Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the *Intifada*

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Many studies suggest that courts fail to protect individual rights since they support and uphold state repressive practices during periods of emergency or confrontation. Previous studies focused on judicial policies as reflected in judicial declarations and decisions that were fully disposed by judges and officially published. I argue that the study of out-of-court settlements and the comparison between the outcomes of settlements and the judicial rhetoric are key to understanding the behavior of courts in times of national crisis. At such times, courts may hesitate to openly confront the government on the issue of minority rights, but they may strive to protect minorities by exerting pressure on the governmental legal apparatus and by effecting out-of-court settlements more favorable to minorities than official decisions. Thus, courts influence social practices while avoiding government or public opinion counterreactions that would impair their institutional autonomy. This argument is demonstrated in a case study of the Israeli High Court of Justice during the Palestinian *Intifada*.

It is an accepted postulate that courts are important social institutions having a broad influence on political and social processes. Nevertheless, the *techniques* by which judicial influence is exerted have yet to be fully explored by social scientists. Declarations included in judicial decisions may, in some cases, stir a process of social change. Likewise, the outcomes of judicial proceedings, whether in an individual case or a series of related cases, may have wide effects on political institutions. Judicial rhetoric and formal court orders are not, however, the only ways by which courts may influence the social environment. Other, albeit

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less formal, methods may be used by judges to achieve social goals. In particular, courts may pressure the parties to litigation to bring about an out-of-court settlement and thus avoid the need for a final judicial disposition. Judges may also express their opinion on a certain point of law or policy, either in court during the course of litigation or via other channels of communication, and thus affect the motivation or the persistence of certain parties to pursue legal proceedings (Mather 1995; Atleson 1989).

The role of informal judicial techniques within the process of judicial intervention in political and administrative processes is the focus of this article. I argue that in some cases, in order to evaluate the role courts play in society, it is not enough to study the open rhetoric and the final orders given by courts. Rather, one must also take into account informal techniques used by courts, as well as the relationship between those techniques and the formal methods of influence, so as to obtain the full picture of the courts' involvement within a particular field of social activity. This is particularly true when courts are required to intervene in sensitive political problems, such as in the protection of human rights in emergencies.

Constitutional theorists maintain that courts are required to defend individual rights, particularly those rights of minorities or disadvantaged groups in the relevant political community. Courts are also expected to refrain from excessive interference in decisionmaking by the other two branches of government. Both these themes derived from the assumption that courts, unlike the legislature and the executive, are not representative institutions. They are not required to reflect in their decisions the popular preferences of the majority. Rather, they are expected to do the reverse: to confront popular decisions that endanger human rights (Bickel 1962; Ely 1980; Ackerman 1984). The "success" of courts in maintaining their institutional autonomy, according to this line of thinking, is revealed by the ability to withstand political pressures and perform their countermajoritarian role (Barzilai 1997).

To what extent, however, do courts fulfill their function of protecting individual rights against governmental actions? Many social scientists argue that courts commonly fail to achieve this task. They point to the accumulated empirical evidence indicating that courts systematically support the operation of state rulers (Funston 1975; Shapiro 1981a; Hase & Ruete 1982; Shamir 1990). Some argue that the countermajoritarian function of courts is, if not a myth, no more than a doctrinal aspiration (Dahl 1957; Marshall 1989; Mishler & Sheehan 1993). Constitutional courts, they argue, serve more to legitimize sociopolitical reforms and broader cultural propensities previously endorsed by the political establishment and public opinion than to confront the majoritarian will (Mishler & Sheehan 1993; Barzilai

1997). Other critics attribute judges' tendency to support government decisions to their political dependence on rulers and their immersion in hegemonic ideology (Shamir 1990).[1] While these arguments are supported by a wide range of empirical research, the knowledge in this field is based primarily on studies relating to formal court decisions. The question is whether our perceptions concerning the contribution of courts to the protection of individual rights may be changed if we look beyond the level of formal judicial decisionmaking.

This article deals with a field study of the attitude of the Israeli Supreme Court toward the rights of Palestinian residents of the Occupied Territories in the West Bank and the Gaza Strip during the years 1986–95. The military occupation of the Territories by the Israeli Defense Forces (IDF) involved, from its beginning in 1967, high tension between the security needs of Israel and the civil liberties of the Palestinian population of these areas. Even so, the period included in the study was an atypical one for the West Bank and the Gaza Strip. During these years, the Palestinian upheaval against the Israeli military occupation of these areas—the *Intifada*—took place, bringing an even wider range of reactions by the military regime, including far-reaching infringements of the civil liberties of the Palestinian residents of the Territories. My theme here is the way the Israeli judiciary, in particular the Supreme Court, responded to the challenge posed by the exigencies of the *Intifada*.[2]

For this purpose I examined judicial rhetoric appearing in court opinions, outcomes of court proceedings, out-of-court settlements, and informal administrative procedures influenced by court policies.[3] The most important conclusions may be drawn—I believe—not from a separate study of each of these categories of sources but rather from analyzing the interrelationships between them. In particular, it is useful to concentrate on the significant differences between rhetoric and practice in court, and between out-of-court practices and procedures. Most important, I

[1] Yet other scholars argue that courts can influence societal norms as well as be influenced by them and, therefore, can succeed *to some extent* to fulfill their countermajoritarian role without losing the public confidence in their moral sanction (Casper 1976; Caldeira 1991; see also Epstein & Walker 1995).

[2] The Intifada erupted on December 1987 and did not completely cease until the breakthrough of the Middle East Peace Process, when Prime Minister Yizthak Rabin and Yasser Arafat signed the first Oslo agreement at the end of 1993. The beginning of the Peace Process did not, however, end the serious problems with human rights issues in the Territories (see note 55 below). Therefore, our study encompasses also the years following the Intifada (see Table 2 below).

For an overview of the Intifada, see Shalev 1990; Schiff & Ya'ari 1990; Yahav 1993.

[3] Unlike the common view of litigation as a relatively late stage in the emergence of disputes (see, e.g., Felstiner, Abel, & Sarat 1980–81; Miller & Sarat 1980–81; Noah 1997), alternatives to litigation in the Occupied Territories were relatively scarce (Shamir 1991). The reasons for this will be more fully explored below. The current research covers some important "layers of disputes" (Galanter 1983) apart from in-court proceedings and out-of-court settlements; see sec. III.D below.

found that while, in general, Palestinian petitions to the Court during this period enjoyed a low rate of success, Palestinians were far more successful in achieving their goals in out-of-court settlements and other informal arrangements with legal authorities within the government. I suggest that the statistical difference in the outcomes in these two categories of cases may be explained by looking both at the strategy adopted by the Israeli Supreme Court during this tense and problematic period and at the role of the lawyers who represented the government before this court.[4]

Law—so it is asserted—is not what judges say in the reports but what lawyers say to one another and to their clients in their offices (Shapiro 1981b:1201). This means that law ought to be examined as part of specific social relationships with particular histories and patterns of interaction and power (Sarat & Felstiner 1995). In order to understand the role of law in a given field of human activity, it is important to study the social interactions between key groups of legal actors (Sudnow 1965; Jones 1978). To understand the judicial influence on the condition of human rights of Palestinians during the Intifada, I suggest that it is crucial to study the social interaction between two groups of legal actors. The first group is judges, and the second one is those legal bureaucrats formally in charge of representing public authorities in court but who informally carry out the policies of the judges on the bench. I suggest that the analysis of the relationship between these two groups of elite legal actors and the comparison between the output of this analysis and the open rhetoric of the judges is the basis for understanding the role the Court played during this atypical period of the Intifada.

I. The Israeli High Court of Justice

A. Background

The High Court of Justice (HCJ) is one of the functions of the Supreme Court of Israel. When a civil or criminal dispute arises in Israel, it normally makes its way into a County Court and

[4] This research relates only to the rights of the Palestinian residents of the Territories, not to Palestinian citizens of Israel. I use the terms "Palestinians" and "Palestinian residents of the Territories" interchangeably. (For an analysis of the Supreme Court's influence on the status of the Palestinian citizens of Israel, see Kretzmer 1990a; Saban 1996.) Unlike Palestinian citizens of Israel, Palestinian residents of the Territories administered by Israel are civilians living under military occupation. Therefore, they cannot be classified as a typical "minority group," which normally forms a part of the population of the relevant state. Nevertheless, the fact that Palestinians—who are regarded by many Israelis as "foreign" if not "enemy"—are controlled and administered by Israel raises a crucial question about the protection of their fundamental rights vis-à-vis the dominant Jewish-Israeli group. Both socioeconomically and politically, Palestinian residents of the Territories are surely one of the most disadvantaged groups resorting to the Israeli Justice system because they are completely isolated from the Israeli channels of power.

then—on appeal—to a District Court. Only a handful of such cases reach the Supreme Court as a third instance of *cassation.* The Supreme Court also functions as an appellate court for cases involving serious criminal offenses or civil disputes in which the value of the claim is particularly high. Such cases will make their way directly to a District Court and then, on appeal, to the Supreme Court. If, however, the dispute—no matter how minor and ordinary—concerns a public agency exercising its legal powers, it is brought directly before the Supreme Court, and is resolved by this Court with no possibility of appeal. Therefore, the Supreme Court in Israel serves, in fact, in three different capacities: as a court of *cassation,* as a court of appeal, and as a court of first (and last) instance for judicial review cases (i.e., as the HCJ).[5]

The fact that the Court serves a triple function has wide implications on its caseload. The Israeli Supreme Court is an extremely busy judicial institution. The 14 judges, sitting normally in panels of 3, must cope with thousands of cases each year. For example, in 1993, the Court dealt with more than 1,400 appellate cases, a similar number of *cassation* cases, and more than a 1,000 other lawsuits, apart from the 1,171 HCJ petitions it disposed of during that year. The number of cases increases constantly each year.[6]

The procedures in the HCJ are characterized by simplicity, brevity, and expediency. Ease of access to the Court is assured by minimal court fees and by the lack of cumbersome formal requirements.[7] A petition to the HCJ can be written by a layman, and at no stage of the proceedings is representation by a lawyer required. Any person who has reason to believe that a particular public agency denies her legal rights may petition the Court and apply for an order *nisi.*[8] A single judge reviews the petition. The judge may order a preliminary hearing before three justices to take place, requiring the respondent to supply the Court with a concise statement as to the reasons and background for the relevant governmental action. Alternatively, the judge may issue an order *nisi,* requiring the respondent to appear in court and show why a particular action should or should not be performed. A full hearing before three judges would then be held before the Court reaches its final decision. Hearings are based on the parties' affidavits and on their oral arguments. Oral testimonies as well as

[5] Some judicial review cases are resolved by civil courts, and not by the HCJ, under specific statutory arrangements or as the Supreme Court itself has so ordered.

[6] Data from Central Bureau for Statistics of Israel. The question of how (if at all) 14 judges can cope with such a huge caseload and still function both as the Supreme Court and the principal tribunal for judicial review is beyond the scope of this article. I refer to it only when discussing practices of the HCJ.

[7] The court fees for a petition to the HCJ is currently about the equivalent of $100.

[8] An order *nisi* is one that takes effect at a specified time unless previously modified or avoided by cause shown or a condition fulfilled.

cross examination are usually not allowed. The Court is able to grant petitioners immediate relief and to issue orders and injunctions, either interim or absolute, at any stage.[9]

B. The Judicial Activism of the HCJ

The HCJ enjoys the reputation of being a powerful, influential, and activist court. In the absence of a written constitution, it was responsible for the development of civil rights, such as freedom of speech and association, freedom of religion, and other fundamental constitutional principles (Zamir 1990; Edelman 1994; Kretzmer 1990b; Moutner 1993; Sharfman 1993). During the past two decades, it has been involved in almost every aspect of political and social life in Israel. It struck down nominations of senior government officials and high military officers. The grounds for intervention were either that the nomination was motivated by party calculations rather than professional considerations, or that the nominee was involved at some point in the past in a public scandal and therefore the nomination was "unreasonable" (H.C. 6163/92 *Eizenberg;* H.C. 7074/93 *Swisa;* H.C. 1284/99 *Ploni*). The HCJ ordered the prime minister to dismiss cabinet members following charges that they were involved in scandals of bribery and fraud (H.C. 4267/93 *Amitai;* H.C. 3094/93 *Movement for the Quality of Government*); interfered with both internal parliamentary procedures and party political activity (H.C. 1601/90 *Shalit;* H.C. 652/81 *Sarid;* H.C. 73/85 *Kach Party;* Kretzmer 1988); and developed a concept of judicial review over statutory provisions (H.C. 98/69 *Bergman;* C.A. 6821/93 *Bank Hamizrachi Hameuchad Ltd*). These judicial rulings were sometimes based on activist interpretation of quasi-constitutional provisions included in Basic Laws enacted by the Knesset.[10] In many other cases, however, such activist rulings were founded on a creative interpretation of general constitutional principles that the Court derived from its own previous rulings. These developments led some scholars to praise the Court for its willingness to confront the government on issues of civil rights and other constitutional questions (Negbi 1981; Segal 1988).

