In the Supreme Court Sitting as the High Court of Justice

HCJ 7245/10
HCJ 8357/10
HCJ 908/11

Before:	Her Honor Justice E. Arbel Her Honor Justice E. Hayut Her Honor Justice D. Barak-Erez
The Petitioner in HCJ 7245/10:	Adalah – The Legal Center for Arab Minority Rights in Israel
	v.
The Respondents:	1. The Ministry of Social Affairs 2. The National Insurance Institute 3. The Knesset
The Petitioner in HCJ 8357/10:	The Israel National Council for the Child
	v.
The Respondents:	1. The Israeli Government 2. The Minister of Finance 3. The Attorney General 4. The Minister of Health 5. The Israeli Knesset 6. The National Insurance Institute
The Petitioners in HCJ 908/11:	1. The Association for Information on Vaccines 2. Binyamin Brotski 3. Matan Koren 4. Netta Dror 5. Itay Hadar 6. Lilach Rochel
	v.
The Respondents:	1. The National Insurance Institute 2. Director General, Ministry of Health 3. The Speaker of the Knesset
	Petitions for an order *nisi* and an interim order
Date of session:	Tammuz 12, 5772 (July 2, 2012)
On behalf of the Petitioner in HCJ 7245/10:	Adv. Z. Zausan, Adv. H. Jabarin

On behalf of the Petitioners in HCJ 8357/10: Adv. V. Windman, Adv. C. Pollack-Cohen

On behalf of the Petitioners in HCJ 908/11: Adv. A. Naveh

On behalf of Respondents 1-2 in HCJ 7245/10 and Respondents 1-4 and 6 in HCJ 8357/10 and the Respondents in HCJ 908/11: Adv. A. Keidar, Adv. M. Freeman

On behalf of Respondent 3 in HCJ 7245/10 and Respondent 5 in HCJ 8357/10: Adv. Dr. G. Bligh

Judgment

Justice E. Arbel:

The petitions before us concern the reduction of child allowance for a parent whose children have not received the required vaccines announced by the Director General of the Ministry of Health. In the petitions, the petitioners demand the revocation of Section 61(2)(d) of the Arrangements Law (Legislative Amendments for Implementation of the Economic Plan for 2009 and 2010), 5769-2009 (hereinafter, the "Arrangements Law" or the "Law"), on the grounds that it is unconstitutional.

The Arrangements Law

1. The Arrangements Law, which was enacted in 2009, included Amendment no. 113 (hereinafter, the "Amendment") to the National Insurance Law [Consolidated Version], 5755-1995 (hereinafter, the "National Insurance Law"). The Amendment mainly concerns the gradual increase of the child allowances paid for the second, third and fourth child in a family unit. Concurrently, the Amendment orders the reduction of the child allowances paid for children who have not received the required vaccines based on their age and health condition and according to the Vaccination Program ordered by the Director General of the Ministry of Health. The main part of this arrangement is currently set out in Section 68(d) of the National Insurance Law:

> (d)(1) If the child meets the provisions of Paragraph (2), the monthly child allowance paid for him will be reduced by the sum of NIS 100 (in this section – the "Sum of the Reduction"), provided that notice was given as stated in Subsection (e) and the 14-day period has passed as stated in the said subsection from the date of service of the notice according to the provisions of Subsection (h)(2); the reduction will begin on the 1st of the month following delivery of the notice to the Institute as stated in Paragraph (2);

> (2) The Ministry of Health shall notify the Institute that six months have passed from the date on which the child was required to receive the vaccines based on his age and health condition and according to the Vaccination Program ordered by the Director General of the Ministry of Health; such notice shall be sent to the Institute no later than seven days after the date on which six months have passed as aforesaid;
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> (3) A program as stated in Paragraph (2) will be published in the Israel Official Gazette and shall include provisions regarding the type of vaccine, the vaccination schedule, additional dates on which a vaccine that was not administered on the required date may be supplemented, and the maximum age at which each vaccine may be administered (in this section, the "Vaccination Program").

It should be noted that additional sections in this arrangement include: instructions regarding the notice that must be sent to parents whose children have not received vaccines as aforesaid, options to challenge and appeal decisions on the matter, sums of allowance reductions according to the number of children in the family, recalculation of the allowance after the child has been vaccinated as required or after the passage of the last date on which the vaccine, because of which the allowance was reduced, could be administered, etc.

2. Publication of the Vaccination Program by the Director General of the Ministry of Health was initially postponed because claims were raised regarding lack of access to Family Health Centers ("Tipat Chalav") by the Bedouin population in the Negev, such that in practice the Amendment could not be implemented. After actions were taken to increase access and awareness among the Bedouin population in the Negev, the Director General of the Ministry of Health published a vaccination program by virtue of the Law, which included one vaccine named MMRV, a "quadrivalent" vaccine against four diseases: measles, mumps, rubella and varicella. The vaccine is given to infants at the age of one year and the program applies to infants born starting January 1, 2012, such that the first reduction of allowance will be made no earlier than July 1, 2013.

The petitions at bar were filed against this arrangement.

HCJ 7245/10 –Petitioners' Claims

3. The petitioners are organizations and associations that act to promote Arab and Bedouin minority rights, as well as residents and chairpersons of local committees of three Bedouin villages in the Negev, in which, on the date this petition was filed, no Family Health Center operated.

4. First, the petitioners claim that the Amendment was passed following a coalition agreement, and that prior to its approval no discussion was held in respect thereof. They also argue the respondents did not base the approval of the Amendment on any analysis or research. Second, the petitioners claim that the Amendment violates the children's constitutional rights. According to them, the child allowance belongs to the children themselves, even though it is remitted to their parents. The court has emphasized on various occasions the importance and objective of the child allowances is for the children's welfare. The conclusion, therefore, according to the

petitioners, is that reduction of the allowances harms the children and violates their rights, mainly children belonging to poor families that will be forced to waive monetary expenses necessary for the upbringing and development of the children. It is argued that the Amendment violates the supreme principle of the best interest of the child, which has been established in the case law of the Supreme Court and in international treaties. The petitioners further claim that the Amendment violates the principle of equality between children, as it creates an irrelevant distinction between children who have received vaccines and those who have not received vaccines, and between children whose parents have access to preventive medical services and children for whom the State has not ensured access to such services. They further claim that the Amendment violates the children's constitutional right to the property, since the allowances belong to them. They claim that the very payment of the insurance contributions to the National Insurance Institute create a contractual agreement between the parent and the National Insurance Institute, which includes the expectation of payment of child allowances against payment of the insurance contributions by the parent. Violating this expectation, it is claimed, is also contrary to Basic Law: Human Dignity and Liberty which establishes the constitutional right to property. A further violation the petitioners ascribe to the Amendment is the violation of the right to social security, which has been recognized in the case law of the Supreme Court and in international treaties. According to the petitioners, the Amendment may aggravate poverty among the children who will be harmed by the Amendment, particularly those who already belong to poor families.

5. According to the petitioners, the violation of the aforementioned constitutional rights does not satisfy the conditions of the limitation clause. The violation, it is argued, is not for a proper purpose. The violation was made without examination and without an appropriate foundation; it aggravates poverty and socioeconomic gaps; and it also harms the public interest that mandates protecting and avoiding harm to those children who are not being vaccinated.

6. It is further asserted that the violation does not satisfy the threefold proportionality test. The violation does not satisfy the rational connection test, since the means chosen do not achieve the objective of protecting the child's health and public health. According to the petitioners, the Amendment in fact harms the child's wellbeing, health, development, property and right to social security, and causes a deepening of poverty. It is asserted that punitive use of the allowances is prohibited, and that the allowances should not be used to combat various negative or wrongful phenomena. The Amendment punishes the children for non-receipt of vaccination services.

The petitioners further claim that the violation does not meet the second proportionality test, the less harmful means test. According to them, other appropriate means could have been adopted to achieve the goal, such as making preventive health services accessible in the unrecognized villages in the Negev. The petitioners assert that the main population that will be harmed by the Amendment is the children residing in the Bedouin villages, including the children of the unrecognized villages. According to them, the high rate of unvaccinated Bedouin children is the product of the State's failure to provide preventive health services at Family Health Centers. The Bedouin children's access to these services is limited. In approximately forty-five unrecognized villages there are, it is argued, only twelve Family Health Centers, and even those were only put in place after a petition to the HCJ, and some are under

threat of closure. The petitioners add that the residents of these villages also have limited mobility due to the absence of driving licenses and suitable public transportation in the area, and that they have low socioeconomic status and a very high rate of poverty. The Amendment therefore punishes the Bedouin children through no fault of their own, and due to the Ministry of Health's failure to fulfill its obligation to realize these children's rights from the outset. This punishment will further aggravate the socioeconomic status of the Bedouin children, and deepen the social gaps between this population and the general population. The petitioners assert that despite the neutral language of the Amendment, the said data reveal that, *de facto*, it discriminates against the Bedouin children on the basis of nationality.

Finally, the petitioners claim that the violation also fails to fulfill the narrow proportionality test. According to them, democracy cannot justify punishing children because they have not been vaccinated by their parents. The Amendment leads to a result opposite to that sought by the legislature and, instead of protecting the children's health, causes them additional harm.

7. In supplementary pleadings filed by the petitioners on August 16, 2012, the petitioners seek to emphasize the claim that the violation of rights should be examined in light of the fact that the matter concerns children, a group with special characteristics which mandate special constitutional protection. According to them, this fact distinguishes between a regular violation of the right of equality, which may be a permitted distinction, and a violation which falls under the definition of prohibited discrimination, i.e. violation of the constitutional right.

HCJ 8357/10 – The Petitioner's Claims

8. The petitioner in HCJ 8357/10 is the Israel National Council for the Child. It too asserts that the Amendment constitutes a violation of the equality between children whose parents vaccinated them and children who have not been vaccinated for whatever reason. According to the petitioner, this is not a distinction that is relevant to the purpose of the legislation. The purpose of the child allowance arrangement, it is argued, is to allow a redistribution of income among the population, transferring income from citizens who have no children to those who have children and whose income needs to be divided between a greater number of persons. According to the petitioner, the allowance is not a prize for desired behavior, and conditioning the allowance on a condition unrelated to the size of the family is wrongful *ab initio*. The petitioner claims that the case does not concern denial of a benefit given to parents for vaccinating their children, as the State claims, since the allowance increment granted in the Amendment does not apply to the first child or the fifth and any subsequent children. The Amendment may also harm populations that are already weakened, who do not vaccinate their children due to lack of access to Family Health Centers or due to the absence of time and financial resources. The petitioner emphasizes that the rate of unvaccinated children is particularly high in the unrecognized settlements in the Negev as a result of a lack of physical, cultural and linguistic access to vaccination services. The petitioner further claims an additional violation of the right to social security which will bring more children into the cycle of poverty and deepen penury among families already below the poverty line, contrary to the objective of the child allowances, particularly with respect to the first child and the fifth child onwards in the family.

9. The petitioner argues that the violation of the constitutional rights of the children does not satisfy the conditions of the limitation clause. The objective of increasing the vaccination rate is foreign to the purpose of the allowances, and therefore is not a proper purpose. Introducing this consideration will create a dangerous precedent whereby allowances may be reduced for any health, educational or social reason. The proportionality test is also not satisfied according to the petitioner. When the reasons for non-vaccination are ideological or depend on access to health services, it is clear that the reduction of the allowances will not affect vaccination. Therefore, the means are inconsistent with the purpose. The lack of consistency, it is claimed, stands out against the background of the data regarding the high rate of vaccination in the State of Israel, mainly with respect to the vaccinations currently required by the Vaccination Program published in accordance with the Amendment. The petitioner makes a distinction between a benefit, the conditioning of which on vaccination may be proportionate, and the imposition of a sanction for failure to vaccinate which is not proportionate. The petitioner rejects the State's claims regarding the measures taken in order to moderate the harm. It further claims that there are many and varied measures for achieving the goals reflected in the Amendment that do not violate the children's rights and have a greater benefit potential. Thus, it is possible to act to increase awareness and improve access to child vaccination services.

HCJ 908/11 – The Petitioners' Claims

10. The petitioners in HCJ 908/11 are the Association for Information on Vaccines and parents whose children they argue suffered various negative reactions following a vaccination. The petitioners claim that there are differences of opinion in the medical community and among the public regarding the effectiveness of vaccines and the severity of their side effects. Hence, they believe that parents should be allowed the right to choose whether or not to vaccinate their children. According to them, the fact that there is a law aimed at compensating those injured by vaccines proves that vaccines are not risk-free. The petitioners further assert that the Amendment violates the right to equality, the individual's right to autonomy and the right to autonomy of parents in the upbringing of their children. The petitioners challenge the Amendment legislation procedure and its inclusion in the Arrangements Law, which does not allow the issue to be thoroughly discussed and examined. Similar to the other petitions, these petitioners claim that the violation does not satisfy the conditions of the Limitation Clause.

The Respondents' Claims

11. Respondents 1-5 the legislative proceedings, which began at the initiative of the Director General of the Ministry of Health, and included preparation and examination of the data in Israel and worldwide. A separate legislative memorandum was subsequently circulated, unlike the regular procedure for enactment of the Arrangements Law, in order to allow specific examination of the matter. The memorandum was discussed both at the various government ministries and at the Finance Committee of the Knesset, and conflicting positions were heard. The respondents note that it was decided to stop collecting the Family Health Centers' fees in order not to create an economic barrier to vaccination. The respondents further specified the actions that were performed by the ministries for the implementation of the Law, including increasing access to Family Health Centers and increasing awareness of the Amendment to the National Insurance Law.

12. The respondents emphasize the importance of the MMRV vaccine and the severity of the diseases against which it immunizes. According to them, the vaccine is intended to combat diseases that can cause severe harm to public health, and particularly to the health of children. In addition, these diseases are highly contagious. The respondents stress that according to professional opinion, in order to reach "herd immunity", which protects even those who cannot be immunized or who have not developed resistance despite having received the vaccine, the immunization coverage required in the population is approximately 95%. The respondents further state the importance of immunization coverage to each individual child, relative to both the child population and the general population. They also note the expected economic and social repercussions for the State due to the absence of effective prevention of disease outbreak.

13. The respondents maintain that the default is that the Court will not be inclined to intervene in socioeconomic policy established in primary legislation of the Knesset. The respondents further claim that the legislative procedure was duly carried out and does not create cause for the Court's intervention. The respondents also assert that the Amendment does not violate constitutional rights. With respect to violation of the children's rights, the respondents contend that the allowance is not a direct right of the child, but rather the right of the parents, intended to help them support the family unit. It is argued that the fact that the amount of the child allowance depends on the birth order of the child in the family supports this conclusion. In addition, on the practical level, it is the parents who decide on the use of the allowance, and they are not obligated to use it for purposes pertaining directly to the children. According to the respondents, even if the allowance did belong to the children, there is no case law establishing a property right for recipients of the allowances.

14. According to the respondents, the Amendment does not violate the constitutional right to minimal dignified existence. According to the respondents, there is no room for the assumption that any change in the allowance's entitlement rate constitutes a violation of a constitutional right. They refer to case law that determines that the array of social rights does not necessarily reflect the bounds of the right to social security at the constitutional level. Moreover, the case at bar concerns the reduction of an allowance that for the most part corresponds to the allowance increment that was granted in the Amendment, and therefore there is no ground for the assertion that the Amendment will violate the right to minimal dignified existence. With respect to the violation of equality, the respondents claim that the Amendment establishes an egalitarian norm which seeks to incentivize individuals to take action that is highly desirable from a social and health perspective, and it cannot be said that it constitutes a discriminatory norm. Every parent is able to ensure that his child is vaccinated, and in such a case, the child allowance will not be reduced. In any event, it is argued that there is no violation of equality at the constitutional level—that is, a violation that is closely and pertinently related to aspects of human dignity as a constitutional right. As for the assertion of consequential discrimination on the basis of nationality, the respondents claim that the data indicate a similar rate of vaccination in the Jewish sector and in the Arab sector, while in the Arab sector there is a slightly lower rate of vaccination than in the Bedouin sector. The respondents admit that the percentage of vaccination in the unrecognized villages in the Negev is lower, but believe that the current level of access to Family Health Centers in these settlements, after various actions have and are being taken, is reasonable and appropriate. Finally, the respondents assert that the

Amendment does not violate the constitutional rights to autonomy and to parenthood. They state that the professional position of the Ministry of Health, which is based on the prevailing approach in the medical world, is that vaccines are a desirable, efficient and safe method of preventing morbidity. They claim that the fact that there is a professional dispute on the matter does not provide grounds for the Court's intervention in primary legislation. They further argue that the law does not force parents to vaccinate their children, but merely creates an economic incentive to vaccinate. In any event, it is argued that there is no violation whose severity rises to the level of a violation of a constitutional right. The respondents believe that the Amendment promotes other aspects of human dignity, leaving no basis to determine that the bottom line is injurious.

15. Alternatively, the respondents assert that even if it is determined that a constitutional right is being violated, the violation is lawful and satisfies the conditions of the Limitation Clause. They state that the purpose of the Amendment is protection of children while ensuring their health and welfare and caring for public health in general. This, they claim, is a proper purpose the values of the State of Israel. They further claim that the purpose is not foreign and extraneous to the National Insurance Law. They also assert that the Amendment satisfies the three proportionality tests. Experience in other countries establishes the effective connection between economic incentives and the conduct of parents with respect to their children, including increasing vaccination rates. Regarding the less harmful means test, the respondents admit that other alternatives exist to incentivize the vaccination of children. However, they claim that the means chosen by the legislator do not exceed the bounds of proportionate measures. They add that the State may intervene in arrangements and regulation of conduct where there is a public good that creates a "market failure" in the actions of citizens, each of whom is relying on the immunization of the other. Finally, they claim that the proportionality requirement in its narrow sense is fulfilled, in view of the clear public interest in vaccinating children and maintaining a high vaccination rate on the one hand, and considering that the harm is limited and proportionate, taking into account the conditions and limitations set forth in the legislation regarding reduction of the allowance, on the other hand.

16. The respondents refer in detail to the issue of the repercussions of the Amendment on children in the Bedouin diaspora. They argue that following actions taken on behalf of the respondents, there is currently reasonable and adequate access of the Bedouin population to Family Health Centers. In addition, they state that the MMRV vaccination rate in the Bedouin population registered at Family Health Centers is higher than the MMRV vaccination rate in the Jewish sector.

17. Respondent 6, the Knesset, rejects the petitioners' claims and joins the position and reasoning of Respondents 1-5.

Deliberation and Decision

Claims Pertaining to the Legislative Process

18. The petitioners raise claims concerning the enactment of the Amendment in the framework of the Arrangements Law in expedited legislative proceedings, and argue that the Amendment was born out of a coalition agreement without comprehensive ground work. These claims should be dismissed. As detailed by the respondents in

their response, the Amendment emerged following the request of the Director General of the Ministry of Health in 2008, Prof. Avi Israeli, to the Ministry of Finance, in which he requested to examine the possibility of conditioning child allowances on various acts, including vaccination of children. In 2009, the issue was also introduced into the coalition agreements, but there is nothing wrong with that in itself. Following the request of the Ministry of Health, the Ministry of Finance carried out a review of similar arrangements around the world, as well as examined the vaccination data in Israel. The resulting position paper stated that the use of allowance conditioning around the world to increase school attendance and the use of preventive medicine has been proven to be effective. It further indicated that there is a phenomenon in Israel of not vaccinating infants, contrary to the Ministry of Health's recommendation. An outbreak of tuberculosis in Israel in 2008 was mentioned, and it was emphasized that the Ministry of Health has no effective means to handle the said problem. The position paper proposed a model whereby receipt of child allowance would be conditioned upon regular attendance at an educational institution and receipt of the vaccines required by the child's age and health condition. As part of the discussions in preparation for the Arrangements Law, several discussions regarding this proposal were held at the relevant ministries as well as before the Attorney General. In the course of these discussions, several changes were made to the model proposed by the Ministry of Finance. Later, a Government Resolution was made generally adopting the proposed model with certain changes, primarily the reduction in child allowances, rather than their denial, and the establishment of caps for the reduction in each family.

19. Following the Government Resolution, and contrary to the regular procedure in the framework of the Arrangements Law, the Ministry of Finance circulated a separate legislative memorandum in order to allow continued examination and detailed discussion on the issue. The memorandum was examined by various entities at the ministries, and the Ministry of Justice also forwarded its comments regarding the memorandum. In addition, the Finance Committee of the Knesset held a discussion on the memorandum and examined the arrangement established therein. Prior to the discussion, the committee members received an analysis on the matter prepared by the Knesset Research and Information Center, which also included positions opposing the proposed arrangement. Many entities from the various ministries and from the National Insurance Institute were present at the Committee's discussion on June 24, 2009, as well as representatives of the Israel National Council for the Child, one of the petitioners at bar. The vaccination data in the various sectors in the State of Israel were presented to the members. On July 7, 2009, another discussion was held at the Finance Committee, and its members were informed of the removal of the condition of regular attendance at an educational institution. Finally, the Finance Committee approved the bill for a second and third reading. The law in its final version was approved by the Knesset on July 14, 2009 after a discussion that included specific reference to the issue at bar (see the Knesset minutes of July 13, 2009, *available at* http://www.knesset.gov.il/plenum/data/02626209.doc#_Toc258334465).

