Research Note

Do the "Haves" Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice

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This research note examines the relations between judicial preferences, institutional concerns, and litigation outcomes. I found that in litigation before the Israeli High Court of Justice, the "haves" enjoyed only a limited advantage over "have nots" in litigation outcomes. I also found that when "have nots" were represented by legal counsel, the "haves" did not come out ahead. Ideological propensities of judges and considerations of institutional autonomy can ameliorate, to some extent, the inherent inferiority of "have nots" in litigation. It was also found that the mechanisms that worked in favor of "have nots" operated not only in litigation that reached final judicial disposition but also when the litigation was disposed through out-of-court settlements.

Under what conditions can litigation be distributive? Galanter's influential analysis suggests that the status of litigants before U.S. courts has substantial influence on judicial outcomes. Higher-status parties typically possess superior resources or greater litigation experience (or both). Corporations and government agencies often function as "repeat players" in comparison with one-shot litigants. Therefore, they are presumably better able to "play the rules" in the legal process (Galanter 1974). They are also able to maximize their success rates by forming settlements in cases likely to be lost and by appealing cases they have the best chance of winning. Other explanations for the advantages of the "haves" in litigation refer to their ability to retain better legal counsel, undertake more extensive research, and otherwise invest more in case preparation (Sheehan et al. 1992).

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Galanter's party capability theory is based on the assumption that courts are passive institutions that depend on the initiative of the parties who come before them. Accordingly, their decisions reflect the existing disparities in wealth and power in society, while the courts themselves are neutral (if not indifferent) to the inequalities entailed by their institutional passivity and ideological detachment (Galanter 1974:119–20).[1] The theory has been corroborated by studies of the appellate courts in the United States (Songer & Sheehan 1992; Songer et al. 1999) as well as of district courts (Dunworth & Rogers 1996) and, to a lesser degree, in states' supreme courts (Wheeler et al. 1987; Farole 1999). It was also validated by works referring to the Supreme Court of Canada (McCormick 1993) and to litigation before the Court of Appeal in England (Atkins 1991).[2]

Several writers, however, have questioned the assumption of institutional passivity and ideological neutrality of courts that underlies Galanter's argument (e.g., Segal & Cover 1989; Segal & Spaeth 1993; Baum 1998). Accordingly, some studies suggest that the party capability theory fails to provide a sufficient explanation for outcomes of litigation. More specifically, these studies stress that, in some cases, status difference in success rates reflects not only relative resources and experience of litigants but also the values, ideological preferences, and prejudices of the court. Thus, Sheehan et al. (1992) argued that the ideological composition of the U.S. Supreme Court has much greater impact on the success of litigants than the resources the litigants possess. They maintained that cases brought by minorities, the poor, and individuals against businesses or government frequently emphasize claims of individual rights and liberties and therefore are likely to appeal to liberal values and enjoy greater success within courts with liberal majorities (Sheehan et al. 1992; Farole 1999).[3]

Sheehan et al. stressed the importance of judicial preferences in the study of outcomes of litigation. Judicial preferences may, however, relate not only to the ideology of the judges, but also to their will to preserve their institutional autonomy. Thus, Haynie, in a study relating to the Philippine Supreme Court, argued that "have nots" enjoyed higher success rates than other groups due

[1] Although founding his analysis on the premises of this model, Galanter does not overlook that this model of judicial passivity and neutrality is by no means exclusive. He points out that judicial passivity may be uneven (citing Mosier and Soble 1973:63 at footnote 59 on page 120), and he mentions more "active" courts in non-common-law systems (at footnote 60).

[2] For a discussion of the applicability of Galanter's theory to South Africa Appellate Division, see Haynie and Devore 1996.

[3] Likewise, Songer et al. (1994) argued that in certain areas of litigation, the judge's gender may have significant influence over his or her attitude toward certain types of claims. They found that female judges tended to be more liberal in employment discrimination cases than male judges.

to the institutionalized concerns of social stability and legitimacy of the courts in developing societies (Haynie 1995).

The relations between judicial preferences, institutional concerns, and litigation outcomes are the focus of this study. I checked the relative success of "haves" and "have nots" in litigation before the Israeli High Court of Justice (HCJ). I found that the Israeli HCJ, much like its Philippine counterpart, is heavily influenced in its attitude toward different categories of litigants by ideological and institutional concerns. In contrast to previous research, I included in the current study not only final decisions of the Court, but also litigation that was disposed through out-of-court settlements. In his celebrated article, Galanter hypothesized, "Greater institutional 'activism' might be expected to reduce advantages of party expertise and differences in the quality and quantity of legal services" (Galanter 1974:140). My central argument is that judicial activism may reduce the advantages of the "haves" not only in final judicial dispositions but also in out-of-court settlements. I also argue that attention to variable functions of public agencies in litigation may be essential for the understanding of outcomes in a given field of litigation.

The Research

The Israeli High Court of Justice

The High Court of Justice 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 to a county court and 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. If, however, the dispute—no matter how minor or 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 (HCJ).

That the Supreme Court of Israel functions, in essence, as a trial court for most judicial review cases in the country has wide implications on both the Court's caseload and on its procedures. The Israeli Supreme Court is an extremely busy institution, disposing of over 1,000 applications for judicial review as well as over 3,000 other lawsuits every year.[4] The procedures in the HCJ

[4] In 1993, for example, the Court dealt with over 1,400 appellate cases, a similar number of *cassation* cases, and over 1,000 other lawsuits apart from the 1,171 HCJ petitions that were disposed by it during that year. The number of cases increases constantly

are characterized by simplicity, brevity, and expediency. A petition to the HCJ can be written by a layperson, 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 his or her legal rights may petition the Court and apply for an order nisi. 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 oral arguments. Oral testimony as well as 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.[5]

All these characteristics seem to make the HCJ a favorable forum from the point of view of "have nots." Gaining access to the Court is easy and inexpensive: fees are remarkably low (approximately the equivalent of $100). The risk of heavy expenses in case of defeat is minimal.[6] In the vast majority of cases, the Court refrains from imposing costs on the losing party, and even when costs are ordered, their amount is usually much lower than in civil cases.[7] Other factors that seem to work for "have nots" are the simplicity of the procedures in the HCJ, the highly informal nature of the process, and the lack of any formal requirement for legal representation.

