

**THE
GERMAN
MODEL**

**SEEN BY ITS
NEIGHBOURS**

**EDITED BY
BRIGITTE UNGER**

The German Model – Seen by its Neighbours

Edited by Brigitte Unger

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'Made in Germany': What about also its Legal Institutions?

Frans van Waarden

1. Models

The term 'model' is used in quite a variety of meanings: as a small version of something (much) larger ('model of the globe'), or as something attractive, successful, admired, and to be imitated if not copied, thus becoming fashionable. This could be anything from a fashion model and a car model to a prosperous economy, a stable political system, an exemplary welfare state or a new political economy fashion such as neoliberalism.

Pertaining to my own country, the Netherlands, the term 'Dutch model' has over the last decades become synonymous with what has become known as the 'polder model'. The term was first coined by the Dutch media shortly after I used the concept of 'dykes' in my 1994 Utrecht inaugural lecture as a metaphor for market regulations and similar institutions,

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such as the then legal cartels and the social partnership – all characterized as consociational and corporatist – at the firm, sector and national levels. While dykes make life and economic activity in the polder possible, safe and prosperous, such market institutions do so for ‘life in the market’, reducing risks and uncertainties, including commercial and labour conflicts, thus facilitating and stimulating transactions, and so producing stability and growth of earnings, employment and economic prosperity. (van Waarden orig.1995; in English 2013). That ‘polder model’ has been admired abroad, notably by the Germans, as e.g. exemplified by the prize that its pivotal symbol, the Dutch tripartite Social-Economic Council (SER) got in the 1990s from the German Bertelsmann Foundation.

In addition to this ‘Dutch model’ there is also a Swedish model (a particular way of handling prostitution, or free university education), a Swiss model (federalism, standing army, international aloofness) and a Danish model (welfare state combining flexibility and security (coined flexicurity (Lykketoft 2009))). Perhaps as many models as there are countries?

2. German Model? What? For whom? Why?

In what meaning do we use the term ‘German model’? Among others to denote a successful industrial nation, proud to advertise ‘Made in Germany’. That expression usually refers to solid reliable engineering products. But it could also refer to the many other products of the German nation and culture. And indeed, in many fields Germany

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has stood as a model to be admired and occasionally copied. In the arts, e.g. painting: from medieval Albrecht Dürer via romantic Caspar David Friedrich to modern Joseph Beuys; but especially in literature, philosophy and law, all fields which in one way or another have to do with *words*. In literature from Goethe to Grass, and in philosophy from Hildegard van Bingen and Meister Eckhart to Heidegger, Hegel, Kant, and Marx. After all, Germany was, in the person of Johannes Gutenberg, in 1450 the inventor of typography, a very important means for spreading words. The downside is of course that arts (or broader 'ars,' a concept combining both arts and technologies) in the form of words limit the audience of admirers to those who master that particular language. And it does not make it easy to translate subtleties in other languages to foreigners.

German grammar allows for longer and more complicated sentences, making extensive and complex connections between rather different phenomena, expressed in words, possible. That has also facilitated the gradual development of an ever more detailed and precise legal system, building upon both the heritage of the centuries old Germanic case law (related to similar origins as that of current British common law) and the continental codification movement undertaken by kings and emperors (in order to increase their own power vis-à-vis the that of the nobility and the cities in the process), culminating in the Code Napoleon, which became a model for the Prussian rulers in their attempt to modernize their legal system. That new German legal system was by the way in turn adopted as a *model* and translated and modified by the Japanese in their attempt to modernize their society and economy near the end of the

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19th century, and now perhaps again by the Chinese, given their interest in western, and especially German, law (e.g. Zhang Shi Ming 2012)

Different cultures excel not only in different industrial products, in different arts, but also in different cultural values having found their expression often in related societal institutions. ‘Made in Germany’ could hence also refer to specific economic, political and legal institutions and their societal support in related cultural values. These have been ‘made in Germany’, and they may have contributed to the production of those ‘goods made in Germany’ by creating a ‘variety of capitalism’ that apparently has made the output of those ‘solid reliable engineering products’ possible in the very first place.

