Upperdogs versus Underdogs

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ARTICLE

Upperdogs Versus Underdogs

Judicial Review of Administrative Drug-Related Closures in the Netherlands

Michelle Bruijn & Michel Vols

1   Introduction

In many jurisdictions, local authorities have increasingly been empowered to address disorderly behaviour with intrusive, and sometimes even punitive, measures.[1] Some scholars argue that using civil or administrative instruments to tackle certain behaviour has developed into a widespread regulatory trend.[2] Two classic examples of such instruments are area exclusion orders and eviction orders.[3] In the Netherlands, which is the focus of this article, administrative authorities have the power to close homes and other properties, in addition to using criminal law enforcement, to tackle drug-related crime.[4]

Due to time-consuming criminal proceedings and criminal law safeguards, the Dutch legislature has drawn upon administrative law to quickly deal with the negative impact of drug-related crime.[5] Under Article 13b of the Dutch Anti-Drugs Act – formally known as the Opium Act – the mayor[6] has the power to close homes and other premises if narcotics are sold, delivered, supplied, or present for one of these purposes, in or near the homes or premises. On a yearly basis, the use of the administrative drug-related closure power in the Netherlands results in the closure of hundreds of homes and other properties, and hundreds of court decisions.[7] In 2016 alone, mayors closed at least 1,277 properties due to drug-related crime.[8]

This intrusive measure often leads to the lockdown of companies, evictions of entire families, placement on tenant blacklists, and even homelessness.[9] What is

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1   Di Ronco & Peršak 2014; Vols & Duran 2014; Fick & Vols 2016.
2   Garland 2001; Beckett & Herbert 2009; Devroe 2012.
3   Weil 1991; Vols & Duran 2014; Fick & Vols 2016.
4   Vols & Bruijn 2015; Peters, 2017; Van der Vorm 2019.
5   Bruijn, Vols & Brouwer 2018.
6   In the Netherlands, a mayor (in Dutch: *burgemeester)* is a non-elected administrative authority appointed by the national government. The mayor chairs both the executive board and legislative council of a municipality (local government) and is responsible for the safety and public order within his municipality.
7   Bruijn, Vols & Brouwer 2018; Bruijn 2018.
8   Bruijn 2018.
9   E.g., Council of State 14 September 2016, ECLI:NL:RVS:2016:2464; Council of State 26 October 2016, ECLI:NL:RVS:2016:2840.

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more, housing associations are entitled to cancel a lease after a drug-related closure, without any judicial intervention.[10] In the case of an owner-occupied home, banks may require that homeowners immediately pay off their mortgage loan.[11]

Despite these signs of the rights and freedoms of individuals being endangered, there is reason to believe that the mayor is more likely to win in court than the individual contesting the closure order. According to Galanter, an insurmountable disparity exists between opposed parties in litigation, in terms of resources and experiences, which tilts the legal system in favour of the 'stronger' party.[12] He divides actors into two classes, calling the stronger party a 'repeat player' and the other party a 'one-shotter'. In Galanter's framework, repeat players are individuals or entities, such as local authorities or governments, with a strategic interest beyond a singular case, and – as the name suggests – repeat players are regularly engaged in legal disputes. A repeat player has expertise, can play the odds, and often has 'resources to pursue its long-run interests'.[13] Whereas repeat players often have low stakes in the outcome of a particular case, the stakes are often high for the one-shotter. One-shotters are therefore more likely to minimise the probability of maximum loss.[14]

An extensive body of empirical research focusses on the framework of the repeat player and one-shotter dichotomy.[15] Much scholarly research has confirmed Galanter's theory that the actor with the greatest recourse and (relatively) lowest stakes has the highest success rate in litigation.[16] For instance, governments are generally more successful than businesses, while businesses are generally more successful than individual actors.[17] Much of the research, however, tests Galanter's theory by focussing merely on win rates, rather than on specific case characteristics.[18]

Our study is the first to analyse the relative strengths of different types of parties appearing as litigants in drug-related closure cases in the first instance courts of the Netherlands. We build on Galanter's dichotomy to create our own framework, and to examine the relative success of litigants by analysing data on a sample of drug-related closure cases, between 2008 and 2016, in the Netherlands (N=217). The article not only assesses whether particular types of litigants win or lose more frequently than other types of parties in first instance court cases on drug-related closures, it also explores how other case characteristics, such as the type of drugs or property, or the legal arguments put forward, might influence case outcomes.

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10 Brouwer & Schilder 2011, p. 322; Vols 2015.
11 Gemeente Rotterdam 2003.
12 Galanter 1974.
13 Galanter 1974, p. 98.
14 Galanter 1974.
15 E.g. Galanter 1974; McEwen & Maiman 1984; Vidmar 1984; Wheeler et al. 1987; Songer & Sheehan 1992; McCormick 1993; Albiston 1999; Dotan 1999; Edelman & Suchman 1999; Farole 1999; Harris 1999; Songer, Sheehan & Haire 1999; Hendley, Ryterman & Murrel 1999; Menkel-Meadow 1999; Howard 2001; Eisenberg & Farber 2003; Kritzer 2003; Cross 2007; Kopczynski 2008; He & Su 2013; Niemeijer 2015.
16 E.g. Owen 1971; Wanner 1975.
17 Songer, Sheehan & Haire 1999.
18 E.g. Wheeler et al. 1987; Songer & Sheehan 1992.

The article is organised as follows. Section 2 presents the background to our study. Here, we describe Dutch drug policy, and the law and legal procedures relating to drug-related closures. Section 2 elaborates on Galanter's framework and prior related research, operationalises our own framework, and addresses our hypotheses. Section 3 explains our empirical study and methodology. Section 4 reports our results; Section 5 discusses our results; and Section 6 concludes our results.

2 Background

2.1 Dutch drug 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. This policy is also known as the 'tolerance policy', since both the sale and possession of cannabis are officially criminal offences under Dutch law (art. 3 of the Opium Act). In 1976, the Dutch government decided to officially tolerate the sale and possession of cannabis, in order to prevent cannabis from becoming a gateway drug.[19] This decision was rooted in a desire to separate cannabis (soft drugs) from drugs carrying unacceptable risks for public health (hard drugs).

