HCJ 9134/12

Petitioners: 1. Prof. Moshe Gavish
2. Prof. Mordechai Segev
3. Prof. Asa Kasher

v.

Respondents: 1. The Knesset
2. Minister of Finance
3. Attorney General
4. Technion – Israel Institute of Technology

Applicant to Join as Additional Petitioner or Amicus Curiae: Prof. Ruth Ben-Israel

Applicant to Join as Amicus Curiae: Association of Law in the Service of the Elderly

Attorneys for the Petitionrs and the Applicant to join as Additional Petitioner or Amicus Curiae: Shoshana Gavish, Adv.
Attorney for Respondent 1: Gur Bligh, Adv.
Attorney for Respondent 2-3: Hani Ofek, Adv.
Attorney for Respondent 4: Gilat Vizel-Saban, Adv; Yael Hadani, Adv; Adam Fish, Adv.
Attorney for the Applicant to join as Amicus Curiae: Carmit Shai, Adv.

The Supreme Court sitting as High Court of Justice

Opposition to order nisi.
Position of the Attorney General of February 9, 2105
Response of the Petitioners of March 22, 1025

25 Heshvan 5775 (November 18, 2014)

Before: President M. Naor, Deputy President E. Rubinstein, Justice E. Hayut, Justice Y. Danziger, Justice N. Hendel, Justice U. Vogelman, Justice D. Barak-Erez

President M. Naor:

Section 4 of the Retirement Age Law, 5764-2004 (hereinafter: the Retirement Age Law or the Law), provides that "the age at which an employee can be required to retire because of age is 67 for a man and for a woman". The issue before the Court in this petition is whether that statutory provision is constitutional.

Background

The Normative Stuation prior to enactment of the Retirement Age Law

1. The accepted view in Israel, as in many other countries, is that a person should be permitted to retire from work and rest from daily toil in old age. That approach is expressed in the creation of retirement arrangements (HCJ 104/87 *Nevo v. National Labour Court*, IsrSC 44 (4) 749, 754 (1990) [English: http://versa.cardozo.yu.edu/opinions/nevo-v-national-labour-court] (hereinafter: the *Nevo* case)). "Retirement age" is generally defined in the framework of those arrangements. The term "retirement age" can have several possible meanings. One meaning is pension-qualifying age, namely the age at which a person is entitled to retire voluntarily and receive the full pension that he has accumulated during his life (hereinafter: qualifying age). Another meaning is a mandatory retirement age. That is, the age at which an employee can be required to retire because of his age (hereinafter: mandatory retirement age), which is the focus of this petition.

2. The Retirement Age Law was enacted in 2004. Before its enactment, there was no statute in Israeli law that regulated the issue of retirement generally, or that of mandatory retirement age or qualifying age. At that time, mandatory retirement age was gounded in collective agreements, the by-laws of pension funds, or in the statutory provisions that governed certain groups of workers in the economy, like state employees, judges and career soldiers (sec. 18 of the Civil Service (Retirement) Law [Consolidated Version], 5730-1970 as in the version then in force (hereinafter: the Civil Service (Retirement) Law); the Civil Service (Retirement) (Continued Employment of an Employee over the Age of 65) Regulations (hereinafter: the Civil Service (Retirement) Regulations); section 13(a)(1) of the Courts Law [Consolidated Version], 5744-1984; section 13 of the Israel Defence Forces (Permanent Service) (Retiremant) Law [Consolidated Version], 5745-1985). The employment of workers not governed by a collective agreement or a specific law came to an end at the customaary retirement age, if that was expressly or impliedly agreed between them and their employer. Similarly, such workers could resign upon reaching the customary

retirement age and receive severance pay (sec. 11(e) of the Severance Pay Law, 5723-1963.(For details of the arrangements prevailing prior to the enactment of the Retirement Age Law, see: Dan Shnit, "Mandatory Retirement – A Reassessment," 32 *HaPraklit* 507, 514-518 (1980) (hereinafter: Shnit*).*

3. In order to complete the picture, it should be noted that the majority of collective agreements and legal provisions at that time prescribed that the retirement age was 65 for a man and 60 for a woman. Nevertheless, over the years itcame to be understood that requiring women to retire at an earlier age than men was discriminatory (see: *Nevo*, p. 770; HCJ 6845/00 *Niv v. National Labour Court*, IsrSC 56 (6) 663 (2002) (hereinafter: the *Niv* case)). That led to the enactment of the Male and Female Workers (Equal Retirement Age) Law, 5747-1987 [English: http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/6028/97936/F2079498565/ISR6028.pdf] which provided that if a collective agreement prescribed a retirement age that was lower for a woman than for a man, the woman would be entitled to retire at any age between her retirement age and that prescribed for a man (sec. 2 of the statute, later repealed by the Retirement Age Law). Since then, 65 became the normal retirement age for both men and women. (See: HCJ 6051/95 *Recant v. National Labour Court*, IsrSC 51 (3) 289 (1997) (hereinafter: the *Recant* case).

Recommendations of the Netanyahu Commission

4. In 1997, the Minister of Labour & Welfare and the Minister of Finance appointed a public commission headed by Justice (Emeritus) Shoshana Netanyahu to examine the issue of retirement age (hereinafter: the Netanyahu Commission). The Commission was tasked with examining the issue of retirement age, including its social and economic aspects, as well aso the question of standardizing the retirement age for men and women. The Commission availed itself of the services of an external consultancy firm, as well as information from western countries, comprising statistical data, professional articles, judgments and opinions. Representatives of various professional groups in Israel and a variety of experts appeared before the Commission. The Commission also used demographic forecasts and simulations that were prepared by experts in regard to the implications of a change in the retirement age for the social security system. In addition, the public at large was invited to express its opinions on the issues on the agenda.

5. The Commission submitted its recommendations in July 2000 (Report of the Public Commission for the Examination of the Retirement Age) (hereinafter: the Netanyahu Commission Report). The Commission's recommendations related to various aspects of the retirement age issue. We shall focus on the Netanyahu

Commission's opinion on the matter of *mandatory retirement age* -- the age at which it is possible, as stated, to require an employee to retire because of age. The Commission studied the possibilities of changing the mandatory retirement age, including the possibility of abolishing it altogether. Due to various factors, including the opposition of certain organizations, the Commission decided not to go so far as other countries had in completely abolishing a mandatory retirement age, and instead, adopted a course of "gradual progression, while studying the implications of the proposed change to retirement age" (*ibid*., p. 6). Consequently, having regard to the data on the ageing of the population and the need to increase the participation of older people in the workforce, the Commission recommended a *gradual increase* in the customary retirement age (from 65 to 67). In addition, the Commission believed that the mandatory retirement age should be grounded in primary legislation and should apply to all workers. Commission member Prof. Frances Raday took the minority view that a more significant increase in the mandatory retirement age would be appropriate. However, she was also of the opinion that it should not be abolished altogether. This, because such a step might lead to personal competence criteria for persons wishing to continue working after the normal retirement age, and such criteria might demean and infringe the dignity of those workers. In addition, Prof. Raday believed that abolishing the mandatory retirement age would make it difficult to plan manpower in the workplace.

6. In March 2003, the Government adopted the recommendations of the Netanyahu Commission, making the necessary adjustments to accomodate the passage of time and the changes in the economy since the recommendations were made. Pursuant to the Government's decision, the Retirement Age Bill, 5764-2003 (*S.H*. 64), was submitted, proposing a comprehensive arrangement for retirement age in Israel, and the required legislative amendments. The Explanatory Notes to the Bill explained the need for legislation in this area:

> The ongoing increase in life expectancy, together with the increase in the ratio between the number of elderly in Israeli society and the general population, are not phenomena that are unique to the State of Israel and they exist in most countries of the developed world. These phenomena have led many developed countries, like the USA, to make changes to their prevailing retirement age arrangements in order to adapt the labor market and social security systems (both state and non-state systems) to those changes.
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> … In July 2000, the Public Commission [the Netanyahu Commission – MN] submitted its recommendations on the said issues, among them te

following:… the mandatory retirement age, namely the age at which an employee may be required to retire because of age, should be raised from 65 to 67. The said rise should be implemented gradually, at the rate of one year every three years, so that it will extend over six years… The Commission believed that it would be appropriate to ground its recommendations in primary legislation, in view of the comprehensive and innovative character of recommended arrangement,and in order to ensure equality among all the residents of the State of Israel".

7. On January 7, 2004, the Bill passed on second and third readings in the Knesset, and on January 18, 2004, the Retirement Age Law, 5764-2004 was published.

The Law that is the Subject of the Petition

8. The Retirement Age Law regulates various aspects of retirement age. The stated purpose of the Law is to prescribe standard rules with regard to retirement age, including raising it gradually. Thus the purpose clause of the Law states:

> *Purpose* 1. The purpose of this Law is to establish standard rules with regard to retirement age, including raising it gradually, while applying the said rules both in regard to entitlement to the benefits granted to whomever has attained the said age, and in regard to entitlement to the benefits granted to whomever has not yet attained the said age, until he does attain that age.

9. To achieve that purpose, the Law lays down several provisions concerning the mandatory retirement age and regarding the qualifying age. Section 3 of the Retirement Age Law provides that the age at which a person is entitled to retire voluntarily (the qualifying age) is 67 for a man and, subject to certain provisions, 62 for a woman. Section 5 of the Law provides that upon certain conditions, a person can retire voluntarily at an earlier age. Section 4 of the Law, around which this petition herein revolves, embodies the mandatory retirement age. It provides:

> *Mandatory retirement age* 4. The age at which an employee can be required to retire because of age is 67 for a man and for a woman (in this Law – mandatory retirement age).

This provision of the Law does not lay down a mandatory obligation to retire from work at the age of 67, but provides that an employer can reauire that an employee retire because of age. Alongside this, section 10 of the Retirement Age Law provides that an employee and employer can agree that the retirement age will be different from the mandatory retirement age. Among other things, it can be agreed that the retirement age will be *higher* than the mandatory retirement age:

> *Priority* 10. (a) The provisions of this Law [the Retirement Age Law - MN] shall apply notwithstanding as provided in any agreement.
>
> (b) Notwithstanding the provisions of subsection (a), it may be provided by agreement –
>
> (1) *that the age at which an employee can be required to retire from work because of age shall be higher than mandatory retirement age;*
>
> (2) that the age at which an employee is entitled to receive benefits because of his retirement from work on account of his age even before he has attained retirement age shall be less than early retirement age, provided that the employer shall bear the cost deriving therefrom in full; the Minister may authorize an entity other than the employer to bear all or part of the cost provided in this paragraph instead of the employer; notice of such authority as aforesaid shall be published in the Official Gazette.
>
> (c) The provisions of this Law shall apply unless otherwise provided in another Law (emphasis added – MN).

Developments in Case Law after Enactment of the Retirement Age Law: the Weinberger Decision

10. After the Retirement Age Law was enacted, an appeal was filed in the National Labour Court that asserted that the obligation to retire at the age of 67 was unconstitutional (LabA (National) 209/10 *Weinberger - Bar Ilan University* (December 6, 2012) (hereinafter: the *Weinberger* case)). In the alternative, it argued that the Retirement Age Law, according to its interpretation, provides that if an employee asks the employer to continue working after the age of 67, the employer is obliged to give relevant consideration to that request on an individual basis. The National Labour Court (per Judge S. Davidow Motola, President N. Arad, Judge O. Verbner and Public Representatives S. Habshush and Y. Belizovsky concurring) allowed the appeal in part. The court stated that the mandatory retirement arrangement infringed constitutional rights, and such being the case, an examination should be made as to whether the infringement complies with the conditions of the Limitation Clause. The court further held that, *prima facie*, mandatory retirement is intended for a proper purpose, but there are questions as regards its compliance with the requirement of proportionality. In that context, the court addressed whether it might be proper to adopt a different retirement arrangement that would, mitigate the serious infringement of elderly workers' rights to the extent possible. Nevertheless, the court held that it did not intend to rule on the constitutional issue:

> Let us first say that although this court has recognised in its case law, and still recognises, the problems involved in fixing a uniform compulsory retirement age by virtue of a statutory provision, we have decided to leave the ruling on the constitutional issues to the Supreme Court…
>
> Without derogating from the this court's competence to try constitutional issues, including in the course of indirectly challenging a statute, regard should be had to the fact that jurisdiction to try a direct challenge to the Law – in a way that will apply to everyone, not merely to the direct parties to the dispute – is vested in the Supreme Court, and it is the appropriate and proper instance forexercising constitutional review of a law of such broad scope that has such overall social and economic importance" (paras. 43 and 63).

Prenthetically, I would remark that the court will not always deem it appropriate to award relief in the event of an indirect challenge, in circumstances where the party has refrained from presenting the alleged flaw for judicial review by a direct challenge (see and compare: CFH 1099/13 *State of Israel v. Abu Pariah*, paras. 8-12 (April 12, 2015); LAA 7363/09 *Mishan Centre Ltd v. Tel Aviv – Jaffa Municipality*, para. 8 (March 2, 2010) and the references there; on the Labour Court's competence to entertain an indirect challenge, see: section 39 of the Labour Court Law, 5729-1969, which refers,

inter alia, to section 76 of the Courts Law [Consolidated Version], 5744-1984 regarding incidental jurisdiction). The Labour Court had power not to deal with the constitutional issue. The question whether the Labour Court exercised its *discretion* properly in those proceedings is not before us, and in any case does not need to be decided.

As for the matter of the Retirement Age Law's interpretation, the Labour Court stated that section 10 of the Law makes it possible to agree to a retirement age that is higher than the mandatory retirement age. Consequently, an employee is entitled to put it to the employer that he wishes to continue working even after accepted retirement age. Alongside that, the Labour Court held that the employer, for his part, must exercise due, individual discretion in answer to the request. The Labour Court enumerated a series of factors that the employer must take into account, like the personal circumstances of the employee, his entitlement to pension and verall concerns of the workplace. The Labour Court emphasised that those factors are not a closed list, and that in any event the employer does not have to continue employing the worker after the hearing. The Labour Court stated, obiter dictum, that according to its interpretation, the mandatory retirement arrangement might permit the employer to require an employee to retire because of his age only in circumstances in which ending the employment involves "leaving on pension", namely "only in circumstances in which there is an overall pension arrangement that regulates the pension age, in the scope and by virtue, of which the employee is entitled 'to leave on pension'" (*ibid.*, para. 71). Nevertheless, it was held that in the circumstances of the case before the Labour Court, it was unnecessary to definitively decide the issue since the appellant there was in any case ending her employment in the framework of a comprehensive pension arrangement, and as part of a collective agreement that gave her tenure. As to the crux of the matter, the Labour Court found that in the case before it, the employer had not summoned the appellant to a hearing or examined the appellant's request to continue working after retirement age. The Labour Court therefore allowed the appeal in part, in the sense that the employer was ordered to pay the appellant compensation of NIS 50,000.

Further to the judgment in *Weinberger*, in which it was held as aforesaid that this Court should consider the constitutionality of the mandatory retirement arrangement, the petition before us was filed.

The Petitioners

11. The first and second Petitioners are members of the academic staff of the Technion – Israel Institute of Technology (hereinafter: the Technion). The first

Petitioner, Prof. Gavish, is a full professor in the Faculty of Medicine of the Technion. The second Petitioner, Prof. Segev, is a full professor in the Faculty of Physics of the Technion and also holds the title of Distinguished Professor. According to para. 16(b)(1) of the collective agreement between the Technion and several other employers and the employee organizations (hereinafter: the Pensions Constitution"), senior academic staff members must retire at the age of 68 (one year over the mandatory retirement age prescribed in the Law). Nevertheless, according to the procedures of the Technion, a full professor, whose academic achievements so justify will, on attaining mandatory retirement age, be appointed as an emeritus professor of the Technion. An emeritus professor may continue teaching, mentoring and research work, albeit on a limited scale in comparison with the work of a tenured professor of equivalent rank. According to the Pensions Constitution, Prof. Gavish reached retirement age in October 2014 and could be appointed an emeritus professor. Prof. Segev is expected to reach retirement age in 2027 but because of his senior title – Distinguished Professor – the procedures of the Technion will permit him to extend his service as a tenured senior staff member with an appointment, subject to the necessary approvals.

The third Petitioner, Prof. Kasher, took early retirement and is now Emeritus Professor of the Chair in Professional Ethics and Philosophy of Practice, and Emeritus Professor of philosophy at Tel Aviv University.

As will be explained below, the Petitioners assert that section 4 of the Retirement Age Law which, as aforesaid, grounds the possibility of compelling an employee to retire because of his age, is void.

Applications to Join the Petition

12. After the petition had been filed, Prof. (Emeritus) Ruth Ben-Israel filed an application to join the petition as a Petitioner or, in the alternative, as amicus curiae. Prof. Ben-Israel served for many years as a full professor at Tel Aviv University. Over the years she published extensive, important research in labour and social security law, such as on collective agreements, the right to strike and equal opportunities at work. Because of her activity in those years, Prof. Ben-Israel has achieved academic recognition, a variety of degrees, and even the Israel Prize. Prof. Ben-Israel applied to join the proceedings in order to support the petition and, according to her, to put her knowledge and expertise on the issues before the Court. Prof. Ben-Israel stated that she has been researching the phenomenon of discrimination against the elderly in the labour market for years, and she regards herself as being at the forefront of the fight against age discrimination. Prof. Ben-Israel also filed an affidavit in which she detailed

the difficult personal experience that she had undergone when she had to retire from the senior academic staff of Tel Aviv University.

13. Another application to join was filed by the Association of Law in the Service of the Elderly. The purpose of the Association is to promote the rights of the elderly in Israel, and in order to achieve that purpose, it operates at the public and legal level. The Association's main battle is against discrimination against the elderly because of their age (a phenomenon which is called ageism). The Association also applied to support the Petitioners' pleas.

