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Class Justice in The Netherlands. A Review of 30 Years of Research.

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1. Introduction and Description of the Study

1.1 Incidents

In many cases sensational incidents determine the picture which people form of the term class justice. These incidents mainly become 'sensational' on account of the intensive media attention, which is above all aroused when public figures are involved. In such cases supposed class justice can easily result in an explosive mixture. The 'O.J. Simpson Case' (in 1995) in the USA can be taken as an historic example. Never before had there been such frenzied media attention for a lawsuit. Apart from the fame of the suspect, it can be explained in this instance by the nature of the case: in this lawsuit there were even two indictments of class justice involved, which were moreover diametrically opposed to one another. As a reminder: O.J. Simpson was a well-known American football player who had acquired additional fame and wealth by appearances in TV programmes and commercials. He was suspected of the murder of his ex-wife and a man who was with her. Simpson was an exceptional figure in more than one respect; apart from the fact that he was famous and had travelled a long road to reach the top (something which, as is known, always appeals to Americans), he possessed two characteristics which are not often found in combination in the USA: he was black and rich. An important detail: the victims were white. The result was that one half of the country - the black, badly-off section - pointed an accusing finger at the judicial authorities and declared that Simpson threatened to become the umpteenth victim of a legal system which systematically treats the blacks unfairly. The other half of the country - the white middle class - also pointed an accusing finger at the judicial system. Their attention, however, was directed to the extensive staff of expensive lawyers which Simpson could afford to retain and who ultimately, according to the predominant opinion of this section of the population, wrongfully procured his acquittal.

Although incidents of this kind to a large extent determine the picture of class justice, they provide little information on the way in which the criminal justice system works. In order to discover whether the incidents are symptomatic or just a matter of chance, we must not direct our attention to separate events, however telling they may be, but to *patterns* in events which give evidence of *systematically* unfair treatment of particular groups. As far as this is concerned, the analysis of incidents which have received a great deal of media attention, does not offer much help.

1.2 History

The origin of the term class justice must be situated somewhere in the middle of the nineteenth century. Marx viewed justice as the formalized embodiment of the will of the ruling class (1988 [1848]). This class uses the legal system to perpetuate the unequal (economic) balance of power in society. From this point of view justice is always *class* justice. In the beginning of the twentieth century, when proletarian revolutions once again

loom on the horizon, there is evidence of renewed attention to the phenomenon of class justice. Liebknecht's elaboration of the subject has become a classic, even though he uses a fairly narrow definition; he limits himself to the behaviour of judges during the trial. In the Netherlands Meijer-Wichmann (1930: 95-99) is one of the authors who have published on this subject. She notes that class justice is intrinsically bound up with the organization of society: if there are no class differences, then there can be no class justice. After the Second World War the theme is virtually absent in the (*mainstream*) literature. In noted criminological papers, such as those by Bonger (1954), Van Bemmelen (1958) and Kempe (1967), the theme is scarcely mentioned, if at all. In these works the focus is on the offender and the background to his behaviour. At the end of the sixties there is a shift of emphasis. Van Weringh (1986) points out that Hoefnagels in his *Beginselen van kriminologie* (1969) reverses the situation: 'the accent is no longer on the offender, but on the question of how crime is defined' (1986: 207). This 'reversal' once more puts the emphasis on the class aspects of criminal law. Later on Groningen criminologists (led by Jongman) were to be mainly responsible for making this theme the subject of systematic empirical study. During the last ten years the theme has ceased to occupy a prominent place on the scientific research agenda.

In the study of class justice many authors have followed in the footsteps of Marx and Liebknecht by choosing a politico-ideological approach. This speaks for itself, since the original content of the concept is related to a specific view of society. These studies predominantly present a vision of society in which the attention is focussed in particular on the way in which social relationships find expression in the operation of criminal law. In the present study an *empirical* approach has been chosen. This means that we translate the ideological significance of the concept into empirical categories. In our definition of class justice we express this by highlighting concepts such as *selection and selectivity*. More about this in section 2.

1.3 Description of the Study

Meijer-Wichmann rightly concluded that the existence of a phenomenon such as class justice is related to the existence of classes in society. This evokes the question as to whether, and if so to what extent, there can be said to be class justice at the present day. After all, many sociologists are of the opinion that the inequality in society has decreased since the Second World War (Dronkers & Ultee, 1995). However, others point out that this trend has changed course since the mid-eighties and that since then the social antitheses have again increased. There could even be said to be social dichotomy.¹ In an article in the daily paper *De Volkskrant* Schuyt maintains that the phenomenon of class justice does not seem to occupy such a prominent place in our society as twenty-five years ago (VK 20-5-1996). He ascribes this development to diminishing antitheses between the classes and to changes in the judiciary (more openness). At the same time, however, he points out that the inequality in access to legal aid has again increased, after there had been a long period with a trend towards more equality. In fact Schuyt foresees the return of the phenomenon of class justice within ten years. In Schuyt's argument the question *whether* the phenomenon of class justice has actually disappeared remains unanswered. In this paper we shall try to formulate an answer to this question on the basis of existing research and existing data.

