyers

The first set of factors can be found in the infrastructure of the legal profession. There are a number of rather detailed statutory differences as to how attorneys' fees are regulated: German attorneys follow a strict fee scheme, and they can rely on the rule that "the loser pays all costs"; in The Netherlands hourly fees are billed, which renders litigation for small amounts unattractive and the costs in general somewhat unpredictable. This causes a Dutch litigant as well as Dutch lawyers to seek more carefully for alternatives before starting a formal court procedure.

Furthermore, the German bar enjoys a monopoly for giving legal advice; in The Netherlands anyone can give legal advice. This gives rise to a number of Dutch membership organizations (such as trade unions, automobile clubs, or consumer groups) that offer legal advice. It also permits public legal aid offices to work on a subsidy scheme entitling about half the Dutch population to free legal advice. All these advisors may represent their clients in lower courts; attorney representation is required only before district courts that are competent for civil law cases involving higher stakes (currently at a value above Hfl. 5,000) and divorce.

One might expect such free access to legal aid to stimulate litigation, and in fact welfare state opponents have criticized the subsidy scheme along these lines. The comparative evidence on legal aid in several European countries (cf. Blankenburg 1993),

however, suggests, that the free competition of legal services helps to avoid some types of litigation as much as it stimulates others.

Alternatives to Litigation

Which types of cases are stimulated, and which are avoided thanks to the Dutch infrastructure of access to the courts must be discovered for each area of law separately. As a rule, we find institutions that facilitate judicial remedies side by side with alternatives for avoiding formal procedures. Avoidance is part of the art and advice of attorneys in Germany as well as in The Netherlands, but the Dutch culture of legal behavior offers *more* alternatives and *more* pre-court conflict institutions than the German one. The final volume of litigation is explained by the specific mixture of facilitation and avoidance, which varies according to the kind of problem and the social relationship involved in the underlying conflict.

1. *Debt collection* is the single quantitatively most prevalent issue in civil courts of both countries. Both legal systems at the time of our research offered a summary procedure (the Dutch *betalingsbevel* was taken over from the German *Mahnverfahren* during the occupation of 1941). It allows the creditor to file an allegation without presenting evidence other than a contract and a statement that payment is overdue. Court clerks under (formal) supervision of a judge screen the forms for correctness and issue an injunction. If the debtor contradicts the claim, a formal litigation procedure may be begun; if not, the payment can be enforced with the help of a bailiff (comparable to a U.S. marshall).

Table 3 shows that summary debt collection is used on a massive scale in West Germany but rather modestly in The Netherlands. The same holds true for the followup: little more than 10% of the injunctions are protested and later litigated in court; thus a considerable part (about a third) of the difference in general civil litigation is caused by fewer debt claims reaching the litigation stage in Dutch courts than in German courts.

The lesson to be drawn from these findings is even more illuminating if we look back a few years in procedural history. Before 1984, when Dutch court fees were raised, summary debt enforcement was used somewhat more often; since then, privately operating bailiffs refuse to use the summary court procedure altogether, maintaining that they can enforce small debts more quickly and cheaply on their own authority. At the same time, frequent users of debt enforcement increased their efforts to eliminate bad debtors from their delivery lists and to automate their own reminders and subtle threats by increasing the costs of late payment. Computer technology helped even small compa-

nies, craftsmen, and doctors to organize the early stages of debt enforcement in-house (cf. Raken & Otto 1987).

