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Student Paper

The Relationship between Role Conception, Judicial Behaviour and Perceived Procedural Justice

Some Explorative Remarks in the Context of Dutch Post-Defence Hearings

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1. Introduction

Since the entry into force of the Civil Procedural Law Revision Act (*Herzieningswet procesrecht burgerlijke zaken*) in 2002, a post-defence hearing has become an essential part of the Dutch civil legal procedure. After an extensive written round, the post-defence hearing is often the only moment when the parties, their lawyers and the judge directly come together. The legal principle of a post-defence hearing is an integral oral hearing in which the debate between the parties will be completed. This development has generated a lively academic debate in the Netherlands with regard to the interaction between the judge and the parties at the hearing. One issue that has been noted is that post-defence hearings may significantly contribute to the perceived legitimacy of judicial procedures. This is caused by the fair process effect, which suggests that if parties perceive the procedure as fair, they are more likely to perceive the procedure as legitimate.[1] The fair process effect constitutes an important reason for conducting research in order to understand under which conditions parties perceive procedures to be just. Departing from these assumptions, this paper makes a contribution to the discussion in this Utrecht Law Review special issue by sharing the method and results of an explorative research on role conception, judicial behaviour and perceived procedural justice in post-defence hearings.

The study which we conducted at the District Court (*Rechtbank*) of Midden-Nederland examines how the role conception of the judge and his behaviour during the hearing affect subjective procedural justice. The study was designed to function as an experiment for a large-scale research to be conducted later. For that reason, our experiment consisted of only eight cases and did not yield generalizable results. Since, to date, barely any empirical research has been carried out on a combination of the variables of role conception, judicial behaviour and procedural justice, we designed a detailed and comprehensive study in order to measure the variables of role conception, judicial behaviour and subjective procedural justice by qualitative research methods, in particular through observations and interviews. The main aim of this paper is to provide more insight into the barely examined concepts of role conception and judicial behaviour in the context of procedural justice. The data brought forward by our study on procedural justice during post-defence hearings in the District Court of Midden-Nederland complement in important ways the studies that have been carried out so far in the field of subjective procedural justice.

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1 K. van den Bos, 'What is responsible for the fair process effect?', in J. Greenberg & J.A. Colquitt (eds.), *Handbook of Organizational justice*, 2005, p. 274.

By describing our method and illustrating it with some important results, we attempt to offer researchers in the field of procedural justice inspiration to examine some of our findings in future research.

This paper is structured as follows. Section 2 provides the context of our research by explaining briefly the most important concepts of our study. Section 3 describes the methods which we combined in this research. Section 4 discusses our most important findings. Section 5 describes how our multi-method approach adds to the already existing body of research on the topic of procedural justice by providing some examples from our dataset. In section 6 we will draw conclusions and offer some suggestions for follow-up research.

2. Background and context of the research

2.1. The concept of procedural justice

The concept of procedural justice was introduced by Thibaut and Walker in 1975.[2] Their research formed the empirical basis for examining procedural justice from a social-psychological perspective. With the introduction of this concept the focus of studies shifted towards the perception of citizens and participants of the fairness of the proceedings, whereas earlier studies had focused mainly on the effect of the outcomes of procedures on procedural justice judgments.[3] Nowadays, it is generally assumed that procedural justice is of great importance in judging the fairness of procedures, although the question whether subjective procedural justice is more important than the perception of the outcome is still debated.[4]

Judgments on procedural justice are complex.[5] Studies on procedural justice reveal that there are numerous components influencing this judgment. In his speech on the 18th January 2012 in The Hague, Lind stated that the most important components of procedural justice are voice, respect and explanation.[6] However, Tyler distinguished four key components of perceived procedural justice, which are voice, neutrality, respect and consistency.[7] Later studies suggest that the value of a high degree of procedural justice can be found in one of its main effects. Folger, Rosenfield, Grove and Corkran have labelled this effect the 'fair process effect' which entails that the perception of a fair procedure has a positive effect on the subsequent reactions of the parties, such as their satisfaction with the outcomes received.[8] If parties perceive the procedure as fair, they are also more likely to perceive the procedure as legitimate.[9] Research by Tyler showed that perceiving a procedure as fair encourages decision acceptance. In addition, positively perceived procedural justice leads to positive views about the legal system as well.[10] Studies show that when citizens have experienced a high degree of procedural justice, this can positively influence the perceived legitimacy of the courts.[11]

2.2. Post-defence hearings in the Dutch courts

In the last few years, the concept of procedural justice has become a popular topic for research into post-defence hearings in civil procedures in the Dutch courts. An important reason for this is the entry into force of the Civil Procedural Law Revision Act in 2002. This change should be seen against the background of a growing belief that Dutch civil procedure did not allow parties to resolve their conflict quickly and efficiently. In order to improve the efficiency of the proceedings, it was decided to provide

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2 J. Thibaut & L. Walker, *Procedural justice: a psychological analysis*, 1975.

3 J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken*, 2010, p. 20.

4 M. Barendrecht & A. Klijn, *Balanceren en vernieuwen. Een kaart van sociaal-wetenschappelijke kennis voor de Fundamentele Herbezinning Procesrecht*, Council for the Judiciary (*Raad voor de rechtspraak*) 2004, pp. 14-15. More recently: B.C.J. van Velthoven, 'Over het relatieve belang van een eerlijke procedure: procedurele en distributieve rechtvaardigheid in Nederland', 2011 *RM Themis*, no. 1, pp. 7-16, disputed by A.F.M. Brenninkmeijer et al., 'Het grote belang van procedurele rechtvaardigheid in Nederland en daarbuiten', 2011 *RM Themis*, no. 4, pp. 178-181.

