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COURTS AS ORGANIZATIONS: THE DRIVE FOR EFFICIENCY AND THE REGULATION OF CLASS ACTION SETTLEMENTS

Orna Rabinovich-Einy* & Yair Sagy**

ABSTRACT

This Article argues that legal scholarship in recent decades is sharply divided on the role of efficiency considerations in the operation of courts. One camp has highlighted the dangers of injecting a bureaucratic-managerial ethos into the halls of justice, arguing that efficiency considerations undermine the quality of judicial performance. The other camp has promoted systemic efficiency as a necessary precondition for the healthy functioning of the judiciary in the face of heavy backlogs and high costs. To a large extent the second camp has prevailed, as managerial judging, settlement-encouragement, and fast-track justice have become the norm. This Article uncovers some of the implications of these developments, as well as possible means for curbing the drive for efficiency, by drawing on organizational theory literature. Insights from organizational theory can help us move beyond a dichotomous, one-dimensional debate over efficiency toward a multi-dimensional understanding of the conditions under which efficiency can play a necessary, but not exclusive, role in the operation of courts. The Article explores these issues through an empirical examination of judicial oversight on class action settlements in Israel.

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INTRODUCTION

Legal scholarship in recent decades is sharply divided on the role of efficiency considerations in the operation of courts. One camp has highlighted the dangers of injecting a bureaucratic-managerial ethos into the halls of justice, arguing that efficiency considerations undermine the quality of judicial performance.[1] The other camp has promoted systemic efficiency as a necessary precondition for the healthy functioning of the judiciary in the face of heavy backlogs and high costs.[2] To a large extent, the second camp has prevailed, as managerial judging, settlement-encouragement, and fast-track justice have become the norm.[3] This Article uncovers some of the implications of these developments, as well as possible means for curbing the drive for efficiency, by drawing on organizational theory literature.

While some writing has recognized the relevance of such literature, courts'

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1. See Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. (1982) [hereinafter Resnik, *Managerial Judges*]; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129 (2009); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) [hereinafter Galanter, *The Day After*]. It is important to note that many proponents of Alternative Dispute Resolution (ADR) cannot be placed in the "pro-efficiency" camp. See Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal,' in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419 (Felix Steffek et al. eds., 2013) [hereinafter Menkel-Meadow, *Regulation of Dispute Resolution*] (offering a non-exhaustive list of both qualitative and quantitative measures for evaluating the success of dispute resolution systems and stating that such "list, whether exhaustive or not, cannot quantify, combine or 'equalise' measures of 'justice' with measures of 'efficiency' . . . ").

2. Warren E. Burger, *Agenda for 2000 A.D.–A Need for Systematic Anticipation*, 70 F.R.D. 79 (1976) [hereinafter Burger, *Agenda for 2000 A.D.*]; Wayne D. Brazil, *Case Management: The Panacea Has Its Side Effects*, 24 JUDGES J. 32 (1985); Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970); Robert H. Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss, Against Settlement*, 78 FORDHAM L. REV. 1171 (2009); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Larry Kramer, *"The One-Eyed Are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 73 (1991); Nathan Glazer, *Towards an Imperial Judiciary*, 41 PUB. INT. 104 (1975).

3. *See infra* Part II. A. - C.

organizational features have mostly gone unnoticed.[4] Organizational theory tells us that efficiency is an inherent part of the lives of organizations, but organizational models vary in their approach to efficiency, the means for attaining it, and the degree to which it is embedded in organizational structures. Insights from organizational theory can therefore help us move beyond a dichotomous, one-dimensional debate over efficiency—are efficiency-inducing measures "good" or "bad" for courts?—towards a multi-dimensional understanding of the conditions under which efficiency can play a necessary, but not exclusive, role in the operation of courts.

We single out three models within the organizational literature, which provide important insights on the limitations of the current debate on efficiency as well as on the possibilities for broadening the scope of the discussion. We show that the enthusiastic adoption of efficiency considerations by some jurists (and policy makers) comports with a somewhat dated organizational approach that can be termed the "rational" model of organizations. Under such approach, efficiency is embedded in the very fabric of bureaucratic organizations, courts included. This model was fiercely critiqued due to its failure to capture the complexities of organizational reality, and, among other things, its simplistic vision of the means for attaining efficiency.

Later organizational approaches, which we group under the headings of "relational" and "cognitive" models, lay the foundation for a more nuanced understanding of organizations as platforms for human interaction. Under such approaches, the attainment of efficiency in the organizational setting, as well as other organizational goals is a product of a complex web of social dynamics, personal motivations, and cognitive processes.

This Article explores the contribution of organizational theory to the understanding of the deep impact of efficiency on the operation of courts through an empirical examination of judicial oversight on class action

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4. *See* Salmon A. Shomade & Roger E. Hartley, *The Application of Network Analysis to the Study of Trial Courts*, 31 JUS. SYS. J. 144 (2010) (noting that "several studies of the organization of trial courts were performed in the 1970s, 1980s, and early 1990s . . . but there has been less attention since."); *see also, e.g.*, David J. Saari, *Modern Court Management: Trends in Court Organization Concepts–1976*, 2 JUST. SYS. J. 19 (1976-1977); Lawrence B. Mohr, *Organizations, Decisions, and Courts*, 10 LAW & SOC. REV. 621, 622 (1976) (noting in 1976 "recently, there has been something of a movement to understand courts as 'organizations' . . . "); Wolf V. Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 LAW & SOC. REV. 759 (1977); Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC. REV. 407 (1973). For recent exceptions, *see, e.g.*, Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACH 1-12 (Cornell W. Clayton & Howard Gillman eds., 1999); JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS (2002).

settlements in Israel. Our research presents pioneering empirical data on the judicial approval process of class action settlement proposals from the enactment of the Israeli Class Action Law (CAL or the "Law") in 2006 through 2013.

We chose this case study for several reasons.[5] First, it exemplifies how deep the drive for efficiency has become, coloring judicial activity even where judges have been explicitly instructed otherwise. The context of class action settlement oversight is a unique setting in which the legislature explicitly tried to subject efficiency considerations to other competing goals and values, but—as we reveal in this Article—failed. Specifically, the pertinent Israeli legislation requires that certain quality control mechanisms be in place. While these mechanisms prolong the process, they are perceived as essential in order to produce fair settlements in light of the unique problems that color class action settlements—the agency problem[6] and the risk of frivolous litigation.[7] Despite such statutory dictates, our data clearly shows that judges ignore these legal requirements and prefer instead a fast-track for approving proposed settlements.

Second, the class action settlement context is a clear demonstration of courts as organizations. As this Article demonstrates, judicial conduct and motivation are driven by organizational dynamics, not only by the letter of the law. We draw on literature that deals with judges' motivation in deciding cases by arguing that judicial conduct in this case study stems from organizational forces and is neither based on judges' straightforward, professional application of the law, nor is it convincingly rooted in judges' pursuit of personal values, preferences, and choices.[8]

Last, our case study uncovers the limitations of the rational model of organizations, which undergirds the abovementioned legal debate surrounding efficiency, in explaining the dynamics that shape judicial activity and the need for supplementary models. The relational and cognitive models go beyond the formal rules, which under the rational model are believed to guide the conduct of judges, and take into account additional factors in deciphering patterns of judicial decision-making, such as organizational culture, informal relations among organization members, incentives, and decision-making processes. By adopting a broad organizational perspective that transcends the rational model, we not only reveal the forces that render efficiency considerations in class action settlements central, but we also uncover possible conditions under which such tendencies can be mitigated.

The structure of the Article is as follows. Part I explores the dominance of

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5. *See also infra* text accompanying note 100 (explaining further the relevance of the test case to this Article's arguments).

6. *See infra* notes 104, 105, and 107.

7. *See infra* notes 106, 109.

8. For the literature on judges' motivations, *see infra* note 142 and accompanying text.

efficiency considerations in the workings of courts—its sources, characteristics, and critiques. We then establish our claim that courts are organizations, connecting between the main features of modern-day courts and organizational theory by drawing on three theoretical models—the rational, relational, and cognitive models of organizations. In Part II we turn to the context of class action settlements as a case study for an organizational analysis of courts in light of the failure of legislative attempts to subject efficiency to other competing goals and values. Next, in Part III, we draw on organizational theory to explain our empirical findings as well as illuminate the conditions under which the drive for efficiency may be mitigated. The Conclusion calls for further exploration of the role organizational theory can play in transcending the current debate over the role of efficiency consideration in the workings of the courts.

I. COURTS, EFFICIENCY, AND ORGANIZATIONAL MODELS

A. The Courts' Drive for Efficiency

In 1908, Roscoe Pound delivered a well-known speech at the annual convention of the American Bar Association.[9] His talk has since become synonymous with the need for reform in search of a more efficient and equitable justice system. The lecture had such a strong and lasting impact, that in 1976 a conference (the "Pound Conference") was held to discuss what Pound had termed seventy years earlier "The Causes of Popular Dissatisfaction with the Administration of Justice."[10] Speakers and attendees included hundreds of judges, lawyers, and law professors, all of whom discussed what they saw as sources of the dissatisfaction with the American judicial system and possible solutions to these problems.[11]

Major sources of dissatisfaction discussed at the Pound Conference were the heavy backlog, long waits, and high costs associated with the court

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9. Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, *in* WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2005), *available at* http://www.encyclopedia.com/doc/1G2-3437704909.html; *See also* the critical assessment of the following two eminent American jurists: Arthur T. Vanderbilt, *Improving the Administration of Justice–Two Decades of Development*, 26 U. CIN. L. REV. 155 (1957) (opening with the observation that "from every quarter come complaints as to the evil of delay in litigation."); Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043 (1958).

10. Pound, *supra* note 9; THE POUND CONFERENCE: PERSPECTIVE ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (Leo A. Levin & Russell R. Wheeler eds., 1979).

11. *See, e.g.*, Burger, *Agenda for 2000 A.D.*, *supra* note 2.

system.[12] These were attributed to the complex procedures and adversarial nature of litigation in the American justice system. These critiques were not new. Some had been raised by Pound himself seven decades earlier, but some were later voiced by other critics of the system, such as Jerome Frank. In the 1930s, Frank was one of the fiercest critics of the adversarial system, underscoring the ways in which it led to the distortion of the truth, providing incentives for parties and their lawyers to "fight" in order to "win," rather than allow the court to decide what it believed was true and fair. The system, by leaving the investigation of claims in the hands of the parties, was inherently imbalanced as wealthier parties could conduct lengthy and expensive investigations which would inevitably support their own story or weaken their counterpart's case.[13]

Over the years, the critiques against the adversarial system remained, but the discontent was overwhelmingly related to effectiveness in terms of costs and time spent in deciding claims, while the question of fairness received secondary attention (although critiques of the system's inequities obviously remained).[14]

In the 1970s, the questions of time- and cost-efficiency became more acute as the mix of civil cases changed and the caseload in federal courts increased disproportionately.[15] Thus, the need for more efficient procedures became *the* theme of the Pound Conference, and reform proposals seeking to streamline litigation and divert disputes to alternative forums were presented. One such proposal, raised by Frank Sander, related to what he termed the "Multi-door Courthouse."[16] Sander questioned the common view of court processes as "one size fits all." Instead, he offered a contextual approach under which the court

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12. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 95 (1983).

13. JEROME FRANK, COURTS ON TRIAL 80-102 (1949).

14. Marc Galanter's seminal article from the 1970s is one such example, exposing the structural biases that made courts a more favorable arena to "repeat players"—typically the "haves." These biases were a result of certain features of the court system, namely: the precedent system, the backlog, the complexity and costs of the court system, and the characteristics of the attorney bar at the time of the article. Since ADR systems were, at least in theory, supposed to operate on a case-by-case basis (with no precedents), and were touted as simple, quick, and inexpensive processes for which legal representation was often unnecessary, they were expected to be free of these biases. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

15. Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives and Accommodation: Background Paper*, DUKE L.J. 824, 838 (1989). *But see* Galanter, *The Day After*, *supra* note 1 (viewing skeptically the figures on the so-called litigation explosion and its implications).

16. Frank E.A. Sander, *Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 111 (1976).

would serve as a gateway for various disputes from which the claims would be referred to one of several processes according to the nature of the dispute and other relevant considerations.[17]

While Sander's approach was premised on a view that a multi-door courthouse scheme would allow the justice system to devise qualitatively better procedures and outcomes by preserving ongoing relationships or to devise more creative resolutions, it also resonated with those seeking to adopt ADR processes for efficiency-related reasons. Indeed, a central strand in the call for adoption of ADR (and what later became the ADR movement) was related to the added efficiency such processes were expected to afford the legal system.[18] ADR processes involved simpler proceedings and as such were supposed to be quicker and require less (or no) legal assistance. Therefore, institutionalization of ADR in the courts promised to both reduce the courts' caseload as a result of the diversion of claims to ADR and to deliver resolutions or decisions more quickly and for lower costs than the time and costs associated with court litigation of such claims.