¹ See overview of discussion in report from the Advisory Council for Government Policy (WRR, 1996).

In particular in the seventies and the beginning of the eighties a great deal of empirical research was carried out in the Netherlands into class justice. We shall list and evaluate this research, as well as the empirical studies which have more recently appeared. This should lead to an answer to question (1) whether there is any class justice in the Netherlands, and if so, to what extent and in what parts of the system of criminal procedure. We shall also try to find an answer to the question (2) what knowledge is missing in the empirical research literature.

This paper is further arranged as follows. Section 2 contains a definition of class justice. In sections 3 and 4 answers are given to questions (1) and (2). In brief concluding observations we go into the developments in class justice from 1970 onwards.

2. Definition of Class Justice

A screening over a period of five years (1994-1998) of the daily paper *De Volkskrant* for the term 'class justice' shows that this term is used to indicate very divergent phenomena. In order to arrive at a workable definition, an attempt has been made to answer the following questions: what is the constituent element of class justice, who is adversely affected by class justice, where does the phenomenon of class justice occur, what forms of class justice can we distinguish, how do the adverse effects find expression and who or what is responsible for the occurrence of class justice? The answers to these questions lead to the definition of class justice presented below:

By class justice is meant the systematically prejudicial treatment of persons (potentially) subject to jurisdiction (justiciables) with weak socio-economic resources (including migrants) in all parts of the system of criminal procedure.

- systematic means that there must be evidence of structural (as opposed to incidental) selectivity in decisions in the system of criminal procedure;
- the selectivity is asymmetric, that is to say that the difference in treatment between groups is indicated in terms of prejudicial treatment of specific groups;
- prejudicial treatment implies more likelihood of ending up in the system of criminal procedure, less likelihood of escaping from it at some point and harder treatment while going through the penal system (in terms of criminal law);
- prejudicial treatment can arise from differential treatment of persons in concrete, comparable criminal cases (direct selectivity) and from differential handling of indictable offences (indirect selectivity);
- the possession of socio-economic resources is measured on the basis of the level of education, income, economic possessions, professional or job status;
- prejudicial treatment can occur in all stages of the system of criminal procedure: in legislation and rule-making, in the investigation, in the prosecution, in the trial and in the execution of sanctions;
- selectivity can be both the intentional and the *unintentional* result of decisions in the penal system, on which different parties exert influence, such as the judiciary, the justiciables, the victims and the public;
- the definition is restricted to natural persons.

There are some points on which this definition requires further explanation. The terms preferential treatment and prejudicial treatment are obviously exchangeable: preferential treatment of group A in relation to group B implies prejudicial treatment of group B in relation to group A. Thus the perspective may be different, but the implications are identical. Moreover, the terms ‘prejudicial treatment’ and ‘preferential treatment’ introduce a normative element into the definition. After all, when is this the case and who determines that? It is quite possible that there are very different views on this. Would it not therefore be better simply to talk about *differences* in treatment and not to try to evaluate them? We consider that it would not. The terms ‘preferential treatment’ and ‘prejudicial treatment’ provide more structure for the differences in treatment. By eliminating this structure from the definition, the concept of class justice loses its (historic) significance and also its practicability. After all, without this distinction we should, for example, also have to view the fact that justiciables with a high income are put at a disadvantage in relation to those with a low income as a case of class justice; this is counter-intuitive. We therefore restrict ourselves to selectivity in one direction (asymmetry). We do not exclude the possibility of selectivity occurring in another direction, but that does not occupy our primary attention. It goes without saying that our interpretation of the term ‘prejudicial treatment’, in view of its inevitably normative nature, is open to discussion.

The decisions which come under this definition are of rather different kinds. In order to structurize this to some extent, we make a distinction between direct and indirect selectivity. *Direct selectivity* refers to decisions concerning *persons in concrete criminal proceedings*. In this case we speak of selectivity if accused or convicted persons with divergent socio-economic background characteristics are treated differently for similar offences. Thus these decisions only come up for discussion when concrete individuals are involved as accused or convicted persons. This applies from the moment that the police or a special investigation department regards a person as a suspect. All the decisions which subsequently concern this person (in the sphere of investigation, prosecution, judgement and execution of the sanction) belong to the collection of decisions to which the term direct selectivity can be applied.

