



Wetenschappelijk Onderzoek- en
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Cahier 2022-5

De (on)mogelijkheden van het meten van klassenjustitie in de Nederlandse strafrechtketen

*Een verkenning met handreikingen
voor kwantitatief vervolgonderzoek*

Summary

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Summary

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Cahier

De reeks Cahier omvat de rapporten van onderzoek dat door en in opdracht van het Wetenschappelijk Onderzoek- en documentatie Centrum is verricht. Opname in de reeks betekent niet dat de inhoud van de rapporten het standpunt van de Minister van Justitie en Veiligheid weergeeft.

Summary

The (im)possibilities of measuring class justice in the Dutch criminal justice system

An exploratory study with recommendations for further quantitative research

Reason for and purpose of the study

The out-of-court settlement reached between the Public Prosecution Service and ING in 2018, in consequence of the latter's facilitation of the laundering of criminal proceeds, led to questions in the Lower House of Parliament about the perceived lack of action against white-collar crime when the House debated the budget of the Ministry of Justice and Security on 20 November 2018. During the budget debate, the members of parliament Buitenweg and Van Nispen raised the question of whether there is class justice in the Netherlands: do wealthy potential suspects too often escape justice while less wealthy suspects are prosecuted? Can criminal prosecution of those responsible be 'bought off' by legal entities accepting an out-of-court settlement on the condition that no natural persons are prosecuted? The members of parliament also pointed out that it had been 20 years since the last time a large-scale study was carried out into class justice in the Netherlands. Subsequently, Van Nispen submitted a motion calling for an independent study.

In response to the Van Nispen motion, Utrecht University carried out a qualitative study into class justice. This qualitative study focused on a broad exploration of the notion of class justice and incidences of class justice in the criminal justice system. It consisted of a review of existing literature, followed by interviews and focus group sessions with parties involved in the criminal justice system as well as private citizens. A key finding of the qualitative study was that it is likely that salient aspects of class justice may have found their way into the Dutch criminal justice system. The study authors noted that class justice is very difficult to prove. In the course of their qualitative study, they were indeed unable to do so. As such, the study provided no solid basis for conclusions on the frequency of incidences of class justice in the Dutch criminal justice system. This will require additional quantitative research, which will in turn require a specific operationalisation and narrowing of the working definition of class justice used in the qualitative study.

The Research and Documentation Centre (WODC) study in front of you was carried out in tandem with the qualitative study and had a more quantitative focus. However, operationalising and narrowing the concept of class justice for the purpose of quantitative analysis was outside of the scope of this study, partially because it was carried out in tandem with the qualitative study. The objective of this study was to assess the viability of quantifying class justice and explicitly not to provide quantitative evidence of incidences of class justice in the Dutch criminal justice system. It was carried out for exploratory purposes only. For this reason, this report contains no quantitative results and does not provide an answer to the question whether and to what extent there is class justice in the Netherlands. Nevertheless, the findings of the

exploratory study were used as a basis for recommendations on how to proceed with future quantitative analyses.

The main research question examined in this exploratory study is as follows:
To what extent can class justice be quantified using quantitative analysis techniques?

In order to answer this question, this exploratory study is divided into three parts:

- 1 measurability of the notion of class justice;
- 2 available data;
- 3 quantitative methods and techniques.

The three parts of the exploratory study each address a subquestion. We used three research methods to answer the subquestions of this exploratory study: (i) desk research; (ii) investigation of sources; and (iii) experiments. For the desk research, we used the qualitative study and the definition of class justice used therein as a guide. The investigation of sources focused on available and relevant data on suspects, including their socio-economic traits. This encompassed a study of data sources provided by the Public Prosecution Service, the judiciary, the WODC and Statistics Netherlands (CBS). For the experiments, we applied a number of quantitative analysis methods to a limited test data set in practice.

Measurability of the notion of class justice

In the first part of the exploratory study, we answer the following question:

Which elements of the broad notion of 'class justice' can be made measurable, and how can they be operationalised?

