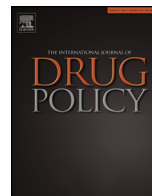




Contents lists available at ScienceDirect

## International Journal of Drug Policy

journal homepage: [www.elsevier.com/locate/drugpo](http://www.elsevier.com/locate/drugpo)



# Home closure as a weapon in the Dutch war on drugs: Does judicial review function as a safety net?

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### ARTICLE INFO

#### Article history:

Received 7 March 2017

Received in revised form 26 July 2017

Accepted 3 August 2017

Available online xxx

#### Keywords:

War on drugs

Dutch drug policy

Home closures

Eviction

Judicial review

Empirical legal research

Culture of control

### ABSTRACT

**Background:** A widespread sense of a failing criminal justice system and increased feelings of insecurity changed the response to crime into a culture of control, which is characterized by policies that punish and exclude. In the Netherlands, these influences can be witnessed in the war on drugs where local authorities use their administrative power to close homes involved in drug-related crime. Citizens can invoke judicial review over these administrative interferences by claiming that such closure results in an unfair balance between purposes, means and consequences. This paper assesses whether judicial review functions as a safety net against losing one's home due to drug-related crime.

**Methods:** We used doctrinal legal research methods to examine the "law in the books" and empirical legal research methods to analyse the "law in action". We used a survey to investigate how often the drug-related closure power was used in 2015, and we statistically analysed all published case law of Dutch lower courts between 2007 and 2016.

**Results:** The scope of the closure power broadened over the years and our data show that local authorities fiercely make use of this instrument. In 41.4% of the cases, citizens are successful in fighting the closure. While scholarly literature indicates that judicial courts function as safeguards by questioning the proportionality of administrative action, raising a proportionality defence does not necessarily result in a more favourable outcome for citizens. In fact, raising a proportionality defence makes it more likely to result in dismissal of the appeal.

**Conclusion:** The stretched scope of the drug-related closure power together with the relatively low success rate of citizens who fight the loss of their home and a seemingly meaningless proportionality check show no sign of a safety net against the loss of one's home at the suit of a local authority.

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### Introduction

The global war on drugs is predominantly fought using criminal law; those who sell or possess illicit drugs are arrested by the police, prosecuted, and fined or imprisoned by a criminal court (Trebach, 1988; Stevenson, 2011). Nevertheless, research shows that current reliance on criminal law enforcement is resulting in an array of negative unintended consequences (ICSDP, 2010) such as the increase of risks to public health, the creation of a criminal market, the subversion of social and economic growth, the enrichment of criminals, and the stigmatisation and discrimination of people who use drugs (UNODC, 2008; Rolles et al., 2016).

Unsurprisingly, many countries are moving towards less punitive regimes (Room, Fischer, Hall, Lenton, & Reuter, 2010,

pp. 74–106) and consider alternative approaches and policies (Global Commission on Drug Policy, 2016). Portugal, for example, no longer resorts to criminal penalties when it comes to low-level drug possession (Global Commission on Drug Policy, 2016), and Canada is taking serious steps to legalize recreational cannabis (Global Commission on Drug Policy, 2016; Austin, 2017). Moreover, jurisdictions such as Uruguay and several states in the United States already officially allow recreational cannabis markets (Davies, 2016; Global Commission on Drug Policy, 2016; Godlee & Hurley, 2016). The Netherlands drew away from a punitive prohibition style four decades ago by *de facto* legalizing personal possession of all drugs and small retail for cannabis (WODC, 2009). These widespread developments combined with recent calls for a global drug policy reform suggest that the global war on drugs might be sputtering to a close (Godlee & Hurley, 2016; UNGASS, 2016a, 2016b; Global Commission on Drug Policy, 2016; APPGDPR, 2017).