Sander's vision materialized as courts across the U.S. adopted ADR schemes, mostly involving court-annexed mediation programs.[19] These pilots and sporadic schemes that emerged in the 1970s and 1980s became a widespread phenomenon as of the 1990s with the enactment of the Civil Justice Reform Act of 1990 and the Dispute Resolution Act of 1998.[20] Despite the diverse rationales for the adoption of ADR—the search for more satisfying processes that could produce diverse remedies, the quest for individual and group empowerment through dispute resolution tools, and the desire to resolve disputes efficiently—efficiency became the leading paradigm for referral to ADR and for the evaluation of such programs, which were measured according to case closure rates and number of resolutions reached.[21] Court administrators and judges actively promoted the use of ADR, in certain cases "twisting [parties'] arms" to consent to ADR.[22] At a certain point, some ADR schemes

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17. *Id.* at 83-84. This approach was developed by Sander further as he advocated "fitting the forum to the fuss," analyzing the connection between dispute variants and procedural attributes. *See also* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

18. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170, 174 (2003).

19. Menkel-Meadow, *Regulation of Dispute Resolution*, *supra* note 1, at 435.

20. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609 (2005).

21. For a critique of this approach, see Francis E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, 3 DISP. RESOL. MAG. 12 (1996-1997).

22. This is a reference to Hazel Genn's report on the adoption of mediation in court settings in the U.K. *See* HAZEL GENN ET AL., TWISTING ARMS: COURT REFERRED AND COURT-LINKED MEDIATION UNDER JUDICIAL PRESSURE (2007), *available at* https://www.ucl.ac.uk/laws/judicial-

shifted from a consensual model to one in which participation in ADR was mandatory in the hope of expanding use of ADR,[23] despite inconclusive empirical data on such processes' success in efficiency (and other) terms.[24] These developments have raised serious concern within the ADR community over the integrity and quality of ADR processes delivered under the auspices of the court system, bemoaning what has seemed like the coopting of ADR by the formal legal system.[25] Empirical research uncovered a reality in which the various goals of ADR processes other than efficiency, such as party empowerment, voice, and creative resolutions, have rarely been realized.[26]

The eager adoption of ADR in courts has led to the erosion of the formal-informal distinction over the years, and much of what transpires in courts has become "semi-formal,"[27] with efficiency being the primary driving force for settlement-encouragement and the adoption of expedited flexible procedures both within and outside the litigation route.

How have these developments affected the functioning of judges within the court setting? It appears that the legal arena's attempts to cope with a growing caseload and rising costs, as well as a docket increasingly comprised of large scale complex litigation, generated a new set of practices by judges in the late 20th century that were aimed at streamlining the litigation process. In those years, judges' perception of their role shifted from that of passive and detached neutrals to activist "managers" of the process, awarding them the *critical* title of "managerial judges" coined by Judith Resnik.[28] While initially such procedural activism found expression in the exercise of new authority in the preliminary stages of trial and in their attempts to render the process more efficient, both by promoting settlement and in their interpretation of various procedural rules,[29] later on these methods colored the entire spectrum of judicial activity, including the trial stage.[30]

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institute/files/Twisting_arms_mediation_report_Genn_et_al_1.pdf.

23. Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 79-89 (2007).

24. Carrie Menkel-Meadow & Bryant G. Garth, Civil Procedure and Courts, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 679-704 (Peter Cane & Herbert M. Kritzer eds., 2010).

25. *See* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted of "The Law of ADR"*, 19 FLA.ST. U. L. REV. 1 (1991) (describing the problems associated with court-annexed mediation programs).

26. *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 412-16 (2004-05) (questioning whether court-connected civil mediation fulfills its goals of substantive, procedural, and efficient justice).

27. Menkel-Meadow, *Regulation of Dispute Resolution*, *supra* note 1.

28. Resnik, *Managerial Judges*, *supra* note 1.

29. *Id.*

30. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV.

Managerial judges' practices vary, but what unites them is the rhetoric that says that the current procedural methods established by law do not work and need to be altered, and that the way to do that is through judicial procedural activism.[31] Critics of managerial judging have claimed that such activism bars the parties from raising substantive claims, as in many cases such practices shelter judges from supervision and intervention on appeal.[32] As the phenomenon of judicial settlement conferences expanded, the debate over the appropriateness of such measures, and the dangers associated with them – mainly their inconsistent application by different judges and the impossibility of review on appeal – have become commonplace.[33] Nevertheless, such practices have, to a large extent, become an accepted part of the contemporary judicial landscape,[34] as judges are explicitly instructed under law and informally incentivized to adopt a managerial stance and encourage settlement.[35]

In terms of the trial stage, Elizabeth Thornburg has shown how judicial decisions made during the course of the trial over such matters as consolidation or bifurcation, *voir dire*, or time for presenting case, number of witnesses, and the requirement to submit written statements in lieu of oral testimony, are often driven by managerial, rather than substantive, concerns.[36] As such, they are applied inconsistently across cases,[37] are subject to individual judges' perception of the significance of the matter at hand,[38] compromise judicial neutrality,[39] are not accompanied by a reasoned decision,[40] are often undocumented,[41] and are not subject to review on appeal.[42] Trials and judicial decisions have become the exception with the "vanishing trial" phenomenon becoming the norm.

Interestingly, the dominance of the efficiency paradigm in court procedures and judicial performance in recent decades is not a local U.S. phenomenon. Similar accounts can be told of other common law jurisdictions–notably, of the

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1261 (2010).

31. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986); Thornburg, *supra* note 30, at 1294.

32. Thornburg, *supra* note 3030, at 1270.

33. Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891, 1892-98 (2006).

34. Donald, *supra* note 31, at 314; Thornburg, *supra* note 30, at 1319.

35. Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J. L. & POL'Y 83, 89, 93-94 (2009).

36. Thornburg, *supra* note 30, at 1296-98, 1301-07.

37. *Id.* at 1270, 1298, 1301-11.

38. *Id.* at 1307.

39. *Id.* at 1287.

40. *Id.* at 1292.

41. *Id.* at 1293.

42. *Id.* at 1270, 1311-15.

British,[43] Australian,[44] and Israeli[45] legal systems–as well as some continental legal systems, such as Germany and Spain, where surveys have shown a high level of discontent with the way in which courts are operating.[46] In all of these places we find rising concerns over heavy caseloads, judicial backlogs, and cumbersome and expensive court procedures, as well as the adoption of various ADR schemes and strong encouragement of judicial facilitation of settlement as possible means for enhancing the efficiency of court proceedings.

As evidenced from the critiques of both court and ADR proceedings, the eager advancement of efficiency often comes at a cost to other, competing procedural goals and values.[47] This is not to say that the quest for enhanced efficiency should be abandoned. Efficiency is obviously an important value and bears on other procedural values as well. Hence, for example, a more efficient system can increase access to justice, which assists parties belonging to disadvantaged social groups in bringing their cases to court, and therefore promotes equality. Furthermore, an efficient court system is one in which parties can actually enforce their rights, and therefore enhances legitimacy. Nevertheless, the focus on efficiency has tended to overshadow other important values, undercutting judicial oversight over, and commitment to, the realization of other competing values, notably, the fair, equitable, and just conclusion of disputes. In effect, efficiency has become *the* goal of judicial proceedings, rather than a means to an end.[48] In the following Section we situate the courts'

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43. Recently, the British Ministry of Justice addressed the issue of efficiency of its criminal justice system. *See* Ministry of Justice, *Making the Criminal Justice System More Efficient* (2013, last visited on January 20, 2016), ; Media Release, Cts. and Tribunals Judiciary, Review of efficiency of criminal proceedings announced, (March 14, 2014) (https://www.judiciary.gov.uk/announcements/review-of-efficiency-of-criminal-proceedings-announced).

44. *See* Afroza Begum, *Blending Fairness and Efficiency: An Analysis of Its Desirability in the Context of Insider Trading Laws in Australia*, 20 J. FIN. CRIME 203, 214 (2013) (stating that "the 'efficiency paradigm' reflects the values concerning IT and corporate litigation in Australia[]").

45. *See, e.g.*, Stephen Goldstein, *Fast Justice: A Comparative View*, 9 ALEY MISHPAT 19 (2001) (Hebrew).

46. HECTOR FIX-FIERRO, COURTS JUSTICE AND EFFICIENCY: A SOCIO-LEGAL STUDY OF ECONOMIC RATIONALITY IN ADJUDICATION 1-3 (2003).

47. Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J. L. & TECH. 1 (2008).

48. *See, e.g.*, Feeley, *supra* note 4, at 409 (arguing that "particularly in the administration of justice, the means become the end . . . ."); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 615 (1984-1985) (critiquing the over-emphasis on efficiency, and stating that "[e]conomy is not the sole purpose of a court system, nor is it the hallmark of court systems as contrasted with other forms of decision making. Coin flipping (or lotteries) would, after all, provide final and inexpensive solutions, but would also be an offensive mechanism by which to make many decisions in this society."). *See generally* Robert K. Merton, *Bureaucratic Structure and Personality*, 18 SOC. FORCES 560, 563-564 (1940).

drive for efficiency in the field of organizational studies, which can contribute to the understanding of the reasons and motivation for the courts' current *modus operandi*.

B. Courts as Organizations

Courts are organizations. Suffice it to note that courts form a longstanding structure ("the judiciary") devoted to a specific activity ("adjudication"), which is carried out by its various subdivisions (the different courts) following well-established schemes (civil and criminal procedure), to realize that courts possess dominant features of innumerable other organizations.[49] Hence, similar to the U.S. Steel Corp., the Red Cross, a corner grocery store, and the New York State Highway Department,[50] a given court system constitutes an organization.

Furthermore, courts are the kind of (formal) organizations whose ideal type is the bureaucracy.[51] As bureaucratic organizations, courts are "goal-directed"[52]

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49. The elaborate discussion *infra* notes 51-56 and accompanying text substantiates our claim that courts fall under established definitions of organizations. *But see* Heydebrand, *supra* note 4 (defining courts as "networks of organized activities . . . ." (emphasis omitted). It should be clarified that for the purpose of this Article, we view the various courts in the Israeli court system, taken as a whole, as forming an organization devoted to the adjudication of class (and similar) actions. *Compare* Feeley, *supra* note 4, at 407 (characterizing "the criminal justice system in the terms of the theory of large-scale organizations . . . ."), *with* Yair Sagy, *A New Look at Public Law Adjudication: A Critical Organizational Analysis & an Israeli Test Case*, J. TRANSNAT'L L. & POL'Y (forthcoming 2015) [hereinafter Sagy, *New Look at Public Law Adjudication*] (discussing further the question whether the Israeli judiciary is "an organization").

50. This list of bodies forming "organizations" is cited from the classic JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 20 (2d ed. 1995), whose two authors are among the leading lights of modern organizational theory; the latter even won the Noble Prize, *inter alia*, for his achievements in this field.

51. *See, e.g.*, Merton, *supra* note 48, at 560 (noting, following a detailed description of a formal organization, "[t]he ideal type of such formal organization is bureaucracy . . . ."). For ideal-type analysis, see ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 134-59 (1995); Susan J. Hekman, *Weber's Ideal Type: A Contemporary Reassessment*, 16 POLITY 119 (1983); Donald McIntosh, *The Objective Bases of Max Weber's Ideal Types*, 16 HIST. & THEORY 265 (1977). *See also* Richard H. Fallon Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 40-41 & 55-56 (1997); Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425, 430 (2011) [hereinafter Sagy, *Triptych of Regulators*].

52. RICHARD DAFT, ORGANIZATION THEORY AND DESIGN 10 (1995). *See also, e.g.*, Lawrence B. Mohr, *The Concept of Organizational Goal*, 67 AM. POL. SCI. REV. 470 (1973), and the sources cited *infra* note 54.

A separate issue concerns the question of defining courts' primary goals (e.g., dispute settlement and/or setting public policy). This contested issue obviously goes beyond the ken of this Article. For relevant discussions, *see, e.g.*, MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS ch. 1 (1981); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Henry P. Monaghan,

and strive for efficiency in the pursuit of their mission, "with a premium placed on precision, speed, expert control, continuity, discretion, and optimal returns on input."[53] Courts' bureaucratic-organizational nature is also revealed through their coordinated sub-unit composition and through their definitive hierarchical features.[54] Moreover, just like in any other organization, highly meaningful social, professional, and managerial interactions take place both within courts and vis-à-vis other organizations and institutions.[55] Likewise, as organizations, courts serve as a hub for the reception, processing, and delivery of information, and follow complex data analyses and decision-making processes.[56]

While courts' organizational features have been recognized by some legal scholars in the past, recent scholarship has tended to overlook the connection between courts' mode of operation and organizational theory, a relationship which can offer important normative and operational insights for the court

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Constitutional Adjudication: The Who and When, 82 YALE L.J. 1363 (1973); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975).

53. Merton, *supra* note 48, at 561. *See also* Feeley, *supra* note 4, at 408-10. *Cf.* Luther Gulick, *Science, Values and Public Administration*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION 191, 192-93 (Luther Gulick & Lyndall Urwick eds., 1937) (insisting that "[i]n the science of administration, whether public or private, the basic 'good' is efficiency," which is "the single ultimate test of value in administration.").

54. *See, e.g.*, Philip Selznick, *Foundations of the Theory of Organizations*, 13 AM. SOC. REV. 25 (1948); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 342–43, 353 (1977). *See also* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 331 (A. M. Henderson & Talcott Parsons trans., 1947) [hereinafter WEBER, SOCIAL AND ECONOMIC ORGANIZATION] ("The organization of offices follows the principle of hierarchy; that is, each lower office is under the control and supervision of a higher one.").

