

The Dutch Complaint Procedure: A “Picture-Perfect” Procedure?

ARTICLE

A Plea for More Research into the Causes of and Solutions for the Challenges of the Dutch Complaint Procedure in Prisons in the Light of Procedural Justice Theory

**TESSA VAN DER RIJST** **PAULINE JACOBS** 

*Author affiliations can be found in the back matter of this article

ABSTRACT

The aim of this article is to urge the need for (further) research into the experiences of prisoners with the Dutch complaint procedure in prisons. Legally and theoretically speaking, the Dutch complaint procedure is almost “picture-perfect”: it has been set as an example by the ECtHR and has repeatedly received a high approval rating by the CPT. Therefore, it could serve – and is already serving – as an example for other member states of the Council of Europe. However, the Dutch Life in Custody Study shows that prisoners are not satisfied with the way their complaint is dealt with and the procedure is overflowing with complaints. For the Dutch complaint procedure to keep serving as an example for other countries, and at the same time to be able to overcome the challenges it faces today, the causes of and solutions for these challenges should be investigated. We argue that (*inter alia*) the notion of procedural justice could provide excellent opportunities for further research in this field.

CORRESPONDING AUTHOR:

Tessa van der Rijst, LLM

PhD candidate, Free University of Amsterdam, Faculty of Law,
De Boelelaan 1105, 1081 HV
Amsterdam, NL

t.j.vander.rijst@vu.nl

KEYWORDS:

prison law; penitentiary law;
perceived procedural justice;
complaint procedures; human rights

TO CITE THIS ARTICLE:

Tessa van der Rijst, Pauline Jacobs, ‘The Dutch Complaint Procedure: A “Picture-Perfect” Procedure?’ (2022) 18(1) Utrecht Law Review 1–13.
DOI: <https://doi.org/10.36633/ulr.711>

1.1. THE IMPORTANCE OF COMPLAINT PROCEDURES IN PRISONS FROM A HUMAN RIGHTS PERSPECTIVE

Article 3 of the European Convention on Human Rights (hereafter: ECHR) provides that: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’, together referred to as ill-treatment. Not only do all member states of the ECHR have a negative obligation to refrain from subjecting their citizens to ill-treatment, they also have a positive obligation to actively protect their citizens against ill-treatment and to effectively investigate claims of ill-treatment.¹ The objective that prisoners must be protected against ill-treatment is recognized in various international human rights documents. Protecting prisoners against ill-treatment is an important aim of the Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT) that was set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that entered into force in 1989. The CPT provides a non-judicial preventive mechanism to protect persons deprived of their liberty against ill-treatment. It thus complements the judicial work of the European Court of Human Rights (hereafter: ECtHR).² The CPT organizes visits to places of detention, in order to assess how persons deprived of their liberty are treated. These places include prisons, juvenile detention centres, police stations and psychiatric hospitals. After their visits, the CPT draws up a report. Additionally, it brings out a general report every year in which it includes guidelines on how persons deprived of their liberty should be treated. Although they are not binding, these standards and reports are highly valued.³ The Council of Europe also drew up legally non-binding standards of good principles and practices in the treatment of prisoners: the European Prison Rules (EPR), which were substantially revised in 2006.⁴ Despite their lack of binding effect, they too have strong moral authority amongst ECHR member states.

Rule 70 of the EPR expresses the importance of an effective complaint procedure to enable prisoners to file a complaint when they feel that they are being or have been ill-treated by prison staff or fellow prisoners. Additionally, in 2017 in its 27th general report, the CPT devoted a chapter to such complaint procedures in prisons.⁵ According to the CPT, complaint procedures serve to protect the human rights of prisoners and can reduce tensions between prisoners and prison staff and contribute to a positive relationship between them. Therefore, complaint procedures in prison should be readily available, accessible and confidential, should provide an effective remedy and should be traceable in official records. However, the CPT found that in many countries there are no complaint procedures or that, if they exist, they display major shortcomings, for example that the complaint bodies do not function independently from the prison authorities.⁶

1.2. THE CASE OF THE DUTCH COMPLAINT PROCEDURE

In the Netherlands, a system of complaint and appeal procedures was developed in the 1970s for the realization of the fundamental human rights of prisoners. Legally and theoretically speaking, the Dutch complaint procedure is “picture-perfect”. After all, it complies with (most of) the – partly overlapping – criteria for complaint procedures as determined by the ECtHR and the CPT and the standards of the EPR:⁷ it is available, the complaint bodies are independent, it

¹ Assenov and others v Bulgaria App no 90/1997/874/1086 (ECtHR, 28 October 1998), read in combination with Art. 1 ECHR; Sakir v Greece App no 48475/09 (ECtHR, 24 March 2016); MC v Bulgaria App no 39272/98 (ECtHR, 4 December 2003); Šečić v. Croatia App no 40116/02 (ECtHR, 31 May 2007). See also Aisling Reidy, *Handbook no 6: A guide to the implementation of Article 3 of the European Convention on Human Rights, The prohibition of torture* (Council of Europe 2003), 36.

² <www.coe.int/en/web/cpt/about-the-cpt> accessed 17 February 2022.

³ Rod Morgan, ‘The European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment’ in Dirk Van Zyl Smit and Frieder Dünkel (eds), *Imprisonment Today and Tomorrow. International Perspectives on Prisoners’ Rights and Prison Condition* (Kluwer Law International 2001), 717; Jim Murdoch, *The Treatment of Prisoners: European Standards* (Council of Europe Publishing 2006), 45.

⁴ Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules.

⁵ CPT/Inf (2018)4, 25–29.

⁶ CPT/Inf (2018)4, 25.

⁷ Pauline Jacobs and Anton van Kalmthout, ‘The Dutch complaint and appeal procedure for prisoners in the light of European standards’ in Gaëtan Cliquennois and Hugues de Suremain (eds), *Monitoring Penal Policy in Europe* (1st edn, Routledge 2017) 54–70; Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy* (OUP 2009).

allows complainants active participation and legal assistance, it provides redress, it is both a preventive and compensatory remedy, and it offers reasonable prospects of success.⁸

Consequently, this procedure is one of the very few that has (repeatedly) received positive consideration by the CPT.⁹ The Dutch complaint procedure was even brought forward by the ECtHR as an example of an effective remedy for prisoners to enforce their human rights.¹⁰ Therefore – seemingly – the Dutch complaint procedure could provide an example for other countries of an effective complaint procedure in prisons. So far, it has already inspired Belgium to implement a similar complaint procedure.¹¹ However, in practice the Dutch complaint procedure is dealing with several challenges: it is overflowing with complaints and Dutch prisoners are not satisfied with the way their complaints are dealt with – as the Life in Custody Study (hereafter: LIC Study) shows.¹² Therefore, we call for more empirical research to identify the causes of and solutions for these challenges, to improve the Dutch complaint procedure in prisons and to prevent transplanting these challenges into the complaint procedures of countries looking to adopt a similar system – such as Belgium.