5 T. Tyler, 'What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures', 1988 *Law & Society Review*, no. 1, p. 103.

6 A.E. Lind, speech in The Hague on the 18th of January, 2012.

7 T. Tyler, speech in Leiden on the 7th of March, 2012.

8 R. Folger et al., 'Effects of "voice" and peer opinions on responses to inequity', 1979 *Journal of Personality and Social Psychology* 37, no. 12.

9 Van den Bos 2005, supra note 1, p. 274.

10 T. Tyler, 'Procedural justice and the courts', 2007 *Court Review* 44, no. 1/2, p. 27.

11 A. Lind & T. Tyler, *The social psychology of procedural justice*, 1988, pp. 64-65; Van der Linden 2010, supra note 3, pp. 31-32.

for one moment in the procedure in which parties could actually have face-to-face interaction with the judge: the post-defence hearing.[12] This 'day in court' has led to an increasing interaction between the judge and the parties, which, in turn, has encouraged greater scientific attention for this interaction in court. Furthermore, the increased importance of the post-defence hearing demands a different attitude and skills on the part of the judge. It no longer suffices to have excellent legal skills. The judge should take shared responsibility with the parties and their lawyers to provide tailor-made solutions that actually solve the conflict.[13]

Several studies have examined the perception of parties in civil procedure in order to understand how judges can uphold these high standards. One of the first studies was carried out by Heeger-Hertter and Ippel in 2006.[14] This research focused on the daily practice in Dutch courts and how this practice was experienced and evaluated by its participants – judges, lawyers and parties. In 2009, Van der Linden, Klijn and Van Tulder published a study in which the influence of judicial behaviour in post-defence hearings on the procedural justice perceived by the parties was examined.[15] Their research shows that certain behaviour has a measurable impact on this perception of the parties. For example, this study revealed that parties who are often interrupted by judges experience a lower degree of procedural justice.[16] It was also shown in this study that the personal traits of judges, such as their personality or role conception, may also influence the experience of parties.[17] In her dissertation, Van Der Linden examined procedural justice during the post-defence hearing as well as the tendency of judges to promote settlements in these hearings.[18] She concludes with three recommendations. First, judges should improve the manner in which they provide information to parties. Second, there should be more attention for the specific skills required to deal with parties in a hearing so that their real dispute is addressed. Third, it is necessary to pay more attention to the ways in which judges facilitate settlements.

2.3. Role conception and judicial behaviour

The aim of our research was to complement the findings in the above-mentioned studies. The core question was to what degree judicial behaviour and the role conception of the judge influence the experienced procedural justice of the parties in post-defence hearings. In this research we explored the relationships between role conception, judicial behaviour and procedural justice. We have defined the concept of procedural justice in line with previous research. Procedural justice in our research is restricted to the components voice, neutrality, respect and explanation. The choice for these components is based on research by Lind, complemented with one component from Tyler.[19]

In Dutch literature on the judiciary, courts and judges no clear answer has yet been given to the question of what the role conception of the judge specifically consists of. In the compilation 'The role conception of the judge' (*De taakopvatting van de rechter*) edited by Brenninkmeijer, several lawyers answered this question for their specific field of law.[20] What all these contributions have in common is that the described judicial role conception is related to the question of what the core business of the judge entails: legal dispute regulation or solving the problem that keeps the parties divided? In addition, the various conceptions of the role conception of the judge have in common that they concern the relationship between the judge and the parties. Based on these descriptions we defined role conception as follows. In our research, the judicial role conception consists of two elements: the way the judge approaches the

12 J.M. Barendrecht & E.J.M. van Beukering-Rosmuller, *Recht rond onderhandeling*, 2000, p. 5.
13 S. Verberk, 'Inleiding', in M. Pel & S. Verberk (eds.), *De pilots 'Conflictoplossing op maat'*, Council for the Judiciary (*Raad voor de rechtspraak*) 2009, p. 7.
14 P. Ippel & S. Heeger-Hertter, *Sprekend de rechtbank: Alledaagse communicatie in de Utrechtse zittingszaal*, 2006.
15 J. van der Linden et al., 'Meesterlijk gedrag: leren van compareren', 2009 *Rechtstreeks*, no. 3.
16 Ibid., p. 38.
17 Ibid., p. 20.
18 Van der Linden 2010, supra note 3, pp. 198-212.
19 Although the enumeration of components by Tyler involves both neutrality and trust, we decided not to include trust since our research involved mainly so-called one-shotters who may not notice a great deal about consistency. Based on our experiences with Dutch civil law procedure, we decided to choose four components which we considered to be the most important. These are voice, respect, explanation and neutrality.
20 A.F.M. Brenninkmeijer (ed.), *De taakopvatting van de rechter*, 2003.

case (is he primarily settling the dispute or is he primarily solving the conflict?[21]) and his attitude towards the parties (to what degree does the judge feel responsible for finding suitable solutions at the hearing?).

With regard to judicial behaviour, important research has been carried out by Praagman and the earlier mentioned research by Van der Linden, Klijn and Van Tulder. Praagman describes the several phases the judge goes through in the post-defence hearing. In each phase, she describes characteristic actions by the judge, such as summarising the points of view, identifying interests and guiding negotiations.[22] Van der Linden, Klijn and Van Tulder examined the influence of judicial behaviour on the results of a post-defence hearing by observing the behaviour of judges in 150 cases. The authors divided judicial behaviour into different actions, such as interrupting, summarising and asking for information.[23] On the basis of these two studies, we distinguished seven different categories of behaviour which are typical for judges to perform in post-defence hearings: asking questions, interruptions, providing the opportunity for the parties to comment, summarizing, responding to emotions, explaining and interventions with the aim being to discuss the possibility of a settlement. These categories were based on either the fact that previous research had shown that there is a connection between this type of behaviour and procedural justice or because of the hypothetical link we assumed to exist between the behaviour and procedural justice.

3. Methodology: a multi-method approach

We conducted this research by combining various empirical research methods.