Over the years, the national legislature, local governments and the Public Prosecution Service have developed rules and policies on small retail in cannabis.[20] Under current Dutch law, coffeeshops are allowed to operate under strict conditions: the prohibition of advertising and marketing, and the banning of hard drugs, alcohol, public disturbance, minors, and transactions with non-Dutch residents. Moreover, a coffeeshop's stock should be limited to 500 g, and sale transactions should not exceed 5 g per customer, per day.[21]

In 1999, the legislature decided to grant mayors the power to close down coffeeshops not complying with these conditions, under Article 13b of the Opium Act. The same provision authorises mayors to close any public premises that are engaged in illegal drug trading.[22] In 2007, the legislature decided to extend the scope of this closure power to homes and other non-public premises.[23] Ever since, mayors have been entitled to close down both public and non-public premises, including private owner-occupied housing, if drugs are sold, delivered, provided, or present for one of these purposes, in or near the building in question.

2.2 The Dutch drug-closure procedure

Drug-related closures in the Netherlands are subject to administrative law. The mayor initiates the closure by issuing a closure order against the owner, owner-occupier, occupier, shopkeeper, business owner, or any other party holding a title

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19   WODC 2009, p. 50-51.
20   Van der Veen 2002.
21   Wouters, Benschop & Korf 2010; Aanwijzing Opiumwet 2015; Bruijn & Vols 2017; Bruijn, Vols & Brouwer 2018.
22   Richtlijnen 1996; Aanwijzing Opiumwet 2000.
23   *Kamerstukken* II 2005/06.

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to the property. If the party wishes to fight the closure order, he or she may respond by filing an objection with the mayor who issued the order (art. 7:1 General Administrative Law Act, hereafter: GALA).

After the mayor is served with the notice of objection, he or she will reconsider the closure order. The mayor may consider the objection to be either well-founded or unfounded. If the mayor considers the objection well-founded, the closure order will be modified or annulled. If the mayor considers the objection unfounded, the party may file a notice of appeal with the district court (art. 8:1 GALA). This is the court of first instance. Due to judicial powers being overloaded, a regular administrative law procedure with proceedings on the merits can easily take up to a year. However, if the interests at stake are too high to wait this long, parties can request a preliminary injunction (art. 8:52 GALA). The decision in a preliminary injunction is provisional and not binding in the main proceedings, but it could (for instance) suspend a closure. The deadlines for these procedures are shorter, and some procedural formalities are omitted. A request for such an accelerated procedure is only granted if waiting for the main proceedings would have irreversible consequences. The main proceedings usually continue after the court decides in the preliminary injunction.[24]

The mayor's authority to close properties is a discretionary power, which means that district courts are only allowed to review whether or not the power has been exercised reasonably. In 2016, the highest administrative court in the Netherlands – the Administrative Jurisdiction Division of the Council of State (the Council of State) – stressed the importance of including the circumstances of each individual case in this 'test of reasonableness'.[25] This decision underlines the primary goal of an administrative procedure: examining if someone is being treated unlawfully by the actions of an administrative authority.[26]

If a district court rules that a closure order is unlawful, it will annul the order and instruct the mayor either to issue a new order or to provide better substantiation for the annulled order (art. 8:51a GALA). The rulings of district courts are open to higher appeal at the Council of State.

2.3 Upperdogs versus underdogs

With 4,975 citations[27] on Google Scholar, Galanter's article, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' is one of the most cited law review articles of all time.[28] Galanter addresses the question of how parties perform in litigation based on a position of (dis)advantage.[29] His theory ought to explain why governments are generally more successful in litigation than businesses, and why businesses are generally more successful than individuals.

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24   Marseille et al. 2016, p. 375-392.
25   Council of State 26 October 2016, ECLI:NL:RVS:2016:2840.
26   Brouwer & Schilder 1998.
27   On February 28, 2020.
28   Shapiro & Pearse 2012.
29   Galanter 1974.

Galanter divides actors in a legal dispute into two categories: repeat players and one-shotters. As the terms imply, repeat players are engaged in many litigations over time, while one-shotters only use the court occasionally.[30] In Galanter's framework, repeat players are not only actors with greater litigation experience, but are usually also the 'larger units' (organisations), with low stakes relative to total worth, while one-shotters are typically the 'smaller units' (private individuals), with high stakes relative to total worth.[31]

According to Galanter, repeat players are the 'ideal type' of litigant, with low stakes, and a wealth of resources, expertise and experience. Repeat players can play the odds and have a strategic interest beyond a singular case. Moreover, their advantage extends beyond legal disputes, as repeat players are likely to be adept at making their behaviour conform to the law and to relevant jurisprudence. While lawyers are supposed to level the playing field, and are themselves repeat players, their influence is insufficient, as superior financial recourse allows repeat players to hire better legal representation than one-shotters.[32]

Another distinction that Galanter creates is the distinction between 'haves' and 'have nots'. Haves are those with power, wealth and status. Galanter introduces different but overlapping classes of haves, all enjoying different interlocking advantages – such as repeat player status.[33] In the United States, the repeat player category often overlaps with the haves, and the one-shotter category typically melds with the have nots, as 'most repeat players are larger, richer and more powerful' than most one-shotters.[34]

Research by myriad scholars has confirmed Galanter's theory that haves tend to come out ahead in litigation, due to a combination of legal experience, financial resources, and better legal representation.[35] Yet, other studies find little to no evidence to support the theory that stronger parties persistently come out ahead.[36] Regardless of the research outcome, all studies apply a framework that is similar to that employed by Galanter. Popular variations include party capability theory, and terminology such as 'stronger and weaker parties' or 'underdogs and upperdogs'.[37]

Several studies acknowledge the extraordinary role played by one specific repeat player: the government.[38] Kritzer analysed eleven different scholarly studies that focus on Galanter's framework, in order to demonstrate that governmental parties come out ahead because of advantages associated with being a government, rather than their greater resources or their repeat player status.[39] A governmental

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30 Galanter 1974, p. 97.
31 Galanter, 1974, p. 98.
32 Galanter 1974.
33 Galanter 1974, p. 124-125.
34 Galanter 1974, p. 103.
35 E.g. Owen 1971; Wanner 1975; Wheeler, Cartwright & Kagan 1987; Atkins 1991; Songer & Sheehan 1992; Farole 1999; He & Su 2013.
36 E.g. Haynie 1994; Smyth 2000.
37 E.g. Wheeler et al. 1987; Atkins 1991; Songer & Sheehan 1992; McCormick 1993; Smyth 2000; He & Su 2013.
38 E.g. Sheehan & Mishler 1992; Farole 1999; Kritzer 2003.
39 Kritzer 2003.

