



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

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 eviction¹ 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, Tassenaar, & 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

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.² 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.³

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).⁴ 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

² 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.

³ 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.

⁴ 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).

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

court in the Netherlands, the Administrative Jurisdiction Division of the Council of State (the Council of State).

As this instrument operates under administrative law the closure power will not be encumbered by criminal law safeguards. The presumption of innocence (Article 6 of the European Convention on Human Rights) is, for instance, bypassed when operating under administrative law, and the burden of proof in administrative law is less strict than under criminal law (Bröring & Jurgens, 2006; Ashworth & Zedner, 2008, p. 48). However, the consequences of closing one's home show signs of endangered individual's rights and freedoms, and despite the fewer legal safeguards under administrative law it is still the task of judicial courts to protect these rights and freedoms (Ewing, 2010; De Waard, 2016).

In response to the emerging culture of control and the subsequent empowerment of local authorities to subject criminal or disorderly behaviour to intrusive measures, previous scholarly research focused on legal protection provided by judicial courts against interferences by local authorities in individual's rights and freedoms. For example, Di Ronco and Peršak (2014) show that courts provide certain legal protection, arising, *inter alia*, from case law of the European Court of Human Rights (European Court). The European Court deems that any person at the risk of losing one's home should "in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end" (ECLI:CE:ECHR:2008:0513-JUD001900904).

In light of the above, we will assess whether Dutch judicial courts function as a substantial safeguard against losing one's home due to drug-related crime at the suit of a local authority. In order to do this, we apply two different research methods. First, we use doctrinal legal research methods to examine the "law in the books" (Pound, 1910). We will give an overview of the Dutch drug policy and the use of the closure power under Article 13b Opium Act to deepen our understanding of this relatively unknown aspect of the Dutch war on drugs. Whereas much research has already been conducted on the drug policy in the Netherlands (e.g., Erickson, Leuw, & Marshall, 1994; MacCoun & Reuter, 1997; Ossebaard & Van de Wijngaart, 1998; Boekhout van Solinge, 1999; Korf, 2002; Uitermark, 2004; Reinerman, 2009; Van Ooyen-Houben & Kleemans, 2015; Van Laar, Van der Pol, & Niesink, 2016; Van Ooyen-Houben, Bieleman, & Korf, 2016), the power of local authorities to fight the war on drugs by closing homes received little to no attention within international scholarly literature.

Secondly, we use empirical legal research methods to examine the "law in action" (Pound, 1910). We used a survey to investigate how often the closure power under Article 13b Opium Act was utilized in 2015. Moreover, we statistically analysed all published case law of Dutch lower courts to examine judicial behaviour in cases where citizens appeal their closure order. While Article 13b Opium Act can be used to close down any type of premises (Bruijn & Vols, 2017), this paper focusses merely on the closure of homes.

Law in the books: analysis of the Dutch drug policy and legislation

Research methods

The analysis below is based on doctrinal legal research (Westerman, 2011), which means that we studied law and legal concepts by reading and analysing literature, legislation, and case law to establish "the nature and parameters" of the law and legal issues involved (Hutchinson & Duncan, 2012; Hutchinson, 2010, p. 37). Doctrinal legal research distinguishes itself from quantitative

research since law is not datum that can be presented numerically or subjected to statistical testing like quantitative research does with data (McCrudden, 2006; Walter, 2010). Doctrinal analysis is also different from content analysis as the role of the researcher is important to synthesise meaning from texts (Hutchinson, & Duncan, 2012). Doctrinal research can use content analysis to deconstruct texts, but it is more than an "analysis of documents and texts that seeks to quantify content in terms of predetermined categories" (Bryman, 2008, p. 692). The importance of the role of the researcher and the need for interpretation and analysing to construct meaning are qualitative aspects of doctrinal legal research (Hutchinson & Duncan, 2012). Yet, doctrinal methodology is unique and different from all other social scientific methods as it focusses on legal principles developed by the courts and the legislature (Bartie, 2010, p. 350). Doctrinal research makes a clear distinction between legal norms or standards and the facts of the situation. Moreover, in contrast to most other social sciences, doctrinal research lacks an independent theoretical perspective; the law is seen as both the object of research and the theoretical perspective from which the object is studied (Westerman, 2011).