Although the costs and risks in petitioning the HJC are low, the stakes—from the point of view of "have nots"—are high. The HCJ is the most important and influential judicial forum in the country. The professional expertise of the justices is beyond question. The influence of their rulings on the administrative bureaucracy is immediate, with high effectiveness in mobilizing re-

each year, according to the Central Bureau of Statistics of Israel. The question of how (if at all) 14 judges (normally sitting in panels of three) can manage to 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 note. The reality of a heavy caseload bears, however, on some of the practices of this court that are described below.

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

[6] The general practice of Israeli courts is to impose costs on the losing party on a "no fault" basis. This practice, which is prevalent in civil law litigation, is less commonly implemented in litigation before the HCJ.

[7] We found that out of 172 in our sample of petitions issued by "have nots" dismissed by the HCJ, only in 14 cases (8.1%) did the Court impose costs on the petitioners. The average amount of costs imposed was around the equivalent of $1,100.

sponse from government agencies. The judicial process in the HCJ also enjoys a very high level of visibility. Several journalists cover the Court's activity on a regular basis, which provides a good opportunity for media coverage even for those cases that are not of paramount public importance.

Moreover, the HCJ enjoys a high level of legitimacy within the Israeli public. This public legitimacy is based (among other factors) on the popular belief that the Court functions as the "representative of the common citizen" (Barzilai et al. 1994a:vii).[8] This image of the Court as "the protector of the little person" is promulgated in the rhetoric of the HCJ itself as well as in many other texts (professional and popular) describing the institution.[9] It also serves as the ideological justification for the strong sense of informality and lack of rigidity embedded in the Court's practices (H.C. 2148/94 *Gelbert*). In other words, the "have-not" petitioning the HCJ should expect to meet a judicial forum that is not only devoid of formalistic legal restraints, but also deeply committed to the values of substantive justice and the need to protect the interests of the individual vis-à-vis the government.[10]

The HCJ is also known as an activist court whose policies were directed on many occasions toward the protection of the human rights of minorities and other disadvantaged groups. Although the record of the Court in some areas of human rights, such as the protection of the rights of Palestinian residents of the territories, is controversial,[11] in many other fields the Court did

[8] In a study of a representative sample of the adult Jewish population in Israel about the attitudes of the Israeli public toward the HCJ, over 66% of the respondents said that they agree to the proposition that the HCJ functions as a "representative of the common citizen," whereas less than 15% objected to it. See Barzilai et al. 1994a:211. The HCJ has enjoyed greater public legitimacy than its U.S. counterpart (Epstein et al. 1994; Barzilai et al. 1994b; Barzilai 1996). The level of trust that the Court enjoys among non-Jewish Israelis 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).

[9] See, for example, H.C. 287/69 *Miron;* H.C. 910/86 *Ressler;* H.C. 5364/94 *Volner;* Segal 1988.

[10] Some of these sentiments toward "justice" (in its literal and ordinary sense) have to do with the title of this Court: "The High Court of *Justice*." The institution of the HCJ (i.e., a special court for judicial review cases) was first introduced in Palestine during the period of the British Mandate (1917–1948). It was preserved by Israel after the establishment of the State in 1948 (like the rest of the structure of the court system). The name of the Court, in its original (British) sense, means nothing more than a court of law that deals with cases of judicial review. Therefore, its correct translation into Hebrew should have been "The High Court of Law." Due to inaccuracy in translation, "justice" *(tzedek)* was preserved in its Hebrew title. Thereafter, the rhetoric of the Court, as well as the public discourse concerning the HCJ, made extensive use of this title to emphasize the special qualities of the institution (see, e.g., Zamir 1970; Zamir 1975:83–84, 102).

[11] The Court rendered some important decisions on the protection of the rights of Palestinian residents of the occupied territories (H.C. 2/79 *El Asad;* H.C. 390/79 *Dawikat;* H.C. 320/80 *Kawasme;* H.C. 168/91 *Morkus*). Nevertheless, critics suggest that despite some successes in "landmark" cases, in the vast majority of cases, the Court failed to address Palestinian grievances. The overall impact of Court's decisions in this field remains the subject of much debate. See Shamir 1990; Kretzmer 1994; Dotan 1999.

adopt a strong agenda in favor of human rights. Besides the development of a rich jurisprudence concerning political rights in general (such as the freedom of expression, the freedom of procession and association), the Court has intervened in government policies on many occasions for the benefit of members of disadvantaged groups. It struck down governmental decisions in the field of nominations and ordered the government to respect the need to appoint women to senior bureaucratic positions (H.C. 453/94 *Shdulat Ha'nashim B'Israel*; H.C. 153/87 *Shakdiel*; H.C. 953/87 *Poraz*). It ordered the Israeli Defense Forces to accept female candidates for the posts of combat pilots and commanders of battleships (H.C. 4541/94 *Miller*). The Court acknowledged the rights of homosexuals to equal treatment in the field of labor rights (H.C. 721/94 *El-Al*). Moreover, since 1980, the Court has intervened in some cases in the socioeconomic policies of the government to guarantee equal access to public resources for members of disadvantaged groups. For example, in 1993, the Court ordered a municipal council to rebuild certain public facilities to ensure full accessibility to handicapped persons (H.C. 7081/93 *Botzer*). The Court also ordered the government to appropriate funds for the construction of rehabilitation facilities for juvenile offenders belonging to minority groups (H.C. 3473/92 *The National Council for the Welfare of the Child*). And, recently, the Court ordered the government to take the necessary steps to connect the schools serving pupils belonging to the Bedouin minority in the southern part of the country to the electricity network (H.C. 4671/98 *Awad Abu Fariach*).