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party's presumed legal expertise, economic resources, rule-making power, and ability to settle cases if it considers its position to be weak are just some of the factors explaining why it can dominate in court.[40]

In our analysis, we build on Galanter's framework and other insights into governmental parties,[41] to suggest that the mayor is the stronger litigant in first instance cases on drug-related closures in the Netherlands. In other words, we assume that the mayor is the upperdog litigant. We deliberately chose to avoid the term 'repeat player' since we believe that, as head of the local council and chair of both the executive and legislative council of a municipality, a mayor has significant advantages over individuals, businesses and organisations, which go beyond the advantages usually associated with repeat players. Mayors make their own local policy rules, which (amongst other things) define the local sanctioning regime. This is an important advantage over other litigants, as the actions of mayors are reviewed against their own policy rules. This is particularly relevant in cases on drug-related closures. The court not only reviews if the mayor was legally empowered to close the premises, but also (and more importantly) whether the closure order was in line with the mayor's own policy.[42] In other words, a mayor plays a role as both law-maker and law-enforcer.

Mayors are also frequently engaged in disputes and litigation, and they can create new policy rules according to the outcome of court decisions, and hence adapt their behaviour in line with the adapted policy.[43] These advantages, in combination with the discretionary nature of the closure power and their litigation experience, give mayors the ability to develop and implement a comprehensive litigation strategy.

Another advantage mayors have – unrelated to being a 'have' or a repeat player, but associated with the nature of a governmental party – is their ability to choose their own 'battles'. Generally, mayors have two opportunities to start or end a legal procedure: 1) they can refrain from issuing a closure order; and 2) they can 'withdraw' during the objection phase, if they consider their prospect of winning in court unlikely.[44]

Mayors are thus not only strong in court, but also during the pretrial phase and the aftermath. These advantages, in and outside of court, show that the suggested strength of mayors is based not only on their experience and economic resources, but also (maybe even largely) on their capacity as a governmental party.[45] This is why we classify mayors as upperdog litigants, relative to any opposing party (the underdog litigant) in drug-related closure cases (see figure 1). In line with Galanter's framework showing that the stronger party comes out ahead in litigation, we expect the following:

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40   Kritzer 2003.
41   E.g. Sheehan & Mishler 1992; Farole 1999; Kritzer 2003.
42   E.g. Council of State 26 October 2016, ECLI:NL:RVS:2016:2840.
43   Eikenaar 2017.
44   With 'withdraw' we refer to the possibility to declare an objection well-founded.
45   See also, Kritzer 2003.

- *Hypothesis 1: Upperdogs are more likely to win in court than underdogs.*

We made an extra classification of upperdogs.[46] We assumed that large municipalities have more and better legal and financial resources (e.g. a larger legal department and better access to lawyers) than small municipalities, and that they are therefore stronger overall. Due to these resources, mayors from large municipalities are probably better able to adapt their behaviour to the law and court decisions. Mayors with better legal resources might also be more selective in deciding whether or not to use the closure power under article 13b of the Opium Act, or in determining when to withdraw from a case in the objection phase. Based on the population size of their municipalities, mayors from large municipalities are classified as 'strong upperdogs' (figure 1). The category of 'weak upperdogs' refers to mayors from small municipalities. Thus:

- *Hypothesis 2: Strong upperdogs are more likely to win in court than weak upperdogs.*

Opposing upperdogs, we have the underdog litigants. The underdogs are individuals, businesses and organisations, such as coffeeshops, restaurants, cafes, stores, and companies. Despite the fact that businesses and organisations are called the stronger party in most studies,[47] we classify them as being the underdog relative to the mayor, for the reasons explained above. Similar to upperdogs, we divided the category of underdogs in order to identify 'strong underdogs' and 'weak underdogs'. Strong underdogs are businesses and organisations, such as coffeeshops, restaurants, cafes, stores, and companies. These business parties are more likely to have litigated in the past, and they have substantially more financial resources than individuals. Businesses and organisations like restaurants and coffeeshops are also more likely to have frequent correspondence with the local government. Like McCormick, Wheeler et al., and Songer et al., who have attempted to operationalise and test Galanter's theory, we consider individuals to be relatively weak litigants, since they usually have less experience and fewer resources than businesses or organisations.[48] We therefore classified individuals as weak underdogs (figure 1). Thus:

- *Hypothesis 3: Strong underdogs are more likely to win in court than weak underdogs.*

## 3 Empirical study

The above shows that we are not comparing haves and have nots or repeat players and one-shotters in the absolute sense, as intended by Galanter, nor are we inter-

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46 For other studies with subdivisions of party classifications, see e.g. Songer & Sheehan 1992; McCormick 1993.
47 E.g. Songer & Sheehan 1992.
48 Wheeler et al. 1987; McCormick 1993; Songer, Sheehan & Haire 1999.

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Figure 1   *Party classification*
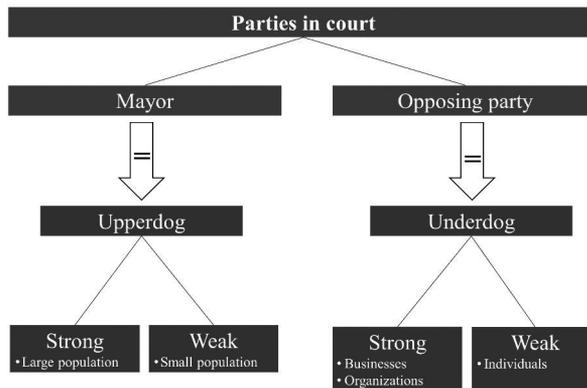
ested in the success rate of parties relative to their resources. However, our study does examine the impact of the type of litigant on case outcome. In line with Galanter's theory, we hypothesise that governments (upperdogs) do better in court than businesses (strong underdogs), which in turn do better than individuals (weak underdogs). The null hypothesis suggests that there is little to no difference between these categories of litigants.