3. Legalism

Befitting the importance of words is a strong importance of, and respect for, the rule of law in Germany. That has created a rather specific and important legal and political institutional framework for the economy. As in most other economic systems, the institutional, political and legal frameworks of the economy are important for its performance. That may exist and be important in many other countries as well, but in Germany they are taken particularly serious. The country has – or rather is – a highly legalistic system. There is quite a detail of legal rules, from constitutional to commercial and labour law. And it has a highly differentiated court system, with various specialized courts, including for corporate and labour relations issues. The availability of many litigation

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opportunities has stimulated a high frequency of litigation, which has only further increased the legal density by adding case law to codified law. The high litigation rate is nothing new but has a long history, as can be seen from table 1., which compares litigation rates in civil courts to those in other European countries in the years 1970/75 and 1900.

The contrast between the Netherlands and Germany is particularly strikingly large: Two close neighbouring countries, whose histories and economies have been closely intertwined – connected historically through the Rhine and the North and Baltic Seas – yet are quite different – e.g. Germany's economy being historical an industrial one, while the Dutch had and still has a strong base in commercial and trading services. More importantly, their political and legal institutions have been quite different and still are.

The difference in legal cultures can also be seen symbolically from something as trivial as a speeding or parking ticket. The Dutch rule enforcer puts a simple money-transfer-form behind the windshield wipers – or in the case of a speeding ticket a similar form in the mail – with the order to pay with it the fine that one has been given for the transgression of the law. And in the case of a parking ticket it may even be a fee 'for the temporary use of public space', so that it seems merely a transaction under economic rather than criminal law.

By contrast if one commits a similar disobedience of the rules in Germany, one is likely to get successively several thick packages in the mail at home. The first one with a lengthy 'Belehrung' of one's rights as a car-driving-citizen (rather than duties, e.g. decent driving or parking behavior), the road to follow if one wants to appeal the fine, etc. In

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the case of a speeding ticket it is possible that a photo made from the car is included as ‘proof’ of the transgression, and if made of the front of the car often with the location of the face of a side passenger blotted out, to protect the driver’s privacy rights. Talking about German perfectionism! The request is not yet to pay a fine, but to admit that it was your car and you in the driver-seat. Only after that has been done one gets another thick mail package in which one hears what the fine is, and a ‘Belehrung’ of more rights, e.g. that and how one can object paying it or how to appeal the decision to impose the fine.

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Table 1. National Legal Systems of 12 European countries and the US, ranked by Nr. of Civil Cases in 1970, absolute number, and corrected for population size of the countries

Country	Nr. of Civil Cases in Courts of First Instance				Nr. of Registered Lawyers 1970		Nr. of Judges 1975	
	1970 absolute (approx..)	1970 per 100,000 inhabit.	1900 absolute	1900 per 100,000 inhabit.	absolute	Per 100,000 inhabit.	absolute	Per 100,000 inhabit.
Finland	27,000	586	50,000	1,880				
Netherlands	83,000	637	12,000	235	2,063	16	325	2.39
Spain	280,000	829	170,000	913				
Norway	66,000	1,701	120,000	5,357				
France	1,100,000	2,118	640,000	1,643	25,000	46	3,676	6.98
Italy	1,150,000	2,137	2,400,000	7,279				
Sweden	280,000	3,183	60,000	1,167				
Belgium	310,000	3,219	150,000	2,242				
Denmark	195,000	3,955	38,000	1,551				
England + Wales	2,150,000	4,408	1,260,000	3,873	26,991	49	1,802	3.22
US (1975)	7,600,000	5,212			355,242	175	22,161	10.26
Austria	530,000	7,105	1,700,000	6,513				
Prussia/BRD	5,000,000	8,183	2,100,000	7,500	23,798	36	14,054	22.80

Sources:

Litigation data: Wollschlaeger 1989: 55-81 (based on readings of his graphs); population data, Geohive (<http://www.xist.org/earth/census.aspx>). US data from National Center for State Courts 'Court Statistics Project' 1975, data of 44 states on appellate and general jurisdiction courts

Legal Functionaries: various Bar Associations, Blankenburg 1997, Blegvad and Wulff. 1989; Second UN Survey of Crime Trends and Operations of Criminal Justice Systems 1975-1980 (<http://www.uncjin.org/stats/wcs.html>)

(these data earlier published in Van Waarden and Hildebrand 2009)

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4. Obedience

Germans have also respect for the law – and rules in general, be they public or private – and obey them easier. This can be nicely seen from the behavior on the German Autobahnen where a general speed limit is absent, a holy cow in Germany. This allows the German drivers to accelerate to 200+ km per hour, mindful of the German Autobahn adagio ‘Freie Fahrt für Freie Bürger’. However, there are highway sections where there is nevertheless a speed limit. There one sees most German cars slowing down to precisely the allowed speed, while a slower Dutch car, before overtaken by the German ‘racers’, disregards these local speed limits and now passes all these obedient Germans who he saw just some minutes ago racing past.