In this paper, we critically assessed essential features of legislation, legal policy documents, and case law, after which all the relevant elements were synthesised "to establish an arguably correct and complete statement of the law on the matter in hand" (Hutchinson, 2013, p. 9–10). Our doctrinal analysis consists of three elements. First, relevant Dutch legislation was gathered and analysed using the website <https://zoek.officielebekendmakingen.nl>, which contains all legislation from 1995 until present. Legislation before 1995 was found using Dutch online databases such as Legal Intelligence, Kluwer Navigator, and Rechtsorde. These databases were searched using keywords such as "Article 13b Opium Act" and "drug policy". Second, we collected and analysed the relevant research literature using electronic databases such as Lexis-Nexis, Google Scholar, Elsevier, and Wiley, as well as article reference lists. Search terms included "war on drugs", "drug-related eviction(s)", "drug-related crime", "Article 13b Opium Act", "Damocles Act", and "right to housing". Each database was searched for English and Dutch language articles on the Dutch drug policy and the fight of local authorities against drug-related crime. The databases were searched from its inception to its most recent update as of January 2017. Third, the online database of the Dutch judiciary, www.rechtspraak.nl; was used to gather all relevant published Dutch case law, using the following search terms: "Article 13b Opium Act", "eviction" and "drug-related closure". All indicated search terms are English translations of the Dutch terms.

Dutch tolerance policy

The key element of the Dutch drug policy is that any person above the age of 18 can buy cannabis in tolerated outlets known as coffeeshops. Yet, while cities such as Amsterdam and Maastricht are famous for their coffeeshops, cannabis sale and possession are officially criminal offences under Dutch law (Article 3 Opium Act). This illustrates a system of *de facto* legalization and *de jure* prohibition (Ossebaard & Van de Wijngaart, 1998; De Kort & Cramer, 1999).

This policy, also known as "the tolerance policy", has its roots in a desire to separate cannabis (soft drugs⁵) from drugs with unacceptable risks for public health (hard drugs). To prevent cannabis from becoming a gateway drug, the Dutch government

⁵ For long, cannabis was the only "soft drug", but nowadays the Opium Act includes more than 250 different soft drugs. Yet, coffeeshops are only allowed to sell cannabis products.

decided in 1976 to officially tolerate the sale and possession of cannabis (WODC, 2009, pp. 50–51). Such policy is possible under the legal “expediency principle”. This principle empowers the Public Prosecutor in the Netherlands to refrain from prosecution if it is “in the public interest” (Duncan & Nicholson, 1997; Chatwin, 2003; Corstens, 2014, p. 41). This means that illegality does not automatically result in repressive law enforcement (Uitermark, 2004). The expediency principle, hence, enables the Public Prosecutor to withdraw from investigation and prosecution of cannabis sale and possession (Ossebaard & Van de Wijngaart, 1998). Thus, the sale and possession of cannabis remain officially illegal under Dutch law, but are tolerated as a matter of government policy.

Under current national drug policy, drug possession for personal use is tolerated up to a maximum of half a gram of hard drugs, five grams of soft drugs, or five cannabis plants (Aanwijzing, 2015). Moreover, coffeeshop owners will not be prosecuted for selling cannabis as long as they comply with the following set of rules: they must refrain from advertising and marketing, selling hard drugs and alcohol, causing public disturbance in their vicinity, and selling to minors and non-Dutch residents. Moreover, a coffeeshop’s stock should be limited to five hundred grams, and sale transactions should not exceed five grams per customer per day (Wouters, Benschop, & Korf, 2010; Aanwijzing, 2015; Bruijn & Vols, 2017). These rules have developed over a number of years by the national legislature, local governments and the Public Prosecution Service (Van der Veen, 2002).

In the early days of the tolerance policy, few rules regulating the upcoming drug market existed and the number of coffeeshops grew exponentially, which in turn had a significant impact on public order and the quality of life in local communities (Breunese, Brouwer, & Schilder, 1996; Van Rest & Visser, 1996; Uitermark, 2004). Many people complained about unpleasant smells, higher traffic volume, pollution, unlawful assembly, noise nuisance, and feelings of insecurity (Bieleman, Schakel, De Bie, & Snippe, 1995). Consequently, rules on coffeeshops became more stringent (Uitermark, 2004; MacCoun, 2011, p. 1900) and enforcement became subject to administrative public order law. As such, local authorities started to play a key role in the enforcement of the national drug policy (Breunese et al., 1996).

These serious problems caused by coffeeshops led in 1996 to a change in the national drug policy, which empowered local authorities to ban coffeeshops within their jurisdictions (Breunese et al., 1996; Bruijn & Post, 2017). Furthermore, the legislature entitled local authorities in 1999 to close down coffeeshops for non-compliance with the rules under which they are tolerated. This same provision, Article 13b Opium Act, authorizes local authorities to close public premises used for illegal drug trades (Richtlijnen, 1996; Aanwijzing, 2000). The possibility to ban coffeeshops and the closure power introduced in 1999 (Article 13b Opium Act) seemed to cause a rapid decline in the number of coffeeshops. The peak in the number of coffeeshops is estimated at 1450, but by the end of 1999 the number of coffeeshops dropped to 846 (Bieleman & Goeree, 2000; Bieleman, Mennes, & Sijstra, 2014).

