

## The Israeli Public Class Action Fund

### *New Approach for Integrating Business and Social Responsibility*

*Eli Bukspan\**

#### 26.1 INTRODUCTION

The Israeli Class Action Law, 2006<sup>1</sup> (hereinafter the Law or the Class Action Law) brought about dramatic changes in the adjudication of class action lawsuits in Israel. If the number of cases filed is a parameter of success, this law is clearly a phenomenal success: the number of plaintiffs requesting to certify a claim as a class action suit is on a continuous upward trend and far exceeds the general trend in civil lawsuits filed, which has remained relatively stable during the same time period. In 2007, one year after the law was enacted, 28 motions were filed to certify class action suits, in 2010 this number rose to 335, in 2012, 820,<sup>2</sup> and in 2018, 1,250.<sup>3</sup>

One of the major innovations in the Israeli Class Action Law is the establishment of Public Fund to Finance Class Action Lawsuits to assist representative plaintiffs finance the petitions for certification of class actions with public and social importance.<sup>4</sup> The fund is a rare phenomenon throughout the world,<sup>5</sup> and therefore can also be viewed as a “test case” for some of class actions’ descriptive and normative issues in other legal systems as well.

While I discuss the Fund in greater detail further on, it is important to understand three issues at the onset: (1) the Fund’s mandate is to assess the social and public significance of the class

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<sup>1</sup> Class Action Law, 5776–2016, SH No. 2054 p. 264 (Isr.). The opinions expressed in this article are my own.

<sup>2</sup> Camille Cameron, Jasminika Kalajdzic and Alon Klement, Economic Enablers, in CLASS ACTIONS IN CONTEXT – HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION 137, 164 (Decorah R. Hensler, Christopher Hodges & Ianika Tzankova eds., 2016).

<sup>3</sup> Assaf Fink, 2018 *Summary of Class Action Law Suits*, Ninth Conference on Class Action Lawsuits (Mar. 2, 2019), available at <http://knowit.org.il/Uploads/Documents/sikum2018.pdf> [in Hebrew].

<sup>4</sup> Class Action Law, *supra* note 1, art. 27(a).

<sup>5</sup> To my knowledge, only two other *public* funds worldwide were established by law: in Quebec and in Ontario, Canada. Presently, there is now a proposal to establish similar funds in Australia and Hong Kong. In addition, in Israel there is separate fund to finance *securities* class actions.

action law suit; (2) the class action lawsuit is not adjudicated before the Fund, and its protocols and decisions cannot be submitted as evidence in court; (3) the Fund does not oversee issues related to securities class actions, which has a unique and separate public fund within the Israel Securities Authority – which is much smaller with only a few inquiries per year.<sup>6</sup>

The chapter begins with a short discussion on class action lawsuits in Israel (Section 26.2); proceeds with the Public Fund to Finance Class Action Lawsuits (Section 26.3) and concludes with a normative discussion on the relationship between class action lawsuits, the Public Fund, social change, and corporate social responsibility (Section 26.4).

## 26.2 CLASS ACTIONS IN ISRAEL: PURPOSES AND TRENDS

At face value, class action lawsuits are a procedural mechanism that serves first and foremost to unify and manage multiple claims against a singular defendant, but clearly their role is not solely limited to this and also has the potential to advance other significant and more substantial interests.<sup>7</sup> Additionally, while it is true that monetary ambitions often spur the submission of class action lawsuits, this in and of itself does not negate the realization of important public interests. In this manner, the representative plaintiff serves as a procedural “Robin Hood” and catalyst, since without her petition an important public concern would not “see its day in court.”

Section 1 of the Law lists its four main objectives: (1) increase access to court, including for those with limited access; (2) enforce the law and deter violation; (3) provide appropriate remedies to those whose rights have been violated; and (4) promote an efficient, fair, and comprehensive legal process to manage these type of claims. While the relative importance of these objectives was not determined in the Law, case law has repeatedly pointed to public interest as the most important.<sup>8</sup> One possible explanation for this is the continuing and increasing importance of public interests in the civil law discourse, particularly in light of the general legal trend to rein in the growing strength and influence of corporations, the largest number of defendants in class action lawsuits.<sup>9</sup>

The pro-public/social approach that stands at the foundation of class actions is prevalent in legal literature as well, and points out that the plaintiff’s personal interests (i.e., remedies), which ostensibly are relevant to a group of plaintiffs as well, is not the main goal of the class action process.<sup>10</sup> This position is clearly articulated in the Law’s provisions, specifically in Article 27 establishing the Fund to Finance Class Action Lawsuits, and which is the focus of this chapter.

<sup>6</sup> Securities class action lawsuits are governed by the Israeli Company Law 5759–1999, 44 L.S.I. 119 (not the Class Action Law).

<sup>7</sup> See the explanatory note to the Israeli bill: “Legal representation is not necessarily viewed as a process to manage multiple plaintiffs with similar claims but rather as a tool to promote public interests. A considerable part of the changes made in the proposed law reflect this view.” (See Proposed Class Action Law, 5766–2006, 234).

<sup>8</sup> CA 03/345 Dan Reichart v. the Heirs of Moshe Shemesh, the deceased, p. 83 Nevo database (given June 7, 2007); CA 8037/06 Brazelai v. Priner, p. 88, Nevo database (given Sept. 4, 2014); CA 10085/08 Tnuva v. Estate of Tofik Ravi, deceased (given Dec. 4, 2011).

<sup>9</sup> *Compare*: Western Canadian Shopping Centers v. Dutton, (2001) 2 S.C.R. 534, ¶ 26 (emphasizing the role of class actions in the modern era: “The class action plays an important role in today’s world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth . . . The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties”).

<sup>10</sup> Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591 (1987); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1355 (1995); and Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105–06 (2006) (“The most critical and controversial feature of this argument is that compensation is not really an important goal in small-claims class actions . . . We must also do the easy (or at least intuitive) work of showing that the deterrence of corporate wrongdoing is what we can and should expect from class actions.”).

However, the Law includes other pro-public/social arrangements, such as Article 22(b)(3) that instructs that the “degree of the class action’s public importance” will be a positive consideration when determining the plaintiffs’ compensation and/or attorney fees in a successful suit. So is the case with the participation of public officials in the class action proceedings. Prior to the Law’s legislation only a private individual could sue using the class action mechanism; however, since its legislation, Article 4 (a) (2) of the Law allows public authorities, in the area of their jurisdiction and on behalf of a group of individuals whose claim raises fundamental questions, to initiate a class action lawsuit. The new law also allows public officials to participate, with court’s permission, in proceedings they did not initiate.<sup>11</sup> In this manner, public officials can participate in settlement agreements between plaintiffs and class action defendants to prevent the misuse of the proceedings at the detriment of the group’s best interests.<sup>12</sup>

The ingrained public interests in class action lawsuits are not exhausted by the examples above and are readily found in legislative and case law developments as we discuss below.