This article deals with two subjects in particular, which are both related to the aim of making the Dutch complaint procedure resistant and future-proof. Firstly, we call for more empirical research to investigate why complainants are not satisfied with the – legally good – Dutch complaint procedure and how this could be improved. Looking at previous research as well as at the questionnaire used in the LIC Study, we argue that at least the perceived justice of the outcome as well as the perceived justice of the procedure should be taken into account in this research. Remarkably, the relevance of perceived procedural justice (in prisons) has been researched in numerous studies. However, the perceived justice of the complaint procedure in prisons has not yet been studied in the Netherlands and has been studied only rarely in other countries. Improving the complainants' perceived procedural justice could prove beneficial for the (perceived) legitimacy and effectiveness of the procedure.

Secondly, another challenge which undermines the (effectiveness of the) Dutch complaint procedure and probably affects complainants' satisfaction with the procedure, is the high case load it has been facing over the last years. This high case load has several negative consequences, such as the fact that complaint committees often cannot meet the decision deadline and complaints are not settled within due time. As part of a solution for this high case load we see potential in focusing on improving prisoner-staff relationships and the willingness of all parties involved to deal with complaints at an early stage, trying to prevent a formal complaint procedure.

In this article we first briefly describe the Dutch complaint procedure (Section 2). Secondly, we deal with the first challenge we identify using the outcomes of the LIC Study: complainants' dissatisfaction with the Dutch complaint procedure (Section 3). We devote some attention to the (possible) relevance of research into the perceived procedural and distributive justice of the Dutch complaint procedure as part of the solution for this problem. Thirdly (Section 4), we focus on the second challenge we identify: the increasingly high case load of the Dutch complaint procedure, which has several negative consequences. We describe these and review to what extent the measures proposed by the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*, hereafter: RSJ) could be an improvement thereof. This will result in directions for research and points to which to pay attention while implementing these measures (Section 5).

⁸ Jacobs and Van Kalmthout (n 8) 54–70. They base this on *Varga and others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13 (ECtHR, 10 March 2015); *Ananyev and others v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012) paras. 110, 215; *Alimov v Turkey* App no 14344/13 (ECtHR, 6 September 2016) para. 66; *Pugžlys v Poland* App no 446/10 (ECtHR, 14 June 2016) para 43.

⁹ CPT/Inf (93)15, 46; CPT/Inf (2008)2, 29; CPT/Inf (2015)14, 22; CPT/Inf (2017)1, 35.

¹⁰ *Ananyev and others v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).

¹¹ An-Sofie Vanhouche and Olivia Nederlandt, 'Eindelijk een onafhankelijk en effectief toezicht op de Belgische gevangenissen? Een overzicht van de recente wetswijzigingen en discussies over het toezicht op de Belgische gevangenissen' (2019) 36 *Fatik* 25 <<https://hdl.handle.net/2078.3/216810>>.

¹² This is a large-scale evaluation study conducted among 4,538 prisoners in the Netherlands into the living environment in Dutch prisons: Esther FJC van Ginneken and others, 'The Life in Custody Study: the quality of prison life in Dutch prison regimes' (2018) 4 *J Criminol Res Policy Prac* 253 <<https://doi.org/10.1108/JCRPP-07-2018-0020>>.

2. THE DUTCH COMPLAINT PROCEDURE: A “PICTURE-PERFECT” PROCEDURE IN THE LIGHT OF EUROPEAN HUMAN RIGHTS STANDARDS

Van Der Rijst and Jacobs
Utrecht Law Review
DOI: 10.36633/ulr.711

4

It is important to substantiate why the Dutch complaint procedure could be a good example for other countries to follow – legally speaking. Therefore, we shortly describe the complaint procedure in Dutch prisons and point out reasons for its high quality from a human rights perspective, mostly based on the EPR and the CPT standards. Firstly, according to the CPT, complaint procedures in prison should be readily ‘available’.¹³ This means that prisoners should be legally entitled to lodge a complaint, other interested parties may act on behalf of the prisoner and complaints that do not concern ill-treatment or any other serious human rights violations may be dealt with through *alternative dispute resolution*. Secondly, the complaint procedure should be ‘accessible’: prisoners should receive oral, as well as written *information* about the procedure in a language they understand; the appropriate complaint forms should be easily available and all necessary material to fill in the form should be freely accessible. Special measures should be taken for persons with particular needs. Thirdly, the procedure should be ‘confidential and safe’: filing a complaint should be *free from intimidation and reprisals*. Fourthly, the procedure should be ‘effective’: it should process complaints *promptly, thoroughly and expeditiously*. If the complaint is accepted, it should be *remedied* and followed by a suitable sanction. If necessary, legal assistance should be provided and in case of serious human rights violations, the complaint bodies should be able to initiate proceedings *ex officio*, without a preceding complaint. The CPT mentions explicitly the *perceived fairness* of the procedure and that the complaint bodies should be *independent*. Finally, filed complaints should be ‘traceable’ in official records and statistics.¹⁴

In the EPR, Rule 70 is dedicated to an effective complaint procedure in prisons. Rule 70.1 requires that prisoners – and in some cases their relatives (Rule 70.5) – have the ‘opportunity’ to file a complaint to the competent authority, ‘without being punished’ (70.4). They should be entitled to seek ‘legal assistance’ (Rule 70.7) and the prisoner should have the ‘right to appeal’ if their request is denied (Rule 70.3). If possible, ‘mediation’ should be tried first (Rule 70.2).

The Dutch complaint procedure adheres to virtually all of these EPR and CPT standards. In the Netherlands, the prisoner’s right to file a complaint is described in Articles 60–68 of the Custodial Institutions Act (*Penitentiaire Beginselenwet*, hereafter: CIA). A prisoner is entitled to file a complaint with the Complaint Committee against any decision taken by or on behalf of the governor of the prison. This committee is independent from the prison and consists of members of the general public, as independent representatives of society.