20. In order to examine the petitioners' claims regarding the legislative proceedings described above, it is necessary to mention the case law that held that intervention of this Court in parliamentary proceedings will be limited to cases in which "the legislative process causes deep harm to material values of the constitutional regime[.]" (HCJ 6784/06 Shlitner v. The Pensions Commissioner, Paragraph 36 of the opinion of Justice Procaccia (January 12, 2011)). The test that was set out is "whether

the defect in the legislative proceeding goes to the root of the proceeding, and whether it harms basic values of the constitutional regime." (*Id*). It was further held that an expedited legislative proceeding, such as the Arrangements Law, does not, in itself, lead to the striking down of the law. Even in such a case, the Court will examine whether there was a defect that goes to the root of the proceeding to an extent that justifies judicial intervention, and the consequence of such a defect in accordance with the severability model. (HCJ 4885/03 The Poultry Breeders in Israel Organization Agricultural Cooperative Society Ltd. v. The Israeli Government [2004] IsrSC 59(2) 14, 42 (hereinafter, "The Poultry Breeders Organization Case"); HCJ 3106/04 The Association for Civil Rights in Israel v. The Knesset [2005] IsrSC 59(5) 567). It was further held that "even if it were proven that the legislative procedure prevented the holding of an in-depth and exhaustive discussion and impaired the ability of Knesset members to formulate a well-established position with respect to each one of the issues included in the bill, this is not enough to justify judicial intervention." (The Poultry Breeders Organization Case, on p. 50).

21. In the case at bar, there is no room for judicial intervention in the legislative proceedings of the Amendment. Contrary to the practice with the Arrangements Law, a separate legislative memorandum was circulated on the issue in question to the various ministries for their comments. In addition, as can be seen from the chain of events reviewed above, the issue was discussed and examined by various entities; various positions were heard, a report of the Knesset Research and Information Center was prepared and data were presented regarding the success of similar arrangements around the world. In the course of the discussions, the bill was modified, narrowed, and arrangements were added in order to reduce the harm to the entitled population. The issue was also raised in the discussion at the Knesset, and objections by various Knesset Members were heard regarding conditioning the child allowances on the vaccination of children. Indeed, there may have been room for a more in-depth discussion with a broader foundation. However, this is not a defect that goes to the root of the proceeding, and therefore there is no room for the Court's intervention based on a defect in the legislative proceeding. (See and compare HCJ 494/03 Physicians for Human Rights – Israel v. The Minister of Finance [2004[IsrSC 59(3) 322, 330 (hereinafter, "PHR Case")).

Regarding the Content of the Legislation

22. Before examining the constitutionality of the Amendment, we must first state the essence and purpose of the child allowance arrangement. I will then review the standpoint of the Ministry of Health and medical science on vaccines in general, and specifically on the MMRV vaccine. These reviews will lay the foundation for examining the constitutionality of the Amendment to the National Insurance Law. As part of this examination, I will examine the question, as customary, of whether constitutional rights established in Basic Law: Human Dignity and Liberty are violated, and if the answer is affirmative, I will go on to examine whether the conditions of the limitation clause are satisfied.

Child Allowance – the Arrangement and its Purpose

23. The arrangement regarding child allowances is established in Chapter D of the National Insurance Law. According to the arrangement, an insured parent is entitled to a monthly child allowance for each child until the child reaches the age of 18. The main condition, therefore, to receiving child allowance is having children younger than 18 years of age in the family unit. The entitlement to receipt of child allowance and the rate of the allowance is not dependent on income.

24. The purpose of the social security system, in general, is to provide a safety net for individuals and families in cases of need, loss of or a decrease in the regular financial income, or due to increased expenses because of a variety of circumstances. (Johnny Gal "The Social Security System" from State of the Nation Report – Society, Economy and Policy 2009, on p. 234 (Taub Center for Social Policy Studies in Israel, Dan Ben-David, Editor, 2010) (hereinafter, "Gal"); HCJFH 4601/95 Serossi v. The National Labor Court [1998) IsrLC 52(4), 817, 831; HCJ 6304/09 Lahav, The Umbrella Organization for Independent Businesspeople v. The Attorney General, Paragraphs 43-44 (September 2, 2010) (hereinafter, "Lahav Case")). The social insurance system is supposed to ensure minimal dignified existence for all of its residents and to protect their standard of living. The system is based on the principle of social solidarity and mutual assistance. (LCA 7678/98 The Payment Officer v. Doctori [2005] IsrSC 60(1) 489, 525; Lahav Case, Paragraphs 44, 58). The purpose of the child allowances is to help families with children to bear the increasing costs of raising children. In fact, the child allowances to equalize the state of different-sized families whose level of income are equal. In addition, they help families not to fall below the poverty line due to the added expenses of having children, and protect the family against exposure to the social risk of a decline in the standard of living created as a result of expansion of the family. (Abraham Doron "The Erosion of the Israeli Welfare State in 2000-2003: The Case of Children Allowances", Labor, Society and Law, 11 95, 106 (5766); Gal, on p. 254; Ruth Ben-Israel "Family and Social Security: From A Traditional Division of Labor to a New Division", Menashe Shava's book, 207, 215-216 (Aharon Barak & Daniel Friedmann eds., 2006)). Understandably, these allowances affect the welfare of the child in the family, and therefore one of the purposes of the allowance is to further the best interests of the child and caring for the children's welfare. (NIA 1117/04 Azulay v. The National Insurance Institute, the opinion of Deputy President E. Barak-Ussoskin (November 2, 2006) (hereinafter, "Azulay Case"); HCJ 1384/04 Betzedek – The American-Israeli Center for the Promotion of Justice in Israel v. The Minister of the Interior [2005] IsrSC 59(6) 397, 408 (hereinafter, "Betzedek Center Case")).

25. The parties before us were divided on the issue of whether child allowances should be deemed as belonging to the child's parents or to the child himself. The petitioners assert that the allowance is the property of the child himself. Conversely, the respondents argue that the child allowance is not a direct right of the child, but a right of the parent aimed at assisting him or her in supporting the family unit. I believe that this question has not yet been decisively answered, but it seems to me that the inclination of this Court's case law is actually towards the petitioners' position. And so, in CA 281/78 Sin v. The Competent Authority under the Invalids (Nazi Persecution) Law 5717-1957 [1978] IsrSC 32(3) 408 (hereinafter, "Sin Case"), Justice C. Cohen holds that the child allowances are not income of the insured parents, but rather escrow funds the mother is entrusted with to spend for the welfare of her children. Certainly, it was held, it is not income of the father, who does not receive the

money, neither into his possession nor for his enjoyment. The Court added that "the legislator's intention in allocating an allowance to children would be entirely thwarted and frustrated if the children's allowance was deemed as income of their parents, and all types of authorities would be able to get a hold thereof and take it from the mouths of the children in order to collect payment from their parents." (Sin Case, on p. 411; see also LCA 3101/00 Betiashvili v. The Competent Authority [2002] IsrLC 57(1) 183). Indeed, a ruling of the National Labor Court held that the person who is entitled to the child allowance is the insured parent and not the child directly, and that the parent does not hold the money in trust for his child in the legal sense. (Azulay Case, Paragraphs 4-5 of the opinion of Justice V. Wirth Livne). However, this Court has not ruled on the issue, and the petition filed on the opinion in the Azulay Case was dismissed *in limine* because it was theoretical, and did not state a position on the merits of the issue. (HCJ 967/07 Jane Doe v. The National Insurance Institute (April 29, 2007)). In addition, it should be noted that in the Azulay Case, a minority opinion was voiced by Deputy President E. Barak-Ussoskin. This position, which was based, *inter alia*, on the said judgments of this Court, asserted that the right to child allowance is granted to the child and not to the parent, and that the parent receives the allowance in trust in order to care for the welfare of the child.

In any event, I do not believe that we are required to decide this issue, but we should rather assume that the legislator, when determining the child allowances, had in mind the welfare and best interests of the children.

The Vaccination Program

26. The issue at bar mainly concerns the conditioning of part of the child allowance on vaccinating the child for whom the allowance is paid. Therefore, the purpose of the Vaccination Program in Israel should be briefly stated. As the respondents clarified, the professional position of the Ministry of Health is that vaccines are a means of utmost importance for protection of the health of children and of the general public. The vaccine system currently in place protects the population in general and children in particular from serious morbidity. The importance of the vaccines is not expressed merely in vaccinating children, but also in ensuring the vaccine is timely given, in accordance with the recommendations of the Ministry of Health. This was addressed in the past by Deputy President E. Rivlin:

> "There is no doubt that compliance with the vaccination dates is of great importance, and it is the duty of the persons charged with it to ensure and verify that there is no unjustified delay in vaccinating infants. The schedule set for vaccinating infants was set for good reason, and it obviously must be adhered to with the utmost attention and the strictness required in such a matter." (CA 9628/07 Shalom v. Clalit Health Services, Paragraph 6 (September 2, 2009)).

27. The Ministry of Health deems the vaccination of children to be of great importance on two levels: the first level concerns the protection of the health of the individual child receiving the vaccine. The respondents state that a vaccine is the only way to ensure protection of the individual from the diseases against which the children are vaccinated. They explain that in a world that has become a type of "global village," there is a risk that any immigrant or tourist will bring with him diseases that are not currently found in Israel, and which may infect those who are not immunized against

such diseases. The second level concerns what is termed "herd immunity." Herd immunity protects individuals in the public who have not been vaccinated for justified reasons, such as newborn babies who have yet to reach the age in which the vaccine is administered, the elderly person whose immune system is not functioning properly, or other persons at risk with respect to their immune systems, such as people suffering from serious illnesses or undergoing chemotherapy. In addition, herd immunity protects the small percentages of individuals who were vaccinated but are not reacting to the vaccine. Herd immunity is only achieved when there is a high coverage rate of vaccinated individuals in society and so long it is maintained.

Herd immunity creates a unique characteristic with respect to the issue of children's vaccination, since the individual decision of each parent as to whether or not to vaccinate his children has an effect on the entire public. In addition, a "free rider" problem may develop in this regard, whereby a parent will choose not to vaccinate his children on the assumption that herd immunity will protect them from the diseases against which the vaccines protect. A wide-scale phenomenon of free riders could harm the herd immunity and thus harm the general public.

28. It appears that the majority of the petitioners also recognize the importance of vaccines and their significant contribution to public health; the main dispute is about what measures should be taken in order to encourage the vaccination of children. However, the petitioners in HCJ 908/11 challenge this starting point, arguing that the effectiveness of vaccines and the severity of their side effects are in dispute. It appears to me that this position cannot change the said starting point. It seems that the position of the Ministry of Health regarding the importance of vaccines is a prevalent and very common position in Israel and around the world. (See e.g. Avraham Sahar "Opportunity Makes the Thief..." Beliefs, Science and the Vaccine Victims' Insurance Law, 5750-1989" Medicine and Law 36 on p. 105 (2007) (hereinafter, "Sahar"); Bilhah Kahana "The Vaccine Victims' Insurance Law – A Law that is Not Enforced" Medicine and Law 38 on p. 14 (2008)). Insofar as we are aware, to date no causal link has been scientifically proven between vaccines and neurological or other damages. However, medical science recognizes that vaccines, or to be precise, the fever caused in some children as a result of vaccination, can create a risk and cause damage to a very small percentage of children with a certain genetic predisposition who receive a vaccine. Nonetheless, it is unclear whether, even if the vaccine had not been given, damage could have been caused as a result of another fever-inducing disease. (See Tali Sagi "Comments on the Article "Opportunity Makes the Thief - Beliefs, Science and the Vaccine Victims' Insurance Law"" Medicine and Law 36 on p. 116 (2007)). In addition, there is broad consensus that even if there is a certain risk, it is very small, and that the benefit resulting from the vaccine is much greater:

> "The risk entailed in receiving the vaccine, even though it does in principle exist, is very distant and rare, while the benefit and necessity of the vaccine to the health of the child are not doubted" (CA 470/87 Eltori v. The State of Israel – The Ministry of Health [1993] IsrSC 47(4) 146, 153).

Examples from Israel and around the world can illustrate this risk. When the public immunization level declines, usually due to fears raised by vaccine opponents, there are reports of outbreaks of epidemics which were ostensibly extinct, causing severe injuries. This was the case in Britain after the rate of persons immunized against

pertussis dropped to approximately 30% in early 1980; a pertussis epidemic broke out leading to the hospitalization of approximately 5,000 children and the death of twenty-eight children (Sahar, on p. 106). In Israel, an outbreak of measles occurred in 2003 among a population that did not habitually vaccinate. Within two weeks, sixty children fell ill, out of whom one child passed away from the disease. Another outbreak occurred in 2007-2008 after a sick tourist arrived from England. The disease spread among a non-immunized population and within several months 1,452 cases of measles were reported.

29. It should further be noted that the case law holds that the administrative authority, and certainly the legislative authority, may rely on expert opinion, even if there is a contradicting opinion, and the court will honor the authority's decision between the contradicting opinions. "When a law is based on a matter within professional expertise, the fact that there are contradicting opinions on such issue does not justify striking it down." (HCJ 6976/04 The "Let the Animals Live" Association v. The Minister of Agriculture and Rural Development, Paragraph 11 (September 1, 2005) (hereinafter, "LAL Case"); see also HCJ 1554/95 Gilat Supporters v. The Minister of Education and Culture [1996] IsrSC 50(3) 2, 19; HCJ 4769/95 Menachem v. The Minister of Transport [2002] 57(1) 235, 271 (hereinafter, "Menachem Case")). Understandably, had there been a well-established and prevalent position among medical experts believing that the risks from the vaccines exceed the benefit, it would have affected the constitutional analysis of the Amendment being examined before us. However, this is not the factual situation. As I stated, the prevalent and recognized position worldwide is that the benefit derived from the vaccines immeasurably exceeds the risk inherent therein. (See e.g. EXPANDED PROGRAMME ON IMMUNIZATION, DEP'T OF IMMUNIZATION, VACCINES AND BIOLOGICALS, WORLD HEALTH ORG; IMMUNIZATION IN PRACTICE: A PRACTICAL GUIDE FOR HEALTH STAFF, MODULE 2: THE VACCINES (2004); COMMITTEE ON THE ASSESSMENT OF STUDIES OF HEALTH OUTCOMES RELATED TO THE RECOMMENDED CHILDHOOD IMMUNIZATION SCHEDULE, BOARD ON POPULATION HEALTH AND PUBLIC HEALTH PRACTICE; INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, THE CHILDHOOD IMMUNIZATION SCHEDULE AND SAFETY: STAKEHOLDER CONCERNS, SCIENTIFIC EVIDENCE, AND FUTURE STUDIES (2013). This position has opponents, but it appears that they are the relatively marginal minority. Therefore, this will be the starting point for the continuation of our discussion.

The MMRV Vaccine

30. As mentioned above, according to the Amendment to the National Insurance Law, the Director General of the Ministry of Health is required to publish a program of the vaccinations required. The child allowance will be reduced only for parents who have not vaccinated their children with the vaccines included in the program published. This program currently includes only one vaccine, the MMRV, also known as the quadrivalent vaccine, which is given to infants at the age of one year in a single dosage. Another dose is given to children in first grade, but this dose is not included in the Vaccination Program published. It is therefore appropriate to provide some details on this vaccine.

31. The quadrivalent vaccine, as its name suggests, protects against four diseases: measles, mumps, rubella and chicken pox. The vaccine is common in many countries worldwide. All European countries recommend a vaccine against measles, mumps

and rubella. The vaccine against chicken pox is recommended in the United States, Australia, Canada, Germany, Greece, Latvia, and Japan.

32. Measles is a serious childhood disease. The disease may cause serious complications in the respiratory airways and in the nervous system. Approximately one third of patients will develop complications such as otitis media, diarrhea and keratitis. Rarer complications are pneumonia and encephalitis (one in 1000 cases). A very rare complication of the disease, which may appear approximately ten years after its manifestation, is a complication that manifests as a degenerative disease of the brain called subacute sclerosing panencephalitis and which causes serious and irreversible damage to the central nervous system, including mental deterioration and seizures. The risk of complications is higher among children under the age of five, among adults over the age of twenty, and among patients with a suppressed immune system. 1-3 children of every 1,000 patients die from the disease. Worldwide, measles is responsible for approximately twenty-one percent of mortality resulting from diseases preventable by vaccines. Measles is highly contagious, and a person who is not immunized and is exposed to a patient has a general risk of 90% of being infected. The vaccine against measles is very effective. 95% of children who receive the vaccine at the age of one develop antibodies against the disease, which give them long-term immunity. A few lose the protection against the disease after several years, and to address that, a repeat vaccine was introduced in Israel to be administered at school age. It should further be noted that in outbreaks of measles in Israel, the highest morbidity rates were of infants below the age of one, as they were not vaccinated against the disease.

33. Measles manifests in swelling in the salivary glands and in the glands beneath the ear lobe, sore throat, high fever, headaches and weakness. In approximately ten percent of patients, meningitis may develop, which manifests in vomiting and headaches. A common complication among adults is orchitis; more rare complications are an infection in the joints, thyroid, kidney, cardiac muscle, pancreas and ovary, deafness and other complications in the nervous system. Manifestation of the disease in a pregnant woman in the first trimester causes an increased rate of spontaneous miscarriage. The disease is more severe among adults and the rare mortality from the disease is mainly among this group. The vaccine against the disease is very effective. 80% of persons vaccinated with a single dosage are protected, and 90% are protected after receiving 2 doses.

34. Rubella may, in certain cases, cause complications such as encephalitis, which is more common in adults, and hemorrhaging due to a decline in the number of platelets, a phenomenon common mainly in children. Among women in the first months of pregnancy, rubella may harm the developing fetus and cause the death of the fetus or severe birth defects, which include eye defects that cause blindness, heart defects, deafness, defects in the nervous system which cause behavior disorders, and mental disability.

35. Chicken pox manifests in a high fever accompanied by a rash with blisters. Complications of the disease are pneumonia and encephalitis, a severe bacterial infection of the skin, a decline in the number of platelets and in rare cases hemorrhaging, kidney dysfunction, and even death. The disease is more severe among adolescents and adults, and is especially serious among persons with suppressed immunity who cannot receive the vaccine. Cases of death from chicken pox have been

described among children treated with corticosteroids, which are frequently given as a treatment for other diseases (such as asthma). Contracting chicken pox in the first twenty weeks of pregnancy may cause birth defects in the eyes, limbs, skin and nervous system. Contracting the disease shortly after birth is especially dangerous for a newborn. Patients who have recovered carry the "varicella-zoster" virus in a dormant state in their body. This virus may, years later, or when the immune system is weakened, cause an outbreak of a disease called "herpes zoster." This disease causes severe local pain which may last for a long time. The vaccine results in the development of protection in 85% of the persons vaccinated at the age of one year. The vaccine protects against a serious disease with complications, and giving two doses leads to a very high protection of 97%, to a point where it is impossible to identify chicken pox.

36. With respect to the MMRV vaccine, the vaccination coverage in Israel among the general population was on average 90% between the years 2006 and 2009. It should be noted that according to what we have been told, the position of professionals is that to achieve "herd immunity" with the MMRV vaccine, the vaccination coverage required in the population is approximately 95%.

Now that the factual foundation has been laid, the legal aspect shall be built upon it.

Examination of the Constitutionality of the Amendment to the National Insurance Law

37. We should first reiterate what is known: that the Court will not be quick to intervene and repeal statutory provisions enacted by parliament. In this regard, the court must exercise judicial restraint, caution and reserve:

> "Indeed, striking down a law or part of it is a serious matter, not to be taken lightly by a judge. Striking down secondary legislation for conflicting with a statute is not the same as striking down primary legislation for conflicting with a basic law. By striking down secondary legislation, the judge gives expression to the desire of the legislator. By striking down primary legislation, the judge frustrates the desire of the legislator. The justification is that the legislator is subject to supra-statutory constitutional provisions, which he himself set. (See A. Barak "Judicial Review of the Constitutionality of a Statute", Law and Governance C 403 (5756)). Nevertheless, considerable judicial caution is required." (LAL Case, Paragraph 9).