Despite this decline in number of coffeeshops and the power to tackle illegal drug stores, the quality of life in residential areas was still degrading (Kamerstukken, 2005/2006; Kamerstukken, 2006/2007). According to the government, residential premises were increasingly used as drug outlets, which led to nuisance, disturbance of public order, and unsafe living conditions (Kamerstukken, 2005/2006; Kamerstukken, 2006/2007). This was an incentive for the legislature to extend the scope of the closure power under Article 13b Opium Act in 2007 with homes and other non-public premises (Kamerstukken, 2005/2006). Ever since, local authorities are entitled to close down both public and non-public premises, including private housing, if illicit drugs are sold,

delivered, provided, or present for one of these purposes in or near a property.

Article 13b Opium Act: closing illegal drug outlets

Both the introduction of the closure power under Article 13b Opium Act in 1999 and the subsequent amendment in 2007 were originally intended to close sites involved in illegal drug trade and to tackle coffeeshops that violate the tolerance conditions (Kamerstukken, 1996/1997; Kamerstukken, 2005/2006). Yet, case law shows that the scope of the closure power has broadened and that its use intensified over the past years (Brouwer & Bruijn, 2016).

Under current Dutch law, the closure power is no longer limited to illegal drug outlets; local authorities may issue a closure order if the quantity of discovered drugs exceeds the tolerated amount for personal use (half a gram of hard drugs, five grams of soft drugs, or five cannabis plants). According to the highest administrative court in the Netherlands (the Council of State), any amount of drugs above these thresholds for personal use is a trading volume used for commercial activities such as dealing or transporting drugs (ECLI:NL:RVS:2015:130).

Furthermore, from its inception Article 13b Opium Act was explicitly not intended as an instrument to close down cannabis farms or marijuana growing facilities (Kamerstukken, 2006/2007a). Yet, in 2013, the Council of State held that any amount of cannabis plants above the tolerated amount for personal use – five plants – is probably used for commercial activities and hence subject to the closure power under Article 13b Opium Act (ECLI:NL:RVS:2013:2362). Since then, this provision has been used to tackle growing facilities (Brouwer & Bruijn, 2016).

Similarly, when Article 13b Opium Act was introduced the legislature clarified that the closure power should be used as a last resort. A less intrusive measure, such as a final warning or a penalty, should always precede a closure order. The only accepted exemption is a “serious offense” (Kamerstukken, 2006/2007b; Kamerstukken, 2006/2007c). Yet, in 2012, the Council of State approved a “one strike you are out-policy” with regard to hard drug violations. This policy of the municipality of Kerkrade is to immediately close a building after the discovery of hard drugs without a prior warning. The Council of State reasoned that any activity relating to hard drugs is a serious offence, which justifies such immediate closures (ECLI:NL:RVS:2012:BY4412). In 2015, the Council of State approved the policy of a municipality that abandons the requirement of a prior warning in cases where more than twenty cannabis plants are discovered (ECLI:NL:RVS:2015:130). In 2016, the Council of State took it a step further and approved a local one strike you are out-policy with regard to all drugs. The Council of State approved this policy by reasoning, analogous to its judgement in 2012, that commercial possession of soft drugs is a serious offence and hence subject to immediate closure (ECLI:NL:RVS:2016:950).

These developments in case law show that the scope of the drug-related closure power has broadened over the years and illustrate the contradictions between its initial purpose and its use in practice. Whilst this increased scope together with the acceptance of a one strike-policy created an instrument that quickly tackles all sorts of drug-related activities, it also created a seemingly harsh measure considering that the use of this power results in the eviction of entire households regardless of whether the drug-related activity was engaged in by tenants, owner occupiers, or other residents including minors (Vols & Bruijn, 2015). Yet, as the closure power under Article 13b Opium Act operates under administrative law, citizens lack legal safeguards provided by criminal law. This raises the question whether a legal barrier exists against this repressive instrument used to fight the war on drugs.

Courts as a potential barrier against drug-related closures

The war on drugs in the Netherlands is increasingly fought without the use of criminal law as drug-related crime is increasingly subject to the administrative closure power of local authorities. This is problematic from a legal point of view as losing one's home is characterized as "a most extreme form of interference with the right to respect for the home" by the European Court (ECLI:CE:ECHR:2008:0513JUD001900904). According to the European Court, every home occupier derives protection from the right to respect for the home found in Article 8 ECHR. Contracting parties to the ECHR should ensure that anyone who is at risk of being evicted from his or her home at the suit of a local authority should have the right to raise the question of proportionality and reasonableness of the measure in front of an independent tribunal in light of Article 8 ECHR (ECLI:CE:ECHR:2008:0513JUD001900904; ECLI:CE:ECHR:2009:1022-JUD000357206; ECLI:CE:ECHR:2011:0203JUD000657104). All Member States of the Council of Europe have to comply with this minimum level of protection against the loss of the home (Kenna & Gailiute, 2013; Vols, Kiehl, & Sidoli del Ceno, 2015).