If the complaint is sustained after mediation, one or three members of the Complaint Committee deal with a complaint during a closed hearing (CIA Article 62). During this session, both the complainant (the prisoner) and the respondent (the governor) are allowed to represent their side, produce documents and ask each other questions. Moreover, the complainant is entitled – but not obliged – to be assisted by a lawyer, free of charge and by an interpreter if necessary (CIA Article 65). The basic premises are that complaint procedures have a low threshold, detainees are self-reliant and, as such, do not need legal assistance.¹⁵

The Complaint Committee’s decision should usually be communicated within four weeks and will contain a declaration that the complaint is inadmissible, unfounded or well founded. The decision must contain reasons for the decision reached and a report of the hearing, translated if necessary (CIA Article 67). If a complaint is declared to be fully or partly well founded, the Complaint Committee may instruct the governor to take a new decision, take a new decision itself, or merely annul the decision. If the annulment concerns a decision of the governor that has already been implemented and cannot be reversed, the Complaint Committee can determine that the complainant will be compensated. This compensation may be awarded in kind, such as extra visit(s) or telephone calls, but financial compensation is also possible (CIA Article 68).

¹³ CPT/Inf (2018)4, 27–28.

¹⁴ CPT/Inf (2018)4, 29.

¹⁵ Pauline Jacobs, Anton van Kalmthout and Joep Lindeman, *Eupretrial Rights Work Package 3 – Actors and Practices, Report on the Netherlands* (UU 2018) 22.

In conclusion, as earlier research shows,¹⁶ the Dutch complaint procedure complies with (most of) the – partly overlapping – criteria for complaint procedures as determined by the ECtHR and the CPT and the standards of the European Prison Rules (hereafter: EPR). After all, it provides a preventive and compensatory remedy because an external, independent body deals with complaints. This independent body has the competence to issue binding and enforceable decisions. Moreover, it has the power to redress the complainant's situation or to provide financial or other means of compensation. In addition, the Dutch complaint procedure provides an effective remedy since prisoners can effectively participate in the procedure and they may be assisted by a lawyer.¹⁷

3. CHALLENGE AND CALL FOR ACTION I: RESEARCH INTO REASONS AND SOLUTIONS FOR COMPLAINANTS' DISSATISFACTION TAKING INTO ACCOUNT (AT LEAST) PERCEIVED PROCEDURAL JUSTICE

3.1. DISSATISFACTION WITH THE DUTCH COMPLAINT PROCEDURE

Despite this legally outstanding procedure, according to the results of the LIC Study, as described by Van Ginneken and others, prisoners are not very satisfied with the settlement of complaints in practice, (see *Table 1*).¹⁸ In this study, the quality of life in prison in the Netherlands was measured by administering a wide-scale survey amongst 4,538 prisoners in pre-trial detention and in prisons, in a total of 28 prisons in the Netherlands in the first four months of 2017. To investigate the satisfaction of prisoners with the complaint procedure, prisoners were asked to indicate to what extent they agreed with four statements: 1) the visiting officer on a monthly or weekly basis could be easily reached, 2) the Complaint Committee took the complaint seriously, 3) the complaint was dealt with swiftly and 4) I am satisfied with how the complaint was dealt with.¹⁹

The results were fairly low: on a scale from 1–5 (from completely disagree to completely agree), the mean was a little over 2.5, score 2 reflecting *somewhat disagree* and score 3 reflecting *neutral*. Twelve out of the seventeen included aspects of prison life scored higher, only four scored lower, being reintegration; shop quality; food quality; and the availability of meaningful activities (see *Table 1*). By contrast, the respondents were fairly positive concerning safety, relationships in prison and the quality of care.

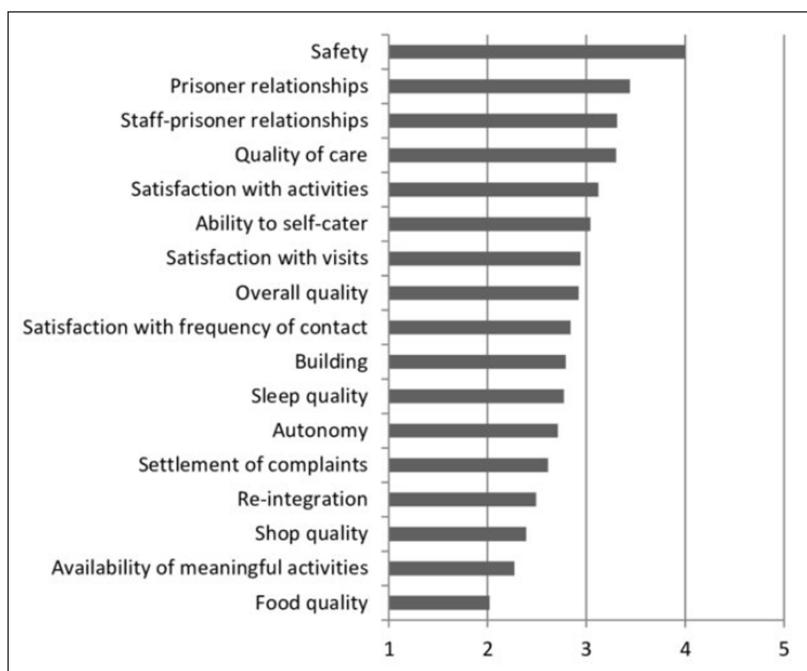


Table 1 Mean scores on prison climate scales.²⁰

¹⁶ Jacobs and Van Kalmthout (n 8) 54–70; Smit and Snacken (n 8).

¹⁷ Jacobs and Van Kalmthout (n 8) 54–70.

¹⁸ Van Ginneken and others (n 13).

¹⁹ In the questionnaire, the prisoners were only asked about their experiences with the Complaint Committee, not the Appeals Committee.

²⁰ Van Ginneken and others (n 13) 262.