The Proceedings Before Us

14. There were two oral hearings on the petition. At the end of the first hearing, an order nisi was issued, directing the Respondents to show cause why section 4 of the Retirement Age Law should not be declared void. It was further decided that opposition to the order nisi would be heard before an extended bench, and that the applications to join would be referred to it (President A. Grunis, and Justices E. Arbel and D. Barak-Erez, judgment and decision of February 12, 2014). Other relief that was sought in the petition was struck out by consent of the Petitioners, while reserving their right to raise them in regard to the stricken issues.

15. On November 18, 2014, a hearing was held before an extended bench of seven Justices. At the end of the hearing, we asked the Attorney General to submit his opinion on the rule established by the National Labour Court in the *Weinberger* case, and we ordered that the other parties could reply to his opinion. Finally, it was decided that a judgment would be handed down after the notices and replies had been received (Deputy President M. Naor and Justices E. Rubinstein, E. Hayut, Y. Danziger, N. Hendel, U. Vogelman and D. Barak-Erez, decision of November 18, 2014).

The Parties' Main Arguments

The Petitioners' Arguments

16. According to the Petitioners, work is a means for their self-fulfilment, health and longevity. Their only wish is to continue working regularly, without the Technion taking into account the retirement age fixed in the Law or in the Pensions Constitution. The Petitioners believe that an employee's age cannot serve as a criterion for his abilities or skills, and that giving weight to that datum is discriminatory and demeaning, contrary to the Employment (Equal Opportunities) Law, 5748-1988 (hereinafter: the Equal Opportunities Law), and also inconsistent with the relevant case

law of the Supreme Court. The Petitioners therefore argued that the mandatory retirement arrangement seriously infringes their constitutional right to equality and to freedom of occupation to an extent that is greatr than required. They assert that the biological retirement model can be replaced by a *functional retirement* model, based on individual competence criteria. According to them, functional retirement presents a lesse infringement of the rights of elderly employees because it is bases the end of the empoyment relationship on a relevant foundation – the worker's performance. The Petitioners emphasized that in Israel there are already individual competence tests, such as those conducted for state employees, and there is therefore no particular difficulty in making use of them in the framework of an overall retirement arrangement. The Petitioners also argued that the harm caused to them exceeds the benefit that derives from the Law. Finally, the Petitioners explained that, in their view, the interpretation of the National Labour Court in the *Weinberger* case, according to which an employer is obliged to give individual consideration to the request of an employee to continue working after the accepted retirement age, does not make the mandatory retirement arrangement constitutional.

In view of the above, the Petitioners asked that we strike down section 4 of the Retirement Age Law, and consequently order that para. 16 of the Technion's Pensions Constitution is void, and other relief. Thereafter, on the recommendation of this Court, the Petitioners focused the petition exclusively on the constitutionality of sec. 4 of the Retirement Age Law.

The Respondents' Answers

17. The first Respondent is the Israel Knesset. The second and third Respondents are the Minister of Finance and the Attorney General (hereinafter referred to together as: the State), while the fourth Respondent is the Technion.

18. According to the State, a mandatory retirement arrangement passes the constitutionality test. The State first asserted that the issue of retirement age is a multifaceted economic and social issue, and that judicial intervention in might have far-reaching implications for the Israeli economy. The State went on to argue that it is doubtful whether mandatory retirement infringes constitutional rights because in certain respects, it benefits workers. First, it helps increase job security until retirement age. Second, it permits the entry of new workers into the labor market. Finally, it saves workers having to undergo constant review of their competence in individual competence examinations. The State also asserted that in various countries, a variety of retirement arrangements, including mandatory retirement arrangements, has been introduced. The State emphasized that the various different retirement models have

advantages and disadvantages, and that in such circumstances the legislature's decision to choose the mandatory retirement model is not illegitimate. In addition, the State asserted that since the enactment of the Retirement Age Law, the participation of the elderly in the labor market has increased; that the rate of elderly workers in Israel is among the highest in the world; and that the average, actual retirement age is also higher in comparison with other countries. Consequently, the State argued that the Retirement Age Law has not proven detrimental to the situation of elderly workers.

19. As regards the interpretation of the Law laid down in the *Weinberger* case, in its reply of February 9, 2015 the State did not dispute that an employer is obliged to consider an employee's request to continue working after reaching retirement age, but emphasised that that did not mean that the employer *must* extend the employee's employment. In addition, according to the State, it is unnecessary to rule on the scope and nature of the factors that the employer must consider in that regard. In order to demonstrate this, the State noted that it doubted whether the employer should, for example, be required to consider the extent of an employee's entitlement to pension. According to the State, obliging the employer to consider that factor might deter employers from employing candidates who are not likely to accrue sufficient pension rights by the time of reaching the mandatory pension age.

20. The Knesset asked to join the State's arguments, and emphasised three matters: first, according to the Knesset, it is not at all clear that the arrangement infringes the rights of elderly persons. According to the Knesset, an arrangement of compulsory retirement because of age might be to the benefit of elderly workers and safeguard their dignity. Secondly, it argued that support for the arrangement existing in Israel can be found in comparative law, especially in Europe. Finally, the Knesset asserted that ruling on the question of retirement age is complex and has far-reaching implications for the labour market, and that being the case, the decision should be made by the legislature.

21. In its response, the Technion, adopted the position of the State as regards the constitutionality of the mandatory retirement arrangement. According to the Technion, the Retirement Age Law adopted the conclusions of the Netanyahu Commission, which had considered the matter and all the factors relevant to the issue of retirement age. Consequently, according to the Technion, there is no justification for judicial intervention in the Law. The Technion further contended that the advantages of a mandatory retirement arrangement are of particular importance in the context of collective agreements, like the Pensions Constitution, which constitute a "package deal", comprising long-term employment alongside a constant increase in wages, on the one hand, and a predetermined time for the labor relationship to end, on the other

hand. The Technion asserted that arrangements of this type are especially important in institutions of higher education, in which academic freedom should be maintained. It argued that abolishing the mandatory retirement age would negatively affect collective agreements that are for the benefit of workers, and also harm the Technion's administrative and budget flexibility. Finally, the Technion argued that the interpretation of the mandatory retirement arrangement made in the *Weinberger* case expresses a balanced solution, suitable to the labor relationship, and makes it unnecessary to abolish the mandatory retirement age.

The Response of the Petitioners and Prof. Ben-Israel

22. In their response of September 15, 2014 the Petitioners and Prof. Ben-Israel presented arguments counter to those of the Respondents. It was first argued that the consideration that a mandatory retirement age promotes job security might be relevant only to employees who enjoy tenure and not workers who are employed under personal contracts. In this connection it was asserted that nowadays the majority of workers in the economy are not governed by employment arrangements that incorporate job security, and the mandatory retirement arrangement is of no advantage to them. In addition, it was argued that the Respondents' position with regard to the need to give the employer tools to plan the workforce at the workplace is not persuasive because it was not raised in other relevant contexts. Thus, for example, section 5 of the Retirement Age Law enables, as aforesaid, an employee to retire voluntarily before reaching the qualifying age. However, although the possibility of early retirement also impairs certainty, it was never argued that it makes it difficult for the employer to manage the workplace. The Petitioners further argue that individual competence tests do not demean the employee since, according to them, the requirement of continuing conformity of a worker to the needs of his job is a relevant requirement. Finally, the Petitioners again warned that the solution outlined by the National Labour Court in the *Weinberger* case "perpetuates and aggravates discrimination against the elderly because it gives it a color of constitutionality" (*ibid.*, para. 26).

Discussion and Ruling

23. The question for us to decide is the constitutionality of section 4 of the Retirement Age Law. It is acknowledged that the Court undertakes judicial review of the Knesset's primary legislation with cautious restraint. "In its legislation, the Knesset gives expression to the will of the people's elected representatives" (HCJ 7717/13 *Colian v. Minister of Finance*, para. 8 (October 2, 2014)). Therefore, "the Knesset's legislation enjoys the presumption of constitutionality, which imposes a substantial burden on whoever argues against it" (HCJ 6304/09 *Lahav - Israel Organization of the*

Self-Employed v. Attorney General, para. 62 (September 2, 2010) (hereinafter: the *Lahav* case)). A review of the constitutionality of a statute is of narrow scope, which necessitates a delicate balance between the principles of majority rule and the separation of powers, on the one hand, and the constitutional protection of human rights and the fundamental values of the Israeli regime, on the other hand (HCJ 2605/05 *Academic Centre for Law and Business, the Human Rights Division v. Minister of Finance*, IsrSC 63 (2) 545, 593 (2009) [English: http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance] (hereinafter: the *Prison Privatization* case)).

24. Special care is necessary when legislation is involved that delineates wide-ranging social and economic policy (HCJ 1715/97 *Israeli Bureau of Investment Managers v. Minister of Finance*, IsrSC 51 (4) 367, 386, 388-389 (1997); *Lahav*, paras. 62-64; *Prison Privatization*, p. 593; HCJ 4885/03 *Israel Association of Poultry Farmers Cooperative Agricultural Society Ltd v. Government of Israel*, IsrSC 59 (2) 14, 60 (2005) [Engish: http://versa.cardozo.yu.edu/opinions/israel-poultry-farmers-association-v-government-israel]; HCJ 4948/03 *Elhanati v. Minister of Finance*, IsrSC 62 (4) 406, 467-468 (2008) (hereinafter: the *Elhanati* case). As Justice D. Beinischsummarised in HCJ 4769/95 *Menahem v. Minister of Transport*, IsrSC 57 (1) 235, 263 (2002) (hereinafter: the *Menahem* case):

> … It has been emphasised many times in this Court's case law that in applying the constitutional criteria prescribed in the Limitation Clause to the legislation of the Knesset, the Court will act with judicial restraint, caution and moderation. This is particularly so when the legislation under constitutional review is in the area of the economic market, which involves broad social and financial aspects. In these spheres there can often be several possible objectives and courses of action. Deciding among them is often based on an evaluation that involves uncertainty, and that involves forecasts and professional considerations that are not always within the expertise of the Court. An incorrect evaluation of the situation may lead to instability or even upheaval in the State economy. Consequently, the authorities responsible for economic policy – the executive branch and the legislative branch – should be given broad discretionary space, since they determine the overall policy, and bear the public and national responsibility for the State economy. Furthermore, the choice between the various different objectives and courses of action in the economy may derive from social-economic perspectives that, despite being different and even contradictory, may all coexist within the framework of the Basic Laws.

This statement should also guide us in reviewing the constitutionality of the Retirement Age Law. The issue of retirement is a complex one, that combines both economic and social aspects (LabA (National) 56/196-3 *Dead Sea Works Workers Council v. Sharabi,* IsrLC 30 283, 313 (1997)). Retirement age itself is a complex, multifaceted subject. It is not without reason that there are several different models in the world in this sphere (for a comprehensive survey of the different models, see Pnina Alon-Shenkar, "Ending Mandatory Retirement: Reassessment," 35 *Windsor Rev. Legal & Soc. Issues* 22 (2014) (hereinafter: the *Shenkar* case); I shall address this again below). Of the possible solutions, the Israeli legislature has decided to adopt a collective model in the Law, which prefers the criterion of age to a specific review of the individual (see, for example: HCJ 7957/07 *Sadeh v. Minister of Internal Security*, para. 11 of the opinion of Justice E. Hayut (September 2, 2010) (hereinafter referred to as "*Sadeh*"); HCJ 4487/06 *Kelner v. National Labour Court*, para. 2 of the opinion of Justice E. Rubinstein (November 25, 2007) (hereinafter: referred to as *HCJ Kelner*)). This decision results from the conclusions of the Netanyahu Commission, which examined all the aspects of the issue under review. In such circumstances, although the Court will not refrain from exercising constitutional review, it will do so with extreme care (the *Prison Privatization* case, pp. 593-594; for criticism of certain aspects of this approach, see: Barak Medina,
"'Economic Constitution,' Privatization and Public Finance: A Framework of
Judicial Review of Economic Policy," in *Zamir Book on Law, Society and Politics* 5, 583, 648-652 (Yoav Dotan and Ariel Bendor (eds), 2005) (Hebrew)).

25. As customary, the review of an argument against the constitutionality of a statute is carried out in stages. First, it is necessary to determine whether the statute infringes a human right grounded in a Basic Law. If the answer is negative, constitutional review comes to an end. If the answer is affirmative, it becomes necessary to examine whether the infringement is lawful, in accordance with the conditions of the Limitation Clause. This expresses the approach prevailing in our legal system, according to which constitutional human rights are relative. Consequently, they can be limited if there is justification for so doing. If the infringement is lawful, the constitutional review ends. If the infringement is unlawful, to the Court must determine the consequence of that unconstitutionality (see and compare: HCJ 7052/03 *Adala - The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior*, IsrSC 61 (2) 202, 281-282 (2006) [English: http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior] (hereinafter: the *Adala* case); HCJ 2334/02 *Stenger v Speaker of the Knesset*, para. 5 of the opinion of President A. Barak (November 26, 2003); HCJ 2254/13 *Samuel v Minister of Finance*, para. 8 of the opinion of Justice N. Hendel (May 15, 2014)).

We will now proceed to a review of the constitutionality of the mandatory retirement arrangement.

Does Compulsory Retirement by Reason of Age infringe the Right of Equality Deriving from the Constitutional Right to Human Dignity?

26. The Petitioners' main argument is that the Retirement Age Law unlawfully infringes the right of equality that derives from the constitutional right to human dignity. Israeli case law has long recognized the right to equality as a fundamental right of prime importance (see: HCJ 1213/10 *Nir v. Speaker of the Knesset*, paras. 11-12 of the opinion of President D. Beinisch (February 23, 2012) and the numerous authorities there (hereinafter: the *Nir* case); Aharon Barak, *Human Dignity: The Constitutional Right and its Daughter Rights*, vol. II 685-688 (2014) (Hebrew); Itzhak Zamir and Moshe Sobel, "Equality before the Law," 5 *Mishpat Umimshal* 165, 165-170 (5760) (Hebrew)). "Equality is a foundation of social existence. It is one of the pillars of the democratic regime" (HCJFH 4191/97 *Recant v. National Labour Court*, IsrSC 54 (5) 330, 362 (2000) (hereinafter: *HCJFH Recant*). The right to equality has also been recognized as a constitutional right under the intermediate model that also includes discrimination that does not involve humiliation, provided that it is closely associated with human dignity (HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset*, IsrSC 61(1) 619 (2006) (hereinafter: the *Yeshiva Students* case)). The other side of the equality coin is the prohibition of discrimination. There are clear reasons for the prohibition of discrimination: discrimination leads to the creation of a sense of oppression, frustration and social ostracism (*Nevo*, p. 760). It "… completely erodes human relations…" (HCJ 7111/95 *Center for Local Government v. Knesset*, IsrSC 50 (3) 485, 503 (1996)).

27. Equality – and the prohibition of discrimination that it entails – are also necessary in labor law (the *Recant* case, pp. 340-341; HCJ 1268/09 *Zozal v. Israel Prison Service Commissioner*, para. 13 of the opinion of Justice E. Hayut (August 27, 2012) [English: http://versa.cardozo.yu.edu/opinions/zozal-v-israel-prison-service-commissioner] (hereinafter: as the *Zozal* case); Ruth Ben-Israel, "Occupational Equality, Where from and Where To?" 6 Labour Law Yearbook 85 (1996) (Hebrew)). "This area is 'asking for trouble' as regards prohibited discrimination" (the *Elhanati* case, p. 450). Consequently, in labor law there is extensive legislation aimed at promoting employment equality (see, for example: Female and Male Workers Equal Pay Law, 5756-1996; the Employment of Women Law, 5714-1954). A central law that reflects the importance of equality in the context of labor law is the Equal Opportunities Law. That statute prohibits an employer from discriminating among

employees or among those seeking employment on the basis of their sex, sexual orientation, personal status, pregnancy, fertility treatment, IVF treatment, being parents, *their age*, race, religion, ethnic group, country of origin, views, political party, or their service in reserve duty, their call for service in reserve duty or their anticipated service in reserve duty (section 2(a) of the Equal Opportunities Law). An exception thereto can be found in section 2(c) of the statute which provides: "Differential treatment necessitated by the character or nature of the assignment or post shall not be regarded as discrimination under this section".

28. Discrimination by reason of a person's age was already prohibited in certain contexts in Israel at the end of the 1950s (see, for example: sec. 42(a) of the Employment Service Law, 5719-1959; *HCJFH Recant*, p. 367-369), but only in recent years do we find growing has public and legal awareness (HCJ 10076/02 *Rosenbaum v. Israel Prison Service Commissioner*, IsrSC 61 (3) 857, 872 (2006) [English: http://versa.cardozo.yu.edu/opinions/rosenbaum-v-israel-prison-service-commissioner] (hereinafter: the *Rosenbaum* case) and the references cited there). The primary occurence of discrimination on account of age is discrimination against "the elderly" or "the old", referred to as "ageism" (Israel (Issie) Doron, "Ageing and Anti-Ageing in Israel's Supreme Court Rulings," 14 *HaMishpat* 65 (5771) (Hebrew); Israel Doron and Einat Klein, "The Inappropriate Arena? Discrimination because of Age in the Eyes of the District Labor Court," 12 *Labour, Society and Law* 435 (2010) (Hebrew); Israel (Issie) Doron, *Old Age in the Temple of Justice: The Old and Ageism in the Case Law of the Supreme Court*, (2013) (Hebrew) (hereinafter: *Doron*)). Discrimination because of age "… usually reflects the entrenchment of stereotypes with regard to the limitations of the body and the mind of the older person. Usually this has no rational or objective basis" " (the *Rosenbaum* case, p. 871). Such discrimination is not unique to Israel. It exists in the majority of the Western world. Some explain its growing prevalence by the trend of population ageing, which has led to an increase in the number of elderly who constitute part of the general workforce (Pnina Alon-Shenkar, "The World Belongs to the Youth: On Discrimination against Senior Workers and Mandatory Retirement,", in *Liber Amicorum Dalia Dorner Book* 81, 82-84, Shlomit Almog, Dorit Beinisch & Yaad Rotem (eds), (5769) (Hebrew) and the comparative research cited there (hereinafter: Shenkar – The World Belongs to the Youth); see also Batia Ben-Hador, Aliza Even, Efrat Appelbeum, Hadas Dreiher, Daphna Sharon, Yinon Cohen, Guy Mundlak, "Assessing Employment Discrimination in Hiring by Correspondence Studies," 11 *Labour, Society and Law* 381, 395 (2005); *Equality at Work: the Continuing Challenge, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 100th Session 2011 (Report I(B)), p. 49). It is

against that background that the prohibition of age discrimination was added to the Equal Opportunities Law in 1995.