### 26.2.1 *Legislative Innovations*

Beyond the public aspects of the Law detailed above, it is important to mention the 2016 fund to manage and distribute monetary judgments of class action suits.<sup>13</sup> The purpose of this relatively new fund is, by definition, public – to distribute funds for public uses that have goals closely associated with the claim that had been adjudicated and to prevent potential biases in the distribution of the funds, inter alia, due to concerns about previous ties between the defendant and recipients of the funds.

An additional development relating to the public nature of class action suits is the 2018 regulation on class action court fees.<sup>14</sup> Architects of the regulations claimed that class action plaintiffs should not be exempt from paying court fees – as do plaintiffs in other legal proceedings. While the new regulations originally were opposed on the grounds that they weakened the institution of class actions, it is impossible to ignore the fact that this amendment also includes public justifications, for example, subsidizing a percentage of the costs of the class action processes that are usually long, complex, and require vast resources. Another public purpose attributed to this new policy assumes that court fees will reduce submissions of false claims and deter defendants from initiating unnecessary proceedings.

As expected, these regulations were not passed without detractors, although recently the Israeli Supreme Court, sitting as the High Court of Justice, overturned a petition to revoke the regulations.<sup>15</sup> One of the central claims against imposing court fees concerns redundancy of the Class Action Law objectives since the objectives clearly advocate increased access to court, and court fees could act as a deterrent.

<sup>11</sup> Class Action Law, *supra* note 1, art. 15.

<sup>12</sup> *Id.* art. 18.

<sup>13</sup> *Id.* art. 27a. (for the fund’s site see: [www.justice.gov.il/Units/ApotroposKlali/Departments/ApotroposKlali/giloi/Pages/ClassActionLaw.aspx](http://www.justice.gov.il/Units/ApotroposKlali/Departments/ApotroposKlali/giloi/Pages/ClassActionLaw.aspx)) [in Hebrew].

<sup>14</sup> Court Regulations (Court Fees), 2007, Regulation 7a.

<sup>15</sup> See HCJ 3646/18 *Friends of Community Rights’ Centers v. Minister of Justice* (handed down on Jan. 16, 2019). The framework of the final regulations imposes a 16,000 NIS filing fee in the district court, where most of the class actions are filed, and a 8,000 NIS filing fee in the magistrate court. Half of the fee is paid before submitting the suit and the other half after the judgment. See Constitution, Law, and Justice Committee, Outline of Class Action Lawsuit Fees, Framework Compromise 2017, available at <http://m.knesset.gov.il/Activity/committees/huka/Pages/CommitteeMaterial.aspx?ItemID=2023754> [in Hebrew].

## 26.2.2 Case Law Innovations

Three important judgments, which were handed down by the Israeli Supreme Court in recent years, and which their original suits were also backed by the Fund to Finance Class Action Lawsuits, assisted in consolidating the perception of the social and public importance of class action suits in Israel: LCA 6897/14 *Radio Kol BaRamah Ltd. v. Kolech – Religious Women’s Forum*,<sup>16</sup> which emphasized the class action lawsuit’s ability to protect human rights, alongside two additional precedents LCA 8771/16 *Nobel Energy Mediterranean Limited v. Moshe Nazri*<sup>17</sup> and LCA 3456/13 *The Israeli Electric Company Ltd., v. Yonatan Shlider*,<sup>18</sup> both which confirmed the regulatory nature of the class action suit.

*Radio Kol BaRamah Ltd. v. Kolech* claimed that Kol BaRamah radio station discriminated against women. In this case, Kolech – The Religious Women’s Forum, a religious feminist movement in Israel, sued the ultra-Orthodox radio station “A Voice in Ramah” on grounds that it prevented women from broadcasting on the station, following its stated policy between years 2009 and 2011. The Israeli Supreme Court allowed the petition to continue as a class action lawsuit on the grounds that the radio station’s position constituted prohibitory discrimination.<sup>19</sup> Following this ruling, the district court ruled on the suit as a class action law suit and required “Voice in Ramah” to pay one million NIS to traditional, religious, and ultra-Orthodox women empowerment programs; 250,000 NIS for legal expenses; and to repeal its discriminatory policy and begin to play women on the radio station.

*Nobel Energy Mediterranean Limited v. Moshe Nazri*, the largest class action suit in Israel, claimed that the gas company had exploited its monopoly by charging the electric company excessive prices and which were ultimately passed on to Israeli consumers. *Israeli Electric Company Ltd., v. Yonatan Shlider* petitioned to approve a class action suit claiming that electricity prices had been unlawfully inflated, including within the inflated prices high salary payouts – which had been previously criticized by the Supervisor of Wages in the Ministry of Finance. While both of these judgments discussed price control, which is one of the main functions of economic regulation in Israel and therefore, ostensibly, lies within the traditional realm of public enforcement, the Israeli Supreme Court saw fit to broaden the judicial review of the alleged acts through the class action law suits as a private mechanism (though assisted by the public class action fund) that works hand-in-hand with direct public enforcement and acts as deterrent against corporations that use illegally payments made by the public.<sup>20</sup>

<sup>16</sup> Given Dec. 9, 2015.

<sup>17</sup> Given Sept. 28, 2017.

<sup>18</sup> Given Aug. 29, 2017.

<sup>19</sup> See also Class Action 8214-05-14 Ronen Meirav v. IDI Insurance Company Ltd. (given Aug. 30, 2016) (as an example of using class action lawsuits as a tool for social change in the field of human rights). This lawsuit addresses the question of whether a car insurance offer, which provides free tire replacement services to women but not men breaches the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000, thereby violating the rights of insured men. Judge Grosskopf discussed the difference between a personal discrimination claim – appropriate for pinpoint violations of the principle of equality – and a class action on similar grounds, suitable in those cases in which discrimination is based on policy and not individual instances.

<sup>20</sup> Until these rulings, the Attorney General’s position, as well as the courts’ position, prevented indirect attacks on tariffs. This approach, termed the “Filed Rate Doctrine” fits the US approach denying petitions with indirect claims against tariffs set by the regulator but at the same time faces much criticism; see Judge Meltzer’s ruling in *Electric Company v. Shlider*, *supra* note 18. In addition, US regulation is created by independent, professional authorities on a legal-economic basis and not a governmental basis. With that, this approach is incompatible with the Israeli legal system.