55. Innumerable studies have detailed the extent to which organizations' interface with external institutions and social relationships evolving within organizations bear heavily on their operation. *See, e.g.*, PHILIP SELZNICK, TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION 10-16, 147-149 (1966); Franziska Tschan et al., *Work Related and "Private" Social Interactions at Work*, 67 SOC. INDICATORS RES. 145, 145 (2004) ("Hardly anyone would doubt that social relationships are an important aspect of working life and can have far reaching consequences both for people in an organization and for the organization as a whole."). *See also, e.g.*, James G. March, *The Business Firm as a Political Coalition*, 24 J. POL. 662 (1962); John Maniha & Charles Perrow, *The Reluctant Organization and the Aggressive Environment*, 10 ADMIN. SCI. Q. 238 (1965); Jeffrey Pfeffer & Gerald Salancik, *Organizational Decision Making as a Political Process: The Case of University Budget*, 19 ADMIN. SCI. Q. 135 (1974); W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493, 501-09 (1987); Edgar H. Schein, *Organizational Culture*, 45 AM. PSYCHOLOGIST 109 (1990).

56. There is a vast body of literature studying organizations' data-analysis and decision-making processes. *See, e.g.*, RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM 118-119 (1963); HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 40-41, 240-44 (3d ed., 1976) [hereinafter SIMON, ADMINISTRATIVE BEHAVIOR]; Richard M. Cyert et al., *Observation of a Business Decision*, 29 J. BUS. 237 (1956); Kenneth J. Arrow, *Control in Large Organizations*, 10 MGMT. SCI. 397 (1964); David J. Hickson, *Decision-Making at the Top of the Organization*, 13 ANN. REV. SOC. 165 (1987).

setting.[57] We seek to reorient the literature in this direction,[58] focusing on the connection between organizations – particularly, bureaucratic organizations – and efficiency. As we shall see, for courts the drive for efficiency has for some time now been part of their organizational DNA. At the same time, we wish to emphasize and illustrate that, while traditional organizational scholarship viewed efficiency as its first article of faith, later approaches maintain a more complex approach towards the role efficiency can and does play in the workings of contemporary organizations, thereby offering significant lessons for the legal arena on the efficiency debate (as we demonstrate in the following Sections).

What does organizational theory literature tell us about the role of efficiency in the operation of organizations? According to the founding fathers of modern organizational theory, efficiency is the *sine qua non* feature of bureaucratic organizations. Max Weber, whose influence on the whole of organizational theory can hardly be overstated,[59] holds that the bureaucratic organization is a rational device exactly because it is efficient.[60] According to Weber's analysis, in its orderly structure, the bureaucratic machine "is the very essence of modern efficiency."[61] As Weber famously stated, it is "capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings."[62] Efficiency, then, is viewed by the Weberian school as the *raison d'être* of modern day organizations, giving rise to what may be termed the "rational model" of organizations.[63]

Thus conceived, the rationality informing the administration is entirely "formal" and instrumental, in the sense that it revolves around a pure means-

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57. *See supra* note 4.

58. *See also*, Yair Sagy, *The Missing Link: Legal Historical Institutionalism & the Israeli High Court of Justice*, 31 ARIZ. J. INT'L & COMP. L. 1 (2015) [hereinafter Sagy, *The Missing Link*].

59. *See, e.g.*, Gibson Burrell, *Normal Science, Paradigms, Discourse and Genealogies of Analysis*, *in* THE SAGE HANDBOOK OF ORGANIZATION STUDIES 642, 642 (Stewart R. Clegg & Cynthia Hardy eds., 1996); SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT ch. 10 (1960); STEWART CLEGG & DAVID DUNKERLEY, ORGANIZATION, CLASS AND CONTROL 33-135 (1980).

60. *See* COTTERRELL, *supra* note 51, at 143-46.

61. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1299 (1984).

62. 1 MAX WEBER, ECONOMY AND SOCIETY 223 (Guenther Roth & Clauss Wittich eds., Ephraim Fischoff et al. trans., 1978) [hereinafter WEBER, ECONOMY AND SOCIETY]. Moreover, bureaucratic organization is "especially rational," according to Weber, as it "means fundamentally domination through knowledge." *Id.* at 225.

63. To be sure, the Weberian model has been labeled somewhat differently by different scholars. *See, e.g.*, Feeley, *supra* note 4, at 409 ("The Rational-Goal Model"); Frug, *supra* note 61, at 1297 ("The Formalist Model").

end calculus.[64] Indeed, as under the rational model, organizations are likened to machines – or, in Weber's terminology, bureaucratic organizations are viewed as an "automaton[s]." These machines are capable of perfecting their rational-efficient performance, or, in other words, of meeting their goals through efficient use of available resources.[65]

According to Weber and other thinkers in this school,[66] achieving such efficiency is dependent upon the installation of several structural arrangements. What is required, notably, is a clear hierarchical division of the areas of responsibility among the various organizational sub-units, while instituting formal mechanisms that would ensure that the heads of the organization oversee and monitor the actions of those supervised by them.[67] Scholars belonging to this school have particularly emphasized the advantages of the centralized control of the heads of organization over its operation, basing their

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64. *See, e.g.*, WEBER, ECONOMY AND SOCIETY, *supra* note 62, at 223. As is well known, Weber emphasized the deep connection between principles of legitimation, types of leadership, and administrative organization, as well as the makeup of society, when he presented his famous triad of legal, traditional, and charismatic systems of domination. *See* REINHARD BENDIX, MAX WEBER: AN INTELLECTUAL PORTRAIT 290-416 (1977); ANTHONY T. KRONMAN, MAX WEBER 176-182 (1983). It is noteworthy that, following this triadic distinction, one of the features distinguishing rational-legal from traditional authority is that whereas the former is associated with "formal," the latter relies on "substantive" rationality. *See* Talcott Parsons, *Introduction* to WEBER, SOCIAL AND ECONOMIC ORGANIZATION, *supra* note 54, at 63-65. For more on modern Western rationality, see IAN HACKING, REPRESENTING AND INTERVENING 1-17 (1983); Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 30 DUKE L.J. 181, 185-190 (1981); Frug, *supra* note 61.

65. *See supra* note 51 and accompanying text.

66. The rational model is intellectually rooted in and closely associated with at least two other schools of thought or "movements":

(1) The scientific management "movement," most identified with the path-breaking work of Frederick W. Taylor, which has revolutionized the industrial world with its emphasis on industrial efficiency. FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911). *See also* ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 272-83, 415-48, 464-68 (1977); YEHUDA SHENHAV, MANUFACTURING RATIONALITY: THE ENGINEERING FOUNDATIONS OF THE MANAGERIAL REVOLUTION 10-36 (1999).

(2) The Science of Administration "movement," which has left its greatest mark on American public administration. *See, e.g.*, Luther H. Gulick, *Notes on the Theory of Organization*, PAPERS ON THE SCIENCE OF ADMINISTRATION 1 (Luther H. Gulick & Lyndall Urwick eds., 1937); BARRY D. KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT, 1900-1939 (1963); DWIGHT WALDO, THE ADMINISTRATIVE STATE (Holmes & Meier Publishers 1984) (1948); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887); Yair Sagy, The Manager, the Judge, and the Empiricist: American Administrative Law as a Theory of Expertise ch. 4 (2006) (unpublished J.S.D. dissertation, New York University) (on file with the N.Y.U. School of Law Library).

67. *See, e.g.*, 2 WEBER, ECONOMY AND SOCIETY, *supra* note 62, at 956-1003; John Child, *Strategies of Control and Organizational Behavior*, 18 ADMIN. SCI. Q. 1 (1973); John Child, *Organizational Structures and Strategies of Control: A Replication of the Aston Study*, 17 ADMIN. SCI. Q. 163 (1972).

claim on the conviction that such centralized control would allow the organization's leaders to more efficiently direct the various organizational units and best coordinate their actions.[68]

Another noteworthy attribute of the rational model relates to its perception of the organizational member whose authority – as an organizational member – inheres in her office rather than in her personality.[69] Correspondingly, in keeping with the centrality accorded to formalities in this model,[70] organizational members are said to strictly follow the official rules of the organization upon assuming their organizational role, and to give preference to such rules over other (personal or other) motives and aspirations.[71] Characterization of these members is determined by their role in the organization, irrespective of personality type, personal motivation, and institutional incentives.[72]

In many respects, the rational model provides a good fit for the legal system. Courts follow a formal-hierarchical structure in which rules and regulations occupy center stage. Courts are sites that are particularly attuned to rules, the backbone of the rational view of organizations.[73] Oversight, control, and guidance are provided chiefly through fixed rules operating *ex ante* and appeals operating *ex post.*[74] Court administration is driven by efficiency considerations, based on the understanding that an efficient performance of the judicial role is essential for the fulfillment of the judicial mandate and systemic goals.[75] Also noteworthy is the professional ethos pervading courts, which de-

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68. *See, e.g.*, PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905-1980 (University Press of Kansas 1998) (1986); THE PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937); Herman G. James, *The City Manager Plan, The Latest in American City Government*, 8 AM. POL. SCI. REV. 602, 602 (1914) (arguing that "[a]dministration is that function of government which demands for its proper exercise centralization of power and responsibility."); Andrew H. Van De Ven et al., *Determinants of Coordination Modes Within Organizations*, 41 AM. SOC. REV. 322, 332 (1976).

69. Merton, *supra* note 48, at 560 ("Authority, the power of control which derives from an acknowledged status, inheres in the office and not in the particular person who performs the official role.").

70. *See, e.g., id.* (observing that "[o]fficial action [within formal organizations] ordinarily occurs within the framework of preexisting rules of the organization.").

71. 2 WEBER, ECONOMY AND SOCIETY, *supra* note 62, at 959 ("[]entrance into an office, including one in the private economy, is considered an acceptance of a specific duty of fealty to the purpose of the office . . . in return for the grant of a secure existence.").

72. *See* Feeley, *supra* note 4, at 410-12 (with respect to the criminal justice system).

73. This point was heavily relied upon by scholars introducing "new institutionalism" to the legal academy, following the rise of the Attitudinal and other positivistic models of adjudication. *See infra* note 142.

74. *But see infra* note 79 and accompanying text (emphasizing the limits of appeals as means of control).

75. *See supra* Part II.A. (discussing the drive to efficiency in the administration of courts).

personalizes judges and attributes their authority to their official role within the judiciary,[76] marginalizing most personal aspects of adjudication.[77]

At the same time, in other respects, the court system does not neatly fall in line with the rational model. Notably, the principle of judicial independence[78] does not comport with a rational-model view of courts-as-formal-organizations in which strict, readily-available, and expansive hierarchical control looms large. Further, even a superficial acquaintance with the actual operation of courts reveals the degree to which higher courts' control over lower courts by the appeal mechanisms is limited.[79]

In addition, while the rational model maintains that organizations seek to maximize efficiency in realizing their goals (whether producing a high quality running shoe or devising a convincing campaign), in the judicial setting it is more difficult to agree on the contours of a "just," high-quality judicial decision and what the efficient manner for achieving such decision is.[80] Quality control is therefore difficult to achieve not only because litigants and jurists often face difficulties in evaluating judicial decision-making and appeals provide a partial avenue for review, but also due to judges' considerable discretion in the application and interpretation of rules. Yet, it is clearly easier to measure use of judicial time spent on cases as well as judges' case load and case closure rates. It is not difficult to see how under such circumstances efficiency becomes a measuring rod for the evaluation of the quality of judges' performance, transforming into a goal in and of itself,[81] instead of supporting the goal of advancing just judicial decision-making.

Lastly, it is crucial to emphasize that the existence of discrepancies between the rational model of organizations and the court systems does not imply that courts are not organizations. Rather, as the field of organizational

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76. *See supra* note 69 and accompanying text.

77. *See* Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israel Judiciary*, 31 SETON HALL L. REV. 760, 786-807 (2001).

78. Much has been written on judicial independence. *See, e.g.*, Peter H. Russell, *Toward a General Theory of Judicial Independence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 1 (Peter H. Russell & David M. O'Brien eds., 2001); Mauro Cappelletti, *Who Watches the Watchmen?*, 31 AM. J. COMP. L. 1 (1983); Charles G. Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE WESTERN RES. L. REV. 911 (2006).

79. *See, e.g.*, STEPHEN T. EARLY, CONSTITUTIONAL COURTS OF THE UNITED STATES: THE FORMAL AND INFORMAL RELATIONSHIP BETWEEN THE DISTRICT COURTS, THE COURTS OF APPEALS, AND THE SUPREME COURT OF THE U.S. 57-69 (1977); Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1017 (1959); Bradley C. Canon, *Organizational Contumacy in the Transmission of Judicial Policies: The Mapp, Escobedo, Miranda, and Gault Cases*, 20 VILL. L. REV. 50, 54-55 (1974); Stephen L. Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086, 1104, 1116-17 (1973).

80. *Cf.* Feeley, *supra* note 4, at 424 n.3.