Besides its pretensions to values of substantive justice and its political activism, one more factor contributes to the difference between the HCJ and ordinary courts. The Supreme Court of Israel is dominated by justices who come from an academic and bureaucratic background. Unlike many justices serving in lower echelons, they have no prior experience as lawyers in the private sector and no strong social ties to business circles or to political elites.[12] Their social reference group is the bureaucratic elite of the Ministry of Justice, which is composed of bureaucrats serving in the ministry as a life career (unless nominated for the

[12] The current President of the Supreme Court, Justice Aharon Barak, who is widely regarded as the leader of the activist revolution, never practiced law. He was a professor of civil law at the Hebrew University and served as attorney general before being nominated to the Supreme Court. The former Chief Justice Meir Shamgar also served as attorney general before his nomination to the Court. Before that, he served as the chief prosecutor of the IDF (the Israeli Army). Two former deputy presidents, Menachem Elon and Miriam Ben-Porat, also came from the same background (the former from the legal academy and the latter from the attorney general's office). Four of the justices currently serving on the Supreme Court (Barak, Zamir, Heshin, and Beinish) served before their nomination in senior positions in the attorney general's office, another Justice (Dorner) served as a senior military judge, and another (Engelard) was a law professor. All these justices have hardly any experience as private attorneys.

bench).[13] Therefore, it is fair to assume that their ideological commitment as well as their sentiments toward the interests of the business community are minimal. In fact, since 1995, the Israeli polity has seen a series of clashes between two elite groups, the first composed of the Supreme Court justices and the higher functionaries in the attorney general's office (in the Ministry of Justice) and the second composed of a group of businesspersons with strong ties within the party system. These controversies arose when some party leaders and businesspersons associated with them were brought to justice due to their involvement in a series of public scandals. The decisions to charge these top political leaders and businesspersons were taken by the attorney general's office, under the close supervision and the approval of the HCJ.[14] These events, combined with the outright activist tendencies of the Court in general, brought an unprecedented wave of public attacks on the Supreme Court (and the HCJ in particular) from political and party leaders as well as top businesspersons affiliated with political parties.[15] These tensions between the Court and older elite groups do not necessarily prove any preferences of the Court toward "have nots" in society. It does suggest, however, that the common assumption that high court justices tend to identify themselves with socioeconomic elite groups in society (Miliband 1969; Scheingold 1974; Funston 1975; Hase & Ruete 1982; Shamir 1990) may not be completely accurate in the case of the HCJ.

[13] The appointment of judges in Israel (including Supreme Court Justices) is also based on a process that is chiefly bureaucratic. Judges are not elected or nominated by holders of political positions. Rather, they are nominated by a special committee composed of three justices of the Supreme Court, two representatives of the Government, two Knesset members, and two members of the bar association. Even though the justices have no formal majority in the committee, the process is known to be dominated by them, and no appointment was ever made without their approval.

[14] In the 1990s, the HCJ has intervened in a few major cases in prosecutorial decisions. The Court ordered the attorney general to indict leading figures in the Israeli banking community, and it also ordered the prime minister to discharge ministers, deputy ministers, and senior government officials allegedly involved in scandals. The Court also consistently dismissed any attempt to challenge prosecutorial decisions when the attorney general's office decided to issue indictments against top business or political figures (H.C. 6163/92 *Eisenberg;* H.C. 943/89 *Ganor;* H. C. 7074/93 *Swissa;* H.C. 3094/93 *The Movement for the Quality of Government;* H.C. 4267/93 *Amiti*).

[15] See, for instance, Adato 1996; Shehori 1996. A recent article in the *Israeli Bar Association Magazine* expressed the concern that the Supreme Court has become "a branch of the Ministry of Justice" (see Kaluf 1998). The private bar is closely related to the political-business group, and its leaders have been known to make public attacks on the Court.

Research Methodology

In this study, I sought to examine the relative success rates of "haves" and "have nots" in litigation before the HCJ between 1986 and 1994.[16] I reviewed a sizable sample of the files of the HCJ during this period by systematically checking all HCJ files in the archives of the Supreme Court for every second year included in the research period (i.e. 1986, 1988, 1990, 1992, and 1994).[17] Although this procedure may seem rather cumbersome and demanding, it was essential to acquire a full and accurate picture on the uses of litigation by "haves" and "have nots." The research could not be based on an inquiry into the Court's registers (rather than on checking the files themselves) because the Court's registers do not always contain full and accurate details of the parties involved in the litigation and of the outcome of the cases. Neither could I limit my research only to *published* decisions of the Court for two main reasons. First, not all the Court's decisions are officially published. The process of generating a published opinion is not random and thus samples of published cases would not be representative of all cases (Siegelman & Donohue 1990; Atkins 1990; Songer & Sheehan 1992:238; Albiston 1999). Second, and more important, is that the vast majority of petitions issued to the HCJ do not reach a final judicial disposition, but are settled out of court. A sample relating only to published decisions, or even one that would refer to all cases *disposed of by the court* (even if not officially published), would nevertheless overlook this important segment of out-of-court settlements.[18]

The study of out-of-court settlements is important to fully understanding the outcomes in litigation for a number of reasons. First, studying settlements is important for understanding the very meaning of the term *success,* or a *favorable* outcome in litigation because the analysis of success in litigation should always refer to the all alternative outcomes for the given controversy (Kritzer 1990:135). Second, it is well known that most cases and controversies are settled rather than disposed by a final judicial decision. Because the relative advantage of the "haves" may result from their ability to use strategic bargaining, their relative advantage in litigation may be reflected in settled cases more intensively than in cases that were fully adjudicated and published. In

[16] This research period was chosen because the tendencies of the Court to expand its involvement in public issues became increasingly dominant during these years (H.C. 910/86 *Ressler;* Kretzmer 1990).