3.1 Methods

To test the research hypotheses, and to examine the success of the different types of litigants in cases on drug-related closures decided by district courts in the Netherlands, we retrieved court decisions manually from the official Dutch Judiciary website (www.rechtspraak.nl). To facilitate the reproducibility of our study, we used the following fixed search terms: '13b Opium Act', 'closure', '13b Opium Act closure', 'Opium Act + home', 'Opium Act + property' and 'Opium Act + coffeeshop'.[49] The Dutch Judiciary website allowed us to automatically filter on all judgements from courts of first instance – the district courts – on administrative law. We manually selected all judgements on drug-related closures. This search resulted in a data set (N=217) containing all the published cases on drug-related closures under article 13b of the Opium Act between 2008 and 2016 in the Netherlands.

This sample of 217 court decisions is a selection of the overall population of judgements from 2008 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. The policy shows 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, such as media attention, consequences for the

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49   These indicated search terms are English translations of the following Dutch terms: '13b Opium-wet', '13b Opiumwet sluiting', 'Opiumwet + woning', 'Opiumwet + pand' and 'Opiumwet + coffee-shop'.

application of regulations, and the interests of the 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'. A court decision should also be published if a case has received attention from the media, or if the decision is of significant importance for further rulings. Courts can develop additional rules and selection criteria. This ambiguous publication policy implies that we cannot be certain whether our sample of published case law is representative of the population of all case law (published and unpublished). We discuss the implications of this possible selection bias in the discussion of our results (section 5).

We reviewed and hand-coded all cases, in order to document factors that appear to be important to case outcomes, such as the type of drug-related crime, property, litigant, and arguments advanced by litigants.[50] Finally, the collected data were analysed statistically. A series of logistic regressions is used to estimate the association between the type of litigant and the case outcome. We also consider how this association changes in light of other case characteristics, such as the type of property subject to the closure order, the type of drugs involved, and the legal arguments put forward by the accused.

Regression analysis is a statistical tool that 'allows us to quantify the relationship between a particular variable and an outcome that we care about while *controlling for other factors*'.[51] We use logistic regression instead of linear regression, because our dependent variable is a dichotomous variable, which means that it has two possible outcomes.[52] The dependent variable in this analysis is the outcome of a court case: the upperdog either won or lost the case, which is equal to whether the appeal was dismissed (= upperdog won) or allowed (= upperdog lost). The independent variables, also known as predictors, are the case characteristics. Logistic regression analysis estimates the association between the dependent variable and the independent variables.[53] In other words, the logistic regression analyses used in this research estimate the association between the outcome of the court case and different case characteristics (such as the type of drugs discovered and the type of premises closed).

The analysis used a logit model to predict the log odds ratios (the logarithmically transformed odds ratios) for the predictors. I transformed the log odds ratios into simple odds ratios, by removing the logarithm. To clarify, odds present the ratio of the probability that event X occurs to the probability that event Y occurs. The odds ratio is the ratio of two odds.[54] Consider the odds that the mayor will win the case in soft drugs-related cases vs. the odds that the mayor will win in hard drugs-related cases. If the odds ratio is 1, this would mean that there is no difference between the odds that mayors will win. If the odds ratio is greater than 1, the odds that the mayor will win in soft drugs-related cases are higher than those

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50   See Hall & Wright 2008; Lawless, Robbennolt & Ulen 2010; Epstein & Martin 2014; Jacobs & Vols 2017; Vols 2019.
51   Wheelan 2013, p. 186.
52   Menard 2002; Levshina 2015, p. 253.
53   Levshina 2015 p. 253-276.
54   Levshina 2015, p. 261-262.

in hard drugs-related cases. If the odds ratio is less than 1, the odds that the mayor will win in soft drugs-related cases is smaller than in hard drugs-related cases. The coefficients for the predictors (the case characteristics), as presented in this article, are presented in odds ratio. They represent the expected chance that the upperdog wins the case, compared to the reference level; the reference level being the omitted category (see e.g. table 3).[55]

The estimated association – expressed in an odds ratio – can be based on coincidence, therefore the probability of two or more distributions being interrelated is calculated. This probability is also called the p-value. If the p-value is lower than 0.05, the hypothesis that there is no relationship between two or more variables is rejected. This is also called the null hypothesis. The Wald test statistic (a ratio of the estimate to the standard error) is used to obtain the statistical significance (p-value) of each coefficient.

3.2 Party classification

In order to examine the association between the relative strength of litigants and the case outcome in drug-related closure cases decided by the administrative district courts in the Netherlands, each party was initially classified as belonging to one of two major classes: upperdogs and underdogs. While most previous studies did not make further distinctions, we created subcategories encompassing stronger and weaker upperdogs and underdogs (figure 1).

Specific information about the wealth and the exact litigation experience of particular parties is not available in court decisions. As such, we did not have enough information to unambiguously classify one of the upperdogs as having greater litigation resources than the others. Consequently, we assigned mayors to general classes of stronger or weaker upperdogs, based on the population size of their municipality. We assumed that large municipalities have more legal and financial resources than small municipalities (e.g. larger legal departments and better access to lawyers), and that they are therefore stronger. Strength, in terms of population size, is measured using the median population size for the municipalities in our data set. We used the population size for each municipality, as measured on January 1st 2017.[56] Mayors from municipalities with more than the median number of citizens are classified as 'strong upperdogs', while mayors from municipalities with the median number of citizens or less are classified as 'weak upperdogs'.

We divided the class of underdogs similarly, into strong and weak underdogs. We coded businesses and organisations, such as coffeeshops, restaurants, cafes, stores, and companies, as 'strong underdogs'. Individuals were coded as 'weak underdogs'. We coded both private and professional landlords as being the stronger litigants, relative to an occupier. In some cases, a closure order is contested by multiple litigants, for example a landlord and a tenant. In these cases, we looked at the strongest party involved, in order to classify the litigants as either strong or weak. In the example of a landlord contesting a closure order together with a

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55 Levshina 2015, p. 253-276.
56 CBS 2017.

tenant, the parties are coded together as being a strong underdog. The weak underdogs class includes mainly tenants and people who own the home in which they live (owner-occupiers).

4   Results

4.1 Descriptive statistics

Table 1 provides summary statistics for the full sample of drug-related closure cases in the Netherlands. In almost 70% of all cases the appeal is dismissed, meaning that the mayor wins in the vast majority of cases. This offers preliminary evidence that upperdogs are stronger in court than underdogs; this is explored in greater depth in the regression analysis in the next section.