29. Discrimination against a person because of age in the field of employment may be expressed at different stages of the labor relationship between the employee and the employer. This was addressed by the National Labour Court in the *Weinberger* case:

> Discrimination against an elderly person in employment is expressed at all the stages of the relationship between him and the employer or potential employer, from the hiring stage… through determination of the terms of employment and limited promotion options… to the stage of employment termination "as *a catalyst for the employee's dismissal or retirement*" (para. 27 of the opinion of Judge S. Davidow-Motola).

Age discrimination can also occur *upon retirement*. To date, the Court has assumed that a compulsory retirement age can be fixed, but that it must be done equally. Consequently, it has been held that the determination of a retirement age that is younger than customary for a certain type of worker without substantive justification is unlawful (see, for example: *HCJFH Recant*, pp. 364-370; *Rosenbaum*; *Sadeh*; *Zozal*; *Nevo*; *Niv*; LabA (National) 1313/04 *Asa v. El Al Israel Airlines Ltd*, para. 22 of the opinion of Judge S. Zur (March 23, 2006) (hereinafter: the *Asa* case); LabA (National) 14705-09-10 *Muzafi v. Bank Leumi Ltd*, paras. 28-31 of the opinion of Judge V. Wirth Livne (May 16, 2012) (hereinafter: the *Muzafi* case); LabA (National) 203/09 *The Agudath Israel Kindergarten Network v. Boussi*, para. 41 of the opinion of Judge R. Rosenfeld (October 2, 2011); LabA (National) 1414/01 *Dead Sea Works Ltd. v. Nissim*, IsrLC 40 193 (2004) (hereinafter: the *Dead Sea Works* case); *cf.* HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Internal Security*, IsrSC 58 (2) 358 (2004) [English: http://versa.cardozo.yu.edu/opinions/association-civil-rights-v-minister-public-security] (hereinafter: the *Association for Civil Rights* case)). However, the question of whether requiring a person to retire from work at a predetermined, uniform age is discriminatory *per se* has not yet been decided in our law. In any event, hard and fast rules have not been laid down as to whether compulsory retirement because of age amounts to the infringement of a *constitutional right*.

30. The question whether compulsory retirement because of age infringes equality has been described in the case law of this Court as a complex one, on which comparative law is not unanimous (*Rosenbaum*, p 875; also see and compare: *Sadeh*, para. 11 of the opinion of Justice E. Hayut). In the *Recant* case, various opinions were advanced on the subject, but no binding precedent was set. Justice I. Zamir was of te opinion that age discrimination can find expression in the workplace, *inter alia*, in the

very requirement to retire at some particular age (*ibid.*, pp. 341-342). On the other hand, in the same case, Justice M. Cheshin stated that Israeli law does not prohibit fixing of a compulsory retirement age for workers, and that fixing such an age is not "*at the present time"* regarded as age discrimination (*ibid*., p. 336). President *D.* Beinisch, for her part, stated that "… according to the norms currently accepted in Israel, the fixing of a compulsory retirement age, which is within the accepted norm both in legislation and in collective labor agreements, is not unlawful discrimination but a permitted, relevant distinction because of age…" (*ibid.*, p. 374). Justice *D.* Beinisch went on to say that "new winds are blowing in our society, as in other societies, and future development cannot be ruled out that will undermine the point of departure in regard to the proper compulsory retirement age and perhaps even in regard to compulsory retirement because of age in general" (*ibid.*).

31. Opinions are also divided in the legal literature. There are those who assert that retirement based on the employee's chronological age infringes his dignity (see, for example: Ruth Ben-Israel, "Retirement Age in light of the Principle of Equality: Biological or Functional Retirement," 43 *Hapraklit* 251 (1997) (Hebrew) (hereinafter: Ben-Israel); *Shnit*, p. 509). Others believe that there are concrete circumstances in which a substantive distinction is involved (for example, Sharon Rabin-Margalioth, "Age Discrimination in Israel: A Power Game in the Labor Market,", 32 *Mishpatim* 131 (5762) (hereinafter:Rabin-Margaliot) (Hebrew); Sharon Rabin-Margalioth, "The Elusive Case of Employment Discrimination: How Do We Prove Its Existence?" 44 Hapraklit 529 (1999) (Hebrew)).

32. The question whether requiring an employee to retire from work at a uniform age infringes the right to equality is indeed a venerable one. In order to analyze the matter, I am willing to accept that compulsory retirement because of age – as it appears in the Retirement Age Law – does infringe the right to equality that derives from the constitutional right to human dignity, as I shall explain. . The Law under review, according to its wording and purpose, is sweeping, and comprehensive. It distinguishes as regards retirement between young employees and elderly ones without any direct link to their competence or work capacity (see: *Zozal*, para. 24 of the opinion of Justice S. Joubran). It applies to all employees in the economy, without distinguishing among different types of occupation, types of employee or terms of employment. In such circumstances, individuals might understandably be harmed (*HCJ Kelner*, para. 2 of the opinion of Justice E. Rubinstein; *Shnit*, pp. 508-509; *Rabin-Margalioth*, pp. 144-147; *cf*. the position of Justices M. Cheshin and *D.* Beinisch in the *Recant* case, *supra*). Furthermore, it is acknowledged that "The principle of equality does not operate in a social vacuum. The question whether a certain case involves discrimination between equals, or whether it merely involves different treatment of different people, is decided

on the basis of the accepted social outlooks" " (HCJ 721/94 *El Al Israel Airlines Ltd v. Danilowitz*, IsrSC 48 (5) 749, 779 (1994) [English: http://versa.cardozo.yu.edu/opinions/el-al-israel-airlines-v-danielowitz, para. 4, *per* Dorner J]). While in the past the prevailing view was that there is a close connection between age and performance, it is now clear that reality is more complex and the effect of age on body and mind differs from one person to another (see: *The Netanyahu Commission Report*, p. 6). In this regard the saying goes that "the only generalization that can be made about the elderly is that one cannot generalize" (*Doron* p. 28). Consequently, making decisions on the basis of attribution to the elderly group is, as aforesaid, likely to cause injustice to the individual. By way of comparison, that was also the opinion of the Supreme Court of Canada (*McKinney v. University of Guelph* [1990] 13 C.H.R.R. D/171 (S.C.C) (hereinafter: the *Mckinney* case; see also *Dickason v. University of Alberta*, [1992] 2 S.C.R 1103 (hereinafter: the *Dickason* case); *Harrison v. University of British Columbia* [1990], 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483).

33. I therefore believe that an infringement of equality is involved. It is acknowledged that not every infringement of equality amounts to an infringement of human dignity. However, in the case before us, we are not concerned with a trivial infringement. Discriminating against an elderly person is harsh and outrageous, and it even "involves an element of humiliation and infringement of his dignity as a person" (*HCJFH Recant*, p. 366; see also Ruth Ben-Israel and Gideon Ben-Israel, "Senior Citizens: Social Dignity, Status and Representative Organization," 9 *Labor, Society and Law* 229 (5762) (Hebrew))). Added to this are the implications associated with making a person retire against his will. As Justice *G. Bach* stated in *Nevo*:

> Retirement from work has many negative personal, mental and social consequences. Frequently, a person who retires from his employment because of his advancing age feels that he is no longer a participant in the productive sector of society. He feels that he has been deprived of the satisfaction of working and receiving compensation for his labour. This feeling is also strengthened by society's attitude, which in many cases treats him as an "old man" who no longer serves any useful purpose. The situation is more acute in our day, where average life expectancy has increased and people remain healthy even at an advanced age. For this reason, the number of years have increased in which an older person, of sound body and mind, is forced, despite his capabilities, to leave his activities in the labour market and gaze, frequently in frustration, on the progression the accordingly of life's activities in which he can no longer

take part (*ibid*., p. 755 [http://versa.cardozo.yu.edu/opinions/nevo-v-national-labour-court at para. 5B(1)]).

And as Justice *E. Hayut* stated in *Zozal*:

> An older-person's retirement is very significant, and carries weighty consequences for that person's life, in financial and social terms, and no less with respect to the person's self-image, given the insult inflicted on a person who is capable and wishes to continue working " (*ibid.*, para. 15 [http://versa.cardozo.yu.edu/opinions/zozal-v-israel-prison-service-commissioner]).

Also apt in this regard is the statement of Justice I. Zamir in the *Recant* case:

> Discrimination against a person because of his belonging to a group, for example discrimination because of race, religion or sex, infringes the person's dignity. It is demeaning.… Such is also the case in respect of discrimination concerning retirement age. A person who was active and effective, involved and useful is suddenly, in his own eyes and the eyes of those around him, made irrelevant. The harm generally caused to someone who has to retire from work at an age that is fixed as a general one for mandatory retirement is aggravated when a person belongs to a group of workers that has to retire at an earlier age (*ibid*., p. 342).

Although the statement was made in regard to compulsory early retirement, it is in my opinion also relevant here. Indeed, work is not merely a source for dignified minimal existence, but also a source for self-fulfillment and social fulfilment. Naturally, the greater the place that work occupies in an individual's life, the greater the harm caused as a result of compulsory retirement because of age. Having regard to the nature and extent of the harm, I am willing, as aforesaid, to accept that such harm amounts to an infringement of human dignity. This approach is consistent with opinions that have recently been expressed in the National Labour Court, according to which compulsory retirement because of age infringes constitutional rights *(Weinberger*, para. 57 of the opinion of Judge S. Davidow Motola; LabA (National) 107/05 *Kelner v. Civil Service Commissioner*, para. 7 of the opinion of President S. Adler (February 27, 2006) (hereinafter: the *Kelner* case), and compare *HCJ Kelner*, para. 7 of the opinion of Justice E. Rubinstein; see further: the *Asa* case, para. 22 of the opinion of Judge S. Zur; the *Muzafi* case, paras. 16-17 of the opinion of Judge V. Wirth Livne*).*

34. Even the Respondents do not wholeheartedly dispute that compulsory retirement because of age might harm the elderly who can and want to continue working. Nevertheless, according to them, that harm is negligible when considered against the advantages of a predetermined, uniform chronological retirement age. The Respondents assert that a mandatory retirement age protects the elderly against demeaning competence tests and helps promote job security. Therefore, they assert, weighing the interests of elderly workers as a *group* leads to the conclusion that a mandatory retirement arrangement protects, rather than harms, employees. These are serious arguments. However, I believe that they do not nullify the harm to the individual. In similar circumstances – in which various aspects of the same right clashed with each other – I stated:

> We are therefore concerned with a clash between two constitutional rights that are designed as fundamental. How can this clash be resolved? The solution is not one right "winning" over the other. Indeed, at the constitutional level, the clash cannot be completely resolved, as though "letting a hundred flowers blossom" … The solution will be found at the practical – sub-constitutional – level… A. Barak considered this clash between the subordinate rights of human dignity:
>
> "The conflict between the subordinate rights does not lead to changing the bundle of rights that expresses the whole of human dignity. Indeed, the solution to the conflict will be found at the sub-constitutional level. At that level it will be determined if a sub-constitutional norm […] that has limited one subordinate right of human dignity in order to protect another subordinate right of human dignity is constitutional. The criterion for the determination of that constitutionality is the rules of proportionality"…
>
> That statement is also apt with regard to the sub-subordinate rights that clash in the instant case. One right does not retreat in the face of the other but a balance is determined between them at the sub-constitutional level. If it is found that the solution chosen by the legislature infringes the constitutional right of the student to obtain an education, then that infringement will only be constitutional if it is proportionate. Therefore, as my colleague Justice E. Arbel has stated, it is necessary to examine whether the statute complies with the criteria of the Limitation Clause… (HCJ 3752/10 *Rubinstein v. Knesset*, paras. 4-5 of my opinion (September 17, 2014); and compare the opinion of President A. Grunis there).

So too in the case before us. The protection of the individual against harm caused by requiring him to retire against his will does not retreat in the face of the necessary protection of the elderly as a group, but a balance must be struck between them in light of the criteria of the Limitation Clause (also see and compare: HCJ 42/94 *Manco Food Import & Marketing v. Ministry of Trade and Industry* (September 3, 1994) (hereinafter: the *Manco* case). The Respondents further asserted that the Petitioners have not proven that compulsory retirement because of age is makes there situation worse in comparison with that of young workers. In support of that argument, the Respondents adduced data showing that the participation of the elderly in the workforce is growing and that the *actual* retirement age in Israel is among the highest in the member states of the Organisation for Economic Cooperation and Development (hereinafter: the OECD). In my opinion, those data indicate less harm to the individual, but it appears that they are not sufficient to neutralize the harm. An employee's very obligation to retire against his will is likely to harm his dignity and his sense of competence, even if the age at which he is obliged to retire is relatively high (*cf.* HCJ 8665/14 *Desta v. Knesset*, paras. 58-60 of my opinion (August 11, 2015) (hereinafter: the *Desta* case)).

In view of the foregoing, the point of departure for our further discussion is that a constitutional right, namely the right to equality that derives from the constitutional right to human dignity, is infringed. However, I would first say that the conclusion that I have reached is that the infringement meets the requirements of the Limitation Cclause and it would therefore be inappropriate to invalidate the provision of the Law that is under review.

The Criteria of the Limitation Clause

35. Our assumption that the obligation of a person to retire because of his age infringes the right of equality that derives from the constitutional right to *human* dignity is not the end of the line in respect to the validity of the Retirement Age Law because it is still necessary to examine whether the infringement is lawful (*Elhanati*, p. 467; *Nir*, para. 17 of the opinion of President D. Beinish). The constitutionality of the infringement is examined in accordance with the conditions of the Limitation Clause, according to which constitutional rights are not to be infringed, unless by a law that befits the values of the State of Israel as a Jewish and democratic state, which is intended for a proper purpose and in a way that does not exceed what is necessary. The Limitation Clause is the criterion for balancing competing values (HCJ 10203/03 *Hamifkad Haleumi v. Attorney General*, IsrSC 62 (4) 715, 764 (2008) [English: http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general). It reflects

the approach prevailing in our law according to which constitutional rights are not absolute. "The Limitation Clause emphasises the concept that the individual lives within society and that the existence of society and its needs and traditions might justify the infringement of human rights" (the *Yeshiva Students* case, p. 692). This was also addressed by President *D.* Beinisch in the *Prison Privatization* case:

> The limitations clause expresses the balance provided in Israeli constitutional law between the rights of the individual and the needs of society as a whole and the rights of other individuals. It reflects our constitutional outlook that human rights are relative and may be restricted. *The limitations clause therefore fulfils a dual role — it stipulates that the human rights provided in the Basic Laws shall not be violated unless certain conditions are satisfied, but at the same time it defines the conditions in which the violation of the human rights will be permitted* (p. 620 [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance, para. 8]; emphasis added – MN).

The conditions of the Limitation Clause are, *inter alia*, examined having in light of the nature of the right infringed, the purpose of the enactment and the intensity of the infringement caused in the particular case (*Nir*, para. 18 of the opinion of President D. Beinish; *Menahem*, pp. 258-259).

36. In the instant case, the infringement is in the Law. In their arguments before us, the parties did not address the question of the Law's befitting the values of the State of Israel as aJewish and democratic state at any length. Therefore, the purpose of the Law will first be discussed and finally – and this is the essence of the matter before us– the question of the Law's proportionality will be discussed.

Proper Purpose

37. A purpose is proper if it is intended to achieve important public interests (see: *Desta*, para. 24 of my opinion, and the authorities cited there), or if it is intended to promote human rights, "including by prescribing a fair and reasonable balance between rights of individuals with conflicting interests in such a way as leads to a reasonable compromise in granting the optimum rights to each individual" (*Menahem*, p. 264).

38. The general purpose of the Retirement Age Law is to prescribe uniform rules with regard to retirement age, including raising it gradually (section 1 of the Law). The determination of uniform rules for retirement is intended to promote several interrelated sub-purposes. Those purposes are not expressly mentioned in the purpose

section of the Law, but they do find expression in the Explanatory Notes to the Retirement Age Bill, and in the recommendations of the Netanyahu Commission that formed the basis for the Law's enactment (see: *The Netanyahu Commission Report*, pp. 6-8 for the majority opinion, and pp. 31-32 for the minority opinion of Prof. Raday). The determination of a mandatory retirement age seeks to protect the dignity of workers and improve their job security in the economy until retirement age. At the same time, it is intended to enable the employer to manage the workforce at the workplace, especially in unionized workplaces, where the employees enjoy tenure. Mandatory retirement age is also intended to promote fairness among the generations – the integration and promotion of new employees in specific workplaces where the number of jobs is limited. Alongside this, *raising* the mandatory retirement age in the Law enables anyone so desirous to work longer, and it thereby also seeks to provide an answer to the continuing increase in life expectancy and the rise in the ratio between the number of elderly in Israeli society and the population in general. Since these demographic changes might cause difficulties in financing the increase created in the various different pensions and place a more onerous burden on social security systems, it has become necessary to *extend* the time for pension savings by means of a standard rise in the qualifying age and the mandatory retirement age (*the Netanyahu Commission Report*, pp. 9-10).