Such experiences explain why in the eyes of some of their neighbours the Germans are an overly ‘obedient’ people, suffering from ‘an authority complex’. It may be a bit of a cliché but it is true nevertheless. This difference in respect for rules and authority also affects inter-business and intra-firm labour relations, where workers on the whole obey authorities. This, often to the surprise in other (neighbouring) countries.

The Dutch quality newspaper NRC published an article (issue of 01-07-2006) about the different business cultures in Germany and the Netherlands under the heading ‘A Dutchman is surprised that Germans do everything what the boss tells them to do’. It continues by pointing out that:

Dutch businessmen see their German colleague squeezed in a strict hierarchy. He does not dare to take decisions alone and is perfectly happy if he gets commands. He loves details, his car, and his lawyer.

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Even for the smallest difference of opinion legal advice is called in. Germans follow a different approach in negotiations and use a different leadership style. ... Dutch businessmen are advised by KPMG-partner Aalberts to do their homework before they go to do business in Germany; "As regards the preparation of negotiations there is no difference between Germans or Chinese". Aalberts continues: "Germans are tougher, fiercer. Dutchmen seek the compromise and hence behave more moderately. Dutchmen see the compromise as a win-win-situation. Germans are inclined to see the compromise as a loss."

The German Dietrich Venn, who managed a quarter of a century Dutchmen in the Dutch subsidiary of the German company Alta Pharma : "In a German negotiation delegation one immediately sees who the boss is. In a Dutch delegation that is not immediately clear. Everyone participates in the discussion. Sometimes it becomes only near the end clear who pulls the strings. When the German boss speaks the rest remains in the background. ... Germans are Befehlsempfänger. They love clearly demarcated responsibilities and tasks. The German wants before everything else to avoid mistakes. He is a bit timid. Dutchmen dare to take also independently decisions within their sphere of competence. The German does not. In Germany it can happen that the boss afterwards intervenes and corrects agreements of subordinates."

... The hierarchy on German side contains two important lessons for Dutch negotiators. In Germany the quality of arguments may count, but in the end the hierarchy wins. Therefore, one should always ask oneself: does my interlocutor have the authority to take a specific decision? Venn warns Dutchmen not to exert too much pressure. "Dutchmen should be patient. You should never push negotiations. Otherwise the chance is great that the German loses face or falls down. You should leave him room for consultation."

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The Germans may be too anxious; conversely, in the eyes of the German businessmen their Dutch colleagues may be too direct, informal, badly dressed, and often too late. Still, Dutchmen are popular in Germany. Germans respect the classic Dutch merchant spirit and are charmed by the informal style of the Dutch. Aalberts: “Germans know that the Dutch are more informal. This you can use to your advantage. As a Dutchman you can permit yourself more in negotiations. Nicely loose may, but moderately.”

A curious and paradoxical consequence of this difference in cultures of obedience is that German policemen have to use their weapon much less frequently to get respected and obeyed by citizens, including suspected criminals, than in neighbouring Netherlands, where there are as a result more shooting incidents: obedience has to be more frequently enforced with (threats of) violence.

5. Formalization of Social Relations: Hierarchy and Rational-Legal Authority

Hence quite unlike in the US (also a country with traditionally a high litigation rate) is the high German litigiousness related to a relatively strong formalization of social relations in society, especially, as already indicated, hierarchy. In the country of Max Weber does it go together with a great importance of ‘rational-legal authority’, i.e. social hierarchy on the basis of formal-legal criteria, such as what position one has in the state, or broader, in any organizational or social hierarchy.

In so far as there is any respect for authority at all in neighbour the Netherlands it is based less on ‘who you

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are', nor on 'whom you know' – i.e. (relations to) formal rankings – but more on 'what you know' or 'what you say'. Knowledge and expertise – pragmatic criteria typical for a pragmatic utilitarian culture – can command social respect. A type of authority – 'technocratic-utilitarian' – that Max Weber (1964/1920) apparently overlooked in his famous triple typology of authority – traditional, charismatic, and rational-legal. Perhaps because it was then less present in his German surroundings?