[17] I could not use only a sample of the files in each year because I had no previous information as to the relative size of the relevant groups of files, which would have enabled me to prepare a proportionate representative sample.

[18] HCJ decisions are published in two principal ways. An official publication in print, *Piskei Din,* contains only those decisions considered to have a legal precedential value, but a few commercial publications in the form of electrooptical disk (CD-ROM) claim to contain almost all the decisions rendered by the Court. These sources, however, do not contain out-of-court settlements.

any case, a sample containing only published cases may well be unrepresentative for the whole population of cases in the relevant research arena (Albiston 1999). Moreover, the study of out-of-court settlements is essential from the point of view of Galanter's argument. According to his hypothesis, some sorts of litigators (such as repeat players) are more likely to develop alternative mechanisms for dispute resolution (such as settlements) than others.[19] Last, the study of out-of-court settlements is particularly important in the context of litigation before the HCJ, not only because the vast majority of petitions to the HCJ are so settled, but also because prior research has shown that the study of out-of-court settlements in the HJC may change profoundly our perception of the relative success rates of certain categories of litigation (Dotan 1999).[20]

To estimate the relative success rates of "haves" and "have nots" in the HCJ, one needs to be able to identify cases in which the petitioners belong to one of these groups. This task is not simple, because the HCJ is a forum addressed by all kinds of petitioners and because this analysis refers to the content of the court files, without any independent knowledge of the socioeconomic state of each of the thousands of petitioners whose court files were examined. To overcome this difficulty, I identified some categories of petitioners that *typically* belong to "haves" and "have nots" in society. For "have nots," I examined files of the following groups: welfare services customers, immigrants, disabled people (attacking administrative decisions related to their disability), people suffering from mental disability (related to the

[19] See Galanter (1974:110–14), discussing "informal bilateral controls" developed by strategic litigators in some cases.

[20] According to the data of the Israeli Ministry of Justice (for 1990–1994), only about 40% of the petitions to the HCJ during that period reached the stage of final disposition by the Court. Accordingly, 31% of the cases were withdrawn by the petitioners, whereas 16% were settled with "full success" for the petitioner. Another 10% were settled with "partial success" for the petitioner. Withdrawals may occur at any stage of the litigation, but they most commonly occur after the preliminary hearing, when the remarks of the justices lead the petitioner to believe that his or her case is weak and that he or she had better withdraw than risk a dismissal that is likely to be accompanied by imposition of costs. Settlements with "full success" for the petitioner are, in essence, cases in which the responding agency gives up its original position and allows the petitioner whatever was asked for. These settlements may happen at a very early stage of litigation, even before any court hearing, when the government lawyers decide that the petition has merits. They may also happen at the stage of the preliminary hearing, when the judges "offer" the respondents to "reevaluate" their position. The parties may bring the settlement for the approval of the Court in the form of a consent decree in some cases, whereas in others they only notify the Court that a settlement was reached. It is not always easy to extract from the file of a case whether and to what extent the outcome was successful from the petitioner's point of view, because the formal procedural measures taken by the parties do not necessarily conform with the actual outcomes. For example, the petitioner may inform the Court that he or she "withdraws" his or her petition, whereas, in fact, the reason for the withdrawal is that the government agreed to allow whatever was originally asked for. The outcomes reported by the Ministry of Justice, as well as the outcomes reported in the current research, however, relate to the actual outcomes of the case rather than to the formal procedural format used by the parties to close the file.

issue of the petition), petitioners challenging decisions of social services (such as adoption agencies), prisoners, and petitioners exempt from the duty to pay court fees. For "haves," I analyzed all petitions that were issued by registered companies and business associations. Following prior research, the "haves" category was also divided to identify a "big corporations" category. This category includes litigants such as banks, oil companies, insurance companies, utilities, and airlines as well as major manufacturing, media, and construction companies that possess both substantial resources and recurrent litigation experience differentiating them from the broader category of business (cf. Songer & Sheehan 1992; Sheehan et al. 1992; McCormick 1993). I am well aware that there is no complete correspondence between these categories and the distinction between "haves" and "have nots." Not all immigrants are necessarily indigent,[21] and not every corporation is necessarily a "have." There may well be indigent petitioners that are not included in our sample, and there are wealthy petitioners that did not address the court as corporations. Nevertheless, because court files do not provide direct measures of financial resources of litigants, previous research has used status as proxy for resources (Wheeler et al. 1987; Atkins 1991:885; Songer & Sheehan 1992:238; McCormick 1993; Haynie 1995:374; Farole 1999). The same strategy was adopted here.