The qualitative study used the following definition of class justice: *'Class justice is the selective dispensation of justice that illegitimately prejudices individuals who are not part of the ruling class and illegitimately favours individuals who are part of the ruling class. These forms of prejudice and favour may be illegitimate by law and/or experienced by citizens as illegitimate. Both prejudicial and favourable class justice may be either direct or indirect, either conscious or unconscious and either systemic or incidental in nature.'*¹

As this definition was formulated in preparation of an exploratory qualitative study, it was intentionally kept broad. The researchers concluded early on that the phrase 'class justice' is used in a variety of different ways and can carry many different emotional overtones. It is all too easy to use 'class justice' as a catch-all term. For this reason, the qualitative study focused on producing a usable working definition for the purpose of discussing the class justice phenomenon in an enlightening and non-polarising fashion in the focus groups. A secondary objective was to arrive at a helicopter view of class justice and its various manifestations.

At the same time, this means that the above definition cannot be applied synonymously as a working definition for the purpose of measuring class justice.

¹ Van den Bos, K., Ansems, L., Schiffelers, M. J., Kerssies, S., Lindeman, J., Bovens, C. (medew.), Manshanden, L. (medew.), Peters van Neijenhof, F. (medew.) & Verhoeven, L. (medew.) (2021). *Een verkennend kwalitatief onderzoek naar klassenjustitie in de Nederlandse strafrechtketen* (p. 29). Utrecht: Universiteit Utrecht.

Before a quantitative study can be carried out, we need to refine the concept further. This is because such a study requires a more specific operationalisation and demarcation than a qualitative one. For instance, we still need to operationalise the difference between the ruling and non-ruling classes. Additionally, the definition focuses on experienced illegitimacy: a normative concept that is prone to debate (including social debate) and therefore very difficult to measure.

Irrespective of the exact definition of class justice, it is possible in any case to measure whether at least two groups of suspects are sentenced differently for similar criminal offences. If it turns out that two groups are indeed being treated differently, this does not automatically mean that this is a case of class justice – but it might be an indicator for it, and the bigger the difference, the more likely it is that something is ‘wrong’. In any event, it is a clue that warrants further investigation by way of a qualitative follow-up study.

With this in mind, our exploratory study focused on measuring direct selectivity. These are cases of selectivity where individuals receive different sentences in specific criminal proceedings for similar offences. Our main focus was on systemic forms of this. This puts the spotlight on the increasingly problematic nature of selectivity when this occurs on a larger scale or is entrenched in the system. Indirect selectivity (whether or not to penalize certain types of offenses) is not covered by this exploratory study, as it can be more accurately explored through qualitative research.

As a consequence of our focus on direct selectivity, legal entities (businesses, institutions and government bodies) fall outside of the scope of the qualitative analyses we recommend here. This is because it is difficult to make a quantitative comparison between the treatment of legal entities and that of natural persons, as crime is much less common among legal entities, they commit other types of offences than natural persons and they cannot receive certain criminal sentences (such as a prison sentence). Another factor is that such a comparison would yield little or no insight into the selective treatment (favouring) of directors of large businesses (through the avoidance of criminal prosecution in a personal capacity). Qualitative research into the way this group is treated is likely to achieve more and better results than a quantitative analysis.

Our exploratory study shows that selectivity should not be approached as a global phenomenon, but is best studied by looking at specific offences and specific decisions in the criminal justice system. This methodology matches that of earlier quantitative or empirical research into class justice and/or selectivity in the criminal justice system. In essence, such research consistently focused on a single aspect of class justice, rather than on class justice as a whole. It seems obvious, then, to have future quantitative analyses of class justice focus mainly on those decisions where the most discretionary power could be exercised. The majority of these are made in the criminal justice system’s preliminary stage.

The above findings have led to the following recommendations for future quantitative analyses:

Recommendation 1: Operationalise the definition of class justice further by:

- a** narrowing the definitions of the ruling and non-ruling classes in order to divide suspects into either one of these groups on the basis of various traits;
- b** elaborating those elements of the definition that are still highly subjective, such as experienced legitimacy, into more measurable, objective standards.

Recommendation 2: Make sure that quantitative analyses mainly focus in the first instance on specific stages of the criminal justice system where there is the most room for exercising discretionary power, such as in the criminal justice system's preliminary stage.

Available data

In the second part of the exploratory study, we answer the following question:

Which data do we need, where can we obtain them and what are the limitations that we need to take into account?