Otherwise, Dutchmen are not so easily given to obey rules easily or per se. Top-down command and control by a hierarchy is likely to meet active or passive resistance. More effective is to organize 'overleg' (consultation). The Dutch appreciate it to be consulted in drawing up the rules and the enforcement means and strategies. This was among others confirmed in the 1989 study of the French sociologist Philippe d'Iribarne, who compared how managers motivated their workers in 3 different factories of the same company (aluminum producer Pechiney) in 3 different countries: in the US managers referred effectively to what workers 'voluntarily' had promised and agreed to do in their individual (detailed) labour *contract*; in France, workers could be motivated by managers appealing to their sense of collective *honor*, while in the Netherlands it was done by organizing 'consultation' sessions aiming for *consensus* with the workers, giving them a feeling of participation in decisionmaking. Too bad that Germany was not included in this comparative study. If it would have been, the motivation means there could very well have been *command*. In this law- and rule-abiding culture hierarchy and obedience might probably dominate over equality and consultation. There is of course

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a certain pragmatism in this logic: Why have laws and rules if one does not live by them? Doing so is in many ways efficient: strictly enforced rules leave no uncertainty about what the rules in practice are. It makes the rules certain and clear and transparent to everyone, which is also for all efficient. And it is also a form of equality: equal for the law.

Related to the egalitarian and authority-averse Dutch culture is the Dutch preference for collegiate governance. Who were important authorities in the Dutch Republic? Councils, groups of more or less anonymous persons. The difference becomes quite visible if one visits museums. German museums (and for that matter also Austrian, French or Spanish ones) are full with portraits of individual powerful rulers. By contrast in Dutch museums one rarely sees paintings of opulently dressed individual rulers but instead groups of trustees of institutions, like Rembrandt's famous *Nightwatch*.

6. Bureaucracy

The rule of law, together with some of its consequences, such as formal authority and formal hierarchy, make a specific type of organization: the 'bureaucracy'. This phenomenon, as well as its name are certainly not German inventions nor unique to Germany. But there is something to be said that it has developed there relatively early and probably into its fullest ideal-typical form, starting as the written formalization of a decisionmaking hierarchy. The Germans may not have coined the term 'bureaucracy' – that was done by the Frenchman Vincent de Gournay, who used it, or 'bureau-

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mania', in the pejorative sense of the word. But the Germans have certainly developed it to its later more elaborated form of organization: a formally hierarchic organization ruled by 'the rule of the 'bureau', i.e. law' and meant to be an effective and efficient group governing instrument. The importance and respect for rules has certainly facilitated the development of such formal bureaucracies, in public organizations as well as in private, profit as well as non-profit. Its development in reality, after its earlier introduction by Napoleon in the German lands, was observed by Max Weber who subsequently codified the concept.

7. The German State: Strong and Weak: lots of Checks and Balances

The rule of law and respect – if not awe – for it gives the rule-makers obviously a lot of societal and political power. But the 'rule of law' is that what it is. And not a 'rule of people'. Still laws need to be made. Hence befitting the rule of law is not only the creation of formally defined centers of power, but also their subservience to the rule of law. In order to ensure that, also checks and balances have been build up around those positions of power. The rule of law itself is that for most formal organizations, but cannot be that so easily for the lawmakers themselves. Hence over time the German political model has eventually created a rather elaborate system of checks and balances on political power. In the past it started with the beginning of formally negotiated checks and balances between the emperor, the nobility, and the free cities in the *Hoftag*, later *Reichstag*, which was

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democratized after the First World War. The experiences of Nazi-Germany and the Second World War led to much further separation of powers. First vertical, by the introduction of federalism, i.e. separation and mutual checks and balances between the Bund and rather autonomous Länder. Further very strong horizontal separation of powers: within parliament between the directly elected Bundestag and the Bundesrat composed of the governments of the Länder. The presence of the regional governments here reinforces vertical checks and balances as it gives the Länder direct influence at the national level, which is different from the American Senate, where the senators are less explicitly representatives of their states, at least not of their governments. The German system reinforces the separation and mutual control between the governing parties and opposition as the latter can have a majority in the Bundesrat.

Furthermore Germany has now a very strong system of judicial review, with the German Constitutional Court, the *Bundesverfassungsgerichtshof*, having more formal powers than e.g. the US Supreme Court. Whereas the latter has only powers under concrete judicial review (some concrete case has to be brought to court in order to test the constitutionality of the ruling related to that case), the German Supreme Court has next to the right to concrete also the authority of abstract judicial review, i.e. ruling directly on the constitutionality of a law, without the necessity of a case being brought to the court. Hence a minority in parliament – the opposition to that law – can challenge the legislation for the court.