While the judicial activism of the HCJ was often met by unfavorable, if not hostile, reaction by politicians, religious leaders, and bureaucrats, it was not at odds with the opinion of the gen-

[9] The vast majority of cases dealt with by the HCJ are disposed at the stage of the preliminary hearing without any order *nisi* being issued. According to Central Bureau of Statistics of Israel data, an order *nisi* was ordered in only 886 of 4,266 cases disposed by the HCJ between 1985 and 1993.

[10] While Israel has no formal constitution, the Knesset preserves, according to the prevailing view, the power to enact "Basic Laws" which are assumed to be superior to regular legislation (C.A. 6821/93 *Bank Hamizrachi Hameuchad Ltd.*). Some fundamental civil rights are included in two Basic Laws enacted by the Knesset in 1992: Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation. No Basic Law enacted before 1992 dealt with the issue of human rights.

eral public. Surveys suggest that the Israeli judiciary, in general, and the HCJ, in particular, enjoys a high degree of trust among the Jewish-Israeli public, second only to that of the Israeli Army, and much higher than the level of trust in representative institutions such as the Knesset (the Israeli Parliament), the government, or the political parties (Peres 1987; Yuchtman-Ya'ar & Peres 1991a; Barzilai, Yuchtman-Yaar, & Segal 1994a:55, 69; Zureik, Moughrabi, & Sacco 1993; Rattner 1994).[11] Surveys also suggest that in a comparative perspective the Israeli judiciary enjoys a higher level of trust than do judiciaries in most Western democracies (Barzilai, Yuchtman-Ya'ar, & Segal 1994a:55), and that the Israeli public tends to show a high degree of trust in the Court's decisions even when such decisions deal with controversial issues such as those arising from the Arab-Israeli conflict or the protection of minorities' rights. These surveys also suggest that public opinion supports the HCJ's activist actions, such as the expansion of the scope of standing in issues of public concern,[12] the policy of judicial involvement in actions taken by the government and the legislature, and the Court's close supervision over decisions of religious tribunals (Barzilai et al. 1994a:130).

The activist decisions of the HCJ during the past two decades have extended to petitions against military or other security agencies. In the past, the Court stated that the scope of judicial review would be narrower in cases involving security matters than in other cases of administrative discretion. More recently, however, the Court has stepped back from this position. For example, in a case in which the Court was asked to review a decision of the Military Censor not to allow the media to publish the name of the new head of the Mosad (the Israeli Intelligence Agency), Justice Barak (currently the president of the Court) concluded:

> The security nature of the administrative discretion deterred judicial review in the past. . . . During the years it was made clear that there is nothing unique in security considerations. . . . Judges can and should review the reasonableness of discretion in security matters as much as they can and should review administrative discretion in any other field. Hence, there are no special limits on the scope of judicial review in security matters. (H.C. 680/88 *Shnitzer v. Military Censor et al.*, pp. 639–40)

As a result, the Court ordered the publication of the name of the new head of the Mosad. The Court also stated that a military au-

[11] The level of trust that the Court enjoys among Israeli Palestinians is, to some extent, lower than the level expressed by Jewish Israelis. Still, a significant portion of Israeli Palestinians expresses trust in the fairness of the Israeli justice system (Zureik et al. 1993; Rattner 1994:363; Barzilai 1998).

[12] Under which any person, even if not personally affected by the government action, may attack that action in court if the action raises an important question of wide public implications (H.C. 910/86 *Ressler;* Segal 1986).

thority may infringe on basic civil rights (such as the freedom of speech or the freedom of association) only where there is an real likelihood of serious damage to national security.

The *Shnitzer* case and some other decisions (e.g., H.C. 448/85 *Dahar*; H.C. 799/80 *Shlalam*; H.C. 554/81 *Beransa*) reflect the tendency of the Court to expand its supervision over the field of national security in general (Zamir 1988; Bracha 1991; Hofnung 1991:222). There remains the question, however, to what extent were the general policies of judicial activism of the HCJ applied to security considerations of the Military Government in the Territories.

II. The HCJ and the Occupied Territories during the Intifada

A. Background

Since the beginning of Israel's occupation of the West Bank and Gaza Strip, the residents of these territories have been allowed to petition the HCJ in order to challenge the actions of the Military Government (H.C. 302,306/72 *Hilu;* H.C. 393/82 *El Masulia;* Shamgar 1971). The legal standards applied by the Court to these actions derived from various sources: the local law in the territories, including both Jordanian law and orders of the Military Government itself, the principles of customary public international law (as integrated into Israeli law),[13] and the general principles of judicial review derived from Israeli administrative law (H.C. 69,493/81 *Abi Ita;* H.C. 393/82 *Gama't Asachan;* Shamgar 1971; Kuttab 1992; Yahav et al. 1993).[14]

The HCJ's jurisdiction to hear petitions from residents of the Territories was determined by the Court itself, absent any statutory provision dealing directly with this point. The Court's willingness to deal with such petitions against the Military Commander was, in itself, considered—at the time it was first asserted—as an act of judicial activism.[15] The actual value of the

[13] The Israeli Supreme Court ruled that the regulations annexed to the Hague convention of 1907 are applicable to the Territories under Israeli law as part of customary international law. The Court declined, however, to declare that the Fourth Geneva Convention of 1949 is fully applicable to the Territories. This position drew strong criticism from several scholars; see, e.g., Qupty 1992; Falk & Weston 1992; Cassese 1992. Other questions as to the applicability of the regime of belligerent occupation under the principles of international law also arise in this context due to the prolonged nature of the Israeli occupation of the Territories; see Roberts 1992; Cassese 1992.

[14] Following the agreements signed between Israel and the PLO in September 1993, Israel has redeployed its military forces. As a result, the greater part of the territory of the Gaza strip and some parts of the West Bank are now under Palestinian rule. Nevertheless, the peace agreement did not solve the problems entailed by the frequent friction between the Palestinian population and the Israeli military forces, which still occupy part of the Territories and control its borders.

[15] The Court's decision to apply its jurisdiction to the Territories was given after it had openly expressed some hesitation to do so, and in light of the Attorney General's

protection conferred by the Court's rulings on the civil rights of the Palestinian population was, however, much debated both in political and academic circles.

There is no doubt that during the long period of the military occupation, the Court issued some important decisions allowing protection of the basic liberties of the Palestinian population. For example, in its landmark decision in the *Elon Moreh* case (H.C. 390/79 *Dawikat)*, the Court ruled that the government is not allowed, under international law, to confiscate privately owned lands for the purpose of building new Jewish settlements, unless the seizure order could be justified on the basis of military needs. This decision forced the government to evacuate an already established settlement and had, according to some observers, wide impact on the Israeli government's later ability to build new settlements (Yahav et al. 1993; Shamir 1990; Negbi 1981). Likewise, in another important case, the Court quashed the Interior Minister's decision to refuse an application for a permit to publish a new newspaper in East Jerusalem on the grounds that the petitioner was a subversive element (H.C. 2/79 *El-Asad*). The Court also restricted the ability of the military commander to use his powers under emergency regulations to take severe administrative actions against people involved in terrorist activities, such as deportation or house demolition. It did so by imposing procedural requirements on the authorities before any such action could be taken (H.C. 320/80 *Kawasme;* H.C. 358/88 *ACRI*).

Despite these well-known decisions, critics argue that the HCJ should reconsider its willingness to deal with petitions against the actions of the military commander in the Territories, because the practical impact of the HCJ on the civil liberties of the Palestinian residents of the Territories was negligible. These critics contend that the Court legitimates the occupation regime, while failing to actually protect the civil liberties of the Palestinians against the evils of the occupation (Kuttab 1992; Barzilai et al. 1994c; Kimerling 1993; Bisharat 1995:387). It is also argued that, in reality, the "landmark" decisions of the HCJ merely added some limited procedural or formal obstacles to the operation of the Israeli government in the Territories. Accordingly, the government was quick to adopt measures that conform with these procedural requirements but are no less offensive to Palestinians' fundamental rights under international law (Kuttab 1992; Playfair 1992a: 237).[16] The question therefore arises: To what extent were judi-

position, who had not objected to such a move (see H.C. 302,306/69 *Hilu et al.,* pp. 169, 176; Negbi 1981:12-18; Rubinstein 1991:93–94).

[16] Thus, e.g., Shehadeh notes that the HCJ decision in the *Elon Moreh* case did not, in fact, stop the process of requisition of Palestinian land for purposes of Jewish settlements in violation of the requirements of international law. Rather, the decision forced the government to change some legal formalities related to the process of land requisition. The new policies of land confiscation arising from that decision led to an even faster

cial declarations in the HCJ's "landmark" decisions translated into policies protecting Palestinians' rights?

This question is particularly important in the context of the period of the Intifada. Since the beginning of the Intifada during December 1987, the number of hostile activities against the Israeli forces has risen sharply, and so has the number of military actions infringing on the liberties of the Palestinian residents of the Territories. For example, during the first three years of the Intifada, about 14,000 Palestinians were taken into administrative detention. During the same period, more than 500 houses were either demolished or sealed. The frequency of use of other infringing measures, such as curfew and closure of schools, has also risen sharply (see Shalev 1990; Straschnov 1994:72, 86–87; Bisharat 1995; Hajjar 1997; B'Tselem 1989, 1992).

This increase in the number of restrictive administrative measures was accompanied by a sharp rise in the number of petitions to the HCJ from Palestinians. For example, during the 20 years between 1967 and 1986, 557 petitions were submitted (Shamir 1990). During the four first years of the Intifada (1988–91), Palestinians submitted 806 petitions (see Fig. 1).[17] Therefore, the Intifada posed a serious challenge to the HCJ. The Court had to reevaluate its previously declared policies concerning the protection of human rights in the face of the emergency situation caused by the upheaval. Furthermore, the Intifada put an additional pressure on the Court's already stretched docket. Whether the Court was willing, or even able, to translate

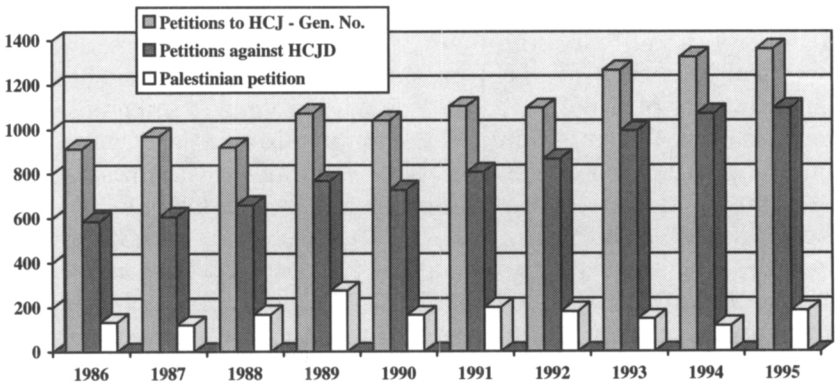

Fig. 1. Petitions to the Israeli High Court of Justice, 1986–1995

SOURCES: For second and third bars in each set, HCJD registers; for first bar in each set, Central Bureau for Statistics. (The HCJD is the High Court of Justice Department in the Ministry of Justice. It is in charge of representing the Israeli government before the HCJ in almost all cases of judicial review. For a description of this department and its functions, see sec. III.C below.)

land confiscation process and were no less rapacious from the Palestinian point of view (Shehadeh 1988; Playfair 1992a).