However, I do not accept the respondents' position that the judicial restraint required in this case is similar to that required for constitutional review in areas of economy and finance. As is known, case law mandates that this Court exercise particular restraint in areas of economy and finance, which involve far-reaching social and economic aspects. It has been held that the authorities entrusted with the economic policy should be allowed broad leeway "as the entities in charge of determining the comprehensive policy, and bearing the public and national responsibility for the State's economy and finance." (Menachem Case, on p. 263; see also HCJ 8803/06 Ganei Chuga Ltd. v. The Minister of Finance, comments of Justice Procaccia (April 1, 2007); Lahav Case, Paragraph 63). In the case at bar, although the Amendment to the National Insurance Law is part of the Arrangements Law, it is not a law whose essence is budgetary or economic. Although this is a socio-public matter, this is not

what was meant by the special judicial restraint mentioned. As the respondents emphasized, the purpose of the Amendment is not economic and is not monetary savings. On the contrary, the purpose of the Amendment is to ensure that no child loses his allowance, since the purpose is that all children be vaccinated. Hence, I do not believe that the said case law applies to this matter. It is, however, clear the judicial restraint and reserve required by the mere constitutional review of an act of the Knesset also apply to the case before us.

38. As is known, constitutional review is divided into three stages. At the first stage, it is necessary to examine whether the law in question violates constitutional rights enshrined in the basic laws, and in the case before us, Basic Law: Human Dignity and Liberty (hereinafter, "Basic Law"). If the answer is negative, the constitutional review ends and it should be held that the law in question is constitutional. If the answer is affirmative, it is necessary to proceed to the second stage at which we examine whether the violation satisfied the conditions set in the Limitation Clause in Section 8 of the Basic Law. In order for the law to be declared constitutional, the violation must satisfy all of the conditions set forth in the Limitation Clause. If one of the conditions is not met, it is necessary to proceed to the third stage, which is the stage of the remedy for the unlawful violation. (HCJ 2605/05 Human Rights Unit v. The Minister of Finance, Paragraph 16 of the opinion of President Beinisch (November 19, 2009); HCJ 10662/04 Hassan v. The National Insurance Institute, Paragraph 24 of the opinion of President Beinisch (February 28, 2012) (hereinafter, "Hassan Case"); Lahav Case, Paragraph 75). As held in the Hassan Case, this method of constitutional analysis will be identical both when we are concerned with civil and political rights and when we are concerned with social and economic rights. (Hassan Case, Paragraph 31 of the opinion of President Beinisch).

We shall begin, therefore, at the first stage of constitutional review and examine whether, as the petitioners claim, the Amendment to the National Insurance Law indeed violates rights enshrined in Basic Law. In this framework, we will specify three principal rights that the petitioners mentioned in their pleadings: the right to a dignified life or the right to social security, the right to autonomy, and the right to equality.

The Violated Rights: The Right to a Dignified Life

39. Nowadays, no one disputes that the human dignity enshrined in Basic Law also includes the right to a minimal dignified existence, including both the positive and negative aspects of the right. This right means that "a person will be guaranteed the minimum of material resources that will allow him to sustain himself in the society in which he lives[.]" (HCJ 366/03 Commitment to Peace and Social Justice v. The Minister of Finance [2005] IsrSC 60(3) 464, 482 (hereinafter, "CPSJ Case")). It was held that this right is at the core and nucleus of human dignity:

> "Living in starvation and without shelter, while constantly searching for handouts, is not a dignified life. A minimal dignified existence is a condition not only to preserving and protecting human dignity, but also to exercising other human rights. There is no poetry in a life of poverty and deprivation. Without minimum material conditions, a person lacks the ability to create, aspire, make his choices and realize his freedoms." (Hassan Case, Paragraph 35 of the opinion of President Beinisch).

It was further held that the right to a dignified life is not a right derived from the right to human dignity, but a right that constitutes a tangible manifestation of human dignity. (Hassan Case, Paragraph 36 of the opinion of President Beinisch; CPSJ Case, on p. 479).

40. The right to a dignified life is protected by the State using a variety of measures, systems and arrangements, and there is no doubt that the welfare legislation and allowances of the National Insurance Institute constitute a considerable and significant part of the realization of this right. The child allowances also constitute an additional tool to realize the right, since families living in poverty due to, *inter alia*, the expenses of raising children, can gain much assistance from these allowances and rise above the threshold that enables a dignified life. It should indeed be kept in mind that child allowances are universal allowances given according to the make-up of the family, and are not dependent on the family income. Therefore, the object of realizing a dignified life will not always be relevant to these allowances, compared to income assurance, for example, which is an allowance whose main purpose is to create a lasting safety net for families that need it. (Hassan Case, Paragraph 44 of the opinion of President Beinisch). However, there might be cases in which families on the edge of the last safety net will fall below it if they are denied the child allowance. The assumption is that "the gamut of the welfare arrangements granted in Israel provide the 'basket' required for a minimal dignified life." (Hassan Case, Paragraph 46 of the opinion of President Beinisch).

41. Despite the aforesaid, I believe that in the case at bar, the petitioners have not presented a sufficient factual foundation to prove the existence of a violation of the right to a dignified life resulting from the Amendment to the National Insurance Law. As is known, a person who claims a violation of a constitutional right bears the burden of proving such violation. (Aharon Barak, Interpretation in Law – Constitutional Interpretation 374 (Vol. 3, 1994)). The petitioners bear the burden of demonstrating that after examination of the range of services provided to the family, reduction of the child allowances will cause harm to the dignity of families whose material living conditions will fall short. At the very least, and under the lenient approach, they should have presented individual cases that indicated the alleged harm; then, the burden of proof would have shifted to the State. (See the comments of President Beinisch in the CPSJ Case, on p. 492-493; HCJ 4124/00 Yekutieli v. The Minister of Religious Affairs, Paragraph 48 of the opinion of President Beinisch (June 14, 2010) (hereinafter, "Yekutieli Case")). In the CPSJ Case, it was held that the mere reduction, even if it is a significant reduction, in income assurance allowances, does not in itself prove a violation of the right to a dignified life, and it is necessary to examine the gamut of services and arrangements granted as a safety net in the State of Israel. "The examination is always concrete and consequential." (CPSJ Case, Paragraph 19 of the opinion of President Barak; see also PHR Case, on p. 334; HCJ 10541/09 Yuvalim S.D.I. Ltd. v. The Israeli Government (January 5, 2012)).

42. The above is all the more relevant to the case before us. First, the petitioners did not point to any data proving their claim regarding the violation of the right to a dignified life of families to whom the Amendment will apply. The reduction in the child allowance cannot, in and of itself, establish a foundation for proving the violation. "The right to dignity, as well as the right to a dignified life, is not the right to a monthly allowance in a certain amount." (CPSJ Case, on p. 485).

Second, this case concerns child allowances, distinguishable from income assurance allowances. As I stated, while the central purpose of the latter is to create a safety net for the realization of the right to a dignified life, this is merely one of the purposes of the child allowance. Therefore, while there are grounds to assume that denying income assurance allowance for reasons other than the existence of different sources of income violates, under the appropriate circumstances, the right to a dignified human existence of the person whose allowance was denied (see Hassan Case, Paragraph 46 of the opinion of President Beinisch), it is difficult to make a similar assumption with respect to the denial of the child allowances, and certainly with respect to their reduction. The case of child allowances therefore requires even more data-based proof of the violation of the right to a dignified life.

Third, and perhaps most important, most of the reduction in the child allowances for families who do not vaccinate their children is made after an increase of a similar amount of the child allowance, as it was prior to the Amendment. The Amendment increased the child allowance for the second, third and fourth child by NIS 100 per month for each child. At the same time, the reduction due to non-vaccination is NIS 100 per month for each child. It should be emphasized that for a family with more than three children the reduction is capped by the Amendment at NIS 300 per month, such that the reduction will be paralleled by a NIS 300 per month increase of the child allowances for that family (for the second, third and fourth children). The increase was also taken into account for families with two or three children, because for these families the maximum reduction will be NIS 100 and NIS 200 per month, respectively, equal to the increase in the child allowances that these families will receive. The only difficulty pertains to a family with a single child. In such a family, a reduction may be made in the sum of NIS 100 per month if the child is not vaccinated with the MMRV vaccine without such family receiving an increase in the child allowance to which the family is entitled. However, even with respect to such a family, it cannot be said that a violation of the right to a dignified life has been proven. As said above, data showing such a violation for a family of this type was not presented. In the absence of data, it may also be assumed that families with one child are less at risk of deprivation compared to large families. (See data thereon in the article of Yoram Margalioth "Child Allowances", the Berenson Book on 733, 747-748 (5760)). Finally, weight should be given to the fact that even for such a family, the child allowance to which the family is entitled is merely reduced and not fully denied. In any event, "a deduction from a person's income . . . is not the same as not granting a benefit." (Betzedek Case, on p. 409). Where the main reduction is made following an increase of a similar amount in the allowance, it should be deemed as not granting a benefit, not as a deduction from a person's income.

The conclusion is therefore that the Amendment does not violate the right to a dignified life.

43. I should note that insofar as the petitioners claim a violation of the right to social security, as distinguished from the right to a minimal dignified existence, they did not provide any support for its existence as a constitutional right, and made no argument as to the content of such right as distinguished from the right to a minimal dignified existence. This Court has not yet discussed the status and scope of the right to social security in Israeli law. (See HCJ 5578/02 Manor v. The Minister of Finance [2004] IsrSC 59(1) 729, 737 (hereinafter, the "Manor Case"); PHR Case, on p. 333). The

petitioners did not expand on this issue, and it appears that some of them did not specify the differences between the two rights at all. Hence, I saw no room to discuss the issue of violation of this right separately. This is also the case with respect to the claim of violation of the property right. The question of whether the constitutional right to property applies to child allowances has not yet been decided in the judgments of this Court. (See the comments of Justices (formerly) Grunis and Rivlin in the Manor Case). The petitioners in HCJ 7245/10 raise this claim in a laconic and unsubstantiated manner, and I therefore also did not expand on this claim. In addition, I should note that the contractual assertion raised by the petitioners should be dismissed. No link is required between the insurance contributions collected by the National Insurance Institute and the allowances paid to entitled persons in respect of the various grounds for entitlement. (Lahav Case, Paragraph 57). Therefore, no harm is caused to the expectation of parents who pay national insurance contributions and whose child allowance will be reduced as a result of not vaccinating their children and *a fortiori* when the reduction in the child allowances almost fully corresponds to the increase in the amount of the allowance by the Amendment.

The Violated Rights – The Right to Autonomy and Parental Autonomy

44. The petitioners in HCJ 908/11 raised, at the center of their arguments, the violation of the right to autonomy, the right to parental autonomy and the right to parenthood. "One of the most important basic values is the value of the individual's freedom of will" (Aharon Barak, Interpretation in Law – General Theory of Interpretation, 301 (vol. 1, Ed. 3, 1998)). This value of autonomy constitutes part of human dignity and is constitutionally protected by the Basic Law (HCJ 4330/93 Ganam v. The Israel Bar Association [1996] IsrSC 50(4) 221, 231 (hereinafter, the "Ganam Case")). The meaning of the right to autonomy is the right of every individual to decide on his actions and wishes, according to his choices, and to act according to such choices:

> A person's right to shape his or her life and fate encompasses all the central aspects of his or her life: place of residence, occupation, the people with whom he or she lives, and the content of his or her beliefs. It is a central existential component of the life of every individual in society. It expresses recognition of the value of every individual as a world unto him or herself. It is essential for the self-determination of every individual, in the sense that the entirety of an individual's choices constitutes his or her personality and life.

(CA 2781/93 Ali Daka v. Haifa "Carmel" Hospital [1999] IsrSC 53(4) 526, 570 (hereinafter, the "Ali Daka Case"). The right to autonomy is a framework right from which many other rights are derived. (See Ganam Case; HCJ 7357/95 Barki Feta Humphries (Israel) Ltd. v. State of Israel [1996] 50(2) 769; see also Ali Daka Case, on p. 572). The importance of the right to autonomy was recognized especially in the context of giving or avoiding medical treatment, and it gives rise to a separate cause of action which entitles the claimant to damages. (Ali Daka Case).

45. One of the aspects of the right to autonomy is the right to parental autonomy. Parents are the natural guardians of their children. (Section 14 of the Legal Capacity and Guardianship Law, 5722-1962 (hereinafter, the "Legal Capacity Law")). As such, they have the "obligation and the right to care for the needs of the minor, including his education, studies, training for work, occupation, and employment, as well as

preserving, managing and developing his assets; also attached to this right is the permission to have custody of the minor and authority to represent him and to determine his place of residence." (Section 15 of the Legal Capacity Law). The parents are obligated to ensure the "best interests of the minor [in the way that] devoted parents would act under the circumstances." (Section 17 of the Legal Capacity Law). This Court's rulings have recognized a very broad autonomy of parents in raising their children. Several reasons are presented as underlying this recognition. First, this recognition derives from the natural connection between a child and his parents. Second, it is commonly assumed that the parents, who are in charge of the family unit and know it from every aspect, will make the best decisions for the children. The supplementary assumption is that outsiders will not always be able to make the best decisions for the minor because the decisions often entail emotional aspects. Third, often these are issues on which there is no social consensus. Finally, the fact that the parents are those who will need to cope with the practical repercussions of the decision is taken into account. (LCA 5587/97 The Attorney General v. John Doe – Minor, PDI [1997] IsrSC 51(4) 830, 860 (1997)). However, it should be emphasized that the autonomy of parents vis-à-vis their children is not absolute and is limited by the principles of the child's best interests and his rights.

46. Nevertheless, I do not believe that any harm to autonomy or parental autonomy will be recognized as constitutional harm which requires compliance with the terms and conditions of the limitation clause. Obviously, the closer the harm is to the core of the right, the greater the inclination to recognize it as constitutional violation. (See the comments of Deputy President Rivlin in CA 8126/07 The Estate of the Late Bruria Tzvi v. Bikur Holim Hospital (January 3, 2010)). "Overexpansion of the extent of the constitutional right should be avoided. Sweeping expansion of the limits of the constitutional right at the first stage, and "automatically" proceeding to the tests of the limitation clause in any case in which it is argued that legislation violates that right, may lead, in the overall balance, to an erosion of the protection granted by the basic laws." (Hassan Case, comments of Justice U. Vogelman). It appears to me that two parameters may be examined to determine whether or not the violation will be recognized as a constitutional violation of the right to autonomy. First, the essence of the choice denied the individual should be examined. The more the harm to autonomy pertains to aspects concerning personal expression and self-realization of the person, the greater the inclination to deem it as a violation of a constitutional right. Denying a citizen of the State the possibility to marry the love of his life is not the same as denying another the option to choose the type of facilities that will be installed in the public park next to his home. A second parameter that should be examined in my opinion is the extent of coercion and denial of will. A prohibition that entails a criminal sanction is different from the denial of a minor financial benefit.

47. In the case at bar, I am not convinced that a violation of the constitutional right to autonomy or to parental autonomy has occurred. Even if I assume that the first parameter regarding the essence of the choice denied is met, the second parameter regarding the extent of the coercion is not fulfilled. The Amendment does not create an obligation to vaccinate children, nor does it impose a criminal sanction on non-vaccination. The monetary reduction that accompanies non-vaccination of children is not high and can range between NIS 100 and NIS 300 per month at most. Even if I do not disregard the fact that for some families this amount is significant, as mentioned above, it is, for the most part, a reduction of the same amount that was added to the

child allowances in the Amendment to the National Insurance Law. Hence, I do not believe that the reduction in the Amendment may be deemed to violate the right to autonomy in its constitutional sense.

The Violated Rights: The Right of Equality

48. Much has already been said in the rulings of this Court on the right of equality, its status and importance, and it has been widely extolled:

> The principle of equality is one of the building blocks of the law and constitutes the backbone and 'life-blood' of our entire constitutional regime. (Justice Landau in HCJ 98/69 Bergman v. The Minister of Finance [1969] IsrSC 23(1) 693, 698; HCJ 4805/07 Israel Religious Action Center of the Israel Movement for Progressive Judaism v. The Ministry of Education, Section 70 of the opinion of Justice A. Procaccia (July 27, 2008) (hereinafter, "IRAC Case"); HCJ 11956/05 Bashara v. The Minister of Construction and Housing (December 13, 2006)). The right of equality was recognized in our legal system in the early days of the State, when it received a place of honor in the Proclamation of Independence, and it was further established in various laws that were enacted by the Knesset over the years, and in the case law of this Court, which deemed it a 'regal right' and a principle which is 'high above the other principles'." (HCJ 2671/98 The Israel Women's Network v. The Minister of Labor and Social Welfare [1998] 52(3) 630, 650; HCJ 2911/05 Elchanati v. The Minister of Finance, Section 17 of the opinion of Justice E. Hayut (June 15, 2008)); APA 4515/08 State of Israel v. Neeman, Paragraph 17 of my opinion (October 6, 2009) (hereinafter, "Neeman Case")).

And elsewhere I stated:

> "It appears that no one disputes that equality is the keystone of a democratic regime and a central aspect of the relations between the individual and the State. No society can be maintained in a democratic state without equality, which is one of the derivatives of justice and fairness. Equality is a synonym for justice and fairness, as it appears to members of society in a certain period. Equality leads to justice, equality whose path is fairness. (See HCJ 7111/95 Federation of Local Authorities in Israel v. The Knesset [1996] IsrSC 50(3) 485, 502)" (HCJ 6298/07 Rasler v. The Israeli Knesset, Paragraph 18 of my opinion (February 21, 2012)).

The importance of the right of equality has been recognized and emphasized numerous times with respect to the distribution of budgets or resources of the State. "The resources of the State, whether land or money, as well as other resources, belong to all citizens, and all citizens are entitled to benefit from them according to the principle of equality, without discrimination on the basis of religion, race, sex or any other prohibited consideration." (HCJ 1113/99 Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister for Religious Affairs [2000] IsrSC 54(2) 164, 170).

49. The right of equality, which creates the duty not to discriminate, does not mean equal treatment for everyone. It is a complex right which results from the fact that the common concept of equality seeks to give equal treatment for equals and unequal

treatment for unequals. Equality does not require things to be identical. (HCJ 6427/02 The Movement for Quality Government in Israel v. The Knesset [2006] IsrSC 61 (1) 619, 677 (hereinafter, the "MQG Case"). Not every difference between people justifies distinguishing between them, but only a difference that is relevant to the matter in question. (HCJ 200/83 Veted v. The Minister of Finance [1984] IsrSC 38(3) 113, 119 (hereinafter, the "Veted Case")). "The difference between wrongful discrimination and a permitted distinction depends, as is known, on whether a relevant difference exists between the groups that received different treatment from the authority." (HCJ 6758/01 Lifshitz v. The Minister of Defense [2005] IsrSC 59(5) 258, 269; Yekutiel Case, Paragraph 35, 37 of the opinion of President Beinisch). In order to determine that the right of equality has been violated, it is necessary to examine who is the group of equals for the purpose of the matter at hand. The group of equals will be decided according to the purpose of the examined norm and the nature of the matter and the circumstances, as well as in accordance with common social conceptions. (HCJ 8300/02 Nasser v. The Israeli Government, Paragraph 37 (May 22, 2012) (hereinafter, the "Nasser Case"; Neeman Case, Paragraph 18 of my judgment; MQG Case, on p. 677; HCJ 1213/10 Nir v. The Speaker of the Knesset, Paragraph 14 of the opinion of President Beinisch (February 23, 2012) (hereinafter, the "Nir Case"; HCJ 4906/98 "Free Nation" for Freedom of Religion, Conscience, Education & Culture v. The Ministry of Construction and Housing [2000] IsrSC 54(2) 503, 513); Veted Case, on p. 119, 122; Yekutieli Case, Paragraph 36 of the opinion of President Beinisch).

In the case before us, it appears to me that it is possible to say that the right of equality has been violated. As described above, child allowances are universal allowances that are granted to every family according to its composition. Their purpose is to assist in financing the expenses of raising children, and to prevent the family in general and the children in particular from becoming impoverished. Therefore, adding a condition to the receipt of the allowance that is dependent on the vaccination of the family's children is foreign both to the structure of the allowance and to its purposes. Indeed, the child allowance serves the best interests and welfare of the children, and the assumption is that vaccinating the children is also in their best interests and protects their health. It is still a stretch to say that the condition is naturally integrated with this allowance. The main and natural condition to receiving the allowance is the number of children. Additions and conditions beyond that (apart from conditions such as residency, and without going into the issue of conditioning the allowances on income) would be foreign to the allowance, and therefore violate the right of equality. The fact that the allowances are intended for the best interests of the children also has repercussions for the determination that the right to equality has been violated. In fact, children whose parents decide not to vaccinate them are harmed twice, both by their non-vaccination and by the decision to reduce the allowances intended for their benefit. The equality group, therefore, is all parents who are insured pursuant to the National Insurance Law.

50. The petitioners argue that in principle, the national insurance allowances, the main purpose of which is social-welfare, should not be made contingent upon conditions intended to regulate behavior and achieve other social objectives that do not have a direct and close connection to the allowance granted. They emphasized that the allowances are not a prize for proper behavior. They also raise an understandable concern about the expansion of the conditions to the point of absurdity. Will it be

possible to condition the granting of child allowances on the parents not smoking? On maintaining proper nutrition? On installing bars on home windows? Where will the line be drawn between behavior that ought to be encouraged through the conditioning of child allowance and that for which conditioning will not be the correct and constitutional tool? (See the comments of Members of the Knesset at the Finance Committee's discussion on June 24, 2009).