Indirect selectivity applies to decisions regarding (the handling of) *indictable offences in general*. The characteristic of these decisions is that no concrete individuals come into the picture, at most in abstracto. Examples of this are decisions taken on penalization by the formal legislator, case law, prosecution guidelines from the public prosecutor’s office and investigation policy of the public prosecutor’s office and the police. In short, it is a matter of decisions which are laid down in laws, regulations and policy. With these decisions it is also possible for selectivity to occur by persons, though this is not direct, but takes place via decisions regarding (the handling of) indictable offences. This mechanism can be clarified very simply: the penalization of something such as corruption implies a selection by people who have sufficient financial means at their disposal to be able to commit this offence (successfully); the penalization of drink-driving implies selection by people who own a car. Thus in this stage indirect selectivity can take place on account of the fact that background characteristics of persons (in this case: money and car ownership) systematically vary with the occurrence of punishable conduct. It is true that the examples mentioned here are somewhat atypical. Various authors have argued that selections in this stage are particularly to the disadvantage of people on the lowest rungs of the social ladder (Hulsman 1965, Bianchi 1967, 1980, Hoefnagels 1969). In other words, the selection is such that particularly people with weak economic resources are more likely to end up in the penal system.

There are many decisions conceivable where selectivity can take place. The definition is restricted to decisions with criminal consequences for the persons involved. In principle these are to be found in legislation and rule-making. Decisions of other kinds do not come within the scope of this definition. This applies, for instance, to the treatment of the accused by the judiciary.

The last but one remark on the framed list is important; the selectivity which we are discussing here always occurs *in* criminal law, but not always *through* criminal law. Other outside factors can exert their influence. Moreover, the distinction between intentional and *unintentional* results also indicates the difference between class justice and discrimination: the latter is always the result of a conscious decision, while this is not (necessarily) the case with class justice.

The terms class justice and selectivity are further used synonymously.

3. Class Justice in the Netherlands: direct Selectivity

In this section we shall discuss the results of the empirical research into *direct* selectivity in the system of Dutch criminal procedure (section 3.2). This forms the bulk of the survey. In these studies an attempt has been made to check on the nature of the offence as thoroughly as possible (so that there are comparable facts) and subsequently to examine whether there are differences in the way in which persons with diverse socio-economic characteristics are treated. Prior to dealing with the results, the content and scope of the studies will be considered (section 3.1). The section concludes with a discussion on the results (3.3).

3.1 Content and Scope of the Studies

In total we have found 47 studies in which (after 1970) there was a report on empirical research into phenomena which fit into the definition used here of direct selectivity. Most of the studies are fairly dated. During the last 10 years class justice has been a negligible subject for empirical research. The emphasis in this literature is on the prosecution (21 studies) and trial (17 studies) and to a lesser extent on the investigation (9 studies). The studies on selectivity in the investigation stage all deal with decisions by the police. By far the majority of the studies are of a descriptive nature, that is to say that the focus is on the question of *whether* there is selectivity. There is little empirical research on the *causes* of selectivity. Most of the work, especially the research concerning the prosecution and trial phase, is based on criminal dossiers and data from the Central Bureau of Statistics. In the research connected with the investigation stage use has more often been made of a combination of sources (observation, interviews, dossiers). There is great geographical variation in the studies. The majority relate to data collected in certain geographical units (municipalities, [legal] districts), a large number relate to data from all over the Netherlands and a few are restricted to data on one geographical unit (for example a town or a district court). Most of the research concerns adult men of Dutch descent, who are suspected of 'traditional' forms of general crime (such as theft, assault and vandalism). The studies in which selectivity has been examined by ethnicity naturally form an exception to this. Finally we may remark that nearly all the studies have a *cross-section design*, that is to say that different research units (matters, persons, [legal] districts) have been compared with one another at one period in time. We have found hardly any longitudinal research, where developments are examined over a period of time.

In short we can establish that research into direct selectivity cannot provide us with any insight into the background of class justice nor into the development of this phenomenon

over a period of time. Moreover, most of the research is fairly dated and restricted to decisions in the prosecution and trial phase (and to a lesser extent in the investigation phase). What the studies can indeed offer us is a good picture of the prevalence of class justice in particular in the prosecution and trial phase and to a lesser degree also in the investigation phase.