To ascribe the downward trend of summary debt enforcement in The Netherlands to the rise in court fees alone would overestimate the effect of litigation costs as a single factor. In contrast to their German counterparts, Dutch bailiffs do not need a court-issued document to act on behalf of the creditor; many act as debt enforcers and thereby judge on their own the legal validity of a claim. Asking for a court injunction is only one of their techniques; for the German bailiffs it is a precondition of action. Therefore Dutch bailiffs have never used the court injunction as often as have the Germans; they rather see the possibility of free access to that procedure as competitive with their own services. They argue that their own professional standards not only provide the debtors with sufficient guarantee of due process but that they can also negotiate terms of payment far better in direct contact with the debtors than through a court, which issues its injunction in absence of the parties and, if it decides in adversary procedures against debtors, it does this mostly by default. Recently the Dutch bailiffs even achieved legislative success: the latest amendment to the Dutch procedural code does away with the *betalingsbevel* from 1992 on. European harmonization of civil procedural codes, however, might force them to reintroduce a similar procedure in the near future. It is easy to predict the consequences of a European regulation: if summary procedures function effectively, they offer easy access and quick decisions; in a small number of cases they also lead to full-fledged litigation if the injunction is contradicted. The more courts offer such quick and easy access, the more they will also be used for subsequent adversary litigation. The higher the courts set the threshold of access, the more they will stimulate out-of-court alternatives; and the more these are professionally regulated, the better they can guarantee standards of due process comparable to those of courts of justice.

2. Looking at the other side of trade and service relationships, we see that in both regions *consumer complaints* are handled by informal institutions first. They face the principal public interest dilemma that individual cases might be too trivial to risk litigation costs while collectively cases would be of great significance for everyone. Controlling product standards, sales practices, and fair pricing are a task for organized interest representation using information and consultation on behalf of consumers; handling complaints, lobbying, and occasionally litigating on behalf of producers and distributors. In both The Netherlands and West Germany, consumer associations were initially organized by trade unions partly subsidized by public funds and they are aided by publicity in the mass media. They set up complaint boards for industries with specific troubles (such as for travel agencies,

cleaners, the textile industry, or car repair shops) jointly with the respective industries. Pre-court institutions take up almost the entire bulk of such cases. While these organizations ease the access to small claims, they at the same time filter a few more serious cases and occasionally take a test case before court.

Again, both countries show the same institutional pattern in principle, but the Dutch consumer organizations are relatively more active, are better funded, and handle a higher caseload. But there is no argument that they prevent complaints from being litigated. Consumer complaints usually are not worth fighting individually in court. More likely, there will be (relatively) fewer test cases in German courts, simply because the basis of collective interest representation is weaker. The lesson is: Out-of-court forums for consumers are no alternative to otherwise litigating; rather they provide the only basis for representing the collective interest, including occasionally seeking access to courts.

3. Rather frequent consumer problems where big stakes are at issue arise in the *construction* industry. Problems between builders and contractors are inherent in the long duration and complexity of the job: contractors must work with a number of subcontracting firms, which may be hard to coordinate; time schedules are regularly not met; materials may not be delivered in time and substitutes may have to be purchased; changing conditions and new wishes force adaptation of the contract; thus renegotiating is the rule. In the end the most beautiful construction project will still entail dissatisfactions that the client expresses by withholding part of the price. The saying is: "Take a lawyer before you build a house"—and indeed, legal cost insurers in Germany refuse to cover risks arising from construction work because they fear people might buy the insurance policy because they anticipate the certainty of risks. (They do not, however, refuse clients who buy a car or enter into a marriage.) In German civil courts, construction conflicts are among the most cumbersome proceedings: the court must reconvene more often than in any other kind of procedure, evidence must be taken more often, expert witnesses often must be called in. There are also more appeals than on the average.[5]

In The Netherlands construction contractors rarely see the courtroom. Contractors always provide in their standard contracts that conflicts will be heard by the Council for Construction Firms (Raad voor de Bouwbedrijven at The Hague), an arbitration service set up by the industry. Parties may choose an arbiter among the architects and engineers of the council; a law-trained secretary guards the procedural fairness. The arbiters decide in first and last instance; their decisions can be executed formally if

[5] All data from our court file study are based on a court file sample of Prof. Baumgärtel. Our study is published in *Bundesrechtsanwaltskammer* 1974:v. 2, tables 3.20 ff.

registered with the president of a district court. A monthly journal *Bouwrecht* publishes all novel decisions and is referred to as if it were an exhaustive caselaw compilation.