39. In my opinion, these are proper purposes. The need to protect interests of workers and promote social security is one of the foundations of the whole of labour law. In addition, a purpose that seeks to safeguard the dignity and livelihood of elderly workers recognizes them as a separate group entitled to protection in the employment market, and expresses a proper awareness of the vulnerability of the elderly in labor relations. On the other hand, in my opinion, it is not improper to have regard for the interests of new workers in the labor market. Giving weight to those interests, *prima facie* strives towards finding compromises between different generational groups, on the assumption that, in time, everyone is likely to reach an advanced stage of life (see: *Kelner*, para. 7 of the opinion of President S. Adler; *Asa*, para. 22 of the opinion of Judge S. Zur, para. 3 of the opinion of President S. Adler; *Weinberger*, para. 59 of the opinion of Judge S. Davidow Motola; *cf*. HCJ 1181/03 *Bar Ilan University v. National Labour Court*, IsrSC 64 (3) 204, 237 (2011) [English: http://versa.cardozo.yu.edu/opinions/bar-ilan-university-v-national-labor-court] (hereinafter: the *Bar Ilan*" case; for criticism of this purpose, see, for example: Shenkar, "The World Belongs to the Youth", pp. 101-105; Shnit, pp. 509-513; Ben-Israel, pp. 259-261). The purpose of managing the workplace and planning manpower is not an improper purpose either.

The purposes mentioned have also been recognized as proper purposes in comparative law. Thus, the European Court of Justice has held that legitimate purposes of an arrangement for mandatory retirement on account of age might include the protection of long-standing employees against the infringement of their dignity; the promotion of new employees and the creation of jobs; and enabling the employer to plan and manage the workforce at the workplace (see, for example: *Palacios de la Villa v. Cortefiel Servicios SA* (C-411/05) [2007] (hereinafter: *Palacios de la Villa*); *Georgiev v. Tehnicheski Universitet - Sofia, Filial Plovdiv* (C-250/09) [2010] (hereinafter: *Georgiev*); *Torsten Hörnfeldt v. Posten* (C-141/11) [2012] (hereinafter: *Torsten Hörnfeldt*); *Fuchs (C-159/10) and Köhler (C-160/10) v. Hessen* [2011] (hereinafter: *Fuchs*); *Petersen v. Berufungsausschuss für Zähn für den Bezirk Westfalen-Lippe* (C-341/08) [2010]. That was also the opinion of the Supreme Court in England (*Seldon v. Clarkson Wright & Jakes* [2012] UKSC 590 (hereinafter: *Seldon*), and of the Supreme Court in Canada (*Dickason*; *Mckinney*). It should be noted that further to a *legislative* change, the current legal position in Canada is not as it was when the said judgments were handed down. I shall refer to this below.

40. The various purposes of the Retirement Age Law demonstrate the Law's aspiration to effect a balance between the rights and interests of the different "players" in the labour market: the needs of the employer, the rights of the different groups of employees, and the needs of the economy as a whole (see: *Weinberger*, para. 59 of the opinion of Judge S. Davidow Motola). This also finds expression in the overall provisions of the Retirement Age Law. Thus, for example, the Law enables an employer to require an employee to retire on reaching the age of 67, but this is nevertheless on the assumption that the employee will be entitled to a pension as a substitute for income from work. In addition, the Law does not compel an employee to retire from work on reaching a certain age, and permits him and the employer to agree that the employee will retire at a later stage, and it even obliges the employer to give consideration to continuing the worker's employment after retirement age, if the employee so requests (*Weinberger*, paras. 64-72 of the opinion of Judge S. Davidow Motola). As a rule, striving for a fair balance between competing interests of individuals is a proper purpose (cf. the *Yeshiva Students* case, pp. 696-700; *Manco*). This is also apt in the case before us.

The Petitioners, for their part, asserted that even if the determination of a uniforn rule for retirement is a proper purpose, it can be achieved in other ways, and in any event, it does not justify the serious blow caused to elderly persons by obliging them to retire from work because of their age. I shall now proceed to review these arguments.

The Proportionality Criteria

41. The infringement of the right must be proportionate. "While the Limitation Clause stands at the heart of constitutional review, the criterion of proportionality stands at the heart of the Limitation Clause" (*Lahav*, para. 111 of the opinion of Justice A. Procaccia). In the scope of the proportionality criteria, an examination is made of the relationship between the purpose of the Law and the means chosen by the legislature in order to achieve it (see, for example: HCJ 6133/14 *Gorvitz v. Knesset*, para. 54 of the opinion of Deputy President E. Rubinstein (March 26, 2015) (hereinafter: the *Gorvitz* case); an application for a Further Hearing was dismissed, HCJFH 2649/15 *Gorvitz v. Knesset* (August 2, 2015)). The proportionality criteria express the concept that it is not sufficient for the purpose of the statute to be a proper one. It is also necessary that the means chosen to achieve that purpose to be fit and proper (the *Yeshiva Students* case, p. 705). The proportionality of the statute is examined by means of three subordinate criteria. The first subordinate criterion is that of the rational connection, which considers whether the statute has the power to realise the purpose for which it was enacted. The second subordinate criterion – the means of least infringement – examines whether among the means that achieve the purpose of the law, the legislature has chosen the means that infringes human rights the least. Finally, the third subordinate criterion, namely the test of proportionality "*stricto sensu*", requires that there should be a proper relationship between the purpose of the statute and the associated infringement of the constitutional rights.

The Rational Connection Criterion

42. According to the rational connection test, as aforesaid, the means chosen by the legislature must lead to the achievement of the purpose underlying the statute. This criterion does not require that the statutory means to lead to the achievement of the purpose with absolute certainty. Nevertheless, a slim, theoretical prospect does not suffice (*Adala*, p. 323; Aharon Barak, *Proportionality in Law: Infringement of the Constitutional Right and their Limitations*, 373-374 (2010) (hereinafter: *Barak, Proportionality*)). Does the arrangement in the Retirement Age Law have the power to achieve its purposes? In my opinion, the answer to this question is in the affirmative. A mandatory retirement arrangement is based on rational considerations, for which support can be found in case law and in the economic and legal literature. Firstly, there is a reasonable connection between the determination of an equal, uniform rule for retirement from work and the promotion of certainty in the employment market. The fixing of a retirement age enables the worker to know when he will reach the time to rest from his daily toil. Alongside this, it enables employers to plan the workforce at the workplace (see also: *Zozal*, para. 24 of the opinion of Judge S. Joubran*; Nevo*, p.

754). The Petitioners, for their part, asserted that the Law enables flexibility in regard to retirement, and the connection between mandatory retirement and promoting certainty in the economy is therefore slim. The Retirement Age Law does, indeed, provide that in certain circumstances it is possible to retire at an age that is *different* from the qualifying age or the mandatory retirement age (see: section 5 of the Law, which permits voluntary early retirement on certain conditions; section 3 of the Law, which permits women to retire at a younger age than men; section 10 of the Law, which permits an employee and employer to agree that the retirement age will be higher than the mandatory retirement age). Nevertheless, it cannot be inferred from the foregoing that there is no connection between mandatory retirement and the promotion of certainty, nor can it be inferred that there is no need for certainty in the scope of retirement arrangements. I would mention the the factors of certainty and manpower planning did find expression in the recommendations of Prof. Raday in the *Netanyahu Commission Report,*. Apart from that, the Retirement Age Law seeks to balance different interests, which naturally cannot lead to the absolute achievement of every single purpose of the Law. Consequently, even if the purpose of certainty is not completely achieved, this does not necessarily attest that there is no rational connection between it and the Law.

43. In my opinion, there is also a rational connection between mandatory retirement and promoting the interests of employees in certain respects. The accepted view is that the existence of a mandatory retirement age limits the need for the employee to undergo repeated tests of his abilities and performance that might cause him pressure and uncertainty, and even lead to arguments over his competence (see and compare: *Sadeh*, para. 13 of the opinion of Justice E. Hayut; *HCJ Recant*, pp. 373-374; *Weinberger*, para. 60 of the opinion of Judge S. Davidow Motola). That being the case, it is not unreasonable to assume that a mandatory retirement arrangement can in promote the employee's interest in this regard. Moreover, when there is a predetermined, uniform retirement age, the ordinary practice is to wait until that age and not require the employee's early retirement, even if there is a certain decline in his competence. Consequently, mandatory retirement might reduce the number of workers who are discharged from the workplace *before* the normal retirement age (see: *Shnit*, p. 511 and the authorities cited there). In addition, there are those who argue that a mandatory retirement age is an essential, or at least an important element in the employment model termed "deferred compensation". This model is common in unionized workplaces that grant employees tenure by virtue of collective agreements, but it can also exist in an informal format *without any explicit contractual arrangement* (Rabin-Margalioth, p. 155). In a deferred compensation system, the employee's wage is characterized by a constant increase in its real value over the period of employment, and at a certain stage it even exceeds the employee's marginal output. Such an

employment model is based on the assumption that parties to a labor relationship make investments in their relationship that decline to nothing in the case of employment termination (*ibid*., p. 154). Both parties – the employee and the employer – therefore wish to maintain a long-term labor relationship. A deferred-compensation employment model helps to promote that objective. As described in the article by Rabin-Margalioth:

> The beginning of the relationship constitutes the employee's training period, in which he is remunerated in excess of his marginal output. During the second time period (mid-career), the wage continues to rise, but the rate at which the employee's output increases is greater and the wage paid therefore falls below the worker's marginal output. This increase in output is made possible thanks to the skills that the employee has developed in the course of his work. In the third stage of the relationship (the later period), although the employee's wage continues to rise, his marginal output no longer increases and sometimes even declines (*ibid.*, p. 154).

At the same time, the deferred compensation model is also based on the existence of a fixed time that is known in advance for the termination of employment, namely a time when the employee can be required to retire because of his age. Without such a time, a particular employer will find it difficult to assure his employee increased wages linked to increased seniority (*ibid*., p. 155). This approach – which connects mandatory retirement age with the deferred compensation model – has support in the economic literature and empirical research (Edward P. Lazear, "Why is There Mandatory Retirement?" 87 (6) *Journal of Political Economy* 1261 (1979); *Mandatory Retirement: Why Governments Should Quit Banning It* (AIMS Labour Series Commentary #3, 16.12.2008) and the authorities cited there; Samuel Issacharoff and Erica Worth Harris, "Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution," 72 *NYU L. Rev*. 780, 787-790 (1997) (hereinafter: *referred to as* Issacharoff & Harris); Beverley Earle and Marianne DelPo Kulow, "The "Deeply Toxic" Damage Caused by the Abolition of Mandatory Retirement and its Collision with Tenure in Higher Education: A Proposal for Statutory Repair," 24 *S. Cal. Interdis. L.J*. 369 (2015) (hereinafter: Earle & Kulow); Julie C. Suk, "Evolutions in Antidiscrimination Law in Europe and North America: From Antidiscrimination to Equlity: Stereotypes and the Life Cycle in the United States and Europe," 60 *Am. J. Comp. L*. 75, 93 (2012) (hereinafter: Suk); Rabin-Margalioth, pp. 150-161; Shenkar, The World Belongs to the Youth, pp. 139-141; and also see the opinion of Judge Y. Plitman in *Dead Sea Works*, mentioning the advantages of fixing a mandatory retirement age in collective agreements (although he was left in the minority there with respect to the result, it appears that the other members of the bench did not specifically

dispute his said approach)). It cannot therefore be said that this approach, which regards mandatory retirement age as a means to promote job security, is irrational.

44. As regards the purpose of promoting new employees and increasing jobs, there are no unequivocal findings that employment of the elderly leads to unemployment of the young. Consequently, it appears that if the mandatory retirement arrangement was intended for that purpose, it would have been difficult to find correspondence between it and the means taken (see also "Equality at Work: Tackling the Challenges, Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work," International Labour Conference, 96th Session 2007, Report I (B)), p. 42; Shenkar, The World Belongs to the Youth, pp. 101-104). Notwithstanding the foregoing, the need for a balance between senior employees and new ones might be necessary in *certain* workplaces typified by a limited number of tenured positions and a "narrow" promotion pyramid (*The Netanyahu Commission Report*, p. 9 of the majority opinion; LabA (National) 300205/98 *Avni v. New Histadrut General Federation of Labor*, para. 11 of the opinion of Judge S. Adler (June 2, 1999)). This factor is particularly salient when institutions of higher education are involved, where on the one hand, the integration of new academic staff members is important as a means for the interchange of ideas and innovation, but on the other hand, there is a limited number of positions. The Supreme Court of Canada discussed this in *Mckinney*:

> Mandatory retirement is thus intimately tied to the tenure system. It is true that many universities and colleges in the United States do not have a mandatory retirement but have maintained a tenure system. That does not affect the rationality of the policies, however, because mandatory retirement clearly supports the tenure system. Besides, such an approach, as the Court of Appeal observed, would demand an alternative means of dismissal, likely requiring competency hearings and dismissal for cause. Such an approach would be difficult and costly and constitute a demeaning affront to individual dignity.
>
> Mandatory retirement not only supports the tenure system which undergirds the specific and necessary ambience of university life. It ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new people. In a closed system with limited resources, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the universities and the individual.

The United States Federal Court of Appeal made a statement along similar lines in *Lamb v. Scripps College*, 627 F.2d 1015, 1023 (1980):

> In light of the unique problems encountered by universities in their efforts to prevent intellectual stagnation and to assure diversity and competence in their faculties … and the likelihood that a mandatory retirement policy will remedy at least some of these problems, … California's determination that different treatment is warranted for a certain class of tenured private college professors than for other tenured private college professors and other employees is rationally based … In rejecting Lamb's equal protection challenge on that basis, we make no endorsement of mandatory retirement as a matter of social policy. We are aware of both the debilitating effect that compulsory retirement can have on an individual, and the potential loss to society in terms of human resources that may result therefrom. The promulgation of a mandatory retirement policy, however, reflects a legislature's resolution of competing interests and this is "precisely the type of clash of competing social goals that is best resolved by the legislative process. The federal courts should not second guess the wisdom or propriety of such legislative resolutions as long as they are rationally based" …

The Petitioners, for their part, pleaded that the effect of mandatory retirement on actual retirement age is negligible. According to them, research shows that even in countries where mandatory retirement because of age has been abolished, the retirement age has risen only slightly. Therefore, according to them, abolishing mandatory retirement because of age will, in any event, not affect new workers who wish to progress in the workplace. On the other hand, there is other research according to which the abolition of mandatory retirement has led to an increase in the age of those retiring in certain workplaces (see, for example, Earle & Kulow; Issacharoff & Harris*;* Orley Ashenfelter and David Card, *Did the Elimination of Mandatory Retirement Affect Faculty Retirement Flows?* (NBER Working Paper No. 8378) (2001), http://www.nber.org/papers/w8378; but see Till von Wachter, *The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts*, Center for Labor Economics, University of California, Berkeley (Working Paper No. 49 (2002)), http://cle.berkeley.edu/wp/wp49.pdf)). Nor is it possible to ignore the context of this petition, which we should recall, is brought by senior lecturers in institutions of higher education. According to the data presented to us by the Technion, the number of tenured posts in the institution is limited, and the acceptance of new academic staff depends, to a certain extent, upon the retirement of senior staff members. Indeed, the

weight of the intergenerational argument is not the same in all workplaces, and it is influenced by macro-economic changes. This argument should, therefore, perhaps not be given great weight. However, ultimately, it cannot be said that the connection between mandatory retirement and the promotion and integration of new employees in certain workplaces is merely theoretical.

45. The Petitioners further argued that the purposes of the Law detailed above can be achieved in other ways but, as is known, the rational connection criterion does not require that the means chosen be the only one that can achieve the purpose. It suffices for there to be a reasonable possibility that mandatory retirement age promotes the Law's purposes in order to find that there is a rational connection between the Law's purposes and the means adopted by it. The choice between different possible means for achieving the purpose will now be examined in the scope of the second and third subsidiary tests (see: the *Yeshiva Students* case, pp. 706-707; *Barak, Proportionality*, pp. 376-377).

The Means of Lesser Infringement Test

46. The lesser-infringement test consists of two elements. The first element considers whether there is an alternative that can achieve the proper object of the Law to the same extent as the means adopted by the Law. The second element examines whether the alternative infringes constitutional rights to a lesser extent than the infringement of the Law under the Court's review (*Barak, Proportionality,* p. 399). In Retirement Age Law, the legislature preferred to adopt an overall, uniform criterion, rather than abolish the mandatory retirement age and arrange for individual competence tests. In principle, a sweeping arrangement might raise concern of disproportionality in the sense of the second subordinate criterion. In this respect, the statement of this Court in the *Association for Civil Rights* case is apt:

> Indeed, the employer will find it difficult to satisfy the "smallest possible harm test" if he does not have substantial reasons to show why an individual examination will prevent the attainment of the proper purpose that he wishes to achieve (p. 367 [http://versa.cardozo.yu.edu/opinions/association-civil-rights-v-minister-public-security, para. 9, *per* Barak P]).