### 26.3 THE PUBLIC CLASS ACTION FUND

Class actions have a multitude of objectives, some explicit, others implied: they create, *inter alia*, a more efficient system of enforcement by grouping together individual claims of lesser monetary value that may otherwise not be filed due to their lower monetary value; they also create an efficient mechanism to internalize the law and deter its violation. However, this chapter focuses on the objective usually downplayed in the mundane analysis of class actions, and that is their potential to promote greater social and public changes in the business sector through the Public Class Action Fund.

Class actions act to introduce social and legal norms into private law, especially within the commercial sector, while strengthening private enforcement and reducing the need for public enforcement. These themes are clearly resonant in the establishment of the Israeli Public Class Action Fund. Initially, the Fund was established for a period of seven years;<sup>21</sup> currently, legislation is being drafted to ensure its continuation after the conclusion of seven years.<sup>22</sup> As mentioned above, this type of fund is almost unknown in the world. A similar fund exists within the Israel Securities Authority to finance securities-related claims. Both of these funds are public, and as such highlight the private-public duality of their mechanism while supporting class action lawsuits (which are considered a private enforcement mechanism); and each receive a state budget to assist representative plaintiffs in financing requests for approval of class actions of public and social importance.

The Public Class Action Fund has more of a public, and less of a legal, value. As I note, it does not replace court, and its decisions cannot be used as evidence in court because the Fund does not focus on legal issues, nor on the claim's chance of receiving a positive verdict (as the corresponding securities fund is), *but rather solely on the claim's social and public merits*. In addition, as a public fund, the Class Action Fund, as well as its nine representatives from various regulatory positions and as appointed by the Minister of Justice,<sup>23</sup> reflect the recognition, support, and indirect cooperation of the regulator with the class action mechanism as a private enforcement tool. Indeed, the Fund's composition may also raise criticism about apparent conservatism in discretion of the majority of the fund's members as representatives of regulatory agencies that are responsible for the public enforcement of many issues brought before the fund. However, the high rate of financing by the Fund shows that the regulator representatives, the public representative, and the Fund's chairman serve as an unbiased, *de facto* public jury, which uses the fund's resources to strengthen the other and alternative public enforcement mechanisms. In other words, the Class Action Fund's pluralistic composition and its mandate to finance class actions of "public and social importance in their submission and clarification" clearly attests to the legislature's recognition and support of the use of class action lawsuits to promote issues of social and public importance. These aspects all support the concept that the Public Class Action Fund acts as a magnifying glass for those public purposes that are embedded in class actions and in its active assistance to issues of great social and public importance.<sup>24</sup>

The Class Action Fund annual budget is relatively low (around 1.5 million NIS – approximately less than half a million US dollars) and cannot be carried over into the next fiscal year.

<sup>21</sup> Class Action Law, *supra* note 1, art. 27.

<sup>22</sup> Class Action Law (11th amendment), 2020.

<sup>23</sup> The Fund is composed of nine representatives from a variety of regulatory agencies and the public: the Consumer Protection and Fair Trade Authority; Antitrust Authority; Bank of Israel Supervision Department; Pension Fund Commission; Ministry of Environment; Commission for Equal Rights for Persons with Disabilities; Office of the Attorney General; the public; and the Fund chairman, who is qualified to be a district court judge.

<sup>24</sup> Catherine Piche, *Public Financiers as Overseers of Class Proceedings*, 12 N.Y.U. J.L. & BUS. 779, 801 (2016).

The fund mainly finances expert opinion fees, reimburses court expenses for failed claims and, more recently, pays court fees.<sup>25</sup> Since its creation, the Fund has reviewed approximately 700 requests and has approved more than 45 percent of them – a remarkably high percentage, demonstrating the poignancy of the submissions.

The unofficial policy guiding funding is to provide partial funding to as many just claimants as possible on a diversified range of issues, rather than provide full funding to fewer claimants or for a centralized area of claims. That is to say, even those claimants that receive financing still have to fund most of the suit's costs.

However, in addition to receiving direct financial assistance, the Fund's endorsement of the suit may also have an informal expressive and signaling effect within, and outside, the judicial process.<sup>26</sup> The Fund meets once every quarter, and the upward trend in requests for funding indicates a constant increase in awareness and volume of its activity.<sup>27</sup> Since its enactment, the Fund has received requests on a wide range of claims. Most requests that are approved are for consumer related claims, similar to those class action suits filed annually. With that, antitrust, environmental protection, discrimination, insurance, rights and equality for people with disabilities, and the restitution of illegally collected monies by authorities are areas that the Fund regularly approves.<sup>28</sup>

Many of the class actions filed point to the Fund's ability to impose corporate responsibility, inter alia for violations of pollution standards and environmental harms. The Israeli Railways and large factories are frequent defendants in these cases, and claims are based on a combination of health hazards suffered by the general public living in proximity to these violations.<sup>29</sup> Another area of requests include claims against monopolistic and restrictive trade practices, in which large corporations use restrictive arrangements and

<sup>25</sup> Camille Cameron, Jasminika Kalajdzic, & Alon Klemet, *Economic Enablers*, in *Class Actions in Context – How Culture, Economics and Politics Shape Collective Litigation*, *supra* note 2, at 137, 166. Due to the Fund's small budget, the authors are critical of the Fund's ability to make a difference. I disagree, particularly in light of the number of requests approved by the Fund and the benefit that may be connected to the Fund's approval which may help court identify "good" and just class actions. For an interesting discussion, also about the Israeli experience, see Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES L. 47, 61 (2018) (suggesting establishing public funds to assist funding "objectors" – those who object to the terms of a proposed settlement – in order to bring unbiased opinions to the courts in settlements proceedings).

<sup>26</sup> Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding – A Signaling Model*, 63 DePaul L. Rev. 223 (2014).

<sup>27</sup> Ministry of Justice, *Situational Report: The Fund to Finance Class Action Lawsuits, May 2011 Meetings to October 2015*, available at [www.gov.il/BlobFolder/generalpage/representative\\_actions\\_fund/he/%D7%94%D7%A7%D7%A8%D7%9F%20%D7%9C%D7%9E%D7%99%D7%9E%D7%95%D7%9F%20%D7%AA%D7%95%D7%91%D7%A2%D7%A0%D7%95%D7%AA%20%D7%99%D7%99%D7%A6%D7%95%D7%92%D7%99%D7%95%D7%AA-%20%D7%AA%D7%9E%D7%95%D7%A0%D7%AA%20%D7%9E%D7%A6%D7%91.pdf](http://www.gov.il/BlobFolder/generalpage/representative_actions_fund/he/%D7%94%D7%A7%D7%A8%D7%9F%20%D7%9C%D7%9E%D7%99%D7%9E%D7%95%D7%9F%20%D7%AA%D7%95%D7%91%D7%A2%D7%A0%D7%95%D7%AA%20%D7%99%D7%99%D7%A6%D7%95%D7%92%D7%99%D7%95%D7%AA-%20%D7%AA%D7%9E%D7%95%D7%A0%D7%AA%20%D7%9E%D7%A6%D7%91.pdf) [in Hebrew].