3.2 Results of the Research

Selectivity by Police Decisions

Research into selectivity by police decisions concerns both the investigation and also the handling of punishable acts. For the sake of convenience this is also taken to include the decisions which are formally taken by the (assistant) public prosecutor in the context of the criminal investigation, such as the police custody. Studies on views and conduct of police officers in which no concrete link is made with criminal consequences for the suspects, have not been taken into consideration here.²

We have found a total of nine studies. Six of them deal with the investigation of punishable acts (stopping, arresting and detaining for questioning), four studies refer to the disposal of punishable acts by accused who are mainly minors (drawing up official report, taking accused into police custody).³ Thus it is a question of a few studies which are moreover concerned with very diverse decisions by different police services (such as the surveillance department, criminal investigation department, youth affairs, vice squad, aliens department).

Of the six studies which deal with the investigation of punishable acts there are three which have produced results that we can interpret in terms of selectivity. Junger-Tas (1977) describes the results of an observation enquiry among various surveillance departments. She reports differing forms of direct selectivity: coloured people were more often checked in traffic (while nothing was detected) and they had to go to the police station more often (while no offences were established). Part of this selectivity also applied to slovenly dressed people and people with long hair. Observation research by Jongman and Veendrick (1976) shows comparable results. They found that people from certain neighbourhoods and people with a low socio-economic status (SES) were more likely to be taken to the police station for interrogation. This only applied in cases where there was substantial contact between the police on beat and the offender. The most recent study is by Rovers (1997). He carried out a self-reporting study among 12-year old pupils in primary education in Rotterdam and asked these children whether they had ever committed certain offences and whether they had ever been questioned at a police station in connection with committing an offence. After checking the number of offences reported, big differences were found to exist in the number of reported police contacts: children with parents with a low SES and Antillian and Moroccan children were found, independent of their type of offence, to be considerably more likely to come into contact with the police.⁴ In the remaining two studies by Fijnaut (1971) and Aalberts (1990), no traces of direct selectivity were encountered.

² These studies, which mostly deal with prejudices of policemen or treatment of persons/suspects, do not come within our definition of class justice. Examples of this include: Buruma et al. (1978), Esmeijer & Luning (1978), Punch (1983), Aalberts & Kamminga (1983) and Willemse et al. (1984).

³ In one study both the investigation as well as the disposal of punishable acts are dealt with.

⁴ Additional calculations have been carried out in respect of these data in order to be able to establish the selectivity with regard to SES. The 1997 publication mentioned above only reports on selectivity with regard to ethnicity.

Of the four studies which deal with the disposal of punishable acts there are two in which some form of selectivity has been found. In the previously mentioned study by Jongman & Veendrick (1976) it appeared that people with a low SES and people from certain (“bad”) neighbourhoods not only had a more than proportional chance of having to go to the police station for interrogation, but the likelihood of an official report subsequently being drawn up was also above average. Andriessen (1976) examined the way in which the juvenile police in Amsterdam and The Hague deals with cases involving minors. Particular attention was paid to decisions concerning the drawing up of an official report and decisions on police custody. The socio-economic background of the suspects did not appear to play a direct role in the handling of these cases. In The Hague there was indeed found to be a connection between an accused’s SES on the one hand and recidivism and readiness to cooperate on the other hand. The last two factors did appear to influence the settlement. In the two most recent studies, that of Van der Hoeven (1986) and Junger and Zeilstra (1989), no direct selectivity has been encountered in the drawing up of official reports.

In conclusion we may say that, considering the multiplicity of decisions under discussion here, and considering how few empirical studies we have been able to find, no general pronouncements can be made on selectivity in (specific) police decisions. However, if we lump all the studies together, we can establish that in seven of the eleven decisions examined some form of direct selectivity has been found. In our opinion this is indeed a strong indication that ‘something is amiss’.

Selectivity in Decisions by the Public Prosecutor

Studies on selectivity in decisions by the public prosecutor can relate to very diverse decisions. The most important is probably the decision to prosecute in the narrower sense, since this concerns the way in which a criminal case is disposed of (dismissal, arrangement of compromise, summons) and the sentence demanded (type of punishment, degree of punishment, modality of punishment). Research on decisions by the examining judge will also be discussed in this section.

Most of the studies we have found concern the way in which the public prosecutor disposes of the cases (11 of the 21 studies). In seven studies the sentence demanded by the public prosecutor is (also) examined. In three studies the imposition of pre-trial detention by the examining judge is the subject under consideration.

In most of the studies in which the disposal of the cases has been examined, traces of selectivity have been found (9 of the 11 studies). There are considerable differences between the studies regarding the persons and matters to which this selectivity applies. In one case it only occurs with assault (and not with other offences), on another occasion with all the offences examined. On one occasion it is a question of minors only (and not of adults), on another it is of men only (and not of women).