81. *See supra* Part II.A., note 48 and accompanying text.

theory has come to recognize, they may be a testament to the fact that rational model is not the only (or even best) prism through which to look into the nature of organizations. As noted, over the years, organizational theorists have critiqued the rational model's view of organizations on various fronts, giving rise to several other organizational theories. Consequently, in later decades, the rational model has come to occupy a less central space in organizational studies and new theories that better capture the reality of organizational life have come to dominate the field. To recall, we term two such theories (or families of theories) the "relational" and the "cognitive" models of organizations, each of which can illuminate the organizational dynamics that have given rise to our findings.

In depicting these two models (or family of models), we rely, *inter alia*, on one of the foundational books in the organizational literature, *Organizations*,[82] where the eminent James March and Herbert Simon provide "a brilliant summarization of developments in organization theory."[83] The book's all-encompassing title alone, as well as its scope of interest, suggests that it deals with the full gamut of issues associated with organizations, private and public.

In one of the first sections of the book, March and Simon present the following trichotomy:

> Propositions about organizational behavior can be grouped in three broad classes, on the basis of their assumptions:
>
> 1. Propositions assuming that organization members, and particularly employees, are primarily passive instruments, capable of performing work and accepting directions, but not initiating action or exerting influence in any significant way.
>
> 2. Propositions assuming that members bring to their organizations attitudes, values, and goals; that they have to be motivated or induced to participate in the system of organization behavior; that there is incomplete parallelism between their personal goal and organization goals; and that actual or potential goal conflicts make power phenomena, attitudes, and morale centrally important in the explanation of organizational behavior.
>
> 3. Propositions assuming that organization members are decision makers and problem solvers, and that perception and thought processes are central to the explanation of behavior in organization.[84]

Taking March and Simon's authoritative overview as our point of reference, it is evident that the first group in the trichotomy corresponds to the rational model of organizations. The brief description of the second group

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82. MARCH & SIMON, *supra* note 50

83. Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 315 (1983).

84. MARCH & SIMON, *supra* note 82, at 6. It should be noted that March and Simon further clarify that "[t]here is nothing contradictory among these three sets of assumptions. Human beings are all of these things and perhaps more. An adequate theory of human behavior in organizations will have to take account" of all of the three sets. *Id.*

should give a sense of the relational model, and the sketch of the third group captures the essence of the cognitive model of organizations.

Relational theory of organizations views the organization as an arena of social interaction.[85] This approach highlights the diversity of goals and incentives of the various actors in the organizational setting.[86] Under this theory, the organization's goals and operation are often not the output of a cohesive unit, but reflect the interaction among various social groups within the organization and among each group's varying motivations.[87] For the relational model, the possibility of diverging motivations and modes of operation within the organization are only to be expected. Importantly, in uncovering such motives and incentives, this model refers us to the informal channels of operation within organizations as central arenas in which organizational goals and mandates are *de facto* established and realized.[88]

It is an established precept of the relational paradigm that the manner in which an organization functions depends to a considerable extent on its (informal) organizational culture.[89] Under this view, special emphasis is put on the socialization process whereby individuals in the organization (in particular newcomers) learn to perform as expected of them by the organization and its leaders.[90]Indeed, the socialization processes specifically, and organizational culture in general, have been described as "gluing" together the various organizational units.[91]

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85. *See also* Sagy, *New Look at Public Law Adjudication*, *supra* note 49 (detailing the model further and terming it "the attitudinal model").

86. *See, e.g.*, Pfeffer & Salancik, *supra* note 55.

87. *See* Sagy, *New Look at Public Law Adjudication*, *supra* note 49.

88. *See, e.g.*, SELZNICK, *supra* note 55, at 251-52; Albert Breton, *Organizational Hierarchies and Bureaucracies: An Integrative Essay*, 11 EUR. J. POL. ECON. 411, 425 (1995).

89. On organizational culture, see, *e.g.*, Schein, *supra* note 55; Monica Tuttle, *A Review and Critique of Van Maanen and Schein's 'Toward a Theory of Organizational Socialization' and Implications for Human Resource Development*, 1 HUM. RESOURCES DEV. REV. 66 (2002). For a discussion of these issues in the context of judges and courts, *see* Leonore Alpert et al., *Becoming a Judge: The Transition from Advocate to Arbiter*, 62 JUDICATURE 325, 332, 335 (1979); Brian J. Ostrom & Roger A. Hanson, *Understanding and Diagnosing Court Culture*, 45 CT. REV. 104 (2009).

90. *See, e.g.*, Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359, 375, 384-85 (1972); Georgia T. Chao et al., *Organizational Socialization: Its Content and Consequences*, 79 J. APPLIED PSYCHOL. 730, 730-32, 742 (1994). On socialization of judges, *see* Beverly B. Cook, *The Socialization of New Federal Judges: Impact on District Court Business*, 1971 WASH. U. L.Q. 253 (1971); Susan L. Goldberg, *Judicial Socialization: An Empirical Study*, 11 J. CONTEMP. L. 423 (1985); *Serving Judges and the Courts: Organizations Which Deliver Education, Training, and Library Services to Judges and Court Administrators*, 72 LAW. LIBR. J. 628, 638-40 (1979).

91. John Van Maanen & Edgar H. Schein, *Toward a Theory of Organizational Socialization*, 1 RES. ORGANIZATIONAL BEHAV. 209, 209-15 (1979).

A cognitive model of organizations is premised on the understanding that while there cannot be sound decision-making in the absence of relevant information,[92] organizations never have full information and inevitably operate under conditions of uncertainty.[93] What's more, this model highlights the centrality of information-processing and decision-making processes in organizational operations in exposing and exploring cognitive biases that shape organizational decision-making.[94] As one leading scholar stated "decisions ensue from narrow perspectives and distorted data!"[95] Under this model, "the imperfections of human perception and decision"[96] are conceptualized and catalogued, producing a long list of cognitive biases and heuristics,[97] such as the "framing effect"[98] or the "anchoring heuristic."[99]

As we can see, the field of organizational studies has come a long way since the Weberian model of the ideal organization. More recent approaches provide richer accounts of the workings of organizations. In the following Section, we draw on the case study of judicial supervision over class action

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92. *See, e.g.*, Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254 (1987) ("[D]ecisions depend on the information that underpins them . . . ."). *See generally* Gifford, *supra* note 83.83

93. *See* SIMON, ADMINISTRATIVE BEHAVIOR, supra note 56, at 79; Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79, 80 (1959); *see also* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 397 (1981); Hickson, *supra* note 56, at 168, 183-87; Richard B. Stewart, *Organizational Jurisprudence*, 101 HARV. L. REV. 371, 376, 379 (1987) [hereinafter Stewart, *Organizational Jurisprudence*] (reviewing MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986)).

94. *See* SIMON, ADMINISTRATIVE BEHAVIOR, *supra* note 56, at 40-41, 240-44; *see also* HERBERT A. SIMON, MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN A SOCIAL SETTING, 198-99 (1957); Cass Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613 (1999); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

95. Hickson, *supra* note 56, at 171.

96. Amos Tversky & Daniel Khneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453 (1981) [hereinafter Tversky & Khneman, *Framing of Decisions*].

97. *See generally* Carol A. Heimer, *Social Structure, Psychology, and the Estimation of Risk*, 14 ANN. REV. SOC. 491 (1988); Cass Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962 (2005); Sagy, *Triptych of Regulators*, *supra* note 51, at 445-47.

98. Namely, the finding that the manner in which a problem is presented ("framed") tends to direct the decision-making process. *See* Tversky & Kahneman, *Framing of Decisions*, *supra* note 96.

99. *See* Paul Almond, *Regulation Crisis: Evaluating the Potential Legitimizing Effect of "Corporate Manslaughter" Cases*, 29 LAW & POL'Y 285, 291 (2007) (illustrating the anchoring heuristic in the following manner: "high-profile incidents that possess a high degree of salience, or relevance to the lives of the public, have pronounced effects upon public attitudes . . . leading in many cases to a hardening of attitudes and overestimation of associated risks . . . .").

settlements in Israel to demonstrate the contribution of a broad organizational perspective in analyzing contemporary courts' drive for efficiency.

II. THE CENTRALITY OF EFFICIENCY IN CLASS ACTION SETTLEMENTS IN ISRAEL: EMPIRICAL FINDINGS AND ANALYSIS

A. Class Action Settlements as a Case Study

The case study of class action settlements presents an ideal setting for the application of organizational theories in the legal arena, for several reasons.[100] First, class action settlements present a setting in which the drive for efficiency is particularly strong. In this context, the legislature explicitly tried to overcome efficiency concerns, providing for the application of elaborate (and time-consuming) quality control measures over such settlements prior to their approval by the courts. These efforts have, for the most part, failed. Our research shows that courts have time and again ignored the letter of the law. They have ostensibly preferred quick settlements over time-consuming quality control mechanisms, the application of which could ultimately lead to the disqualification of a settlement proposal or breakdown and the full hearing of the case by a judge.

Second, class action settlements provide a clear demonstration of how the framework of "courts as organizations" can add to our grasp of adjudication. As illustrated in the ensuing discussion, the dynamics revealed in our empirical findings can be best understood through an organizational prism, thus moving beyond the by-now conventional formal-legal and individual-motivational perspectives on adjudication.[101] Our analysis focuses on important circumstances where both of these perspectives fail to encompass the dynamics of judicial interventions and decision-making, as well as the role efficiency considerations play within courts.

Finally, this case study clearly shows the limitations of the rational model, alongside the potential of alternative organizational models to depict the reality of judicial activity. In particular, judges' deviance from the statutory scheme governing the process of class action settlement approval and the relationship between the judges and external actors who are supposed to provide input during the approval stage[102] reflect complex organizational dynamics that are

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100. *See also supra* note 55 and accompanying text.

101. *See infra* note 142 (describing a Legalist Approach and a Positive Approach to adjudication, which correlate, respectively, to the formal-legal and individual-motivational perspectives).

102. Broadly speaking, Sections 18 & 19 of the Class Action Law prescribe the following procedure for the approval of a class-action settlement proposal: First, following a submission of such a proposal the court has to preliminarily approve it. Second, having preliminarily approved the proposal, the court is to order its publication (in accordance with

not captured in the rational model's simplistic depiction of organizational life.

Before we turn to the empirical findings, we provide some additional necessary background on the need for an elaborate judicial-supervisory scheme over class action settlements and the particular structure of such a scheme in the Israeli context, from which our data is derived.

B. The Need for Judicial Oversight over Class Action Settlements

At first blush, class action settlements seem to be no different from other settlements and reflect the same patterns that exist in other civil litigation contexts–extremely high rates of settlement or dismissal, with very few trials being held and judicial holdings being the exception.[103] There are substantial differences, however, that have to do with the unique nature of class actions and have led to the institution of elaborate quality control measures of settlements in this context. The drive for efficiency, which colors the entire spectrum of judicial activities, is particularly troubling in class action settlements, where the efficiency pull has a heightened potential for producing inequitable settlements. This is because in class action cases there is a danger that the representative plaintiff and the defendant will collude to agree on a settlement that would be sub-optimal from the perspective of the other class members or the general public. This is a result of the following hazards:[104] the agency problem[105] and the risk of frivolous litigation.[106]

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the provisions of Section 25) and its submission for the review of a list of officials–the Attorney General ("AG") ordinarily being the central figure in that list. Third, the AG, a class member who does not take part in the litigation, and the relevant public organizations are allowed to submit to the court their written, "reasoned objection" to the proposal; the proposing parties may then respond to the objection(s). Fourth, the court is specifically ordered not to approve a proposal prior to the appointment of an expert examiner, whose expertise lies in the pending proposal's subject matter; in fact, according to Section 19(B), the court is authorized *not* to appoint such an examiner only in special circumstances, which–the same Section takes the trouble of emphasizing– the court is obliged to enumerate in writing.

103. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (2010); Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213, 220 (2014); Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *How Well Do Measures of Judicial Ability Predict Judicial Performance?: A Case Study Using Securities Class Actions*, 33 INT'L REV. L. & ECON. 37, 42 (2013).

104. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 78-80 (2007).

105. On the principal-agent dilemma or the agency problem, *see generally, e.g.*, Terry M. Moe, *The New Economics of Organizations*, 28 AM. J. POL. SCI. 739 (1984), and Anurag Sharma, *Professional as Agent: Knowledge Asymmetry in Agency Exchange*, 22 ACAD. MGMT. REV. 758 (1997).

For studies of the U.S. Federal judiciary in the terms of the agency problem, *see, e.g.*, Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819 (2003); Donald R. Songer et al., *The Hierarchy of*

The agency problem in class action settlement is driven by the fact that the interests of the representative plaintiff and the rest of the certified class are usually not aligned. Indeed, the plaintiff has a strong incentive to settle early on,[107] while class members have insufficient knowledge to evaluate such settlement, nor motivation to prevent it even in those cases in which they are aware of its inequity.[108] The fear is therefore that the representative will reach inequitable settlements that benefit him while hurting the rest of the class. Consequently, other class members will be bound to the inadequate settlement reached and barred from suing individually.