In these cases, the European Court referred to the proportionality principle, which is, in short, a gateway for citizens to request legal protection against the use of administrative powers such as the closure power under Article 13b Opium Act. The German scholar Fleiner clarified the meaning of the proportionality principle with the famous example "the police should not shoot at sparrows with cannons" (Fleiner, 1928, p. 440). Although the exact meaning of proportionality is subject of fierce academic debate (Barak, 2012), the general underlying idea of proportionality is that purposes, means, and consequences should be balanced (Fick & Vols, 2016). For instance, the purpose of closing a home after drugs are discovered is to terminate the illegal activity, to prevent further violations, and restore the peace and public order in the neighbourhood (Vols & Bruijn, 2015; Bröring et al., 2016, p. 599). If the closure extends further than these purposes, one speaks of "disproportionality" between the sanction imposed and the offence committed (De Waard, 2016). Furthermore, a proportionality review involves balancing the public interests against the interests and rights of the individuals involved (Ranchordás & de Waard, 2016).

Under administrative Dutch law, citizens are required to follow a preliminary administrative procedure before they have the possibility of having the proportionality and reasonableness of the eviction determined by an independent court in light of Article 8 ECHR. Citizens should complain about the closure order to the local authority who issued the closure order before they can appeal the order in front of a judicial court (Article 7:1 of the General Administrative Law Act). This is called the objection procedure. After the local authority reconsidered its order, citizens are entitled to invoke judicial review and have the possibility of a proportionality check by a judicial court under the General Administrative Law Act (Article 3:4 (2)). Yet, it is unclear how Dutch courts handle proportionality defences in cases where citizens appeal their drug-related closure orders. Hence, next part of the paper focusses on the law in action by statistically analysing all published case law of Dutch lower courts on the use of Article 13b Opium Act.

Law in action: judicial behaviour on the administrative war on drugs

Analysis of the law in the books showed that local authorities in the Netherlands are empowered to fight the war on drugs by immediately closing homes involved in drug-related crime. In return, citizens have the possibility to request judicial review of such administrative actions under both Dutch and European law.

One of the most important grounds for judicial review is the proportionality principle. Previous scholarly literature indicated that judicial courts "may well be regarded as fundamental to the safeguarding of individual rights and freedoms" by, amongst others, questioning the proportionality of the interferences by local authorities (Di Ronco & Peršak, 2014). To examine if courts indeed function as a safety net against the loss of one's home at the suit of a local authority, the following part of the paper focusses on the law in action by using quantitative empirical (legal) research methods (Loevinger, 1948; Epstein & King, 2002; Hall & Wright, 2008; Epstein & Martin, 2010; Lawless, Robbenolt, & Ulen, 2010; Epstein & Martin, 2014).

Research methods

The first empirical research method we used was a survey to indicate how often local authorities use their closure power. A survey was sent to forty municipalities with the largest population in the Netherlands and ten randomly selected municipalities (Vols, Hof, & Brouwer, 2017). These municipalities were, *inter alia*, asked to provide data on the usage frequency of the closure power under Article 13b Opium Act over 2015. This resulted in the data on drug-related closures from 46 municipalities (not all municipalities responded).

The second empirical research method we used was a quantitative analysis of Dutch case law regarding the closure of homes based on Article 13b Opium Act. We collected and statistically analysed all published case law between November 2007 and January 2016 on home closures based on Article 13b Opium Act. We chose November 2007 as a starting point since the scope of the provision was formally expanded with the power to close homes and other non-public premises at that time. We searched the online database of the Dutch judiciary (www.rechtspraak.nl) with fixed search terms in order to ensure reproducibility. We used the following terms: "13b Opium Act", "closure", "13b Opium Act closure". This database allowed us to automatically filter on all judgements of the lowest courts – the district courts – on administrative law, and we manually selected all judgements on home closures. This search yielded 87 relevant court decisions on the closure of homes based on Article 13b Opium Act in the period from November 2007 to January 2016.

This sample of 87 court decisions is a selection of the overall population of judgements from 2007 to 2016 as district courts in the Netherlands do not publish every single judgement. To assess the representativeness of our sample, we examined the official policy of www.rechtspraak.nl (Besluit selectiecriteria, 2012). We discovered that the judiciary itself selects which court decision will be published and that the rules for publication are rather vague. Until 2012, court decisions were published on the basis of qualitative criteria including media attention, importance for public life, consequences for application of regulations, and interests of parties. As of 2012, certain decisions should always be published, for example judgments of all highest courts "if the case is not unfounded or inadmissible and/or dismissed with a standard reasoning" (Besluit selectiecriteria, 2012). A court decision should also be published if a case received attention from the media or if the decision holds a significant importance for further rulings. The rules on publication contain some more selection criteria, and courts are also allowed to develop additional rules and selection criteria.