<sup>28</sup> In 2018, 35 percent of the class actions approved were consumer class actions; 4 percent antitrust class actions; 8 percent environmental protection; 6 percent insurance; 8 percent discrimination; 1 percent restitution of illegally collected monies by authorities; 2 percent banking; 24 percent equality for people with disabilities; 11 percent labour law; and 1 percent anti-spam. See the 2018 Annual Fund Activity Report [in Hebrew], [www.gov.il/BlobFolder/generalpage/representative\\_actions\\_fund/he/2018.pdf](http://www.gov.il/BlobFolder/generalpage/representative_actions_fund/he/2018.pdf).

<sup>29</sup> See ClassAct. 45641-09-15, *Horowitz v. Volkswagen*; ClassAct. (Ja.) 4373-01-15 *Meir Godush v. Israeli Railroad Co. Ltd.*; ClassAct. (TA) 20901-03-Ron Reighter v. Israeli Railroad Co. Ltd.; ClassAct. (TA) 45897-01-17 *Vered Schahar v. Israeli Railroad Co. Ltd.*; and ClassAct. (TA) 14412-04-17 *Omer Avraham v. Israeli Railroad Co. Ltd.*; (all claiming extreme levels of air pollution, all above the accepted standard and endangering the residents, in areas around train stations throughout Israel). In ClassAct. 34564-05-15 (*Central*) *CSO of Citizens for the Environment v. Compost Agricultural Cooperative Ltd.* and ClassAct. (TA) 14087-06-15 *Jehusula Klein v. Neshet- Israeli Cement Factory Ltd.* (claiming environmental harm and violations by these factories). In ClassAct. (44000-06-12 (TA)) *Mazel Hadad v. Osem Investments Ltd.*, (claiming an individual nuisance caused by an ammonia leak from defendant's logistics center). In addition, a recent request from the CSO of Citizens for the Environment was approved to help finance a first class action of its kind – mass tort – in Israel, against major environmental offenders in the Haifa Bay for causing an increase of incidences of cancer in the region.

price setting, violating provisions of the Israeli Restrictive Trade Practices Law (Economic Competition Law) and harming the public good.<sup>30</sup> A third example arises from suits against foreign companies, mainly against giant international conglomerates, for cross-border infringement,<sup>31</sup> particularly when the regulatory authority is limited in its ability to enforce Israeli law on a foreign company.<sup>32</sup>

A fourth and different type of request demonstrates the role of class actions in promoting constitutional and public rights in the private sector.<sup>33</sup> Examples of such requests include claims for alleged violations of the Equal Rights for Persons with Disabilities Law, 5748–1988, either for denying access to public places for people with disabilities,<sup>34</sup> or the receipt of a public service,<sup>35</sup> or of a service required by law.<sup>36</sup> Other requests for funding fall within violations of the provision against Prohibition of Discrimination in Products, Services and Entry to Entertainment and Public Places Law, 5761–2000 for discrimination against different groups of people based on gender,<sup>37</sup> age,<sup>38</sup> and nationality.<sup>39</sup> Other requests that have been

<sup>30</sup> ClassAct. (Center) 46010-07-11 Ofir Naor v. Tnuva Agricultural Marketing Cooperative Center in Israel Ltd. and ClassAct. 57534-02-14, 43206-10-14 Yaron Zlichia v. Tnuva Agricultural Marketing Cooperative Center in Israel Ltd. (claiming unfair price and monopolistic actions); ClassAct. 31011-08-15 Meir (Maor) Klein v. Holon Halls Ltd., (claiming violation of antitrust law by bakeries after agreeing on price fixing, raising bread prices, and preventing competition). Israeli Electric Company v. Shlider (*supra* note 18) was a class action suit against the “undue inflation” of electricity rates, including within the rates inflated salaries as previously criticized by the Supervisor of Wages in the Ministry of Finance. In Nobel Energy Mediterranean Limited v. Moshe Nazri (*supra* note 17) as well, the Electric Company’s monopolist was claimed to abuse and excessive pricing, which was passed on to its customers.

<sup>31</sup> See, e.g., ClassAct 44244-02-16 Niv Lev v. Booking; ClassAct. 63423-10-17 Yaron Greenberg v. eBay; ClassAct. 41239-04-18 Stinkaritz v. WhatsApp; ClassAct. 1393-01-17 RotemGel v. Facebook Ireland Ltd.; ClassAct. 66426-06-17 Liron Priminger v. Instagram LLC; CaseStud. Ori Cohen v. hotels.com; and LC 5860/16 Facebook Inc. v. Ben Hamo (given 31.5.2018).

<sup>32</sup> See, e.g., ClassAct. (9615-09-17 (Center)) Baruch Yaniv Azrideil v. Viagogo (examining a foreign company that scalped tickets via its website even though scalping is prohibited by Israeli law). The Fund financed the translation of court documents and their procedural serving out of the country. See also ClassAct. 44244-02-16 Niv Lev v. Booking (alleging that the respondent, operating abroad, prevents clients from receiving money after canceling a transaction).

<sup>33</sup> *Radio Kol BaRamah*, *supra* note 16.

<sup>34</sup> ClassAct. (TA) 16317-06-12 Lihi Tsubari v. The Municipality of Tel Aviv-Jaffa; ClassAct. (TA) 25559-03-10 Reuben Baron v. Israel Railways Ltd. and Tel. Hecht v. Renoir Fashion Manufacturing & Marketing (1993) Ltd. (claiming the defendants failed to uphold Israeli legislation ensuring accessibility to public buildings and businesses such as bus stations and clothing stores).

<sup>35</sup> ClassAct. (TA) 29387-09-14 Oren Tal Debuskin v. Egged Public Transport Cooperative Association Ltd., ClassAct. (TA) 57824-06-15 Noam Gershom Reshef v. Hot-Communications Systems Ltd. and ClassAct. (TA) 28211-09-16 Anna Barak v. Chamber Theater Inc. claiming the defendants failed to install necessary mechanisms ensuring accessibility to people with hearing loss in various services such as television stations and theaters.