3.2. RELEVANCE OF PERCEIVED PROCEDURAL JUSTICE RESEARCH

Van Der Rijst and Jacobs
Utrecht Law Review
DOI: 10.36633/ulr.711

6

Perceived procedural justice

The second and fourth questions of the questionnaire (the Complaint Committee took the complaint seriously and I am satisfied with how the complaint was dealt with) point at the possible relevance of the perceived procedural justice of the complaint procedure to improve complainants' dissatisfaction. The role of perceived procedural justice in the subjects' evaluation of a procedure and of the authorities involved has been given an empirical basis by Thibaut and Walker.²¹ Perceived procedural justice is the fairness and justness of a procedure and of the authorities in charge, as perceived by its subjects, the people undergoing the procedure. Important determinants of perceived procedural justice are *trust, respect, neutrality and voice*.²² Firstly, *trust* reflects the subject's confidence in the (competence of the) decision-making authority and therefore the trustworthiness thereof.²³ Secondly, a determinant is *respect*: the (polite and respectful) treatment of the party by the decision-making authority.²⁴ Thirdly, *neutrality* reflects the perceived impartiality and objectivity of the decision-making authority. Finally, *voice* expresses that the party should feel heard and have the opportunity to participate in the process.²⁵

In particular, the *relational* aspect of perceived procedural justice is important in prisons.²⁶ Interpersonal respect between prison staff and prisoners means, according to Hulley and others, that prisoners are being treated as autonomous, as individuals and without prejudice by the prison staff.²⁷ In the literature, interpersonal, interactive, or interactional justice is sometimes distinguished from perceived procedural justice,²⁸ and is sometimes understood as part thereof. In this article, following amongst others Van den Bos, Van der Velden and Lind,²⁹ we therefore see the interactional element as – an important – part of the concept of perceived procedural justice.

According to Tyler, the perceived procedural justice of an authority's decision-making procedure adds to the overall legitimacy of and trust in that authority even more than the decision itself, leading people to be more likely to voluntarily accept and comply with the decisions of this

21 John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (1st edn, LEA1975).

22 Of course this is too simplistic, usually perceived procedural justice is measured using an elaborate questionnaire.

23 Derrick Franke, David Bierie and Doris Layton Mackenzie, 'Legitimacy in corrections, a randomized experiment comparing a boot camp with a prison' (2010) 1 Criminal Public Policy 89, 103 <<https://doi.org/10.1111/j.1745-9133.2010.00613.x>>.

24 Tom R Tyler, 'Procedural Fairness and Compliance with the Law' (1997) 133 SJES 219, 231 <<https://ideas.repec.org/a/ses/arsjes/1997-ii-8.html>>; Susie Hulley, Alison Liebling and Ben Crewe, 'Respect in prisons: Prisoners' experiences of respect in public and private sector prisons' (2012) 12 Criminol Crim Justice 3 <<https://doi.org/10.1177%2F1748895811423088>>.

25 Tyler (n 24) 232–233.

26 Richard Sparks and Anthony Bottoms, 'Legitimacy and order in prisons' (1995) 46 Br J Sociol 45; Alison Liebling and Helen Arnold, *Prisons and their Moral Performance: A Study of Values, Quality, and Prison Life* (1st edn, OUP 2004); Alison Liebling, 'Incentives and earned privileges revisited: Fairness, discretion and the quality of prison life' (2008) 9 J Scand Stud Criminol Crime Prev 25 <<https://doi.org/10.1080/14043850802450773>>; Faye S Taxman and Jill A Gordon, 'Do fairness and equity matter? An examination of organizational justice among correctional officers in adult prisons' (2009) 36 Crim Justice Behav 695 <<https://doi.org/10.1177%2F0093854809335039>>; Hulley, Liebling and Crewe (n 24); Miranda Boone, Martina Althoff and Frans Koenraadt, *Het leefklimaat in justitiële inrichtingen* (Boom Criminologie 2016); Francis D Boateng, 'Misconduct within the "four walls": Does organizational justice matter in explaining prison officers' misconduct and job stress?' (2019) 63 Int J Offender Ther Comp Criminol 289; Christopher M Campbell and others, 'Do perceptions of legitimacy and fairness matter in prison? Examining how procedural and distributive justice relate to misconduct' (2020) 47 Crim Justice Behav 1630 <<https://doi.org/10.1177%2F0093854820916901>>.

27 Hulley, Liebling and Crewe (n 24).

28 Robert J Bies and Joseph S Moag, 'Interactional justice: communication criteria of fairness' in Roy J Lewicki, Blair H Sheppard and Max H Bazerman (eds), *Research on negotiations in organizations* (1st edn, JAI Press 1986) 43; Robert J Bies, 'International (in)justice: The sacred and the profane' in Jerald Greenberg and Russell Cropanzano (eds), *Advances in organization justice* (1st edn, SUP 2001) 89; Jerald Greenberg, 'The social side of fairness: interpersonal and informational classes of organizational justice' in Russell Cropanzano (ed), *Justice in the workplace. Approaching fairness in human resource management* (1st edn, LEA 1993) 79.

29 Kees van den Bos, Lynn van der Velden and E Allan Lind, 'On the role of perceived procedural justice in citizens' reactions to government decisions and the handling of conflicts' (2014) 4 ULR 1, 7 <<https://doi.org/10.18352/ulr.287>>.

authority.³⁰ Nowadays, the importance of perceived procedural justice is researched by many authors in many different settings – as well as in a correctional setting. Research on perceived procedural justice *in prisons* in various countries shows that increasing perceived procedural justice can have many positive effects. For instance, research by Franke and others shows that positive experiences in prison not only improve prisoners' perceived justice – and thus their acceptance – of the procedures they are involved in, but also prisoners' feelings of the legitimacy of the entire justice system.³¹ Perceived procedural justice in prison has also been linked to lower levels of reoffending after release from prison.³² Moreover, legitimacy of the prison system and order in prison seem to be related.³³ According to both Beijersbergen and others,³⁴ and Reisig and Meško,³⁵ prisoners who feel that they are being treated fairly, misbehave less often.

Distributive justice

Competing with the notion of *perceived procedural justice*, is the notion of *distributive justice*. The latter dictates that the outcome of a decision-making procedure, the final decision, is important for the subject's feeling of justice: when a decision is taken that benefits the subject, this feeling of having obtained justice is greater than when the decision negatively affects the subject. Several authors emphasize the importance of the outcome rather than the process.³⁶ There is reason to believe that, especially in prisons, distributive justice is very important as well – and maybe even more important than perceived procedural justice. For instance, Boone and Kox point at the relevance of distributive justice (individual treatment) in prison.³⁷

What matters most in complaint procedures in prisons?