51. "The main purpose of social insurance is to realize the State's obligation to ensure a minimum standard of living for all of its residents, so that no person falls below the threshold of a dignified life. Social insurance, and the statutory frameworks intended to realize it, are an important component in realizing the idea of a society based on foundations of justice, equality and social care for the needy." (Lahav Case, Paragraph 44; Johnny Gal "The Compensation Principle in the Social Security System for Persons with Disabilities in Israel and its Repercussions" Labor, Society and Law, I 115, 118 (5762)). The social security system is based on mutual assistance, where strong population groups subsidize assistance for the weak and needy groups of society. (Lahav Case, Paragraph 58). This Court has insisted that the National Insurance Law be interpreted and implemented in accordance with its social purpose. (Lahav Case, Paragraph 45). Indeed, some believe that the social principle must be entirely neutral with regard to the moral profile of those in need of assistance, even when a connection exists between the behavior of the insured and the causation of the risk which entitles the insured to the allowance. (See Arie Miller "The place of the concept of fault in social security law" Mishpatim 14 460, 486-487 (5745) (hereinafter, "Miller"). In my view, this does not mean that the legislator is not at all entitled to place conditions upon the social security allowances. (See NIA (National) 1245/00 Davies – The National Insurance Institute, Paragraph 13 (November 3, 2005)). Still, the main social purpose underlying the National Insurance Law will, for the most part, entail an assumption that equality is violated when the social allowance is conditioned on something other than the main social purpose underlying it. Therefore, this reason leads us to the conclusion that the right of equality has been violated in this case.

52. However, our work does not end here. Since we are concerned with primary legislation of the Knesset, it is necessary to examine the issue and ask whether the violation of equality in this case is a violation in the constitutional sense, i.e. whether it amounts to a violation of the right to human dignity enshrined in the Basic Law. "The Knesset has broad discretion in the task of legislation, and there are situations in which broader protection may be afforded against a violation of equality caused by an administrative authority than to one inflicted by the legislator." (Nasser Case, Paragraph 43). In the MQG Case, an interim model was adopted for interpretation of the term human dignity in the Basic Law:

> The interim model does not limit human dignity merely to humiliation and contempt, but it also does not expand it to all human rights. According to this model, human dignity includes those aspects of human dignity which find, in various constitutions, manifestation in special human rights, and are characterized by having, according to our perception, a pertinent and close connection to human dignity (whether at its core or in its margins). According to this approach, human dignity may also include discrimination that is not humiliating, provided that it is closely related to human dignity as expressing the individual's autonomy

> of will, freedom of choice and freedom of action, and other such aspects of human dignity as a constitutional right.

(MQG Case, on p. 687). Not every violation of equality, therefore, amounts to a constitutional violation. In order to prove a violation of the constitutional equality, it is necessary to demonstrate that the violation of equality has a pertinent and close connection to human dignity (whether at its core or in its margins). (See also Nir Case, Paragraph 11 of the opinion of President Beinisch; HCJ 9722/04 Polgat Jeans Ltd. v. The Israeli Government (December 7, 2006); HCJ 8487/03 IDF Disabled Veterans Organization v. The Minister of Defense [2006] IsrSC 62(1) 296, Paragraph 23; Nasser Case, Paragraph 44; Lahav Case, Paragraph 76).

53. It appears that the discrimination in this case violates the constitutional right of equality as part of human dignity. The fact that a small group of residents is excluded from the group of all residents with children because of its choice not to vaccinate its children violates the human dignity of this group. The gap created between the two groups creates a sense of discrimination of the latter group, and has a close connection to human dignity. (See, similarly, Lahav Case, Paragraph 92). The violation is comprised of both the lack of respect for the belief or choice of this group not to vaccinate its children for various reasons, and the sense that other parents, whose actions may harm the best interests of their children or the best interests of the public in other ways, continue to receive full child allowances. The sense is that the legislator focused specifically on this group and on this social objective, which is the only one for which a condition is imposed on the child allowances, harming the dignity of the chosen group. (See Nasser Case). The consequence that this reduction has on the distinction between groups of children also contributes to the conclusion that the right of equality has been constitutionally violated.

However, it appears that there is no need to rule on this issue, in light of my conclusion that the above violation satisfies the requirements of the limitation clause. I will proceed, therefore, to examine the violation through the lens of the limitation clause in Basic Law.: Human Dignity and Liberty.

The Limitation Clause

54. It is well known that the right of equality, like other rights, is not an absolute right, and as such it requires a balancing with other rights and interests relevant to the issue in question. This balance is formed in the limitation clause set forth in Section 8 of Basic Law: Human Dignity and Liberty:

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.

President Barak stated the importance of the limitation clause in the MQG Case:

> This provision plays a central role in our constitutional structure. It is the foothold on which the constitutional balance between the individual and the general public, between the individual and society, rests. It reflects the concept d. (See D. Hodgson, Individual Duty Within a Human Rights Discourse (2003)). It reflects the concept that the human rights set forth in Basic Law: Human Dignity and Liberty are not absolute but rather

relative. They are not protected to their full scope. The limitation clause emphasizes the concept that the individual lives within the confines of society, and that the existence of society, its needs and tradition, may justify a violation of human rights. (See re. United Mizrahi Bank Case, p. 433; re. Investment Managers Bureau Case, p. 384; APA 4436/02 Ninety Balls – Restaurant, Members Club v. The City of Haifa, PDI IsrSC 58(3) 782, 803 (hereinafter, "re. Ninety Balls Case") (re. MQG Case, on p. 691-692).

55. The limitation clause contains four conditions, only upon the cumulative fulfillment of which will the non-constitutionality of the prejudicial law be prevented. The first condition is that the violation of the human right was made in or by a law or by virtue of explicit authorization therein. The second condition is that the prejudicial law befits the values of the State of Israel. The third condition is that the prejudicial law is intended for a proper purpose. The fourth condition is that the law violates the right to an extent no greater than is required.

56. There is no dispute that the first condition is satisfied. In addition, the petitioners did not raise claims with respect to the satisfaction of the second condition. Therefore, all that remains is to examine the existence of a proper purpose and the proportionality test.

57. "The purpose of a law that violates human rights is proper if it is intended to achieve social objectives that are consistent with the values of the State in general, and exhibit sensitivity to the place of human rights in the overall social fabric." (MQG Case, on p. 697). It was further held that the more important the right violated, and the greater the harm, the stronger the public interest needed to justify the violation. (MQG Case, on p. 698-700; Yekutieli Case, Paragraph 44 of the opinion of President Beinisch; Nir Case, Paragraph 19 of the opinion of President Beinisch; Hassan Case, Paragraph 55 of the opinion of President Beinisch). Part of the petitioners' claims regarding the satisfaction of the proper purpose condition focuses on the violation alone and not on its purpose. In addition, the petitioners argue that the purpose of increasing the vaccination rate is extraneous to the purpose of the allowances and may create a dangerous precedent of reducing allowances on various grounds. As I stated above, I do not believe that every conditioning of allowances is prohibited, and the fear of a slippery slope is a matter for the proportionality test. It appears to me that the purpose of increasing the rate of vaccination among children is a proper purpose which promotes an important social objective of caring for public health in general and children's health in particular. The purpose underlying the Amendment does not focus only on children that have not yet been vaccinated, but also on additional populations that may be harmed as a result of non-vaccination of such children, including newborn infants whose time to be vaccinated has yet to arrive, populations who are unable to be vaccinated for various medical reasons, a certain percentage of the population whom the vaccination does not protect, despite being vaccinated, etc. As stated above, the diseases against which the vaccines protect might cause serious complications that compromise a person's health and in rare cases might even cause his death. In this sense, the purpose of the Amendment has a close connection to the right to health and life. Therefore, even if we say that the Amendment seriously violates an important right, the purpose of the Amendment is sufficiently strong and important to justify the violation.

58. I further add that the purpose of the Amendment also expresses the principle of mutual guarantee. A separate question is whether encouraging vaccination could be deemed as a proper purpose if we were concerned only with the best interests of the children who have not yet been vaccinated. However, the purpose does not concern only the best interests of the children who have not been vaccinated or whose parents do not intend to vaccinate them, but the best interests of a broader population, as described above. The non-vaccination of such children may have an effect not only on their health and life, but on the health and life of a broader population. The principle of mutual guarantee, alongside the said purposes, justifies deeming the purpose of the Amendment as a proper purpose. It should be noted that this principle is not extraneous to the National Insurance Law, but rather, as I already mentioned, underlies it, albeit in a different context.

The conclusion is therefore that the proper purpose condition is satisfied. All that remains is to examine is whether the violation meets the proportionality test of the limitation clause.

59. The determination that the purpose of the violating law is proper does not mean that all of the measures taken to achieve it are legitimate. The end does not always justify the means. (Yekutieli Case, Paragraph 47 of the opinion of President Beinisch). The proportionality test was created for this situation. The test is divided into three subtests, all three of which must be satisfied in order to hold that the violation is proportionate. The first subtest is the "compatibility test" or the "rational connection test". In accordance with this test, a connection of compatibility is required between the end and the means. The second subtest is the less harmful means test. According to this test, the legislator is required to choose a measure which achieves the legislative purpose and which least violates the human right. The third subtest is the proportionality test in the narrow sense. It examines the proper relation between the benefit derived from achievement of the proper purpose and the scope of the violation of the constitutional right.

60. It appears to me that the Amendment satisfies the rational connection test. It should be noted that several means might achieve the end. In addition, there is no need to prove that the means will definitely achieve the end, and a reasonable degree of probability of achieving the end is sufficient. (MQG Case, on p. 706; Hassan Case, Paragraph 59 of the opinion of President Beinisch). It should further be emphasized that there is no requirement that the means chosen achieve the end in full, and partial achievement, not minor or negligible, of the purpose following the use of the means chosen is sufficient. (Nir Case, Paragraph 23 of the opinion of President Beinisch; Hassan Case, Paragraph 59 of the opinion of President Beinisch). Indeed, it is impossible to know for certain whether the Amendment will achieve its objective and whether the percentage of vaccinated persons will rise significantly and create "herd immunity", or at the very least create a broader protection for the public. However, it is possible to say that there is a sufficiently high probability that such objective will be achieved. The respondents presented data regarding the success of similar programs in countries worldwide and about the support of the World Bank for such programs. (See also Gal, on p. 256-257; report of the Knesset Research and Information Center of June 23, 2009 regarding increasing and conditioning the child allowances). In addition, data was presented regarding a similar program implemented in Israel that made the receipt of maternity allowance contingent upon delivery in a hospital in order to

reduce the phenomenon of home births. The respondents report that following this legislation, the number of home births in Israel decreased significantly. Past experience therefore indicates a substantial probability of achieving the objective with this measure. It should also be added that the assumption is that some parents who do not vaccinate their children are not acting based on ideological reasons, and that there is a "free rider problem" whereby parents are in no hurry to vaccinate their children and rely on the vaccination of the entire public to protect their children against outbreaks of diseases. The respondents also indicated the difficulty of late vaccination of children, which the Amendment might solve by incentivizing parents to vaccinate their infants on time. Finally, I note that after the Amendment is implemented and real data collected regarding its repercussions, it will be possible to reexamine the reality created, and it might transpire that this reality does not meet the rational connection test or another proportionality test. (See HCJ 9333/03 Kaniel v. The Israeli Government [2005] IsrSC 60(1) 277, 293).

61. The Amendment, in my mind, the second subtest, the less harmful means test. It should be kept in mind for the implementation of this test that the court does not put itself in the shoes of the legislator, and that it will intervene only when it is convinced that the expected purpose may be achieved through the use of less harmful means –

> When examining the severity of the violation and whether there is a less harmful means through which it is possible to achieve the purpose of the legislation, the court does not put itself in the shoes of the legislator. The assumption underlying the test of need is that there is maneuvering space in which there may be several methods for achieving the objective of the legislation, from which the legislator can choose one method. So long as the chosen method is within this maneuvering space, the court will not intervene in the legislator's decision. The court will be prepared to intervene in the method chosen by the legislator only where it is possible to demonstrate that the harm is not minimal, and that the purpose of the legislation may be achieved through the use of less harmful means."

(Yekutieli Case, Paragraph 45 of the opinion of President Beinisch). Indeed, there is a range of means for achieving the purpose of encouraging vaccination. Some of these means are more harmful than the means adopted by the legislature, and therefore are irrelevant for the purpose of the test in question. This is the case with respect to criminal sanctions on anyone who fails to vaccinate his children, as proposed by some of the petitioners, and for denying school attendance for those who cannot provide confirmation of vaccination, as is done in the United States. (James G. Hodge & Lawrence O. Gostin, "School Vaccination Requirements: Historical, Social and Legal Perspectives" 90 Ky. L.J. 831 (2001-2002)). It should further be emphasized that the economic sanction used in the Amendment is very similar to the denial of a benefit, since in the majority of cases, the reduction that will be made in the child allowance of parents who have not vaccinated their children is equal to the increase in the child allowances in the same Amendment. The petitioners refer to additional means that concern informational activities and increasing accessibility to Family Health Centers. With respect to informational activities, this is certainly an appropriate means, but it is included and precedes implementation of the Amendment itself. The respondents stated that a campaign is planned for informing the population about the law, in which the importance of vaccination will also be emphasized. Obviously, the sanction of reduction of child allowances will not be used against those who are convinced by the informational activity and vaccinate their children. Therefore, the informational

means is also incorporated into the means chosen. The concern, of course, is that the informational means are insufficient in view of the vaccination "market failure," whereby, as aforesaid, a child who is not vaccinated may be protected against the outbreak of diseases due to the vaccination of the population around him, but this failure may cause the non-vaccination of a certain population, which will cause the outbreak of an epidemic therein.

62. Regarding the accessibility of the Family Health Centers, this difficulty pertains to the Bedouin population in the Negev, and mainly to the population of the unrecognized villages in the Negev. Due to this difficulty, which the respondents recognize, the implementation of the Amendment was postponed in order to make arrangements and increase the accessibility of Family Health Centers to this population. However, the steps specified in the respondents' response are satisfactory with respect to the level of accessibility achieved and the efforts being made to further increase it. The respondents report that there are currently forty-five Family Health Centers spread throughout the southern district, twenty-five of which service the Bedouin community: thirteen centers in permanent settlements, eight portable centers for the Bedouin villages, and centers in the Jewish settlements which also service the Bedouin population. There is also a special mobile family health unit to provide vaccinations for the Bedouin population. This mobile unit travels every day through a different location in the unrecognized villages and is intended to vaccinate children of families who have not visited Family Health Centers. The unit is operated five times a week between 8:00 and 16:00. Three centers in Bedouin settlements which were closed have been reopened and a petition filed on the matter was dismissed with consent. (HCJ 10054/09). The respondents are also working to encourage hiring of male and female nurses for Family Health Centers in the south and in the Bedouin settlements. To this end, it was decided to increase the financial incentive for such personnel, to add administrative personnel and security positions for the centers, and to add positions to make the services accessible to the population that finds it difficult to come to the centers. In June 2011, an incentive plan was formed for the personnel of the Family Health Centers in the Bedouin sector in the south of Israel, including payment of an encouragement bonus, payment of a persistence bonus, reimbursement for rent in certain cases, consideration for travel time to and from work, increased overtime pay, and provision of a mobile telephone to nurses. The respondents further state that mediators are brought in to make the services culturally accessible, and their role includes providing information about the importance of early registration with a Family Health Center. A special program financed by the Ministry of Health was established at Ben-Gurion University to train nurses from the Bedouin sector. The program's students undertake to work in the Bedouin sector upon completion of their studies.

The current data regarding vaccination of the Bedouin population in the Negev with the MMRV vaccine should also be taken into account. According to the data, the vaccination rate for this vaccine in the Bedouin population is higher than in the Jewish sector, the rate in the unrecognized villages is 90%, and in the permanent settlements 93.5%.

It therefore appears that the less harmful means for achieving the purpose of encouraging vaccination have been exhausted, and the next step on the ladder for

achieving the purpose may be at the economic level, as was done in the Amendment. The second subtest is therefore also satisfied.

63. The last question that we must ask is whether we ought to go one step further on the ladder, after previous steps have not yet achieved the desired objective. This is an ideological question, which is based on principles of balance and examines the relationship between the benefit in achieving the proper purpose and the damage that will be caused by the violation of human rights. (See MQG Case, on p. 707; Hassan Case, Paragraph 69 of the opinion of President Beinisch). In my opinion, the Amendment also satisfies this test. We should not disregard the harm that will be caused to parents who do not wish to vaccinate their children, who will be discriminated against compared to the group of child allowance recipients and will either need to be satisfied with a reduced allowance or act against their will and vaccinate their children. There is also difficulty in the distinction that may be created between strong groups in the population which can allow themselves to waive part of the child allowance in order to realize their desire not to vaccinate their children and weak groups which will be forced to choose between aggravated poverty and waiving their desire not to vaccinate their children. Conversely, consideration should be given to the fact that the violation of equality in this case is not arbitrary and is not based on any suspect distinction between different sectors. In addition, the harm was limited to reduction of the child allowance, and was also limited to a maximum amount that can be reduced. Further arrangements in the Amendment, including a right of appeal, prior notice, and increasing the allowances after vaccination also support the proportionality of the violation. On the other side is the benefit, as I have already stated, that may be significant and important to the health of those children who have not yet been vaccinated, and more importantly, to the public at large. The effect of each and every individual on the public justifies a balance which harms the individual to a limited and restricted extent for the benefit of the public. It is impossible to ignore that the individual lives within society and sometimes his acts or omissions impact the society around him:

> A person is not solitary individual. The person is a part of society. (HCJ 6126/94 Sanesh v. The Broadcasting Authority, on p. 833). A person's rights are therefore his rights in an organized society; they concern the individual and his relations with others. (HCJ 5016/96 Chorev v. The Minister of Transport, on p. 41). Hence, a person's dignity is his dignity as a part of society and not as an individual living on a desert island. (Cr.M 537/95 (hereinafter, "Cr.M Ganimat"), on p. 413; LCA 7504/95 Yassin v. The Registrar of Political Parties, on p. 64; HCJ 7015/02 Ajuri v. The Commander of the IDF Forces in the West Bank, on p. 365)" (hereinafter, the "CPSJ Case, on p. 496-497).

A balance is therefore required between the rights of the individual and the best interests of society, a balance, which in my opinion, is proportionate in the case at bar, and within the bounds of proportionality afforded to the legislator.

Conclusion

64. The constitutional examination of the Amendment to the National Insurance Law revealed that the Amendment indeed violates the right of equality enshrined in the Basic Law: Human Dignity and Liberty. However, this violation satisfies all of the

terms of the limitation clause, such that a proper balance is struck with other rights and interests. Hence, the Amendment is proportionate and this Court will not intervene. I will mention that this Court does not examine what it would have done in the legislator's shoes and what its preferences would have been in such a matter, but merely examines whether the legislator's choice is within the boundaries of the range of proportionality available to the legislator. (See HCJ 1715/97 The Bureau of Investment Managers in Israel v. The Minister of Finance, [1997] IsrSC 51(4) 367, 386). I mentioned that most of the reduction in the child allowances will be executed simultaneously with the increase in the allowances set in the Amendment. I further noted the importance attributed to the vaccination of the children, not only for the health of the children themselves, but also for the health of the environment, society and the public. Thus, the conclusion I have reached is that the violation resulting from the Amendment satisfies the conditions of the limitation clause and therefore, the petition should be denied. I did not see fit to an order for costs.

If my opinion is heard, the petition will be denied and as aforesaid, there will be no order for costs.

Judge

Justice D. Barak Erez

1. The petitions before us raised fundamental issues pertaining to the manner in which the State fulfills its responsibility for the health of the public in general and the welfare of children in particular. They also raised the basic issue of conditioning rights and eligibilities. In general, I concur with the comprehensive opinion of my colleague, Justice E. Arbel, and I too believe that the petition should be denied. Nevertheless, I wish to clarify my position with respect to some of the reasons that support this conclusion.