<sup>36</sup> ClassAct. (Ja) 43232-05-12 Ploni v. Migdal Insurance Company Ltd., alleging that respondents refused to insure applicants who had listed their disabilities, without providing a written, individual, and reasoned explanation, contrary to the provisions of the Equal Rights Act for Persons with Disabilities; ClassAct. (TA) 7789-06-15 Uri Karmi v. Knot Rent a Car Ltd. (alleging that respondents breached their duty under the law as a car rental company to own and rent at least two wheelchair accessible vehicles as required by law).

<sup>37</sup> See *Radio Kol BaRamah*, *supra* note 16 and Class Act. (Ja) 65819-02-19 Hana Katzman v. Libnay Tzfonit Ltd., (claiming that IKEA published a separate catalog with pictures of men only, which it distributed to ultra-orthodox Jew populations).

<sup>38</sup> ClassAct. (TA) 19385-08-15 Rina Dayan v. Clal Insurance Company Ltd., (claiming discrimination against the elderly by raising the proof needed to attain nursing assistance).

<sup>39</sup> ClassAct. (TA) 48927-08-15 Aviva in San v. Dacla – Insurance Company Ltd., Class Act (Ha) 39672-01-16 Maher and Achim v. Shufersal Ltd.; and AP 59462-01 16 Awad Abu Freih v. The First International Bank of Israel Ltd. (alleging discrimination against Arab-Israelis population based on lack of accessibility to basic services such as food and banking due to the lack of deliveries to these citizens or the opening of branches in Arab cities and villages). ClassAct (Nz.)19886-07-12 Iyad Abu Ashaq v. Israel Post Company Ltd., (alleging that respondents had discriminated against Arab Israeli citizens by terming them in internal documents as “cousins” and fixing prices of postal services to them higher than those offered to non-Arab Israeli citizens).

approved in this context, relate to infringement of customer privacy<sup>40</sup> and violation of employee rights.<sup>41</sup>

In sum, the Israeli Class Action Fund is a body established under the Ministry of Justice, although its discretion is completely autonomous from that of the Ministry's and its members are representatives of the various regulators. The Fund expresses the involvement and support of the State – albeit indirectly through its budget – in individual attempts to adjudicate class action lawsuits on matters of public and social importance and emphasizes the quasi-regulatory status of the mechanism. It is important to note that class action suits are filed in addition to or in lieu of direct regulatory intervention. Accordingly, class action suits, funded by the Fund, which are usually filed against corporations, assist in imbedding public and corporate responsibility, and transfer government responsibility (and money) to public and legal market forces, while potentially contributing to reducing the need for direct government enforcement.

#### 26.4 THE RELATIONSHIP BETWEEN CLASS ACTIONS, THE PUBLIC CLASS ACTION FUND, SOCIAL CHANGE, AND CORPORATE SOCIAL RESPONSIBILITY

After reviewing the Israeli Public Class Action Fund and its activities, I turn to address the broader normative and theoretical applications of the social role of class action suits, in general, and of the public Class Action Fund, in particular, in the modern era.

In the current era, the growing influence and prolificacy of corporations have increased; this has prompted an updated approach to traditional divisions between public and private law, including the application of human rights law in private law.<sup>42</sup> This phenomenon, which reflects deep social changes that contribute on the one hand to the strengthening of nongovernmental bodies and on the other hand to the weakening of governmental bodies and government supervision, naturally changes the substantive law, but also the procedural law that is supposed to assist in establishing the former.<sup>43</sup> Indeed, some may argue that government and public enforcement ought to be stronger and private enforcement, including class action suits, weaker. This chapter takes the view that both can, and should, work together and that they are not mutually exclusive,<sup>44</sup> especially as both, broadly

<sup>40</sup> ClassAct (Center) 22141-03-15 Pinchas Yosef Greenberg v. Cellcom Israel Ltd., (alleging the respondents violated customer privacy by monitoring their movements 24-7, which it documented on huge servers and sold this information to third parties).

<sup>41</sup> ClassAct (Ja) 53030-05-16 Elad Daniel N. Fox – Wiesel Ltd., (claiming violations of the Right to Work While Sitting and Appropriate Conditions 2007's law, since the company did not provide its employees with an appropriate seat while working). For additional information on class action suits that were financed by the Fund, see 2018 Annual Fund Activity Report, *supra* note 28.

<sup>42</sup> Eli Bukspan & Asa Kasher, *Human Rights in the Private Sphere: Corporations First*, 40(2) U. PA. J. INT'L L. 419 (2019); DANIEL FRIEDMANN & DAPHNE BARAK-EREZ, *HUMAN RIGHTS IN PRIVATE LAW* (2001).

<sup>43</sup> For a discussion about the relationship between class actions, big corporations, and structural reform, see Owen M. Fiss, *The Supreme Court 1978 Term. Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979); OWEN FISS, *THE LAW AS IT COULD BE* 122–32 (2003); LEORA BILSKY, *THE HOLOCAUST, CORPORATIONS, AND THE LAW* 51–54 (2017).

<sup>44</sup> For a review of different aspects related to the balance and reciprocity between public and private enforcement, see REGULATION VS. LITIGATION – PERSPECTIVES FROM ECONOMICS AND LAW (Daniel P. Kessler ed., University of Chicago Press, 2011) – see especially Richard A. Posner, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*, at p. 11. See William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2151 (2004) (expanding the fact that private enforcement mechanisms, including the class action mechanism, intends to complement traditional law enforcement mechanisms used in public enforcement); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 112 (claiming that public enforcement suffers from rigidity and ineffectiveness – in contrast to private enforcement, which is flexible); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). On the other hand, there are those who claim that

speaking, share the definition and goals of regulation, in the current era of the “regulatory state.”<sup>45</sup> This is particularly appropriate with respect to the class action process, which can be viewed as the “missing link” in the encounter between private and public law, particularly due to the nature of the defendants, and the substance of the matters currently being adjudicated. Article 3 of the Israeli Class Action Law prohibits the use of class action law suits against state authorities and regulators that fail to use their power to monitor, regulate, or enforce their authority. Thus, class action lawsuits not only serve as an additional and effective mechanism to protect the rights of a large number of victims – even when the government fails to do so – its most widespread use, at least in Israel, is against corporations.<sup>46</sup> This observation reflects corporations’ growing public standing and their ability to impact upon socially significant rights. In other words, the increase of corporate status and influence in the modern era, which explains their expansive presence as defendants in class actions, invites an up-to-date discussion of the social and public aspects inherent in the class action procedure and its expressions in business law. This chapter, therefore, intends to substantiate the argument that in the current era, in which the business sector’s public responsibilities are becoming solidified, including the protection of individual human rights, the Class Action Law and the Public Fund to Finance Class Action Lawsuits with Public and Social Importance, is an appropriate and efficient regulatory tool for the private enforcement of public, social, and economic interests and will assist in the battle against the significant challenges facing modern corporate law.