I also considered this, albeit in a different context, in HCJFH 203/14 *Salah v. Prison Service* (April 14, 2015):

In general, "any sweeping arrangement is 'suspect' of not being the lesser infringing means because of the possibility of individually examining the individuals included in the relevant group" (the *Younes* case, para. 74 of the opinion of Justice Y. Danziger; see also: *El Abeid*, pp. 706-707; *Saif*, pp. 76-77 [http://versa.cardozo.yu.edu/opinions/saif-v-government-press-office]; the *Airports Authority* case, para. 5 of the decision of President (Emeritus) D. Beinish). On the other hand, sometimes an individual examination will be ineffective or cannot be made at all (see and compare: HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior*, IsrSC 61 (2) 202, (2006) [http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior]; HCJ 466/07 *MK Zahava Galon – Meretz-Yahad v. Attorney General* (January 11, 2012) [http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]; *Younes*, para. 74 of the opinion of Justice Y. Danziger and the authorities there, and the opinion of Justice I. Amit).

There can, indeed, be situations in which an individual examination will not achieve the purpose of the Law *to the same extent* (*Adalah*; HCJ 466/07 *Galon v. Attorney General* (January 11, 2012)). In view of the overall material presented to us, I believe that in the instant case the Respondents have shown substantial reasons in support of the claim that if mandatory retirement is replaced by an individual examination, that might lead to preventing the achievement of the Law's objectives. Thus, a regime of functional retirement does not meet the need of certainty to the same extent, nor answer the need to plan the workforce in the workplace. Such a model might also upset the balance between senior and new employees at particular workplaces. In addition, a move to functional retirement might impair job security in the workplace. First, because, as noted, arrangements that assure the employee tenure in the workplace (such as the "deferred compensation" model) depend to a large extent on the existence of a mandatory retirement age. Second, in the absence of a mandatory retirement age, employers might more frequently compel workers to retire *before* the customary retirement age. Moreover, choosing the functional retirement model might expose employees to constant examination of their competence in such a way as might create unease, stress and anxiety. As noted, these considerationsfind support in the legal and economic literature (including the current literature), and they also find expression in foreign legislation and case law. I shall refer to comparative law at greater length in the course of the third subsidiary test, but as regards the criterion of the means of lesser infringement, I believe that the legislature had adequate foundation to determine that the functional retirement model will not achieve the purposes of the Law to the same

extent. In any event, it is doubtful whether that model infringes workers' rights and dignity less.

The Petitioners dispute the disadvantages of the functional retirement model. According to them, functional retirement does not contradict the deferred compensation model, which can be safeguarded in other ways, like giving incentives to employees who choose to retire early. In any event, according to them, the deferred compensation model is only relevant to unionized workplaces and not to the economy as a whole. In addition, as they see it, functional retirement does not infringe dignity because it is based on substantive reasons for a person's employment termination. Consequently, they believe that the biological retirement model, as enacted in the Retirement Age Law, does not meet the second proportionality test. The Petitioners, like the Respondents, supported their arguments with various authorities and research in the spheres of economics and law. However, having regard for the factual and legal foundations detailed above, that does not suffice to find that a functional retirement regime should be preferred to biological retirement, and to intervene in the choice made by the legislature. It should be borne in mind that the vast majority of the factors for and against mandatory retirement – like the factors in support of other retirement models – are based on appraisals, various expert opinions, and forecasts. Exact science is not involved. Consequently, it is difficult to find a particular retirement model that will provide the optimum benefit of all the "players" in the labor market. It is not without reason that the public, legal and academic debates on this subject have continued in recent years, including in countries where mandatory retirement because of age has been abolished (see for example, Shenkar, pp. 37-39 and the numerous authorities there; Doron, pp. 31-56; Shnit; Ben-Israel; Rabin-Margalioth; Seldon; Earle & Kulo; Suk; Jonathan R. Kesselman, "Challenging the Economic Assumptions of Mandatory Retirement," in *Time's up!: Mandatory Retirement in Canada* 161 (Terry Gillin, David Macgregor, Thomas Klassen (eds.) (2005); Lucy Vickers and Simonetta Manfredi, "Age Equality and Retirement: Squaring the Circle," 42 *Ind. Law J.* 61 (2013); Orly Gerbi, "Compulsory Retirement in Israel: Is the end in Sight?" 24 No. 2 *Emp. & Indus. Rel. L.* 25 (2014); Malcolm Sargeant, "Distinguishing Between Justifiable Treatment and Prohibited Discrimination in Respect of Age," 4 *J.B.L.* 398 (2013); Neta Nadiv and Ariel Mirelman, "Respect for the Old: An Examination of the Issue of Employment after Retirement Age," 10 *Kiriat Hamishpat* 276 (2014) (hereinafter: Nadav & Mirelman) (Hebrew)). For that reason, as well, I do not believe that it is appropriate to intervene in the legislature's preferring the biological retirement model to the functional retirement model.

Having said that, and although the Petitioners did not refer to it at length, it cannot be ignored that there is a broad spectrum of retirement models between a model

of compulsory retirement because of age and a model of functional retirement, (see and compare: *Rosenbaum*, para. 18 of the opinion of President A. Barak; *Weinberger*, paras. 61-62 of the opinion of Judge S. Davidow Motola). Thus, for example, a compulsory retirement age only in the framework of collective agreements, which provide job security and an adequate pension, might have been permitted (*ibid*.; Rabin-Margalioth). Another solution might have been permitted mandatory retirement only if the employer could justify it. Another alternative is gradual retirement, similar to the model existing at the Technion. I will not deny it: these solutions are fair and reasonable, and it might be proper to give them serious consideration. However, as earlier noted, the Petitioners did not base their arguments on these alternatives and consequently, we were not presented with support for the an argument that the alternatives are of equal value to the biological retirement model. We cannot find that they are means that can achieve the purpose of the Law to an equal extent. Moreover, when comparing the existing retirement model with other alternatives, it should be borne in mind that the existing model, according to our interpretation, requires the employer to give consideration to an employee's request to continue working even after the retirement age fixed in the Law (*Weinberger*; I shall refer to this at greater length below). Consequently, to some extent, even the existing arrangement exrpressed consideration for the individual particulars of the employee tn a manner that reduces the infringement of his rights.

My conclusion is, therefore, that the mandatory retirement arrangement meets the second proportionality test.

Proportionality Stircto Sensu

47. In the scope of the third subsidiary test – that of proportionality "in the narrow sense" – an examination is made of whether there is a right and proper relationship between the benefit that will arise from achieving the Law's purposes and the associated infringement of the constitutional rights. This subsidiary test is a values test, based on a balance between rights and interests (see, for example: *Desta*, para. 24 of my opinion). In the instant case, the parties have presented two competing philosophies. While the Respondents side with the existing retirement model, the Petitioners ask that we strike it down because it seriously infringes the rights of the elderly. Both parties have put a wide range of arguments to us, each from its own point of view. Ultimately, having weighed the infringement caused by the Law, on the one hand, and its benefit, on the other hand, I have reached the overall conclusion that there are no grounds for the Court to intervene in the legislature's choice to prefer a model of compulsory retirement because of age.

48. As earlier stated, a model of compulsory retirement because of age harms individuals who can, and want to, continue working. Furthermore, as noted, research shows that there is no necessary connection between one's age and one's performance at work. Although certain abilities might decline with age, there are substantial differences in output within the elderly group (see, for example: Shnit, p. 511; Ben-Israel, p. 268). Against that background, compulsory retirement might cause economic and social harm and lead to serious feelings of deprivation and incompetence. Compulsory retirement because of age might also perpetuate a *collective* stigma in regard to the abilities and skills of the elderly (Ben-Israel, p. 273). Indeed, "… forced retirement, based on nothing except their age, sends the message that older workers are not qualified. This message hurts the core of a person's dignity – a person who, only because of his age, is identified as being of little worth. " (*Zozal*, para. 26 of the opinion of Justice S. Joubran [http://versa.cardozo.yu.edu/opinions/zozal-v-israel-prison-service-commissioner]). It should be borne in mind that the determination of a mandatory retirement age does not merely affect the time of a person's retirement from work, but it might also have an effect on his ability to obtain other jobs after he has passed the retirement age (see, for example, the handicaps that were discussed in *HCJ Kelner* with regard to the acceptance to work of someone who has passed retirement age; see also: LabC (TA District) 6286/06 *Matatia v. Paint Lee Ltd.* (December 17, 2009); Nadav & Mirelman, p. 275). It can also be argued that compulsory retirement leads to the relinquishment of highly experienced, quality manpower that can contribute to the workplace and the economy in general. Abolishing mandatory retirement would therefore enable society to profit from the experience and skills of the elderly.

49. On the other hand, there are weighty arguments in support of a model of uniform, compulsory retirement, as briefly mentioned earlier. In my opinion, among the various factors, consideration should be given to the argument that the implementation of uniform retirement reduces the need constantly to examine the employee's competence, and thereby diminishes uncertainty, tension and anxiety. A decision that an elderly worker must retire because of a decline in his performance at work might also cause serious feelings of incapacity and create an unfavourable "personal stigma" in respect of him. A statement along similar lines was made by Justice *D.* Beinisch in *HCJ Recant*:

> I would further add that I personally believe that there are substantial reasons that can justify a uniform, compulsory retirement age. Since that is not the question to be decided here, I shall not express my opinion on that question in detail, but merely state that I tend to believe that, in general, a uniform retirement age is a solution that is preferable to

> compulsory retirement on an individual basis. Among the disadvantages of such functional retirement, which is gaining a growing number of supporters, mention may also be made of the infringement to the dignity of the ageing employee whose ability to work will be under constant scrutiny (*ibid.*, p. 374).

This was also the opinion of Prof. Raday, who stated in the *Netanyahu Report* that abolishing the mandatory retirement age might lead to the development of personal competence tests for the elderly who wish to continue working after the usual retirement age, "tests that might demean and infringe the dignity of those elderly people" (p. 31; see also: *Sadeh*, para. 13 of the opinion of Justice E. Hayut). I am aware that in certain contexts it has been held that individual competence tests *do not* infringe the employee's dignity. This has regard for the fact that employees' performance is *a relevant* consideration (the *Association for Civil Rights* case, p. 369; *HCJFH Recant*, p. 355). However, even if the intensity of the affront in such a case does not amount to an infringement of human dignity, it certainly has an effect on the worker's conditions of employment and welfare. The practical difficulties involved in the development of individual competence tests cannot be ignored either. While an individual competence test might be simple and possible when work that requires physical skill is involved, that is not the case when occupations that necessitate a qualitative appraisal of work capacity are involved (see and compare: *HCJ Kelner*, para. B of the opinion of Justice E. Rubinstein). This is reinforced in the instant case, which involves senior members of the Technion's academic staff who enjoy academic freedom and independence in research, while any interference in their work might be perceived as the exertion of improper pressure on some of them (see and compare: *Mckinney*; and *cf.* the dissenting opinion in *Dickason*, above, in which the conduct of peer review was suggested as a means to evaluate the competence of a university's academic staff). The Petitioners indeed argued that frequent use is now made of individual competence tests, and they cited as an example the civil service rules that permits them. Although that possibility does exist, it is not the default. Naturally, if mandatory retirement were abolished, the use of individual competence tests would be far more prevalent, with all the implications thereof.

I would incidentally note that I do not give great weight in my decision to the argument that the development of individual competence tests would place the employer under a financial burden. Although such a budgetary factor might sometimes be relevant, in the case before us it does not justify the infringement of equality. It is generally acknowledged that "human rights cost money", and as a democratic society we must be willing to bear their cost (see and compare, *HCJFH Recant*, p. 355; HCJ 4541/94 *Miller v. Minister of Defence*, IsrSC 49 (4) 94, 142 (1995) [English:

http://elyon1.court.gov.il/files_eng/94/410/045/Z01/94045410.z01.pdf]; see also: *Age Concern England* (C-388/07) [2009] para. 46; *Fuchs*, para. 52). My reasons in this regard are entirely concerned with the possible harm to workers that would be caused by widespread application of individual competence tests, and the practical difficulties of implementing them equally and fairly.

50. Another relevant factor is the scope of the elderly's participation in the labor market. There is concern, as aforesaid, that the abolition of the mandatory retirement age will lead to the early dismissal of elderly employees even before reaching the accepted retirement age, and will also affect the arrangements that give job security to workers. Moreover, as mentioned above, the mandatory retirement age might increase certainty and facilitate the planning of manpower in the workplace, as Prof. Raday stated in the *Netanyahu Report*. Finally, as noted, a model of compulsory retirement because of age takes into account the interests of new workers in the labor market, although this factor is at most relevant to certain workplaces in which the number of posts and the possibilities of promotion are limited. Added to these overall factors is the underlying premise of the Retirement Age Law that a person who retires can continue subsisting independently after retirement by receiving some or other pension (that factor has also been raised in the case law of the European Court of Justice: *Palacios de la Villa*, para. 73; *Rosenbladt v. Oellerking Gebäudereinigungsges* GmbH (C-45/09) [2011], para. 44-47 (hereinafter: *Rosenbladt*); Alysia Blackham, "Tackling Age Discrimination against Older Workers: a Comparative Analysis of Laws in the United Kingdom and Finland," 4 *Cambridge J. Int'l & Comp. L*. 108, 112-117 (2015)). This is even though reforms in retirement arrangements, like the transition from pension savings based on the accrual of rights ("defined benefits") to pension savings based on the accrual of money ("defined contributions"), have created different arrangements between one employee and another (as regards the pension arrangements existing in Israel, see: HCJ 2944/10 *Koritsky v. National Labour Court* (October 13, 2015), and the numerous authorities cited there – applications for a further hearing were dismissed: HCJFH 7730/15, HCJFH 7649/15 *State of Israel - Ministry of Finance v. Koritsky* (February 23, 2016); and see also *Bar-Ilan*; *Elhatani*; HCJ 6460/12 *Eliav v. National Labour Court*, IsrSC 60 (4) 411 (2006)).

51. It emerges from the aforegoing that the model of compulsory retirement because of age has advantages and disadvantages. As opposed to this, other models, such as the functional retirement model, based on individual competence tests, are not entirely free of difficulties (see also the comprehensive review of the arguments for and against a mandatory retirement age in *Sadeh*, para. 13 of the opinion of Justice E. Hayut). Given this complex background, I believe that the legislature's preference of the model of compulsory retirement because of age over other models is based on reasonable

considerations that give no cause for the Court's intervention. As this Court has acknowledged, in the context of a constitutional review, the legislature enjoys a "margin of proportionality", within which there are *several options*. The Court will intervene only when the means chosen by the legislature "departs considerably from the scope of the margin of legislative appreciation given to it and is *clearly disproportionate* " (*Prison Privatization*, p. 623 [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance, para. 46, *per* Beinisch P] (emphasis added – MN); *Gorvitz*, para. 53; AAA 4436/02 *Tishim HaKadurim – Members Club Restaurant v. Haifa Municipality*, IsrSC 58(3) 782, 812-813 (2004)).

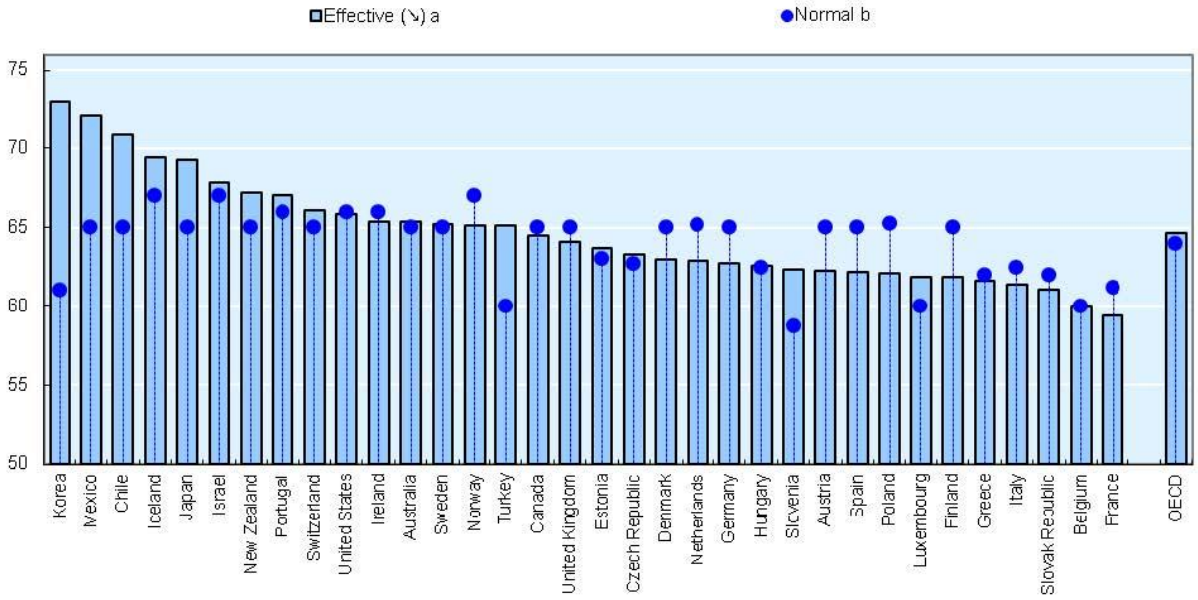
In my opinion, the choice of the compulsory retirement because of age model is not "clearly" disproportionate. This model was chosen after the Netanyahu Commission had deliberated and found that it is inappropriate, for the time being, to abolish mandatory retirement. A similar conclusion was also reached by earlier public commissions that had similarly considered the issue of retirement age (the Nitzan Commission (1967); the Kister Commission (1975); the Vogel Commission (1994); see the reference thereto at p. 26 of the *Netanyahu Commission Report*). Contrary to the Petitioners' claim, the Netanyahu Commission considered factors for and against mandatory retirement. This clearly emerges from the recommendations of the Commission in which those factors were detailed (see, respectively: pp. 6-8 and pp. 31-32 of the *Netanyahu Commission Report*). The legislature's choice of the compulsory retirement because of age model reflects was an informed choice among different possibilities. In view of all the advantages and disadvantages described above, that choice does not depart from the broad margin of proportionality given to the legislature under the circumstances (see also: *Weinberger*, para. 14 of the opinion of Judge O. Verbner). Under these circumstances, even if some of the usual considerations justifying mandatory retirement, and their relative weight can be questioned, that does not suffice in order to find that the Law is disproportionate.