3.1. Observations

First of all, we worked with in-depth case studies by observing eight civil judges in their daily context: the courtroom. From a wide variety of commercial cases involving two parties, we randomly selected eight cases of different judges who agreed to participate in our research. We asked all the civil judges of the court of first instance in Utrecht to participate. All the judges who agreed to participate and who had planned hearings in the period of our field study were included in our research. Prior to the hearing, all parties had been contacted to guarantee their participation in our research. The observation forms used were based on an in-depth literature study[24] which yielded a division of seven categories of judicial behaviour. We discussed and verified these categories with two judges who were not involved in the case studies.[25] Furthermore, the observation form was divided into several phases, such as the information phase and the negotiation phase, so that the behaviour observed could be scored per phase. In addition, we made sound recordings of each case.

3.2. Qualitative interviews

Secondly, we conducted qualitative interviews with the judges prior to and after the hearing. The completed observation form functioned as useful input for the subsequent interview with the judge, since it allowed us to ask the judge about his motives for a certain kind of behaviour. In the interview prior to the hearing, we asked the judges about their role conception and in the interview after the session we verified whether this role conception was consciously used by the judge. For example, when a judge in the prior interview claimed that he had the role conception of an active judge who is always looking to find the interests behind the conflict, and we observed fairly different forms of behaviour, the interview allowed us to discuss this aspect afterwards.

21 In a dispute, parties reformulate their controversies in legal positions by invoking legal norms and legal rules to solve this controversy. A conflict can exist next to or behind the legal dispute. A conflict involves, next to the content and cognitive aspects of a conflict, personal and affective aspects which are not necessarily legally relevant. In the past fifteen years, the Dutch judiciary has paid a great deal of attention to this distinction and the question of what the actual conflict is. This influences the way one thinks about what the actual role of the judge should be as well. L. Combrink et al., *Op maat beslecht. Mediation naast rechtspraak 1999-2009*, Research Memoranda 2009-2, pp. 26-27.

22 S. Praagman, 'Comparitierechters in eenzelfde zaak vergeleken: de individuele aanpak van rechters', 2011 *Recht der Werkelijkheid* 32, no. 2, p. 16.

23 Van der Linden et al. 2009, supra note 15, p. 14.

24 Especially the previously mentioned works by Van der Linden et al. 2009, supra note 15, Van der Linden 2010, supra note 3 and Praagman 2011, supra note 22 were of great importance for designing our observation form.

25 We would like to thank Prof. R.J. Verschoof and Mr. M. Pel for their valuable input here.

3.3. Questionnaires

Thirdly, we examined the relationship between the observed behaviours and the perceived procedural justice by the parties by making use of questionnaires, particularly by allowing parties to rate ten statements on a 5-point scale. These statements implicitly concerned criteria of procedural justice. Based on the work of Van der Linden,[26] we chose two statements for each component. Moreover, we started the questionnaire with a general question concerning the overall fairness of the hearing and ending with a question concerning satisfaction with the hearing as such. After completing these questionnaires, parties were asked in a subsequent qualitative interview to substantiate their answers with concrete examples of judicial behaviour and to give an explanation for some remarkable answers in their questionnaire.

3.4. Data collection and analysis

The practical implementation of the research took place in the period from March to May 2013. We had an overview of all commercial cases where a post-defence hearing was ordered. For our research, it was required that both parties and their lawyers would appear in court. Subsequently, we called the lawyers representing the parties before the hearing and requested them to ask permission from their parties. After obtaining permission, we visited the judge concerned in order to inform him about our presence at the hearing. Moreover, we asked each judge about his or her role conception prior to the hearing. All eight hearings were observed by three researchers by means of a detailed observation form. After the hearing, two researchers interviewed the parties and one researcher interviewed the judge (once again) about his role conception and behaviour during the hearing. The observations, together with the interviews conducted with both the judge and the parties, provided a comprehensive picture of what had occurred during the post-defence hearing and how that was perceived by both the judge and the parties.

Which conclusions can be drawn from this comprehensive picture? In order to make the analysis of each case study comparable, we used a template in which seven steps were described which had to be filled in after the post-defence hearing as soon as possible. In this template the raw data consisting of observation lists, audio recordings, interview recordings and transcriptions of the interviews were combined. The template can be found in the annex to this paper. Ultimately, we analysed these eight templates and tried to explain the interrelationships.

3.5. Research limitations

This research was designed as a preliminary experiment for a large-scale research to be conducted later.[27] Therefore, the main function of this small-scale research is to address underexposed issues in procedural justice research by combining various empirical research methods and to research the concept of judicial role conception in relation to procedural justice. Therefore, this research can be supportive in the design of a large-scale study on procedural justice in the courts. Another aim is to address issues which are relevant to Dutch legal practice, especially to the Dutch judiciary. These issues concern, for example, the assumption that the role conception of judges at the post-defence hearing is moving away from its traditional focus on the legal claim towards resolving the conflict which lies behind the claim. By using the methods explained above, we examined how the role conception of the judge and his behaviour at the post-defence hearing affected perceived procedural justice.

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26 Van der Linden 2010, supra note 3, pp. 24 et seq. We were also inspired by the surveys on procedural justice from the HiiL, <http://www.hiil.org/project/measuring-costs-quality-of-access-to-justice> (last visited 2 October 2014) as well as the 'Questionnaire for Attorneys Who Participated in a Settlement Session Facilitated by a Judge' of N. Welsch et al., 2013. This questionnaire seeks to discover precisely which judicial actions contribute to procedural justice. Although we had the same kind of approach, we chose to freely ask parties to illustrate their scoring with examples of judicial behaviour.

27 Indeed, at the time of writing this article this wider research has been started by R.J. Verschoof and W. van Rossum, both researchers at the Montaigne Centre for Judicial administration and Conflict Resolution in Utrecht. Learning from our experiences, a similar empirical research which involves more or less the same format, observation forms and questionnaires is being conducted at five courts in the Netherlands. This research focuses on judges' behaviour in their attempts to reach a settlement. Three questions are relevant: how effective is this behaviour, how efficient is it, and is it perceived as fair? This study includes 120 court sessions, the majority of which were dealt with by single judges in commercial matters (with a value of over €25,000) and a smaller part which were dealt with by sub-district court judges.