#### 26.4.1 *Class Action Lawsuit: a Legal Tool for Implementing Social Change*

Although the class action lawsuit is rooted in the world of procedural law, its central purpose, as set out in Section 1 of the Law, is to act “to improve the protection of rights” and to bring about realization of significant social and legal norms. To illustrate this issue in a picturesque manner, imagine class action lawsuits as a legal “demonstration” in which the public’s voice is heard and has the strength and the power of legal mechanism on its side. As such, the class action has potential to effect profound social change and processes as is notable in a variety of examples of uses of the Class Action Law in Israel, and from the American experience with its class action law, which served as an inspiration for the Israeli arrangement. Thus, the use of the class action lawsuit as a tool for social change is not a stranger to American law, even though there has been some pushback in recent years.<sup>47</sup> There are those who claim it was behind the 1966 sweeping amendment to Regulation 23 of

the increased use of private enforcement will flood court with unjustified suits. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). An additional claim preferring public enforcement over private enforcement, relates to those instances that the person breaking the law cannot be identified due to informative costs, see, e.g., A. M. Polinski, S. Shavell, *The Economic Theory of Public Enforcement of Law* 38 JOURNAL OF ECONOMIC LITERATURE 45 (2000).

<sup>45</sup> David Levi-Faur, *The Odyssey of the Regulatory State: From a ‘Thin’ Monomorphic Concept to a ‘Thick’ and Polymorphic Concept*, 35 L. & POL. 29 (2013). See THE OXFORD HANDBOOK OF REGULATION (Robert Baldwin, Martin Cave, & Martin Lodge eds., 2010) (discussing the regulatory state).

<sup>46</sup> A study on the types of defendants based on analysis of 2,056 class action actions from April 2006 to August 2012 – according to the first named defendant in the case – found that in most cases the defendant was a corporation. In 55 percent of the cases the defendant was a private company that was not traded on the stock exchange and in 25 percent of the cases, the defendant was a public company that was traded on the stock exchange. See Alon Klement & Keren Weinsahl-Margel, *Cost Benefit Analysis of Class Action: an Israeli Perspective*, 172 J. INST. & THEORETICAL ECONOMICS 75 (2016); David Rosenberg, *Decoupling Deterrence and Compensation Functions In Mass Tort Class Actions For Future Loss*, 88 VA. L. REV. 1871 (2002); Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939 (2011).

<sup>47</sup> Rule 23(b)(2) of the Federal Rules of Civil Procedure enables a declaratory and injunction, remedies that also fit constitutional breaches: Alon Klement & Robert H. Klonoff, *Class Actions in the U.S. and Israel: A Comparative Approach*, 19(1) TIL 151 (2018).

the Federal Rules of Procedure; which was a result of the social changes that took place in the US, particularly the civil rights movement and the collective power of the group,<sup>48</sup> leading to the crystallization of procedural measures required for the effective enforcement of the rights of groups who previously could not exercise their rights in the US legal system as individuals.<sup>49</sup>

It is no wonder then, and as argued by Abram Chayes in his iconic article on public law litigation,<sup>50</sup> that the class action can serve as a clear example of the potential of civil litigation to promote public reform to influence social and group issues. This observation demonstrates the ability of the adversarial process to advance social reforms of the highest order,<sup>51</sup> acting to acuminate the practice of federal courts in the United States on central issues on the public agenda.

A clear example of the social potential inherent in this mechanism is *Brown v. the Board of Education*, which interestingly began as a class action lawsuit.<sup>52</sup> This memorable and important case reached by the Supreme Court in the United States and led to a dramatic constitutional change in the “separate but equal” segregation in public education policy in the 1950s, when the US Supreme Court ruled that this doctrine violates the right to equality under the 14th Amendment to the US Constitution.

Another example is significant US case law in the field of social class action lawsuits focused on reparation of Holocaust survivors and the petitions filed against the ban against abortion.<sup>53</sup> The first claims were discussed in Liora Bilski’s book *The Holocaust, Corporations, and the Law*,<sup>54</sup> in which the author analyzes transnational Holocaust litigation – class action suits filed against Swiss banks and German companies to claim restitution from Nazi war crimes and which were brought in the 1990s in US federal courts and ultimately were settled for significant financial compensation without the defendants formally assuming legal responsibility. Even though these cases ended in unprecedented settlements, albeit without declaring the defendants’ legal culpability, Bilski claims that the public, social, and historical importance of these claims cannot be overlooked. Both of these examples are interesting in the Israeli context, since class action lawsuits in Israel developed to a large extent using American law as a benchmark. Both examples also fit the social backdrop of Israeli Law as can be inferred from its provisions granting public organizations and state authorities the authority to initiate class action suits; the type of causes of action for which a request to approve a class action can be filed and that usually

<sup>48</sup> DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 12 (2000); John P. Frank, Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee (Dec. 20, 1996), in Administrative Office of the U.S. Courts, 2 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23 266 (1997).

<sup>49</sup> Barak Atiram, *From Brown to Rule 23: The Rise and Fall of the Social Reform Class Action*, 37 REV. LIT. 47 (2018), Barak Atiram, *Socially Driven Class Actions: The Legacy of Briggs*, 23 TEX. J. CIV. LIBERTIES & CIVIL RTS. 1 (2017).

<sup>50</sup> Abram Chayes *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976) (“The class suit is a reflection of our growing awareness that a host of important public and private interactions – perhaps the most important in defining the conditions and opportunities of life for most people – are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects.”).

<sup>51</sup> Lesley K. McAllister, Revisiting a “Promising Institution”: Public Law Litigation in the Civil Law World, 24 GA. ST. U. L. REV. (2012) 694; Neal Milner, *The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups*, 8 L. & POL’Y 105 (1986); Bryant Garth, *Introduction: Toward a Sociology of the Class Action*, 57 IND. L.J. 371 (1982); P. A. Paul-Shaheen & H. Perlstadt, *Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases*, 57 IND. L.J. 385 (1982).

<sup>52</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>53</sup> *Roe v. Wade*, 410 U.S. 113 (1973); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

<sup>54</sup> LEORA BILSKY, *THE HOLOCAUST, CORPORATIONS, AND THE LAW* (2017).

represent corporate stakeholders' interests; and above all the public fund that helps finance submission and hearing of petitions for the approval of class actions of public and social importance.