On average, the length of the closure period is seven months (SD=5.7), although the length can range from 1-60 months. However, as table 1 reveals, we had to exclude twelve cases from our sample. In seven cases, the mayor decided to close the property for an indefinite period. The property was permanently closed in three cases, and for the rest of the cases it was not possible to define the length of the closure.

Our sample includes cases from small municipalities like Beemster, with 9,205 citizens, but also cases involving large municipalities like Amsterdam and Eindhoven, with populations of 844,947 and 226,868, respectively. The average population size is 154,365.6 (Mdn=118,731, SD=155,687.2). Six published decisions anonymised the names of the municipalities involved.

The analysis illustrates that the following activities fall within the scope of drug-related closure orders: drug dealing in or near a building; growing more than the tolerated amount of five cannabis plants in or near a building; drug possession for commercial purposes in or near a building; producing drugs in a laboratory; and violating the tolerance criteria. The latter relates to the criteria under which coffeeshops are tolerated.

Table 1 clearly shows that the amount of drugs discovered differs significantly between the cases. The table distinguishes between drugs in grams and cannabis plants. Yet, in some cases both drugs in grams (e.g. cocaine, or cut hemp) and cannabis plants were discovered. Cases involving coffeeshops are left out, since coffeeshops are allowed to possess a certain quantity of soft drugs. Cases involving quantities of drugs that were not converted into grams or plants – such as pills, cookies, or bags – were also excluded.

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Table 1   Summary of Statistics for all Drug-related Closure Cases (N=217)

	Mean or %	Median	Range	SD	N
Decision					217
Upperdog wins	69.6%				
Underdog wins	30.4%				
Length closure period (in months)	7.007	6	1–60	5.7	205
Population size	154365.6	118731	9205-844947	155687.2	211
Violations					
Dealing	18.89%				41
Cultivation	23.50%				51
Possession	34.56%				75
Lab	1.38%				3
Tolerance criteria (coffeeshop) coffee-shop)	19.82%				43
Unknown	1.84%				4
Premises					
Homes	40.09%				87
Coffeeshops	20.74%				45
Other businesses[a]	34.56%				75
Combination of homes and businesses[b]	3.69%				8
Other[c]	0.92%				2
Litigants (appealing parties)[d]					
Strong underdogs (businesses)	64.65%				139
Weak underdogs (individuals)	35.35%				76
Quantity of drugs[e]					
Grams[f]	15025.87	388.0	0.5-446420	50744.53	97
Cannabis plants	585.23	265	2–4260	909.85	47
No drugs discovered					14
Amount unknown					22

[a] Such as restaurants, cafes, stores, companies and storage locations.
[b] In some cases, a cafe or restaurant with a connected upstairs flat is closed.
[c] One of the cases falling within this category includes two sheds, a duckling cage, and a poultry-house. The other case includes the property of a foundation, which was designated as a residential property. Yet, it was unclear whether or not people actually lived there.
[d] We left out the two cases that are categorised as 'other premises'.
[e] Soft drugs and/or hard drugs.
[f] Coffeeshops are excluded.

Figure 2   *Win rates for upperdogs and underdogs (N=217) Estimated Effect of the Relative Strength of Parties on the Probability that the Upperdog will Win*
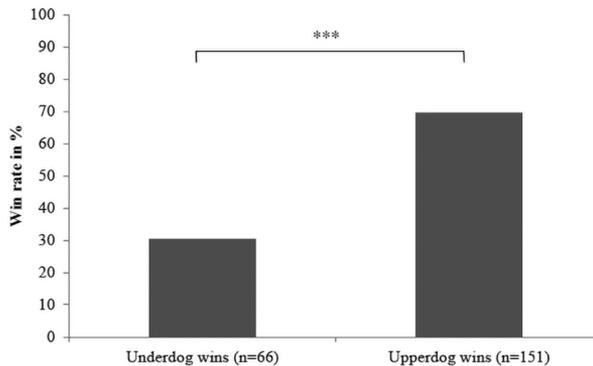
*** p < .001

4.2 Logistic regression results

Our article focusses on the relationship between the case outcome and the relative strength of litigation parties in drug-related closure cases. A directional independent-samples t-test was conducted, to compare the success rate for mayors (the upperdogs) with the success rate of the opposing litigants (underdogs) in drug-related closure cases (N=217) (mayor wins = 1, mayor loses = -1). There is a statistically significant difference between the case outcome for upperdogs and underdogs, $t(216) = 6.26$, $p < .001$, CI [.29, inf]. In line with hypothesis 1, our results show that upperdogs win more often in court than underdogs, when it comes to drug-related closure cases.

Table 2 presents regression models, showing the impact of population size on the chance that an upperdog will win. Mayors from a municipality with more than the median number of citizens (Mdn=118,731) are classified as 'strong upperdogs'. Being a strong upperdog in terms of population size has a positive estimate, boosting the chance of winning in court in comparison with a weak upperdog. Yet, contrary to hypothesis 2, there is no statistically significant difference between the two.

Table 2 also reveals the coefficients and standard errors for underdogs. The coefficient is positive, and highly statistically significant (p < .001). This means that, contrary to hypothesis 3, strong underdogs are associated with a greater likelihood that the mayor will win. In other words, weak underdogs significantly increase the chance that upperdogs will lose the case, in comparison with strong underdogs. Thus, a family who is at risk of losing their home has a better chance of winning the case than the owner of a restaurant.