Because of the experimental and explorative character of our research which relies on an analysis of eight cases, our data are underpowered and the sample size clearly limits the opportunity to draw firm conclusions about the causational relationship between role conception, judicial behaviour and perceived procedural justice. However, the fact that this is a preliminary research which functioned as an exploration for further research allowed us to bring forward interesting issues that need to be followed up by more thorough research studies. For that reason, this paper will end with some interesting hypotheses based on our analysis which can be validated by further research.

One of the risks of taking a multi-method empirical approach is the risk of subjectivity. Each researcher can perceive behaviour at the hearing differently. However, we tried to obviate this by working with well-delineated and comprehensive observation forms. Furthermore, despite the fact that the in-depth interviews with our respondents were of great value, their subjective character and their dependence on the case at hand affected the validity and replicability of this research. We found it difficult to draw conclusions or to validate hypotheses on the basis of the limited research data. Although we certainly found indications for some conclusions, we would highly recommend involving, for example, more case studies of the same judge in a next study. For these reasons, the ensuing presentation of our main findings will function as a first orientation in the qualitative empirical research field of Dutch post-defence hearings and our conclusions cannot be generalized.

4. Main findings

4.1. Judicial behaviour and the components of procedural justice

With regard to procedural justice judgments and their relationship with judicial behaviour, a large part of our findings was in line with former research.

Voice

Our findings indicate that the parties involved regarded the opportunity to voice their opinions as the most important component of procedural justice.[28] One party in case study A explained this as follows: 'Look, no matter what the decision will be, it is very annoying if you did not have the possibility to voice your opinion.' Another quote, this time from a party in case study G: 'The judge truly listened to us. That is the most important aspect for me, and the judge did this very well.' Still, even 'voice' can be an ambivalent factor, since some parties interpret the question of whether they feel that they have been heard objectively instead of subjectively. For example, in case study C it took a lot of persistence to make the defendant explain why he had provided a neutral answer (3 out of 5) to the question on whether he felt that he had been heard. He eventually explained that, on the one hand, he felt that he had been heard because the judge asked him a lot of questions, but at the same time he did not feel that he had been heard because in his perception these questions were not relevant to the issue at stake. He concluded by stating that he did not feel that he had been heard, but that he filled in 'neutral' because, *objectively,* the judge asked him a lot of questions. Furthermore, asking parties what their true interest in the case is (the so-called 'interest' question[29]) had a positive effect on perceived procedural justice in the case studies in which the judge actually posed this question, such as in case study G. Moreover, summarizing and equally hearing both sides with a fair distribution of the time during which the parties had their say influenced 'voice' in a positive way as well.

Neutrality

Neutrality turned out to be an interesting component. Some of the respondents understood neutrality as the impartiality of the judge in general. These parties indicated that neutrality is the most important component of procedural justice. This could be seen as an abstract perception of impartiality, not

28 For the importance of the voice effect, see for example E.A. Lind et al., 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments', 1990 *Journal of Personality and Social Psychology* 59, no. 5, pp. 952-959.

29 With this question ('*de belangenvraag*') each party is invited to explain what his or her case is really about, in terms of underlying interests, concerns, needs and corresponding wishes. Of course, the answers do not necessarily lie in the field of the law and the juridical dispute displayed in the lawsuit.

influenced by judicial behaviour during the post-defence hearing but as a pre-existing assumption. In these case studies the impartiality of the judge was not even in question. Other respondents formed their opinion on neutrality based on the behaviour of the judge in their concrete case. For example, some respondents held that they found the judge to be neutral because both sides were asked critical questions. This shows that the same question about the neutrality of the judge can lead to fundamentally different, maybe even incomparable answers. Also, we tested neutrality defined as accountability by asking parties whether the judge was open to their criticisms. This was perceived positively as well. For example, parties often valued the possibility to correct the judge by interrupting him.

Respect

Parties expect the judge to be respectful and in all our case studies they were not disappointed in this expectation. Our respondents found it difficult to designate specific behaviour of the judge by which respect was shown. Respect was found in the general attitude of and the correct treatment by the judge. In the one case where the judge demonstrated behaviour which might have been perceived as not respectful, this view was not shared by the parties. In case study B, the parties seemed to accept behaviour by the judge which they might not have accepted in a different context. During this hearing, the judge did not make eye contact with the parties or their lawyers at all. While she asked questions or listened to the answers of the parties, instead of making eye contact she was writing. Afterwards, she explained this behaviour to the interviewers: the clerk was not fully prepared so she felt she had to write down everything. However, the parties did not know this. When asked about the remarkable lack of eye contact during the hearing, the parties indicated that this did not mean that they felt they had been treated discourteously. One party even explained that *because* the judge did not make eye contact, he felt that he had been taken seriously by her: the fact that she wrote down what was being said was perceived as an indication of her dedication to making a good decision in their case.

Explanation

We asked parties about the explanation of the procedure, the law and the jargon used. This component was often considered to be the least important. The reasons for this vary. For example, when asked why they considered this factor to be of lesser importance, a party in case study E stated that this is not because an explanation is unimportant to him. On the contrary, he found it very important to understand all about the procedure and the law, but considered his lawyer to be responsible for this, not the judge. The fact that in his perception the judge did not explain enough about the continuation of the procedure was not very important for his overall procedural justice judgment. The majority of the parties were satisfied with the explanation given by the judge: they justified this by describing the judge as open, transparent and he had explained to them how the procedure would continue. Finally, our results show that the perception of the explanation depends on the capacity of the party: some professional parties such as representatives of an insurance company even found the questions on the explanation somewhat presumptuous. These parties found that an explanation was the least important component.