Although a lot of research into procedural justice has been carried out, *complaint procedures* in prisons have rarely been investigated – and not yet in the Netherlands. So far, we have only found the work of Bierie³⁸ and Jenness and Calavita.³⁹ Bierie connects the levels of violence amongst prisoners to the procedural justice of how complaints are dealt with.⁴⁰ According to Bierie, 'violence within a given prison does increase significantly with the volume of late replies as well as substantive rejections of complaints',⁴¹ of which he sees the latter as leading to procedural injustice. However, he does not measure prisoners' perceptions of procedural justice. Interestingly, the research of Jenness and Calavita, the only authors – as far as we

³⁰ Tom R Tyler, *Why People Obey the Law* (1st edn, YUP 1990); Tom R Tyler and Kenneth Rasinski, 'Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson' (1991) 25 Law Soc Rev 621 <<https://doi.org/10.2307/3053729>>; Tom R Tyler and Yuen J Huo, *Trust in the Law, Encouraging public cooperation with the police and courts* (RSF 2002); Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 Annu Rev Psychol 375 <<https://doi.org/10.1146/annurev.psych.57.102904.190038>>; Tom R Tyler, *Psychology and the Design of Legal Institutions* (1st edn, Wolf Publishers 2007); Tom R Tyler 'Psychology and institutional design' (2008) 4 Rev L & Econ 801 <<https://doi-org.vu-nl.idm.oclc.org/10.2202/1555-5879.1233>>.

³¹ Franke, Bierie and Mackenzie (n 23).

³² Andrew McGrath, 'Offenders' perceptions of sentencing process: A study of deterrence and stigmatization in the New South Wales children's court' (2009) 42 Aust NZ J Criminol 24 <<https://doi.org/10.1375%2Facri.42.1.24>>; Raymond Paternoster and others, 'Do fair procedures matter? The effect of procedural justice on spouse assault' (1997) 31 Law Soc Rev 163 <<https://doi.org/10.2307/3054098>>.

³³ Richard Sparks, Anthony Bottoms and Will Hay, *Prisons and the Problem of Order* (OUP 1996); Jonathan Jackson and others, 'Legitimacy and Procedural Justice in Prisons' (2010) 191 Prison Serv J 4 <<http://reprints.lse.ac.uk/29676/>>.

³⁴ Karin A Beijersbergen and others, 'Procedural Justice, Anger, and Prisoners' misconduct: A Longitudinal Study' (2015) 42 Crim Justice Behav 196 <<https://doi.org/10.1177%2F0093854814550710>>.

³⁵ Michael D Reisig and Gorazd Meško, 'Procedural justice, legitimacy, and prisoner misconduct' (2009) 15 Psychol Crime Law 41 <<https://psycnet.apa.org/doi/10.1080/10683160802089768>>.

³⁶ E.g. Linda J Skitka and Elizabeth Mullen, 'Moral Convictions Often Override Concerns About Procedural Fairness: A Reply to Napier and Tyler' (2008) 21 Soc Justice Res 529 <<https://doi.org/10.1007/s11211-008-0085-9>>.

³⁷ Miranda Boone and Mieke Kox, 'Neutrality as an element of perceived justice in prison: Consistency versus Individualization' (2014) 4 ULR 118 <<https://doi.org/10.18352/ulr.294>>.

³⁸ David M Bierie, 'Procedural justice and prison violence: Examining complaints among federal inmates (2000–2007)' (2013) 19 Psychol Policy & Law 15 <<https://psycnet.apa.org/doi/10.1037/a0028427>>.

³⁹ Valerie Jenness and Kitty Calavita, '"It Depends on the Outcome": Prisoners, Grievances, and Perceptions of Justice' (2018) 52 Law Soc Rev 41 <<https://doi.org/10.1111/lasr.12312>>.

⁴⁰ Bierie (n 38).

⁴¹ *ibid* 24.

could find – who studied the importance of prisoners' perceived procedural justice of a prisoner grievance system (in California) in prison found, in contrast to Bierie, that the outcome of the procedure mattered more than its perceived procedural justice.⁴² According to these authors, this can be explained by the high stakes that are in play for these prisoners.⁴³

Following on from this the Dutch complaint procedure, as described in Section 2, includes aspects that could be said to be *procedurally just*. For instance, the possibility for complainants to defend their case and react to propositions that have been forwarded by the prison board and to have (free) legal assistance – which is increasingly used⁴⁴ – grants them active participation and a voice. Additionally, complaints are dealt with by an independent, impartial and neutral body in two instances. Nevertheless, apparently this (legal) procedural justice is not perceived by complainants – at least, they are not satisfied with the current procedure. Following perceived procedural justice theory, this dissatisfaction could have a negative impact on the legitimacy and effectiveness of the Dutch complaint procedure. We therefore argue that the causes of and solutions for this dissatisfaction should be investigated in more depth. Additionally, it is not yet sure whether the perceived justice of the complaint procedure itself or of its outcome matters most. Research should take place in order to find out what matters most while trying to improve complaint procedures in prisons.

4. CHALLENGE AND CALL FOR ACTION II: FOCUS ON RESOLVING CONFLICTS AT AN EARLY STAGE

4.1. THE DUTCH COMPLAINT PROCEDURE UNDER PRESSURE

Another reason for dissatisfaction amongst complainants is reflected in the third question of the LIC Study's questionnaire (the complaint was dealt with swiftly). This points at another – maybe even more pressing – challenge with which the Dutch complaint procedure is dealing: the high case load which the Dutch Complaint and Appeal Committees in virtually all prisons are currently facing.⁴⁵ The number of complaints has been increasing over the years and remains high. In 2018, a total of 21,341 complaints were lodged with the Complaint Committees in all Dutch prisons.⁴⁶ This is a high number, especially since the numbers of prisoners in the Netherlands has been decreasing continuously since 2005.⁴⁷ In 2018 there was an influx of 30,845 prisoners (see *Table 2*),⁴⁸ and a prison population of 33,200 in total.⁴⁹

	2013	2014	2015	2016	2017	2018
Number of complaints	20.217	22.767	19.798	19.361	21.653	21.341
Influx of detainees	39.653	41.400	38.446	33.056	31.625	30.854

Table 2 Cases filed before Complaint Committees in Dutch prisons compared to the total influx of detainees.⁵⁰

It is generally accepted that the high number of complaints has had a bearing on the Dutch system of complaint procedures for prisoners. Due to the high number of complaints, Complaint Committees in virtually all prisons report that they are unable to deal with all the complaints

⁴² Jenness and Calavita (n 39).