The Legal Issues

2. In fact, the discussion of the issue that has been placed before us—conditioning a part of the child allowances on the children's vaccination within an amendment to a law—raised several secondary issues. The first question concerns the examination of the essence and legal status of the child allowances, the conditioning of which is at the center of our discussion. Specifically, the question in this context is whether the eligibility for child allowances is an "ordinary" legal right, conferred merely by a law, or whether it constitutes a manifestation of constitutional rights. Insofar as the argument is that the child allowances embody constitutional rights, it is necessary to examine what is the constitutional right they represent. This question is important because the violation of a constitutional right is not tantamount to the violation of a legal right that does not enjoy a super-statutory status. The second question revolves around the essence and purpose of the condition for granting the allowance: the requirement to vaccinate the children as infants. As part of this question, it is necessary to examine what is the purpose of the vaccination requirement is and whether there is a link between this purpose and the objective of the child allowances. The third question focuses on the legal regime that applies to the conditioning of rights. This question is related to the first question, since the conditioning of legal rights and the conditioning of constitutional rights should not be addressed in the

same manner. The fourth question is whether the distinction that was made in legislation between parents who vaccinate their children and parents who do not amounts to a violation of the constitutional right of equality. The fifth question, derived from the former questions, is how the above normative scheme affects the constitutional judicial review of the amendment to the law, in accordance with the constitutional tests of the limitation clause in the Basic Law: Human Dignity and Liberty.

Child Allowances: History and Purpose

3. As we mentioned, the first question with which the discussion should begin revolves around the essence and objective of the child allowances, as were set in the National Insurance Law. (5755-1995 (hereinafter, the "National Insurance Law"). Because the basis for a discussion on constitutional review of the validity of a law is the status of the right violated, we should begin and by examining if, and to what extent, the eligibility to receive a child allowance is a right that enjoys constitutional protection.

4. My colleague, Justice Arbel, articulated the purpose of the child allowances as part of the fabric of Israel's social legislation. To this I would like to add a review of the historic development of the arrangements in the field, a development that sheds light on the ongoing use of the child allowances as a tool for promoting of social policies.

5. In general, the child allowances were subject to many changes from the time they were first introduced in the format of legislation until the regulation thereof in our time. Generally speaking, a clear process of strengthening the universal element in granting the allowances can be pointed out. The intention is to grant child allowances to each and every family for each of its children, without taking into consideration economic data or other distinguishing criteria (distinct from past practice when they were only granted to some families or some children based on distinguishing criteria).

6. Before the establishment of the State, payment to parents for their children was made in the form of an increase to the employees' salary. (See Johnnie Gal, Social Security in Israel, 97 and 102 (2004) (hereinafter, "Gal")); Abraham Doron "Policy on Child Allowances in Israel" Spotlight on Social Policy Series 1, 2 (2004) (hereinafter, "Doron, the "Allowances Policy" ")).

7. After the establishment of the State in 1950, the Kanev Committee submitted the *Inter-Ministerial Report on Social Security Planning* (1950), which included reference to a "children's grants" plan (See Abraham Doron, In Defense of Universalism –The Challenges Facing Social Policy in Israel, 128-129 (1995) (on the report and its importance)). The report determined that this plan would only be implemented in the last stage of the introduction of social insurance in Israel because its performance was not economically feasible in the immediate future. Nevertheless, striving to increase the birth rate in Israel, the then prime minister, David Ben-Gurion, introduced a monetary prize to families with ten children and more. (Gal, on p. 103). Starting from the early 1950's, proposals were made to grant allowances, and in the second half of that decade, the government began to demonstrate preparedness to consider the idea. (Meir Avizohar, Money to All – The Development of Social Security in Israel 67 (1978) (hereinafter, "Avizohar")).

1. The first piece of legislation that dealt with child allowances was adopted in 1959 as an amendment to the National Insurance Law. (National Insurance Law (Amendment) (No. 4), 5719-1959 (hereinafter, "Amendment 4")). The initiator of the legislation was the Minister of Labor, Mordechai Namir (hereinafter, "Namir"). In the background was a mass immigration from Middle Eastern countries that included large families whose breadwinners did not, at the time, adequately integrate into the labor market. The legislative initiative was thus derived from the social-economic gap created between the immigrant families and long established families in Israel, which were characterized by a smaller number of children on average. (Knesset Minutes 27, 2693-2642 (1959); Giora Lotan, Ten Years of National Insurance – *An Idea and its Fulfillment* 38 (1964)). Some argue that the Wadi Salib events in 1959 were a material catalyst to the enactment of the law (Gal, on p. 103, Avizohar, on p. 68-70) and this appears to have partial support in a discussion that was held in the Knesset (Knesset Minutes 27, 2642 (1959)). More generally, it can be said that the payment of the allowances was the first stage of a process that increased the involvement of the National Insurance Institute in reducing poverty and economic and social gaps in the population. (Ester Sharon, *The Child Allowances System in Israel: 1959-1987 Where did it come from and where is it going?* 3 (1987) (hereinafter, "Sharon")).

2. The allowance payments were consistent, in principle, with the basic principles of national insurance in Israel, in the sense that they were granted on a universal basis, independent of income level. However, the allowance was initially granted only to families with at least four children, and only for children under the age of fourteen. (Michal Ophir and Tami Eliav, *Child Allowances in Israel: A Historical View and International Perspective* (2005) (hereinafter, "Ophir and Eliav")). Minister Namir explained that these conditions were imposed for budgetary reasons, and that the aspiration was to lay down an infrastructure that would be expanded gradually. The deliberations on the scope of Amendment 4 were not particularly heated despite reservations on its small scope. Knesset Members supported Amendment 4 and expressed their hope that the terms of eligibility would be expanded in the future, and that it would presently succeed in encouraging births, eradicating poverty and enforcing equality among the various groups in Israeli society. (Knesset Minutes 27, 2667-2680 (1959)).

3. In 1965 the child allowances were expanded in several respects. First, the allowances were paid for all minor children, with no age distinction (that is, until the age of 18). Second, the allowance paid by the National Insurance Institute was accompanied by an employees' children allowance that was only paid to salaried employees by their employers for their first three children, and was financed by the National Insurance Institute. Therefore, this allowance, unlike the regular child allowance, was deemed as taxable income. (See: The National Insurance Law (Amendment Number 12), 5725-1965, *Statutes* 461, 208; The National Insurance Regulations (Employees' Children Allowance) (Part-Time Employees and Employment Seekers), 5725-1965 which were promulgated by virtue of Sections 31K and 115 of the National Insurance Law, 5714-1953; Gal on p. 103). In addition, in the early 1970s, an additional allowance was introduced for families with four or more children, if a family member served in the security forces (hereinafter, the "Military Veterans Allowance"). This payment was made directly from the National Insurance Institute and was exempt from tax. (Regulations on Grants to Soldiers and their Families, 5730-1970, *Regulations* 2605, 2180, promulgated by virtue of Section 40(B1)(2) of the Discharged Soldiers Law

(Reinstatement in Employment), 5709-1949). In 1975, this payment was expanded to also apply to families with three children. (Regulations on Grants to Soldiers and their Families (Amendment), 5735-1975, *Regulations* 3298, 1001). Over the years, payments were also made to additional families, who did not fulfill the statutory condition of a military service; ultra-orthodox families received additional payments from the Ministry of Religion and families of new immigrants received such payments from the Jewish Agency. (Gal, on p. 104; Eliav and Ophir, on p. 5-6; Yoram Margaliot "Child Allowances" Berenson Book, Second Volume – Beni Sabra 733, 745 footnote 40 (Editors, Aharon Barak and Haim Berenson, 2000) (hereinafter, "Margaliot")).

4. We can therefore summarize that in general, in the first half of the 1970's, financial support was provided to relatively large families in several formats: first, universal child allowances were given by the National Insurance Institute; second, additional allowances were given in the Jewish sector to families for their children (whether Military Veterans Allowances or other allowances); third, employees' children allowances were paid to salaried employees by their employers, and were taxed. These mechanisms were added, of course, to other welfare payments to which the families were eligible based on their individual economic condition. Additionally, families with a relatively high income enjoyed tax benefits which took the family size into consideration. However, this benefit was only enjoyed by families with a relatively high income, whose income was taxed. The incompatibility at the time between the various benefits and the understanding that families with many children constitute a more impoverished group together were a catalyst to a reform in the system. (The National Insurance Bill (Amendment Number 12), 5733-1972, Government Bill 1022, 30; The Amendment to the Income Tax Ordinance Bill (Number 18), 5733-1972; The Government Bill 1022, 31; The National Insurance Law (Amendment Number 12), 5733-1973, *Statutes* 695, 142; Raphael Rotter, The Reform in Child Allowances in Israel (1972); Arieh Nitzan, Twenty Years of National Insurance in Israel (1975) (hereinafter, "Nitzan")).

5. The policy with respect to allowances underwent further turmoil following the recommendations of the Ben-Shahar Committee on the subject of the income tax reform in 1975. (*Report of the Committee for Tax Reform – Recommendations for Changes to the Direct Tax*, 25A-26A (1975)). Pursuant to the committee's recommendations, the double treatment of the child allowances—within tax law and national insurance law—was discontinued, and it was decided to grant tax-free allowances on a universal basis to all families of salaried and non-salaried employees for all children in the family, starting with the first child, until they reach the age of 18. (National Insurance Law (Amendment Number 17), 5735-1975, *Statutes* 773, 152; *Sharon*, on p. 9-11).

6. The trend of expanding eligibility changed in the 1980's to the desire to reduce public expenditure. The scope of allowances was reduced. In addition, the child allowances for the first two children, in families of up to three children with a marginal tax rate on the main breadwinner's salary of at least 50%, were taxed. (Amendment to the Income Tax Ordinance (Number 59) Law, 5744-1984, *Statutes* 1107, 64; *Sharon*, on p. 11-12). In 1985 a tax was also imposed on the child allowance for the third child in families with up to three children and the marginal tax rate was reduced. In addition, the universal payment of the child allowance for the first child was revoked, except

for low-income families. (The Arrangements Law for an Emergency in the State Economy, 5746-1985, *Statutes* 1159, 20; *Sharon*, on p. 12-13). The 1985 arrangement was supposed to remain in effect for only one year, but it "survived" (with various changes pertaining to the income test's threshold amount) until 1993. (*Ophir and Eliav*, on p. 8; *Sharon*, on p. 12-13).

7. The pendulum swing child allowances policy continued in full force in the 1990's. At first, the trend of reducing the universality which characterized the granting of the allowances at the end of the last decade continued, and the eligibility of small families not defined as "in need" was significantly reduced. Later, the trend was one of expansion, while strengthening universality in granting the allowances. In this decade, the following changes occurred: the conditioning of eligibility for the allowance on the family size was revoked; the Military Veterans Allowances were gradually cancelled; the allowances for large families were gradually increased. (The Arrangements Law for an Emergency in the State Economy (Amendment Number 15), 5750-1990, *Statutes* 1328, 188; The Arrangements in the State Economy Law (Legislative Amendments), 5751-1991, *Statutes* 1351, 125 (Indirect Amendment to the Arrangements Law for an Emergency in the State Economy, 5746-1985); The Income Tax Law (Temporary Order), 5753-192, *Statutes* 1407, 22 (Indirect Amendment to the Arrangements Law for an Emergency in the State Economy, 5746-1985); The Arrangements in the State Economy Law (Legislative Amendments for Attaining the Budget Goals), 5754-1994, *Statutes* 1445, 45 (Indirect Amendment to the Discharged Soldiers Law (Reinstatement in Employment), 5709-1949); Dalia Gordon and Tami Eliav "Universality v. Selectivity in the Granting of Child Allowances and Results of Performance Limitations" 50 75, 78 Social Security (1997) (hereinafter, "Gordon and Eliav")).

8. The turmoil continued, even more forcefully, in the following decade. In 2001, the child allowance rate for large families was significantly increased—starting with the fifth child. However, shortly thereafter, a gradual cutback began in all allowances, including the child allowances, in order to reduce public expenditure. Another fundamental change that occurred in this period was equalizing the allowance given for each child in the family, irrespective of his birth order. At the same time, the attempt to reinstate the Military Veterans Allowances failed. (See Doron "The Allowances Policy", on p. 4; Abraham Doron "Multiculturalism and the Erosion of Support for the 'Welfare State': The Israeli Experience" Studies on the Revival of Israel 14 55, 63-64 (2004)); Knesset Research and Information Center, Child Allowances in Israel: A Historic Review – an Update 8 (2008)).

9. The issue before us is related to an additional stage in the development of the policy on child allowances within Amendment No. 113 of the National Insurance Law, which was enacted as part of the Economic Streamlining Law. (Legislative Amendments for Implementation of the Economic Plan for 2009 and 2010), 5769-2009 (hereinafter, the "Amendment")). As part of the Amendment, the allowances for the second, third and fourth child in the family were gradually increased by 100 shekel per month for each child, and eligibility to receive the full amount of the allowance was made contingent on the vaccination of the children.

10. This short historical review of the eligibility for child allowances reveals several important things. First and foremost, it demonstrates how eligibility for child allowances has always served as a platform for the promotion of national public

objectives (for example, the encouragement of births and reduction of social gaps), which go beyond the narrower purpose of supporting the family's finances. For example, in a discussion held in the Knesset on Amendment 4, which gave rise to the child allowances for the first time, Minister Namir stated the following:

> The law was intended to achieve three goals that are social demographic and economic in nature: a) to ease the difficulties in the social condition of weak parts of society; b) to stop signs of negative trends in our demographic development c) to remove several errors and anomalies in the field of employment and distribution of wages in the factories, in relation to the employees' family status." (Knesset Minutes 27, 2639 (1959)).

11. The legislative history also demonstrates the fact that over the years, the child allowances expressed a different and changing welfare policy. In other words, the tool remained one, but into it were cast various objectives, or at least secondary objectives. The goal of reducing poverty among children hovered, throughout the year, over legislation concerning the child allowances indirectly and directly. However, in each of the periods reviewed, alongside the purpose of eradicating poverty stood additional purposes. In fact, even Amendment 4, which gave birth to the child allowances, was intended to provide a response, according to its legislators, to demographic data regarding births in Israel. An additional purpose at the time was bridging the social gaps created between various groups of immigrants in order to promote their integration in Israel.

12. The recurring oscillation between the expansion of eligibility for allowances for small families, and its reduction for large families, marks the tension between the perception that, in general, the State's role is to contribute towards the cost of raising children ,together with their parents (Doron "The Allowances Policy", on p. 2), and the perception that child allowances provide a way to fulfill other roles the State has taken upon itself, such as reducing unemployment and gaps in society and encouraging births. (Margaliot, on p. 734-754). In practice, we have learned that child allowances constituted, throughout the years, a means of realizing various social and economic goals that were placed at the top of the political agenda in each period. For our purposes, it is important to note the following information: child allowances are supposed to promote the welfare of families raising minor children. However, the child allowances are not paid in correlation with the family's economic situation (and in this they differ from income assurance payments). (Compare: HCJ 5578/02 Manor v. The Minister of Finance [2004] IsrSC 59(1) 729 (hereinafter, "Manor Case"), in which former President A. Barak referred to the old-age pension and held that unlike the income assurance allowance, this one is not intended to guarantee a dignified minimal existence). At most, it might be said that they are provided according to the estimated needs of families raising children. (Compare: Abraham Doron, The Welfare State in an Age of Change 72 (1987)). Additionally, the purpose of promoting the economic welfare of families who are raising children is not the sole purpose of the allowances.

13. Thus, it can be determined that in view of the many aspects of eligibility for child allowances, as well as the changes it has undergone through the years, the objective of the allowances is a broad objective of striving to promote the welfare of the children in the Israeli society, as well as to promote the social policy of the government at a

given time. This insight is important in continuing the discussion on the legal status of the allowance.

Child Allowances: Legal Rights or Constitutional Rights

14. Child allowances are currently given by virtue of a law—the National Insurance Law. Does the right to receive child allowances as it they are granted today constitute an exercise of a constitutional right? Like my colleague, Justice Arbel, I too believe that it was not proven before us that this is correct at this time.

15. The ruling on this issue is relevant to the continuation of the constitutional examination process, since the conditioning of the legal means for exercising the constitutional right is not tantamount to the conditioning of the constitutional right itself. Indeed, without legal means for exercising the constitutional right, the right may remain as an empty normative shell, void of content. There may certainly be situations where either the conditioning or denial of the means to fulfill the constitutional right will amount to a violation of the right itself. However, this should be examined in each and every case. This can be compared to a two-story building: on the upper floor is the constitutional right itself; on the lower floor are the means for its fulfillment. Too severe of an injury to the foundations of the lower floor, by conditioning or otherwise, will result in harm to the upper floor, the floor of the constitutional right, and undermine protection. Thus, the question is whether the petitioners have successfully shown that conditioning eligibility for child allowances amounts to a violation of a constitutional right. Additional examples that illustrate the importance and relevance of this distinction can be found in case law regarding the violation of the right of access to the courts. For example, it has been held that a person does not have a vested right to exercise the right of access to the courts through a specific procedural proceeding. Therefore, limiting the ability to file a class action does not necessarily amount to a violation of the right of access to the court. (See and compare: HCJ 2171/06 Cohen v. The Chairman of the Knesset, paragraphs 21 and 24 (August 29, 2011)).

16. Child Allowances and the Right of Dignity – Indeed, this Court's rulings have repeatedly emphasized that the protection of the right to a dignified human existence falls within the scope of the protection of the right of human dignity enshrined in the Basic Law: Human Dignity and Liberty, and that its protection is identical to the protection given to the other basic rights. (HCJ 366/03 The Association for Commitment to Peace and Social Justice v. The Minister of Finance, [2005] IsrSC 60(3) 464, 482-484; HCJ 10662/04 Hassan v. The National Insurance Institute (February 28, 2012), paragraphs 34-36 (hereinafter, "Hassan Case")). However, a distinction should be drawn between the constitutional right and the legislative and administrative means that are used for its fulfillment. The right to dignified human existence does not have to be fulfilled through the payment of child allowances, and in the present legal situation it is not even clear that this is the purpose for which they are paid. As a matter of policy, and in order to promote various national public objectives, the Israeli legislature has chosen to provide for the welfare of families with children, irrespective of their economic situation.

17. In legislative conditions in which the State does not provide a means of existence for weakened populations, payment of child allowances may, *de facto*, guarantee their dignified existence. Nevertheless, at this time, it has not been proven to us that

eligibility to receive child allowances was intended to maintain a dignified human existence or that it is essential to its protection, and therefore, under these circumstances, conditioning the eligibility is not in itself conditioning of a constitutional right. Nothing in the aforesaid negates the possibility to prove that, in a specific case, or following other changes in the welfare system in Israel, cutbacks in child allowances will violate the rights of individuals to basic conditions of a dignified existence. As mentioned, this has not been argued before us and was consequently not proven. It should be added that Section 68(c) of the National Insurance Law orders an increase in the regular child allowance payment for the third and fourth child when the parent is eligible for an income assurance allowance or support payments through National Insurance, but the amendment to the law before us has no ramifications on this special increment and does not derogate therefrom.

18. Child Allowances and the Right to Property – The petitioners also argued that the eligibility for child allowances is a property right protected by the constitutional protection of property under the Basic Law: Human Dignity and Liberty, through application of such protection to "new property." Indeed, through the years, the term "property" has been attributed a broader and more realistic understanding. Currently, rights vis-à-vis the State (the right to a license, the right to an allowance) are no less important to a person's financial situation than classic rights of property, and their importance may even exceed that of classic property rights, as demonstrated by the scholar Reich in his classic article on the issue. (Charles Reich, New Property, 73 Yale L. J. 733 (1964)). The legal protection of new property was also recognized in the judgments of this Court. (See HCJ 4806/94 D.S.A. v. The Minister of Finance, [1998] IsrSC 52(2) 193, 200-202; HCJ 4769/95 Menachem v. The Minister of Transport [2002] IsrSC 57(1) 235, 275), which also recognized certain welfare allowances as new property (Manor Case, on p. 739). However, recognizing rights vis-à-vis the State as property cannot be identical in all characteristics to the protection of traditional rights of property. When the State wishes to expropriate a plot of land owned by a person it is a violation of property that requires constitutional justification and is required to satisfy the tests of the limitation clause. It would be improper to apply precisely the same legal regime to a situation in which the State is seeking to reduce eligibility given to a person by the State treasury. The eligibility for child allowance payments for example, expresses, *inter alia*, the economic and social policy in place at the time the eligibility was granted. Adopting the approach that the scope of eligibility for an allowance as it was set in the past has become a property right in its classical sense, would lead to the conclusion that the State is very limited, more than it should be, in the possibilities available to it to change its social and economic policy. (Compare: Daphne Barak Erez, Administrative Law, Volume A, 50-52 (2010) (Barak Erez, Administrative Law); Daphne Barak Erez, Citizen-Subject-Consumer – Law and Government in a Changing State 32-33 (2012) (hereinafter, "Barak Erez, Citizen-Subject-Consumer"). This perception is contrary to the democratic perception to practical needs, and to the justified recoiling from "sanctifying" the status quo (which occasionally may also reflect unjustified bias toward strong groups that acted in the past to enact laws that benefitted them). Obviously, if the eligibility for child allowances was required for the protection of dignified human existence, this would have been a good reason to impose restrictions on its reduction. In addition, rights to receive allowances from the State must be protected in that they must be granted equally and changes to them must take into consideration legitimate reliance upon them. Furthermore, there may be room for

additional distinctions such as a distinction between an allowance based on an insurance mechanism or a feature of savings via mandatory payments that were made over the years (such as an old-age pension; see Manor Case, on p. 739), and an allowance that was granted in the form of a one-time grant (compare Daphne Barak Erez "The Defense of Reliance in the Administrative Law" Mishpatim 27, 17 (1996); HCJ 3734/11 Haim Dudian v. The Knesset of Israel, paragraphs 24-25, (August 15, 2012)). In any event, the argument that "what was will be", in itself, cannot be sufficient.