Research into the sentence called for by the public prosecutor shows that selectivity plays a much smaller role here. Only in three of the seven studies was selectivity found with regard to the type of punishment called for. Selectivity with regard to the degree of punishment was not found in any of the studies (four studies are concerned here). Naturally the number of studies here is too small to make general pronouncements, but on the basis of these results it seems justified to conclude that as regards the type of punishment called for there is some indication of selectivity, while this indication is absent as far as the degree of punishment is concerned. When fines are called for, it can be seen that there are higher fines when the suspects have an average or above-average income.

Finally we have also found three studies which deal with the court order for pre-trial detention. An important decision, since this means of coercion influences the demand of the

public prosecutor and the sentence pronounced by the judge. Unfortunately the structure of one of these studies is such that it is impossible to say anything about selectivity. Both in the study by Van Leeuwen & Oomen (1974) and also in that of Berghuis and Tigges (1981) traces of selectivity have been found.⁵ The first study shows that education, profession and income do not influence the decision of the examining judge to impose pre-trial detention. The fact of having a job does seem to exert influence: pre-trial detention is comparatively speaking more often imposed on unemployed persons. The second study showed that with the court order for pre-trial detention there is selectivity by ethnicity.⁶

To summarize we may conclude that a good deal of research shows that there is selectivity in the way criminal cases are disposed of by the public prosecutor. The likelihood of a writ of summons is *ceteris paribus* greater for accused with weak economic resources. Moreover these defendants have a greater chance of hearing an unconditional prison sentence called for. (The indications for the latter are weaker.) Two studies showed that selectivity also occurs in the use of pre-trial detention. As regards the degree of punishment it can be said that there are no indications of selectivity. On the contrary, when it is a question of transactions or fines, we see that it is precisely the suspects with (above) average economic resources for whom heavier sentences are demanded.

Selectivity in Decisions by Judges in Court

Decisions in this stage are limited to judgements pronounced by judges at court sessions in criminal cases which are brought before them. Two sorts of decisions can be distinguished. On the one hand decisions which are connected with the conviction and on the other hand decisions which are connected with the determination of the punishment (type of punishment, degree of punishment, modality of punishment).

Before we discuss these studies, we should point out that the judge often pronounces judgement in accordance with the demand made by the public prosecutor. This applies in particular to the type and modality of punishment and to a slightly less extent to the degree of punishment (this is often lower from the judge). This is often anticipated by the public prosecutor. In this way selection by the judge can be a direct result of selection by the public prosecutor. Thus for the study of selectivity it is important to compare the output with the input in the same stage, otherwise it is impossible to distil the selection as such from the judgement.

We found a total of 17 studies. These all relate to the determination of the punishment in the first instance. In 16 studies the type of punishment (and modality) were also examined and in 11 studies (also) the degree of punishment.

In 12 of the 16 studies mention was made of selectivity in the determination of the type and modality of punishment.⁷ Suspects with weak socio-economic resources comparatively more often receive an unconditional sentence (instead of a conditional) and are more often sentenced to imprisonment (instead of a fine). Selectivity in the determination of the degree of punishment was found in far fewer cases. In 4 of the 11 studies in which this phenomenon was examined there was found to be some selectivity. In the remaining 7 studies no selectivity was encountered. It should moreover be noted here that in a number of cases

⁵ The material of Van Leeuwen and Oomen (1974) was reported on earlier, but less fully, by Oomen (1970).

⁶ Both studies investigated whether the examining judge had given a court order for pre-trial detention. It is not clear to what extent this expresses the influence of the public prosecutor (after all the latter calls for the pre-trial detention).

⁷ Since most of the studies are somewhat dated (before 1989) 'unpaid work' as a type of punishment scarcely plays any role, if at all.

selectivity was found in a different direction, that is to say that accused with strong economic resources received higher fines.

The selectivity which occurs in the determination of the type, modality or degree of punishment is not general. Different studies indicate that this selectivity occurs in particular (or solely) with first offenders and to a lesser extent with repeated offenders. It is not possible to say whether selectivity occurs more frequently for some offences than for others. The indications for this are too vague. It is perhaps unnecessary to mention that most of the studies refer to general crime. However, in dealing with offences which do not come within the Criminal Code, such as drink-driving and misdemeanours connected with the Opium Act or the Fire Arms Act, selectivity is also encountered.

To summarize we can say that selectivity in the judgement is chiefly evident in the type of punishment and the modality: accused with weak economic resources are comparatively more often sentenced to imprisonment and to unconditional penalties. This can be called a solid result: the research has taken place at different periods, is based on different sources, different operationalizations, different groups of accused, et cetera. Selectivity in the degree of punishment is much less evident, although a few of the studies do mention it. In the case of fines there is often selectivity in 'the opposite direction'.