⁴³ Jenness and Calavita (n 39).

⁴⁴ RSJ, *Spanning in detentie* (2019) 15 <<https://www.rsj.nl/documenten/rapporten/2019/12/17/advies-spanning-in-detentie#:~:text=Spanning%20in%20detentie%20ontstaat%20daar,van%20strafdoelen%20in%20gevaar%20komt.>> accessed 17 February 2022.

⁴⁵ RSJ (n 44) 45–47.

⁴⁶ ibid 45.

⁴⁷ On the record low numbers of prisoners in the Netherlands, see Miranda Boone, Francis Pakes and Sigrid van Wingerden, 'Explaining the collapse of the prison population in the Netherlands: Testing the theories' (2020) Eur J Criminol online <<https://doi.org/10.1177/1477370819896220>>. Possibly, the number of prisoners is increasing again since 2019, see <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/82321NED/table?fromstatweb>. It will have to become clear in the coming years whether this is an actual trend.

⁴⁸ RSJ (n 44) 46.

⁴⁹ According to CBS data, see <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/82321NED/table?fromstatweb>.

⁵⁰ RSJ (n 44) 46.

within the set time limit of four weeks.⁵¹ The LIC Study reveals that at that time (in 2017), prisoners were already critical of the time it took for their complaint to be dealt with and there is reason to believe that, because of the increasing number of complaints and workload, the time it takes for complaints to be dealt with has only gone up since then.

In an attempt to deal with complaints more swiftly, nowadays complaints are often assessed by one member of the Complaint Committee, rather than the usually required three members.⁵² On the one hand, this may result in a more efficient way of working, resulting in dealing with complaints more quickly. On the other hand, however, this may negatively affect the complainants' trust that their complaint is dealt with adequately, professionally and competently.

A marked downside of the long processing time for complaints is that late replies to complaints are often ineffective, as the complainant may already be out of prison.⁵³ The speed of decision making has also been related to the perceived procedural justice and the perceived legitimacy of the procedure, since a low decision-making speed invokes uncertainty.⁵⁴

One of the reasons for the high case load may be the shortage of prison staff which Dutch prisons are dealing with.⁵⁵ Due to the closure of several prisons and the insecurity and the fear of dismissal, many prison staff members have left. Due to these shortages, prison staff and management are not able to invest sufficient time in informing prisoners about the rules, rights and procedures in prison and in building relationships with prisoners.⁵⁶ Therefore, prison staff have insufficient time to devote attention to the prisoners and to build a relationship with them. According to the RSJ, this staff shortage could (in part) explain the increased number of complaints. Due to these staff shortages, prisoners occasionally miss certain activities if, for instance, a staff member is on sick leave. As a result, prisoners may be more likely to file a complaint, adding to the high case load which the Complaint Committee is already facing.⁵⁷

Thus, it seems to be the case that the shortage of prison staff in the Netherlands can lead to dissatisfaction amongst prisoners, leading to more complaints, which, in turn, could lead to more dissatisfaction amongst prisoners concerning the way their complaints are dealt with, causing an ongoing downward spiral.

4.2. REVIEW OF PROPOSED MEASURES FOR IMPROVEMENT

To relieve the pressure on the Dutch complaint procedure, trying to decrease the number of complaints, the RSJ has proposed several measures for improvement in a report of December 2019. These measures are (partially) approved by the Minister of Justice and Security. We argue that to prevent the Dutch complaint procedure from collapsing under its own success, different ways should be explored to prevent the system from (further) overflowing. To reach this goal, not only the procedure should be perceived as procedurally just, but also the treatment by prison staff, to prevent issues from actually reaching the formal complaint procedure. Here, in particular, the interrelational aspect of perceived procedural justice could play an important role, as well as the presence of informal possibilities to resolve conflicts when they occur.

In the following paragraphs, we will describe these measures and review to what extent they may or may not improve prisoners' satisfaction with the Dutch complaint procedure, using perceived procedural justice theory. We note that other factors may play a role as well, such as the outcome of the case, which we do not review here due to practical reasons. Further research will be needed to show whether and to what extent these measures are an improvement on

⁵¹ RSJ (n 44) 45.

⁵² Jacobs, Van Kalmthout and Lindeman (n 16) 14.

⁵³ Pauline Jacobs and Joep Lindeman, 'De tenuitvoerlegging van de voorlopige hechtenis. Belemmerend voor of juist in dienst van de voorbereiding van de strafzaak?' (2019) 12 Strafblad 6, 13.

⁵⁴ Annukka Valkeapää and Tuija Seppälä. 'Speed of Decision-Making as a Procedural Justice Principle' (2014) 27 Soc Justice Res 305 <<https://doi.org/10.1007/s11211-014-0214-6>>.

⁵⁵ RSJ (n 44) 45. Strikingly, the Netherlands has one of the lowest prisoner to prison staff ratios in Europe, according to Marcelo F Aebi and Mélanie M Tiago, 'Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I report' (2021) Council of Europe Annual Penal Statistics, Figure 10.

⁵⁶ RSJ (n 44) 45.

⁵⁷ RSJ (n 44) 53.

(Intensified) use of mediation

Firstly, a possible solution that is brought forward by the RSJ is the extended use of mediation. Mediation is already current practice and was formalized by law as from 1 January 2021. Before that date, it was already common practice that a commissioner of the Supervisory Committee visits the prison on a monthly or even a weekly basis. This commissioner will talk and listen to the prisoners and will try to solve any existing problems informally. On the basis of the new legislation that entered into force on 1 January 2021, prisoners can ask (this is not obligatory) for mediation themselves concerning a complaint for which an official complaint procedure can be commenced and concerning the conduct of prison staff and government officials (CIA Article 59a).⁵⁸ If requested, mediation will be performed by any member of the Supervisory Committee, who will enable both the prisoner and the governor of the prison to orally express their point of view, if possible in each other's presence (CIA Article 59a, sec. 4). On the basis of this mediation, the member of the Supervisory Committee aims to propose a solution that is acceptable to both parties within four weeks (CIA Article 59a, sec. 3).