In order to establish selectivity in the criminal justice system, we need data on criminal sentences and other decisions, information that these decisions were based on and the traits of the individuals that were the subject of these decisions. These data are available to a greater or lesser extent, depending on the stage of the system. It is often necessary to combine data from various sources (inside and outside of the criminal justice system). There is no single central system that stores all the data we need.

Moreover, there are certain limitations in play. For example, not all decisions in the criminal justice system that might have been affected by selectivity have been recorded in sufficient detail. One of the reasons for this is that organisations in the system generally adhere to the parameters of their primary (operational) process when recording decisions. Consequently, data that are less relevant to the primary process are recorded less accurately and less often. As a result, they are not always suitable for a quantitative analysis (of selectivity). Those data that are available often need to undergo a few processing steps before they can be used. Many relevant data about the substantiation of decisions are unstructured (e.g. because they are embedded in the text of the decision).

In view of these data-related limitations, any quantitative analysis outcome will need to be treated with caution. It would be wise to follow up in all cases with a qualitative analysis and to examine any unusual outcomes critically.

Another aspect of quantitative research into selectivity that may have a limiting or delaying effect is the obligation to comply with privacy legislation and regulations. This is because proving direct selectivity requires the gathering and combination of sensitive data (including personal data) about the criminal justice system and socio-economic aspects. In each case, researchers will need to make a trade-off when it

comes to gathering personal data. The gathered data set must always align with the purpose of the analysis.

Furthermore, procedures to obtain permission to process data may be lengthy, in part because source holders can be reticent to supply data – even when those data are designated for use in scientific research.

All these are complicating factors that mean that quantitative research into class justice will in many cases require considerable resources and long throughput times, depending on the way the research question has been formulated and which data are required and available.

The above findings have led to the following recommendations for the policy departments involved in future quantitative analyses:

Recommendation 3: Streamline and speed up procedures for obtaining data for scientific research. This will enable shorter throughput times and ensure more time for actual research. To be able to measure class justice, it is important to compile a comprehensive overview of the role played by socio-economic aspects. This will require easy access to these data (for the entire population, not just for suspects).

Recommendation 4: Stress the importance of the proper or better registration of data that are currently not being registered properly (or at all) to the relevant criminal justice organisations in the chain. It is important to make clear choices as to the aspects into which additional insights are required in order to limit the impact of changes to the way data are registered. Where class justice is concerned, the aspect that first comes to mind is the registration of data in the criminal justice system's preliminary stage.

Quantitative methods and techniques

In the third part of the exploratory study, we answer the following question:

Which methods and techniques may offer starting points and which methods and techniques are most suitable for specific points of departure and contexts?

Which approach or method is most suitable for a quantitative analysis depends on the objective of that analysis and the available data and subject expertise. In this case, the point of departure is a broad qualitative definition that requires further operationalisation. For a quantitative analysis that sticks closely to this parameter, we first need to elaborate the elements of the definition on the basis of subject expertise (see also Recommendation 1). One of the things we need to determine is how to distinguish the ruling class from the non-ruling class. This distinction must then be shown or made apparent in the data. The next step is to determine how to measure and demonstrate the differences between these two classes. It is also possible to use another method, for example one that distinguishes between social classes on the basis of socio-economic traits.

In any case, we can identify two approaches: a hypothesis-verifying and a hypothesis-forming approach. For the hypothesis-verifying approach, researchers formulate one or more hypotheses on the basis of subject expertise and then gather data to verify

them. For the hypothesis-forming approach, researchers use analytical methods to form a hypothesis on the basis of data (usually a large volume). Over the course of the exploratory study, we tested a number of methods and techniques in experiments to quantify systemic direct selectivity in the criminal justice system. As examples of a hypothesis-verifying approach, we explored descriptive statistics with a test of significance and a regression analysis. As examples of a hypothesis-forming approach, we used a clustering algorithm and a genetic algorithm.