Class action lawsuits are private proceedings, alongside the public proceedings submitted to administrative courts (and the High Court of Justice in Israel), that can disseminate, ingrain, and enforce important public norms, including norms that are designed to protect against the violation of individual human rights. Still, today as we witness the increasing harm to public norms by the business sector, which cannot be sued in public proceedings in the High Court of Justice or before the administrative courts, class action lawsuits have become more significant than ever and in some sense are returning to their historical roots – that is, the protection of important social rights. Accordingly, the public fund, which was created to assist class action lawsuits of public and social importance, emphasizes and accelerates this trend.

#### 26.4.2 *Class Actions, Corporate Responsibility, and Human Rights in the Business Sector*

Over the past few decades, discourse on corporate social responsibility has increased, including corporations' commitment to individual human rights.<sup>55</sup> Today, corporate actions extend far beyond corporations themselves and raise the question of corporate responsibility and their pledge to broader public considerations – and not just profit.<sup>56</sup> Today, and certainly after 2011, the year of worldwide social protests (e.g., Occupy Wall Street), it is clearer than ever that the business sector's impact has become significantly stronger, sometimes no less than that of the government's. In this context, Professor Aharon Barak, former president of Israel's Supreme Court and then a justice, wrote, "in modern society, the corporation is the main basis of human activity. There are countries that have more corporations than people."<sup>57</sup> In light of this phenomenon, it appears that class action law suits, as a "legal protest," and the Public Class Action Fund, embody the commercial sector's increasing social and public responsibilities and bolster the enforcement of public and social norms on the business sector. This approach is also consistent with the growing discourse on the applicability of human rights to the private sphere and to nonstate entities, a subject that has gained increasing significance in domestic, comparative, and international law.

Accordingly, the social and legal potential inherent in class action lawsuits, which mainly reflects the interests of corporate stakeholders, is related to, and even appears to be derived from, the growing strength of the commercial sector, on the one hand, and to the decline in the dominance of the state's traditional social, economic, and legal framework on the other. A comparison of the economic power of large corporations with the economic strength of countries reveals that corporations now account for approximately two-thirds of world trade in goods and services; 51 of the world's 100 largest economic bodies are corporations; the world's 200 largest corporations produce 27.5 percent of the world's gross domestic product, and their

<sup>55</sup> ERIC DE BRABANDERE & MARYS HAZELZET, *CORPORATE RESPONSIBILITY AND HUMAN RIGHTS NAVIGATING BETWEEN INTERNATIONAL, DOMESTIC AND SELF-REGULATION* 6 (2017).

<sup>56</sup> Bukspan & Kasher, *supra* note 42. For an update and modern expression of this evolution, see the Business Roundtable principles on the role of a corporation from August 2019 see: <https://opportunity.businessroundtable.org/ourcommitment/>, and Alan Murray *America's CEOs Seek a New Purpose for the Corporation* Fortune Magazine (Sep., 2019) ("... On August 19, the BRT announced a new purpose for the corporation and tossed the old one into the dustbin. The New Statement is 300 words long, and shareholders aren't mentioned until word 250... Before that, the group refers to creating 'value for customers', 'investing in employees,' fostering 'diversity and inclusion,' 'dealing fairly and ethically with suppliers,' 'supporting the communities in which we work,' and 'protect[ing] the environment"). See also: Ronald Cohen, *Impact: Reshaping Capitalism to Drive Real Change* (2020).

<sup>57</sup> See CrA 3027/90 Modi'im Construction and Development Company Ltd. v. State of Israel, P.D. 45 (4) 364, 384.

annual income is greater than that of 182 countries, in which 82 percent of the world's population lives.<sup>58</sup>

This economic power translates into considerable social, environmental, political, and cultural power, both internationally and at the state level. Moreover, corporations' diverse activities in a wide variety of fields have led to the conclusion that modern society's ability to flourish depends to a great extent on the commercial sphere surrounding. Today most human interactions are based on corporate activities. Accordingly, it is impossible to overstate the power and influence of the commercial sector on human rights, and as an extension, concern regarding corporate violations of human rights is as undeniable and significant today as was the violation by government authorities in the past. This applies not only to serious violations of "classic" human rights, such as slavery or deplorable work conditions, but also to issues such as privacy, mental and economic welfare, and gender equality in employment. This chapter proposes, therefore, that the class action procedure, and the public fund to finance class actions lawsuits with public and social importance, can provide an effective restraint against the increasing power of corporations all the while enforcing public norms in the private sector. This point is evident when we acknowledge that most class action defendants in Israel are corporations and are sued, *inter alia*, for violating consumer protection, insurance, banking, antitrust, environmental, and labor laws; as well as antidiscrimination, including workplace discrimination and discrimination against people with disabilities.<sup>59</sup> These issues relate to stakeholders, and less to stockholders, similar to the new declaration of the Business Roundtable,<sup>60</sup> and as such focus on protecting those interests identified with social responsibility and not just the commercial functioning of corporations.<sup>61</sup> For this reason, and as time passes, there are many more examples of the law's "interest" in corporations, including their obligation to respect human rights.<sup>62</sup> This interest, in turn, creates new economic considerations and market, as well as legal, forces that encourage promoting social issues, including upholding human rights in order to minimize legal and public exposure and indirectly contribute to a beneficial business strategy.<sup>63</sup> This approach, which legally subordinates the commercial sector to public norms and human rights in Israel, has developed alongside growing international discourse in the Western world. This discourse is evident in present initiatives by various international organizations that invest great means to develop ways to apply public law norms to the commercial sector, in particular initiatives such as Professor

<sup>58</sup> Ronen Shamir, *Private Market and Public Pressure: Designing the Corporate Social Responsibility Concept*, in *GENERATIONS, SPACES, IDENTITIES: CONTEMPORARY PERSPECTIVES ON ISRAELI SOCIETY AND CULTURE* 237–39 (Hana Hertzogm Tali Kochavi & Shimsjon Zelinkor eds., 2007).

<sup>59</sup> The Israeli law books contain many laws targeting social and environmental challenges that apply to daily corporate conduct.

<sup>60</sup> *Supra* note 56.

<sup>61</sup> Indeed, most of the class action suits are initiated because of the plaintiff's personal interests; however this and of itself is not sufficient to detract from the public's interests in the claim. The prosecutor of the class action acts as a type of catalyst that, without her initiative, the case would not be brought before court and the various public goals underlying this instrument would not be fulfilled. In order to counter balance the plaintiff's pure self-interest and self-enrichment, which may impair the nature of the proceedings, the mechanism imposes legal expenses on the party losing the case and imposes court fees to file the claim and which should deter the prosecutor's inappropriate and excessive use of the mechanism.