52. This conclusion is supported by various data from which it emerges that the mandatory retirement age model does not actually cause substantial harm to the group of elderly workers in Israel. First, the situation of Israel is better relative to that of the countries in the OECD: the rates of employment of elderly workers in Israel are higher, the demographic make-up of Israel is younger, and the retirement age is the highest in the OECD (Ronnie Hacohen, "Employment of the Elderly in Israel: Review of the State of People over the Age of 45 in the Israeli Labour Market," The Israeli Employment Service – Policy Research Division, Deputy Director of Planning (February 2014); see also: *The Bank of Israel Report, 2015*, p. 45 http://www.boi.org.il/he/NewsAndPublications/RegularPublications/DocLib3/BankIsra

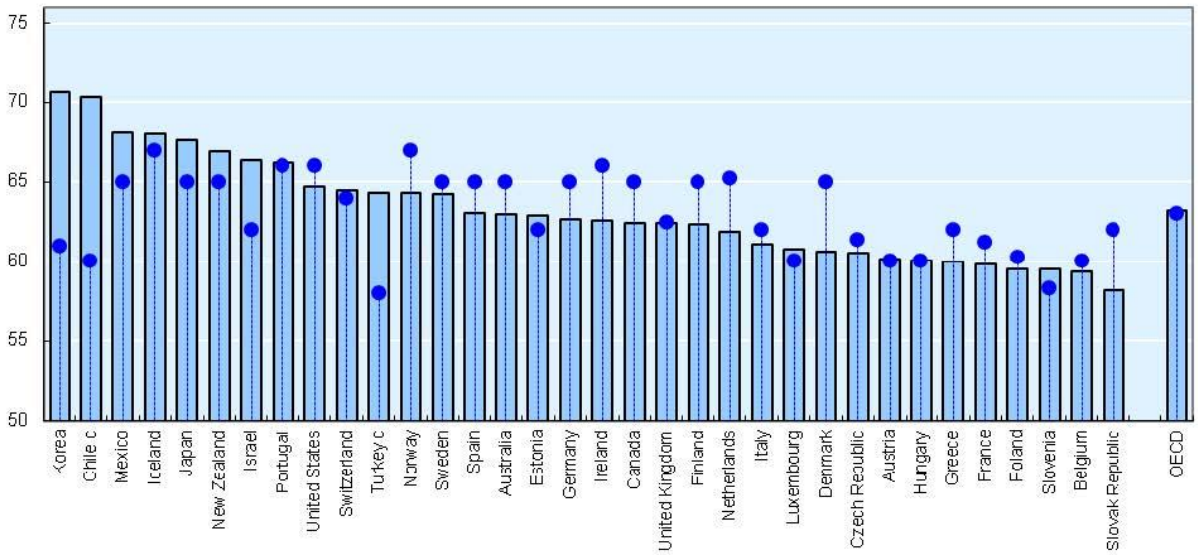
elAnnualReport/%D7%93%D7%95%D7%97%20%D7%91%D7%A0%D7%A7%20%D7%99%D7%A9%D7%A8%D7%90%D7%9C%202015/chap-2-.pdf).

Moreover, according to OECD research, the average *effective* retirement age in Israel between 2009 and 2014 was among the highest of the countries examined in the research, including countries like the United States and Australia, where mandatory retirement because of age has been *abolished* by legislation (OECD, Ageing and Employment Policies – Statistics On Average Effective Age of Retirement, http://www.oecd.org/els/emp/ageingandemploymentpolicies-statisticsonaverageeffectiveageofretirement.htm):

MEN



WOMEN



53. The mandatory retirement age model also exists in various different countries and is not exceptional in that respect. Although the possibility of requiring a person to retire because of his age is not usually prescribed by general legislation, it very common in the employment market in various contractual frameworks or in specific legislation (Shenkar, p. 25). In addition, in 2000, the European Union adopted a directive intended to lay down a general framework for employment equality (Council Directive 2000/78/EC of 27 November 2000). *Inter alia*, the directive prohibits

discrimination against a worker because of his age (Articles 1 and 2), while establishing specific exceptions to the prohibition of age discrimination (Articles 6(1) and 6(2)):

> **Justification of differences of treatment on grounds of age**
>
> 1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
>
> Such differences of treatment may include, among others:
>
> (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
>
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
>
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
>
> 2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Based on the principles of the said directive, the European Court of Justice has on several occasions held that a mandatory retirement age can be fixed if it is

accompanied by a legitimate aim, and if the means taken to achieve it are reasonable and proportionate. Thus, the European Court has held in a series of judgments on the subject, that legitimate aims in this connection include, for example, the access of new workers to the labor market; planning manpower in the workplace; avoiding disputes with employees with regard to their competence for work and the "negative" personal labelling of employees who have been forced to retire due to individual incapacity; and the sharing of opinions and ideas between senior and new employees, especially in institutes of higher education (see, for example: the judgments in *Palacios de la Villa Georgiev; Torsten Hörnfeldt; Fuchs*). As regards the proportionality of mandatory retirement, the European Court of Justice held in one of the cases that it is generally a practice that does not infringe rights more than necessary. In this context the Court stated that the compulsory retirement because of age model is common in Europe, and can serve to balance political, economic, social, demographic and budgetary considerations (*Torsten Hörnfeldt*, para. 28; *Rosenbladt*, para. 44).

54. Accordingly, in various European countries there is in no legal bar to the fixing of a mandatory retirement age. In *Germany*, for example, the majority of State employees are required to retire between the ages of 65 and 67, while it is possible to extend their service beyond that, if consistent with the needs of the employer, and the employee agrees (*Beamtenstatusgesetz Länder* [Civil Servant Status Act for the Civil Servants of the Federate States], promulgated June 17, 2008 *Bundesgesetzblatt* [BGBl] BGBl I 2008, 1010). Similarly, a mandatory retirement age can be prescribed in an agreement between the employee and the employer, provided that the retirement age fixed is no less than the customary retirement age, and that there is justification for it, such as management of the manpower in the workplace (*Sozialgesetzbuch VI: Gesetzliche Rentenversicherung* [SGB VI] [Social Act VI] *19.Februar 2002 Bundesgesetzblatt* [BGBl.]). Similar law also applies in *France* (*Code du travail* [French Labour Code] *Art. L1237-5-1 ;Loi n° 84-834 du 13 Septembre 1984 relative à la limite d'âge dans la fonction publique et le secteur public* [law n. 84-834 concerning the age limit of civil servants] available at legifrance.fr); in *Austria* (*Beamten-Dienstrechtsgesetz 1979* [BDG] [Civil Servant Act 1979] *Bundesgesetzblatt* [BGBl.] Nr. 333/1979 §13-14); *Norway* (Act Relating to Working Environment, Working Hours and Employment Protection, § 13-15); *Sweden* (*Developing Anti-Discrimination Law in Europe* (European Commision, 2013), p. 36, http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2013_en.pdf); and *Switzerland* (*Personal- und Besoldungsgesetz des Kantons Schwyz* [PG] [Employee and Remuneration Act of Canton Schwyz] June 26, 1991).

It should be noted that there have been changes over the last year in some European countries. In *Denmark*, the mandatory retirement age in the public sector was

abolished, but private employers were able to require employees to retire because of age (*Ageing and Employment Policies: Denmark 2015, Working Better with Age* (OECD Publishing), p. 21-22). As of January 2016, a mandatory retirement age has also been abolished in the private sector. In *Ireland*, a December 2015 enactment has limited the ability to fix a mandatory retirement age (Employment Equality Act 1998; Equality (Miscellaneous Provisions) Act 2015).

A mandatory retirement age also applies in countries of Asia like *Japan* and *South Korea* (*A Comparative Review of International Approaches to Mandatory Retirement* (Research Report No. 674 (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214445/rrep674.pdf (hereinafter: *Comparative Review of Mandatory Retirement*); http://www.agediscrimination.info/international/Pages/southkorea.aspx; see also the comprehensive comparative review in the opinion of Justice N. Hendel in *Zozal*).

55. On the other hand, there are countries where the fixing of a mandatory retirement age has been prohibited. In the United States, for example, compulsory retirement because of age was abolished in by law in 1986 (Age Discrimination in Employment Act, 29 USC 621-34 (1967) [ADEA]). At a later stage, it also became prohibited to require a person to retire because of his age in Britain, Canada, Australia and New Zealand (*Comparative Review of Mandatory Retirement*, pp. 2-3; Shenkar, pp. 24-25). Nevertheless, it should be emphasised that when the constitutionality of mandatory retirement has been considered by the American and Canadian courts, the courts there refused to intervene (see, for example: *McKinney*; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)). The change in retirement policy has been made, as aforesaid, in *legislation.* Similarly, in those countries, too, there are exceptions to the prohibition against requiring a person to retire because of his age, and some of the exceptions are quite broad. Thus, for example, in *Britain*, although the uniform mandatory retirement age was abolished in 2011, an employer can still bring the employment of a worker to an end because of his age on the basis of legitimate social factors, such as intergenerational justice (giving employment possibilities to new workers), and the desire to avoid infringing the dignity of an employee against the background of arguments concerning his competence. This is all provided that the employee's obligation to retire because of his age is proportionate (Equality Act 2010 (UK), c 15, §13(1)-(2); Malcolm Sargeant and Susan Bison-Rapp, "Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States," 44 *Loy. U. Chi. L.J*. 717 (2013); *Seldon*). In contrast, in the *United States* the exception is relatively *narrow*: it is permissible to compel an employee to retire only if the same is reasonably obliged by the nature of the job (Anthony Sheppard, „Mandatory Retirement: Termination at 65 is Ended, but

Exceptions Linger On," 41 *U.B.C. L. Rev*. 139, 176-177 (2008); Anja Wiesbrock, "Mandatory Retirement in the EU and the US: The Scope of Protection Against Age Discrimination in Employment," 29 *Int'l Comp. Lab. L. & Ind. Rel*. 305 (2013)). Similarly, in *Australia* and *New Zealand* an employer can require an employee to retire if he can no longer meet the basic requirements of the job (Rachael Patterson, "The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern," 3 *Elder Law Review* 1 (2004)). In *Canada*, there are different arrangements in each province (Shenkar, pp. 31-32). In some, the law is similar to that in the United States, while in others, the exception is broader. Thus, for example, one of the provinces permits fixing a mandatory retirement age, provided that it involves a bona fide requirement that is part of a retirement or pension arrangement. According to a judgment of the Canadian Supreme Court on this issue, it is not necessary to show that mandatory retirement is an *essential* part of the pension arrangement (*New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan*, [2008] 2 S.C.R).

56. A comparative examination of the retirement issue shows that the retirement model chosen by the legislature is not exceptional. In different countries there are a range of possibilities for the regulation of retirement generally, and pension age in particular. The various factors for and against mandatory retirement age are frequently debated in those countries, and the legal, social and economic controversy is not yet over. Even when significant changes to retirement arrangements have been made in other countries, those changes have, as noted, been made in *legislation* and not by judicial ruling. It would appear that this is also the course that should be taken in the instant case.

57. In addition, even were we of the opinion that the mandatory retirement age is improper in its present format, it would be possible to conceive of various ways to rectify it. Thus, for example, it might be desirable, or *even proper*, to consider a further increase in the age of mandatory retirement instead of abolishing it altogether. A model of gradual retirement can also be conceived of, like the model that exists in the Technion, together with abolishing mandatory the retirement age in certain sectors, or limiting the permission to fix a mandatory retirement age to cases in which it constitutes part of an overall pension arrangement. Any solution should take into account a substantial number of factors: the needs of employees, the needs of employers; the effects on the extent of elderly employment, and more. The link between the pension qualifying age and the mandatory retirement age cannot be overlooked either. Increasing mandatory the retirement age – or abolishing it altogether – might, in the long term, lead to an increase in the qualifying age for the receipt of pension benefits (see, for example, the change that has occurred in the United States,

where the qualifying age to receive social security benefits is due to rise from 65 in 2000, to 67 in 2022; Shenkar, opposite fn. 13).

A "polycentric" problem is therefore involved, in which, as a rule, the Court rarely intervenes (see and compare: HCJ 3677/09 *Israel Insurance Adjusters Association v. Supervisor of Insurance and the Capital Market* (December 7, 2010)). This does not relieve the Court of its duty to analyze the Retirement Age Law in light of the constitutional criteria. Nevertheless, it cannot be ignored that there is a difficulty involved in making a material change to retirement age in one fell swoop. A change of such type necessitates scrupulous preparatory work, the analysis of various factors, hearing opinions from factors in the economy, and anticipating possible broad repercussions. It should be borne in mind that the legislature itself initiated changes to retirement age after its feasibility had been studied in depth by various public commissions.

58. Added to this is the fact that a collective retirement model, which lays down a predetermined, uniform retirement age, has been customary in Israel for many years. Replacing that model with *another* one, such as a functional retirement model that takes into account the individual particulars of every employee, might substantially affect the employment market. This is especially so if the change were made immediately, further to a judicial decision. In order to illustrate this, I would note that Bank of Israel research has shown that raising the mandatory retirement age and the qualifying age have led to immediate changes in the economy. While raising the retirement age has led to a significant increase in the number of persons employed at older ages, and to an increase in the income of high earners, it has reduced the income of those finding it difficult to integrate in the labor market at an older age (low-income employees and individuals not working), *inter alia* because they have been unable to plan for it in advance. The recommendation of those conducting the research was, therefore, that if another increase in retirement age is decided upon, it would be appropriate to introduce it *gradually* (*Bank of Israel Report 2014*, pp. 129-134, http://www.boi.org.il/he/NewsAndPublications/RegularPublications/Pages/DochBankIsrael2014.aspx; see also: Bank of Israel Report 2010, pp. 171-175, http://www.boi.org.il/he/NewsAndPublications/RegularPublications/Doch2010/p5.pdf).
Having regard to all the aforegoing reasons, it would be inappropriate to find that the legislature exceeded the margin of proportionality granted it.

59. Although not strictly necessary, I would add that the interpretation of section 4 of the Retirement Age Law also affects its constitutionality. As noted, reading sections 4 and 10 of the Retirement Age Law together led the National Labour Court to conclude in the *Weinberger* case that the Retirement Age Law grants an employee the

right to ask his employer to permit him to continue working even after he has reached mandatory retirement age, and that right the employer is required to review the request on its merits and on an individual basis. The Labour Court further held that the same does *not* mean that the employer must accede to the employee's request, but it must consider it seriously, having regard to all the relevant circumstances. This approach of the Labour Court, in my opinion, gives expression to the need for flexibility in retirement and "softens" the collective model of compulsory retirement, without abolishing it completely. It adds to the balance between the needs of different "players" in the labor market, and is consistent with the retirement mechanism existing in the civil service, which makes it possible to extend the service of an employee beyond the retirement age in certain cases (section 18(a) of the Civil Service (Benefits) Law; the Civil Service (Benefits) Regulations; the provisions of sec. 82.54 of the Civil Service Regulations; Commissioner's Directive No. 8.3 of December 21, 2014; see also: The State Service Commission, Headquarters for Implementation of the Reform, Knowledge Management and Theory Department, *Extension of Service Beyond Retirement Age Policy Document* (December 2014), http://www.csc.gov.il/Units/Reform/RetirementDoc/index.html#1/z). In any event, the State itself has not objected to the determination that an employer must give individual consideration to a person's continued employment if he has so requested, subject to the same not obliging the employer to grant the request.

60. The Labor Court further held that in considering an employee's request to continue working, the employer must weigh a broad range of factors concerning the employee's personal circumstances, systemic factors of the workplace, and the broader effects on other workers. The Labor Court stated that it was not seeking to lay down a closed list of factors, but that, in general, it would be proper to consider the number of years the employee has worked in the workplace; the extent of his entitlement to pension, and his financial and family situation; the employee's contribution to the workplace; the nature of his job, and his success in performing it. In addition, the Labor Court stated that it would be proper to consider "whether there is objective concern that his competence has declined with age (giving an opportunity for an individual competence test insofar as necessary)"; "whether there is a possibility of transferring him to another job etc."; and also, "whether there is a possibility of *continuing to employ the worker in another way*, like reducing his position to part time, or making him an independent consultant" (*ibid.*, paras. 66-67). As for myself, I see no reason to detail the considerations because we are not concerned with a request that the employer must accept. In any event, presumably the list of factors will evolve or change from case to case (see also: UA (Tel Aviv District) 9172/09 *Cohen v. Bank Leumi Ltd.* (August 26, 2014); and see: Tamar Golan, “My Duty to Retire? Your Duty to Consider It,” *The Advocate* (January 2013) (Hebrew); Avinoam Cohen, "Work

Without Welfare: Further to LabA (National) 209/10 *Libi Weinberger v. Bar Ilan University*," 5 *Mivzakei He'arot Pesika* – (*Hamishpat Online*) 7-13 (April 2013) (Hebrew)). Ultimately, it suffices that the mandatory retirement age is not legally obligatory,and that the employer must give consideration to the worker's continued employment after retirement age in order to limit the harm to the employee.