[17] The number of Palestinian petitions has decreased to some extent since the beginning of the Peace Process; see note 55 below.

its declared policies into a daily practice of intervention in infringing military practices became even more questionable.

B. The Current State of the Research

The judicial policies of the HCJ in the Territories have been much studied (e.g., Shamir 1990; Kretzmer 1993; Barzilai 1996, 1997; Sharfman 1993; Shelef 1993; Lahav 1988). Some of this research has focused on single decisions or a defined series of decisions of the HCJ (Lahav 1988; Shehadeh 1992; Kuttab 1992; Barzilai et al. 1994c; Kremnitzer 1994). Other research has examined the general policies of the HCJ in the Territories over time, be it about a specific field of military activity, such as orders for house demolition (Halabi 1991; Kretzmer 1993; Simon 1994) or about various fields of administrative activity (Shelef 1993; Shamir 1990; Sharfman 1993). Despite differences in methodology and focus, the research has come to quite similar conclusions. All have concluded that the rhetoric of judicial activism was not translated by the Court into actual willingness to intervene in decisions of the Military Government when such decisions infringed on the liberties of Palestinian residents of the Territories. Thus, for example, Daphna Sharfman (1993:110) argues:

> Over the years, The High Court has established its position as a defender of civil rights in Israel and in the territories. At the same time, it has generally tended to accept the arguments of the state whenever the issue of security arose. In the rare cases in which the justices ruled in favor of the petitioners, it was because the state's security arguments were not grounded in evidence. . . . Whenever security was involved, the High Court of Justice exercised self-restraint, viewing civil rights as subordinate to, and in conflict with, security.

In his 1990 article, Ronen Shamir argues that the significance of the HCJ decisions for the rights of Palestinians in the Territories is more symbolic than substantive. Shamir points to the fact that in some celebrated decisions the Court allowed petitions from Palestinians, acknowledging their basic rights such as for freedom of speech, due process of law, and protection of private property.[18] Nevertheless, he argues, the Court did not follow the principles laid down in these cases when deciding similar matters and, instead, accepted the position of the government. He concludes (p. 797):

> The analysis of cases decided by the Israeli Supreme Court suggests that the effect of the landmark cases was primarily symbolic. On the one hand, the cases reinforced the court's legiti-

[18] The cases Shamir discusses in his article are the *Elon Moreh* case (H.C. 390/79 *Dawikat* dealing with land confiscation); H.C. 2/79 *El Asad* (license to publish a newspaper); H.C. 320/80 *Kawasme* (due process prior to the implementation of a deportation order).

> macy as a solid defender of human rights. On the other hand, all these cases were isolated victories of Palestinian petitioners which were not followed by similar results in subsequent cases. None of these cases had any significant effect on later policies, save the growing sophistication of the authorities in their implementation of legal procedures. Yet the significance of the cases was exaggerated, allowing them to appear as symbols of justice.

Shamir also found that between 1967 and 1986, Palestinians petitioned the HCJ in 557 cases but that only in 5 of these cases did the Court uphold at least some of the arguments of the petitioners.[19] David Kretzmer examined the policies of the HCJ concerning house demolition orders in the Territories. Such orders are issued according to the powers given to the Military Government in emergency regulations,[20] and were used by the government against Palestinians suspected of involvement in serious terrorist activity (in many cases even before criminal proceedings were concluded against the suspects). He found that since the beginning of the Military Occupation, more than 150 cases concerning demolition orders were brought before the HCJ. The Court, however, intervened only in 3 of them to prevent or limit the use of this extreme administrative measure (Kretzmer 1993:334).

Similarly, Jonathan Kuttab (1992:494) argues that the HCJ has proved to be an ineffective source of protection for Palestinian human rights: "Out of tens, if not hundreds of cases before it, there have been an insignificant number where Palestinians obtained satisfaction and can claim that the Israeli court gave the recourse that they sought in matters pertaining to the military government or its agents."[21]

There have been only a few exceptions to this consensus in the academic research. This minority, while acknowledging that the HCJ rarely intervened in the actions of the Military Government in the Territories, maintained that the HCJ had some influence on the rights of Palestinians because of its deterrent effect on the Military Government (Bisharat 1995; Cohen 1986; Negbi 1989). However, these scholars have failed to address the question how the HCJ could have such deterrent effect if the occasions in which the Court intervened in the actions of the Military Government were so rare.

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[19] He also points out that of these 557 petitions, only 65 actually reached adjudication; the rest were settled or removed (p. 785); see note 23 below.

[20] Article 119 of the 1945 Defense (Emergency) Regulations.

[21] See also Shehadeh 1992:154. Similar conclusions were reached by researchers focusing on the effectiveness of other Israeli courts dealing with cases involving the Intifada, such as the military courts in the Territories. See Bisharat 1995; Hajjar 1997. My research reported here, however, focuses only on the High Court of Justice. I do not contend that it has any direct implications for the evaluation of the effectiveness of other Israeli courts (in particular, military courts) in protecting Palestinian civil rights during the Intifada.

The earlier research shares one thing in common: It is limited to an analysis of *final* decisions of the HCJ—to those cases *adjudicated by and officially published by* the Court.[22] No prior research has examined the significance of the activity of the HCJ in the Territories through analysis of those cases that *did not* reach final conclusion by the Court but were settled or removed before reaching the final stage.[23] I argue that settlement practices within the HCJ must be studied if we are to understand the manner in which the Court exerted influence over the activities of the Military Government in the Territories and that the inclusion of such cases in the analysis dramatically changes the evaluation of the success of Palestinian petitioners before the Court.

III. The Research

A. Studying the Overall Rates of Settlements in HCJ

In the first part of the study, I examined the *general* rate of settlements in comparison with the total number of petitions against government agencies brought before the HCJ. These figures provide a general picture of the place of settlements within the working practices of the Court. I have used for this purpose data of the High Court of Justice Department in the Ministry of Justice (HCJD) for 1990–94 (see Table 1). I point to two particular percentages in Table 1: the extremely low percentage of petitions decided for the petitioner by the HCJ, and the relatively high proportion of cases in which the petitioners achieved their goals by settlements *in spite* of the low rate of success in final court decisions. As the table shows, only about 40% of all petitions were finally adjudicated by the Court (categories A–C in Table 1), and of these decisions the rate of (absolute or partial) success for petitioners was remarkably low (around 10%

[22] Decisions of the HCJ are issued in print (*Piskei Din*) or compact disk format (*Takdin*).

[23] Shamir notes (1990:785): "The overwhelming majority of [the] petitions were removed, compromised, or settled in one way or another." He did not, however, examine the actual outcomes of these cases. In a later article, Shamir does address the settlements made by Palestinians petitioning the HCJ. He observes (1991:53–54): "A closer look at the actual content of settlements indicates that most cannot be accounted for as meaningful compromises. The majority of these cases are removed or settled without obtaining any concrete concessions from the state. . . . Occasionally, however, some meaningful concessions are obtained." These conclusions, however, are based on interviews with Palestinian petitioners and their lawyers, rather than on a systematic analysis of a representative sample of HCJ files. Kretzmer (1993) acknowledges the limitations of an analysis of only those cases decided by the Court and neglecting cases settled out of court. He notes that such analyses may miss the complete picture, since the phenomenon of petitions being removed before final Court determination is known to be common in house demolition cases. He assumes, however, that the average success of petitioners in those cases that do reach the final stage must influence the out-of-court practices adopted by the government in the field (p. 312).

of the adjudicated cases—categories A and B).[24] On the other hand, 26% of the cases were settled with absolute or partial success from the petitioners' view. If we combine the overall rate of success both in court decisions and in settlements, we see that in about 30% of the cases the petitioners achieved all or part of what they asked from the HCJ (categories A, B, E, F).

Table 1. Outcomes of Petitions Disposed by the Israeli High Court of Justice, 1990–1994

Category	No. of Cases	%
A. Court decides wholly for petitioner	95	2.8
B. Court decides partly for petitioner	50	1.5
C. Petition dismissed by the Court	1,247	37.0
D. Petition withdrawn before final decision	1,051	31.2
E. Settlement with full success for petitioner	539	16.0
F. Settlement with partial success for petitioner	330	9.8
G. Other	60	1.8
Total	3,372[a]	100.0

SOURCE: The High Court of Justice Department of the Ministry of Justice.
NOTE: The total does not sum to 100% because of rounding.
[a] The number includes all the petitions involving agencies of the Government of Israel, excluding only petitions issued solely against local authorities. The data relate to cases disposed and sent to the Ministry archive rather than those filed in court during the relevant period. Thus, it includes some cases filed before 1990 and excludes some filed during 1994 (and maybe even during 1993) but still pending. Only data for 1990–94 are presented since the Department did not collect such data prior to 1990. However, the Department's data are consistent with the data collected by the Central Bureau of Statistics. According to its findings, out of 4,266 petitions against government agencies during the period 1985–93, only in 190 (i.e., 4.45% of the cases) was the order *nisi* made absolute (i.e., the petitioner won by a final judicial disposition). The Bureau has no data concerning the outcomes of out-of-court settlements.

The data in Table 1 cast serious doubt on use of only the Court's final decisions for determining the significance of judicial review. The table shows that petitioners' chance of winning their cases through a final Court disposition are very slim. This is true for *any* petition to the HCJ whether coming from a Palestinian or from an Israeli citizen, whether or not the respondent relies on security considerations, or whether or not the issue is a military action in the Territories. Petitions succeed far more often in the HCJ through settlement. Accordingly, it is crucial to analyze settled cases if we are to understand the Court's policies.

B. Out-of-Court Settlements in Petitions from Palestinians

To study the results of petitions from Palestinians to the HCJ during the Intifada, I used a proportionate random sample of 203 court files disposed by the Court during the years 1986–95. This 10-year period commenced about 2 years before the erup-

[24] These findings are not at odds with Shamir's (1990) finding. He found that out of 557 petitions, only 65 were fully adjudicated by the Court, and *of these*, only 5 (less than 8%) were successful (p. 785).

tion of the Intifada (1986–December 1987), includes the entire period of the upheaval itself (1988–92), and concludes with the period after end of the Intifada and the beginning of the Middle East Peace Process. This sample includes about 12% of all petitions from Palestinians during the chosen period.[25] According to the data in Table 2, Palestinian petitioners won their case (wholly or partly) in 9 cases (categories A and B), that is, in 4.5% of the cases in the study. This is about the same rate of success[26] found in the total population of HCJ cases in the 1990–94 period (see Table 1).[27] The findings for the outcomes in out-of-court settlements provide a more compete picture. In 49 of the 203 cases in the study, the petitioners achieved their goals in full because the government backed off from its original position during the litigation (category E). In another 56 cases, petitioners partly achieved their goals by out-of-court settlements (category F),

[25] Details as to the research methods are available from the author.

[26] By "success" in litigation, I mean that the petitioner managed to achieve tangible rather than mere symbolic rewards as the result of the legal process (for the distinction see Handler 1978:36–37). Of course, many other sorts of benefits may be derived from litigation, such as publicity for a certain public cause (Epstein & Rowland 1991), influence on the agenda of a judicial institution (Caldeira & Wright 1990), or even fulfillment of a certain emotional or psychological need "to be heard" (Shamir 1991). While the use of Israeli courts for such purposes by Palestinians during the Intifada was by no means rare (see Shamir 1991; Bisharat 1995; Hajjar 1997), I concentrate on success in terms of tangible benefits derived from the concrete process at stake.