One additional factor that should be mentioned before presenting the outcomes of the survey is that in the HCJ the respondents in court are always public agencies (either governmental or municipal). As I argue later, that public agencies are involved in each and every case of litigation before the HCJ has profound implications on this process at large. For the purpose of this stage, however, this fact is brought only to emphasize that, although the petitioners in the HCJ may be either "haves" (business) or "have nots" (or neither of the two), the respondents are always public agencies defending their administrative decisions. Thus, both "haves" and "have nots" meet the same type of respondents in court and it is therefore relatively easy to compare their success rates.[22]

[21] Israel has long had a strong policy of encouraging immigration and offers immigrants significant economic benefits. Therefore, it may be argued that immigrants petitioning the HCJ to enjoy such special benefits cannot be regarded as "have nots." My sampling brings this point into consideration; see note 26.

[22] In some cases, there are additional respondents besides the administrative agency, such as a private party, who may be adversely affected by a decision in favor of the petitioner.

Success Rates of "Haves" and "Have Nots" in the HCJ

The outcomes of the comparison between success rates of "haves" and "have nots" in the study are presented in Table 1. We see that the "haves" enjoy considerable advantage over "have nots" in litigation before the HCJ when one looks at the figures of cases disposed by the Court. Corporations won in court 20 out of 78 cases in the sample that reached final judicial disposition (25.64%: columns A + B divided by the sum of columns A + B + C). "Have nots" won only 19 out of 191 cases (9.9%) disposed by the HCJ.[23] On the other hand, in out-of-court settlements, the success rates of "have nots" are numerically higher than those of the "haves" included in the research population; corporations succeeded fully or in part in 65.5% of the settled cases (97 cases in columns E + F divided by 148 cases in columns D + E + F), whereas "have nots" succeeded fully or in part in 69.5% of the cases that were settled out of court (139 of 200 cases).[24] This difference is not, however, statistically significant.

From Table 1, we learn that, by and large, "haves" still enjoy a significant advantage over "have nots" in litigation before the HCJ. The overall gross success rate of corporations in the sample—that is, the number of cases in which they achieved their aims fully or partly in court decisions (columns A + B in Table 1) and in out-of-court settlements (columns E + F), divided by the total number of petitions issued by businesses in our sample—is 43.82%. The net success rate of "haves"—that is, after subtracting from the total number of petitions those petitions that cannot be classified as either success or failure (column G)—reaches 51.77%. The net success rate of big corporations is even higher and reaches 56.10%. The overall net success rate of "have nots" is significantly lower: it reaches only about 40% (whereas the overall gross success rate of "have nots" in our sample is 30.5%).

On the face of the matter, these figures seem to say that the special characteristics of the HCJ did not offset the disadvantage of "have nots" in litigation. A more detailed look at the outcomes of the study, however, demonstrates that the situation is much more complex. First, although success rates of "have nots" are lower in comparison with those of the businesses, they are similar to the general (gross) success rates in the HCJ (which is 30%).[25]

[23] In general, the success rates of petitioners to the HCJ are very low in cases that reach the stage of final judicial disposition (see note 33), whereas most cases in which petitioners achieve all or some of their goals are disposed by out-of-court settlements. The reality that "most cases are settled" is, of course, by no means unique to litigation before the HCJ. For the centrality of settlements (and the process of bargaining toward settlements) in ordinary litigation see, for example, Kritzer 1991.

[24] The success rate of petitioners classified as big business in settlements is 73% (38 cases in columns E + F divided by 52).

[25] According to the High Court of Justice Department (HCJD) in the Ministry of Justice (data relating to 1990–1994, $N = 3,372$). The department does not have data relating to years before 1990. The figure refers to the gross success rate of all petitions in

Table 1. Success Rates in HCJ 1986–1994

Petitioner	Outcome of Court Decision			Outcome of Out-of-Court Settlement				Total	Success Rate	
	Full Success (A)	Partial Success[c] (B)	Dismissal (C)	Withdrawal (D)	Partial Success[d] (E)	Full Success[e] (F)	Other[f] (G)		Gross[a]	Net[b]
"Haves":										
Big corporations	2	6	22	14	27	11	11	93	49.46%	56.10%
Other corporations	8	4	36	37	46	13	30	174	40.80%	49.31%
Total "haves"	10	10	58	51	73	24	41	267	**43.82%**	**51.77%**
"Have nots":										
Handicapped	4	5	48	15	27	11	20	130	36.15%	42.73%
Welfare	1	0	10	4	7	2	5	29	34.48%	41.67%
Immigrants	5	1	17	13	24	16	4	80	57.50%	60.53%
Prisoners[g]	1	1	73	22	13	29	87	226	19.47%	31.65%
Other "have nots"[h]	1	0	24	7	6	4	10	52	21.15%	26.19%
Total "have nots"	12	7	172	61	77	62	126	517	**30.56%**	**40.41%**

NOTE: There is some dissimilarity between the data presented here and the data included in the paper presented at the conference on "Do the 'Haves' Still Come Out Ahead?" at the Institute of Legal Studies, Unviersity of Wisconsin Law School, Madison, Wisconsin (1–2 May 1998). The differences derive from additional verifications made on the files included in the research population that brought me to rule out some files that were initially classified as belonging to "have-nots." These changes bear no significant influence on the outcomes of the research.

[a] The number of cases in which petitioners achieved fully or partly their aims in Court decisions (columns A + B) and in out-of-court settlements (columns E + F) divided by the total number of petitions issued (in %).

[b] The number of cases in which the petitioners succeeded divided by the total number of cases after subtracting from the total the figure included in column G (in %).

[c] Included in this category are Court decisions in which petitioners achieved anything between more than nothing and less than everything they asked for.