4. Similar regulations exist in a number of *industrial sectors.* Most national *arbitration* boards have their seat in Rotterdam; they usually provide industrial experts as arbiters. A statutory arbitration code[6] regulates the procedure. It allows for appeal to the civil courts if the procedural code is not followed. Substantive appeal is possible only if parties have agreed on its admission beforehand. Publication of decisions is not mandatory but is often suggested so that a body of precedents may be built. The bimonthly *Tijdschrift voor Arbitrage* publishes all decisions that seem of principal relevance. Over time the arbitrators have successfully built up their "code of arbitration" to be considered a binding source of law.

5. Returning to cases with the potential for appearing in civil courts, a sizable volume is provided by *landlord-tenant* disputes. Contrary to the expectation that rental law is chiefly designed to protect tenant interests, such disputes are mostly initiated by the economically stronger part: the house owner, claiming unpaid rent and often asking for eviction of the tenant. More often than in consumer cases, the tenants mount counterclaims for maintenance or rent rollbacks; in a minority of cases tenants initiate the procedure. In both countries tenant organizations represent the collective interest and provide legal aid to their members. The organizations usually provide conciliation in commissions together with the homeowner associations. In The Netherlands, however, these commissions are given official precourt status. Before being admitted in court with a charge against raising the rent, a Dutch tenant must put the claim before a landlord-tenant commission. The procedure before the commission leads to a recommendation; the data gathered by the commission may serve as evidence in court. If the recommendation is not challenged by either party within two months, it becomes binding. The Dutch commissions handle many more complaints than their voluntary counterparts or even the courts in West Germany; only about 1% of them are taken to court after the commission has given its recommendation. Again, the supply of informal procedures before the commissions eases tenants' access to claim; at the same time it effectively filters out tenants' complaints that in West Germany lead to litigation in court.

6. *Employment protection* provides a similar lesson. In The Netherlands, if employers in The Netherlands want to dismiss an employee for reasons other than manifest misconduct, they need permission from the local labor exchange bureau. The procedure before the labor exchange bureau gives the employee a

[6] *Arbitragewet*, book 4.1 of the civil procedural code of 2/7/1986.

chance to protest; often the terms of the dismissal are reconsidered. The dismissal is effective only after the license has been given. Compared to ex post procedures before German labor courts, this has advantages for both sides: when the license is given, the employer need not fear extensive ex post claims on the basis of unfair dismissal (which often are raised in German labor courts), and the labor side has a chance to object and question the validity of redundancy or dismissal arguments.

The administrative procedure saves the Dutch from setting up labor courts like those in Germany and most other European countries. While there is no appeal against the commission's decision in the strict sense, parties can resort to civil courts. As in other countries, in labor court this is mostly done to challenge a dismissal ex post, especially by those to whom the licensing regulation does not apply (like short-term contract workers or dismissals for malconduct). Few claimants do this, so that the judges need to handle less than 10% of the comparable caseload of their German colleagues.

7. The regulation of *traffic accident damages* fills out our examples. In both countries, most accidents are routinely handled out of court. Other than cases where the amount of damages is in question, traffic tort comes down to a distribution conflict among insurance companies. The companies have every interest in keeping conflicts down; their representatives emphasize that an estimated 95% of all German traffic accidents are regulated by insurance agents without attorneys or courts involved; "only" about 2% lead to litigation in court. When operating in The Netherlands, however, the same insurance companies involve an attorney in less than 1% of cases; the litigation rate for all traffic accident damages is about 0.2%. On the other hand, the volume of these tiny fractions is sizable enough to account for 10% of the caseloads in German civil courts and less than 1% in Dutch courts.[7]

In this instance the difference cannot be explained by a single "alternative" institution. It is rather the result of an institutional cluster consisting of at least the following elements: Liability insurance in both countries is often sold together with legal cost insurance. The insurance companies operating in Germany pay all attorney costs for consultation as well as conciliation or litigation; the same companies in The Netherlands, however, run their own legal consultation service (which in Germany would be illegal under the statutory attorneys' privilege); and while German attorneys point to research showing that 70% of all traffic accidents in their files are settled out of court, the Dutch legal