Then there is a separation of powers between state institutions and civil society organized in a plurality of organizations, which do not only organize and represent

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different interests but may have also statutory powers to regulate and govern their sector of society as well. One example is the constitutionally guaranteed 'Tarifautonomie', which reserves the right to determine financial working conditions to the representative organizations of employers and employees together, and keeps this outside the realm of government regulation.

This delegation of what elsewhere are public tasks to private organizations has a long history, from the emergence of guilds in medieval cities to the present Handwerkskammern and -innungen or the professional associations for doctors or lawyers (modern day guild-like organizations) and similar others which have the authority to regulate their sector of society. Other private organizations carry out typically public service tasks, authorized by the government, such as the Krankenkassen or organizations as *Caritas* and *Arbeiterwohlfahrt*, who finance or exploit health-care facilities. They do so either as alternative to state institutions, or as partners, cooperating in a division of labour between the public and private sectors.

Finally, the principle of legally required checks and balances on positions of power has also been imposed on corporate Germany, by the Law requiring German corporations to have Works Councils (*Betriebsräte*), which are modelled on a parliament, but now representing workers and controlling the management, just as real parliaments control government on behalf of citizens.

By contrast the Netherlands has a weaker separation of powers. As to the vertical one, the lower levels of government (province, municipality) have less authority. Rather than a federal country it is considered a 'decentralized unitary'

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state. And the regional governments have no direct formal influence on national government policy. The horizontal division of powers is also weakly developed. The executive power is dependent on the legislative power as in Germany, but unlike in Germany it has no domestic constitutional review. The Dutch constitution even forbids the testing of the constitutionality of legislation. As the British, the Dutch have cultivated the 'supremacy of parliament'. The one similarity to Germany as regards separation of powers which the Dutch have is that between the state and organizations of civil society. Both countries share a corporatist tradition, albeit that the Dutch version has been weakened over the past decades under the influence of neoliberalism.

However, the Dutch have undergone German influence via the EU. It seems likely that the German model may have stood model for some important European institutions, such as the European system of judicial review and the European law on works councils. Hence just as the British, the Dutch have acquired judicial review through European integration, with the primacy of European law and the EU having in that system a strong constitutional court, the *European Court of Justice*.

8. Conclusion

Could there be any relation between these legal-political institutional systems and a country's economic performance? That is a question that has already often been asked and investigated. The answer may depend on which political and legal institutions one focusses on. Thus e.g. studies have been

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made of the relation between economic performance and different systems of democracy (Lijphart 1999; Schmitter in this volume). Here the authors have claimed to find some relation. However, not many studies have focused on the relation between legal institutions and legal culture on the one hand and economic performance on the other. But one can at least conclude that both highly litigious countries (Germany, Austria and the US) – and low litigious ones (Finland and the Netherlands) perform well economically, with relatively high growth rates, stable financial systems, low unemployment, all over long periods of time. Apparently there are many different roads leading to Rome.

Surprising though. Would not an economy where many commercial and labour conflicts are fought out formally in court between expensive lawyers from both sides imply higher transaction costs for business, higher prices of their products, lower competitiveness and hence less transactions? Or is it that these highly litigious countries are so efficient and prosperous that they can even afford high lawyering costs? Or is it perhaps that the high growth and employment rates are due to a substantial contribution to both national income and employment by a prosperous and growing legal services industry? What could be the end of such a trend? A legal services economy replacing gradually an industrial economy? If the US may be an indicator for such a future: There the legal services industry is already larger than the whole transport industry (planes, trains, cars, bikes, etc.)

That prospect might attract the Asians. The German formal legal system stood already in the late 19th century model for the Japanese. However, Japan has so far been using the formal written rule system derived from that in

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practice in a rather different way. It is still known for a rather low formal litigation rate, befitting Japan's traditional culture of preference for informal conflict resolution and avoiding loss of face, at least among themselves. China may too. That could explain their interest in the alternative Dutch model, as exemplified by their translation and publication of my article on the alternative Dutch model of low litigiousness and alternative less formal and hence cheaper dispute settlement institutions in among others commercial as well as labour relations (Van Waarden 2009 and 2012).

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