[d] Included in this category are settlements in which petitioners achieved anything between more than nothing and less than everything they asked for in the original petition by an out-of-court settlement. Significant achievements for petitioners by the way of settlement are by no mean rare in this sample. One common outcome classified under this category is when the respondent agency agreed—under the Court's recommendation—to reexamine the petitioner's case. In such a case, according to my experience, the petitioner had significant chances that the renewed administrative process would yield a decision in his or her favor. In some cases included in this category, the settlement was ratified by a court decision after it was made by the parties.

[e] Included in this category are all the cases in which the respondent agreed to allow the petitioner everything that was requested in the original petition.

[f] This category refers to cases that cannot be classified as either success or failure, such as cases referred to another tribunal, cases that are still pending, cases in which the outcome cannot be discerned from the file, and petitions that become moot or were dismissed for nonprosecution.

[g] Including only Israeli prisoners and excluding Palestinian petitioners (of which the vast majority were arrested due to security reasons).

[h] Including petitioners exempt from Court fees, mentally disabled petitioners (whose petition is related to their disability), and other petitioners attacking decisions of social services agencies.

Second, as Table 1 shows, success rates of different categories of "have nots" vary. For example, although the success rates of prisoners (31.65%) and other "have nots" (26.19%) are low, the success rate of immigrants is much higher (60.53%) and, in fact, significantly higher even than the success rate of the "haves."[26]

Third, as already mentioned, although success rates of "haves" are still higher than those of "have nots," the gap between the two groups is significant only when one looks at the outcomes in cases fully disposed by the Court. This gap diminishes in out-of-court settlements. In fact, in out-of-court settlements "have nots" seemed to do better than "haves." Although the higher success rate for "have nots" is not statistically significant, the tendency in direction is at odds with Galanter's assumption that "haves" should be better equipped than "have nots" to reach favored outcomes through settlements due to their higher ability to estimate the chances to win in court as well as their ability to engage in strategic litigation (Galanter 1974:100). This finding suggests that there is something in the out-of-court mechanism of the HCJ that may work to ameliorate the inherent inferiority of "have nots."

The Effects of Legal Representation on Success Rates

A second part of the study explored the effects of legal representation on the chances of "have nots" in litigation before the HCJ. I examined success rates of all petitions to the HCJ during the time span of the research in which the petitioners were not represented by lawyers. I also examined success rates of "have nots" who were not represented. The findings are presented in Table 2. From the table, we can see that, despite the activist nature of the litigation before the HCJ, representation by lawyer is still a deciding factor when success rates are calculated.[27] Gener-

which the respondents were represented by the HCJD throughout this period (i.e., more than 80% of the petitions that were disposed by the HCJ during the period).

[26] It may be argued that not all immigrants to Israel are "have nots" and that some of the immigrants seek the Court to enjoy special benefits related to the policies of the Israeli government to encourage immigration (see note 21). To check the possible influence of this argument on the findings, I went over all the cases initiated by immigrants in the sample. Out of 80 cases of immigrants, I found 44 cases in which the petitioners could *clearly* be classified as "have nots" (such as foreign workers petitioning against deportation decrees, immigrants who were in custody and petitioned for their release). The cases in this group had nothing to do with special benefits allowed to immigrants. In the remaining 36 cases, the issue of the petitions was related to immigrant rights and therefore could involve also demands for immigrant benefits (although it is still quite likely that most petitioners in this group were of low socioeconomic status because most of them immigrated to Israel from the former Soviet Union). I found that the net success rate of the petitioners in the first group (of the "poor immigrants") was still high (54.76%), although it was lower than the success rate of the immigrants belonging to the second group (67.65%).

[27] In this respect, the outcomes of the current study correspond with other studies dealing with the issue of legal representation in litigation; see, for example, Genn (1993) and Galanter (1974:114, n. 45). Representation has been proved as a factor that increases

ally, petitioners who were not represented did poorly in the HCJ (net success rate of around 24%). Further analysis of Table 2 also enables us to complement our understanding of the practices of the Court toward "have nots." We can see that there is a clear difference between "have nots" with legal representation (net success rate of 58.64%) and nonrepresented "have nots" (net success rate of 27.5%). In fact, the success rates of represented "have nots" in our study were found to be higher than those of "haves" (in Table 1). These findings strongly support the assumption that the real reason for "have nots'" relative inferiority in the HCJ is, still, lack of adequate resources for legal representation.[28]

The data in Table 2 provide additional perspectives on the Court's attitude toward "have nots." We can see that although, in general, nonrepresented "have nots" had a low rate of success, they did better in comparison with other nonrepresented petitioners (total net success rate of 27.5%, compared with the total net success rate of "other nonrepresented" petitioners, 21.64%). This finding suggest that—the issue of legal representation aside—there is not strong discrimination in the practices of the Court (or its surrounding mechanisms) against "have nots." Therefore, it seems that the practices of the Court contribute to ameliorate, to some extent, the detrimental effects of lack of representation of "have nots" resorting to the Court.[29]

Discussion

What can we learn about the validity of Galanter's theory from the comparison of these findings and the findings of previous research? Obviously, any attempt to test the validity of the party capability theory on the ground of a foreign system that

the chances of the poor to succeed in litigation; see Adler and Bradley (1975); Lawrence (1990); Monsma and Lempert (1992). Although petitioners to the HCJ are allowed to appear without representation, they are not allowed to be represented by nonlawyers (cf. Kritzer 1997:100).

[28] The factor of legal representation can also explain the variance in success rates of different categories of "have nots." For example, although according to Table 2 less than 40% of the "have nots" were represented, the rate of representation of immigrants was found to be much higher (around 80%), which can explain their relative high success rate in Table 1. Unlike some other countries, Israel has no legal aid system allowing state support for representation of the poor in courts. Some groups of "have nots" (such as Palestinian residents of the occupied territories) enjoy the services of nongovernmental organizations specializing in HCJ litigation, but there are no such organizations concentrating on providing legal representation for indigents in general.