Frivolous claims also present a challenge, but for different reasons. Unlike the agency problem, frivolous claims do not harm class members because there is no individual claim to be barred in this case (as there is no legitimate cause of action at all). The problem in this case is that because of the massive impact class action claims can have, defendants are pressured to settle even very weak or frivolous claims so as to make these—often very public—claims disappear.[109] Here also, inappropriate settlements distort the incentives provided by class action claims, which were supposed to make defendants incur the costs of their injurious behavior.[110]

Justice: Principal-Agent Model of Supreme Court-Circuit Court Interactions, 38 AM. J. POL. SCI. 673 (1994); Charles M. Cameron et al., *Strategic Auditing in Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000). *But see* the insightful Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535 (2011) (highlighting the difficulties in applying the principal-agent dilemma in the context of the court system).

For the Agency problem in the context of class actions, *see* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 388-390 (2000); Leslie, *supra* note 104, at 77-79; Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 531-32, 555-57 (2012); Jade A. Brewster, *Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 6-8 (2014).

106. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 905-06 (1996); Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 398-99 (2005); Project, *Developments in the Law – The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1812 (2000).

107. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 191-193 (1987).

108. Leslie, *supra* note 104, at 77.

109. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1293-94 (2002); Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 535-536 (1997); Eran B. Taussig, Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings, 83 ST. JOHN'S L. REV. 1275, 1286 (2010).

110. For the notion that the main goal of class action is "optimal deterrence of risk-taking" by defendants, which is jeopardized by settlements, *see, e.g.*, Richard A. Nagareda,

To mitigate the dangers of both the agency problem generating bad settlements and the risk of frivolous suits being settled, class action settlements are closely scrutinized. While settlement of ordinary civil claims is subject to minimal judicial oversight, with the goal of clearing up the docket (in the name of efficiency), in class actions an elaborate statutory scheme has been put in place to ensure that efficiency goals make way for quality control measures.[111] This has been the approach in various common law countries: the U.S.,[112] Australia,[113] Canada,[114] and Israel.[115] Specifically, the pertinent Israeli legislation provides that once a settlement proposal is reached by the parties, it should be *preliminarily* approved by the court and thereafter made public, so that other class members and/or certain public interest organizations named in the legislation may submit their objections[116] to be reviewed by the court prior to the settlement's ultimate approval.[117] Specifically recognizing the dire need for information to evaluate the adequacy of settlements due to the lack of an adversary proceeding, but also aware of the fact that class member objections were unlikely, the legislature introduced attorney general ("AG") objections.[118]

The Israeli AG holds a unique, extremely powerful position within the Israeli legal system. The AG's major powers include the following: he heads the public prosecution in Israel; he represents the government in legal proceedings (civil, criminal, administrative, and other); he is the government's chief legal advisor, whose legal interpretations are binding as far as the government and government agencies are concerned; and he has general

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Autonomy, Peace, and Put Options in the Mass Tort Class Action, 115 HARV. L. REV. 747, 753-54 (2002).

111. On the inadequacy of judicial oversight over settlement of individual cases, *see* Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 854 (1997) (stating that "[t]he current practice is largely to ignore the problem of settlement in individual cases. Absent facially invalid agreements, courts routinely enter proposed consent judgments as presented; they have neither obligation nor permission in individual civil litigation to scrutinize the adequacy of settlements.").

112. Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1766-67 (2008).

113. Michael Legg, *Class Action Settlement in Australia: The Need for Greater Scrutiny*, 38 MELB. U. L. REV. 1, 2 (2014).

114. Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 274, 281-82 (2001).

115. Class Action Law, 5766–2006, 2054 LSI 264 § 19 (2006) (Isr.); Taussig, *supra* note 109, at 1350.

116. We refer to the objections of such class members and/or public interest organizations as "private objections." *See* Sections 1 & 18(D) of the Class Action Law.

117. *See supra* note 102.

118. *Id.* As we explain *infra* note 138, overall, the AG objections relate to four types of issues: (1) the fairness of the terms of a proposed settlement; (2) the need to appoint an expert examiner (see *supra* note 102); (3) attorneys' fees and the representative plaintiff's remuneration; or (4) some other ground, a category covering various, often case-specific issues.

authority to step in as a party to an ongoing court case with a view to protect the public interest. Likewise, a number of specific statutes provide that the AG's input be incorporated into judicial cases with the same view in mind–CAL provides a perfect example of such an arrangement.[119]

The AG's involvement in the approval of class action settlements as well as the other quality control measures provided for in the legislation take time—they require input, scrutiny, and evaluation, slowing up the process of settlement approval and case closure. In addition, applying such measures may ultimately lead to the disqualification of a proposed agreement and, if no amended proposal is devised and approved, to the full-fledged litigation of the case. Therefore, the pull of efficiency considerations is particularly strong in the class action settlement context, with the legislature pulling in one direction, and—as it turns out in our research—courts, subject to their own set of incentives and pressures, pulling in the other direction.

In the following Part we offer novel empirical data on judicial decision-making in the context of class action settlement approval in Israel. As the data reveals, the judges fail to apply required quality control mechanisms and, to a large extent, actively discourage or reject external input from the AG or other objectors.[120] After we first present our findings, we analyze them and offer explanations based on insights from organizational theory, as well as provide some thoughts on possible avenues for curbing efficiency considerations in favor of other competing values and goals.

C. Empirical Insights on Judicial Oversight over Class Action Settlements

1. Methodology

We established a database of settlement agreements of class actions decided between the years 2006-2013.[121] This database includes 272 legal proceedings, including approved settlement agreements and several requests for withdrawal.[122] The data we used was gathered from Israel's most extensive

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119. On the AG of Israel, *see generally* SUZIE NAVOT, THE CONSTITUTION OF ISRAEL: A CONTEXTUAL ANALYSIS 167-75 (2014).

120. *See infra* Part II.B.

121. Settlements approved in 2006 were subject to the statutory arrangement under Section 18 of the Class Action Law, which entered into force on March 12, 2006. For a list of the tested parameters according to which the 272 cases in our database were analyzed and coded, *see* Appendix 1.

122. Our database included only those withdrawal requests that were suspected to be settlement proposals disguised as withdrawal requests. In certain cases, courts request the AG's opinion regarding withdrawal requests even though in these instances there is no statutory obligation to do so (unlike settlement proposals in which case courts are required to seek the AG's input, as explained *supra* note 102). Courts typically do so when they suspect that the request is actually meant to function as a settlement request but is portrayed as a

legal database (*Nevo*), which encompasses Israeli court records, as well as additional sources, which include the Israeli Register of Class Actions.[123] The search within the *Nevo* legal database was conducted using cluster queries, in order to capture all class action proceedings within the defined time-frame which concluded in settlement or quasi-settlement procedures.[124] These search results were complemented by a list of class action cases documented by the Department of Counseling and Legislation at the Israeli Ministry of Justice, which handles objections to class action settlements on behalf of the AG and is therefore involved in all settlement proceedings.[125] To supplement the data included in the decisions we compiled, we also conducted interviews with several key players in the class action settlement context.[126]

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withdrawal in an attempt to bypass regulatory quality control measures such as AG input. *See, e.g.*, BSA (TLV) 05/24959 *Lavie v. Delkol Inc.*, ¶ 3 (September 18, 2008).

123. Telephone Interview with Ms. Hofit Dvir, Content Division, Nevo Legal Database (Oct. 30, 2014).

124. Three different searches were conducted. The first search was: (request for approval of settlement agreement OR request for approval of settlement arrangement) AND (class action OR in class action OR class claim), in specific order, with no spaces, morphology: exact. The second search was: (withdrawal OR the withdrawal OR of withdrawal), in specific order, with no space, morphology: exact. The third search was: (desist OR the desist OR of desist) AND (class action OR in class action OR class claim), in specific order, with no spaces, morphology: exact.

125. After comparing the list of cases we received from the Department of Counseling and Legislation with those that came up in our own searches, we searched for the additional cases in the legal databases.

126. Like other research projects of this nature, this empirical research project is subject to certain methodological limitations. First, the research consists mainly of an analysis of the judicial decisions approving class action settlements, without studying the contents of the entire court dossier (including the objections submitted by the AG and others), relying on the courts' own description of the content of its decisions and objections made to the proposed settlements. Such methodology may limit the scope of information available on the settlement and, in certain rare instances, result in the removal of certain cases from our database. Furthermore, the database was compiled from search queries we ran on the *Nevo* legal database. We were aware that such searches often fail to capture the entire pool of relevant cases and therefore approached the Department of Counseling and Legislation at the Israeli Ministry of Justice for a list of all class action settlements on which they were requested to comment (as noted *supra* note 102, under the law, *each and every* settlement proposal needs to reach them). We used their database to complement our own, locating decisions we missed in our initial search through various legal databases. An additional limitation of the research is the need to accurately and uniformly code the data. In order to do so, the case files were read, documented and coded by two individuals, while a sample of the case files was tested by two additional readers. Finally, given the inherent limitations of quantitative research, we conducted interviews with members of the District Attorney's Office and the Department of Counseling and Legislation at the Israeli Ministry of Justice, all of which handle the AG's objections to class action settlements on behalf of the AG. We further interviewed Adv. Reshef Chen, who is considered one of the chief architects of the Israeli Class Action Law due to his deep involvement, as a member of the Israeli parliament at the time, with the enactment of the Law. Adv. Chen provided us with historical background on the legislation process and specifically on the adoption of various quality control mechanisms, including the decision to grant standing to the AG in all cases to voice

Our goal was to examine to what extent the drive for efficiency can be curbed by explicit statutory direction. In other words, we examined to what extent the statutory arrangements governing settlement of class actions are effective. Are quality control measures enforced? If so, are there differences in the effectiveness of such mechanisms? What can account for variances in the scope, volume, and impact of the various control mechanisms? Do efficiency considerations continue to play a role in the execution of the statutory arrangement in this context despite explicit statutory language?

2. *Empirical Findings*

a. High Rate of Settlement Approval

The data collected regarding settlement approval by the courts have confirmed previous empirical findings regarding settlements of class action suits, indicating a continuing trend of resolution by settlement and an overwhelming approval rate of the settlement agreements submitted to the courts prior to approval of the application for certification of class actions.[127] Specifically, our data shows that in approximately 94% (255/272) of the cases, a settlement proposal was submitted to the court for approval prior to the certification of the class action. The vast majority of these settlements were approved, as reflected in our data, which shows that only 6.25% (17/272) of the settlement proposals were rejected by the courts.

b. Few Special Examiners Appointed and Private Objections Filed

The findings also confirm previous concerns regarding the strikingly low number of special examiners appointed by the court despite the explicit obligation to do so under CAL.[128] Our data shows that in only 12% (34/272) of the cases a special examiner was appointed (again, despite the clear requirement to do so under CAL).

In addition, our data shows that, for the most part, private objections were made in less than 10% of the cases.[129] These are objections voiced by class members or organizations specified under CAL. As we can see, the special

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objections.

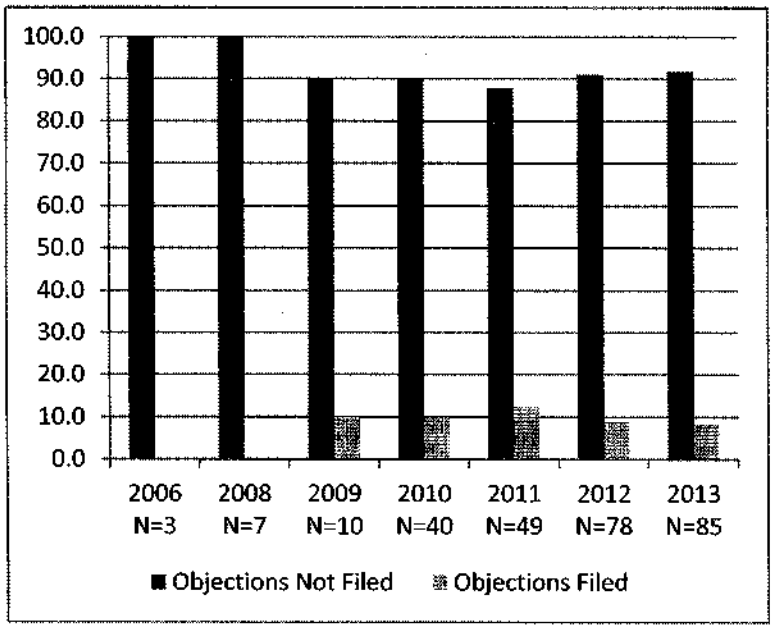
127. Section 8 of the Class Action Law sets forth the terms for the certification of a class action. According to Sections 18 and 19 of the Class Action Law, settlements may be approved either before or after certification of the class action. *See* Alon Klement et al. *Class Actions in Israel – An Empirical Perspective* (2014) (Isr.), *available at* http://classaction.idc.ac.il/files/article/1419358722f22Tu.pdf (establishing the failure to nominate expert examiners and the lack of private objections).

128. *See supra* note 102.

129. *Supra* note 116.

examiners and private objections constitute very weak quality control mechanisms. We expected the AG objections to be substantially more dominant and effective, given the AG's position as a repeat player, with a strong reputation for protecting the public interest, which is required under CAL to voice its opinion in all class action settlement proceedings.[130]

Graph 1: Rate of Private Objections



c. Complex Judicial Attitude Towards AG Objections

i. General

To evaluate the effectiveness of the AG objection mechanism, we examined the correlation between courts' tendency to approve or deny settlement proposals and the existence or lack of objections by the AG and others. In this regard, we examined the scope of objections made by the AG over the years and what impact such objections have had on the courts. As further explained below, in terms of impact of AG objections, we examined whether the procedural form in which the objection was made[131] had an impact

130. *Supra* note 102.