19. To emphasize further, holding that there is no constitutional right to receive support from the State in the form of child allowances, does not mean that this eligibility is not significant. Moreover, once the State has chosen to pay child allowances under law, it is required to do so in a manner that complies with constitutional standards and in this context to ensure, among other things, that payment of the allowances will be made equally and indiscriminately (as distinct of course, from the setting of legitimate conditions to the receipt of the allowances), as will be explained below.

20. As Justice Arbel mentioned, the argument regarding violation of rights was also raised before us with a special emphasis on an alleged violation of the rights of the children for which the allowances are to be paid, separately from their parents' rights. This argument is supported by the current perception that recognizes children's rights and does not merely support a paternalistic protection of their interests. (Compare: CA 2266/93 John Doe, Minor v. John Doe [1995] IsrSC 49(1) 221, 251-255; Yehiel S. Kaplan "The Child's Rights in Israeli Case Law – The Beginning of the Transition from Paternalism to Autonomy" Hamishpat 7 303 (2002)). This development is indeed very significant. Nonetheless, under the circumstances of this case, it cannot change the framework of the discussion. First, it is important to note that the distinction between the rights of children and protecting their best interests without asking their opinion is important in situations where it is possible to consider the child's autonomy of will. However, our case focuses on young infants who, undisputedly, cannot take an autonomous and rational stance on the question of whether to be vaccinated. It should be emphasized in this context that the statutory scheme explicitly orders the continued payment of the allowance even if the children were not vaccinated, once the early infancy period proper for vaccination passes. Second, the petitioners' argument regarding the amendment's violation of the child's rights was made generally without stating which of the rights has been violated. The discussion we conducted clarifies that the contingent reduction of the child allowances does not violate, in itself, a constitutional right, including constitutional rights of children (unless it will be invalid for another reason, such as discrimination, an issue that will be examined separately below). To a certain extent, the argument of a violation of the children's rights in this case wishes to repeat the argument regarding the violation of the parents' autonomy to make decisions with respect to their children's best interests. This tension frequently underlies decisions on the best interests of children and repeatedly arises, for example, in relation to decisions regarding the children's education. (Compare: Yoram Rabin, The Right of Education 121-124 (2002)).

<u>The Objective of the Vaccination Requirement: Between Rights and the Public Interest</u>

21. Based on all that has been said thus far with relation to the legal status of the child allowances and the objective underlying them, it is necessary to address the second question regarding the objective of the Amendment that conditions part of the eligibility for the allowance on vaccinating the children.

22. The policy on the vaccination of young children is currently considered a very important tool in the protection of children's health – both from the aspect of each child's right to good health and the aspect of the public interest in eradicating epidemics which claimed many victims in the past. (See for example: David E. Bloom, David Canning & Mark Weston, The Value of Vaccination, 6 World Economics 15 (2005); Saad B. Omer and others, Vaccine Refusal, Mandatory Immunization, and the Risks of Vaccine-Preventable Diseases, 360(19) New England J. Medicine 1981 (2009)). The State of Israel has excelled since its establishment in operating Family Health Centers, which were an important element in ensuring the population's health. This public health operation ensured the vaccination of children, for their benefit and for the benefit of the population as a whole.

23. Through the years, criticism was voiced against the sweeping policy of child vaccination. Some parents refrain from vaccinating their children for various reasons—both because of a belief that vaccinations are dangerous to children's health and because of a position that prefers "natural" immunization, acquired over the years via "natural" contraction of diseases. So long as those refraining from vaccinations are a minority, choosing this alternative is ostensibly a rational alternative for the relevant persons because of the effect known as "herd immunization;" that is, the phenomenon wherein those who are not vaccinated are in fact protected from contracting diseases when most of the people around them are properly vaccinated. Thus, there is a risk of free riders here, and if it increases it may eventually compromise "herd immunity," which weakens as the rate of non-vaccinated persons rises. In fact, the decision to vaccinate has characteristics of the "prisoner's dilemma:" it is a decision that must be made in conditions of uncertainty with regard to the acts of others, and whose benefit from the perspective of the individual also depends on the behavior of such others. Individuals facing the decision whether to be vaccinated will always tend not be vaccinated (provided that others are being vaccinated), purely out of promotion of self-interest. This is a classic case of a "market failure" that justifies intervention. (See also Christine Parkins, Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations, 21 S. Cal. Interdisc. L. J. 437 (2011)). *De facto,* there is a decline in child vaccination. The professional opinion of the Ministry of Health, supported by clear professional opinions on the matter, is that the decline in child vaccination constitutes a health risk, both to the children themselves and to the population as a whole (due to the risk of contracting diseases from children who were not vaccinated and later contract serious diseases).

24. The new Amendment to the law was intended to provide a response to the problem presented above. This problem is also present in other countries, and a spectrum of responses to situations of non-vaccination of children can be pointed to. (See in general: Daniel Salmon and others, Compulsory Vaccination and Conscientious or Philosophical Exemptions: Past, Present and Future, 367 Lancet 436 (2006)). Among the well-known examples, the United States and France represent a rigid approach to the enforcement of the vaccination obligation. In France, the Code of Public Health

(Code de la Sante Publique) states that parents and guardians of children are personally responsible for their vaccination, and proof of proper vaccination must be presented upon the child's acceptance to an educational institution. (Section L3111-2 of the code). Alongside the aforesaid obligation, criminal sanctions of up to six months imprisonment and a fine were set forth. (Section L3116-4 of the code). A mandatory vaccination policy is also common in the United States. The means employed, as well as the scope of the limited exemptions granted on religious freedom or freedom of conscience grounds, vary between the different states, as these issues are regulated on a state, and not a federal, basis. However, it appears that a central means used is the imposition of a limitation on the enrolment of children in schools when they are not vaccinated in accordance with the basic vaccination plan, because of the concern that others will be infected. Constitutional petitions that challenged laws that imposed vaccination obligations were rejected, based on the recognition of the importance of vaccinations to public health. (See Jacobson v. Massachusetts, 197 U.S. 11 (1905) (a general discussion of the vaccination obligation); Zucht v. King, 260 US 174, 176-77 (1922) (a specific discussion on the conditioning of school enrollment on vaccination). Alongside the aforesaid, additional sanctions were used over the years, including setting a statutory vaccination obligation whose violation entails a fine and cutbacks in municipal education budgets. In the city of New York, for example, it was decided to impose fines on schools that accept unvaccinated children, even when they fall within one of the exceptions that allow parents not to vaccinate their children. The fine is imposed for each day in which an unvaccinated child was present on school grounds. In this manner, the city of New York wished to create an incentive for parents to vaccinate their children, since failing to do so compromises the school's budget and the level of education it is able to provide. (See further: Alan R Hinman, Walter A Orenstein, Don E Williamson & Denton Darrington, Childhood Immunization: Laws That Work, 30 J. L. Med. & Ethics 122, 123 (2002); Gary L Freed, Victoria A Freeman & Alice Mauskopf, Enforcement of Age-Appropriate Immunization Laws, 14(2) Am. J. Prev. Med. 118 (1998); D. Isaacs, H. A. Kilham & H. Marshall, Should Routine Childhood Vaccinations be Compulsory?, J Pediatr. Child Health 40(7) 392, 395 (2004); Anthony Ciolli, Religious & Philosophical Exemptions to Mandatory School Vaccinations: Who Should Bear the Costs to Society?, 74 Mo. L. Rev. 287 (2009); Ross Silverman, Litigation, Regulation, and Education – Protecting the Public's Health through Childhood Immunization, 360(24) New England J. Medicine 2500 (2009)).

25. Unlike in the United States, there is no norm of mandatory vaccination as a condition to the acceptance of children to school in Canada. In fact, only two provinces of Canada, Ontario and New Brunswick, have a statutory vaccination requirement. Nevertheless, an inspection of the education legislation of Ontario shows that alongside the requirement to vaccinate children as a precondition to their enrollment in the education system, a fine of up to $1,000 is also imposed on parents who fail to vaccinate their children. (Education Act, SNB 1997, c E-1.12, s 10; Immunization of School Pupils Act, RSO 1990, c I.1, s 3-4).

26. A different approach prevails in Australia, where monetary incentives are given to parents who respond to the vaccination plan. This is, to a certain extent, in the spirit of the solution chosen by the Israeli legislator. This approach is recognized in academic literature as more respectful of the parents' autonomy, and ethically appropriate,

insofar as it does not endanger the lion's share of welfare payments for children. (See David Isaacs, An Ethical Framework for Public Health Immunisation Programs, 23(5-6) NSW Public Health Bulletin 111,114 (2012).

27. The comparative law was reviewed merely to illustrate the variety of means employed by other legal systems in a similar context. Obviously, these examples themselves cannot dictate the outcome. However, they emphasize several points that ought to be discussed. First, they show that the issue of child vaccination and imposing sanctions in this context (even when they may indirectly harm the children themselves) are also present in other systems to promote the welfare of the children themselves and the welfare of the public. Second, other systems went as far as imposing sanctions, which may be deemed harsher than those methods adopted by the Israeli legislature. These sanctions may indeed serve more closely the purpose of achieving the result of vaccinating children (due to their weight), but they simultaneously entail more severe harms to the children and their parents (including the imposition of fines or prevention of the children's studies in educational institutions). I will mention these alternatives again when addressing the limitation clause.

28. And now: the Amendment discussed before us was intended to achieve a double purpose of protecting the health of infants, for whom contracting the diseases against which the vaccine protects may be dangerous and at times even lethal, and protecting public health as a matter of national medical policy through the creation of "herd immunity". This double purpose will also be important for our later discussion regarding the limitation clause. At this point it can also be said that the double purpose of the law does not mandate a direct confrontation with the discussion on the limits of paternalism. As is known, the classification of a legal rule as paternalistic is made through the prism of the grounds underlying it. Therefore, the more the legal rule intervenes in the individual's autonomy of will for the sole purpose of protecting him and his welfare from his own actions, the more likely we are faced with a paternalistic rule. More specifically, in our case we have a paternalistic rule which intervenes in the parents' autonomy of will in order to stop them from making a mistake, as the issue is perceived by the Ministry of Health. The question of the appropriate limits of paternalism has been extensively discussed and this framework is too narrow to discuss it. (See, for example: John Stuart Mill, On Liberty (Arieh Simon, Translator, 1946); Peter De Marneffe, Avoiding Paternalism, 34(1) Philosophy and Public Affairs 68 (2006); Gerald Dworkin, Moral Paternalism, 24(3) Law and Philosophy 305 (2005)). For purposes of the current discussion it is important to state on this issue the following two points. First, it is evident that those engaged in the legislative work were aware of the difficulties caused by over-intervention in the decisions of individuals. Thus, for example, the drafters of the law refrained from setting a statutory vaccination requirement, the breach of which entails a punitive sanction; instead, they were satisfied with the creation of an economic incentives scheme, which leaves parents a wider array of choices. The fact that it is only the increase in the allowances that is made contingent on the vaccination of the children, while leaving the base allowance intact suggests the same. Second, it is certainly doubtful whether we have before us a paternalistic rule in the full sense of the word, considering that the Amendment was intended not only to protect the children and their parents from themselves, but also to protect the general public against the outbreak of diseases. It seems that the duty of the Ministry of Health to

institute preventive measures to eradicate diseases that threaten public health cannot be disputed.

29. Moreover, since the Amendment was intended to promote the protection of the health of children in the State of Israel, it should not only be deemed as a means that violates rights (in the name of an important public interest), as the petitioners argued, but also as a means intended to promote rights in a positive manner—in this case, the children's right to health. The above fits in with the general perception of Basic Law: Human Dignity and Liberty, pursuant to which the protection of basic rights is not merely reduced to a negative protection against the damaging power of government, but also extends to a positive protection which reflects the government's duty to operate in an active manner for the protection of basic rights. While according to Section 2 of the Basic Law: Human Dignity and Liberty "[t]here shall be no violation of the life, body or dignity of any person as such" (and here the negative protection of these rights is expressed), according to Section 4 of Basic Law: Human Dignity and Liberty "[a]ll persons are entitled to protection of their life, body and dignity (in other words, the government is also required to positively promote these rights)." Although the question regarding the scope of the constitutional right to health has yet to be decided, there is no doubt that striving to guarantee basic conditions of good health falls within the boundaries of the right to human dignity. In addition, it can be deemed as a derivative of the right to life and of the protection of the person's body. (Compare: Eyal Gross "Health in Israel: Right or Product", Economic, Social and Cultural Rights in Israel (Yoram Rabin and Yuval Shani, Editors, 2004); LCA 4905/98 Gamzo v. Yesha'ayahu [2001] IsrSC 55(3) 360, 375-376; HCJ 3071/05 Luzon v. The State of Israel (July 28, 2008), in paragraphs 9-17; HCJ 11044/04 Solometkin v. The Minister of Health (June 27, 2011), in paragraphs 11-16). Legislation seeking to create incentives for child vaccination is legislation that falls not only into the category of laws that limit rights, but also that of promoting rights in general and children's rights in particular. Section 4 of the Basic Law expresses a clear position that rejects the perception that the State is at its best when it does not intervene. Article 25 of the Convention on the Rights of the Child, 1989 also states the obligation of the member states to act for the promotion of children's health, including "to develop preventive health care." (Article 25(6)).

Conditioning of Rights: The Normative Framework

30. The third question of those I mentioned in the beginning is the legal question at the heart of the petition: to what extent can conditions be imposed on rights vis-à-vis the State and more specifically, is it possible to condition rights on requirements which the recipient of the right is required to fulfill? What is the supposed novelty of setting conditions? The law frequently defines rights and eligibilities as such that include restrictions and conditions to their fulfillment, either paternalistic conditions seeking to protect the holder of the right from himself or conditions seeking to protect the public interest. However, the other side of the coin is that imposing conditions on rights raises a concern of weakening those specific rights and eroding the concept of a right until it is turned into a benefit given by the grace of government.

31. An important distinction that should be drawn at the outset is the distinction between constitutional rights and legal rights. The main concern regarding the conditioning of rights pertains to the conditioning of constitutional basic rights. The liberal doctrine of

rights is based on the perception that constitutional basic rights are the individual's shield against government's power, and thus they are supposed to be, in the usual case, autonomous of any and all limitations. The history of the democratic fight for rights is tied to the perception that rights are also conferred on those who are not perceived as "normative persons," violators of law, and those who are not deemed, ever or at the time, to be "model citizens". On the contrary, many battles for rights were shouldered by those whose opinions outraged others and were a thorn in the side of people in authority.

32. Does this mean that conditions may never be imposed on constitutional rights? In fact, since I have reached the conclusion that payment of child allowances does not reflect, at least for the time being, a protection of a constitutional right, I am no longer required to answer this question directly, and therefore I will address it relatively briefly. In general, the position regarding the setting of conditions on the exercise of constitutional rights should be suspicious and minimizing. However, attachment of conditions to the exercise of a constitutional right cannot be rejected at the outset and in advance (as distinct from conditions aimed at denying the constitutional right itself), if only because of the perception that rights are relative for the most part, and not absolute, as indicated by the limitation clauses included in the basic laws. For example, exercising the right of access to courts can be made contingent upon payment of a fee (subject to exceptions guaranteeing that the payment of the fee does not bar persons without means from conducting legal proceedings). (See for example, LCA 3899/04 The State of Israel v. Even Zohar [2006] IsrSC 61(1) 301, 319-321; LCA 2146/04 The State of Israel v. The Estate of The Late Basel Naim Ibrahim [2004] IsrSC 58(5) 865, 868; M.C.M. 457/01 Karlitz v. The Officer of the Elections for the City of Beer Sheva 1998 [2001] IsrSC 55(3) 869, 872)). Similarly, the income assurance allowance, which is generally the legal manifestation of the constitutional right to a dignified human existence, can be contingent upon the requirement to "exhaust earning capacity." In both cases, the conditions are not "foreign" to the purpose of the relevant rights considering that the payment of a fee assists in making sure that the use of the right of access to the courts will not lead to inefficient use of the important public resource of the judicial system, and that the requirement to exhaust earning capacity contributes to the proper use of the limited resource of support for those who cannot ensure their basic sustenance.

33. In any event, the case before us falls within a different category: the conditioning of legal rights vis-à-vis the State (by virtue of legislation, as distinct from super-statutory constitutional basic rights). Because the conferral of rights pursuant to the law is supposed to also serve public interests and public policy, the conferral of this type of right is often accompanied by conditions. Below I will refer to standards which should guide the legislature, and later the court, in outlining the proper framework for the conditioning of legal rights.

34. Presumably, the conditioning of rights available to individuals vis-à-vis the State does not necessarily raise a constitutional difficulty. We should remember that the law often defines rights and eligibilities as such that include restrictions on and conditions to their fulfillment. The aforesaid notwithstanding, in practice the imposition of conditions on legal rights may also be problematic on the constitutional level, when the essence of the condition is a waiver of a constitutional right. For example, conditioning of a legal right, such as eligibility for an allowance, on the recipient's

waiver of his right to freedom of speech or his right to freedom of religion and conscience is problematic even though, theoretically, the government may choose not to grant such an allowance at all. The reason for this is concern about an indirect limitation of constitutional rights. In American constitutional law, the accepted term for discussing the problem of eligibilities given by the government based on a (supposedly voluntary) waiver of constitutional rights is the unconstitutional conditions doctrine. (See for example: Note, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968); Allen Redlich, Unconstitutional Conditions on Welfare Eligibility, Wis. L. Rev. 450 (1970); Richard A Epstein, Unconstitutional Conditions, State Power and the Limits of Consent, 102 Harv. L. Rev. 5 (1988); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); Cass Sunstein, Is There An Unconstitutional Conditions Doctrine?, 26 San Diego L. Rev. 337 (1989); Brooks R. Fundenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 UCLA L. Rev. 371 (1995); Daniel A. Farber, Another View of the Quamire: Unconstitutional Conditions and Contract Theory, 33 Fla. ST U. L. Rev. 913 (2006); Renee Lettow Lerner, Unconstitutional Conditions, Germaneness, and Institutional Review Board, 101 Nw. U. L. Rev. 775 (2007); Philip Hamburger, Unconstitutional Conditions: The Irrelevance of Consent, 98 Va. L. Rev. 479 (2012)). We are not bound, of course, by the details of this doctrine, and some aspects of its scope and application are still in dispute in American law itself. Nevertheless, it does indicate the caution necessary in conditioning legal eligibilities, which may indirectly violate constitutional rights. In this spirit, and without exhausting discussion in the matter, I wish to present primary relevant considerations in examining such conditioning. As I will clarify below, these considerations will ultimately be included in the formal constitutional examination performed within the context of the limitation clause.

35. Relevance of the Condition and its Affinity to Eligibility – Essentially, conditions to eligibility are supposed to have a relevant connection to the policy the eligibility is intended to promote. In order to clarify the nature of the discussion, let us consider two hypothetical examples that may be discussed in relation to framing the eligibility for income assurance allowances: first, conditioning eligibility for receipt of the allowance on the applicant not having a bad traffic record; second, conditioning eligibility on the applicant's active desire to re-join the employment circle by visiting the employment bureau each week. Our intuition suggests that the second condition is legitimate, as it is consistent with the purpose of the income assurance allowance and it comports with the public interest underlying it—the re-integration of a person who has been excluded from the employment circle, while providing a last residual protective net on the way there. (Hassan Case, in paragraphs 6-7 and 57). The translation of this intuition into a legal principle tells us that the condition should derive from the same legal circle within which the conditioned right is operated. In other words, the purpose of the condition and the public interest promoted through it must be derived from the same normative field in which the conditioned right is rooted. The weaker the connection between the two becomes, the more the conditioning becomes constitutionally illegitimate. For example, although there is no dispute that eradicating driving violations and creating a system of incentives to promote this are desirable from perspective, these have absolutely nothing to do with eligibility for income assurance allowance. The purposes underlying each of these arrangements are foreign to one another. This foreignness indicates the arbitrariness of the conditioning and the flaw in combining them with each other. Sometimes, the

question of the relevance of the conditioning may also be examined with respect to the question of whether the condition is paternalistic and seeking to promote the best interests of the holder of the right himself, or a condition seeking only to protect a wide public interest. Sometimes, of course, the conditioning of the right may encapsulate more than one reason within it.