<sup>62</sup> Bukspan & Kasher, *supra* note 42; Ofer Sitbon, *About People, Corporations, and What Is in Between – whether the Basic Law: Human Dignity and Liberty should Apply to Corporations*, 8 *KIRYAT HAMISHPAT* 107, 131–37 (2009) [in Hebrew]; John G. Ruggie & Nelson Tamaryn, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges*, 66 *Corporate Social Responsibility Initiative Working Paper*, Cambridge, MA: John F. Kennedy School of Government, Harvard University 1, 2–6 (2015), available at [www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper.66.oecd.pdf](http://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper.66.oecd.pdf).

<sup>63</sup> Eric De Brabandere & Marys Hazelzet, *Addressing Human Rights in Business – Executive Perspectives*, KPMG International Cooperative 6 n.9 (Dec. 2016), available at <https://home.kpmg/content/dam/kpmg/xx/pdf/2016/11/addressing-human-rights-in-business.pdf>.

Ruggie’s “Protect, Respect, Remedy” which was adopted by the United Nations in 2011 in its groundbreaking guidelines, “Guiding Principles on Business and Human Rights.”<sup>64</sup> This document includes three tenets: (1) states’ obligations to protect human rights; (2) corporations’ obligations to respect human rights; (3) states’ and corporations’ joint obligations to provide legal remedies for human rights’ violations – an obligation that is relevant to all states and all corporations regardless if they are national or international; their size; the sector they operate in; their owner; or their type of incorporation. Furthermore, the UN Committee on Human Rights has adopted these guidelines, and in fact, this was the first time that a UN Committee has adopted principles without conducting negotiations with its member states.<sup>65</sup> More than that, the Committee established a working group on the issue of human rights and transnational corporations and other business enterprises; the main objective of the working group is to promote the guidelines.<sup>66</sup> Today these guidelines are recognized as the global standard for business and human rights,<sup>67</sup> and while there is no legal mechanism to enforce these standards against states or corporations, they bolster the states’ expected response to the commercial sector due to the latter’s public and social influence, and of the search for a new conceptual framework to implement existing legislation in this important area.

This chapter, while discussing class actions, is in line with the UN guidelines that call upon states to provide legal protection, particularly access to legal “remedies,” against the business sector’s violation of human rights. This article reasons that class action lawsuits – and the Public Class Actions Fund – not only assists states in protecting human rights violations by the business sector, it also mainly improves access to remedies when these violations occur, and indirectly pushes corporations to uphold and respect human rights.

In other words, the Guidelines focus on substantive, legal, and practical issues that impact upon the effectiveness of judicial mechanisms to achieve corporate accountability and the public’s access to a remedy (the third pillar of the Guiding Principles) in business-related human rights abuses. According to this framework, the class action procedure and the Public Class Action Fund are especially consistent with this goal and with the United Nations High Commissioner for Human Rights mission that launched the “Accountability and Remedy Project,” promoting a more effective implementation of the Guiding Principles on Business and Human Rights.

## 26.5 CONCLUSION

In sum, in the growing interwoven, complex commercial and social world – and which is continually undergoing substantive social, economic, and legal changes – class actions could be the most significant and effective legal instrument to “power the masses.” Class action lawsuits enable individuals to claim corporate responsibility by cooperating with others who have similarly been wronged by the same offender and together collectivize their lesser potential into a much more powerful mass, and in this manner protect their rights without solely relying on the regulator.

<sup>64</sup> United Nations Human Rights, Office of the High Commission, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011), available at [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>65</sup> Ruggie & Nelson, *supra* note 62.

<sup>66</sup> Overview of the Working Group on the issue of human rights and transnational corporations and other business enterprises, available at [www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx).

<sup>67</sup> Ruggie & Nelson, *supra* note 62, at 5; see also John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011) (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), available at <https://journals.sagepub.com/doi/abs/10.1177/016934411102900206>.

This approach is consistent with the public approach to the class action mechanism,<sup>68</sup> according to which the main justification for the class action lies in its ability to effectively enforce the provisions of the law that are intended to promote social values and goals.

As long as the business sector – the most common defendant in class action lawsuits in Israel – is forced to answer claims, especially those that have been financed by the Public Fund, and the Public Fund continues to enjoy strong public support and recognition, it is likely that corporations will continue to respond favorably to this pressure and act more responsibly. In this sense, the Fund not only has financial significance, it also has deterrent powers. The more the state continues to support the Fund (by at least ensuring the existing budget, if not increasing it), it will continue to assist plaintiffs to access justice to assert their rights, without needing to turn to an external regulator. No doubt that this not only empowers an individual to protect her rights, it can also help reduce the need for direct intervention of market regulators in the business sector.

The recruiting of the class action for these purposes is consistent with modern in-depth changes in substantive and procedural private law, as well as with the social and public importance implicit in the class action lawsuit, and which in fact accompanied it in its early stages in the US. In this regard, and especially with the impact of social media, class actions can contribute to social reform even when they conclude without a judgment, for example through a settlement.

Insights laid out in this chapter are based on the US history of class action suits, but more than this on the modern innovative and almost precedential body of the Israeli Public Class Action Fund that distinguishes the Class Action Law in Israel from class action laws in other countries. This public fund serves as a hybrid mechanism that uses state budget and representatives of the various regulators who are responsible for areas that class actions are frequently filed, in order to assist private enforcement by financing applications for approval as class actions with “public and social importance in their submission and clarification.” The chapter suggests that the Fund’s mandate and objectives, composition, and decisions, make it a unique and innovative tool to treat social and legal transgressions in the modern corporate era. As such, it claims that the Israeli Public Fund could assist in creating a new discourse, which has international merit, on a new mechanism that can sophisticatedly influence and regulate corporations’ violations of rights, including human rights, and facilitates legal remedies for corporate wrongdoings as inspired by the 2011 UN Guiding Principles on Business and Human Rights.

On a personal level, after years of research and teaching in the fields of contract law, corporate law, and corporate social and ethical responsibility, a responsibility that challenges a whole range of substantive and procedural law, and after ten years of familiarity with the activities of the Israeli Public Class Action Fund, I believe that the Fund demonstrates an interesting example of the relationship between private and public law, as well as an innovative mechanism cooperating between and combining public enforcement and private enforcement,<sup>69</sup> one that can significantly improve the growing and challenging interrelationship between corporations and society. Coincidentally, in Hebrew, the word “company” (“חברה”) and “society” (“חברה”) is the same word. This linguistic coincidence may just say it all . . .

<sup>68</sup> Martin H. Redish & Clifford W. Berlow, *The Class Action As Political Theory*, 85 WASH. U. L. REV. 753, 797 (2007); John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003); Owen Fiss, *The Political Theory of the Class Action*, in *THE LAW AS IT COULD BE* 122 (2003).

<sup>69</sup> See, text to *supra* notes 44–46.