[7] Dutch frequencies are even lower than those of Japan, and the German litigation rate after traffic accidents is even higher than in California; the explanation of conflict regulation by internal institutions which Tanase (1990) gives for the Japanese avoidance pattern holds similarly for the Dutch.

insurance regulators reach a settlement in between 96% and 98% of all conflicts (which—it should be remembered—are only a fraction of all accident damages). Furthermore, expert assessment of damages is routinely initiated in The Netherlands before repair work starts, while the German regulation relies mostly on the auto repair shop doing the work; on the other hand, assessment of fault in Germany is often done by experts called in by attorneys as well as by courts; in The Netherlands police reports are more easily accessible and usually relied on by both sides. Altogether, the Dutch practice is clearly more geared at avoiding conflict, while the German attorneys, experts, and even legal insurance companies[8] that make up the infrastructure have a common interest in maintaining their rather costly system of handling (and even encouraging) conflicts.

Finally, a comment should be added about *alternatives within court procedures.* Divorce procedures in both countries illustrate their relevance: both West Germany and The Netherlands require a court decision to dissolve a marriage.[9] Dutch family law, however, allows for decisions by default if both parties agree and no children are involved. About a third of all divorce procedures are decided this way, reducing the role of the judge to that of a notary. Attorneys may suggest and prepare such a do-it-yourself divorce, but so may divorce consultation bureaus that have been set up experimentally by social workers, psychologists, and law-trained colleagues. Initially subsidized by the Department of Justice, the bureaus were resisted by the organized bar. Enjoying a monopoly of representation in district courts (where divorce has to be filed), the bar held the stronger cards. Nevertheless, divorce attorneys also met the competition by setting up their own divorce mediation, sustained by the bar, which offers training in settlement skills especially geared for divorce consultation. If ever the legislature would levy the attorneys' privilege of representation in the first instance (or even allow for divorce before a notary), it is safe to predict that divorce litigation would largely become privatized.

The Infrastructure of Access to and Avoidance of Courts

Civil litigation is said to be like a "market" because parties must invoke the court themselves and also the course of the proceedings largely rests on actions of both parties (Black 1973).

[8] After all, more Germans buy legal cost insurance because everyone runs a higher risk of incurring legal conflicts.

[9] The higher divorce frequencies we found in Germany (shown in Table 1) are most likely due to a difference in court registration: often a procedure has to "rest" for some time before the parties actively pursue it. In Germany this may lead to registration of a new procedure; in the Netherlands it may be continued under the same file number. To the extent that this explains the difference, it would simply be a technicality.

Welfare state legal systems such as ours, however, have moved away from purely formal equality of parties toward compensating for social weakness by substantive as well as procedural law. Freedom of contract is restricted in many areas such as in tenancy and employment relations. Typical for such areas of compensatory substantive legislation is the concomitant supply of informal institutions and procedures that help to deal with conflict cases out of court. Tenant rights, employment protection, and consumer complaints are typically dealt with by pre-court institutions that filter out most cases but always leave open the possibility of invoking a formal court procedure if informal alternatives have been exhausted. In The Netherlands much more than in West Germany, such filtering institutions are effectively taking away some of the potential court caseload by providing easy access for (more) cases in a pre-court conflict arena. Dutch consumer complaint boards are more active than their German counterparts, Dutch bailiffs take over debt enforcement cases that in West Germany are treated by court procedures, and Dutch rental conflict commissions handle landlord-tenant cases. Dutch labor exchange bureaus check on dismissals that in West Germany will more likely end up in court. Compared with Dutch costs and duration of litigation (and this would certainly hold even more true for American trial courts), West German courts are so much more efficient that there is less reason for the (legally experienced) parties to try to avoid them; on the other hand, the German courts thereby attract a high caseload of petty cases that in The Netherlands are handled by filtering institutions.