We hand-coded all cases to document the trends in case law and the factors that might appear important to the outcomes of cases (Hall & Wright, 2008; Lawless et al., 2010). Each case was coded by the same author to prevent multiple interpretations. All published case law was printed out and coded into a computer. We developed a codebook based on our readings of case law, which

contains a list of all variables for which information was available, such as the type of drug-related crime, the defences advanced by the citizens, and the reasoning of the court. The codebook includes a detailed description of how to code, read and interpret the judgements.

Lastly, the collected data were statistically analysed. We used Fisher's Exact Test (two-tailed) because of the relatively small sample ($N=87$) to determine the probability (p-value) that a given pattern in the data is obtained merely by chance. Fisher's Exact Test calculates the deviation from the null hypothesis assuming there is no relationship between variables. The null hypothesis is rejected if the p-value is below 0.05 (Lawless et al., 2010; Epstein & Martin, 2014). We used the phi coefficient (Φ) to determine the strength of a relationship between variables as phi is commonly used in 2×2 contingency tables (Ellis, 2010). Phi ranges in value from -1 to 1 , where -1 is a perfect relationship and indicates that most of the data are in the off-diagonal cells, 0 indicates no relationship and 1 indicates a perfect relationship with most of the data in the diagonal cells (Sirkin, 2006).

Results of survey

Fig. 1 shows that 39 of the 46 (84.8%) municipalities in our sample used the closure power under Article 13b Opium Act in 2015. In total, these local authorities closed 602 premises. The frequency of using this closure power differentiates heavily among the municipalities ($M=13.09$ $Mdn=3.00$, $SD=19.13$).

Local authorities can use the closure power to close public premises, such as coffeeshops and restaurants, as well as private premises such as homes. Of the 46 municipalities who responded to the survey, 38 provided information on the number of homes they closed. Fig. 2 shows the distribution of home closures in 2015.

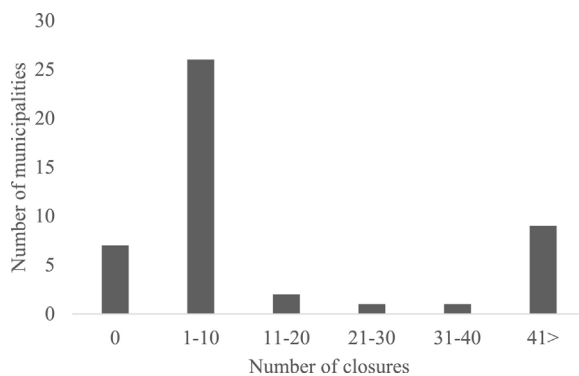


Fig. 1. Distribution of closed premises among municipalities in 2015 ($n=46$).

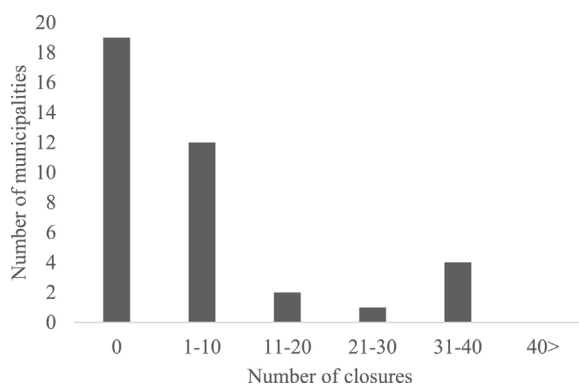


Fig. 2. Distribution of closed homes among municipalities in 2015 ($n=38$).

The 38 municipalities that provided their data on home closures closed 239 homes in 2015 using the closure power under Article 13b Opium Act. The frequency of using the closure power differs heavily among the municipalities ($M=6.29$, $Mdn=0.50$, $SD=11.49$). Fig. 2 shows that half of the 38 municipalities in our sample refrained from closing homes in 2015. Consequently, 19 municipalities are responsible for the 239 home closures in 2015.

Results of quantitative analysis of case law

Our sample of Dutch case law contains 87 court decisions from November 2007 to January 2016 on drug-related home closures. The length of the closures in our sample varies between 3 and 12 months ($M=6.45$, $Mdn=6.00$, $SD=4.83$).

Table 1 shows that local authorities refer to five types of drug-related activities to support their closure order: possession of drugs for commercial purposes, growing over five cannabis plants, dealing drugs from or around the premises, keeping a cannabis "stash" for a coffeeshop, and producing drugs in a so-called drug lab. Drug possession is seen as commercial possession once it exceeds the tolerated amount for personal use (half a gram of hard drugs, five grams of soft drugs, or five cannabis plants). Commercial possession is the reason to close a home in almost half of the cases (see Table 1), and dealing drugs from or around the house leads to a closure order in 10.3% of the cases.