131. *See infra* note 135 and accompanying text (describing the difference between "formal" and "informal" AG objections).

on courts' tendency to accept such objections, and whether the grounds on which objections were made (whether formally or informally) had an impact on courts' tendency to accept such objections.[132]

ii. The Volume of Objections Filed Over the Years

Our hypothesis was that the AG, an objective repeat player with a long-proven commitment to the public interest, would file a large number of objections to the proposed settlements, following the procedural framework prescribed by CAL (what we term "formal objections").[133] We expected to see a consistently high rate of objections over the years, considering that these have been the formative years of a relatively new law. Surprisingly, our hypotheses were disproved, as the data showed that the rate of AG (formal) objections to settlement agreements was between 25-30% in the years 2009-2011, significantly dropping to approximately 10% in 2012-2013.

During our field interviews with members of the District and State Attorneys' Office, we discovered that some of their reservations to settlement proposals are raised through a parallel track of *informal* comments, which we coded as "informal objections."[134] These informal objections include all cases in which the attorney representing the AG in court stated that he has no objection to the settlement but made certain comments regarding the proposed settlement nonetheless.[135] An analysis of the overall input from the AG shows

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132. Those cases, in which the parties revised the proposed settlement agreement—following comments made by the AG—and the court subsequently approved the settlement, were coded by us as cases in which the court accepted the AG's objections/comments.

133. Where the written advisory opinion of the AG contains a clearly stated objection to the proposed settlement, the objection was classified as formal, regardless of its content (*e.g.*, legal fees and remuneration, the appointment of an expert examiner, or the fairness of the proposed settlement). In this category, we also included a few cases in which no written objection was filed, but an objection was clearly voiced by the AG's representative in a court hearing (*see, e.g.*, BSA (TLV) 25786/06 *Epstein v. Maariv Modiin Publishing Inc.* ¶ 10 (February 23, 2009)).

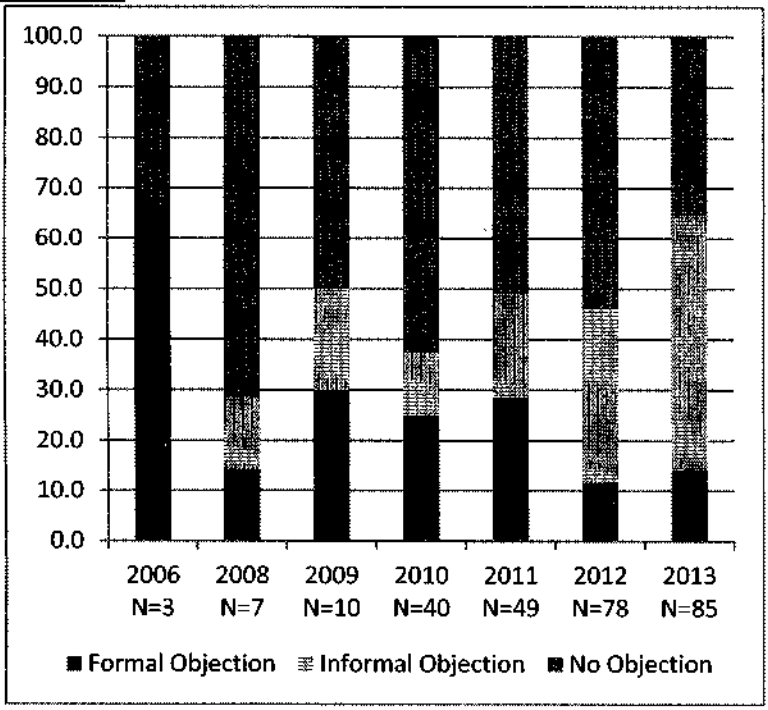
134. Interview with Adv. Roni Neubar, Head of Area (Civil), and Adv. Liran Heshin-Brosh, both from the Department of Counseling and Litigation, in the AG Offices, Jerusalem (Nov. 4, 2014) (on file with authors); Interview with Adv. Liav Weinbaum, Head of Commercial Department, Tel Aviv District Attorney's Office (Civil), in the AG Offices, Jerusalem (Sept. 16, 2014) (on file with authors).

135. These informal objections may be formulated in various ways. For example, in *Epstein v. Maariv*, ¶ 17, it was stated in court that "the Attorney General has chosen not to formally object to the approval of the proposed settlement, but finds it appropriate to alert the court that the settlement may raise certain concerns from a consumerist perspective." In many cases the court describes the position presented by the AG as leaving the approval of the settlement at the discretion of the court, while alerting the court to certain inadequacies in the proposal. *See, e.g.*, TZ (Center) 1988-06-10 *Kobovski v. Shirbit Insurance Corp.* ¶ 17 (August 13, 2013).

Finally, the category of *no objection* included all cases in which no comments or concerns were raised by the AG, or where the court decision clearly stated that no objection

that the decrease in formal objections over the years correlates with an increase in the rate of informal objections. In the years 2009-2011 the rate of informal objections was approximately 10-20%, while in the years 2012-2013 the rate of informal objections rose to 30% and 50%, respectively. The overall picture of formal and informal objections by the AG, therefore, reveals a total rate of objections ranging from about 50% in 2009 to over 65% in 2013. The accumulated number of objections is significantly higher than the number of formal objections, indicating a growing use of the informal objection mechanism.

Graph 2: Position of the Attorney General (Formal/Informal/No Objection) Over the Years[136]



was made and that the settlement is left for the approval of the court.

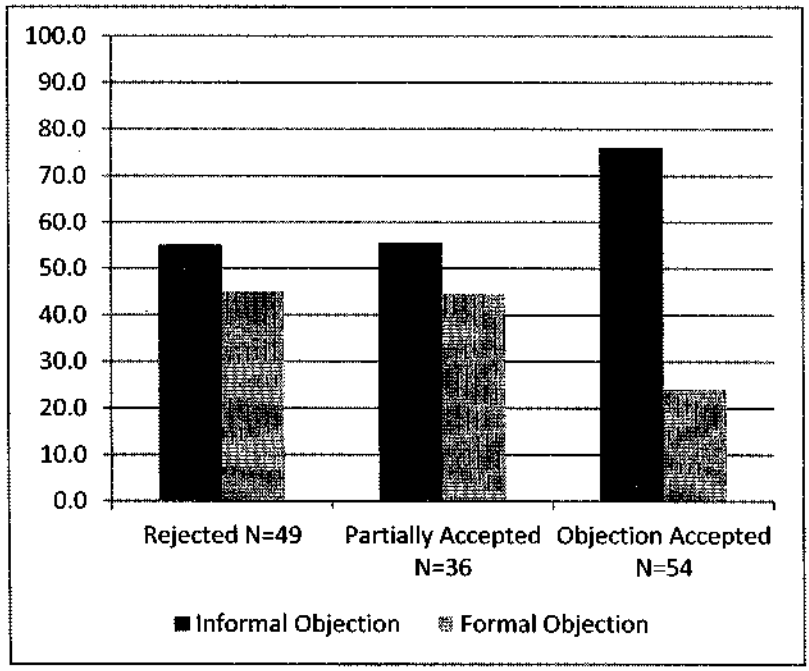
136. In the first years after the enactment of the Law, there were relatively few settlement request approvals (and few cases). In 2006, the AG objected in all settlement approval requests and in 2007 there were no such objections. Since the pool of cases grew in 2008 we can begin discerning trends and patterns in AG objections as of that year. Informal objections first appear in 2009.

iii. Courts' Attitude Towards the AG's Form of Objection (Formal/Informal)

We hypothesized that the courts would tend to accept formal objections (in full or in part) more frequently than informal ones. As we explain below,[137] this hypothesis was based on the information provided to us that the AG funnels its more central reservations through formal channels, while voicing its less significant objections informally. This hypothesis was disproved, as the data revealed that the courts were significantly more inclined to accept informal objections by the AG (accepting over 75% of informal objections, compared to approximately 20% of formal objections). This holds true even for partial approval of objections, as even in such cases informal objections are still approved at a higher rate, though with a smaller gap in comparison with formal objections (55% vs. 45%). Interestingly, the rate of objections wholly denied over the years is identical to that of partial approvals in both formal and informal objections. Finally, the data shows that the overall rate of objection approval (formal and informal, full and partial) was 65%, or 90 of the 139 cases in which an objection was raised by the AG. In other words, in 35% of the cases in which an objection was raised by the AG (49 out of 139), it was denied by the court.

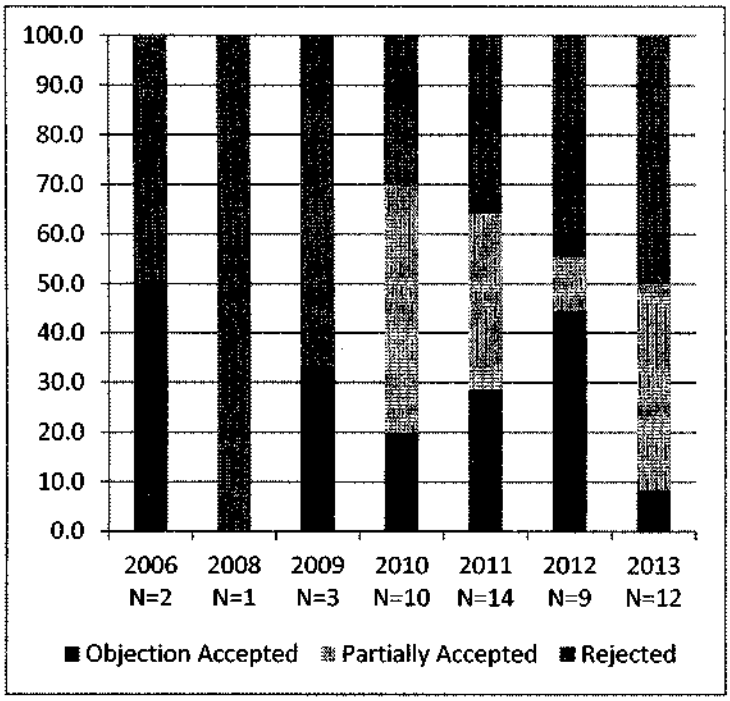
137. *Infra* note 138

Graph 3: Courts' Attitude Towards Formal and Informal Objections By the AG (Approved/Partially Approved/Denied)

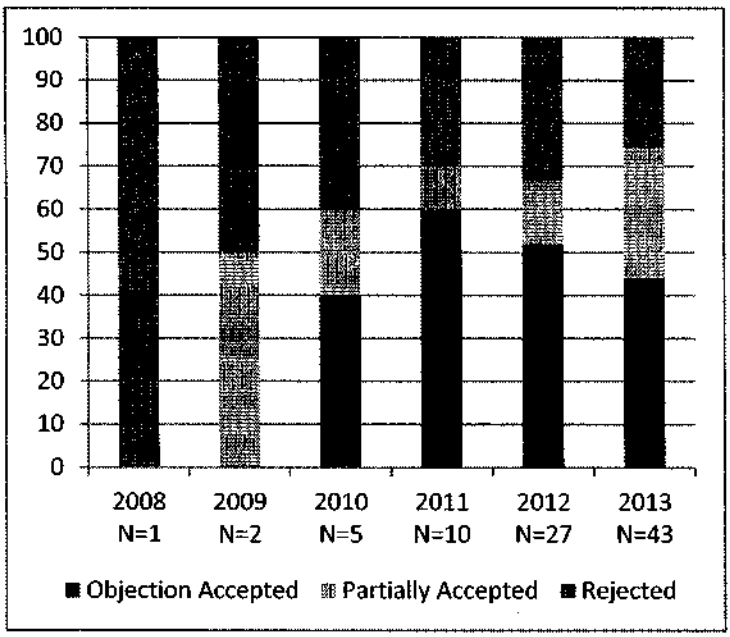


As is shown in the following two graphs, court denial of formal objections raised by the AG is an increasing trend, reaching a peak in 2013, when 50% of formal objections were denied, while only 25% of informal objections were denied.

Graph 4: Courts' Approach to AG Formal Objections



Graph 5: Courts Approach to AG Informal Objections



iv. Grounds for AG Objections

We hypothesized that there would be a distinction between the grounds for the objections raised in the formal track in comparison with those of the informal track.[138] Specifically, we expected that a correlation would exist between the severity of the concerns raised by the AG and the procedural track chosen. We based this hypothesis on our field interviews with members of the State and District Attorneys' Office and the Department of Counseling and Legislation, during which we were told that concerns of greater importance were directed towards formal objections, while concerns of lesser severity were raised as "reservations without objection" (referred to in this paper as informal objections).[139] We therefore hypothesized formal objections would relate mostly to issues of fairness of the settlement reached (including the appointment of expert examiners), with secondary concerns over legal fees and remuneration, but expected to find no formal objections regarding fees and remuneration as a sole ground of objection. In contrast, we hypothesized that informal objections by the AG would serve as an outlet for minor reservations regarding the content of the settlement reached and/or reservations relating to legal fees and remuneration and would not relate to the appointment of expert examiners.