Table 2   ***Estimated Effect of the Relative Strength of Parties on the Probability that the Upperdog will Win***

	Coefficients (SE)	N
Upperdogs		
Strong versus weak	1.55 (.30)	211
Underdogs		
Strong versus weak	2.82***(.31)	215

Note Estimated coefficients in odds ratio. Standard errors in parentheses. *** $p < .001$

4.3 Additional considerations

In this section, we consider the above findings in light of a number of other case characteristics: the type of drugs discovered, the type of property that is subject to closure, and the proportionality defence put forward by the underdogs. A proportionality defence contests that closing the property, and the implications of doing so in the specific case, are in proportion with the purpose of the closure. The exact meaning of proportionality is the subject of fierce academic debate.[57] Yet, the general underlying idea of proportionality is that the purposes, means and consequences of a measure should be balanced.[58] For instance, the purpose of a drug-related closure is to terminate the illegal activity, to prevent further violations, and to restore peace and public order in the neighbourhood.[59] If the closure and its consequences exceed these purposes, one speaks of the disproportionality between the offence, sanctioning, and/or consequences.[60]

Table 3 presents a series of logistic regression models which estimate the chance that upperdogs will win in drug-related closure cases. In order to investigate how the relationship between the type of underdog and case outcome is influenced by other case characteristics, model 2 adds the type of drugs discovered in or near the property that is subject to the closure order. This model also indicates that strong underdogs are positively associated with the odds that the upperdog will win the case, relative to the odds of weak underdogs (OR=2.50, SE=.33). The model also indicates that drug-related activities involving soft drugs decrease the chances that the upperdog will win, in comparison with drug-related activities involving hard drugs (OR=.46, SE=.44). Yet, the coefficients are not statistically significant. In addition, the model indicates a large, negative and significant relationship between the absence of drugs and the chance that the mayor will win (OR=.18, SE=.67).

Model 3 controls for the type of property subject to closure. The coefficients for this variable and the coefficient for underdogs both fail to reach statistical significance. Yet, the parameter estimate for strong underdogs remains positive, and the magnitude increases only slightly compared to model 1 (OR=3.14, SE=.84). The model still indicate that the absence of drugs is significantly and negatively

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57   Barak 2012.
58   Fick & Vols 2016.
59   Bröring et al. 2016, p. 599; Peters 2017.
60   De Waard 2016.

associated with the chance that the mayor will win the case (OR= .18, SE=.67). These results indicate that the influence of the type of underdog on the chance that the mayor will win is exceeded by the absence of drugs, in combination with the type of property.

Parties can put forward many different types of defences, such as lack of substantiation for the closure order, or the lapse of time between the offence being committed and the issue of a closure order. Our analysis and earlier studies show that proportionality defences are most frequently put forward in drug-related closure cases.[61]

After taking the proportionality defence into account, model 4 shows that the magnitude of the association between the type of underdog and the case outcome is diminished (OR=2.81, SE=.87). It is no longer possible to say, with 95% confidence, that there is an association between the type of underdog and the chance that the mayor will win, when adjusting for proportionality defences in combination with the type of drugs and property. Yet, model 4 illustrates that raising a proportionality defence is associated with an increase in the chance that the mayor will win (OR=4.73, SE=.43). While the association of other factors fails to reach statistical significance, the association between a proportionality defence and the case outcome is highly significant.

Model 5 shows that a proportionality defence can be broken down into a wide range of arguments, such as the consequences of the closure for minors. A proportionality defence can also refer to the disproportionality of the closure due to the accused having physical or mental health problems, the length of the closure, the financial implications of the closure, and/or resulting homelessness. Many proportionality defences are associated with the chance that the mayor will win the court case. Notably, arguing the financial consequences of the closure (OR=8.12, SE=.53), putting forward multiple proportionality defences (OR=5.14, SE=.48), or raising a general proportionality defence (OR=2.92, SE=.43), are all associated with an increase in the chance that the mayor will win.

Table 3   *Estimated Coefficients from Logistic Regression Models Predicting the Probability of Success for Upperdogs Among Drug-related Closure Cases*

	Model 1	Model 2	Model 3	Model 4	Model 5
Underdogs					
Strong versus weak underdogs	2.82*** (.31)	2.50** (.33)	3.14 (.84)	2.81 (.87)	
Type drugs (reference = hard drugs)					
Soft drugs		.46 (.44)	.47 (.44)	.62 (.46)	
Hard drugs + soft drugs		.49 (.61)	.48 (.62)	.58 (.64)	
No drugs		.18* (.67)	.18* (.68)	.28 (.70)	

61   Vols & Bruijn 2015; Bruijn, Vols & Brouwer 2018; Bruijn 2018.

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Table 3   *(Vervolg)*

	Model 1	Model 2	Model 3	Model 4	Model 5
Property (reference = homes)					
Coffeeshops			.62 (.92)	1.09 (.98)	
Other businesses			.85 (.86)	.95 (.89)	
Homes + businesses			.79 (1.16)	.85 (1.20)	
Proportionality defence				4.73*** (.43)	
Proportionality defences (reference = no proportionality defence)					
Children					1.25 (.77)
Homeless					2.50 (1.26)
Health problems					3.75 (1.19)
Financial problems					8.12 (.53)***
Duration close down					2.75 (.62)
General proportionality-defence					2.92 (.43)*
Combinations					5.14 (.48)***
Intercept	1.24 (.23)	2.41* (.41)	2.38* (.41)	.54 (.59)	.80 (.3)
Model chi-square (DF)	11.46 (1)	14.62 (4)	15.04 (7)	29.00 (8)	23.61 (7)
C	.622	.665	.670	.719	.695
Significance (p=)	.0007	.006	.0355	.0003	.0013
N	215	188	188	188	217

Note: Estimated coefficients in odds ratios (intercept in simple odds). Standard errors in parentheses. *** $p < .001$; ** $p < .01$; * $p < .05$. The VIF (variance influence factor) values of most variables are < 5 except for strong underdogs and other businesses in model 3 and model 4 (VIF = 6.2 – 6.8). As VIF is < 10, there is still no clear signal of multicollinearity (Allison 1999, p. 137-150; Kennedy 2008, p. 196-202; Levshina 2015, p. 159-161, 272-273). Moreover, an additional examination of the data reveals that the type of underdog and the type of property are conceptually distinct.

5   Discussion

This study is the first to consider the relative strength of different types of litigants as a possible factor influencing the outcome of drug-related closure cases in the Netherlands. We analysed all the published court cases on drug-related closures between 2008 and 2016, to investigate if the type and relative strength of litigants can influence a case outcome. Our data allow us to entertain the first hypothesis, that mayors (upperdogs) are more likely to be successful in drug-related closure cases than underdogs, and to suggest that we should reject the other two hypotheses, which relate to the relative strength of parties within the upperdog and underdog categories.