Another widespread reaction to the shortcomings of criminal law has taken the opposite direction of the trend towards less

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punitive drug policies. High crime rates, increased feelings of insecurity, and a widespread sense of a failing criminal justice system changed the discourse on crime and crime control over the last thirty years and resulted in a “culture of control” (Garland, 2001). The culture of control is, amongst others, characterized by policies that punish and exclude, and measures that seriously intervene in individual’s freedoms and autonomy (Garland, 2001). This changed discourse on crime and crime control leads to social and racial division, decreased tolerance and mass imprisonment (Garland, 2001).

While Garland (2001), in his book “The Culture of Control”, focusses on the United Kingdom and the United States, myriad scholars illustrate that a culture of control is witnessed throughout many Western countries, for example in Continental Europe (for the Netherlands and Belgium see e.g., Van Swaaningen, 2004; Snacken, 2007; Devroe, 2012; Devroe, Bruinsma, & Vander Beken, 2017; for broader – comparative – analyses on countries such as Germany, Italy, France, Denmark see e.g., Welch & Schuster, 2005; Muncie, 2008). Moreover, though Garland describes the culture of control from a criminal law perspective, his theory is often used to interpret the origins and subsequent developments of tough on crime policies built around civil or administrative law (Devroe, 2012; Di Ronco & Persâk, 2014; Devroe et al., 2017).

The use of civil or administrative law to tackle crime or disorderly behaviour relates to what Garland (2001) calls the “responsibilisation strategy”. This is a widespread regulatory trend to mobilize other actors than judicial authorities and the police to tackle criminal or disorderly behaviour (Garland, 2001; Beckett & Herbert, 2009; Devroe, 2012). In many jurisdictions, local authorities have increasingly been empowered with intrusive and sometimes even punitive measures to circumvent criminal law safeguards and time-consuming criminal proceedings (for the Netherlands see e.g., Ferdinandusse, 2016; Tops & Tromp, 2017; De Meijer, 2017; for United Kingdom see e.g., Burney, 1999; Hansen, Bill, & Pease, 2003; Crawford, 2009; for the United States see e.g., Cheh, 1991; Beckett & Herbert, 2009; Torres, Apkarian, & Hawdon, 2016). In the United States, for example, local authorities and criminal justice officials have drawn upon various “banishment strategies” to address criminal behaviour (Cheh, 1991; Beckett & Herbert, 2009; Torres et al., 2016). Comparable tactics are deployed in the United Kingdom using Anti-Social Behaviour Orders (Burney, 1999; Crawford, 2009; Crawford, 2011). Germany (Von Mahs, 2005; Belina, 2007), Belgium (Devroe, 2012; Peršak, 2016), South-Africa and the Netherlands (Fick & Vols, 2016; Vols & Fick, 2017) all have similar exclusion-based instruments. Especially the use of eviction<sup>1</sup> for excluding or banishing people to combat crime and disorderly behaviour has become increasingly popular (Hunter & Nixon, 2001; Hunter, Nixon, & Slatter, 2005; Flint, 2006; Varady & Schulman, 2007; Flint & Pawson, 2009; Yau, 2011; Silva, 2015; Vols, Tassenar, & Jacobs, 2015; Fée, 2016; Kenna, Benjaminsen, Busch-Geertsema, & Nasarre-Aznar, 2016; Vols & Fick, 2017).

Our paper holds that these influences of the culture of control (i.e. the shift to non-criminal law sanctions and the accompanying responsibilisation strategy) can also be witnessed in the war on drugs. Many jurisdictions use intrusive and/or punitive measures based on civil or administrative law as an alternative or supplement to criminal justice intervention (for the United States see e.g., Fagan, Davies, Holland, & Dumanovsky, 2005; Lebovits & Seidman, 2007; Dickinson, 2015; for the United

<sup>1</sup> In this paper, eviction refers the permanent or temporary removal of individuals, families or communities from their homes against their will (UN-HABITAT, 2007).