Nevertheless, the extent to which parties to civil disputes in the Federal Republic and The Netherlands invoke courts, and furthermore the degree to which they make use of legal advice and assistance varies widely from one type of case to another. In both countries, in lower courts many parties proceed without being represented by a lawyer; the informality of Continental procedures (compared with adversary trials) and the discretionary powers of the judges render this feasible. Furthermore, court and lawyer fee waivers for litigants with moderate incomes take away some of the financial barriers of access to lawyers and courts. In The Netherlands about 60% of all private households are entitled to legal aid assistance and court fee waivers over a minimum risk; in the West German system the entitlement ends at considerably lower income levels (in legal aid assistance at about twice the social welfare minimum).

Nevertheless, in both countries, legal aid recipients do not account for a large segment of court caseloads. Only in divorce cases are a major part of court and lawyer fees compensated by legal aid schemes. In all other cases the economically weaker party is usually the defendant—for whom financial obstacles are usually not a main consideration since the legal aid scheme takes

care of most litigation costs. Apart from cost considerations, however, there are sufficient reasons to try to avoid getting involved with lawyers and courts: no legal aid scheme will remove the social considerations that keep individuals from actively invoking lawyers and courts.

No single factor explains why the Dutch handle far fewer conflicts by litigation than do the neighboring Germans. We observe a recurring pattern, however, which is due partly to the institutions filtering access to courts and partly to alternatives that help to avoid them. Part of the "infrastructure of avoidance" is facilitated by the multitude of forms of legal consultation available within and outside of the bar. Legal advice is not an attorneys' monopoly, which allows legal cost insurance, automobile clubs, or trade unions to compete with law firms. On the other side, there are individual as well as institutional government subsidies for legal aid, which (for the past 15 years) enabled "social advocates" to offer low-threshold legal services. Amazingly enough, the abundance of legal advisors fits into a culture of especially low, rather than high, litigation frequencies. In a number of conflict constellations where the law protects the socially weaker parties against the more powerful ones (like consumer protection, tenants rights, and employment protection), "alternative" institutions attract a high number of cases that would not find a forum in a more litigious culture. At the same time that they effectively filter out recurrent routine cases, thus relieving the court dockets, the infrastructure of legal aid nevertheless offers an opportunity for strategic test litigation.

Quite a different constellation prevails in those areas of law where repeat players are disputing. Insurance companies, mail order houses, and banks have a high stake in reducing the conflict costs in everyday transactions. Their strategies are mainly anticipative; if they must enter a conflict, they prefer internal settlement to external dispute, and if there is a risk that external procedures will be invoked, they try to shift the burden of mobilizing lawyers and courts to the opposing party by maintaining control of their stakes in the conflict. If customers have grievances, businesses mostly manage to deal with them by in-house complaint procedures. In sectors that are especially grievance prone (like insurance), industrywide boards serve as appeal bodies. The alternative of invoking courts of justice is reserved as *ultimum remedium.*

In Germany, on the other hand, courts appear to be too efficient and inexpensive to create incentives for plaintiffs to avoid them. In civil courts, half the plaintiffs have a decision within six months, three quarters within three months. Summary proceedings are even faster. It is mainly the business community that profits from having a quick and effective instrument for collecting debts, regulating accidents, and threatening tenants with

eviction; as they usually win their cases, the defendants pay all the fees. In cases where mostly private individuals are the plaintiffs (in , e.g., labor, social, and administrative courts), chances of winning the entire case are empirically small; litigation here is often a means to win advantages outside the verdict: common examples are in labor courts where employers as defendants may settle rather than fight and in administrative courts where plaintiffs without substantial chance for success are glad to pay the price of court and lawyer fees in order to win some time.

In our comparison of The Netherlands and Germany, whose general cultures are so much alike, we need offer no explanation for differences in litigation rates on the basis of "folk mentality." The decisions of plaintiffs to use or avoid courts are based on similar strategic reasons on both sides of the border. What differs are the incentives their respective legal systems offer. The infrastructure, which provides access as well as alternatives to litigation, creates the conditions for invoking or avoiding the courts.

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