As noted, the Labor Court went on to state that it might be appropriate to interpret section 4 of the Retirement Age Law as making it possible to oblige an employee to retire because of his age only when it is carried out in the scope of an "overall pension arrangement". The Labor Court refrained from defining that concept, but did intimate that arrangements that generally exist in unionized workplaces are involved. The Labour Cort did not rule on the question because, in the case before it, the appellant's retirement was in the framework of a pension arrangement of that type. Again, in the petition herein, I do not believe that we must rule on the issue. This interpretation does not, in my opinion, decide whether the Law is constitutional, and the parties have in any event not made any arguments in that regard. I would note that in this case, as well, the Petitioners' employment is regulated by a collective agreement, which entitles employees to a pension upon retirement.

Consequently, having regard to all the reasons detailed above, I believe that the Law also passes the third test of proportionality.

Conclusion

61. I have reached the conclusion that there are no grunds for our intervention in section 4 of the Retirement Age Law. Since the Retirement Age Law was enacted, the retirement age has gradually risen in accordance with the mechanisms prescribed in the Law. Even after full implementation of the Law, the public debate on this issue has not ended. From time to time, the Knesset addresses the issue, and only recently a private member's bill was resubmitted on the matter of the mandatory retirement age. While the bill proposes prohibiting the fixing of a mandatory retirement age, it does permit the employer to require the employee to retire on reaching retirement age if there is functional unsuitability in his case (Retirement Age (Amendment – Abolition of Mandatory Retirement Age) Bill, 5776-2016). There are other debates on the qualifying age of women (Tali Heruti-Sover, "Galon and Yachimovich Propose: Abolition of Mandatory Retirement and Variable Qualifying Age for Pension," *The Marker* (August 27, 2015); see also: The Retirement Age for Women (Legislative Amendments) Bill, 5726-2016). Moreover, as we were informed in the State's notice of February 9, 2015, the issue of retirement age will be referred to the executive branch in accordance with the Government Work Regulations for it to consider whether it is

appropriate to review it, including by setting up a commission. And now, it has also recently been reported that the Minister of Finance has appointed a commission to consider increasing the retirement age for women, which will be responsible, *inter alia*, for considering the possibilities of raising retirement age and encouraging employment of the elderly (http://mof.gov.il/Releases/Pages/presha.aspx). The fact that the issue of retirement age is still on the public agenda reinforces the conclusion that the appropriate place for considering further changes thereto is legislature. Although I have found that the Law does pass constitutional review, it would appear to me that the Respondents did well in deciding to refer this issue back to the Government.

62. Finally, the petition should be dismissed. No order will be made for costs.

Justice Y. Danziger

I concur.

Deputy President E. Rubinstein

1. I concur in the comprehensive opinion of my colleague the President. I would like to add somewhat.

2. In HCJ 4487/06 *Kelner v.National Labour Court* (2007) I had the opportunity to say (para. 1 of my opinion), as is also appropriate here:

> This case raises a question that, apart from being legal, is also a social, moral and humane question that concerns Israel, like other countries, in an age in which, thank God, life expectancy has become longer, as have the abilities of people to work until an advanced tage. On the one hand, there are those who want to enable people to continue working even after the statutory retirement age, on the basis of their functional ability… On the other hand, there are those who regard longer life expectancy as an opportunity for men and women pleasantly to enjoy their free time after retirement as they wish. The Israeli legislature, in enacting the Retirement Age Law, 5764-2004, did not choose the American way, in which there is no obligatory retirement age and the criterion is functional,

and it instead chose a method of fixing an age, older than was customary in the past, for mandatory retirement.

Indeed, the subject of retirement age is complex and dynamic. On the one hand, the constant rise in life expectancy and quality of life supports increasing retirement age over the years, and the Petitioners before us are a living example of that. From the economic aspect of the individual as well, increased life expectancy clearly necessitates greater pension contributions, which might be achievable, *inter alia*, by working for more years and only utilising the pension payments at a later age. See, for example, in this regard, the *Bank of Israel Report for 2010* (which was appended to the State's reply of April 4, 2013 – R/4), from which it appears that the ratio between people aged 25 to 64 and those aged 65 or more in Israel was 4.6:1 in 2005; the forecast for 2015 is 4.2:1; and the forecast for 2030 is 3.4:1 (*Bank of Israel Report for 2010*, p. 175 (2011)). Increased life expectancy is, of course, a blessing in itself. that the statement "sixty for mature age" in *Ethics of the Fathers* (5:21) no longer represents typical old age, nor even do older ages, and we are certainly not dealing with the age at which the Levites stopped serving in the Tabernacle (the age of 50 – Numbers 4:3); see also the determination of 60 years of age in the Torah with regard to the assessment of value (Leviticus 23:3); see also Rabbi Shlomo Yosef Zevin, *L'Ohr Hahalachah,* the chapter entitled "Old Age", p. 176 *et seq*.; see also the comprehensive review by Judge O. Verbner in LabA (National) 209/10 *Weinberger v.- Bar Ilan University* (2012), para. 13, which is partly based on the review by Rabbi Dr Yaron Unger, Adv. and Prof. Yuval Sinai, "Compulsory Retirement Because of Age in Jewish Law," The Centre for Practical Jewish Law (CPJL), 2012 (Hebrew); and see the many authorities cited there. Their review, based on Jewish sources, speaks in praise of the elderly and the duty to exalt their dignity. It further speaks in praise of work, and as regards the Levites, for whom a mandatory retirement age (appropriate to life expectancy then) was fixed as aforesaid, the Jewish law authorities have qualified the rule so that it is not absolute (Maimonides, *Laws concerning Temple Vessels* 3:8). See also Gordon Ashton, Caroline Bielanska, *Elderly People and the Law* (2nd ed., 2014), pp. 120-121, as regards equal treatment of pensioners and p. 123 with regard to part-time employment during retirement.

3. In my opinion, insofar as the ratio of the elderly as aforesaid continues to decline, and from the data it appears that the trend is growing, an increase in the retirement age will be a necessity. This derives from the fact that elderly people who are still full of vigour will want to continue working in view of life expectancy and also, and perhaps no less, because of the State's limited ability – which is more and more worrying – to provide real social security to an increasing number of people who are not included in the labor market. This is also consistent with section 1 of the

Retirement Age Law, 5764-2004 (hereinafter: the Law), which states that "the purpose of this Law is to establish standard rules with regard to retirement age, *including raising it gradually* …" (emphasis added – ER).

In *Kelner*, I added (para. 10):

> Indeed, the world of today sanctifies youth, unlike the ancient world that perceived old age as as a source of experience and wisdom. The media feeds the public success stories of young people, who do of course bring with them charm, freshness and energy; but the the elderly have not reached the end of the road, not only because of longer life expectancy but also because of the ability and need to utilize the knowlege and experience that they have acquired. In the world beyond the "regular" work frameworks there are those who continue to contribute to a great age – in politics, science, the humanities, and more. Take a close look at the Jewish ethos in which old age is perceived as corresponding to wisdom – "with the ancient is wisdom; and in length of days understanding'" (Job 12:12). In the Biblical world, the old were the leaders and in fact, also the judges: "your elders and judges shall go out" (Deuteronomy 21:2). Of the verse "stand up in the presence of the elderly, and show respect for the aged" (Leviticus 19:32), the Sages said (*Babylonian Talmud, Kidushin* 32:2) "not old but wise, as it is said (Numbers 11:16) 'Gather before me seventy men who are recognized as elders and leaders of Israel' (ultimately the *Sanhedrin* or Great Court – ER). Rabbi Yossi the Galilean says, not an old man but one who has acquired wisdom, as it is said (according to wisdom, the wise wise person in the Book of Proverbs, for example – ER) "the Lord possessed me in the beginning of his way' (Proverbs 8:22)". See also the entry "wise" in the *Talmudic Encyclopaedia*, vol. 15, 51 (Hebrew). In the Mishna, old age is 60 ("sixty for mature age" (*Ethics of the Fathers* 8:21), and at the time this was based on the general life expectancy. Nevertheless, there has been increasing awareness of "do not cast me off in the time of old age; forsake me not when my strength is spent" (Psalms 71:9).

4. In view of all this, I believe that it would be best for the relevant authorities to review the concrete retirement age every decade, at most, and whether the changing circumstances are such as to require increasing it. This is connected not only with longer life expectancy, but also social security. I shall refer to this again below. In this respect, leadership must at all times look to the future, beyond the period of its own

office. Let me cite an example: in the second half of the 1980s, when I was Cabinet Secretary in the National Unity Government, after in-depth discussions with pension experts and actuaries in the Directors General Forum of the Government Ministries, it was suggested to the relevant ministers that they consider the matter of the pension funds, on the assumption that a crisis concerning lack of coverage would erupt in or about the year 2000. The response was personal. Action thereafter wnet on for very many years in various commissions and government decisions.

5. On the other hand, I believe that the factor of intergenerational fairness, namely the effect of postponing retirement together with the integration of a young labor force in the economy, has been given very significant weight in determining retirement age. Indeed, as the State has noted, this factor might carry less weight at the macro level. That is to say that there are no data indicating that in a satisfactory economy that is growing, raising retirement age will necessarily impair the ability of young people to integrate in the labor market (*Report of the Public Commission on Retirement Age*, p. 7 (5760-2000)). However it does have effects at the micro level, and the academic institutions from which the Petitioners come are an example. Clearly, given a limited budget, as the age of the lecturers and researchers in the Israeli academic institutions increases, the ability of young lecturers and researchers to integrate in those places, especially as tenured lecturers and researchers, the much longed-for tenured posts in those institutions, will constantly diminish. Hence, although there can be no question that the Law does infringe a certain element of the Petitioners' right of equality, it is done for a proper purpose, which is to increase the ability of the younger generation to integrate in the employment market. See the statement by President Adler in an earlier case:

> I would add that in my opinion, fixing a chronological retirement age does indeed infringe constitutional rights like freedom of occupation and human dignity but it is done for a proper purpose. And what is that proper purpose? Providing a fair opportunity to new participants in the labor market. As such there is a proper balance between the constitutional rights of senior employees and the rights of younger workers from an overall societal point of view (LabA (National) 107/05 *Kelner v. Commissioner of the Civil Service*, para. 7 (2006); see also the opinion of President Adler in LabA (National) 1313/04 *Asa - El v. Al Israel Airlines Ltd*, (2006)).

6. And finally – with genuine sympathy for the Petitioners and the worthy self-fulfilment for which they strive – it should be borne in mind that the Petitioners are not merely seeking an increase in the mandatory retirement age, but they are asking that we

adjudicate that the *very* determination of a mandatory retirement age is unconstitutional and, in fact, to require the State to prescribe an alternative model to that existing in the Law, for example a model of functional retirement. We must make our ruling having regard to: the fact that the course that the Israeli legislature has chosen in this connection is no different from that of many legal systems around the world; the considerable disadvantages involved in the prevailing systems, *inter alia*, in the United States and Britain; the proper purpose underlying the Law, as I mentioned above; and the fact that it is difficult to say that the Law's infringement of the Petitioners' right to equality is so disproportionate as to necessitate the exceptional intervention of this Court, all as stated in the President's opinion. Having regard for all that, the obstacle that the Petitioners had to overcome in order to prove their case was significant, and I do not believe that they were able to do so. However, common sense seeks a balance, and among other things, it is proper and even essential to increase the retirement age from time to time, and also to consider the nature and quality of pension arrangements, the future of which appears to be cause for concern.

7. On reading the opinion of Justice Hendel, I would add that he rightly considered the feelings of someone who has retired from work and feels detached and lacking in dignity. To a certain extent, it can be compared to the feelings of someone who is unemployed, although a retiree knows that he has reached the age at which many good people stop actively working, while as regards the unemployed person who is in mid-life, his lack of work not only affronts his dignity and self-esteem but it also, of course, affects his livelihood with all the implications thereof. There is no need to expound on the importance of work to many people – "When good things increase, those who consume them increase" (*Ecclesiastes* 5:11), and in the words of the poet H.N. Bialik – "Whom should we thank, whom should we bless? Labor and work! ". The various plans in the different sectors of the population in respect of old age and leisure, the numerous frameworks for that in the world of culture, Torah and academia, the establishment of a government ministry for the affairs of retirees (now the Ministry of Social Equality), all reflect awareness that longer life expectancy necessitates arrangements for an era in which many people live longer and are also in satisfactory physical and mental condition. Programs must be arranged for them, together with employment for those desirous, either for financial reasons or to occupy their leisure time. Incidentally, in the academic world, after retirement many continue to teach more or less voluntarily and in consideration receive a certain work environment which, perhaps, has no real financial remuneration, but does involve professional and human continuity, and there are voluntary frameworks in other spheres as well. Therefore, it is very important to uphold human dignity in its simple sense: "The School of Rabbi Ishmael taught: 'And you shall choose life' (*Deuteronomy* 30:19) – this means a skill," i.e., a profession (*Jerusalem Talmud, Peah* 1:1); "'so that the Lord your God will bless

you' (*Deuteronomy* 14:29) – you might think that this means even if you sit idle, therefore Scripture states 'in all the work of your hands that you will do' (*ibid.*) – if a person works, he is blessed, and if not, he is not blessed" (*Tanna Devei Eliyahu*, 12; *Yalkut Shimoni* on Psalm 23; cited in H.N. Bialik and Y.H. Ravnitzky, *Sefer HaAgadah* 1903); "Rav Sheshet said, work is great, because it warms the person who does it" (*Babylonian Talmud*, *Gittin* 67b). All of these, ultimately, are human dignity, and see the entry "Human dignity" in the *Talmudic Encyclopedia* 26 (1907) (Hebrew); see also N. Rakover, *Human Dignity is Great* (1998) 137. Work therefore leads to life and blessing, and giving expression to it in human life, insofar as it is possible, can only be good. This is true of work, and it is also true of rewarding activity during retirement.

8. For the reasons stated above, as aforesaid, I concur in the opinion of my colleague the President. However, I must propose that the matter be reviewed periodically with a view to increasing retirement age in a fair and balanced way. I was therefore pleased to read recently that the Government decided, in June 2015, to charge government agencies with formulating a trial scheme in the scope of the Civil Service for an employment track specifically for senior citizens after retirement age (the review by Mr Kobi Bleich, Senior Deputy Director General for Administration and Projects in the Ministry of Social Equality, *State Service Commission Information Booklet*, issue 39 (April 2016)). That list mentions that average life expectancy in Israel is currently 80 for men and 84 for women, and see also the survey there by Tzachi Kelner, the Director of the Israeli Retirement Centre. On March 28, 2016 the Minister of Finance also appointed a commission to review retirement age, which was charged with "studying and formulating recommendations in respect of the age at which a woman born in or after 1955 is entitled to retire because of her age… *Moreover, the commission was charged with reviewing the implementation of a mechanism for raising retirement age in consequence of longer life expectancy, and also reviewing the application of supportive and supplementary tools for increasing retirement age and encouraging employment of the elderly*" (from an approach to the public by the Commission for the Review of Retirement Age, *Calcalist*, Nissan 9, 5776 (April 17, 2016), emphasis added).

Justice U. Vogelman

I concur in the comprehensive opinion of my colleague President M. Naor and with the comments of my colleague Deputy President E. Rubinstein.

In my view, as well, the provision of the statute that is at the center of the current debate passes constitutional review, based on the analysis detailed in the opinion of President M. Naor. I would emphasize that, in my opinion, the ruling that the employer must give consideration to the worker's continued employment after retirement age – in order to limit the harm to the employee – is an element of considerable weight when examining the balances in the framework of the third subsidiary test of proportionality.

As my colleagues make clear, sealing the legal debate at the present point in time does not put an end to the public debate, or to continued deliberation by the executive branch. In that context, the latter will also consider whether the time is ripe to review the issue.

Subject to these remarks, I concur, as stated, in the opinion of President M. Naor.

Justice D. Barak-Erez

1. I concur with my colleague President M. Naor that the petition should be dismissed. The statutory arrangement that makes it possible to require an employee to retire on attaining the age defined as retirement age provokes dilemmas and questions that will presumably remain on the public agenda. That is only proper. However, it cannot be said that it infringes rights so disproportionately as to justify the intervention of this Court in the scope of a constitutional review of a statute.

The Point of Departure: A Reasoned Infringement of Equality

2. Let me first say that, like the President, I also believe that an arrangement that prescribes that a person can be compelled to retire merely because he has reached a particular age does involve an infringement of equality. A distinction based on mere age is one that is founded on a generalization that reflects a social perception in respect of older people who have passed a certain age, as opposed to a distinction based on an evaluation of the relevant individual's abilities. In that respect, I also believe that the Petitioners are right that the determination of a mandatory retirement age is not problem free. However, ultimately, I believe that this infringement of equality is, in the instant case, based on good reasons and passes the tests of constitutional review.

3. In fact, the State presented three central reasons to justify the present arrangement – the fact that the determination of a mandatory retirement age is in the interest of employees generally; the contribution of the arrangement as regards "intergenerational fairness"; and its contribution to the planning and renewal of the workplace as regards the employer's interests. All these are reasons with fairness and logic on their side, that have also been recognized as justifying retirement arrangements in the precedents of courts elsewhere in the world, as the President showed in her opinion. Moreover, they are not based on general assumptions with regard to the incapacity of elderly people, that is to say that they are not tainted by ageism. Nevertheless, I would emphasise that I personally believe that the most important of the said reasons, which for me tips the scales, is the argument concerning the contribution of retirement age to the rights of retirees themselves. Although the reasons of "intergenerational fairness" and the ability to plan the workplace are important, these are interests, the protection of which when they infringe the right of equality, raises questions that I do not believe arise in respect to the argument concerning protecting the rights of workers themselves. This is therefore not a case of infringing rights merely for the promotion of important public interests, but it is a case in which there is a clash of two clear aspects of the protection of the rights of elderly workers, and even of different groups of elderly workers.