Evaluating this new legislation concerning the use of mediation in the complaint procedure based on a perceived procedural justice framework, mediation can prove beneficial for the relationship between prisoners and prison staff. This relationship is an important element of perceived procedural justice in a broad sense, encompassing interactional justice.⁵⁹ Additionally, mediation can ensure that complaints relating to types of complaints that do not comply with the criteria for a formal complaint, such as the treatment of prisoners by prison staff, are taken into consideration as well.⁶⁰ However, the benefits for the perceived justice of the way a complaint is dealt with, using mediation, depend on the performance thereof. We will therefore deal with several elements of mediation and how these elements could be beneficial for perceived procedural justice.

According to the new legislation, mediation does not necessarily take place in the presence of the complainant and the prison authority at the *same time*. Performing the mediation as much as possible in the presence of both parties would be a good recommendation in this respect. Such a conversation, during which the parties can express their opinions in the presence of each other, can provide the prisoner with a voice and can prevent misunderstandings in communication. In order to benefit the perceived procedural justice of mediation, this procedure should be carried out in a manner so that prisoners feel that they are being heard and that their point of view is being taken into consideration.

The result of the mediation is written down in a report by the mediating member of the Supervisory Committee. This report could be an opportunity to demonstrate that the mediator has listened to the parties, possibly benefitting the perceived justice of the procedure. For the report to have such an effect it should, for instance, elaborate on the arguments of both parties and it should give sufficient reasons for the final decision. From the phrasing in the legal provision, the time limit of four weeks seems to be optional.⁶¹ As mentioned before, the Supervisory Committee is currently unable to meet the time limit that is set for formal complaints. In this respect it is not unimaginable that this will remain an issue if the number of cases to be mediated is high, as is the number of formal complaints at the moment. Exceeding this time limit could prove negative for the perceived procedural justice of the way the complaint is dealt with, as described earlier.

Regardless of the result of the mediation, the possibility to start an official, formal complaint procedure remains open for the prisoner (CIA Article 59a, sec. 5).⁶² This may be positive for

⁵⁸ Paul C Vegter, 'Veegt de Veegwet schoon?' (2020) 2 Sancties 66, 70 <<http://deeplinking.kluwer.nl/?param=00D34157&cpid=WKNL-LTR-Nav2>>.

⁵⁹ Sparks and Bottoms (n 26); Liebling and Arnold (n 26); Liebling 2008 (n 26); Taxman and Gordon (n 26); Hulley, Liebling and Crewe (n 24); Beijersbergen and others (n 34); Boone, Althoff and Koenraadt (n 26); Boateng (n 26); Campbell and others (n 26).

⁶⁰ RSJ (n 44) 60.

⁶¹ Vegter (n 57) 71.

⁶² *ibid* 70.

the perceived voice of the complainant.⁶³ However, for this possibility to remain open, there are additional rules. The prisoner should request mediation within seven days after she or he has become aware of the decision of the Complaint Committee concerned to be able to start a formal complaint procedure (CIA Article 61, sec. 6). Additionally, if the complainant has not first attempted mediation, then she or he should state the reasons for this (CIA Article 61, sec. 3). Also, the formal complaint procedure can be postponed if the chairperson of the Complaint Committee decides that mediation should be tried first, or if the mediation is still pending (CIA Article 63, sec. 4). This may also even further extend the time period in which a complaint is dealt with, which could lead to dissatisfaction among complainants and possibly to perceived unfairness.

Overall it can be concluded that mediation can significantly contribute to perceived procedural justice, if these new rules are adequately explained to the prisoners and if this allows the authorities concerned to have (more) time to talk with complainants and to hear their point of view, in combination with respectful treatment and an impartial mediator. However, the RSJ has indicated that in some prisons the time for these meetings is insufficient and that mediation will lead to a higher workload for the visiting officer, which is already very high.⁶⁴ Consequently, the possible positive effect of these mediation attempts may not be reached in all cases.

The introduction of an internal and informal complaint procedure

A second solution that the RSJ proposes is to complement the current external and formal complaint procedure with an internal and informal complaint procedure.⁶⁵ Such an internal, informal complaint procedure has been highly recommended by the CPT and it already exists in settings other than the prison setting, such as education and healthcare.⁶⁶ The Minister of Legal Protection has agreed to run pilot projects to examine the effectiveness of this solution.⁶⁷ Such a procedure enables prison staff to deal with complaints themselves, without the intervention of an external Complaint Committee. Complaints could first be (orally) expressed to prison staff and if that does not provide the necessary relief, the complaint can be filed in writing with the management staff or the governor of the prison. If the internal complaint procedure does not result in the conflict being resolved, the external complaint procedure could be a second step.⁶⁸

In this way, complaints could be dealt with more rapidly and in a more personal way. The latter could benefit the relationship between prisoners and prison staff and management, which could benefit the perceived procedural justice of the way complaints are dealt with. From a procedural justice theory perspective, for mediation as well as for an informal, internal complaint procedure to be beneficial, the people who deal with the informal complaint should be professional and competent to gain prisoners' trust. Thus, they should not only appear to be so, but they should also be mandated to make the necessary decisions.⁶⁹ Additionally, in order to be effective, as was also mentioned concerning mediation, there should be a possibility for complainants to be able to explain their complaint and for the staff to have enough time to join in a conversation with them, in order for them to feel heard and respected. It should not just add to the current workload.

The introduction of a fee

Thirdly, as a solution the RSJ advises the implementation of (relatively low) fees of, for instance, €1,50 that prisoners would have to pay if they wish to file a complaint, which could be returned to the complainant if the complaint is upheld.⁷⁰ This could prevent prisoners from filing unnecessary or frivolous complaints. Additionally, this could be an incentive to attempt to solve

⁶³ ibid.

⁶⁴ RSJ (n 44) 60.

⁶⁵ ibid 61–62.

⁶⁶ CPT/Inf (2018)4, 26.

⁶⁷ Ministry of Justice and Security, *Beleidsreactie rapport Spanning in detentie (response to the RSJ)* (2019) 2 <<https://www.rsj.nl/documenten/rapporten/2019/12/17/advies-spanning-in-detentie>> accessed 17 February 2022.

⁶⁸ RSJ (n 44) 61–62.

⁶⁹ Vegter (n 57) 70.

⁷⁰ RSJ (n 44) 63–64.