The results of the studies are summarized in table 1. The bibliography lists all the studies on which this table is based (stating the decision examined and a summary of the result).

Table 1 Survey of the most important results of the empirical research on direct selectivity

<i>Decision in the system</i>	No. of studies total	Studies with selectivity	Indication class justice**
Investigation of punishable acts by police	5	3	Strong
Police settlement of punishable acts	5	2	Weak
Order for pre-trial detention by EJ*	2	2	Very strong
Prosecution decision by PP*	11	9	Very strong
Demand by PP*: type and modality of punishment	7	3	Weak
Demand by PP*: degree of punishment	4	0	Absent
Judge's weighing up of sentence: type/mod. punish.	16	12	Strong
Judge's weighing up of sentence: degree of punish.	11	4	Weak
Total number decisions examined	61	35	Strong

*EJ = examining judge; PP = public prosecutor

** indication= col.3/col.2:<25%:very weak; 25-50% weak; 50-75%: strong; >75%: v.strong

3.3 Discussion

In this section we make some comments on the results. On the one hand we shall qualify the results more specifically and on the other hand we shall formulate some general criticism of the study.

Signs of class justice have been found in all parts of the system of criminal procedure, but they are not always present everywhere; selectivity by socio-economic status occurs with certain decisions, with regard to certain offences, with specific groups of accused,

et cetera. Thus the extent of the phenomenon is marginal in much of the research. Does this therefore also mean that the phenomenon must be interpreted as such? We do not believe so. Everything points to the fact that in the Netherlands factors related to the offence carry the most weight. Nevertheless, even in this situation (unintentional) mechanisms can come into play which cause selectivity. It is true that these mechanisms will play a 'marginal' role *compared to* factors related to the offence. This does not alter the fact that as a result of these mechanisms concrete individuals will be at a disadvantage.

The first impression of the study is that many contradictory results have emerged. In the past heated debates have been held on the subject.⁸ The essence of these debates was that factors inherent in the study were repeatedly held responsible for the differences in the results. This is quite possible, but other interpretations are also conceivable. From the discussion in the previous paragraph we can for example infer that conflicting research results can derive from the marginality of the phenomenon. This means that it is to be found in one case and not in another. Thus we cannot automatically infer from conflicting research results that there have been a number of cases of invalid research. Moreover, it is not impossible that unknown factors cause the discrepancies. These factors can be connected with personal characteristics, with characteristics of the offence, but also with other processes and circumstances which exert influence on the final decision.

In order to trace class justice it is important that researchers take account of alternative explanations of the difference in the way cases are dealt with. The degree to which the researchers do so, however, varies from study to study. It is possible that class justice is only found in studies where no account is taken of these alternative explanations. This does not appear to be the case. Also in multivariate studies selectivity by socio-economic status has been shown to exist. The idea of controlling for alternative explanations must be put into perspective. Although this is in itself good and necessary, we must be careful not to throw the baby away with the bathwater: the more control factors, the greater the chance that there are factors present which are connected with the socio-economic status of the justiciables. It may then look as though SES is less important when more control factors are taken into account, but in the meantime all sorts of SES-related factors have slipped into the analysis through the backdoor.

The period concerned can also influence the result. More recent studies possibly present a different picture than older studies. For the investigation of this point we have constructed a very rough measure: we have added up all the studies which appeared before 1980 and all those which appeared after. Both sets consist (coincidentally) of the same number of studies, namely 22.⁹ Within these sets we then counted the number of studies in which any form of selectivity was reported. The percentage of studies from before 1980 in which selectivity was reported amounts to 82%, while the percentage for the studies from after 1980 comes to 59%. Thus there is less selectivity to be found in the recent studies. To what extent we must attach importance to this difference remains to be seen. The numbers on which the percentages are based, are after all very small. Moreover, in the first set there are many comparable studies, which were carried out by the same researcher (Jongman), and which repeatedly exhibit a comparable (positive) result. If these studies are not counted, the differences between old and new research become smaller. We therefore conclude that the difference in results between old and new is marginal.

In the studies which we have discussed, use has been made of diverse SES operationalizations, such as the income size, employed or unemployed, level of education, job status and ethnicity. In this study no distinction has been made between the different indicators; they have all been considered as operationalizations of the same underlying

⁸ See for example the *Tijdschrift voor Criminologie* (Journal of Criminology) (vol. 19), nos. 1-4.