36. An auxiliary test that may assist in examining the nature of the affinity and the connection between the purpose of the condition and the conditioned right focuses on the date the condition was imposed and the legislative history behind it. Generally, insofar as the condition was imposed on or about the time the right was granted, the conditioning will be classified as part of the definition of the right and delineation of its scope. Insofar as the condition is added, or should we say "pasted," at a later date, adding it should be deemed as external conditioning of the normative content of the right. This is of course merely an auxiliary test and no more. Situations can also be conceived where a new statutory eligibility is "born" with an attached foreign and inappropriate condition.

37. Without making a final determination, an example seemingly close to our case is the birth grant given by the State, which is contingent on the mother having chosen to give birth in a hospital and not in her home. (Sections 42-43 of the National Insurance Law). In this context too, the State wishes to help the mother but at the same time promotes a public policy that the delivery will take place in the hospital, which is, as the State and professionals perceive it, in the best interests of the mother and the newborn as well as in the best interests of the public as a whole. In addition, the condition attached to the eligibility is in affinity the general purpose of the eligibility, promoting the welfare of the mother and her family.

38. Voluntary Choice – A distinction must be made between voluntary conditions, which give the individual freedom of choice, and conditions that refer to inherent identity characteristics that a person is unable to change or that it would be inappropriate to require him to change (such as religious or national origin). The importance of this consideration cannot be exaggerated. Conditioning rights on a requirement that contradicts identity characteristics will, by its nature, cause difficulties, and raise a heavy suspicion of discrimination. Obviously, between the extreme situations of full choice on the one hand, and coercion and lack of choice on the other hand, there may be interim situations in which the incentives that accompany the choice affect whether the condition violates a right.

39. Scope of Conditioning – Another consideration that should be taken into account concerns the scope of conditioning: that is, the extent of exposure of the right to the restricting power of the condition. In this context, both the scope of coverage of the condition and whether it applies to the entire right or perhaps only to part of it are significant. Similarly, it may be examined whether the condition pertains to an addition to an existing eligibility, or perhaps results in the derogation therefrom.

Imposition of Conditions on Rights: From the General to the Particular

40. The application of these standards to the case before us makes clear that the Amendment in our case does not create an arbitrary connection between a legal right and the promotion of a public interest.

41. Pertinence of the Condition and its Affinity to Eligibility – The State grants child allowances to everyone (in other words, over and above what is required for the purpose of guaranteeing the right to a dignified human existence of children who grow up in conditions of poverty) in order to promote the welfare of the families who raise children and the children who are raised by them in particular, including the promotion of their health, alongside other public purposes. Thus, in this case, the conferral of the right to receive a child allowance was made contingent upon a condition that has a direct and unequivocal affinity to the purpose for which the right was conferred in the first place; the condition is based on an opinion of independent professionals who indicate that the best interests of children and of society require that they be vaccinated. In these circumstances, in which the right to the allowance is contingent upon a condition that is directly and clearly entwined with the best interests of its beneficiary, it is not difficult to hold that the condition is pertinent. The child allowances are not only granted in order to provide for the children, but for their welfare, including other basic rights they have such as education and health.

42. Indeed, an inspection of the comparative law may serve as a basis for the argument that a condition that links the acceptance of children to schools and their vaccination expresses a stronger affinity between the condition and the right than as distinguished in our case where eligibility for child allowances was made contingent upon their vaccination. However, in practice, and following further inspection, this argument is unconvincing. *De facto*, the only difference between the American conditioning model and the Israeli conditioning model is the time the children's vaccination condition was imposed, not the intensity of the link between the condition and the eligibility. Both models see the need to protect the children themselves and the need to protect those who come into daily contact with them. However, the Israeli legislator wished to move up the date of the condition that incentivized children's vaccination as a preventive measure, and thereby make redundant the future dilemma with which health policy makers in the United States and Canada are dealing, namely, when parents are required to enroll their children in the education system. In addition, earlier vaccination of infants appears to be more effective from a preventive medicine standpoint, and if so, it is more logical to create an incentive to vaccinate the children at an earlier stage, prior to sending them to the education system. In fact, insofar as the main purpose is to prevent the infection of other children, it makes sense to make the connection to the time of entrance into the educational institution. However, insofar as the purpose is the promotion of the best interests of the children themselves, an earlier date is preferable.

43. Some of the arguments advanced by petitioners attempted to undermine the assumption that conditioning the allowances indeed promotes the children's health and their general welfare. One argument made before us on this issue is that there are views that vaccination of children does not serve their best interests and that the route of natural immunity is preferable. A second argument raised in this context is that conditioning the right to child allowance constitutes "double punishment" of the relevant children. First, they are not being vaccinated and thus their health is compromised. Second, the State does not pay their parents the full child allowance amount, and thus their welfare is also harmed. These arguments should be dismissed. The first argument, pertaining to the uselessness of vaccination for the children's health cannot be accepted because of the factual basis underlying it. The medical opinion underlying the vaccination policy is a solid one supported by many studies.

The petitioners' arguments regarding the existence of other approaches have their due respect, but the formulation of national policy is supposed to be based on the position of the professional bodies of the government, founded on studies and examinations. Nothing in the petitioners' arguments undermines the firm basis underlying the policy, at least for the time being. The second argument should also be dismissed. This argument is based on the assumption that conditioning part of the eligibility for child allowances on vaccinating the children is merely a sanction and cannot direct behavior. This assumption remains unsubstantiated. Moreover, the Amendment was enacted in a format that inherently attests that it was intended to direct behavior. The reduction of child allowances is not imposed as a sanction in an irreversible manner. This reduction applies only during the period in which the parents are supposed to vaccinate the child with the vaccine they avoided. During the vaccination period the parents receive several notices and warnings on the consequence of failure to vaccinate the children. Furthermore, once the suitable period for giving the vaccine passes, the allowance returns to its regular amount. Thus, it may be said that the Amendment is phrased in a manner intended to create a means for directing behavior, and at least at this stage, there is no reason to believe that it will not succeed to do so. In any event, this cannot be pre-assumed.

44. Voluntary Choice – The Amendment to the law assumes, in practice, that the impediment to vaccinating children derives from the parents' choice not to vaccinate, and not from the fact that the State does not guarantee reasonable access for the entire population to this essential service, in terms of both location and cost. The aforesaid is particularly important in view of the fact that one of the petitions before us was filed by Adala Center, which alleged insufficient dispersion of Family Health Center services among the Bedouins in the Negev region. If indeed there was no reasonable access to the vaccination services for the entire population, then the Amendment is problematic because this would mean the denial of eligibility for child allowances is in fact arbitrary and does not in practice promote the purpose of the Amendment. In order to avoid this inappropriate result, the Amendment should be interpreted pursuant to its objective and denial of the eligibility for child allowances should only apply in situations where parents choose not to vaccinate their children, and not in situations in which the parents refrain from doing so due to lack of reasonable access to health services. *De facto*, the State's arguments painted a positive picture of improvement in the level of accessibility to Family Health Center services in the Negev region, and the State is presumed to continue to act in this direction. In addition, the State has undertaken, both in writing and orally, that the vaccination fee will be cancelled, so that the cost of vaccination will not be a barrier for those who lack financial means.

45. Scope of Conditioning – conditioning eligibility for child allowances on the children's vaccination does not apply to the entire allowance but only to part of it. Failure to fulfill the condition does not deny the entire child allowance (like it does not deny all other means that the social laws in Israel provide for the fulfillment of the child's right to a dignified existence).

46. Thus, it may be concluded, at this time, that the imposition of conditions on eligibilities relies on solid foundations, at least when (like in the case before us) the eligibilities discussed are eligibilities pursuant to a law that promote public policy (as distinguished from constitutional rights), the condition set is related to the purpose of

granting the eligibility, the fulfillment of the condition depends on the free choice of the relevant party, and especially because the conditioning does not apply to the entire eligibility.

Equality in Granting Eligibilities

47. The fourth question that should be examined, according to the order of things, also relates to the content of the conditioning, and in this context focuses on the level of equality. The petitioners argue that the Amendment to the law discriminates in issue granting full payment of child allowances between those who vaccinate their children and those who do not vaccinate their children. Is this really the case?

48. My colleague, Justice Arbel, accepts the petitioners' argument on this matter, based on the assumption that the condition placed upon the allowance is foreign both to the structure of the allowance and to its purposes (paragraph 49 of the opinion of Justice Arbel). In my opinion, the starting point for the discussion on this issue should be different. In fact, as the discussion on the history of the child allowances makes clear, these allowances embodied several purposes throughout the years, and they are seeking, *inter alia*, to promote the welfare of children in Israel in general. Examining things from this perspective, it cannot be said that a condition that promotes the vaccination of children in Israel, and thus protects their health (according to the prevailing perceptions in the scientific community), is a condition foreign to the purpose of the allowances (as I explained above in paragraph 48).

49. Furthermore, it is also possible to observe the matter through a comparison of the children who receive vaccinations and those who are denied vaccinations by their parents. The conditioning of the child allowances expresses the State's commitment to also care for the latter.

50. On a wider perspective, an important question hovering in the background is whether whenever the law distinguishes between people or groups, it is right to deem the distinction as a violation of the right to equality, and then to examine through the limitation clause; or whether there are "relevant" distinctions that would not be considered, *a priori*, a violation of the right to equality. For example, does the payment of child allowances only to parents of children constitute justifiable "discrimination" because it is done for a proper cause and satisfies all other conditions of the limitation clause, or is it a distinction that does not amount to a violation of the right to equality from the outset?

51. Ultimately, I am of the opinion that a ruling on these issues is not necessary in the case before us because a link exists between the distinction made and the relevant individuals' autonomy of will. According to the judgments of this Court, the right of equality is constitutionally protected as part of the right to human dignity in those situations where the distinction projects on the individual's autonomy of will. (See HCJ 6427/02 The Movement for Quality Government v. The Knesset [2006] IsrSC 61(1) 619, 680-691; HCJ 7052/03 Adala Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Interior [2006] IsrSC 61(2) 202, 303-304). Since the Amendment has ramifications for decisions that express the parent's autonomy of will with regard to the upbringing of their children, even if the Amendment does not violate the autonomy of will, the fact that underlying the distinction is the autonomous

choice of the relevant individuals justifies holding that the Amendment violates equality in a manner that requires to examine whether it satisfies the limitation clause.

52. It is important to add that it cannot be said, based on the data placed before us, that the Amendment imposes a discriminating reality that wrongfully distinguishes between infants from the Jewish sector and infants from the Bedouin sector. Against this argument made by Adala Center the State presented figures (updated as of 2009) in which the rate of unvaccinated Bedouin children (nine percent) is similar to the rate of unvaccinated Jewish children (seven percent), insofar as we are referring to children between the ages of two and five (three percent in the Arab sector). In any event, the Amendment should be interpreted in a way that excludes from the condition anyone who wishes to vaccinate his children, but to whom vaccination services are not made reasonably accessible by the State. In this sense, the petitioners' path will be open to argue against the implementation of the law (as distinct from against its constitutionality) insofar as the access to the vaccination services is not adequately available.

The Amendment to the Law through the Limitation Clause

53. Based on the above, I wish to discuss the fifth and concluding question: does the Amendment include a violation of a constitutional right, and does this violation, if any, satisfy the constitutional tests of the limitation clause.

54. Like my colleague Justice Arbel, I showed that the majority of the petitioners' arguments regarding the violation of constitutional rights are unconvincing. In the absence of a violation of a constitutional right, the discussion ends before it begins, and all that remains is criticism (right or wrong) of a public policy that was embodied in an act of legislation and whose place is in the public sphere. The eligibility for child allowances is part of a welfare policy currently serving the best interests of many children across the country in the immediate future, as well as the best interests of the public as a whole in the long term. However, there is no constitutional right to receive it in one specific form. The State can also care for the welfare of people in general and people living in poverty by paying other allowances and introducing changes to the current allowance policy, which is not "sacred" or "set in stone." No factual foundation has been laid out before us for the argument that child allowances are essential for the dignified human existence of their recipients, and even more so, no factual foundation has been laid out before us to establish that those who avoid vaccinating their children are people who particularly need these allowances. It should be further noted that in most cases (except when the unvaccinated child is an only child), even parents who refrain from vaccinating their children, whatever their motivations might be, are left with the eligibility for the basic child allowance. They are not denied the latter, but only the increase provided by the Amendment. The strongest argument for a violation of a constitutional right in this case was the argument on the alleged violation of the right to equality. Even if a violation of the right of equality was found, it would satisfy the tests of the limitation clause (pursuant to Section 8 of the Basic Law: Human Dignity and Liberty), as I will demonstrate briefly.

55. Under the circumstances of this case, it can easily be seen that the first three conditions of the limitation clause are satisfied almost *prima facie*. The classification of the eligibility for child allowances was set in an explicit amendment to the law. The

purpose of the law is proper, both in the with respect to the right to health of each one of the children to be vaccinated and with respect to the sense of the national interest of public health. In any case, legislation that promotes such important purposes befits the values of the State of Israel as a state that wishes to promote the welfare of its citizens. Thus, it remains to discuss the question of proportionality, which focuses on the means chosen to achieve the purpose. A proper purpose is not enough; the means chosen to achieve the purpose must also be appropriate, suitable and proportionate.

56. The first sub-test of proportionality is the rational means test that asks, whether the means chosen are indeed expected to achieve the purpose of the legislation. The answer to this question is positive, as we stated earlier, at least for the time being. A legislative practice of granting monetary incentives (positive and negative) to promote various behaviors, by conditioning various eligibilities (in the areas of taxes and welfare) is a common matter. Underlying each and every one of these acts of legislation is the assumption that incentives direct behavior. There is no reason to believe that things will be different in our case. If different information accumulates later on, the legislature will be required to assess it.

57. At most, it may be said that the application of the first sub-test of proportionality in the case before us presents the following paradox: the means used (conditioning the eligibility on an act of vaccination) is expected to achieve the purpose, but may achieve it less effectively than harsher means (such as prohibiting acceptance of unvaccinated students to educational institutions). This is why the petitioners characterize the means used as some kind of a "sanction" and not as means of enforcement: because it cannot be guaranteed in advance that the parents will respond to the incentive the conditioning seeks to create. Using a harsher means could have guaranteed the achievement of the purpose with more certainty, but it would have come at the price of a more severe violation of rights, and in this sense would have created more difficulty within the framework of the second sub-test and the third sub-test of proportionality, discussed below.

58. The second sub-test of proportionality examines whether the chosen means are the less harmful means. It seems to me that the case before us is a clear instance where the act of legislation is based on a careful and meticulous thinking process with regard to the means chosen as compared with other possible alternatives. In the course of deliberation, arguments pointed out alternative methods that were used elsewhere or that might have been used, such as preventing unvaccinated children from studying in educational institutions (as in France and the United States) and imposing punitive sanctions, .It can easily be seen that the majority of these means are actually harsher and more harmful than the route chosen by the Israeli legislature. Preventing unvaccinated children from studying in educational institutions is a very harsh step with regards to the scope of the damage to the children. It also comes at a relatively late point in time considering the optimal age for vaccination according to the policy of the Ministry of Health. Imposing a punitive sanction on people who choose not to vaccinate their children is certainly an offensive step, which does not respect those who are deeply convinced that the vaccination will harm their children. Thus, only the tool of advocacy remains, whose value cannot be exaggerated in this sensitive context in which the parents' level of conviction is essential to obtaining the goal of wide-scope vaccination. (Compare Michal Alberstein and Nadav Davidowitz "Doctrine of Therapeutic Law and Public Health: An Israeli Study" *Mehkarei Mishpat* (26) 549,

571-578 (2010)). However, the Amendment to the law was enacted after the advocacy approach failed to produce sufficiently effective results according to the Ministry of Health. It may be added that having said that refraining from vaccinating is a seemingly rational act for the promotion of self-benefit in an environment in which most people are vaccinated, the creation of a monetary incentive (if only limited) to be vaccinated is thinking in the right direction because it creates a counterbalance to the benefit entailed in the decision not to vaccinate. (Compare to the discussion in Parkins' paper above). Perhaps an incentive that is not directly related to child allowances could have been used, and perhaps this type of an incentive should have been preferred. A "vaccination bonus" or a similar benefit could have been established for parents who vaccinate their children. Practically speaking, there is no significant difference between these two methods because in both cases the result is the denial of a benefit from a family because the parents choose not to vaccinate their children. In conclusion, the petitioners failed to indicate a measure of lesser harm that would have achieved the legislative purpose to a similar extent. (See in this context: Aharon Barak, Proportionality in the Law 399 (2010)).

59. Another consideration in assessing the existence of alternative means pertains to the fact that the basic Vaccination Program to which the Amendment applies includes vaccinations for diseases whose consequences are very severe on one hand, and the contraction of which cannot usually be prevented through other means on the other hand. This consideration is important seeing as part of the vaccination plans enforced in other countries are aimed at diseases, contracted through sexual relations or blood donations that can also be prevented in other ways. (See Note, Toward a Twenty-First Century Jacobson v. Massachusetts, 121 Harv. L. Rev. 1820 (2008); Marry Holland, Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children, 12 Yale J. Health Pol'y L. & Ethics 39 (2012)).

60. The third sub-test of proportionality, the narrow proportionality test, examines the appropriate relationship between the means chosen and the purpose, as "the end does not justify all means." I believe that the Amendment to the law before us also passes this final sub-test relatively easily. The purpose which the Amendment to the law seeks to promote is highly important—promoting the health of young children in Israel, as well as promoting the public's health in the face of serious diseases that break out during times when vaccination enforcement is lax. The means chosen to promote this purpose—a partial reduction of child allowances for a limited period as a means to encourage parents to vaccinate their children—is relatively mild. In addition, it should be kept in mind that currently the Vaccination Program is limited to only four vaccines (given in one concentrated shot), such that the condition to receiving the allowances is essentially limited. It was further determined that the process is reversible in the sense that once the child is vaccinated or the maximum age for vaccination passes the reduction will be cancelled and the allowance recalculated. Furthermore, the reduction of the allowance was capped and proceedings to contest and appeal the institution's decision to limit the allowances have also been established. The importance of the purpose alongside the relatively minor harm caused by the sanction, speaks for itself. The relatively minor violation of rights in this case constitutes a counterbalance to the recognition that employing a harsher means could have created a tighter link between the means and the purpose within the first sub-test of proportionality as specified above.

Conclusion: About Rights and the State's Responsibility

61. An overview of the petition reveals a fundamental tension between the expectations the various individuals have of the State. On the one hand, there is an expectation that the State minimize its intervention in decisions of its citizens. On the other hand, there is an expectation that the State operate in an active manner to promote the citizens' welfare. (On the discrepancies between the various expectations from the State, compare Barak Erez, Administrative Law, on p. 54-55; Barak Erez, Citizen-Subject-Consumer, on p. 34-35). The tension that exists between these expectations might lead to a conflict, like in the case before us. When the State takes an active stance with respect to child vaccination, it is intervening in personal decisions. Thus, it is ostensibly intervening in the private sphere. However, the means used by the State in this case pertain to the granting of child allowances, the mere granting of which expresses the State's involvement in the family sphere. Moreover, intervention in the private sphere is not necessarily bad, particularly when it is done to promote the rights of the weak individuals in the family unit, those whose voice is not always heard—in this case the children whose parents did not act to vaccinate them.

62. There may be a dispute on the scope of the requirement to vaccinate children and perhaps, over the years, changes will even occur in the perceptions that direct the policy in this area. However, on principal, the starting point with regard to the State's intervention in promoting children's welfare does not always have to be suspicious. Essentially, taking an active stance on the issue of child vaccination is not the State riding roughshod over rights, but rather evidence of the State's commitment to the welfare of the children in Israel, a commitment whose importance cannot be exaggerated.

Judge

Justice E. Hayut:

1. I agree with the result reached by my colleagues, Justice E. Arbel and Justice D. Barak Erez, that the three petitions should be denied. Like them, I too believe that the petitioners in each of the petitions did not show a violation of the constitutional right to property or to a dignified human existence, and in this context I saw no need to add to the explanations in my colleagues' opinions. As for the constitutional right to equality, Justices Arbel and Barak Erez determined that Amendment No. 113 to the National Insurance Law ([Consolidated Version], 5755-1995 (hereinafter, the "Amendment to the Law") violates the right of equality, but further held that despite this violation, the petitions should be denied because the violation satisfies the conditions of the limitation clause. My route to the same result is different. For the reasons I will specify below, I believe that the petitioners in the three petitions failed to show a violation of the right to equality. However, before we examine the question whether the right to equality has been violated, we should inquire what is the group of equals that should be referred to in this context.