These hypotheses were partially disproved. A content analysis of formal and informal objections shows that the various issues mentioned above were raised at similar rates in both the formal and informal routes, though it seems that overall most concerns regarding settlement fairness were indeed raised as a formal objection.

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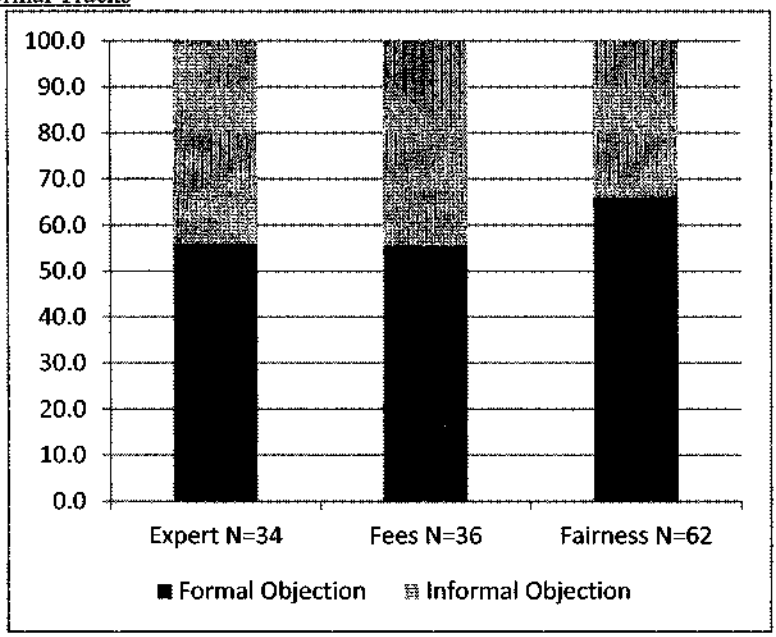
138. In order to better understand the circumstances that give rise to AG objections, these objections were classified into four different categories, based on the objections' grounds (whether formal or informal): (1) the appointment of an expert examiner (*see supra* note 102); (2) the fairness of the terms of the proposed settlement for the entire class; (3) the sum of legal fees and representative remuneration; and (4) other bases, such as procedural discrepancies, wording of the settlement, issues relating to the execution of the settlement, and the like.

The second category includes cases in which the AG had concerns regarding the amount of damages awarded, the identity of their recipients (are they awarded to members of the class or as a contribution to a public cause?), or reservations regarding "coupon settlements," which force class members to continue purchasing products or services from the defendant in order to be eligible for the settlement benefits.

Obviously, in some cases the objection may relate to several of these categories. The differentiation between the various grounds of objection allows us to identify whether certain types of objection are channeled to different avenues (formal vs. informal) or treated differently by the courts (for example, are courts more inclined to accept objections regarding fees and remuneration than those regarding the appointment of an expert examiner?).

139. Interview with Adv. Roni Neubar, Head of Area (Civil), and Adv. Liran Heshin-Brosh,, both from the Dep't of Counseling & Litig., in the AG Offices, Jerusalem (Nov. 4, 2014) (on file with authors).

Graph 6: Allocation of the Different Grounds For AG Objections to the Formal and Informal Tracks

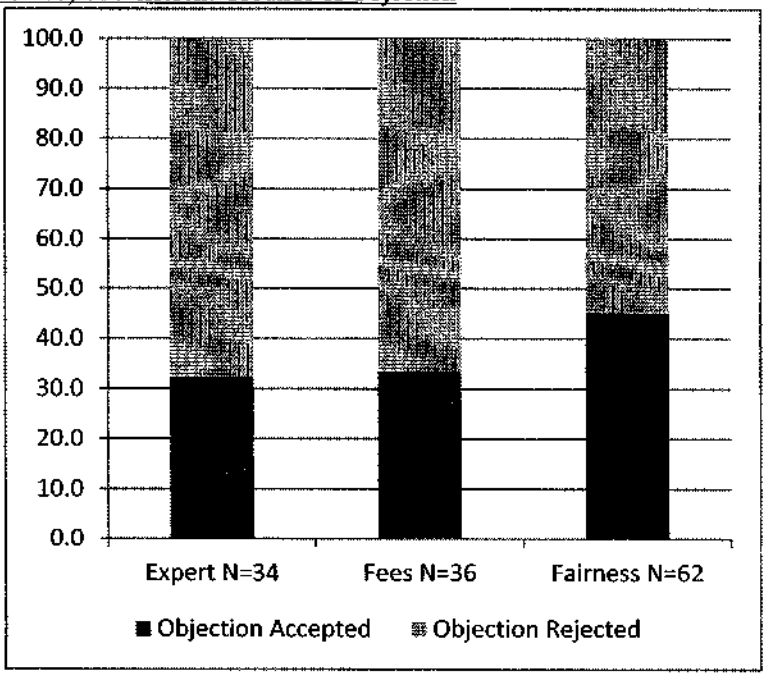


v. The Courts' Attitude Toward the Content of the AG's Objections

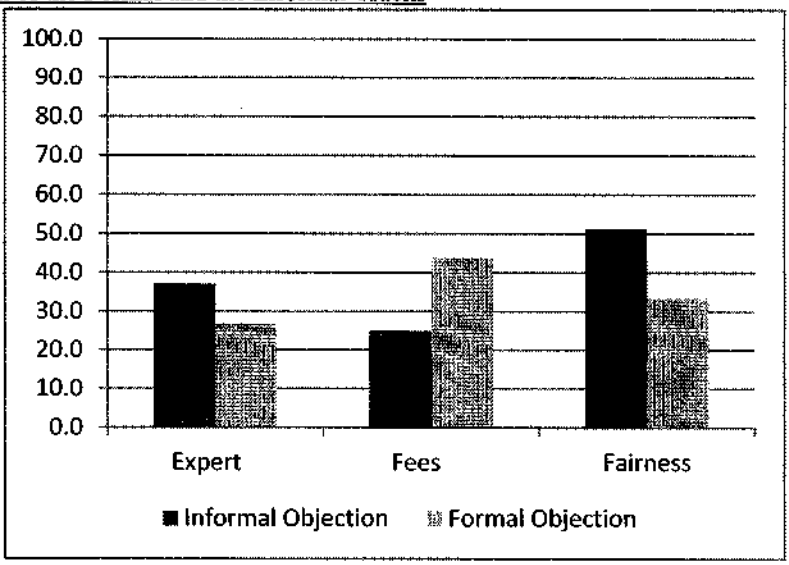
We hypothesized there would be no significant gaps in the rate of acceptance by the courts of AG objections across the various grounds for objections (fairness, appointment of an expert examiner, legal fees and remuneration, or other).[140] This hypothesis was partially disproved. The courts showed a lower tendency to accept objections concerning the appointment of a special examiner and legal fees and remuneration (approximately 30%) than objections regarding fairness (approximately 45%). In all cases, objections include both formal and informal avenues.

140. *Supra* note 138.

Graph 7: Courts' Attitude Towards AG's Objections (Formal and Informal Combined) on Different Grounds of Objection



Graph 8: Courts' Rate of Acceptance of AG Objections on Different Grounds, Per Each of the Formal and the Informal Tracks



As evident from the last graph, the approval rates for objections concerning the appointment of an expert examiner and the fairness of the proposal were higher

when voiced informally (35% as opposed to 25% for the expert examiner, and 50% as opposed to 30% when related to fairness of the proposed settlement). However, objections concerning legal fees and remuneration were more frequently approved as formal objections (approximately 40%), as opposed to informal objections (25%).

3. Summary of Findings

Our database includes all settlement proposals reviewed by Israeli courts between the year 2006 (when CAL took effect) and 2013 (included). We find that the elaborate quality control scheme that was established for such settlements under CAL has been only partially implemented by courts. Notably, special examiners have seldom been appointed, and private objections have rarely been voiced.

Objections by the AG, whose input must be sought for all settlement proposals according to CAL, have dropped substantially over the years, reaching an all time nadir of 15% of the cases in 2013. Alongside this drop, we see that courts often reject AG objections made under CAL, denying 50% of such formal objections in 2013.

As of 2009, contemporaneously with the drop in formal objections, the AG has successfully introduced a new form of objection not recognized under CAL: informal objections. These have been on the rise, reaching a peak of 50% of cases under the AG's review in 2013. Interestingly, informal objections have also proved to be more effective, as only 25% of them were denied in 2013. The formal-informal divide in terms of the format of objection raised by the AG was found to be more meaningful than the grounds on which objections were made in terms of the courts' tendency to accept or deny the objection.

While the AG avenue of objections is the most frequently used and therefore the most prominent quality control mechanism, its impact is not as great as one might expect. To recall, this expectation is rooted in the AG's stature in the Israeli legal system, the limited availability of external controls on class action settlements, and the clear and present danger that the parties in court might not duly represent neither other class members nor the general public interest. Another striking finding is that AG objections seem to be more effective when voiced informally, but objections raised informally are typically less significant.

Why are courts reluctant to follow the legal scheme for quality control over settlement proposals in class actions? Why do they reject the majority of objections made, while being more open to critiques of the settlements voiced by the AG informally? To what extent can these findings be a result of the drive for efficiency, and, if so, what does this teach us about the ways in which efficiency considerations can be mitigated? In the following Section, we address these and related questions regarding our findings through an organizational prism.

III. CURBING EFFICIENCY IN CLASS ACTION SETTLEMENTS: ORGANIZATIONAL INSIGHTS

The legal apparatus governing class action settlements has sought to ensure the fairness of settlements reached by the parties through the formal adoption of various quality control measures. These quality control measures are time consuming and represent a deliberate attempt to offset efficiency considerations and advance fairness concerns in the challenging setting of class action settlements. Courts, however, have rendered these mechanisms ineffectual, deferring to the parties, and preferring a quick settlement approval process over a lengthy consideration of objections and comments. What can explain the above findings? Clearly, the answer to this to this question can neither be found within the normative legal discourse,[141] nor in models based on individual and attitudinal approaches to adjudication.[142] As promised, we therefore turn to organizational studies.

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141. *Cf.* Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, (1990).

142. Taking a panoramic view over the literature studying judges' decision-making patterns, we observe two major approaches: a Legalist Approach and a Positive Approach. The Legalist Approach is familiar enough within the legal discourse. It holds that judges are motivated first and foremost by the desire to interpret and apply the law in accordance with the professional standards of the legal community. As part of this professional ethos, judges aspire to be, and are said to be neutral in their skillful application of the law. *See* Aharon Barak, *The Supreme Court 2001 Term – Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19 (2002).

The Positive Approach is comprised of several schools of thought, which subscribe to the view that while on the bench judges aspire to achieve certain substantive results, which they deem favorable. Under this approach, judges may surely make instrumental use of legal doctrines as they pursue these results. Two major schools within the Positive Approach are particularly noteworthy. They are the Attitudinal Model of Adjudication, which puts the emphasis on judges' ideological predilections, and the Strategic Model, which maintains that judges behave more strategically as they advance ends dear to them (e.g., certain policies or personal aspirations). For examples of the last position, *see, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). On the Attitudinal Model, *see* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2000); Michael Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1740-1741, 1748 (2003) (reviewing SEGAL & SPAETH, *supra*); Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQ. 601, (2000); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, (1996).

For general surveys of the debate regarding judges' behavior, *see, e.g.*, Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, (2002); Hugo Mialon et al., *Judicial Hierarchies and the Rule-Individual Tradeoff*, 15 SUP. CT. ECON. REV. 3, 4-7 (2007); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155-2159 (1998); Kim et al., *supra* note 35; Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models*

Of the three models of organizational theory described above,[143] it seems clear that the rational model of organizational theory cannot account for the key findings of our research. As we have seen, the rational model emphasizes the central role played by formal rules in the operation of organizations, holding that such rules can and do meaningfully guide the actions and decisions of organizational actors.[144] In sharp contrast, our case study reveals a reality in which judges defy the letter of law. In the case of expert evaluators, CAL clearly mandates their appointment prior to the approval of settlements except under extraordinary circumstances.[145] In reality, courts have in almost every single case ruled that the circumstances do not call for such appointment, often stating that it would only encumber the process and cause unnecessary delay.[146]

What's more, contrary to the rational model's assumptions, the findings raise serious doubts about how reasoned and rational judicial ruling is in the context of class action settlements.[147] Our claim is supported by the high rate of rejection of AG objections. The AG is a detached, neutral body that is supposed to provide an objective view on the adequacy of the settlements. One would expect that such objections would be welcomed by a common law court that is in dire need of information as it evaluates a proposed settlement, but at the same time has few effective tools for generating such information. The parties, as explained above, both have an interest in the dissolution of the claim in a settlement and have no interest in presenting a full and balanced picture of the circumstances surrounding the settlement proposal. Nevertheless, courts often reject the AG's objections and at times are highly hostile to their presence.[148]

Finally, the prominence and effectiveness of informal AG objections demonstrates the significance of activities that take place in the shadow of formal organizational rules, contrary to the premise of the rational model. Indeed, the relative success of the AG's informal channel for voicing comments has resulted in a paradox of sorts where the more serious AG objections that are voiced in the formal avenues are more frequently rejected while the less significant objections channeled through informal avenues have had a higher chance of being accepted.