⁹ We have left three studies aside, because no result is known with regard to selectivity.

theoretical dimension, namely socio-economic status. We do this for various reasons. In the first place it results from the presentation of the question and from the way in which the concept class justice is defined. Secondly the number of studies is too small to be able to make valid pronouncements on the basis of separate indicators. Finally it may be assumed that there is a strong connection between the different characteristics; persons with a low income have a comparatively lower level of education, etc. This means that in this study it is not really possible to isolate the influence of the separate characteristics.

Schilt & Jongman (1976) have argued that the greater the discretionary power of the judiciary authority in question, the greater the likelihood of selectivity. Although this hypothesis is very plausible, it does not hold good in general. Thus the public prosecutor and the judge have greater discretionary power in decisions regarding the *degree* of punishment. Yet there are scarcely any indications that selectivity occurs here. For the rest there is practically nothing known about possible selectivity in highly formalized decision processes, such as, for example, the sentencing of the accused by a judge. No research has been done on this subject. The prevailing idea is that little or no selectivity will occur with this type of decision. That naturally remains to be seen.¹⁰

Finally we formulate two general criticisms of the research discussed here. In order to be able to establish direct selectivity the characteristics of the offence (and the circumstances in which it takes place) must as far as possible be brought into line. The greater the spread of these characteristics in a study, the greater also is the chance that it will be wrongly assumed that there is class justice, since the varying characteristics of the offence form a 'disturbing' factor which can influence the decision examined. However, in many studies bringing the characteristics into line is one of the weaknesses. In most of the studies which refer to prosecution and trial, use is made of dossiers and statistics. These sources lack important data concerning the offence, so that it may appear that the selected offences are (fairly) similar, while in reality they may have highly divergent characteristics which are relevant for the decision.

A second criticism concerns the nationwide studies. In examining criminal justice decisions in different organizational contexts (such as police organizations, the public prosecutor's offices, district courts, etc.) account must be taken of the independent influence of these organizations on the decisions. The studies of Fiselier (1991) and Berghuis (1992) among others prove that this is not a luxury. They demonstrate that great differences exist between district courts in the way in which criminal cases are dealt with. In the nationwide studies which we have discussed, this point was scarcely checked, if at all. This can lead to erroneous conclusions if differences in treatment between organizations are connected with differences in socio-economic background characteristics of defendants (with which the relevant organisations are involved). In these cases there may possibly be wrongly concluded that there is selection by socio-economic status, since the differences in treatment are in fact caused by differences in the organization culture. However, it is also possible that through these very organizational differences the selectivity by socio-economic status remains concealed.¹¹ Be that as it may, in nationwide research account should be taken of the influence of this important factor.

4. Missing Knowledge and Recommendations for Future Research

In the previous sections we have sketched a picture of the knowledge which the study has produced up to now. At the same time it has become evident that alterations in criminal law

¹⁰ The study by Crombag et al. (1992) gives rise to the assumption that it is quite possible that selectivity occurs with this decision.

¹¹ It all depends on the nature of the relationship.

are (can be) of influence on changes in selectivity. In most cases the effect of these alterations on possible selectivity is unknown. These observations call for some relevant remarks about the missing knowledge. The description of the hiatuses can be regarded as a research agenda for the future.

4.1 Components of the system of criminal procedure and decisions

It is striking how much has been written about possible selectivity in investigation decisions. However, the empirical research on the subject is marginal and moreover restricted to police activities. Practically nothing is known about selectivity in special investigation branches. Nevertheless, this component of criminal law procedure (the investigation) is extremely interesting, since processes of direct and indirect selectivity (can) cross each other's paths here. Moreover, the organization and methods of criminal investigation are very much on the move. In quantitative terms the most important selection of persons takes place here, since the results of the investigation determine who does and who does not end up in the penal system. More than any other judicial authorities the investigating officers have extensive discretionary powers (with regard to the selection of offences and defendants). All this makes the investigation stage an important and interesting stage for research on selectivity.

Another component which has not received enough attention is the execution of sanctions. The output in terms of the number of sanctions and modalities of sanctions has greatly increased. In the execution of these sanctions there are also numerous decisions taken which have criminal consequences for those involved. These decisions may relate to the implementation of the punishment, the termination and the execution. So far as we know, there has never been any research undertaken on selectivity in these decisions.

Within the components of the system of criminal procedure on which the most research has been done, there are chiefly certain decisions which have received attention, in particular the way in which the public prosecutor disposes of criminal cases (including the content of the sentence demanded) and the judge's weighing up of the sentence to be imposed. Although these are very important decisions, we must not lose sight of the fact that selectivity can also occur in other decisions, such as decisions on the conviction of the accused, decisions concerning police custody and pre-trial detention, etc. Moreover, decisions alter in the course of the years and 'new' decisions are added. In the past, for instance, there was a good deal of research on the policy dismissals of the public prosecutor. However, the number of basic policy dismissals has considerably decreased. Instead there are now more settlements effected. Unpaid work is also more often demanded as a sanction for an offence. There is not much known as yet about these 'new' decisions.