Caution needs to be exercised when generalising the results beyond the sample examined. First, our analysis tells us nothing about legal disputes that were never filed in court. Second, we only used published case law in our analysis, which has implications for the conclusions we can draw. Given the ambiguous publication policy of www.rechtspraak.nl, as discussed above, there is a certain selection bias that needs to be taken into account.[62] It is unclear how the population of published case law relates to the population of unpublished case law. Therefore, we cannot confidently stretch our conclusions to the (probably broader) population of all case law (published and unpublished). Still, our research does quantify the relationships between case characteristics, observed for the entire population of published case law between 2008 and 2016, and it reveals important information that would otherwise have remained unstudied.

5.1 Upperdogs versus underdogs

Our data shows strong support for the hypothesis that mayors (upperdogs) are more likely to win in court than their opposing parties (underdogs). We see that mayors win in the vast majority of cases. The great advantages mayors have over individuals, businesses and organisations (e.g. case selection strategy, litigation experience, and the ability to adapt to changes in the law) seem to outweigh the negative consequences of a closure order, such as the lockdown of a company or the eviction of an entire family with subsequent effects on their physical and mental health.[63]

Moreover, our data shows a positive association between being a strong upperdog in terms of population size, and the likelihood of being successful in court. Yet, this does not reach statistical significance. Our analysis offers no statistically significant results to support the hypothesis that stronger upperdogs have more success in court than weak upperdogs. This suggests that we should reject our proposition that population size is associated with case outcome.

The lack of a significant finding underscores our assumption that the strength of mayors relates not only to the advantages granted by their legal and financial resources, but also (and more importantly) to the advantages associated with being a government.[64] As such, mayors from relatively large municipalities, with presumably better legal and financial resources than small municipalities, do not come out ahead in court, in comparison with mayors from small municipalities. Yet, we may be underestimating the effect of population size on case outcomes, due to the limitations of our sample. Table 1 shows how the number of residents between the cases in our data set varies. The data presented illustrate that our sample contains a relative overload of cases from large municipalities, in terms of population size. In other words, our sample includes many cases involving large municipalities, and fewer cases from relatively small municipalities. This underrepresentation of cases involving small municipalities could produce a bias in the

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62   Vols 2019.
63   Kearns et al. 2000; Nettleton 2001; Bright 2010; Currie & Tekin 2015; Burgard, Seefeldt & Zelner 2012; Desmond & Kimbro 2015; Desmond 2016.
64   Kritzer 2003.

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results, as the variance is not representative of the true variation in population size between the Dutch municipalities.

Hypothesis 3 predicted that strong underdogs are more likely to win in court than weak underdogs. Our empirical analysis, however, shows the exact opposite. Strong underdogs significantly boost the chance that upperdogs will win the case, compared to weak underdogs. The odds that the upperdog will win are 2.82 times higher if the upperdog faces a strong underdog in court, instead of facing a weak underdog. Although this finding is contrary to our theoretical presumptions, when it is combined with the context of the cases under review, previous research does provide some explanation.

Previous studies have posed some explanations for the possibility that the weaker party will win, in spite of the advantages of the stronger party. These arguments are, inter alia, that stronger parties might be more likely to 'test the water' than weaker parties, and that the marginal cost of an appeal is low for stronger parties, due to the legal teams in governments and (big) businesses.[65] In other words, the outcome of a court case is likely to mean more to a weak underdog than to a strong underdog. The cases under review seem to support this argument. The group of weak underdogs includes mainly tenants and owner-occupiers of houses. These weak underdogs are typical one-shotters: individuals with high stakes, most likely zero to insignificant litigation experience, and little legal and financial recourse compared to upperdogs and strong underdogs, such as businesses and landlords. Moreover, the stakes are very high for weak underdogs, compared to those for strong underdogs: the consequences of closing one's home, versus the financial consequences of closing one's business. Closing a person's home can lead to them being placed on a tenant blacklist, or even becoming homeless.[66] Moreover, following a drug-related closure, housing associations are allowed to cancel a lease without any judicial intervention.[67] In the case of an owner-occupied home, banks may require that homeowners pay off their mortgage loan immediately following a drug-related closure, and if the owner is financially unable to do so, the house will be auctioned.[68] These consequences may cause weak underdogs to use their resources more efficiently, and they might be less likely than strong underdogs to make a 'long-shot' appeal.[69]

What is more, Wheeler et al. suggest that the weaker party might come out ahead, as judges 'might feel compelled to find for the weaker, smaller, or otherwise less protected parties'.[70] Dotan confirmed that judges in the Israeli High Court of Justice had such ideological inclinations.[71] Whether it is ideology, or simply compassion, the idea that judges unconsciously or implicitly feel for the weaker party might be another explanation for the finding that weak underdogs tend to come

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65 E.g. Wheeler et al. 1987, p. 409-410; Smyth 2000, p. 257.
66 Council of State 14 September 2016, ECLI:NL:RVS:2016:2464; Council of State 26 October 2016, ECLI:NL:RVS:2016:2840.
67 Brouwer & Schilder 2011, p. 322; Vols 2015.
68 Gemeente Rotterdam 2003.
69 Wheeler et al. 1987, p. 409-410; Smyth 2000, p. 257.
70 Wheeler et al. 1987, p. 409-410.
71 Dotan 1999.

out ahead, compared to strong underdogs. Assuming that the Dutch District Court judges are not immune to the circumstances of a particular case, the far-reaching consequences of drug-related closures for weak underdogs might explain the significantly positive relationship between strong underdogs and a mayor's success in court, compared to the equivalent negative relationship when it comes to weak underdogs.

Our data hence allow us to entertain the first hypothesis, supporting Galanter's assumption that the stronger party comes out ahead, and the findings of Kritzer's study that governmental parties come out ahead.[72] Yet, when zooming in on the influence of the type of underdog, our findings show no support for Galanter's assumption that the stronger party comes out ahead.[73] Therefore, the next section goes beyond the party's capability, and controls for case characteristics which go beyond the type of litigant alone.

5.2 Beyond the strength of parties

The relatively small dataset of 217 cases allowed us to include particular case characteristics, in order to determine the crucial factor(s) influencing the court's decision. Without prejudice to their quality, previous studies focussing on the topic of party capability used large samples, which makes it barely possible to include the content of every single case in the analysis, such as the invoked defences.[74] Although larger datasets are usually preferred, the fact that we used a relatively small dataset could therefore be an advantage. As such, this section considers the above findings in light of a number of case characteristics.