[29] One possible explanation for the low success rates of nonrepresented petitioners is the relative weakness of their cases. The ease of access to the HCJ enables any person to petition to the Court with hardly any mechanism checking the validity of his or her claims. It may be assumed that the lawyers function as a screening mechanism preventing some of the weaker petitions to be issued. This fact can serve as a caveat against drawing direct conclusions from the comparison of success rates of represented and nonrepresented petitioners to the HCJ. This caveat, however, does not apply to the comparison between the success rates of different categories of not represented petitioners, such as "have nots" and other nonrepresented petitioners.

Table 2. Rate of Success Related to Legal Representation 1986–1994

	Outcome of Court Decision			Outcome of Out-of-Court Settlement					Success Rate	
Petitioner	Full Success (A)	Partial Success (B)	Dismissal (C)	Withdrawal (D)	Partial Success (E)	Full Success (F)	Other (G)	Total	Gross	Net
All "have not":	12	7	172	61	77	62	126	517	30.56%	**40.41%**
"Have not" represented	10	4	39	28	50	31	18	180	52.78%	**58.64%**
"Have not" nonrepresented[a]	2	3	133	33	27	31	108	337	18.69%	**27.51%**
Other nonrepresented[b]	4	4	218	68	31	40	97	462	17.10%	**21.64%**
All nonrepresented	6	7	351	101	58	71	205	799	17.77%	**23.91%**

[a] The majority of nonrepresented "have nots" were prisoners. The success rates of nonrepresented prisoners and other nonrepresented "have nots" did not differ remarkably. The overall net success rate of nonrepresented "have nots" without prisoners is 28.35% that is, only slightly higher compared with the success rate of all nonrepresented "have nots" in this table (27.51%).

[b] All except two of the cases included in this category are petitions issued by neither "have nots" nor "haves." All but two of the "haves" in this sample were represented in court.

differs substantially from that of the United States on legal, institutional, social, and cultural levels, runs the risk of serious distortions and misapprehensions. Nevertheless, the comparison of these findings with those of previous research does seem to offer some interesting insights.

Sheehan et al. suggested that ideological considerations are more likely to influence cases reaching supreme courts that have strong control of their dockets. Correspondingly, they argued that differences in status are less likely to influence cases reaching the U.S. Supreme Court. Cases that are important enough to be granted a certiorari are likely to have a sufficient cachet to attract quality counsel as well as financial support (Sheehan et al. 1992:465). Haynie, on the other hand, showed that ideological considerations that work in favor of "have nots" may be prevalent also in judicial forums that do not employ a strong screening process of cases before they dispose them. The Israeli HCJ conforms to the model of the Supreme Court of the Philippines as described by Haynie in two major respects. First, the Court's docket, unlike its U.S. counterpart, contains many routine decisions (Haynie 1995:756) Second, the Court is heavily influenced in its decisions by institutional considerations, and more particularly, by its wish to preserve its public image and increase its legitimacy (ibid., p. 769; Dotan 1999). Both in the Philippines and in the HCJ ideological and institutional considerations of the court seem to work in favor of "have nots" despite the lack of a strong screening process and agenda control.

Some of our findings seem to conform with Galanter's party capability theory. Big corporations succeeded in litigation more than other businesses. The "haves" in general did better than "have nots," and "have nots" did significantly better when they had legal counsel. On the other hand, when "have nots" were represented by lawyers, there is nothing in the findings to corroborate the claim that the "haves" came out ahead. In fact, the findings suggest that represented "have nots" enjoyed success rates somewhat higher than those of the "haves" (see Tables 1 and 2). The relative advantage of "have nots" is reflected not only in the comparison between the success rates of represented "have nots" and "haves" discussed above, but also in the comparison between the success rates of nonrepresented "have nots" vis-à-vis the general population of nonrepresented petitioners (Table 2). Here again we see that although the success rates of nonrepresented "have nots" are significantly lower than those of represented "have nots," they are still significantly higher than other nonrepresented petitioners. Much in accord with Haynie's argument, I suggest that this advantage of "have nots" over other petitioners to the HCJ may be explained by the ideological propensities of the justices of the HCJ as well as institutional considerations in relation to the issue of the legitimacy of the Court

in the eyes of the Israeli public. As in the Philippines, the Israeli HCJ sees its legitimacy tied directly to its decisions. Preserving the image of the Court as "the protector of the little person" is important for preserving the legitimacy in the eyes of the public and for defending its institutional autonomy against threats on behalf of other political forces.[30]

Another issue that our findings raise is the centrality of the role of the government and other public agencies for the understanding of outcomes in litigation. In this study, the respondents in all cases are government agencies. As Table 1 shows, the government enjoys extremely high success rates in litigation that reaches final judicial disposition. The finding that public agencies enjoy high success rates in judicial review cases as well as in appellate courts is far from being unique to this study and is corroborated by several other studies (e.g., McCormick 1993; Atkins 1991; Sheehan et al. 1992; Songer & Sheehan 1992). Moreover, as recent research reveals, public agencies are, in fact, the most successful litigant in almost all the surveys that studied outcomes in litigation (Farole 1999; Songer et al. 1999).