4.2. Role conception and procedural justice

Judges found it difficult to explain what their role conception was. Even though we worked with semi-structured interviews, judges gave a different interpretation to this concept. Based on a total of sixteen interviews with judges, we conclude that the judicial role conception is not so much a principle, but more of a process formed on the basis of each case file, the parties and the judge's own attitude.

Our findings reveal that the role conception as expressed by the judges determines with which assumptions they enter the courtroom. We did find that judges often have assumptions about which approach parties want to see, based on the case file.[30] For example, in case study F the judge explained that her role during the post-defence hearing depends on the specifics of the case. In a complicated case such as the researched case, in which the facts are not yet clear, the judge chooses to focus on asking

30 This conclusion was found by Pel as well. See M. Pel, 'Conclusies over maatwerk in conflictoplossing', in Pel & Verberk 2009, supra note 13, p. 36.

questions and information gathering. If, because of a limited amount of time, there is no time left to try a settlement, the judge is at least able to deliver a judgment. This is what happened in the case study: the judge did not refer to the possibility of settling during the hearing. However, both parties indicated during their respective interviews that they were open to a settlement, and were disappointed that the judge did not try to help them in that respect. One party added that if they would have had a little more time, they probably would have settled. So, these pre-existing assumptions may be incorrect and this may have negative consequences for the quality of the hearing. We will further elaborate on this issue in Section 5.

We found it difficult to test the hypothesis that there is a link between role conception and procedural justice. Although the case studies provided clear indications that the role conception of judges influences the manner, moment, and frequency of the behaviour of those judges,[31] a direct link between role conception and procedural justice by means of the observed behaviour is difficult. For example, a judge who looks for the dispute behind the legal conflict more often asks the 'interest question'. A passive judge interrupts less. However, there are many judicial interventions which are intuitively applied by judges and do not fit a particular role conception.

5. Discussion of the results: some explorative remarks for further research

5.1. Introduction

One of the most challenging issues in this study was how to analyse and draw inferences from the data generated by combining various empirical research methods. In fact, because of the sample size of our research, it was very hard to draw conclusions. Our research yielded more new questions than answers. For that reason, in the following sub-sections we want to make some explorative remarks which can be taken into consideration by future researchers. First of all, we want to present a new perspective on procedural justice in Section 5.2. Secondly, in Section 5.3, we elaborate our findings on the context-specific meaning of judicial behaviour in procedural justice judgments. Finally, Section 5.4 will deal with events in court sessions which lead to misunderstandings between the participants in post-defence hearings.

5.2. New perspectives on procedural justice: on the competence effect and the role of the outcome for procedural justice judgments

A clear advantage of conducting interviews is that parties provide self-generated answers: parties indicate what is important to them, but was not explicitly asked in the questionnaire. Besides the results presented in Section 4, we 'caught' more information with the self-generated answers of our respondents. The following sub-sections deal with two examples of self-generated answers that might offer another perspective on perceived procedural justice. Firstly, the answers may reveal that the perceived competence of the judge can be another key component of perceived procedural fairness. Secondly, they show that the relevance of procedural justice in the light of the perception of the fairness of proceedings should be put into perspective.

5.2.1. 'I am treated fairly by a competent judge': the meaning of perceived competence

During the interviews several respondents came up with self-generated answers in which they indicated that their procedural justice judgment was based on their perception of the competence of the judge. As such, the question arises whether the components of procedural justice we distinguished are sufficient to explain which factors contribute to procedural justice judgments. In other words, is perceived competence a self-containing component of procedural justice?

We presume perceived legal competence to be a self-contained experience showing a positive correlation with the procedural justice conception of the parties ('I am treated fairly by a competent judge'). This legal competence was demonstrated not only when the judge was able to show that he knew the case file by heart, but by explicitly showing the limits of his file knowledge as well. Please note

31 This terminology is based on Praagman 2011, supra note 22, p. 17.

that the perceived legal competence may differ from the actual legal competence of a judge. Explicitly demonstrating knowledge of the case details, such as the exact date of relevant incidents, does not in fact say much about the actual legal competence of the judge as such.[32] The competence effect we observed may have a positive effect on perceived procedural justice. In case study H, the defendant answered the question of what in his opinion was the most important aspect of a hearing as follows: 'I think it is most important that the judge has fully familiarized herself with the file.' In the same case, the claimant, a representative of a large insurance company, said virtually the same thing: he had noticed that the judge was fully prepared for the case, because she showed that she had already formed an opinion on some aspects. He valued this as one of the best aspects of the judicial behaviour in this case.

During the hearing of case study D, we observed many detailed referrals to the case file by the judge. In the subsequent interview, the defendant in this case spontaneously stated that he perceived the hearing as fair because 'the judge had done his homework'. The respective judges seemed fully aware of the competence effect:

> ***Interviewer**: 'Can you mention an intervention you consciously made during the hearing?'*
> ***Judge**: 'What I have consciously done several times is to show that I just knew the file very well. You can simply do that by heart, and if you are well prepared it is easy to refer to dates and exhibits. By doing so you show the parties you have read the case file. You show that the judge has delved into the matter, that he knows what is going on between the two parties. It enhances compliance with the eventual judgment.'*

The competence effect might also have a negative bearing on procedural justice judgements. This happens when parties feel that the knowledge of the judge is not sufficient. In case study C the defendant did not feel that he had been heard because in his opinion the essence of the case had not been discussed. Also, he perceived the explanation as being substandard, because in his perception the judge did not understand the essence of the case herself, so she was not able to explain it either. He said that she lacked knowledge. In the interview he explained this with examples of questions asked by the judge which allegedly show that she had not read the case file properly ('She asked whether my ex-wife and I are on speaking terms, whereas she could have read in the case file that we are anything but on speaking terms!'). He concluded that this was the worst aspect of the hearing.