Citizens use different arguments to oppose a closure order. Table 2 shows that in 45 cases citizens argue that the requirements of Article 13b Opium Act were not met, i.e. the local authority was not entitled to issue a closure order. Moreover, the table shows that citizens consider the closure as punishment in 17 cases; citizens claim that closing their home is a punitive sanction intended to punish them rather than a restorative measure intended to end the violation. The court accepts this defence in 1 case, as shown in Table 2.

Furthermore, citizens argue that the closure order is inadequately reasoned by the local authority. They claim that the decision lacks supporting substantiation on the urgency to close their home and claim that the local authority should have mentioned the reasons why a less drastic remedy is insufficient. The insufficient reasoning of the closure order is a reason to allow the appeal in 22 cases out of 36 allowed appeals. Its role in deciding to allow an appeal is marginally statistically significant in comparison to other defences ($p=0.09$).

As illustrated in our doctrinal legal analysis, proportionality defences are a gateway to judicial review of administrative actions. Our analysis shows that citizens raise a proportionality defence in the vast majority of the cases (78 out of 87 cases). However, Table 2 shows that this defence convinces the court in only 11 out of 78 cases.

Table 3 shows that the court allows the claim of the citizens in 36 cases (41.4%), which means that the appeals are dismissed in more than half of all cases (51 cases of 87 cases). Moreover, Table 3 shows the impact of a proportionality defence on the court's reasoning in their judgements. Here, "impact" means that the court

Table 1

Reasons for closure and corresponding court decisions as a percentage of the sample ($N=87$).

Reason	n (%)	% Appeal	
		Allowed	Dismissed
Commercial possession	42 (48.3)	37.5	67.5
Growing cannabis	33 (37.9)	54.5	45.5
Dealing drugs	9 (10.3)	33.3	66.7
Drug lab	1 (1.2)	0.0	100.0
Unknown	2 (2.3)	0.0	100.0

Table 2

Advanced defences versus frequency of acceptance by court, and number of times similar defence is reason to allow the appeal (N=87).

Defence	Advanced/Accepted	Reason to allow appeal (n=36) (%)
Disproportional consequences	78/11	14 (38.9)
Local authority has no jurisdiction	45/5	10 (27.8)
Insufficient reasoning	18/7	22 (61.1)
Closure is a punitive sanction	17/1	1 (2.8)

Table 3

Proportionality defence and its impact on court decisions as a percentage of the sample.

Court decision	Impact of proportionality defence on court decision	Proportionality defence raised (%)		
		Yes	No	Total
Appeal allowed (n=36)	Impact	11 (30.6)	3 (8.3)	14 (38.9)
	No impact	17 (47.2)	5 (13.9)	22 (61.1)
	Total	28 (77.8)	8 (22.2)	36 (100.0)
Appeal dismissed (n=51)	Impact	50 (100.0)	0 (0.0)	50 (98.0)
	No impact	0 (0.0)	1 (2.0)	1 (2.0)
	Total	50 (98.0)	1 (2.0)	51 (100.0)
All (N=87)	Impact	61 (70.1) [*]	3 (3.4) [*]	64 (73.6)
	No impact	17 (19.5) [*]	6 (6.9) [*]	23 (26.4)
	Total	78 (89.7)	9 (10.3)	87 (100.0)

^{*} p=0.0092.

includes the proportionality defence in its reasoning and explicitly mentions the (dis)proportionality of the closure order and its consequences as a reason for its final decision. Although a proportionality defence got accepted in only 11 out of 78 cases (14.1%), there is a moderate positive relationship between raising a proportionality defence and its impact on the reasoning in a final court decision ($p=0.009$, $\Phi=0.31$).

Raising a proportionality defence is reason for the court to allow the appeal in 11 out of 28 cases in which the defence was raised, and in 50 out of 50 cases reason to dismiss the appeal. In addition to the positive relationship between raising a proportionality defence and its impact on the reasoning in a court decision, we found a significant substantial negative relationship between raising a proportionality defence and allowed appeals ($p<0.0001$, $\Phi=-0.53$).

Discussion

We collected data on the number of drug-related closures in 2015 to provide some insights on the usage frequency of this instrument. We also conducted a statistical analysis of all published case law on the use of the closure power between November 2007 and January 2016 to examine whether courts function as a safety net against losing one's home at the suit of a local authority. We specifically focused on the proportionality principle as one of the most important grounds for judicial review.