Included in "partial success" are settlements in which a petitioner achieved anything between more than nothing and less than everything she asked for in the original petition. Our data suggest that significant achievements by petitioners in the course of settlement were by no means rare. For example, 44 cases in our sample dealt with house demolition orders based on security reasons. Eight of these cases were classified under category F in Table 2 as partial successes. In 4 of these cases, the government agreed to withdraw its order to demolish the house and to seal only one room instead. In the fifth case, the house was sealed rather than of demolished. Another case involved demolition orders against 4 houses, and the government agreed to cancel one of these orders in the course of settlement. In 2 cases, the file contains no information about the substance of the settlement. We also classified 20 of 52 cases dealing with permission to enter, stay, or leave the Territories under category F. Of these 20 cases, in at least 16 the petitioner achieved significant benefit from the settlement agreements (for 3 cases the content of the agreement cannot be extracted from the file). The most typical example is the case in which the petitioner seeks permanent permission to stay in the Territories and a status of permanent resident. The agreement stipulates that she be allowed an extension of her temporary permission to stay in the Territories for a fixed period (most commonly 2 or 3 years) after which she may reapply for permanent residency status. Another example is the case in which the petitioner asked to leave the Territories for Jordan. The agreement stipulated that she would be allowed to do so, provided that she would remain in the Territories for at least 12 months after her return. Settlement agreements are sometimes brought for the approval of the court (consent decrees) (see, e.g., Noah 1997; Mezey 1998). Such cases are also included within the relevant categories of settlements.

[27] The rate of success of Palestinian petitions calculated vis-à-vis the number of cases in the sample reaching *final judicial disposition* is 19.1% (9 of 47 cases disposed by the Court). On the face of it, this 19.1% success rate in final court dispositions may seem higher than the general success rate in final court disposition in the HCJ (10.4%—categories A, B, and C in Table 1 above). However, our sample is too small to allow us to attribute any statistical significance to the difference in final Court disposition. We can only conclude that the Palestinians' success rate we found was not significantly different from the general success rate in final court dispositions in the HCJ. Note also that Table 1 includes data for the years 1990–94, while the study covers the longer period of 1986–95.

bringing the overall rate of success by settlements (categories E and F) to more than 51.7%, and the combined rate of success in court decisions and settlements (categories A, B, D, and F) to 56.2% of the cases in the study. In fact, if one subtracts from the sample the cases in which the outcome cannot be classified as victory or failure ("Other" in category G[28]), one finds that of 183 cases, petitioners *failed* to achieve their goals in only 69 cases, while they succeeded fully or partly in all other cases, bringing the overall rate of success to 62.3%.[29]

Table 2. Disposition of Petitions Issued by Palestinians Residents of the Territories 1986–1995

Category	No. of Cases	%
A. Court decides wholly for petitioner	3	1.5
B. Court decides partly for petitioner	6	3.0
C. Petition was dismissed by Court decision	38	18.7
D. Petition withdrawn before final decision	31	15.2
E. Settlement with full success[a] for petitioner	49	24.1
F. Settlement with partial success[a] for petitioner	56	27.6
G. Other[b]	20	9.9
Total	203	100.0

SOURCE: HCJ files.

[a] For the meaning of success and partial success in litigation, see note 26.

[b] "Other" cases were disposed as follows: 3 cases were referred to another tribunal; 3 cases were still pending at the time of the research; the outcome cannot be discerned from the file for 2 cases; the petition became moot in 1 case; 5 cases were dismissed for nonprosecution. The remaining 6 cases dealt with house demolition orders, in which the petitioners resorted to the HCJ before any such order was, in fact, issued. For more information on such demolition orders, see note 28.

[28] Six cases in the "Other" category in Table 2 dealt with house demolition orders, in which the petitioners resorted to the HCJ before any such order was, in fact, issued, and the respondent notified the Court that there was no intention to issue such order against the house in question in the foreseeable future. Subsequently these petitions were removed. Such petitions were common during the first years of the Intifada because the military commander would issue demolition orders immediately after evidence was brought to him about the involvement of a Palestinian inhabitant in terrorist activity, and the order could be carried out within hours and with no notification prior to its implementation. (This state of affairs was later changed by the intervention of the Court, which ordered the commander to allow inhabitants of the houses a hearing prior to issuing a demolition order; see H.C. 358/88 *ACRI* discussed below). Since such petitions were officially removed on ripeness grounds, I did not classify these cases as "successes" for petitioners. Nevertheless, there is reason to suspect that these petitions did serve the interest of the petitioners and may well have prevented the issuance of demolition orders. This assumption is supported by the fact that Palestinians would enter such petitions when they learned that an inhabitant of the house (usually a son) had been arrested by the Israeli forces and accused of being involved in serious terrorist activity; therefore, they anticipated an immediate demolition order against the house. The petition served in such cases as "an insurance policy" against such orders, and may well have prevented demolitions (cf. Bisharat 1995, 378).

[29] The subject matter of the petitions in the sample varied. There were 56 cases dealing with freedom of movement (including applications to leave the Territories, to enter Israel, to be eligible to work in Israel—28% of the cases sampled), 57 house demolition orders (based on either security or planning grounds—28%), 14 deportation orders (7%), 32 administrative detentions and issues concerning prison conditions (16%), and a variety of other matters. The success rates according to petition subject matter vary from a net success rate of 44% for demolition cases to 77% for freedom of movement issues. More details on petition subject matter are available from the author.

These settlement figures show that the conclusions reached in prior research were based on incomplete information. Palestinians' success rates in the HCJ proved to be high in both absolute and relative terms. In absolute terms, in about six out of every ten cases studied, Palestinian petitioners achieved their goals (fully or partly) by resorting to the HCJ. On the basis of such findings, it seems that any observation as to the "ineffectiveness" of the HCJ as a steady and reliable tribunal protecting Palestinians' rights—or as to the "primarily symbolic" effect of its rulings (see Shamir 1990:797)—must be reevaluated. Moreover, in relative terms, the data in Table 2 indicate that Palestinian petitions to the HCJ proved to enjoy a success rate that was significantly higher than the general success rate of petitions in the HCJ. In other words, according to the study, Palestinians did *significantly better* than non-Palestinians. These findings should not be surprising when one takes into account the differences between the content of the petitions from Palestinians during the Intifada and those from non-Palestinians. Many of the petitions from Palestinians dealt with severe violations of basic human rights on such practices as house demolitions, deportation orders, and the like. Most such restrictions did not apply at all to non-Palestinians. In other words, while petitions from Palestinians involved, in most cases, serious issues of human rights violations, most petitions from Israelis during the research period dealt with a variety of "normal" administrative issues, such as licensing, zoning and planning, government contracts, and the like. Therefore, the apparent willingness of the Court to interfere more intensively when Palestinians petitioned is anything but unexpected. Nevertheless, these findings cast doubt on previous attempts to use qualitative analysis as the basis for the argument that the HCJ failed to function as a solid protector of Palestinian rights as a result of a systematic tendency to yield to the arguments of the Israeli Government in general or to national security needs in particular. Indeed, *if anything,* the numbers point in the other direction.

At the same time, the data gathered in this part of the study raise some new and intriguing questions. First, the data point to a large gap between the outcomes in court decisions and in out-of-court settlements. In the cases in the study, the government won over 80% of the cases reaching a final disposition (in fact, it lost completely in only 3 of 47 cases, or 6.4%). On the other hand, the government settled 105 of the remaining 136 cases; that is, 77% of the cases not reaching a final court decision (about 47% of these were withdrawn by the government). These figures need further explanation: If the government is so successful in final court dispositions, why is it so quick in out-of-court settlements to concede to the petitioner part or all of what she asked for? To answer this question we need to examine the mechanism by

which settlements are formed. I will deal with this in section III.C below.

A second question relates to the relationship between the success rate of Palestinians in the HCJ and the eruption of the Intifada. As stated before, the Intifada and the political processes following it brought a sharp rise in the number of petitions from Palestinians to the HCJ. Yet, our data suggest that the rise in the number of cases was not followed by any corresponding decline in the settlement rate for Palestinian petitions. Likewise, I did not find any decline in the overall success rate of Palestinian petitioners following the eruption of the Intifada. Do these findings (shown in Fig. 2) mean that the political processes in the Territories had no effect whatsoever on the policies adopted by the Court or on the outcomes of legal proceedings? How did the Court cope with the pressures caused by these political changes? These questions will be elaborated on in the following sections.

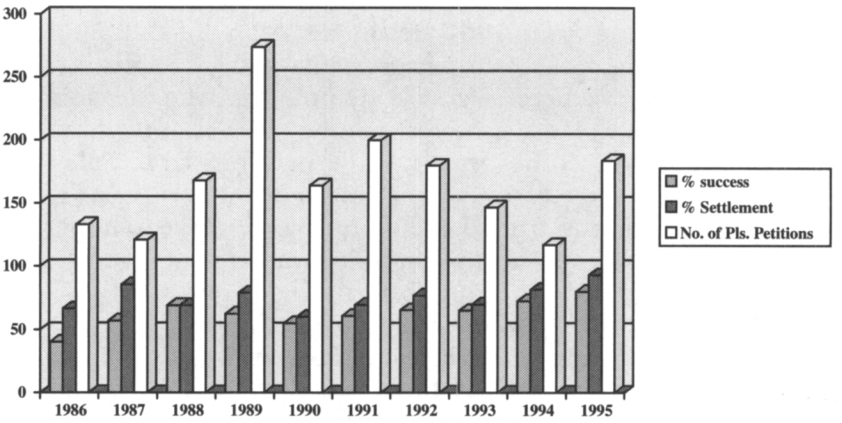

Fig. 2. Settlement and success rates for petitions to the Israeli High Court of Justice, by years, 1986–1995

NOTES:

% Success bar: General success rate per year: Rate was calculated for both total and partial success in court decisions and out-of-court settlements (see categories A, B, E, and F in Table 2). This was related to the *net total* number of cases each year in which the results were known (i.e., excluding cases in category G in Table 2).

% Settlement bar: Settlement rate per year: Rate here was percentage of cases not reaching final judicial disposition (categories D, E, and F) related to the net total number of cases (source: HCJ files).

Open bar: No. of Palestinian cases disposed per year (source: HCJD registers).

C. The Role of Government Lawyers in the HCJ as an Explanation for Settlement Practices

To probe into the mechanism of settlements in the HCJ, I studied the functions and practices of lawyers who represented the Israeli government in the HCJ during the period under study. My research included participatory observation in the gov-

ernmental agency charged with representing the government (the HCJD),[30] as well as interviews with lawyers involved in litigation in the field of Palestinian rights both for the government and for the petitioners and interviews with former Supreme Court justices.[31]

1. The High Court of Justice Department in the Ministry of Justice (HCJD)

The Government of Israel is represented in all judicial proceedings by the Attorney General of the State. In the HCJ, the government is represented by lawyers from a department specializing in litigation before the HCJ, *the High Court of Justice Department (HCJD),* which is part of the office of the Attorney General. It is a small department, normally with no more than 10 lawyers, in charge of the representation of public agencies belonging to the Central Government of Israel, including ministries, governmental departments, the army (and any other security agency); the police; and many other public corporations (other than local authorities, which are represented in court by their own lawyers).[32]

The department enjoys a high degree of independence from overt political pressures. The staff is nominated by the General Prosecutor (herself not a political nominee) solely on the basis of professional skills, and serves under her supervision and under the instructions of the Attorney General.[33] All the lawyers in the

[30] During 1993, I joined the HCJD for five months and worked there as a lawyer. This gave me an opportunity to study the working practices adopted by its members, as well as an almost unlimited access (except when security issues arose) to material of all sorts used by the department. The department continued to allow me access to most of its materials after that period as well.

[31] During 1996 and the first half of 1997 I conducted in-depth semistructured interviews with 12 lawyers who served in the HCJD during the research period. All but one of the lawyers agreed to be interviewed. The interviews covered various topics related to the practices of the HCJ and the HCJD during the Intifada. I also interviewed a Supreme Court Justice and 6 lawyers who took part in litigation of several cases on behalf of Palestinian petitioners and civil rights organizations representing Palestinians during the research period. Most interviews were taped and transcribed. The interview information was supplemented with other, shorter interviews and informal background conversations with lawyers. I agreed not to publish identifying information about any of the lawyers interviewed. For this reason the interviewees have been assigned pseudonymous initials.

[32] The HCJD even represents the Israeli Parliament (the Knesset) before the HCJ whenever a statute or any other decision of Parliament is challenged in court. It also represents judicial bodies, such as the civil courts and quasi-judicial tribunals.