Kingdom see e.g., Flint, 2002; Brown, 2004; Eastwood, 2015). In the Netherlands, one such jurisdiction and the focus of this paper, the responsibility for drug-related crime control has progressively shifted towards local authorities.<sup>2</sup> Under Article 13b of the Dutch anti-drugs Act – the Opium Act – local authorities have the power to close homes and other premises if they are used as illegal sites for drug-related crime (Vols & Bruijn, 2015). This instrument addresses all types of drugs and is tenure neutral as both rental and owner-occupied premises are subject to closure. Moreover, Article 13b Opium Act subjects both public and non-public premises to closure. Yet, this paper focusses merely on the closure of homes.<sup>3</sup>

A closure is characterized as a restorative measure instead of a punitive sanction and is therefore temporary – about three to twelve months (Vols & Bruijn, 2015). In theory, this means that one can continue his or her residence after the closure period has expired. Yet, despite the provisional nature of the closure, the consequences are not necessarily temporary. Closing one’s home and the following eviction can have immense negative consequences. An emerging body of research focusses on the negative effects of eviction on one’s physical and mental health and show how losing one’s home often causes stress, unhappiness, and disrupts the lives of the residents (Kearns, Hiscock, Ellaway, & Macintyre, 2000; Nettleton, 2001; Bright, 2010; Currie & Tekin, 2015; Burgard, Seefeldt, & Zelter, 2012; Desmond & Kimbro, 2015; Desmond, 2016). Moreover, closing one’s home due to drug-related crime can lead to placement on a tenant blacklist, or even homelessness as local authorities are not required to provide alternative living arrangements after closing one’s home (ECLI:NL:RVS:2016:2464; ECLI:NL:RVS:2016:2840).<sup>4</sup> Additionally, housing associations may cancel a lease without judicial intervention after a drug-related closure (Brouwer & Schilder, 2011, p. 322; Vols, 2015), and in case of an owner-occupied residence, banks may require that homeowners pay off their mortgage loan at once after a drug-related closure. The house will be auctioned if the owner is financially unable to do so (Gemeente Rotterdam, 2003). Thus, while the closure lasts temporarily, the consequences are often continuous.

A closure order can be fought by filing a notice of objection with the local authority that issued the order (Article 7:1 General Administrative Law Act). The local authority will then reconsider the closure order. If it considers the objection unfounded, the citizen may then file a notice of appeal with the district court (Article 8:1 General Administrative Law Act). Rulings of district courts are open to higher appeal at the highest administrative

<sup>2</sup> Throughout the article, the term “local authority” will be used to describe the authority entitled with this power while it is officially the (in Dutch:) *burgemeester*. In the Netherlands, a *burgemeester* is a non-elected administrative authority appointed by the national government. The *burgemeester* chairs both the executive board and legislative council of a municipality, and is responsible for safety and public order. The title for *burgemeester* is sometimes translated as “mayor” or as “burgomaster” to emphasize the significant difference between the Dutch mayor and the British mayor. However, unfamiliarity of the Dutch concept *burgemeester* in international context and the – in our view – lack of proper translation induced us to use the term local authorities throughout the article.

<sup>3</sup> In 2016, the housing stock in the Netherlands included 7,641,323 premises; 56.2% were owner-occupied and the other part of the housing market were mainly rental premises. Roughly 30% of all rental premises were owned by private landlords, and the vast majority were rent out by housing associations (Statline CBS, 2016). According to the Housing Act 2015, all housing associations must rent the majority of their premises to people with a relatively low annual income.

<sup>4</sup> Throughout this paper, all case law is referred to using the European Case Law Identifier (ECLI). ECLI is an identifier for case law in Europa and consists of five components. The first part is the acronym “ECLI”, the second part is the country code, followed by the code of the court, year of the decision, and unique identifying number. For more information on the ECLI, visit the official website of the European Union on European Union law ([eur-lex.europa.eu](http://eur-lex.europa.eu)).

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