The obligation to pay a fee for a complaint to be dealt with may negatively affect the perceived procedural justice of the complaint procedure. Prisoners with less or no financial means, who may be less able to pay the fees, may feel that they are being treated unequally, compared with prisoners for whom the fees are less of a burden and thus this may be perceived as unfair.⁷² Additionally, fees may send a message that prison staff and management, as well as the Complaint Committee, are not willing to listen to (all of) the prisoners. This may lead to a diminished feeling of being heard, respected and treated fairly amongst prisoners. Introducing a fee would also detract from the good quality of the Dutch complaint procedure in terms of human rights standards. After all, as mentioned, having access to complaint procedures is a fundamental safeguard against ill-treatment and other types of abuse by authorities in prisons. Therefore, according to the CPT's standards, these procedures should be freely accessible and prisoners should not be discouraged from making use of them.⁷³ Requesting payment to file a complaint diminishes this accessibility.

It can be debated whether this measure is necessary and whether there are not less intrusive measures possible. After all, the introduction of an internal and informal complaint procedure alone may already create a sufficient barrier to formal conflict resolution and has the potential to prevent frivolous claims from reaching the formal, overflowing, complaint procedure.

Investing in good personal relationships between prisoners and prison staff and clear rules

Finally, the RSJ advises investing in the personal relationship between prisoners and prison staff and management. As described earlier, research shows that the behaviour of prison staff and the interaction between prisoners and prison staff are particularly important for the perceived procedural justice of prison life. Thus, in order to improve the perceived procedural justice of prison life more generally, the advice of the RSJ to invest in the relationship between prisoners and prison staff is to be welcomed. The Minister of Legal Protection agreed with this and recommended examining possibilities to create more time for prison staff to invest in relationships with the prisoners.⁷⁴

The LIC Study actually shows that prisoners were at that time, around 2017, quite satisfied with their relationships with the prison staff (*Table 1*). It scores roughly a 3.5/5, the third highest score, which provides great potential. Since then, however, the pressure has grown and more prison staff have left, leading to shortages. According to the RSJ, due to this shortage, prison staff have insufficient time to devote attention to the prisoners, and in building relationships with them.⁷⁵ In addition to establishing good prisoner-staff relationships, we argue that the (main) focus should be on the willingness of prisoners and staff to resolve conflicts in their early stages, trying to avoid a (formal) complaint. Staff that have sufficient time and opportunity to engage in such conversations and overall good relations between staff and prisoners are vital in this respect.

5. CONCLUSION: RELIEVING THE DUTCH COMPLAINT PROCEDURE

The Dutch complaint procedure has received positive considerations for its compliance with human rights standards by both the ECtHR and the CPT. Research shows that prisoners are actually not satisfied with the way their complaints are dealt with by the Complaint Committee. With this article, we have demonstrated the importance of further research into the reasons for this dissatisfaction by reviewing potential reasons for the experienced procedural (in)justice by prisoners. We argue for more empirical research into the experienced procedural justice of prisoners who have taken part in complaint and appeal procedures. Knowledge of experienced procedural justice of detainees is indispensable to the discussion on how the Dutch complaint and appeal procedure could be made (more) effective and future-proof. In any such research,

⁷¹ Ministry of Justice and Security (n 66) 2.

⁷² How strong this effect will be obviously also depends on how high the exact fee will be set.

⁷³ CPT/Inf (2018)4, 26–29; Jacobs and Van Kalmthout (n 8).

⁷⁴ Ministry of Justice and Security (n 66) 2.

⁷⁵ RSJ (n 44) 45.

the role of distributive justice can provide another interesting perspective, since some studies show that distributive justice may be especially important in prison – maybe even more important than procedural justice.⁷⁶

However, the (research) focus should not merely be on improving the complaint procedure *itself*. Importantly, the case load of the procedure should be brought down by focusing on resolving complaints at an early stage, *before* they reach a formal complaint procedure. Relieving the current pressure on the complaint system is vital, from a procedural justice perspective as well, as the Complaint and Appeal Committees are currently no longer able to deal with cases in time. A lighter case load could improve the procedure itself as well: committees would have more time to deal with the complaints (with three members) and deciding within the deadline could be feasible again. This could lead to more satisfaction with the complaint procedure for complainants.

In order to make the current procedure effective and future-proof, the RSJ has proposed measures and points for improvement, which have already been (partially) accepted by the Dutch government. However, to know which measures to implement and to implement these effectively, more research into the problem and possible solutions is crucial. Here the notion of procedural justice could also provide valuable insights and could serve as an important assessment framework. We argue that the focus should be on the question how to reach a culture in which there is the aim and the willingness to resolve conflict at an early stage, in a more informal way, rather than letting it escalate and referring it to the formal complaint procedure, which is currently already overflowing. From a procedural justice perspective, the intensified use of mediation, the introduction of an informal complaint procedure and investing in good relationships between prisoners and staff can be positively valued. We do not expect the proposed measure of introducing a fee to have a beneficial effect.

ACKNOWLEDGEMENTS

The authors would like to thank Prof. dr. Kees van den Bos from Utrecht University and Prof. dr. Miranda Boone from Leiden University for their useful feedback and comments on an earlier version of this article.

COMPETING INTERESTS

The authors have no competing interests to declare.

AUTHOR INFORMATIONS

Tessa van der Rijst is a PhD candidate in criminal law at the Free University of Amsterdam. Her PhD research concerns the Dutch criminal law judge's use of the silence or statement of the accused in relation to the evidence and the type of crime in the fact finding courts.

Pauline Jacobs is an Assistant professor in criminal law and criminal procedure at the W.P.J. Pompe Institute for Criminal Law and Criminology of Utrecht University, the Netherlands. She is affiliated with the Montaigne Centre for Rule of Law and Administration of Justice of the same university.

AUTHOR AFFILIATIONS

Tessa van der Rijst  orcid.org/0000-0001-6261-5607

PhD candidate, Free University of Amsterdam, Faculty of Law, De Boelelaan 1105, 1081 HV Amsterdam, NL

Pauline Jacobs  orcid.org/0000-0002-5658-4514

Assistant professor, Utrecht University, Faculty of Law, Janskerkhof 3, 3512 BK Utrecht, NL

TO CITE THIS ARTICLE:

Tessa van der Rijst, Pauline Jacobs, 'The Dutch Complaint Procedure: A "Picture-Perfect" Procedure?' (2022) 18(1) Utrecht Law Review 1–13.
DOI: <https://doi.org/10.36633/ulr.711>

Published: 05 May 2022

COPYRIGHT:

© 2022 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

Utrecht Law Review is a peer-reviewed open access journal published by Utrecht University School of Law.

⁷⁶ Jenness and Calavita 2018 (n 39); Boone and Kox (n 37).