[33] The Attorney General in Israel is nominated by the government and serves as its legal advisor. Unlike in England, the Attorney General is not a member of the cabinet, and unlike in the federal system of the United States, the position is not considered a political one; also the nomination is not understood to be influenced by partisan affiliations or ideological inclinations. Rather, the Attorney General is assumed to be the unbiased guardian of the rule of law and is answerable to the principles of the constitution alone. Recently, when the government attempted to appoint to this position a lawyer who was a party member and involved in political activity, the appointment was met with an almost unprecedented wave of public criticism and was challenged immediately in the HCJ. As a result, the nominee was forced to resign (see, e.g., Alon & Verter 1997; Markus 1997).

department, much like their colleagues in all other departments of the Attorney General's office, are career civil servants. They join the public service sector at an early stage of their professional careers, usually after completing legal training. They normally serve in the department for a long period and in most cases leave the department for a senior job within the Ministry of Justice or for the bench.[34]

The lawyers in the department enjoy a considerable amount of prestige both within and outside of the bureaucracy. For their colleagues within the Ministry of Justice, these lawyers are the only ones who appear before the Supreme Court and "control" the important arena of public law litigation. Bureaucrats within the various departments of the administration respect them as their representatives in court. From the point of view of the public at large, the HCJD staff enjoys some of the glory of the HCJ itself.

The work of the department is characterized by professionalism and centralization. As the lawyers who litigate most public law cases, they have developed a high degree of expertise in the field. Such expertise encompasses knowledge of the law, the procedures and practices of the Court, and the internal practices within the various organs in the governmental sector. Above all, the HCJD lawyers have great experience appearing before the Justices of the HCJ. The 10 lawyers of the HCJD appear constantly before the same 14 Justices of the HCJ. As a result, the lawyers are extremely well informed about the legal position, the judicial policies, and the ideological inclination of each Justice. They are also well attuned to every *dicta* in a written decision or any oral remark from the bench that may signal a possible direction for future decisionmaking or a foreseen shift in a Justice's position on a certain point of law. They are cognizant of differences of opinion on the bench as well as to the internal politics of the HCJ.

Another important point is the special relationship between HCJD members and the HCJ justices. Observation of the frequent interaction between these two professional elites shows that the Justices on the bench tend to have a very high level of trust in the government lawyers appearing before them. Factual statements made by the HCJD staff are accepted as truths by the Justices, as one former senior HCJD member observed:

[34] Two former heads of the department are currently serving as Supreme Court Justices. One former head is now a general manager of the Ministry of Justice; another member of the HCJD was appointed in 1996 to be a county judge. Two members left for senior posts at the Ministry of Justice. None of the HCJD members during the past 5 years left the department for the private sector.

> When the question is asked how a court [the HCJ] is willing to conduct a process with no cross examination of witnesses[35] . . . . [O]ne of the answers is that the HCJ relies on the HCJD to conduct investigations of witnesses. Therefore, the Court relies on statements of HCJD members to the extent that no other court would be willing to do. . . . The HCJ is willing to do this on the basis of a confidence that was built over the years, and which can be easily destroyed, of course. No doubt, the Court gives the position of the HCJD weight which is beyond the usual [in an adversarial setting]. The Court assumes that the Department checked things, interviewed [bureaucrats]. . . . Very often the trial begins and you notice that the one document in the file that the judge read is the statement that you [the HCJD member] had issued. (IZ)[36]

The HCJ Justices expect the government's lawyer always to supply them with the full details of the factual and legal background of a case, as well as the alternative ways to resolve the dispute (preferably solutions that will consume little of the Court's time). The HCJD lawyer is there, from the point of view of the Court, not only to represent the administrative agency but also to help the Court complete its supervisory mission quickly and efficiently. Sometimes, it seems that the latter function is more important to the three-judge panel than meeting an administrative agency's needs. It is common for a judge, after hearing the petitioner for a few minutes, to address the HCJD lawyer in the following manner: "Could you please take care of this matter and resolve it without the need for our intervention?" Such a remark, often with notes giving the *prima facie* opinion of the Court as to the merits, is sufficient to license the HCJD to dispose the case. Quite often, such remarks, in fact, trigger a process that ends the dispute without bringing it back into the courtroom.

The HCJD's lawyers accept in full the role conferred on them by the Court. During interviews, they repeatedly emphasized that they view themselves as "officers of the Court" rather than merely as lawyers representing the government. As one of them stressed:

> We and the Court have one significant thing in common, that we are all in charge of defending the rule of law. . . . [F]rom this point of view we [the government lawyers] serve a function complementary and similar [to those of the Court]. (IZ)

Another senior member described the department's role as follows:

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[35] The procedural vehicles at petitioners' disposal before the HCJ are very limited because of the concise nature of the process. The litigation is based on affidavits, and there is usually no possibility of cross examination (Zamir 1993). See sec. I.A above. Therefore, the role of the HCJD lawyers, on the factual level, is paramount.

[36] These impressions are corroborated by other interviews with HCJD members (IN, TL) as well as by an interview with a former Supreme Court justice (RR).

> [As a lawyer in the department] you are the lawyer of the government, as well as the officer of the court, the gatekeeper of the rule of law; you also have to watch your professional reputation. (IN)

These statements are corroborated by the remarks of lawyers who frequently represent Palestinian petitioners in the HCJ, when asked for their opinions about the functions of the HCJD members. As one said:

> When I am in contact with the HCJD members . . . I feel that I am talking to people that are similar to myself, more or less, in our basic conceptions as to what is law and to what we are striving to as the public interest. . . . I have full confidence in them. (UM)[37]

HCJD members also state that, from their point of view, whether the government wins a certain case is of secondary importance. What is more important is to assure that the administrative action at stake meets the legal standards set by the HCJ.[38] As a result, these lawyers would adopt many practices that would be uncommon for lawyers acting in an adversarial environment. For example, HCJD lawyers will search for and expose any piece of evidence, even if they know that such evidence weakens their clients' case, and even if they know that had they not exposed the evidence, the chances are slim that it would have otherwise been exposed in court.[39] In the words of one lawyer I interviewed:

> It is a million times more important for me to retain the Court's trust in me than to win a certain case. (TL)

Last, but not least, the HCJD's lawyers enjoy a high level of autonomy vis-à-vis their client agencies. On the institutional level, they are part of the Ministry of Justice and are not supervised by the client agencies. Indeed, they do not view themselves as completely committed on the policy level or on the institutional level to the interests of the client agency. Moreover, according to the rulings of the Supreme Court, the Attorney General's office enjoys the exclusive right to represent the government before the HCJ.[40] The HCJD members are well aware of the power this exclusivity bestows on them. Therefore, in disputes about the true perception of the "public interest" between the client agencies and the Attorney General's office, it is usually the latter's view that prevails. As a senior member of the HCJD says:

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[37] Also interview with IL.

[38] See interviews with ID, TL, KS, HB, HN. While all the HCJD lawyers I interviewed emphasized their dual function (as representatives of their client and as officers of the court), they all pointed out that the weight and intensity of each of these values varies among the lawyers, in accordance with the professional ideology of each member, as well as with the policies of the head of the department at the relevant time (e.g., interviews with IN, IZ, KS, HR).

[39] See note 35 above.

[40] See note 41 below.

> If, according to our legal analysis, the position of the [client] Minister is one that can be defended before the Court—even if we do not like it—we will represent the case in court. If we see that the Minister's position cannot be defended according to the rules of judicial review, it is our job to say so, and we say so loud and clear. When there is a dispute between us and the Minister which cannot be settled by mutual understanding, the Attorney General makes the final decision. He hears all parties concerned. If he decides that the Minister is entitled to be represented—we represent. If he accepts [our] position that the case is indefensible, he tells the Minister. . . . Today, we have a clear-cut ruling of the Court in this matter. Beforehand, the rules of the game were not written. Today we have written rules for this matter. It is clear to everybody that the Attorney General has the last word as to whether the position of the government can be defended in Court. And he is the only one [who] can bring the position of the government into the court. Therefore, the rules for this matter are very clear. (UN)

Indeed, the independence of the HCJD vis-à-vis its clients is supported by the Supreme Court, both explicitly in its judgments and implicitly by its highly "chilling" attitude toward any attempts, rare though they may be, by public agencies to circumvent the department and to seek other lawyers (whether from its own staff or from the private sector) to represent them before the Court.[41]

To summarize this point: the HCJD may be viewed as an extension of the Court no less than a body of lawyers representing one of the parties to the dispute before the Court. The high level of trust that the HCJD lawyers enjoy from the Court is well reflected in the extremely low proportion of cases in which the Court rules against their position in final decisions. Therefore, the process of litigation before the HCJ is usually transformed

[41] In H.C. 4267/93 *Amitai v. Government of Israel* the petitioners sought an order to force the Prime Minister to dismiss the Minister of Interior after the latter had been charged with forgery and larceny. The Attorney General's office refused to defend the decision of the Prime Minister not to dismiss the Minister. The Court explicitly endorsed the position of the Attorney General. While answering the argument that the government did not enjoy proper legal representation, Justice Barak said (p. 473):

> The General Prosecutor represented one and only client—the Prime minister. She did so as the agent of the Attorney General. . . . Indeed, the position of the Attorney General was different than the position of the Prime minister . . . in such a case, the Attorney General should represent the Government according to his own legal perception. The reason for this principle is the concept, that the Attorney General is the authorized interpreter of the law *vis a vis* the Executive.

This case was by no means the only one in which the Court supported the refusal of the Attorney General or the HCJD to represent the government. In another case, the HCJD refused to defend a decision by the Public Censorship Committee to dismiss an application for a license to present a theater play. The Court allowed the committee to be represented by a private lawyer, but intervened and quashed the committee's decision (H.C. 14/86 *Laor*). For a description of other instances of refusal by the Attorney General to represent the government or of divergence of their positions, see Gavison 1996; Gutman 1995.

into a process of negotiation in which the HCJD has a central role. Within this framework, one of the government lawyer's principal functions is to mediate between the requirements of the Justices on the bench and the position of its client agency. This is particularly true in cases of petitions by Palestinians, in which the Court's willingness to quash governmental actions is minimal, for reasons that are more fully explored below.

2. HCJD Policies for Settlements in Palestinians' Petitions to the HCJ

With the background of the HCJD given here, I can now turn to analysis of the factors that account for the high success rate of Palestinians in settlements in the HCJ. From a rational choice perspective, a number of factors may influence the decision of a party to the litigation to settle. The first is the costs of the litigation itself and for a mass litigator such as the state, the administrative pressures resulting from the heavy caseload (Posner 1992; Landes 1971; Blumberg 1967). The assumption that a higher rate of settlement is the result of case pressures is by no means supported in all the work in the field (cf. Feeley 1973; Skolnick 1967; Heumann 1994). Neither is this assumption supported by the data collected in the current study: While we observed that the general number of petitions to the HCJ rose constantly between 1986 and 1995, we did not detect any correlative rise in the general portion of cases settled in the cases in the study (see Figs. 1 and 2 above). Nevertheless, even if one accepts the assumption that docket pressure may influence the willingness of government lawyers to settle, this factor cannot explain the fact that Palestinians enjoy *higher success rates* in settlements than do non-Palestinians. After all, the case pressures on the HCJD or on the Court itself are caused by the general number of petitions, not only by those coming from Palestinians.[42]

From a rational choice approach to settlement analysis, a second important factor is the amount of information each party to the litigation has and the perceived likelihood of winning by court decision (Posner 1973; Cooter, Marks, & Mnookin 1982; Bebchuk 1984). Once again, this factor, taken by itself, cannot account for the settlement practices of the HCJD. As the previous section demonstrates, the HCJD enjoys superb access to information both in terms of knowing the relevant legal principles and the accumulated data concerning its ability to win in any of the various settings of litigation before the HCJ. In other words, the lawyers in the department are well aware of the low number of cases in which the Court rules against the government.

[42] Another factor affecting settlement outcomes is the negotiation skills and strategies of the parties (Cooter et al. 1982). This factor cannot account for the differences between the results that the HCJD achieved in settlements in Palestinian and non-Palestinian petitions.