2. One of the arguments raised by the petitioners in HCJ 7245/10 is the argument that the right to child allowances a right conferred upon the child and not his parents. (compare CA 281/78 Sin v. The Competent Authority under Nazi Persecution Disabled Persons Law, 5717-1957 [1978] IsrSC 32(3) 408) and thus the relevant group of equals is the group of children who were given the right to the allowances

specified in the National Insurance Law when they came into the world. According to this approach, the essence of the violation of the constitutional right to equality is that, with regard to the child allowances, it is improper to distinguish between children who were vaccinated and those who were not vaccinated. On the contrary, this type of distinction, it is argued, constitutes a double harm to the children: not only did their parents fail to vaccinate them, but the allowance for which they are eligible is reduced because of it. This argument is captivating but it appears to have no real basis in the provisions of the law. Section 66 of the National Insurance Law states that "an insured parent is eligible for a monthly child allowance under this chapter for each child." This indicates that the right set forth in the law is the parent's right, provided that the child for whom the allowance is paid is in the custody of that parent. (See Section 69 of the National Insurance Law). Another provision that supports this conclusion that the right to the allowance set in the National Insurance Law is the right of the parent and not the child, is Section 68(b) of the National Insurance Law, which determines a differential payment of the allowance for each of the children in the family according to the birth order. It is obvious that such differential payment is improper if the right to the allowance is the child's right, since there is no justification to discriminate between the children with regard to the extent of social support they will receive from the State, based only upon the time they were born relative to the other children in the family. In contrast, if the allowance is the parent's right, it makes sense and is justified to consider, with regard to the social support the cumulative amount available to the family, and therefore setting different allowance amounts for children, based on their birth order does not constitute discrimination. It should further be mentioned that in the past, a tax, in various amounts and under various conditions, was imposed on the child allowances, treating them as parents' income. (See for example: Taxation of Allowance Points Law (Temporary Provision), 5744-1984; for support of the continuation of child allowances taxation policy see Yoram Margaliot "Child Allowances" Berenson Book Second Volume – Beni Sabra 733 (Editors, Aharon Barak and Haim Berenson, 2000); and for a historical review of child allowance taxation see paragraphs 8-15 of the opinion of Justice D. Barak Erez). The National Labor Court has also adopted the opinion that the person eligible for the child allowance is the parent and not the child. (See NIA 1117/04 Azulai v. The National Insurance Institute (November 2, 2006)). The starting point in examining the question of discrimination raised in the petitions before us is that the right to child allowance is the parents' right, and that the parents therefore constitute the relevant group of equals.

3. Does the Amendment to the law, which is the subject matter of the petition, discriminate between the different groups of parents?

"The obligation to act with equality means giving equal treatment to equals and different treatment to those who are different." (See, for example, HCJ 4124/00 Yekutieli v. The Minister of Religious Affairs, paragraph 35 (June 14, 2010) (hereinafter, "Yekutieli Case")). Since the enactment of the Basic Law: Human Dignity and Liberty, the right to equality has been recognized as part of the person's right to dignity in the sense that discrimination, even if it is unaccompanied by humiliation, will be deemed as a violation of the constitutional right to equality which enjoys the constitutional protection conferred under the Basic Law. (HCJ 6427/02 The Movement for Quality Government v. The Knesset [2006] IsrSC 61(1) 619, paragraphs 40-43 of the opinion of President Barak (hereinafter, "re: MQG Case")).

The obligation not to discriminate, which is imposed first and foremost on government authorities, is nothing but a mirror image of the person's right to equality; therefore, a law that discriminates between equals in the aforementioned aspects may be invalidated as unconstitutional, unless the violation of equality can be justified as a violation that satisfies the conditions of the limitation clause in Section 8 of the Basic Law: Human Dignity and Liberty.

The uniqueness of the petitions before us is in that the petitioners are not arguing that it is unjustified to prefer the group of vaccinating parents over the group of non-vaccinating parents; they focus their arguments instead solely on the manner in which the legislature has chosen to express this preference. For example, the arguments of two out of the three groups of petitioners (in HCJ 7245/10 and HCJ 8357/10) make clear that they consider it very important that the population of children will indeed receive the MMRV vaccine according to the Ministry of Health's vaccination program (hereinafter, the "Vaccination Program"), and they also deem it justified to set a policy that incentivizes parents to give their children this vaccine, in order to protect the general population from spreading of dangerous epidemics. The petitioners in HCJ 908/11 argue that the effectiveness of the vaccines is uncertain, but they do not argue that simply creating an incentive to vaccinate the children creates an irrelevant and unequal distinction, and focus their arguments on the discrepancy they believe exists between this distinction and the objective of the child allowance. It appears that there is no dispute that the State is entitled, and perhaps even obligated, to use the means available to it to maintain public health, and that according to the medical data in the State's possession (the accuracy of which the petitioners in HCJ 908/11 dispute), the Vaccination Program is effective and essential in the prevention of dangerous diseases. From this derives the conclusion that the legislature is allowed to treat the group of parents who vaccinate their children differently than the group of parents who do not vaccinate their children, and from the arguments in all three petitions it is clear that had the legislature chosen, for example, to give a monetary bonus to the parents who vaccinate their children rather than reduce the allowance for those who do not vaccinate their children, the petitioners would have had no argument regarding a constitutional violation of the right to equality. In other words, the petitioners do not dispute the fact that the legislator may give different treatment to each of the aforesaid groups, and that it is permitted to do so, *inter alia,* through an economic incentive.

4. Does the fact that the economic incentive enacted by the Knesset was incorporated into the child allowance mechanism by way of reducing the allowance (a negative incentive) cause, in itself, a violation of the constitutional right to equality?

Justice Arbel believes that the purpose of the child allowances is to help fund the families' expenses in raising children, and thus the denial of a part of the allowance for reasons unrelated to the number of children in the family "would be foreign to the allowance, and therefore violate the right to equality." (Paragraph 49 of her opinion). Justice Barak Erez believes that the "strongest argument, relatively, of a violation of a constitutional right in this case was the argument on the alleged violation of the right to equality," and although she doesn't explicitly determine that such a violation indeed exists and or indicate what makes it strong, she holds that "in any event, even if a violation of the right to equality was found, it would satisfy the tests of the

limitation clause." (Paragraph 61 of her opinion, and see also paragraphs 57-58 of her opinion).

I disagree.

The fact that the legislature amends an existing law, and at the same time creates a new distinction between the groups of those entitled to receive all rights pursuant to the amended law, does not, in itself, constitute a violation to equality, unless we believe that the groups designated as entitled persons in the original law must never be changed. It appears to me that such a rigid approach is uncalled for, and it seems that the question that ought to be examined in this context, like in other cases in which we try to identify wrongful discrimination, is whether the new distinction between the groups of entitled persons created by the law in its amended form treats equals differently. The common method in case law to identify the "group of equals" whose members are entitled to equal treatment is to examine the "objective of the law and essence of the matter, the fundamental values of the legal system, and the special circumstances of the case." (See for example HCJ 6051/95 Rekant v. The National Labor Court [1997] IsrLC 51(3) 289, 346; HCJ 3792/95 National Youth Theater v. The Minister of Science and Arts [1997] IsrSC 51(4) 259, 281; AA 343/09 Jerusalem Open House for Pride and Tolerance v. The City of Jerusalem, paragraph 41 of the opinion of Justice Amit (September 14, 2010)). In other cases it was stated that the question of whether this is a prohibited discrimination or a permitted distinction will be examined according to the "accepted social perceptions," (HCJ 721/94 El Al Israel Airlines Ltd. V. Danilowitz [1994] IsrSC 48(5) 749, 779; HCJ 200/83 Watad v. The Minister of Finance [1984] IsrSC 38(3), 113, 118-119; MQG Case, in paragraph 27 of President Barak's judgment). The fundamental values of our legal system recognize legislative models in which the legislator incorporates into a law intended for a specific main objective, secondary objectives intended to promote important social purposes, even if there is not necessarily a tight link between them and the main objective of the law. For example, the main purpose of the Income Tax Ordinance is "[to] ensur[e] income for the public authority's treasury," but the legislature has also used the ordinance and taxation provisions to promote additional social purposes through which "[S]ociety fights phenomena that are perceived as negative. It encourages acts that it wants to encourage and deters acts it wants to prevent." (Aharon Barak "Interpretation of Tax Law" *Mishpatim* 28, 425, 434 (1997); For example, see HCJ 2651/09 The Association for Civil Rights in Israel v. The Minister of Interior, paragraph 31 of Justice Danziger's opinion (June 15, 2011)). The above also applies to customs laws intended mainly, to increase the State's income, but at the same time serving additional purposes including the "regulation of the demand and the protection of local production and products." (CA 2102/93 The State of Israel v. Miron Galilee Industrial Plants (MMT) Ltd. [1997] IsrSC 51(5) 160, 167). The objective of the National Insurance Law is to "guarantee proper means of existence for the insured, their dependents and survivors, whenever their income is reduced or disappears for one of the reasons set by the law." (CA 255/74 The National Insurance Institute v. Almohar [1974] IsrSC 29(1), 11, 14). However, this law, like the other acts of legislation mentioned, promotes additional social purposes as well, such as incentivizing the social and public interest of delivering children in hospitals rather than at home (Section 42 of the National Insurance Law), performing amniocentesis for pregnant women aged thirty-five to thirty-seven (Section 63 of the National Insurance Law), and encouraging the integration of disabled persons into the

workforce. (Section 222C of the National Insurance Law; and see in general, Abraham Doron "The Erosion of the Insurance Principle in the Israeli National Insurance: The Effect on the Functioning of the Israeli Social Security Scheme" Social Security 71, 31 (2006)).

5. Does each additional social purpose promoted by a law necessarily violate the constitutional right to equality by discriminating with respect to its general purpose? Of course not. The main question that ought to be examined in this context is not what is the relationship between the general purpose of the existing law and the additional purpose the legislator is seeking to promote, but whether, according to the general tests set in the Rekant Case and other cases which we mentioned above, the legislator has wrongfully discriminated between equals for the promotion of such purpose. For example, it was held in the past that granting tax benefits that are not based on pertinent distinctions or criteria is constitutionally discriminatory and wrongful. (Former) President Beinisch articulated this as follows:

> Granting of tax benefits is tantamount, in economic terms, to granting public funds to selected individuals. Although it is true that the State does not directly transfer funds to taxpayers (and therefore it is commonly deemed as indirect support), essentially, the indirect support is tantamount to charging all taxpayers with tax payment, and in the second stage repaying it to selected individuals only. Such a distribution of public resources, without criteria, constructs a reality in which selected individuals are preferred over others, despite the fact that there is no relevant difference between them. This amounts to a blunt disrespect for a person's equal status before the law.

(HCJ 8300/02 Nassar v. The Government of Israel, paragraph 46 (May 22, 2012) (hereinafter, "Nassar Case") From the positive one can deduce the negative: the tax benefits intended to direct social behavior, although they do not directly derive from the objective of income tax, are not wrongful in themselves, unless they give preference to a group which is not relevantly different from another group.

6. The petitioners focused on the main purpose of the child allowances, i.e. the provision of social-financial support to those who are parents of children (this purpose also underwent many changes over the years, as arises from the comprehensive review of the legislative history in this regard, specified in the opinion of Justice Barak Erez). Based on this purpose, the petitioners argued that the relevant group of equals is all of the insured, as defined in Section 65(a) of the National Insurance Law, who are parents of children.

Indeed, this probably was the purpose of the child allowances on the eve of the Amendment to the law. However, the legislature has now revealed its view that it wishes to add a secondary purpose, which will affect a certain derivative of the increased allowance set in the Amendment (up to NIS 300 per family)—increasing the rate of vaccinated children in the population in order to promote the health of children and the public. As far as the normative ranking, this additional purpose does not differ from the objective of the child allowances before the Amendment, and in this sense the former purpose has neither priority nor exclusivity for the purpose of defining the relevant groups of equals. Because the normative ranking is identical, the examination of the argument of discrimination with regard to the Amendment to the

law is different from an argument of discrimination in regulations or procedures of the executive authority, in that we are often required to examine the latter in reference to the purpose of laws ranking higher on the normative ladder. (See for example HCJ 9863/06 Organization of Fighter Leg Amputees v. The State of Israel – The Minister of Health, paragraphs 11-14 (July 28, 2008); HCJ 153/87 Shakdiel v. The Minister of Religious Affairs [1988] IsrSC 42(2) 221, 240-242; HCJ 4541/94 Miller v. The Minister of Defense [1995] IsrSC 49(4) 94, 108-110). On the constitutional level, it has been held in the past that legal provisions are discriminatory with respect to the purpose of the same law when a distinction irrelevant to the purpose for which the law was intended was made. (Nassar Case, paragraphs 39-42, 50-52 of the opinion of (former) President Beinisch; Yekutieli Case, paragraph 39 of President Beinisch's opinion. In these cases, it was a law whose clear purpose pertains to a wide group, but whose clauses were "hiding" conditions that reduce its applicability to a specific group. (On hidden discrimination, see for example HCJ 1113/99 Adala Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Religious Affairs [2000] IsrSC 54(2) 164, 175; HCJ 1/98 Cabel v. The Prime Minister of Israel [1999] IsrSC 53(2) 241, 259-262). This is not the case here. The Amendment to the law which is the subject matter of this petition has altered the purpose of the child allowance in the sense that, similar to the tax legislation which promotes various public purposes, it includes the purpose of incentivizing child vaccination, incidental to promoting its general purpose as articulated above.

7. This does not complete the examination of the violation of the constitutional right of equality. As aforesaid, the group of equals is defined not only with respect to the purpose of the law, but also with respect to the essence of the issue, the fundamental values of the legal system, the special circumstances of the case and the prevailing social perceptions. Had the legislature sought to add to the child allowance scheme another purpose that created a distinction between groups that are not relevantly different from one another pursuant to these tests, such an addition would have violated the constitutional right to equality. For example, had the distinction been between groups, the belonging to which does not depend on choice but rather derives from various characteristics of the parents, it would have been justified to wonder whether these characteristics are relevant, according to the fundamental values of the legal system and the prevailing social perceptions. In such a theoretical case, it could not have been argued that the purpose of the Amendment to the law is to promote proper behavior of the parents, and it would have therefore been necessary to deeply examine whether there is indeed a relevant distinction that would justify preferring one group over the other. In addition, regarding the aspect of providing an incentive—positive or negative—for certain behaviors, it should be examined whether the distinction between the various behaviors justifies a distinction between the legal consequences that accompany them in accordance with the tests established in case law. However, in the case before us, not only did the petitioners not support the argument that these are equal groups according to the acceptable tests accepted in case law in this context, but, *de facto,* they agreed that this is a distinction between groups that may justifiably be treated differently because it is necessary to protect public health, at least according to the studies held by the Ministry of Health. Hence my conclusion that in this case, the distinction set forth by the Amendment to the National Insurance Law between parents who vaccinated their children and parents who refrained from doing so, with regard to the reduction of a set amount of child

allowance, does not constitute a violation of the constitutional right of equality of the parents who chose not to vaccinate their children.

8. In HCJ 7245/10, an argument was raised on the discrimination of the Bedouins in the Negev based on the fact that this sector's access to Family Health Center services is very limited and this sector consequently finds itself in an impossible situation where it has no access to vaccines and yet is being told to vaccinate. In my opinion, this argument does not establish constitutional grounds for a violation of equality; and insofar as it indeed transpires that pursuant to the Amendment any child allowance belonging to a parent who wished to vaccinate his child but was unable to do so due to lack of suitable access to a Family Health Center was reduced, this would, in my opinion, be a good argument to raise in the contestation and appeal proceedings set forth in Sections 68(i) and 68(j) of the National Insurance Law. Without addressing the argument on the merits, it should be noted that while these petitions were being deliberated, the respondents acted to increase access to Family Health Centers in the Bedouin sector in the Southern District (see details in paragraph 62 of the opinion of Justice Arbel), and the respondents have also presented figures that show that the vaccination rates in this sector are similar to the rates in the other sectors. Therefore, the discrimination argument insofar as it was raised with regard to the Bedouin sector should be rejected in this case.

9. Before concluding and, I would like to make two notes. One pertains to the nature of the reduction contemplated in the petition. Unlike my colleague, Justice Barak Erez (paragraphs 37-53 of her opinion), I believe that a reduction of child allowances by a set amount as a result of failing to vaccinate according to the Vaccination Program is a sanction and not conditioning. As I understand it, there is an obvious difference between the reduction set by the Amendment to the law and the conditions set forth with regard to eligibility for child allowances, including: the child's presence in the State of Israel, the child's age is below eighteen (Section 65(a) of the National Insurance Law [Consolidated Version], 5755-1995), the child is, generally, in the custody of an eligible parent (Section 69 of the National Insurance Law), and the parent is an "Insured" within the definition of Section 65(a) of the National Insurance Law. These and others are conditions to the receipt of child allowances, which guarantee that the allowance will be given to families whose characteristics fulfill the purpose of the child allowance. However, the nature of the reduction set by the Amendment to the law is different from these conditions in several respects. First, the amended law grants an increment to the allowance and alongside such increment also determines that certain amounts of this increment will be deducted from the allowance paid to the parent if the required vaccine is not given by the date set forth in the Vaccination Program. In the words of the provision, if the child is not vaccinated "the monthly child allowance paid for him will be reduced by the sum of NIS 100." (Section 68(d)(1) of the National Insurance Law; the emphasis has been added). A "reduction" is, as its name suggests, the denial of a right that has been granted, and therefore, it seems that the words of the law and the mechanism chosen support the viewpoint that this is a sanction. Second, this is a reduction that is intended to motivate parents to vaccinate their children using a negative economic incentive that denies part of the allowance amount due to conduct that is inconsistent with the goal the legislature seeks to promote. Such a negative economic incentive bears, by its essence and purpose, the characteristic of a sanction and has a punitive hue that is directed against someone who chooses to jeopardize the health of his children and the

health of the general public. In view of my position that we are faced with a sanction and not conditioning, I did not deem it necessary to address the doctrine and the auxiliary tests, which my colleague chose to develop at length in her opinion, with respect to the issue of conditioning. I will further note in this context that the position that we are faced with conditioning was not raised by any of the litigants, and in any event was not discussed and deliberated in the petitions at bar. For these two reasons, I believe this issue may be left for the opportune moment.

1. Another remark I would like to make as a side note follows. In my opinion, while the reduction at the center of the petitions neither violates the constitutional right to equality nor other constitutional rights and, thus there is no need to grant the remedy sought in the petitions—invalidating the Amendment to the law which sets the reduction—it is difficult to avoid the impression that in the case at bar, the legislature chose a "shortcut" in order to promote the Vaccination Program of the Ministry of Health. The fact that the legislator chose to enforce an administrative Vaccination Program, set by the Director General of the Ministry of Health (Section 68(d)(3) of the National Insurance Law) through a reduction in child allowances derives mainly, it seems, from considerations of efficiency. These considerations were expressed in the Statements of Raviv Sobel, (Former) Deputy Director of Budgets at the Ministry of Finance, in a deliberation held before the Finance Committee of the Knesset:

> The data presented by Dr. Kedman regarding the ineffectiveness of the criminal supervision . . . PM Oron says that we will send an army of policemen, an army of controllers, and they will get the job done, but we see that this is not working . . . there are worse things for which the State of Israel does not indict people; and if someone thinks that the criminal tools are those through which all problems can be solved, just like they discovered around the world that this is not the way, it also became clear in Israel that this is not the way. Criminal tools are not enough. Therefore, certainly, financial incentives are also a tool.

(Minutes of the Finance Committee's meeting of June 24, 209, on p. 44; Annex 2 to the preliminary response to the petitions on behalf of the Knesset).

Indeed, it is difficult to dispute the assumption that the imposition of a sanction based on the data relied upon by the authority, without having to confront the difficulties of its execution, makes the sanction highly efficient. However, without derogating from the importance of considerations of efficiency, it may have been proper to also take additional considerations into account. Perhaps, based on such considerations, it would have been appropriate to first enact a law that creates a vaccination requirement before imposing a sanction on its breach, which would also be set out in the same law. In other words, perhaps it would have been appropriate to take the statutory "highroad" and to regulate the entire issue of vaccination in a single act of legislation. In this context, it is noteworthy that if, for example, a criminal prohibition had been imposed on refraining from vaccinating children it would not have been possible to collect fines imposed on child allowances since national insurance allowances are non-attachable. (Section 303(a) of the National Insurance Law; Section 11 of the Tax Ordinance (Collection); and see also, Pablo Lerner "On the Attachment of Salaries in the Israeli Law", Hapraklit [48] 30, 46 2005); David Bar Ophir, The Procedure and Case Law of Execution 893-894 (Seventh Edition, 2012)).

Furthermore, the right to child allowances is a central and basic social right. This was expressed in both the petitioners' arguments and in deliberations of the Knesset's Finance Committee. For these reasons, and for other reasons that can be raised in this context, I believe that it would be appropriate to consider the use of other means to promote the proper purpose of encouraging child vaccination, such as through granting a positive economic incentive to those who vaccinate, or alternatively, through the use of different sanctions. In any event, because I have not found that the manner in which the legislature has acted violates a constitutional right, I concur with the result reached by my colleagues, Justices Arbel and Barak Erez, that the three petitions should be denied.

Judge

The conclusion of the judgment as per the opinion of Justice E. Arbel.

Issued on this date, 26 Sivan 5773 (June 4, 2013).

Judge Judge Judge