As explained before, the competence effect is not only demonstrated by showing knowledge of the case, but by explicitly showing limits of the file knowledge as well. In the case in which the judge gave a very comprehensive, chronological summary of the facts which led to the proceedings, she explicitly mentioned the boundaries of her knowledge on the case file to the parties. She explained that the reason for this was that if parties want to focus on specific information in the case file, they would be given the opportunity to point the judge towards this. If not, she would not take it into account.

5.2.2. The role of the outcome of the case

Self-generated answers revealed that parties linked their procedural justice judgment explicitly to the outcome of the case. Also, the possible outcome of the case was often linked to the perceived competence of the judge. Exemplary is the following answer of a party to the question whether he was satisfied with the hearing: 'I will not be satisfied until I know what the judgment will be. But because the judge was well-prepared, I rank the hearing with a 5 [highest ranking].'

We were warned that many interviewees might be unable to distinguish between procedural justice and distributive justice. We tried to reduce this risk by interviewing the parties immediately after the hearing, so generally before an outcome has been reached. Furthermore, we gave an introduction to the aims of our research before each interview. In this introduction we tried to explain that the possible

32 This conclusion may be understood by using psychological theories on information processing. For example, when processing information heuristically, people focus on the available information that enables them to use simple inferential rules or cognitive heuristics to formulate their judgements. Persuasion heuristics such as 'Expert statements can be trusted' serve as simple heuristics in social judgement settings. See for example S. Chaiken et al., 'Heuristic and Systematic Information Processing within and beyond the Persuasion Context', in J.S. Uleman & J.A. Bargh (eds.), *Unintended thought*, 1989, pp. 212-252. Since the authors did not find that such psychological information processing theories had been tested in a legal context, this might be interesting to examine in further research.

outcome of the case was irrelevant for the research, so we requested the interviewees to focus only on the process; the post-defence hearing. Still, self-generated answers often show concern for the outcome of the case. Especially professional parties, in their capacity as representatives of e.g. large insurance companies, seemed to be rather sceptical about the importance of the components of procedural justice: 'The result is all that counts for us. Even if a judge is not respectful towards me, if the judgment is in our favour, I can live with that.' In his view, all components are subordinate to the outcome. This opinion was recognizable in many interviews with professional parties. However, one professional party stated the following about the importance of *voice:* 'Whatever the decision is going to be, if you are not given the chance to voice your points of view, that is very annoying.' But, on the other hand, this party stated that she could not answer the question whether the judge had taken into account her points of view, because she did not yet know the outcome.

In case study A, a party explained why she did not answer the question on the questionnaire as to whether in her perception her views had been taken into account by the judge. She explained that she could only answer the question after the judge had made a reasoned decision. When the interviewer tried to explain the difference between the *perception* of whether her views were incorporated by the judge and the actual incorporation of her arguments by the judge in a decision, this did not change her answer.

Finally, some respondents even literally stated that apart from the assumed neutrality of the judge (conceived as impartiality), they did not find the components at all relevant, as long as the outcome of the case was in their interest.

5.3. The context-specific meaning of judicial behaviour

Previous research shows that judicial behaviour may contribute to or decrease the degree of procedural justice experienced. For example, interruption by judges is deemed to negatively influence procedural justice, whereas summarizing is considered a contributing factor.[33] In this sub-section we share two remarkable observations which show that the meaning of judicial behaviour for procedural justice judgments is context-specific. Carrying out further research in this field will allow us to understand how parties give meaning to judicial behaviour in terms of procedural justice. Based on such research, guidelines for judges may be developed as to how to use their behaviour in a specific context.

5.3.1. Summarizing

We know that summarizing may be a contributing factor for positive procedural justice judgments from quantitative research. Earlier research showed that summarizing the statements of parties enhances *voice,* because summarizing shows the parties that the judge is aware of their views.[34] However, we do not yet fully understand which meaning parties give to specific summaries of judges and how important this is for the procedural justice judgment of the parties. It might be interesting to shift the focus of research to how statements are being summarised by the judge.

First of all, our study seems to affirm the general conclusion that summarizing contributes to procedural justice: many parties stated in the interviews that they felt that they had been heard because the judge summarized their points of view. For example, in case study C. In the interview prior to the hearing, the judge had already indicated that she expected summarizing to have a positive influence on procedural justice. During the hearing, we noted many summaries, mostly on legal points of view (as opposed to summarizing emotions). This was much appreciated by the claimant, who said the following in the interview after the hearing:

> ***Interviewer**: 'You state that you feel very well heard, how come?'*
> ***Claimant**: 'Because the judge listened very well to all the information which was brought forward by us.'*
> ***Interviewer**: 'How do you know the judge listened very well?'*
> ***Claimant**: 'Because she summarized our points of view and did this in our own words.'*

33 See for example Van der Linden et al. 2009, supra note 15, p. 38.
34 J. van der Linden 2010, supra note 3, p. 205.

Besides supporting this general conclusion, the interviews allowed us to take the respondents one step further and get to know which specific summaries contributed to their judgment and why. The following examples show how parties give meaning to the summaries of the judge.

A couple of self-generated answers referred to summarizing in the words of the parties. In another case, a party stated that by using the words used by the parties, the judge remained neutral, and it was clear that she was summarizing the view of the party and not her own view. That is why this party felt heard *and* why he regarded the judge as impartial: a package deal of voice and neutrality. Not only summarizing in their own words contributes to the perceived procedural justice of parties. In other case studies, parties explicitly noted that they felt heard because the judge summarized their points of view in their own words. According to the respondents, one can be sure that a judge understands what has been brought forward. Except for one judge, judges explain their summarizing behaviour mainly pragmatically: they want to check whether the information and the essence of the dispute are clear.