Nevertheless, I argue that a high level of information does play an important role in understanding why the HCJD allowed Palestinian petitions such a high success rate in HCJ proceedings. This is, however, not information about the prospects of winning in court but rather information concerning *what the Justices of the Court expect the government lawyers to do, regardless of such prospects.* In other words, *the HCJD settled cases because the HCJ expected them to do so as part of their role in the realization of the policies of the Court in the field of Palestinian rights.* The channels for communicating these expectations vary. They include the rhetoric in HCJ decisions and, to certain extent, the threat of an immediate judicial response (in the form of an adverse judgment) if the government lawyer fails to comply with the implied judicial requirement. However, informal messages play an equally important role within this ongoing communication between these two groups of professionals in the course of their daily interactions.[43]

From the point of view of the government itself (and regardless of the conditions of its legal representation), settlements may sometimes have advantages over litigation in the HCJ. Settlements may be preferable from a strategic view because the overall impact of a concession within a settlement may be much more limited than the impact of a defeat in a celebrated court decision. Such a concession would not set a formal precedent, and it might entail much less publicity. Thus, if the government foresees the possibility of a defeat, it may well prefer to avert the risk by reaching an out-of-court settlement.[44] Similarly, in some cases, the government may prefer a quick settlement to a long and complicated litigation even if it does not foresee a high likeli-

[43] The assumption concerning the high level of access that the HCJD has to information about the probable outcomes of litigation may provide an alternative explanation to its litigation strategies. It may be argued that the HCJD settles such a high portion of the cases because it evaluates its chances to win *all* (or almost all) these cases as very low. Under this assumption, the HCJD acts as a "perfect win-rate maximizer" and settles only those cases (many as they are) that it expects to lose in court. Although such an explanation is logically possible, there are several indications invalidating it in the case of the HCJD. For a start, the HCJD's exceptional high rate of winning in litigation makes this assumption improbable (even if not impossible). Second, it is at odds with the information collected during my study (by observation and interviews). Lastly, it is negated by a comparison between the success rate of the HCJD in litigation and the success rate of local authorities in litigation before the HCJ. Local authorities are represented by their own lawyers, not by the HCJD. Therefore, their lawyers' attitudes are much more adversarial, and they have no motivation to settle just because the Court expects them to do so "for the public interest." Nevertheless, the local authorities' loss rate in the HCJ is not sharply higher than that of the HCJD in litigation before the HCJ. According to Central Bureau of Statistics data for 1985–93, local authorities lost 7.74% of their cases; the HCJD lost 4.45% of the petitions against state authorities. In any case, even if this alternative explanation *were* valid, it would indicate as the ultimate explanation for the high success rate in settlements that Palestinian petitions were received favorably by the Court.

[44] The importance of this factor seemed to be quite limited with regard to the Territories since many petitions came from public action organizations or "cause lawyers" who were routinely involved in such litigation and could apply any favorable result in other, similar cases (see note 56 below). Therefore, the HCJD lawyers did not consider this factor as paramount in shaping their "settle or litigate" policies (interview with KS).

hood of defeat, so that it might avoid embarrassment in public opinion or in foreign relations. This is particularly true with regard to the Territories, where actions taken by the Israeli government were often met by disapproving reactions from foreign governments, international institutions, and the public. However, these factors, taken by themselves, can hardly account for the overall high rate of governmental concessions within settlements affected by the HCJD during the Intifada.

If, however, one adds to these factors other causes related to the structure and practices of the HCJD itself, a more comprehensive picture is revealed. In the course of their duties as government lawyers, the HCJD staff view themselves not only as lawyers representing their clients but also as officers of the Court in charge of assisting the Justices in implementing the judicial agenda. Many factors contribute to this state of affairs: their career structure, their social affiliation with the legal elite (led by the Justices of the Supreme Court), their day-to-day interaction with the same persons on the bench, their self-image as agents of the Court no less than agents of their clients, and their willingness to fully internalize the principles and values produced within court decisions. Therefore, the HCJD lawyers understood their responsibility to the Court to include settling a case whenever the Court lets them know that they should so do. And during the Intifada the message was repeatedly conveyed.

3. HCJ Policies for Settlements in Palestinians' Petitions

Why was the Court itself so eager to carry out its policies in the field of Palestinian rights during the Intifada through settlements, rather than by clear-cut, open-ended judicial declarations? One possible reason for the Court's preference for settlements is case pressure. There is no doubt that the costs of settlements in terms of judicial time and efforts are usually lower than those of full court processes. This is true even in the case of the HCJ where the normal procedure is relatively simple and concise (see sec. I.A above). The importance of this factor as a cause for judicial pressure to settle should not be underestimated. This was particularly true during the Intifada when the Court's docket was flooded with petitions dealing with the Territories. Once again, however, this factor cannot explain the high success rate of Palestinians during this period (let alone the difference between the success rate of Palestinians and that of non-Palestinians). The Court could have equally eased these pressures by routinely dismissing Palestinian petitions. In other words, if the only motivation behind the Court's policies had been the wish to ease case pressure, the Court could have easily dismissed the vast majority of Palestinian petitions by either concise judicial determinations or by pressing petitioners to with-

draw their petitions before such determination is given.[45] The fact that so many settlements included significant achievements for the petitioners points to the need to look for other explanations for the Court's practices during the Intifada.

Another advantage of settlement over litigation—from both the Court's and the government's view—relates to administrative and operational levels. Settlements are less rigid and more flexible than court orders. They can reflect more accurately the preferences of each party and can be adapted to organizational changes that occur later. This is particularly important when the litigation deals with an issue of great importance to a large group of people, and the solution to the conflict necessitates administrative efforts and logistic skills. Such is the case, for example, if petitioners attack the general conditions in a certain state prison. In such a case, settlements may be more effective for all parties than court orders (Horowitz 1977). Indeed, during the Intifada a number of petitions dealt with issues in this category (e.g., prison conditions, curfew, and closure orders on villages in the Territories), and many were settled.[46] Once again, however, this explanation accounts for the Court's tendency to prefer settlements only in some particularly complicated cases rather than offering a comprehensive explanation for the overall portion of settlements and the success rate of Palestinian petitions.

Accordingly, the explanation for the high success rate of Palestinians in settlements during the Intifada cannot rest on procedural or administrative grounds. Rather, it rests on the *political* setting of the HCJ position during this crucial period. In order to supply such an explanation, one needs to refer to the general framework in which higher courts function, as well as to analyze the particular political conditions in which the HCJ functioned during the Intifada.

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[45] Indeed, in those Palestinian petitions that were dismissed by the HCJ during the Intifada, the judicial reasoning tended to be extremely concise, and the Court was criticized for such concise reasoning; see, e.g., Kretzmer 1993. The main tool the Court used to pressure petitioners to withdraw their petitions before judicial determination was the threat of imposing the costs of litigation on the petitioner. The HCJ Justices use this tool routinely and openly in cases in which they consider the petition to be frivolous.

[46] One prominent example for such settlement is H.C. 670/89 *Uda v. Military Commander of Juda and Samaria.* There, the issue at stake was the duty of the military to notify the families of administrative detainees about the arrest of their relatives. During the first year of the Intifada, thousands of Palestinians were arrested by the Israeli army. In many cases their families had serious difficulties in locating them after their arrest. Under the supervision of the HCJ, the government developed guidelines and regulations to guarantee that each detainee would be able to inform his or her family about the arrest and where he was being held both by mail and by publication of detainee lists in each region of the Territories. The guidelines were developed by the respondents while the case was pending and were carefully examined by the Court. Subsequently the Court dismissed the petition. The Court imposed the costs of litigation on the respondents. Similar settlements were made for matters such as prison conditions, medical treatment during curfew, and the like. In most cases such settlements were reached by the HCJD without any judicial intervention and without leaving any traces in the Court's reports (interview with ID).

On the issue of motivation of judges, scholars argue that judges seek to maximize two principal interests: their influence on society and the level of their institutional autonomy (Posner 1992:534; Epstein & Knight 1997). In some cases, courts can both influence social values and restate their institutional autonomy at the same time (Shamir 1990). However, in other situations, there is a sharp contradiction between these two interests. The more the court seeks to enforce its perceptions over society, the more it needs to interfere with the spheres of activities of other political institutions and, therefore, the greater the danger of counterreaction to infringe on the court's autonomy (Epstein & Walker 1995).

Strong tensions between the HCJ's values and its ability to defend its institutional autonomy were embedded in the its position during the Intifada. On the one hand, the wide scale of infringements of civil rights by the IDF and other security forces contradicted the general principles of civil liberties as proclaimed by the Court, as well as its asserted policies regarding the Territories themselves. On the other hand, the exigencies of the emergency situation following the massive scope of clashes between the army and the Palestinian population, as well as the reactions of the government and Israeli public opinion, created a real danger that judicial enforcement of civil rights might trigger a strong counterreaction by the government, and thus create a serious threat to the Court's institutional autonomy.

During the Intifada, the judicial apparatus in general and the HCJ in particular were severely criticized by the heads of the army, cabinet members, and senior politicians, who argued that legal constraints inhibited an efficient and decisive reaction to end the upheaval. Legal institutions were accused of "assisting" the rioters to achieve their goals and of being "a weapon" in the hands of the enemy (Straschnov 1994:297 ff.; Shalev 1990:119). Likewise, the public's trust of the Court was also threatened. Surveys prove that the HCJ enjoys a high level of trust from the Israeli public. These surveys, however, also reveal that the HCJ rulings granting individual rights to Palestinians in the Territories won the lowest level of support from the general public, in comparison with other rulings of the Court (Barzilai 1996; Barzilai et al. 1994b). Therefore, the HCJ justices had reason for concern that a strict insistence on pursuing the Court's general principles on human rights and massive intervention to forestall military actions infringing on Palestinians' liberties might impair its image with the public and lead to a strong counterreaction from competing political institutions.[47]

[47] Israel has no formal constitution. The principle of judicial independence is acknowledged by the Basic Law: The Judiciary, 1984 (sec. 2). However, this statute is not immune from future amendments by the legislature. Therefore, at least on the formal level, the government may, at any time and without serious constitutional obstacles, move

How did the HCJ confront these inherent tensions? While the Court did not wish to give up its constitutional policies, it could not afford risking its institutional autonomy. Therefore, it did not stop enforcing its rules concerning civil rights protections. Rather, it did everything it could to lessen the level of *exposure* of its interference with military actions. It avoided—to the extent possible—direct intervention in governmental actions by official rulings and final judgments. Instead, it exerted influence on actions of the government through the informal means of settlements. In this respect, settlements enjoy considerable advantages over litigation and final judgments: The level of exposure of the outcome of the process is likely to be much lower than a final decision quashing a state action. The interference may well be presented not as a blatant interference of the judiciary in the operation of other agencies, but rather as a solution which the government itself favored, or at least cooperated in the process of its formation. Public criticism against such a solution—even if the matter is exposed in the media—could be effectively diverted from the Court itself toward the relevant governmental agencies that cooperated to form the settlement. Finally, the government itself is less likely to criticize or to react against a solution to which it itself is a party.

These factors account for the willingness of the Court to render some protection to human rights under threat by exerting influence over governmental actions through settlements. The Court *could* do so, in most cases, because it enjoyed the cooperation of the HCJD (for the reasons explained above). Indeed, in those less common cases in which the HCJD refused to cooperate, the Court generally yielded to the department position and dismissed the petitions. Consequently, the success rate of Palestinians in final Court decisions is very low, despite the high success rate of Palestinian petitions in out-of-court settlements (see Table 2).

The crucial importance of the level of exposure, as a factor having adverse effects on the HCJ's tendency to intervene in military actions, may also be demonstrated by the practices of the Court on those occasions when exposure to public opinion was at its highest level. A manifest example of this is the way the Court dealt with the decision of the government to deport 415 members of the militant religious underground—the Hamas (H.C. 5973/92 *ACRI v. Minister of Defense* (1992)). The government's decision to carry out the deportation orders was meant to be implemented within a few hours of being made, and without allowing the deportees a hearing or any other elementary procedural rights prior to the deportation. On the face of the matter,

to curtail the authority of the Court by presenting legislation that needs only to be approved by a simple majority in the Knesset.

the decision, which was accepted without the involvement of legal advisors, was contrary to the requirements of the relevant regulations as well as to the principles laid down by HCJ precedent, and was therefore manifestly illegal (Kremnitzer 1994; Cohen 1993; Benvenisti 1993; Negbi 1993). Nevertheless, under strong pressure from the military and the government, in full view of the entire international community and the media networks, and with a clear impression that the Israeli public and the local media supported the decision to carry out the deportation,[48] the Court yielded. It (implicitly) accepted the argument that a judicial injunction against the deportation, at the stage at which it was in fact already almost completed, would damage the national security interests of the state. It approved the massive deportations by rendering one of the most peculiar decisions in its history, distorting most of its declared principles in favor of what appeared to be the national consensus.[49] This decision, as well as some others (see, e.g., H.C. 4112/90 *ACRI,* the *El-Bureigh* case), demonstrates the constraining influence which a high level of exposure had on the Court's ability to stick to its principles in Palestinian petitions (Dotan 1996). Such decisions, however, are the exception rather than the rule. In most cases, the level of exposure of the proceedings in the HCJ was much lower, and the Court's practices assured that they would stay that way. Therefore, as our study demonstrates, the Court's ability to intervene and provide protection to human rights in the Territories was much greater than it might have been.