On the whole, the results from our survey showed that the closure power under Article 13b Opium Act is frequently used in 2015. Our sample of 46 municipalities constitutes only 11.8% of all municipalities in the Netherlands but nonetheless closed 602 premises over a period of one year.⁶ The number of closed premises varies heavily among the municipalities in our sample. These differences may be explained by the composition of our sample. Municipalities such as Amsterdam and Maastricht with a high coffeeshop density are more likely to encounter drug-related crime than others. This is similar for municipalities close to the international borders that draw many drug tourists from Germany,

Belgium and France (Wouters et al., 2010; MacCoun, 2011), and for municipalities in the Southern part of the Netherlands where the authorities encounter extreme forms of drug crime and nuisance (Tops & Tromp, 2017). This might explain why, for example, Amsterdam, with 173 coffeeshops (Bieleman, Mennes, & Sijstra, 2017) and much drug tourism, closed 51 premises in 2015, while Deventer, situated in the middle of the Netherlands with only four coffeeshops (Bieleman et al., 2017), closed only one building in 2015. This does not necessarily suggest that there is less drug-related crime in Deventer than in Amsterdam, but it might be that Deventer suffers less from drug-nuisance and that local authorities are hence less concerned with tackling drug-related crime than those in Amsterdam. Another explanation might be the differences in local policies. For example, local authorities in the one municipality might see themselves as crime fighters more than others (Misérus & Zoetbrood, 2017).

The data showed that home closures constitute about a third of all closures in 2015. A possible explanation for this relatively low number might be that homes are less often used as sites for drug-related crime than public premises. Another explanation might be that local authorities are more likely to refrain from closing homes as the interests at stake are often higher for individuals who will lose their home compared to the interests at stake for someone whose restaurant or store will be closed. Nevertheless, the fact that only 19 municipalities account for 239 closed homes and just 11.8% (46) of all Dutch municipalities account for a total of 602 closed premises over a period of one year, proves how immersed local authorities are in the war on drugs. Subsequently, these results illustrate the importance of a more detailed study on the use of this closure power.

Although the quantitative case law analysis tells us nothing about the legal disputes that were never filed in court, and those that have not been published, we believe that the analysed case law is a valuable source, revealing information about an important portion of the law in action. Moreover, we believe that an examination of our sample is useful and increases our knowledge and understanding on court legal reasoning and the function of courts as safety nets in cases regarding drug-related closures in the Netherlands. Nevertheless, given the above, the imprecise publication policy of www.rechtspraak.nl and the role of the

⁶ On January 1st 2016, the Netherlands had 390 municipalities.

judiciary's judgment in publishing case law, caution needs to be applied when generalizing the results beyond the sample examined in this paper.

Our quantitative analysis of case law showed that 41.4% of all cases resulted in allowed appeals. This success rate for citizens is especially interesting in relation to the broadened scope of local authorities' closure power. Whilst the doctrinal analysis shows that Article 13b Opium Act was originally intended as an instrument to fight illegal drug outlets, our empirical analysis shows that only a small portion of all cases involve actual drug dealing. Almost half of all cases involved commercial possession and a slightly smaller portion involved growing cannabis. While the legislature never intended for commercial possession and growing cannabis to fall under the scope of the closure power, today they account for almost all published cases brought before court.

The relatively low success rate for citizens is striking both with respect to the underlying drug-related activities of a closure, as well as the number of received warnings. Closure orders were only preceded by warnings or other less intrusive measures in 5.7% of all cases, and lack of a prior warning or other measure was only reason to end a closure in 4.6% of all cases. These findings not only show that local authorities apply a one strike you are out-approach, but also that courts do not disapprove of such an approach. Lack of prior warnings in the analysed cases might indicate that serious violations with large quantities of drugs are overrepresented in our sample. However, the Council of State actively approved the one strike you are out-policy of the municipality of Venlo in 2016 (ECLI: NL:RVS:2016:950), which supports the idea that, despite the legislature's intention, immediate closure is developing into the rule rather than the exception. This development, together with the other developments shown by the doctrinal analysis regarding the ongoing widening of the scope of the closure power, will likely result in a decrease of successful defences for citizens. This makes us draw the cautious prediction that the number of allowed appeals may drop in the future.

Table 2 showed the defences put forward by citizens in court. We specifically focussed on the impact of proportionality defences as previous scholarly literature indicated that the proportionality principle is one of the most important grounds for judicial review and one of the most important factors in protecting individual rights and freedoms against excessive interference by local authorities (Di Ronco & Peršak, 2014). The results showed that proportionality defences are put forward in the vast majority of all cases. Our analysis of case law and earlier studies on drug-related closures (Vols & Bruijn, 2015; Bruijn & Vols, 2017) show that a proportionality defence breaks-up in a wide range of arguments such as physical or mental health problems, lack of a prior warning, and financial implications of the closure. A proportionality defence can also include the consequences of the closure for minor children, or the argument that a closure will result in homelessness, placement on a tenant blacklist, or both.