We should not be surprised by the fact that the rational model cannot provide a satisfactory explanation for the findings since, as we have seen, in light of its shortcomings, other models have come to figure more dominantly in organizational

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of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel, 8 J. EMPIRICAL L. STUD. 556, 557-561 (2011).

143. *See supra*, Part I.B: Courts as Organizations.

144. *See supra* notes 67-68.

145. *See supra* note 102.

146. *See, e.g.*, TA (TLV) 1953/04 *Schechter v. Carmel Inc.* ¶ 6 (July 7, 2007).

147. *Cf.* WEBER, ECONOMY AND SOCIETY, *supra* note 62 at 979 ("In principle, a system of rationally debatable 'reasons' stands behind every act of bureaucratic administration, namely, either subsumption under norms, or weighing of ends and means.").

148. *See, e.g, Epstein v. Maariv*, ¶ 17, and TA (TLV) 2446/06 *Rothschild v. Partner Communication Ltd.*, ¶ 11 (April 4, 2011).

studies. As we shall now see, the relational and cognitive models can better illuminate the organizational dynamics that have given rise to our findings.

Turning first to the relational model, our findings on class action settlements seem to comply with the model's essential features. This model, by highlighting the centrality of informal venues of action, would underscore the significance of the ways in which courts operate "in action" (as opposed to their mandate "on the books"), as well as the alternative channel of interaction that arose between courts and the AG through informal objections. In addition, the relational model would emphasize the incentive structure that shapes judicial interventions in this setting.

As stated above, the judicial system creates strong incentives for judges to streamline litigation and encourage quick settlements so as to reduce caseloads.[149] It is essential to note that most, if not all, claims filed under CAL, introduced in 2006, represent an additional burden on the judges, as these are not claims that would have been filed individually absent the class action avenue. This is so for a simple reason: typically, a class action lumps together a string of too-small-to-sue actions. As the number of judges has not increased following the introduction of CAL, these claims have added to an already burdensome caseload. Each judge, therefore, when considering the appointment of an expert evaluator or whether to accept an objection to the settlement, inevitably weighs such a decision's impact on the duration of litigation (and consequently his or her overall caseload). Input from an expert evaluator takes time and may hinder the settlement proposal reached by the parties. Similarly, accepting the AG's formal objection may jeopardize the settlement proposal and ultimately lead to a full-fledged trial. Informal objections, by contrast, do not threaten the stability of the settlement proposal as they tend to require less significant amendments and, on the whole, support the approval of the proposed settlement.

Moreover, the relational model can explain the actions of the AG, whose motivation and incentives are influenced by its position as a repeat player that interacts with judges on a daily basis, on a wide range of issues, and in different capacities. Indeed, because of its ongoing involvement in class action settlement approval proceedings, the AG may be regarded in this context as a veritable organizational member of courts (at the very least it can be analogized to such a member).[150] Thus viewed, its interaction with the presiding judges may be conceptualized as territorial organizational behavior, practically a turf war of sorts, in which both the judge and the AG "make claim on and defend [their] control of a variety of organizational objects, spaces, roles, and relationships."[151]

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149. *Supra* note 35.

150. Compare with the analysis in Heydebrand, *supra* note 4, particularly at 765 (Arguing that "[c]*ourts are networks of organized activities*[,]" and that "[i]n trial courts, this network includes the activities of judges, courtroom deputies, law clerks, magistrates, judicial secretaries, court reporters, clerks, public defenders, probation officers, and court-appointed counsel." (emphasis in original)).

151. Graham Brown et al., *Territoriality in Organizations*, 30 ACAD. MGMT. 577, 577

In this case, both the AG and the court are entrusted with the responsibility of defending the general public interest as well the interest of all class members. As illustrated in the organizational literature, such a situation is a fertile breeding ground for territorial disputes.[152] In this setting, the AG's informal objections may be perceived as less threatening to the court. Formal objections, on the other hand, are likely to pose a direct challenge to the court. After all, such objections publicly posit that a proposed settlement, which the court had already openly endorsed (however preliminarily), does not meet the standards of CAL. In the formal track, the AG's objection may amount to questioning the court's competence in defending the public interest as well as the interests of third parties. Under this framework, it seems only natural for the court's reaction to the AG's formal objections to be highly critical. These tendencies are compounded by the strong incentives, described above, to opt for the faster route of objecting to formal objections.

As for the cognitive model of organizations, the class action settlement context gives rise to many of the concerns over scope and accuracy of information that feed into judicial decision-making. For one, as stated above, the class action settlement framework is a non-adversarial procedure that takes place within an adversary system.[153] As a result, the judge is faced with the challenging mission of uncovering crucial information without having the necessary inquisitorial tool set.

Furthermore, as noted above, CAL provides that judges are to conduct a preliminary review of the settlement proposal before sharing the proposal with class members and receiving objections and comments thereto. This structure creates two interrelated problems. First, the judge is required to evaluate the settlement proposals in the preliminary stage with limited information available. The problem of information scarcity is greatly exacerbated by the fact that courts rarely appoint expert examiners to assist them with assessing settlement proposals,[154] as well as the fact that the vast majority of settlement proposals are approved prior to class certification.[155] Second, when the relevant information is received via class member or AG objections, it is put forward only after the judge has publicly given his or her blessing to the proposal, even if only preliminarily. There is reason to believe that this dynamic presents serious challenges not only from an inter-institutional perspective,[156] but also from a cognitive decision-making perspective. A wealth of research in the cognitive and social psychology

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(2005).

152. CRAIG C. PINDER, WORK MOTIVATION IN ORGANIZATIONAL BEHAVIOR 151-152 (2d ed., 2008).

153. *See supra* Parts II.A: Class Action Settlements as a Case Study and II.B: The Need for Judicial Oversight over Class Action Settlements.

154. *Supra* text accompanying note 128.

155. *See supra* note 127. The certification process inevitably uncovers more information about the facts surrounding the case and can therefore shed light on the sufficiency of the proposed settlement.

156. *Supra* text accompanying note 151.

fields demonstrates that the stage in which information is presented and the manner in which it is framed can influence the outcome of decision-making processes.[157] Therefore, creating a preliminary approval stage can make it difficult for judges to later retract from their original (albeit preliminary) decision to proceed with the approval of the proposed settlement in light of AG objections raised at later stages.

Beyond preliminary review, heuristics (e.g., the framing effect) and decision-making theories may also explain why judges are more receptive to AG objections when presented informally. The literature in this area shows us that people prefer to make decisions that enhance their sense of agency, i.e., the feeling that they can (and do) shape reality through their decisions.[158] Under such a prism, formal objections are perceived as undermining judges' sense of agency, while informal objections are perceived to be in line with the original decision made by the judge. In essence, this is a similar dynamic to the one described in the relational realm, only here the explanation stems from individual-psychological reasons rather than institutional-relational ones.

Another possible explanation for the judges' preference for informal comments by the AG may lie in the phenomenon of "reactance," under which decision-makers tend to reject information which they perceive as constraining their freedom to reach a decision on their own.[159] In our case, this phenomenon may lead to the rejection of formal objections because of judges' (unconscious) psychological feeling that such objections threaten their freedom of choice and decision-making.

All of these psychological and decision-making dynamics reinforce judicial incentives to shorten processes and to view the preliminary approval stage as an end-point rather than an initial step in the evaluation of the proposed settlement.

As we can see, a broad organizational perspective illuminates two problematic junctures of the current legal arrangement governing class action settlements in Israel: the existence of a preliminary approval stage by the court, and the overlap in the authority of the AG and the court. These elements create perverse incentives for judges, limit the scope and quality of information available to them, and generate competition with other actors operating alongside them. The combination of the above factors and the strong incentives for all judges operating in the court system to reduce caseloads through quick settlements drive judges to ignore or reject important information that could help improve their decision-making and produce better settlements.

Attempts to understand these dynamics as resulting solely from the drive for efficiency, without considering the organizational dimensions uncovered through

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157. *See supra* notes 56 and 98.

158. *See, e.g.*, Albert Bandura, *Human Agency in Social Cognitive Theory*, 44 AM. PSYCHOL. 1175 (1989).

159. JACK BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966) (defining reactance as "motivational state directed toward the reestablishment of (a) threatened or eliminated freedom").

the relational and cognitive models, could give rise to the misguided notion that all that should be done to counter such tendencies is to adopt a legislative scheme of the sort implemented in Israel in the class action settlement approval context. As we have seen, this approach has proven inadequate. We uncovered some of the sources of the failure of the Israeli statutory attempt to curb efficiency considerations–the existence of incentives, motivations, relationships, and psychological phenomena that drive decision-makers to reject external input that could help generate more informed decision-making. Any reform must therefore heed well organizational factors in seeking to promote such informed decision-making.

At the same time, merely addressing the organizational challenges we uncovered without attending to the underlying drive for efficiency is also incomplete. It seems tempting to suggest that the problematic dynamics can be cured by removing the judicial preliminary approval stage and/or by better carving the respective areas of responsibility between the AG and the court. While such measures may improve somewhat judicial responsiveness to AG input, they will not bring about real transformation. As the relational model teaches us, organizational culture is a powerful force that shapes the actions and decisions of organizational actors.[160] The notion that the legislature can create a space in which judges will act in a completely different manner than they do in other instances is unrealistic, as exemplified in our case study.

As we can see, organizational theory offers significant lessons for the prospect of curbing the drive for efficiency. First, it uncovers additional, previously unrecognized harms caused by the emphasis on efficiency. When judges are in a rush to settle cases and reduce caseload, the impact of problematic incentives and cognitive biases (that are a natural part of the organizational landscape) becomes more extreme, further reducing the quality of judicial decision-making. Second, organizational studies show that an attempt to curtail the drive for efficiency and improve judicial outcomes requires a multi-layered approach. Such an approach would include a detailed analysis of the relational and cognitive forces at play and the adoption of specific measures that address them (e.g., reforming the preliminary judicial approval stage), as well as a rigorous scheme for inducing an overall change in the organizational culture of the court system as a whole. Such deep change requires the adoption of appropriate judicial selection and promotion criteria, training programs, incentive structure, quality control mechanisms, and the development and cultivation of a strong alternative judicial ethos in which efficiency's pull is tamed.

160. On organizational culture, see *supra* notes 89-91 and accompanying text.

CONCLUSION

In recent decades, courts have become synonymous with the advancement of efficiency. Settlement, fast procedures, and ADR are now the norm as a result of conscious efforts by policymakers, court administrators, and judges to reduce caseloads and streamline litigation. These developments have given rise to sharp critiques bemoaning the subjection of legal criteria to bureaucratic-managerial considerations. Proponents of the measures for advancing efficiency have fended off the critics, underscoring the need to alleviate backlogs and reduce costs.

This Article joins the discussion over the impact of efficiency and the role it can and should play in the court setting. It does so by offering two innovative contributions. First, it provides pioneering empirical data on the impact of efficiency in the class action settlement context in Israel, where explicit measures aimed at curtailing efficiency considerations have been introduced. Second, the Article draws on organizational theory to establish the inevitable role of efficiency in the operation of courts, uncovers previously unnoticed problematic aspects of the drive for efficiency, and offers insights on possible avenues for mitigating efficiency considerations.

While efficiency is an important and inseparable component of the administration of justice, the all-encompassing role it has come to occupy in the last generation is neither *force majeure* nor a *fait accompli*. Organizational theory can help us in adopting an alternative, more balanced ethos for the judiciary.

Appendix 1: The Tested Parameters

	Variable	Values
	Case Number	Serial number + Party Identity + Date of Given Decision
	Court district	The district to which the court assigned to the case belongs
	Cause	The relevant item on second addition to the law, constituting legal cause of action (1-13)
	Settlement timing	Prior to / after the approval of the class action suit
	Quality of settlement	The proportion between the sum awarded in the settlement and the damage incurred by class members: -no compensation -partial damages (less than 50% of the estimated damage), indirect damages (awarded in the form of a public donation) -direct and full damages (50% and over of the estimated damage)
	Position of the AG	-Formal objection -Informal objection -No objection
	Grounds for AG Objection	-Examiner Appointment -The sum of legal fees and representative remuneration -Fairness / other
	Grounds for AG objection accepted by the court	-Examiner Appointment -The sum of legal fees and representative remuneration -Fairness / other
	Private objection filed (none-AG)	Yes / No
0	Expert Examiner Assigned	Yes / No
	Settlement	Yes / Approval with revision / No[161]

161. First round/second round: in cases in which two rounds of AG objections took place (whether formal or informal) and then the settlement was approved/rejected by the court, the coding was done as follows: we viewed the objection by the AG whether voiced in

1	approved by the court	
2	AG objections accepted by the court	Yes / Partial Approval / No
3	Private objections accepted by the court	Yes / Partial Approval / No

the first and/or second round as an objection and coded the court's acceptance/rejection of the AG objection according to the court's final decision (i.e., we examined to what extent the AG comments were accepted as part of the grounds for rejecting the proposed settlement or in the final settlement approved, even if such comments were accepted voluntarily by the parties).