There are various possible explanations for this pattern of overall advantage of governments in litigation. Some suggest that governments are successful simply because they are the most capable of all repeat players, possessing the greater resources, expertise, insider knowledge of the judicial process, and other repeat player characteristics (Songer et al. 1999). That government agencies have much higher success rates in litigation than other groups may, however, be explained in terms of resource shortages rather than of the affluence of governments. According to this line of thought, it is resource shortages that lead agencies to litigate only cases where they have high chances of winning, therefore leading to high rates of success (Posner 1972). Yet another explanation relates the strength of public agencies in litigation to substantive legal doctrines that favor their position in litigation, such as the principle that courts should normally defer to the expertise of agency officials (Songer et al. 1999). Finally, it is suggested that governments are successful litigants because they fundamentally differ from other litigants due to their institutional relations with courts, and their key function within the judicial process (Farole 1999).

At this stage, it is impossible, without further research, to rule out any of these explanations for the extraordinary success rates of public agencies in litigation before the HCJ. My findings, however, seem to support the latter explanation that relates the suc-

[30] Israel has yet to form a complete formal written constitution. Therefore, the Knesset (Parliament) can infringe on the Court's powers by legislation endorsed by a regular majority. The legitimacy of the Court therefore serves as a vital shield against such attempts to curtail the Court's jurisdiction made on behalf of opposing political forces. See Sharfman 1993; Barak-Erez 1995; Hofnung 1996; Dotan 1998.

cess of the government in litigation to its special status as a party that has an important institutional position in litigation. As this study shows, the full picture of success in litigation cannot be learned by focusing only on the outcomes of court decisions. A fuller picture is revealed by looking into the outcomes of out-of-court settlements. When out-of-court settlements are taken into account, we see that the success rates of petitioners in general are considerably higher than appears from studying cases disposed by judicial decisions exclusively. We also see that the gap between the success rates of "haves" and "have nots" in litigation against the government is considerably narrowed due to the impact of out-of-court settlements. In other words, we see that the government agencies that appear before the HCJ tend to settle many cases to allow petitioners significant achievements in litigation, and this settlement mechanism works to ameliorate considerably the inferiority of "have nots" (vis-à-vis the "haves"). That the inclusion of settlements in the analysis of litigation outcomes results in higher success rates for the petitioners does not rule out any of the above-mentioned explanations for the success of government in litigation. The findings concerning the impact of the settlement mechanism in favor of "have nots," however, can be explained only by regard to the special institutional status of the government, and the government lawyers in litigation before the HCJ.

The explanation for the success rates of "have nots" in settlements has to do with the function of the lawyers representing the government before the HCJ. The State of Israel (including all agencies that are part of the central government) is represented in the HCJ by a small department (normally composed of no more than 10 lawyers) in the office of the attorney general (High Court of Justice Department, or HCJD). Because the lawyers in this department represent the respondents in the HCJ in over 80% of the petitions, they appear before the 14 justices of the HCJ almost daily.[31] Previous study shows that these lawyers tend to internalize the ideological propensities of the Court and serve as its extension rather than as merely representatives of state agencies. Accordingly, these lawyers tend to form settlements in the vast majority of cases that reach the Court, in many cases even before the litigation starts (Dotan 1999).[32] In other words, the settlement mechanism of the HCJD may serve the interests of "have nots," whenever the government lawyers believe that, according to the doctrines and policies set by the Court itself, the petitioner's needs deserve to be met. Correspondingly, although

[31] From the Central Bureau of Statistics. The HCJD represents the respondents in all the petitions involving agencies of the government of Israel, excluding only petitions issued solely against local authorities.

[32] The mechanism of settlements formed by the HCJD is also necessary, from the Court's point of view, to ease its heavy caseload. See note 4 and Dotan 1999.

functioning as the extension of the Court, the HCJD enjoys a high degree of trust on behalf of the judges of the HCJ. Their factual statements are taken for granted; their offers for settlements win a high degree of credibility and attention; and when they decide to litigate the case up to a final judicial disposition, they seldom face defeat (Shamir 1990; Kretzmer 1994; Dotan 1999).[33] This support structure, through the function of the HCJD lawyers, also ensures the effectiveness of the application of the Court's policy in the field of indigents' rights (cf. Epp 1998).[34]

Conclusion

In this study, I found that in litigation before the Israeli High Court of Justice, the "haves" enjoyed only a limited advantage over "have nots" in litigation outcomes. It was also found that when "have nots" were represented by legal counsel, the "haves" did not come out ahead before this forum. Ideological propensities of judges and considerations of institutional autonomy can even out, or at least ameliorate to some extent, the inherent inferiority of "have nots" in litigation. It was also found that those mechanisms that worked in favor of "have nots" operated not only in litigation that reached final judicial disposition but also—and even more forcefully—when the litigation was disposed through out-of-court settlements.

This study also supports the need to focus more closely in research regarding outcomes in litigation on the special status and functions of governments and other public agencies. Governments are not only powerful repeat players; they are also key players in the actual process of litigation. The case of litigation before the HCJ shows that government representatives function as an essential part of the mechanism of the Court itself to carry out judicial policies. Studying the special functions of government in litigation is essential for understanding the litigation process.

[33] According to the data of the Central Bureau of Statistics, out of 4,266 petitions against government agencies during the period of 1985 to 1993, only in 190 cases (i.e., 4.45%) did the petitioner win by a final judicial disposition. The bureau has no data concerning the outcomes of out-of-court settlements.

[34] Another interesting aspect of this support structure is the ability of the judicial system to create *legal precedents* through settlements. It is normally assumed that settlements are inferior to judicial decisions in the sense that they lack precedential impact on similar cases (Fiss 1984; Albiston 1999). This assumption, however, does not necessarily apply to the case of the HCJ. On many occasions, settlements are made between organized parties (i.e., the HCJD and the pertinent nongovernmental organization that represents the petitioner). In such cases, settlements do create precedents because both parties assume that the same achievement allowed to the individual petitioner will also apply to any other petitioner in a similar situation that will be represented by the same organization (Dotan 1999).

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