Not only statements made during the hearing are summarized. In case study E, the judge started with a chronological summary of the run-up to the proceedings. Furthermore, she summarized a lot during the hearing. She explained that she does so to check whether her interpretation of the case file is correct, and because she does not want parties to be surprised by her judgment: by giving information in the form of summaries, she hopes parties will respond to it, if they think that this is necessary. In the interview, the claimant stated that she appreciated the chronological summary, because it structured the information. Both the claimant and the defendant in this case felt that they had been heard because the summaries show that the judge has taken their statements into account.

The judge in case study G started by asking the 'interest question'. The underlying interest or the need for the claimant was a recognition of his illness by the big insurance company. The judge summarised these underlying interests and came back to them by the end of the hearing, which was very much appreciated by the claimant. Furthermore, the judge often reformulated or summarized the interests of both parties in a positive manner. By doing so, he explicitly paid attention to the underlying interests of the parties, and he made the parties look to the future instead of looking to their conflictual past.

5.3.2. Procedural justice judgments and the 'interest question'

As noted in Section 2.2, the prevailing view in the literature is that in recent years it has become more and more important for judges to focus on the underlying conflict between parties rather than on their legal dispute.[35] Against this background, several judges indicated in the interviews that they find it important to ask the parties in the hearing what their interest in that specific case actually is. The judge in case study G stated that he believes that asking for the interests at stake – 'what is it all about' – is an important aspect in giving parties the feeling that they are treated fairly. In case study D, the judge indicated that 'when I study a case I will also look for the underlying conflict. What makes the parties decide to bring their case before a judge?' However, the interviews with the parties showed us that looking for the 'underlying conflict' may not always be an effective tool for influencing procedural justice judgments. Our findings show that whether the interest question contributes to higher experienced procedural justice depends on the context in which judges pose the question.

For example, in case study G the parties stated that they very much desired to discuss the possibility to settle the issue. The judge – in line with his statements in the interview before the hearing – explicitly asked the parties what interest they had in reaching a settlement. The claimant indicated that he looked for a recognition of his illness, but also experienced a high degree of stress due to the procedure. The insurance company indicated that it was important for them to reach a final solution to the case. At the end of the hearing the judge explicitly repeated both statements, which was appreciated by both parties. The claimant had experienced this to be the most crucial element of the hearing. The representative of the insurance company indicated that he appreciated the fact that the judge also understood the – primarily business-related – interests of his company.

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35 In addition, the research of Welsch et al. 2013, supra note 26 confirms some of our findings with regard to the interest-question as well. For example, Welsch et al. state that providing parties with an opportunity to discuss non-legal (e.g. personal, financial and relational) needs and concerns may influence the parties' perceptions of respectful treatment, p. 74.

However, in case study H the representative of another insurance company stated that he was relieved to see that the judge did not ask questions like 'How does it feel for you to be here today' and 'What is the importance of this case for you'. In his opinion, the hearing should not be a place for emotions, but for legal arguments. When judges ask about the underlying interests or emotions, the parties will feel even worse if they lose the case.

5.4. Judicial role conception, the expectations of the parties and procedural justice: the influence of misunderstandings between the judge and parties during post-defence hearings

An advantage of our approach is the amount of interviews with both judges and parties, and with regard to the judges, both before and after the hearing. As such, we could compare both perspectives of the hearing. On the one hand, the parties could reflect on the actions of the judge and form a procedural justice judgment. On the other hand, judges had the opportunity to explain their role conception and their motive behind certain actions. Consequently, we could identify events in the hearing in which there was a misunderstanding between the judge and the parties which influenced or could potentially influence the procedural justice judgments of the parties. The best example thereof concerns the assumptions judges made about the expectations of the parties at the hearing. Many judges made assumptions as to what parties want based on the case file, for example whether they want a settlement or not.[36] These assumptions might prove to be incorrect during or after the hearing. For example, parties might be willing to discuss a settlement, despite the fact that the judge could not infer this from the file. This came up in several case studies, sometimes influencing the experienced procedural justice of the parties.

The most striking example of a misunderstanding between the judge and the parties can be found in case study F, in which both parties indicated in the subsequent interview that they were disappointed that the judge neither tried more to direct them towards a settlement, nor did she check whether they were in need of a settlement. This disappointment was understandable in the light of our observations: the judge focused a great deal on the limited amount of time she had for the hearing, and in the subsequent interview she explained that she did not have time to try to reach a settlement because she needed information to eventually make a decision. She assumed that the parties did not want to settle, so she focused on gaining information.

Another example is the judge in case study D. He entered the hearing with the aim to come to a final decision because he assumed on the basis of the case file that the parties were no longer willing to talk to each other. He did not test his assumptions by explicitly asking the parties about their expectations at the hearing. Only after a substantive examination of the case did the judge explore the possibilities for an alternative solution of the case. The judge explained that he was surprised when the parties indicated that they wanted to settle.

Our study showed that role conception may be an important factor in determining the assumptions judges make before commencing the hearing. As we have discussed above, role conception appears to be a process in the judge's mind in which he forms an opinion on his role during the hearing on the basis of the case file, the parties and his personal beliefs. As such the judge develops assumptions of the expectations of the parties. It is important that the judge maintains a critical view towards these assumptions in order to avoid misunderstandings.

An effective method to tackle these false assumptions is to simply ask the parties at the beginning of the hearing what they expect from the post-defence hearing. An example of how this may be done was given in case study G. Case study G was a case between a person unfit for work and his invalidity insurance company. The judge in this case started by asking the parties what they wanted to achieve with this hearing: a settlement or a judgment. Both parties indicated that they preferred a settlement, so the hearing was only directed at reaching a settlement. In the interview, the judge explained his way of behaving.

36 This is in line with former research by Van der Linden, who concluded that it might be wise to simply ask parties about their mutual expectations at the beginning of the hearing. See Van der Linden 2010, supra note 3, p. 211.