It is worth pointing out that, while a hypothesis-verifying approach may yield some clues as to certain aspects of class justice, it cannot explain the entire spectrum of the phenomenon. Prior to conducting a hypothesis-verifying analysis, researchers always need to make a number of choices: (1) which decisions (the dependent variables) and (2) which classes or groups (the independent variables) are compared for (3) which types of offences? Due to the broad definition of the class justice phenomenon in the qualitative study, it only offers a limited number of reference points for these choices. Nevertheless, these are choices that need to be made before any follow-up study can be carried out. Because of the current lack of subject expertise, these choices will partially be policy-driven.

On the other hand, a hypothesis-forming approach may help researchers make the aforementioned choices and set parameters for a hypothesis-verifying approach. Such an approach may also help them identify groups that are representative of a class. Furthermore, they may use a hypothesis-forming approach to gather evidence of selectivity – including selectivity on the basis of previously unsuspected traits. As an example, a hypothesis-forming approach could be used to refine a follow-up study into selectivity (both quantitative and qualitative) in order to examine aspects that previously went underappreciated. The advantage of this approach is that researchers do not need a prior definition of a class and only need to choose the relevant stage of the criminal justice system for the analysis (which decisions), whether or not in combination with a definition of the types of offences. A disadvantage (particularly in view of privacy) is that they will need to gather a broad spectrum of traits that may play a role in selectivity. Another disadvantage is that aspects that are relevant from a policy perspective (such as the favourable treatment of directors of legal entities) may not be revealed as outcomes of the analysis, because they are not reflected in the available data. A targeted search for such aspects (i.e. on the basis of a prior hypothesis) will therefore require a hypothesis-verifying approach.

If the quantitative analysis yields evidence of selectivity (i.e. differences in the treatment of suspects), there will always be a need for a supplemental qualitative analysis to find conclusive proof of class justice. That is why any future research into direct selectivity in the criminal justice system should be cyclical in nature, so that quantitative and qualitative research alternate. First, a quantitative study is carried out to verify the hypotheses statistically. These hypotheses may have been prepared on the basis of data mining techniques applied to the available data or on the basis of available subject expertise. Next, a qualitative study is carried out to find potential explanations for the identified selectivity. In turn, these explanations may lead to further hypotheses to serve as input for further quantitative research.

The above findings have led to the following recommendation for future analyses (and their parameters):

Recommendation 5:

Policy departments should specify the objective (or even the political objective) of the analysis to be conducted and primarily focus in the first instance on evidence of direct selectivity with regard to specific groups for specific decisions and specific types of offences.

- a** First, determine which socio-economic traits, which decisions and which offences warrant investigation from a policy perspective.
- b** Determine whether to use a hypothesis-forming or hypothesis-verifying approach, taking into account the available data and subject expertise. Adopt a cyclical process, so that quantitative and qualitative research alternate.

In conclusion

This exploratory study provides some answers to the question whether class justice in the Dutch criminal justice system can be quantified, which data can be used to do so and which analysis techniques are suitable.

To sum up, this study explains that quantifying class justice in the entire criminal justice system would require lengthy and expensive research. The wide variety of socio-economic traits of suspects, the offences for which they are sentenced and the decisions that may be made in the criminal justice system make it impossible to measure this as a general phenomenon. A first step towards achieving quantitative results quickly could be to focus primarily on systemic or other direct selectivity in a limited number of decisions in the system's preliminary stage. As an added bonus, this would allow for narrower and more specific parameters for the purpose of data gathering for quantitative research. Simultaneously, and if the topic is judged to be sufficiently important, steps could be taken by the relevant Ministry of Justice and Security policy departments to initiate a separate research programme with a focus on class justice. This programme would have to be cyclical in nature, so that quantitative and qualitative research alternate. In this context, it is also important to further define and operationalise the concept of legitimacy.

This general finding leads to a key recommendation.

Recommendation 6: Policymakers should make clear choices, in consultation with those politically responsible if necessary, about which elements of the catch-all term 'class justice' should be prioritised specifically for further research.

The focus of this exploratory study was class justice in the criminal justice system. However, the methods and techniques investigated in this study and the recommendations could be applied just as easily in other areas of the law that may be just as susceptible to class justice and might be even more suitable for quantitative analyses. We therefore conclude with a final recommendation for future quantitative analyses of class justice.

Recommendation 7: Carry out future studies into class justice in other areas of the law than criminal law as well, for example in civil law.

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