The Court's willingness to try to stick, albeit partly, to its principles while preserving its autonomy by reducing the level of exposure is reflected not only in the relations between settlements and final decisions. Another aspect is the divergence between rhetoric and practice embedded in HCJ's decisions regarding the Territories. On the rhetorical level, the Court has been slow to allow the Palestinians any "grand" victories that knock down a practice or policy endorsed by the government. On the practical level, it was the Court that contributed to the fact that many of these policies were abandoned as impractical and ineffective. For example, the Court refused to accept the argument that deportations are illegal under international law (H.C. 698/80 *Kawasme*; H.C. 514,513/85 *Nazal*). Instead, the Court imposed cumbersome procedural requirements on the government that made deportations impractical and led the government to give up its orig-

[48] According to polls conducted for an Israeli newspaper during the week following the deportation, 91% of the Jewish population in Israel supported the government decision (see Barzilai et al. 1994c:n.4).

[49] The Court gave a *per curium* opinion, an almost unprecedented practice in a case of such importance. The judgment was relatively concise and failed to address several of the legal difficulties raised by the case. The unanimous opinion was probably designed to smoothly cover disagreements among the seven justices on the bench (Barzilai et al. 1994c:10).

inal intention to carry them out in most cases (Straschnov 1994:105; Kuttab 1992:496–97; see also B'Tselem 1993:23; interview with ID). Similarly, the Court rejected attempts to challenge the legality of house demolitions. It did, however, manage to temper, to some extent, the harshness of this measure by creating procedural protections and by imposing substantive limitations on the emergency powers of the military authorities (H.C. 358/88 *ACRI*; H.C. 5510/92 *Turkeman*; Bisharat 1995:374–75). Thus, judicial review contributed to reducing the number of demolitions (Simon 1994:32–37). The Court rejected attempts to attack the legality of the Jewish settlements in the Territories (H.C. 4481/91 *Bargil*), but its decisions limited the government's ability to go forward with settlements in many areas in the Territories (H.C. 390/79 *Dawikat;* Negbi 1981). The Court dismissed claims that curfew and closure are illegal practices on the basis of them being forms of collective punishment imposed on the population of a whole village or town. At the same time, the Court intervened in curfew and closure orders to limit the number of days on which they could be imposed and to alleviate the harshness of these measures (H.C. 1113/90 *Shava;* H.C. 5820/91 *Father Samuel Panus;* see also B'Tselem 1994a, 1990:41). In short, during the tense period of the Intifada, the Court did everything it could to avoid a direct, overt conflict with the other political branches or the sentiments of the vast majority of the Israeli population. At the same time, by routine judicial work, the Court managed to limit—within the existing political boundaries—the harshness of the military occupation.

The divergence between rhetoric (in the reasoning of final decision) and practice (in the content of settlements) is also detected when one studies the Court's attitude toward specific legal arguments. Take, for example, the question of the legality of the practice of house demolition. One of the most frequently used arguments against the legality of this practice (both under the standards of Israeli constitutional law and the requirements of international law) related to the collective and nonindividual character of this practice. This argument was raised repeatedly both by lawyers representing petitioners and by academic critics (Simon 1994:53–74; Kretzmer 1993; Halabi 1991). It was the subject of much debate among the HCJ Justices themselves (e.g., H.C. 4772/91 *Khizran*; H.C. 2722/92 *El-Amrin;* H.C. 6026/94 *Nazal;* H.C. 1730/96 *Sabiah*). Despite inherent analytical difficulties and widespread criticism, the majority of the Court refused to accept the argument. Therefore, on the rhetorical level, the argument was rejected. However, a closer look at settlement practices reveals that while the argument failed on the rhetorical level, it did succeed in shaping the outcomes of many settlement practices. A recurring pattern in out-of-court settlements in demolition cases is that a house in which, in addition to the person

involved in terrorist activity, others live would not be destroyed; rather only the one room in which the terrorist himself lives would be either destroyed or sealed.[50] This is yet another indication for the Court's willingness to allow in practice (usually by utilizing the mechanism of settlements by the HCJD) protection of Palestinians' rights that it would otherwise decline to publicly acknowledge through open declarations in final judgments.

D. The Adjudicative Function of the HCJD—Pre-petitions

1. Background

Earlier in this article, I argue that the examination of settlements may dramatically change our evaluation of the significance of judicial review by the HCJ. However, the data on out-of-court settlements of HCJ petitions do not supply a full picture because of the large class of cases that do not reach the Court at all. In these cases *petitioners address the HCJD directly, without, or before, any formal petition being filed in the Court.* They form an identified layer within "the Dispute Pyramid" (Galanter 1983). I refer to these proceedings as "pre-petitions" (PPs). They are of a highly informal nature, such as a letter from a citizen to the department complaining about some bureaucratic illegality, or even a telephone call by a certain lawyer to the head of the department on an urgent matter (such as a dispute about the legality of a demonstration about to begin or a complaint about an illegal arrest of an immigrant). Even though no petition to the Court is filed, and even though no basis in statute or regulation exists for such procedures, the HCJD treats these cases in much the same manner as a case in which a petition is filed. Such pre-petitions are brought to the head of the department and transferred by her to a staff member to be handled like any other case under her responsibility. The treatment that such cases receive is similar in many respects to that given to regular petitions to Court: factual investigation with the pertinent agency, legal analysis and contact with both parties in order to settle the case if the lawyer finds the pre-petition to have merits, or notification to the petitioner that the HCJD found no basis for her complaint.

Despite the highly informal nature of these cases, the department also developed procedures for filing and indexing these cases.[51] The result is that the files of the HCJD contain a considerable amount of data concerning such pre-petitions. No doubt,

[50] See, e.g., H.C. 602/89; H.C. 728/87; H.C. 769/91; H.C. 3539/91 (all included in the sample in Table 2), and also H.C. 361/82 *Hamdi v. Commander of Juda and Samaria.* See also Bisharat 1995:375 n. 111.

[51] This filing process is done both manually and on computer. Whenever a PP reaches the HCJD, the secretary of the head of the department files a computerized form (which is much like the form used for court cases), and after the completion of the process, the relevant documents are filed with all the PPs from the same period of time. The data presented below draw on both the computerized data and the paper files. A full

the data cannot give a full picture of this activity for a number of reasons: the highly informal nature of this process, the fact that many disputes are resolved within a few days (or even during the same day, see below), and the overall working pressure on the HCJD staff, all make the filing process incomplete and inaccurate. The information collected from the observation of HCJD practices and in interviews with its staff revealed that a considerable number of pre-petitions are disposed without records being kept of them. Moreover, the files that do exist in the department offices are often partial, incomplete, and disorganized. Nevertheless, the files are a useful source of information for evaluating some of the implications of this phenomenon as part of the process of litigation in the HCJ.

2. The Institution of Pre-petitions and the Intifada

The phenomenon of pre-petitions was not the product of an official decision of some governmental institution. Rather, it was the product of a gradual process of interaction between the HCJ Justices and the lawyers of the HCJD. It emerged as an informal process intended to address the justices' requests that the HCJD staff "sort things out" in order to save the Court precious time. The effective response by the HCJD to this expectation, and the strong tendency the Court showed to support the solutions formed by the department's staff, led lawyers representing petitioners to understand that they might better serve their clients by addressing the HCJD directly instead of wasting their time waiting for the judges on the bench to tell them to do the very same thing.[52] The informality of this process makes it is impossible to point to the exact date when the first pre-petition was disposed by the HCJD. It is likely that the department was in fact dealing with such petitions long before any of its members realized that the volume of pre-petitions required some level of institutionalization. Thereafter, the HCJD began to keep (some partial) records of this activity.

While it may be the case that the HCJD was already dealing (perhaps without being fully aware of the fact) with PPs, the first real (if scattered) evidence of PP files dates to 1988, and the first attempt to set up a filing procedure for this sort of petition began a year later, during 1989.[53] For 1990, I found dozens of files containing PPs indexed and handled in the same manner that is now used by the department. The number of recorded PPs and the number of PPs from Palestinians during 1989–95 are shown

description of the research methods used for the analysis of these files is available from the author.

[52] Interview with RR. Even today, the pre-petition procedure is used mainly by those lawyers often involved in litigation before the HCJ. Most other lawyers, as well as the general public, are not aware of its existence.

[53] Interview with KS.

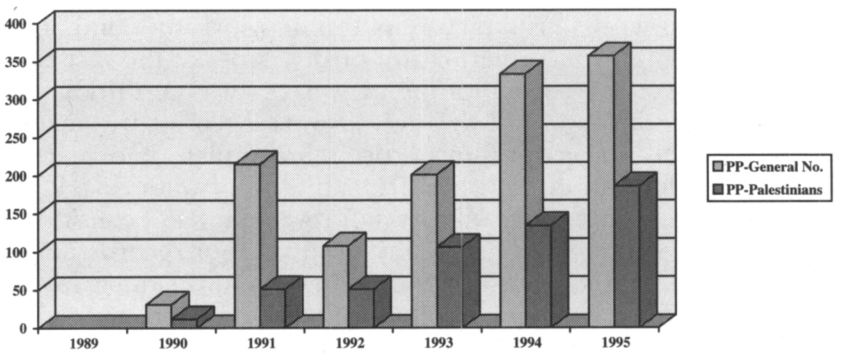

Fig. 3. Number of recorded pre-petitions

NOTE: Data for 1990 is only for November and December. No files relating to pre-petitions for earlier months of 1990 were found.

in Figure 3. The data in Figure 3 demonstrate the importance of the procedure of pre-petition to the rights of the Palestinian residents of the Territories. According to the HCJD files, 540 pre-petitions out of 1,245 pre-petitions between November 1990 and December 1995 came from Palestinians. This means that about 43% of the pre-petitions recorded from this period dealt with Palestinian grievances. The proportion of pre-petitions from Palestinians among the general number of PPs is even higher than the proportion of petitions to the Court from Palestinians.[54] The fact that Palestinians made intensive use of this procedure during the Intifada and the years following it is hardly surprising. The Intifada (and to some extent the Peace Process following it) brought a sharp increase in the number of petitions to the HCJ dealing with allegations of serious violations of human rights.[55] It created a severe pressure on the Court's docket, which was already stressed by the continuous increase in the general number of petitions.[56] The Court and the judicial system at large (includ-

[54] According to our data, of 8,185 petitions coming to the HCJ and handled by the HCJD during 1986–95, only 1,688 (20.6%) came from Palestinians. During 1991–95 the relative proportion of Palestinian petitions is 17.1% (828 out of 4,384 petitions); data from HCJD registers (see Fig. 1 above).

[55] The end of the Intifada and the beginning of the Peace Process (the Oslo Declaration of Principles in September 1993) has not brought an immediate decrease in the number of violations of human rights in the Territories. Paradoxically, to some extent it has caused an increase in the number of Palestinian grievances. The use of infringing measures (such as preventive detentions or deportation orders by the military commander) has not stopped but has since been directed against members of Islamist groups who oppose the Peace Process. Likewise, restrictions on the freedom of movement of the residents of the Territories were not lessened, and have in fact become even more burdensome. See B'Tselem 1994b, 1995; Bisharat 1995:355–56.