***Interviewer**: 'Was this hearing representative of how a hearing normally tends to go?'*
***Judge**: 'Yes, in that it is common to deliberate with the parties what they actually want at the very beginning of a post-defence hearing, and that the post-defence hearing meets these wishes. In this case, it was remarkable that the parties wanted a substantial discussion ending in a settlement. That is not representative (…), but it is a result of being in concert with the parties. (…)'*
***Interviewer:** 'Which intervention is important to you?'*
***Judge:** 'I think it is essential to deliberate with the parties as to what they expect. In this post-defence hearing, that moment was the most essential. (…) What is special is that you will be in control, but at the same time you are constantly deliberating with the parties. (…)'*
***Interviewer:** 'If you now reflect on this case, in what way was your role conception visible?'*
***Judge:** 'Well, actually, this hearing perfectly fits my role conception. I did what I agreed upon with both parties and that fits my role as a mediating judge.'*

6. Conclusion

By describing the various methods we have used and illustrating them with our miscellaneous findings, we tried to provide more insight into the complexity of interactions at post-defence hearings and we attempted to offer researchers in the field of procedural justice inspiration to examine some of our findings in future research. This research can be supportive in the design of a large-scale study on procedural justice in the courts.

Our research tells us more about the four components of procedural justice which are considered to be the most important ones. Voice is often perceived as the most important component of procedural justice, whereas explanation is often held to be the least important. All the judges in our case studies were perceived as neutral. However, our results show that parties have fundamentally different, sometimes conflicting, definitions of neutrality. Respect was found in the general attitude of and correct treatment by the judge, and seems to be an everlasting existent and untouchable component.

Since our study was designed to function as an experiment for large-scale research to be conducted later, we will conclude this paper with some hypotheses to be tested in further research. First of all, the self-generated answers show that it does not seem to matter which words the judge uses when summarizing, since both summarizing in the words of the parties and the judge's own words contribute to procedural justice. For this reason, we hypothesise that *if* the judge summarizes, it does not matter in whose words he does so. Secondly, these self-generated answers have indicated that the legal competence of the judge as perceived by the parties was important and positively correlated with their judgment of the process. This provides a basis for new hypotheses to be tested in future research on this topic. We assume that the perceived legal competence plays an important role in parties' satisfaction concerning the hearing. Thirdly, our data revealed that parties linked their procedural justice judgment explicitly to the outcome of the case. Many interviewees seemed to be unwilling or unable to distinguish between procedural justice and distributive justice.

Our study has taken the first experimental steps towards answering the question of how the role conception of the judge and his behaviour during the post-defence hearing affect perceived procedural justice. Although the case studies provided indications that the role conception of judges influences the manner, moment, and frequency of the behaviour of the judges, the sample size of our research did not allow us to conclude that there is a causal relationship between role conception and procedural justice. Although there might be an indirect link through judicial interventions, it turned out that a lot of interventions are intuitively applied and do not fit a particular role conception. We assume that role conception is more a process formed on the basis of each file which influences the manner, moment, and frequency of the judge's behaviour. It might be interesting to test this assumption in further research and thereby examine what the precise relationship between the role conception of the judge, judicial behaviour and procedural justice is. ¶

Annex 1: Our case study template

1. General information

Case number:	HA ZA ****
Date and time	dd-mm-yy
Judge	X
Claimant (and: present?)	X
Defendant (and: present?)	X
Lawyer claimant	X
Lawyer defendant	X

2. Substantive information of the case

Background of the conflict:
Core of the legal conflict:

3. Observation during hearing

Chronological: the phases	*How are the different phases gone through? In what order?*
Summary of the observation forms	*Summary and aggregation of our three observation forms.*
Striking behaviour of the judge	*In the field of procedural justice.*
Striking behaviour of the claimant	*Particularly expressions of emotion/underlying interests.*
Striking behaviour of defendant	*Idem.*
If applicable:	
Settlement/preliminary judgment	*Discuss, briefly, the substance of the settlement/preliminary judgment. Parties can refer to it in their interview.*

4. Interview with the judge

1. Summary of the interview prior to the hearing on role conception.
2. Summary of the interview after the hearing.
3. Linking these interviews to our observations during the hearing.

5. Interview with claimant

1. Results of the questionnaire and on which questions did you elaborate?
2. Summary of the interview with the claimant (if possible, per component of procedural justice).
3. Linking this interview to our observations during the hearing.

6. Interview with defendant

1. Results of the questionnaire and on which questions did you elaborate?
2. Summary of the interview with the defendant (if possible, per component of procedural justice).
3. Linking this interview to our observations during the hearing.

7. Analysis			
Step 1. Please keep in mind the research question of our research. *To which degree do the role conception and behaviours of the judge at post-defence hearings influence the perceived procedural justice by parties?* How do the data summarized above contribute to answering this research question?			
Step 2. Summarize the core of this template.			
Short and concise impression of the hearing.			
Main message claimant.			
Main message defendant.			
Differences.	1.		
Similarities.	1.		
Explanations.			
Step 3. Summarize the specific behaviours of the judge.			
a. Observed behaviour of the judge	b. Behaviours of the judge according to the parties (and their influence on procedural justice)	c. Behaviours according to the judge himself/ herself.	d. How do these behaviours relate to the role conception of the judge?
Asking questions			
Interrupting			
Hearing both sides			
Summarizing			
Naming emotions			
Explaining			
Settlement interventions			
Others (which were not included on the observation form but which are still of importance.			
Step 4. Please summarize the most important conclusions drawn from the behaviours mentioned above. What are the causal relationships? And if there are none, why not? Did you expect them?			
•			
Step 5. What do you want to discuss with the other observants? (Such as doubts and barriers)			
•			
Step 6. On the basis of this whole document, what are the points which should be referred to in our overarching analysis or in our conclusion?			
•			

Attachment:
1. Three observation forms.
2. Audio document of the hearing.
3. Transcript of the interview with the judge prior to the hearing.
4. Transcript of the interview with the judge after the hearing.
5. Transcript of the interview with the claimant.
6. Transcript of the interview with the defendant.