Although research on direct selectivity has received the most attention and probably also deserves it, the importance of indirect selectivity should not be underestimated. In Dutch criminal law procedure, for example, increasing use is being made of guidelines. These probably have a restraining influence on mechanisms of direct selectivity, since there is less room to take into account the personal circumstances of persons subject to jurisdiction, but the possibility cannot be ignored that new forms of indirect selectivity are introduced through these guidelines.¹² Little empirical research has been done to test these forms of indirect selectivity.¹³

¹² As was evident in the study by Timmerman and Van der Zee (1990): unemployed persons more often refuse a transaction offer from the public prosecutor than employed persons, since the costs are an insuperable factor for them. As a result they more often appear before a judge and are more often sentenced to imprisonment.

¹³ An analysis of penal statistics (from 1994) shows that the settlement of offences against the Road Traffic Act and against the Economic Offences Act, where the offenders stand out on account of their relative prosperity, differs considerably from the settlement of most other offences (usually *poor man's crime*): for these offences imprisonment is seldom if ever imposed (Rovers 1999: 57-65).

4.2 *The Content of the Study*

The emphasis in the study has been on the question as to *whether* there can be said to be selectivity. There has scarcely been any concrete testing of the explanations which have been given for this phenomenon. More attention should be paid to this, even if it were only because policy which is directed to combatting undesirable selectivity can only be effective when the causes of selectivity are clearly charted.

The sources on which much of the research is based are limited. This applies whether it is a matter of quantitative data from statistics from the Central Bureau for Statistics or of observations in court. Future research should make more use of combinations of sources. Indeed, there seem to be (practical) possibilities for doing this. Increased automation has considerably simplified and improved the gathering of quantitative data. The time which can thus be saved, can be used to augment these data with qualitative data.

The study shows that selectivity is not an omnipresent phenomenon. It occurs with certain decisions and with regard to certain offences and persons subject to jurisdiction. Research workers should take account of this and direct their research to this aspect, so that more precise descriptions can be obtained. A better basis makes it possible to formulate better hypotheses on the way selectivity comes into being.

An important omission in the research is the lack of attention to developments in time. The analyses in the previous section clearly show that on the basis of existing empirical material there are certainly possibilities of carrying out research on specific developments and their effect on selectivity in the system of criminal procedure.

4.3 *What research should be carried out?*

In previous sections we have gone into the attention paid to different components of the penal system and the attention paid in those components to certain decisions. We have also made a number of comments on the research. It only remains for us to comment on how we think future research should be carried out so as to colour in the *white spots* in question.

The research should consist of successive quantitative and qualitative steps. The first step, the quantitative research, calls for the critical determination of whether or not selectivity exists. If the answer is yes, the following step, qualitative research, takes place. This research tries to find explanations for the selectivity. These in turn form the input for quantitative research in which the hypotheses put forward are subjected to critical examination. In the event of refutation qualitative research follows once more, in which an attempt is made to find an explanation of the refutation, after which new hypotheses are formulated, which are then tested in quantitative research, etc. The advantage of this sort of cyclical approach is that the quality of both the descriptions and the explanations increases, since there is continual cross-fertilization.

5. Concluding Remarks; Developments since 1970

There is no longitudinal research available from which it is possible to make pronouncements about developments in time. However, to enable us to say at least something about the development of class justice since 1970 up to the present day, we have followed an alternative strategy. We have systematically gone through a number of explanations (hypotheses) of class justice, which are often mentioned in the literature, and have (with the aid of existing empirical research) examined how the circumstances and processes, which are mentioned in these explanations, have developed over the past 30 years. There are ten explanations

involved which refer to decisions in different components of the system of criminal procedure (decisions concerning legislation, investigation, prosecution and trial). This analysis enables us to gain insight into the possible developments with regard to class justice.

The analysis presents a mixed picture. On the one hand various developments indicate a probable decrease in selectivity with certain decisions. On the other hand we see developments which probably stimulate selectivity. In particular in the first phases of the penal system, in legislation and investigation, there are developments which we can probably term indications of decreasing selectivity. However, in the prosecution and trial phase we see developments which possibly indicate increasing selectivity. These developments need not necessarily always be endogenous, that is to say that they take place within the criminal justice system. Exogenous developments, such as changes in public opinion, increased crime, the growing number of immigrants in society and alterations in the reimbursement for legal aid, can also influence the increasing selectivity in these components of the penal system.