For the upperdog, cases brought before court by weak underdogs end in success less frequently than those brought before court by strong underdogs. The logistic regression analysis indicates that strong underdogs are positively associated with the probability that the mayor will win the case, even when the type of drugs is taken into account. However, after adjusting for the type of property, the probability that the upperdog will win the case is not significantly different in cases where a strong upperdog is the opposing litigant, compared to cases where a weak underdog is the opposing party.

Another finding shown by our data is the influence of the type of drugs on court decisions. Our data confirm the intuitive presumption that when no drugs are discovered in or near a property, the chances of a mayor's success decrease, in comparison with a discovery of hard drugs. Similarly, drug-related activities involving soft drugs, or both soft drugs and hard drugs, are negatively associated (although not significantly) with the success of the upperdog, compared to activities that merely involve hard drugs. After adjusting for proportionality defences, the probability that the upperdog will lose the case is not significantly different for cases in which no drugs were discovered, compared to those in which hard drugs were found.

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72   Galanter 1974; Kritzer 2003.
73   Galanter 1974.
74   See, for example, He & Su 2013, who analysed 2,724 cases, or Songer & Sheehan 1992, who coded 4,281 cases.

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One of our most striking findings is that the chance of the mayor winning a case increases when a party invokes a proportionality defence. This appears almost paradoxical, when comparing this to the finding that weak underdogs come out ahead compared to strong underdogs. We assumed that the latter might be the result of the more serious consequences of a closure for weak underdogs, compared to the consequences for strong underdogs. Yet, table 3 reveals that raising a proportionality defence – pointing out the disproportionate consequences of the closure – has a negative effect on the chances of winning the case. While this suggests a paradox, we might be able to provide an explanation by looking at the different types of proportionality defences (table 3).

The proportionality defences with significant impact on the outcome of a case are: financial problems, a general proportionality-defence, and a combination of different arguments. Proportionality defences relating specifically to weak underdogs (households) – homelessness, health problems, and the consequences for children – lack any significant association with the case outcome. In other words, the striking finding that certain proportionality defences have a negative effect on the case outcome for underdogs does not necessarily undermine the assumption that judges are implicitly attentive to the consequences of a home closure.

A possible explanation for the negative association between a proportionality defence and the case outcome for underdogs concerns the set-up of Dutch administrative law procedures. Under Dutch administrative law, an intermediate stage exists between issuing a closure order and accessing a judicial review, in which the mayor must reconsider the closure order. Earlier in our theoretical framework of upperdogs and underdogs, we proposed the possibility of reconsidering the closure order as a factor contributing to the mayor being the stronger litigant, relative to an underdog. This intermediate stage (the objection phase) creates the possibility for mayors to terminate the closure order, if they consider their prospect for winning in court to be small due to the underdog's objections. In other words, mayors can refrain from the court procedure, without any consequences.

The proportionality defence can even function as a threshold for, or barrier to, issuing a closure order. It is unlikely that a mayor will close a property if (s)he believes that closure is not in proportion to the offence and/or consequences of the closure. This might explain why proportionality defences in court lead to an increased chance that the mayor will win the case. The existence of the proportionality principle itself, in combination with the objection phase, will filter out any cases that are evidently disproportionate. Subsequently, we believe that using the proportionality defence in court might be either a last straw for litigants to grasp in order to defend their case, or even a procedural hurdle rather than an effective defence, irrespective of the consequences a closure might have. This suggestion is especially plausible, since relying only on financial problems, a general proportionality defence, or a combination of several different proportionality defences, has a statistically significant association with case outcome.

Additionally, when taking the type of property and the proportionality defence into account, the probability that the upperdog will win the case is not significantly different in cases where a weaker underdog was the opposing party, compared with cases where a strong underdog was the opposing litigant. This

strengthens the suggestion that particular case characteristics are consequential for the resolution of drug-related closure cases.

At this stage, however, more quantitative and qualitative research is needed, in order to study and explain the factors that seem to influence case outcomes. Yet, despite the difficulty of explaining certain results, it is clear that a weak underdog decreases the chance of an upperdog being successful in court, presumably because of the high stakes for the underdog. Yet, interestingly, invoking proportionality defences achieves the exact opposite result, as it increases the upperdog's chance of winning.

6   Conclusion

In this article, we build on Galanter's framework of repeat players and one-shotters, and studies that attribute advantages to governmental parties to argue that mayors are more likely to be more successful in court than the opposing litigants.[75] Altogether, we reasoned that the terms and definitions used by Galanter (i.e. repeat players and haves) are inadequate for explaining the presumably stronger position of mayors in the Netherlands. A Dutch mayor is head of the local council, and chair of both the executive and legislative councils in his/her municipality; (s)he makes his/her their own local policy rules, by which litigation is conducted. Mayors are also frequently engaged in disputes and litigation, and they can implement the outcome of court decisions into new policy rules, hence adapting to any changes in the law.[76] These advantages, together with their litigation experience, the discretionary nature of the closure power, and their ability to select cases, all show that mayors are upperdog litigants, and not just in terms of their experience and resources. In other words, their dominance over individuals, businesses and organisations goes beyond the advantages usually associated with repeat players and haves.

In line with this presupposition about the relative strength of mayors, we found that mayors are more likely to win in court than the parties opposing them. Yet, our other findings offer evidence that other characteristics of cases on drug-related closures (in addition to the type of litigant) also influence the court decision, and thus the success of upperdogs.

The results of our analysis and the limitations of our sample suggest that additional research is needed. First, unpublished case law should be studied, to determine if these cases are similar to published case law or whether published case law should be considered as an isolated group. Second, it would be interesting to analyse the legal disputes that were never filed in court, but were settled (i.e. objection allowed) or stranded (i.e. objection denied, but no appeal) in the objection phase. In the objection phase, mayors reconsider their own closure order. The decisions made by the mayor in this phase may be affected differently by party capability than decisions that are made by the district court in the appeal

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75   E.g. Galanter 1974; Kritzer 2003.
76   E.g. Eikenaar 2017.

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phase. Yet, although much remains for future research, by focussing on the role of the type of litigant and particular case characteristics, this study adds a new dimension to our understanding of drug-related closure cases, the impact of party capability, and particular case characteristics.

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