[56] Interviews with KS and IN. Another reason for Palestinians' intensive use of PPs is that many of the pre-petitions were brought by a small group of lawyers and public action organizations (such as ACRI and the Hotline—Center for Defense of the Individual) specializing in Palestinian issues. They were the first to learn of the existence of this procedure and made intensive use of it. In fact, 383 (around 71%) of the 540 pre-petitions from Palestinians during this period came from this small group of six lawyers and four public action organizations. However, the issues dealt with by pre-petitions are by no

ing the Ministry of Justice and the HCJD) faced a huge number of petitions containing allegations of severe infringements of basic liberties. It also faced the fact that many of these petitions dealt with issues that needed an immediate response in order to prevent or alleviate violations of human rights. These included, for example, petitions relating to an individual who disappeared from his home during a military operation and whose family sought to know whether he was detained by the security forces, or a petition on behalf of a detainee denied access to her lawyer, or a petition concerning the closure of roads or areas that would prevent residents from obtaining urgent medical help (see B'Tselem 1990, 1992). These petitions necessitated a response by the judicial system which, in order to be effective, would need to be immediate, organized, and well coordinated with the Military Government itself. In other words, these were petitions that could hardly be dealt with effectively by a formal and cumbersome process in a court of law, particularly when the petitions reach the court in large numbers during a short period of time.

The PP process was meant to serve as a quick and effective measure for disposing of disputes of the kind described above. Instead of going to court for a relatively slow and cumbersome procedure, the lawyers acting on behalf of the Palestinians gradually accustomed themselves to addressing the HCJD staff directly. Such informal petitions were submitted by mail or in more urgent cases by faxes or phone. The reaction of the department was, in many cases, immediate. Sometimes the relevant detainee was located, and information on where he was held was sent to his family and his lawyer within a few hours. Or the closure of a certain road or village was lifted within half a day to enable the population to get medical help or other urgent supplies.[57]

The HCJD files do not contain much information about the outcomes of PPs. The highly informal nature of such proceedings makes it extremely difficult to gather systematic information about them.[58] Information collected in interviews and by checking documents confirms the usefulness of this procedure for Palestinian petitioners. Both lawyers in the HCJD and those who represented Palestinians during the Intifada said that in many, if not in most, cases the pre-petitions answered (in full or in part)

means limited only to Palestinian grievances. Non-Palestinians also take advantage of this option in a variety of areas of administrative activity such as immigration and entry to the country, housing and planning, licenses, subsidies, etc. (HCJD files).

[57] In interviews HCJD members recalled many cases of Palestinian pre-petitions being initiated by a telephone call from their lawyers or by fax (e.g., interviews with IT and HR). Because the department resolved many of these petitions within hours, often no record was kept. Thus, the volume of such pre-petitions is without doubt higher than is shown in Fig. 3.

[58] HCJD lawyers don't always make sure that pre-petitions they dispose are filed. In many cases, there are no files whatsoever to be studied for the details of such proceedings. Even in files that do exist, there is often no evidence on the outcome of the process (see Table 3 below).

the grievance of the petitioners.[59] This conclusion is supported, albeit in a limited way, by my examination of the outcomes of PPs dealing with freedom-of-movement matters from Palestinians during 1994. The outcomes are presented in Table 3.

Table 3. Success of Pre-petitions Dealing with Freedom-of-Movement Matters from Palestinians during 1994

Petition dismissed	7
Petition succeeded partly	3
Petition succeeded fully	17
Other[a]	11
Outcome unknown	25
Total	63[b]

SOURCE: HCJD files.

[a] Cases classified as moot or referred by the HCJD to other authorities. One case was still pending.

[b] Of the 63 cases, 37 dealt with applications for permission to go abroad or to enter Israel to work; 7 dealt with family reunification; the subject of 2 petitions was not clear from the record. The rest dealt with other applications for permits.

While the data do not enable us to draw any conclusions as to the accurate overall success rates of pre-petitions, they do point to the fact that in some areas of administrative activity, such as freedom of movement, this type of procedure was useful in protecting human rights in the Territories.

The creation of the institution of pre-petitions is yet another aspect of informal processes of decisionmaking by which the HCJ exerted influence on the reality of human rights in the Territories. That this procedure developed rapidly and thrived during the Intifada and the following years is by no means a coincidence. While the procedure was executed by lawyer-bureaucrats, it was the Court whose influence pervaded the processes. Once again, this was an avenue of judicial influence that could not have been detected from the text of formal decisions.

IV. Critique

Earlier in this article I described the judicial techniques employed by the HCJ while dealing with petitions from by Palestinians during the Intifada. Palestinians, I argued, could hardly win their cases in court decisions. Rather, they could often work to obtain an out-of-court settlement. On the practical level, the HCJ's ability to render relief to Palestinian petitioners through settlements should not be underestimated. During the Intifada fewer houses were destroyed, fewer people were deported, and less property was confiscated due to the intervention (and to the deterrent impact) of the HCJ (Kuttab 1992:496–97).

[59] Interviews with IL and IT, as well as a letter from a lawyer-activist representing Palestinians, praised the HCJD for its policies in disposing PPs.

On the other hand, forceful arguments can be raised against this kind of judicial action, and some serious reservations should be made as to its overall impact on the situation of human rights in the Territories. First, it may well be argued that fundamental human rights, such as those rights of the Palestinian residents of the Territories that were violated almost daily by the Military Government, should be protected by clear-cut rules of law that are unconditionally and openly acknowledged by courts of law.[60] The legal system described above did not uphold this requirement. Instead of enjoying legal *rights*, Palestinians were dependent on discretionary concessions rendered to them on an *ex gratia* basis because of the (contingent) "good will" of the judge (or the government lawyer). It is true that "discretionary justice" is an inevitable component of modern administration and of modern systems of judicial review (Davis 1969; Galligan 1986). It is also true that the technique of out-of-court settlements was widely applied by the HCJ to all other petitions during the relevant period (as demonstrated in Table 1 above). There is, however, a major difference between the situation in Israel and that in the Occupied Territories. It is one thing to facilitate the operation of judicial review by out-of-court settlements in "normal" cases of administrative faults. It is another thing entirely to use such techniques so extensively where fundamental civil rights are intensively and systematically violated by a military regime. In the first case, the use of settlements can be viewed as no more than an efficient measure to expedite the operation of the legal system and to ease the overcrowded docket of the Court. In the second case it may well be considered to be an illegitimate practice that does not answer to the serious human right issues that were brought to the Court during the Intifada. On the moral level, it may be argued that when the government is involved in serious violations of fundamental human rights, the duty of the judiciary, under the principle of rule of law, is to stand firm and prevent such violations by open and clear-cut judicial declarations that will send an unambiguous message to the violating government. On the practical level, one may question the overall effectiveness of such practices in the context of the tense and violent confrontations between the Israeli army and the Palestinian population during the Intifada.

The Israeli occupation in the Territories is often criticized because of the "hidden" nature of its bureaucratic misdeeds in

[60] It is worthwhile noting, however, that constitutional rights are seldom regarded as absolute *even if formally recognized in court decisions.* Courts normally hold that even the most fundamental human rights (such as freedom of speech and freedom of movement) are not absolute since they are subject to limitations under balancing tests and proportionality formulas in the light of countervailing rights and interests including national security and personal security of others (see, e.g., H.C. 73/85 *Kol Ha'am;* H.C. 448/85 *Dahar*). Therefore, the distinction between constitutional rights stated and enforced in final, formal decisions and settlements is not so clear.

the daily lives of Palestinians. Paradoxically, it may be argued that the way in which the HCJ functioned in fact supported and complemented this bureaucratic reality rather than correcting it. The system of "informal" concessions to Palestinian petitions demonstrates how the petitioners were marginalized by the same legal process that allowed them some access to the Israeli justice system. The system of judicial review through informal settlements has ameliorated to some extent the effects of the infringements on human rights in the Territories. It has also contributed to the process of concealing these infringements under the thick cover of "legality." This line of criticism may also help explain (in contrast to those suggested above) the willingness of the legal functionaries to cooperate and settle so many cases, despite the government's obvious advantage in those cases that reached final judicial dispositions. Palestinians, it may be asserted, did not win *justice* in the "High Court of Justice." Rather, they were, in some cases, allowed some mercies by their rulers.

V. Judicial Rhetoric and Informal Legal Practices—Some Concluding Remarks

The workings of the HCJ during the Intifada may serve as an example of the process of bureaucratization of adjudicative systems. It also demonstrates how the clear-cut lines of division between categories of modernity such as "courts" and "bureaucracy" (Kagan et al. 1972) and between "adjudicator" and "parties" no longer exist. Instead, there is a continuum of actions by which human grievances are transformed into legal arguments by a series of semibureaucratic legal processes.

The adjudicative system of the HCJ shaped other forms of adjudication within the legal bureaucracy, and at the same time it was shaped by policies and practices reproduced by these other forms of dispute resolution within the Attorney General's office (cf. Silbey 1992). The close cooperation between these two systems and their mutual dependence is well reflected in the practices of dispute resolution during the Intifada. The HCJD practices offered the Court many valuable advantages: an effective answer to the problem of case pressure, a flexible mechanism for solving complex conflicts with wide ranges of implications, and a technique to lower the level of exposure of the HCJD's interference within the activities of the military authorities. The HCJ, for its part, legitimized and supported the practices of the HCJD. It took for granted the statements made by the HCJD lawyers in court, and it reaffirmed the positions and solutions of the government lawyers in the vast majority of the cases that did reach final disposition. Such interdependence was based on a high level of trust in the integrity and professionalism of the government lawyers. As Alan Hunt (1992:35) noted, such pervasive pat-

terns of interdependence run the risk that "the emergence of patterns of a destructive or blocked interaction [such as malfunctions by the government lawyers] will undermine the normal hegemonic preconditions of both institutions."

Dealing with decisions of the HCJ during the Intifada that interfered with military actions in the Territories, Martin Edelman (1994:116) wrote: "This type of action by the Israeli High Court has tempered some of the actions accompanying the occupation; it has not changed the basic nature of military rule. No court could do that." Indeed, the HCJ's supervision of the actions of the Israeli government did not prevent large-scale infringements on human rights. During the course of the confrontation between the IDF and the Palestinian population, hundreds of houses were demolished, thousands of people were kept in administrative detention, and the population at large severely suffered from a variety of restrictions infringing on their civil rights.

For those critics who expected the HCJ to lead the Israeli occupation of the Territories to its quick and decisive end by one or a series of judicial declarations, the Court rulings were doomed to be a continuous disappointment. The HCJ did not change the political reality in the Territories. Nor did the Court manage to guarantee, by its complicated and predominantly informal judicial techniques, the prevalence of the rule of law principle, during the violent and furious period of the Intifada. This strategy of judicial intervention through informal pressure on the bureaucracy may, on the one hand, impede infringements on individual rights by the government. On the other hand, it may also be a source of recurring legitimization for the very same regime that carries out such violations of human rights. We should not, however, underrate the influence of HCJ actions on the conditions of human rights in these areas. This influence was exerted through day-to-day judicial work rather than by grand and open declarations. It is the relationship between the rhetoric and action that enable us to begin to capture the full meaning of this complicated process.

In doing the routine work of disposing Palestinians petitions, the Court has used a variety of tools: rhetorical declarations in "landmark" decisions; final decisions quashing military orders; informal pressure on the government to settle cases; and a continuing influence on the legal bureaucracy of the government itself to serve as a semi-independent mechanism of supervision to assure the implementation of the Court's policies. The rhetoric of the Court in "landmark" cases was not mere lip service for its constitutional principles, nor was it a mere assertion of the Court's autonomy directed to reinforce its legitimacy in society. Rather, it served as a signal directing the operation of a complicated legal apparatus of constant negotiations, bureaucratic ma-

neuvering, and legal decisionmaking over which the Court presided. The influence of judicial intervention on the actions of the Military Government goes much beyond what can be seen by reading the Court's formal decisions. At the same time, the Court managed to preserve its institutional autonomy and to avoid open conflicts with the other branches of government by reducing the exposure of its intervention within the action of the military regime in the Territories.

The story of the HCJ during the Intifada reveals the importance of informal legal practices within the framework of judicial decisionmaking. It also demonstrates why we must study such practices as a precondition for any evaluation of the role of judicial institutions in society. Final court decisions are like the tip of the iceberg. It is hard to tell the shape and magnitude of an iceberg by looking only at its tip.

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