Our data showed that none of the defences seem statistically significantly successful in court, not even a proportionality defence. Proportionality defences were only successful in 11 out of 78 cases (14.1%) in which the defence was put forward. Yet, our analysis shows that, despite the case outcome, raising a proportionality defence makes it more likely that the court explicitly mentions the (dis)proportionality of the closure and its consequences as a reason for its final decision. This does not only mean that the court balances the consequences of the closure and interests of the citizen against the purpose of the closure to decide whether the closure is proportional in a particular case, but also that the outcome of this balancing will directly impact the court decision. Moreover, while the court can decide to review the proportionality of the closure on its own initiative, not raising a

proportionality defence makes it more likely that the judge does not assess the proportionality of the closure order and its consequences at all. In other words, it is likely that the proportionality of the closure and its consequences will not have any impact on the court decision if a proportionality defence is not put forward.

Thus, despite its function as a gateway to judicial review, the fact that it was put forward in the vast majority of the analysed cases, and its impact on court decisions, a proportionality defence does not necessarily result in a more favourable outcome for citizens. In fact, our analysis suggests the exact opposite. Contrary to our expectations, we found a substantial relationship between raising a proportionality defence and the dismissal of an appeal. In other words, raising a proportionality defence makes it more likely that an appeal will be dismissed.

A possible reason is that local authorities probably refrain from closing a home if they believe that the closure and its consequences are not in proportion to the offence committed. The proportionality principle will hence function as a barrier or threshold for the local authority to issue a closure order. This presumable role of the proportionality principle is probably more apparent in cases on home closures than in cases on the closure down of public premises as the negative consequences of eviction on someone's life are immense (Kearns et al., 2000; Nettleton, 2001; Bright, 2010; Burgard et al., 2012; Currie & Tekin, 2015; Desmond & Kimbro, 2015; Desmond, 2016). This would also explain the differences in number of closures between public premises and homes as shown by the survey.

A similar explanation for the relationship between a proportionality defence and the dismissal of an appeal relates to the set-up of Dutch administrative law procedures. Under Dutch administrative law, an intermediate stage – the objection procedure – exists between issuing a closure order and access to judicial review in which the local authority reconsiders its closure order. It is possible that local authorities decide to terminate the closure order if they believe that closing the home will result in an unfair balance between the purpose of the closure and the interests of the citizen(s) involved.

Hence, the proportionality principle might filter out cases that are evidently disproportionate before issuing a closure order or during the objection procedure. This could explain why a proportionality defence does not lead to a successful outcome for citizens in court; advancing a proportionality defence at such a late stage might just function as a last straw that citizens grasp to defend their case.

Another explanation might be that the cases in our sample mainly involve serious violations with large quantities of cannabis that justify the outcome of a proportionality review. This suggests the need for further research involving analyses of more factors that may relate to the case outcome such as the type and quantity of discovered drugs.

Nonetheless, current analysis seems to indicate that, once the case is taken to court, a proportionality review is a procedural hurdle rather than a substantial safeguard protecting citizens against the harsh law and order approach that relies on closing homes.

Conclusion

This study combined doctrinal and empirical legal analyses to explore and reveal a hidden aspect of the war on drugs in the Netherlands: the use of home closures to tackle drug-related crime in residential areas. Although the drug policy in the Netherlands is known for its tolerance, this paper demonstrated that the Dutch have developed an aggressive enforcement method against drug-related crime without bringing criminal law into play. The results

from the survey showed that only a small portion of the municipalities in the Netherlands already account for hundreds of closed premises in 2015. This alternative war on drugs is a perfect example of how the response to crime has changed into a culture of control.

While an analysis of the law in the books showed that citizens have the possibility to request judicial review of administrative action under both Dutch and European law, the analysis of the law in action showed that judicial courts do not seem to counter this repressive approach. Our findings show that citizens advance a proportionality defence in the vast majority of all cases and that raising such defence is likely to impact the case outcome. Yet, raising a proportionality defence will not result in a more favourable outcome for citizens and will most likely even result in the dismissal of the appeal. This seems to indicate that the judicial proportionality review is of procedural importance rather than a safety net to protect individual's rights and interests against the excessive use of closure orders and following eviction in the war on drugs.

The ongoing widening of the scope of the closure power, the approved one strike you are out-policy, relatively low success rate of citizens who fight the loss of their home, lack of significantly successful defences together with a seemingly meaningless proportionality check show no sign of a legal safety net against the loss of one's home due to drug-related crime at the suit of a local authority. This makes it hard to believe that the war on drugs in the Netherlands is sputtering to a close.

Conflict of interest statement

We wish to confirm that there are no known conflicts of interest associated with this publication and there has been no financial support for this work that could have influenced its outcome. The manuscript has been read and approved by all named authors.

Acknowledgments

The authors are grateful to Judith Mildner and Suzanne Schot for their contribution during the writing process.

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