4. Several advantages of the fixing of a mandatory retirement age can be indicated from the perspective of the rights of workers themselves. First, as the State rightly argued, the mandatory retirement age creates the effect of a "protective shelter" over the heads of elderly employees, in the sense that it creates a presumption against terminating their employment before they reach retirement age, especially as they approach that age. Second, the existence of a retirement age "on the horizon" substantially weakens the incentive of employers to initiate general competence tests for employees, which might be significantly strengthened in circumstances in which the decision to terminate employment necessitates an indication of functional difficulty or handicap. Indeed, even now there are such tests in certain places, but they are not the rule. It is important to note that such tests, despite perhaps serving legitimate interests of the employer, might cast a shadow of unease over the workplace, and in any event "color" any retirement decision with incompetence. Despite the Petitioners' arguments, currently an employee who retires from work does so without his leaving work representing any negative judgment about his ability to continue working. That is essentially different from retirement based on a determination – difficult and painful for the relevant employee, especially having regard to the fact that it is given public expression – that there is a decline in his function and competence. Third, and no less important, without acknowledging the legitimacy of mandatory retirement age, the willingness to grant tenure to employees, or even to reach partial job security

arrangements will be weakened to a great extent. The ability to acquire tenure is of great importance to many employees since it enables them to plan in advance for the long-term, and contributes to their emotional welfare. The abolition of mandatory the retirement age might, therefore, affect job security, which is also an interest that is dear to many workers.

The Limits of Judicial Review in Areas that Necessitate Complex Legislative Arrangement

5. The Petitioners argued with great self-assurance that the alternative based on the employee's functional testing is preferable to the determination of a standard retirement age. However, as explained above, there are also substantial reasons that weigh against this. The question of which is the preferable retirement arrangement – that based on a retirement age norm or one based on the employee's functional testing – is one that remains the subject of controversy, and there are arguments both ways. As for myself, I believe that the advantages of the arrangement that sets a mandatory retirement age are preferable for the reasons that have been detailed, as I shall explain below. However, it is important first to say that we do not need to decide which is the desirable arrangement. That question is first and foremost a matter for the legislature, which should deliberate and rule on policy questions that are characterized by being "polycentric", as the State has rightly said (see: HCJ 7721/96 *Israel Insurance Adjusters Association v. Supervisor of Insurance*, IsrSC 55 (3) 625, 645 (2001). For the source of that expression, see: Lon L. Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev*. 353, 394-404 (1978)). The question that has been put to us is one of the "second order" – whether prevailing legislative policy involves a disproportionate infringement of rights to an extent that necessitates judicial intervention. In my opinion, too, the answer to that question is in the negative.

6. As the President stated, the comparative examples that have been presented to us concerning the erosion of the mandatory retirement age regime in other countries in fact support the decision to dismiss the petition. From those examples, it appears that changes affecting the mandatory retirement age arrangement have mainly been made by legislation. In the major examples cited , the courts found it inappropriate to invalidate mandatory retirement age arrangements, and the changes in that area have been made through the legislative process, on the basis of social debate and persuasion in the public arena (in the United States, the claim of discrimination by virtue of the determination of retirement age was dismissed in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and the change in the legal situation was made in a 1986 legislative amendment to the Age Discrimination in Employment Act; in Canada, the argument that the determination of retirement age does not meet the constitutional

standard for the protection of rights in accordance with the Charter was dismissed in *McKinney v University of Guelph* [1990] 3 S.C.R. 229, and then a 2012 amendment to the Canadian Human Rights Act abolished the determination of retirement age as deviating from the prohibition of age discrimination; in Britain, the general recognition of mandatory retirement age, called the "default retirement age", was abolished in 2011 in the scope of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (hereinafter: the 2011 Regulations), which revised the general law on equality (the Equality Act 2010) so as also to apply to retirement arrangements.

7. Regulating the issue of retirement age in legislation makes it possible to do so comprehensively, with reference to associated economic and employment aspects as well, including insurance and pension factors. Thus, for example, in Britain in the scope of the 2011 Regulations, alongside the repeal of compulsory retirement because of age, it was established that employers can make different insurance arrangements for employees who have reached state pension age or have passed the age of 65, whichever is the higher. More generally, the relevant legislation in various different countries leaves room for exceptions, a matter that is also suitable for legislative arrangement and necessitates the laying of a broader foundation than has been laid before us.

8. To this it can one may add that – unlike what is implied by the petition – the abolition of mandatory retirement age does not necessarily also mean individual competency examination of every single employee in all workplaces. Even in countries where mandatory retirement age is not customary, examples can be found of the determination by various employers of arrangements that do include an element of mandatory retirement age, and it has also been held that there is no bar to doing so – so long as there is good justification (or in our constitutional language, when the same is done for proper purposes and insofar as the means prescribed are proportionate). Thus, for example in *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16, the British Supreme Court held that the determination of retirement arrangements for the partners of the particular law firm had been done for a proper purpose (in the circumstances, the proportionality of the arrangements that were prescribed was left for later litigation). Indeed, that judgment revolved around events that occurred at a time when the British legislation recognized mandatory retirement age, but the principles that were delineated in it are also regarded as having guiding value in the review of retirement arrangements made in the context of the new statutory position.

The Possible Effects of abolishing the Retirement Age on Employees' Rights in View of the Diversity of the Labor Market

9. As stated, the most persuasive reason, in my view, for finding that the arrangement involved in the petition passes the proportionality tests is the protection of workers themselves. In this connection, the Petitioners made two main arguments. First, they asserted that the abolition of the mandatory retirement age is not likely to affect those workers who, in any event, do not benefit from tenure, the proportion of whom in the current labour market is significant. Secondly, they argued that, in any event, even if the arrangement of mandatory retirement age is beneficial for some workers, it is not of benefit to the Petitioners, and the infringement of their rights for the sake of other workers cannot be justified. As for myself, I believe that neither part of this argument is persuasive, as explained below.

10. First, I believe that although the abolition of a statutory retirement age is first of all likely to have an effect of eroding existing tenure arrangements (and is therefore problematic for those who are employed where tenure arrangements are customary), there is basis to believe that it might also affect employees in workplaces where there are no tenure arrangements at all. The reason for this is the concern, which is of course regrettable, that various employers "will seek a reason" (whether or not they formally need to indicate such a reason) to terminate the employment of relatively old employees in circumstances where there is no foreseen date for the end of the contract of employment. In that sense, it appears that a mandatory retirement age helps workers who do not enjoy tenure. In this connection, it should also be noted that the overall interests of those workers have not been presented to us, which also makes it difficult to accept the argument that the harm to workers who do not enjoy tenure is limited.

11. Secondly, one cannot accept the assertion that the arrangement of mandatory retirement age has not been of benefit to the Petitioners. The question whether the arrangement of mandatory retirement age has been of benefit to the Petitioners themselves cannot be asked after the event ("*ex post*"), at the present point in time when they want to continue working, knowing their health and employment situation, after they have "enjoyed" the advantages of the arrangement. That question should be considered looking to the future ("*ex ante*") – would the Petitioners and others like them be rewarded by having entered a labor market in which there were tenure arrangements and in which they have not been subjected until retirement age to functional examinations that affect their employment stability (as opposed to evaluations that affect promotion)? The contribution of mandatory retirement age should, therefore, be examined when the parties to the discussion look at the question through "the veil of ignorance", when they do not know whether they have been successful employees, enjoying good health and sheltering under comfortable tenure arrangements. The question is what position could have been taken in view of the possibility that they were employed in less comfortable work, and perhaps their health

or performance was impaired to some extent before reaching the age at which they had to retire in accordance with the arrangements in their workplace. One way or the other, I believe that specifically in the context of general labour arrangements, it is right and proper to consider their contribution to workers with a broad view that goes beyond the bounds of the autonomous wishes of the specific employee.

12. In fact, opinions have been expressed in the legal literature that recognize the legitimacy of arrangements that include an element of mandatory retirement age when those involved are employees who receive "consideration" for that element in their terms of employment, in the form of tenure and adequate pension arrangements (see Sharon Rabin-Margalioth, "Age Discrimination in Israel: A Power Game in the Labor Market,"," 32 *Mishpatim* 131, 174 (2002) (hereinafter: Rabin-Margalioth). For an approach that supports the same but with more limitations, like making it possible for employees who are so desirous "to leave" the collective arrangement, see for example: Pnina Alon-Shenkar, "The World Belongs to the Youth: On Discrimination against Senior Workers and Mandatory Retirement," in *Liber Amicorum Dalia Dorner Book*81, 139-141 (Dorit Beinisch *et al*. (eds.) 2009) (Hebrew)). The aspect of collectively arranging retirement age was also emphasised in a case of the European Court of Justice (see: *Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05 [2007] ECR I-8531).

13. Under the circumstances, in my opinion there is also some importance to the fact that the Petitioners only challenged the mandatory retirement age arrangement after they reached retirement age, despite the fact that, *prima facie*, they could have put it to the test in the past, while they actually enjoyed the tenure arrangements (and it should be reiterated that the Law in its present form – the Retirement Age Law, 5754-2004 – was enacted several years before the Petitioners reached retirement age). In other words, the petition was brought by those who for years enjoyed strong tenure arrangements, and are now seeking to avoid paying the bill (see: Rabin-Margalioth, p. 159).

14. To all the foregoing we should add reference to the characteristics of the Petitioners' workplaces – institutes of higher education. Although this petition is being heard as a general one against the principle of mandatory retirement age, it cannot be ignored that the case of the Petitioners– university professors – also raises other difficulties concerning the importance of protecting the academic freedom of the faculty members of those institutions. The tenure arrangements existing at the universities protect not only the welfare of the academic faculty, but especially their freedom so that they can conduct research and fearlessly express their professional opinions. Abolishing retirement age in a way that might erode the tenure arrangements

would yield a less protected academic environment, and might also lead to the infringement of another important public interest. In fact, this point also illustrates that the determination of a mandatory retirement age involves other arrangements, such that its abolition by the Court might have repercussions that have not been made clear to us.

15. Also of importance is the fact that the Petitioners' workplaces are specifically public institutions, as opposed to workplaces that clearly belong to the private sector. In fact, in some of the countries were the mandatory retirement age has been abolished, the identity of the employer (as "public" or "private") is of significance as regards evaluating the justification for determining a mandatory retirement age, which is regarded as more acceptable in the public arena. It should be noted that the private member's bills that have been submitted on this subject (see for example: The Retirement Age (Amendment – Abolition of Mandatory Retirement Age) Bill, 5773-2003) include the possibility of authorizing the Minister of the Economy to exclude "certain spheres of work".

16. Hence, the Petitioners fall within the scope of the cases that are regarded as less "difficult" as regards the constitutional questions that the determination of a mandatory retirement age raises, even according to those who believe that mandatory retirement age arrangements do raise difficulties.

Other Aspects of the Legal and Public Debate Looking to the Future

17. A distinction should, of course, be drawn between the principle of mandatory retirement age and the aspects that concern its implementation. The petition did not address the question of the proper retirement age having regard for longer life expectancy. It might be right to consider increasing retirement age, as my colleague, Deputy President E. Rubinstein mentioned. However, such a decision would concern the implementation of the principle, as opposed to the principle itself, against which the petition is aimed. It is important to emphasize that the Petitioners did not focus on the specific retirement age prescribed in the Law, and that has therefore not been examined by us.

18. Furthermore, as the President has emphasized, recognizing the constitutionality of the retirement age does not relieve the employer of his obligation to consider the possibility of continuing the employment of a worker who seeks not to retire. This takes account of numerous factors, including the ability of the employee, how essential he is to the workplace, and even the extent of the pension rights accumulated by him so that he can live with dignity after retiring from work. The discussion appropriate to

these questions is therefore a contextual one in the circumstances of each individual case, as distinct from a general discussion like that which conducted before us.

19. Incidentally, I would raise another point for consideration, which does not tip the scales against the petition, but should be examined as part of the repercussions of any future retirement age reform. Formally, the question before us revolved, as noted, only around the constitutionality of the determination of a mandatory retirement age, as opposed to recognizing the institution of retirement age, namely permitting the worker to retire on attaining a certain age, an option that not a few employees would like. From the point of view of many employees in the economy, the possibility of retiring at a certain age is a blessing; an aspiration for which they long after years of wearying work – physically, emotionally or mentally. In fact, historically, the determination of a retirement age is regarded as a social innovation that only began at the end of the 19th century, but mainly in the 20th century. Before then, it was a benefit to which workers could not aspire. They had to work "until death" unless they had the means to enjoy retirement, which was considered a luxury. The determination of a retirement age therefore went hand-in-hand with the development of welfare and pension schemes that were intended to ensure a source for the subsistence of workers on reaching retirement age. *Prima facie*, this is a separate issue. The Petitioners say: those who want to retire, should retire and those who want to carry on working, should work. From the purely analytical perspective, that is correct. However, having regard to the broader social context, it is only partially correct. If retirement age could be chosen by the worker, there might be an erosion in the development of pension arrangements available to workers upon their retirement. Such a state of affairs would sharpen the view of retirement as a privilege that might not be appropriate if the employee and the economy "cannot afford" it. Alongside the concern of "being cast aside in old age", there is therefore concern for workers being thrown back into the world without an adequately protected retirement, with all the related implications.

Conclusion

20. In concluding, let us go on to mention that discrimination for reasons of age is illegitimate. Moreover, ageism is an ugly social phenomenon that should be opposed. Our judgment in this case is not based on an assumption as to the incompetence of workers who have reached retirement age, and needless to say that the same also goes for the Petitioners themselves. Nevertheless, the arrangement of mandatory retirement age is a complex one that also involves the protection of rights, where that protection is viewed in its broad sense, going beyond the protection of the individual employee's freedom to decide.

21. I therefore believe that the petition should be dismissed, although the matter raised by it should continue to be examined in the public arena.

Justice E. Hayut

I concur in the comprehensive opinion of my colleague President M. Naor and the conclusion reached by her that the model of compulsory retirement because of age established in section 4 of the Retirement Age Law, 5764-2004 (hereinafter: the Retirement Age Law), and its preference to other models, like that of functional retirement, which the Petitioners support, is not unconstitutional to an extent that justifies the repeal of the section.

1. As my colleague the President stated, each of these models has advantages and disadvantages. They have been set out at length in her opinion, and I have therefore not considered it appropriate to repeat them (see also in this regard, HCJ 7957/07 *Sadeh v. \Minister of Internal Security*, para. 13 (September 2, 2010)). Indeed, making an employee retire merely because his or her age has been fixed as the retirement age is one of the most injurious phenomena of age discrimination (see: HCJ 1268/09 *Zozal v. Israel Prison Service Commissioner*, para. 15 (August 27, 2012) [[English: http://versa.cardozo.yu.edu/opinions/zozal-v-israel-prison-service-commissioner] (hereinafter referred to as "*Zozal*")). However, as my colleague the President showed, the regime of compulsory retirement because of age passes the tests of the Limitation Clause in section 8 of Basic Law: Human Dignity and Liberty and is therefore not constitutionally invalid. Among the grounds justifying the present arrangement, in my opinion the one that ought to be emphasied is that concerning the aspects that are beneficial to workers generally, and in that I am in full agreementwith my colleague Justice D. Barak-Erez. The legislature's provision in section 4 of the Retirement Age Law that 67 is the mandatory retirement age for men and women, implies a statement that, in general, the employer's terminating the labor relationship before the employee has reached that age is illegitimate. The legislature thereby set a clear criterion that helps eradicate phenomena of discriminating against workers because of their age *before* they reach mandatory retirement age, while transferring the discretion concerning the time of the employee's retirement to the employer on the basis of competence and function tests does not set such a clear criterion and might legitimate employers' requiring employees to retire even before they have reached the age of 67. My colleague the President therefore rightly said that "mandatory retirement might reduce the number of workers who are discharged from the workplace *before* the normal retirement age" (para. 43 of her opinion). This conclusion is all the more

important in view of the fact that the majority of workers in the economy are employed under personal contracts, and not protected by unions and collective agreements (Mundlak G, Saporta I, Haberfeld Y, Cohen Y, "Union Density in Israel 1995-2010: The Hybridization of Industrial Relations," 52(1) *Ind Relat.* (Berkeley) 78 (2013)). The labor relationship between an employer and an employee who is not unionized leaves the worker without collective protection in the event of unlawful dismissal. In that situation, the general law of contracts, as well as shield legislation come to the aid of the employee (Guy Mundlak, "The Rule on Dismissals: Default and Mandatory Rules, and Some Interim Options," 23 *Iyunei Mishpat* 819, 822 (1999)). In that sense, section 4 of the Retirement Age Law can be regarded as one of those statutory shield provisions that regulate clear criteria with regard to the employer's ability to dismiss an employee (as regards the shield provisions of the Retirement Age Law, see also section 10 of the Law, and as to the duty owed by the employer to give substantive consideration to the employee's request to remain at work after retirement age, see: LabA (National) 209/10 *Weinberger v. Bar Ilan University* (December 6, 2012)).

2. The petition before us has again placed on the legal agenda the fact that the labor market in Israel, and in fact the whole Western world, is undergoing far-reaching changes in view of the increase in life expectancy, while maintaining levels of competence and function at work at more advanced ages than in the past. These changes have significant economic and social implications, and necessitate rethinking, *inter alia*, with regard to retirement age, and perhaps also with regard to the appropriate model to be adopted in that respect. In any event, the trend apparent in Israeli law is a clear one of increasing retirement age for both men and women (*Zozal*, para. 25), and the Israeli legislature may continue to adapt the relevant legislation to that trend.

Justice N. Hendel

I concur with the result reached by my colleague President M. Naor, according to which the petition to strike down section 4 of the Retirement Age Law, 5764-2004 (hereinafter: the Retirement Law), requiring an employee to retire at the age of 67, because of its unconstitutionality, should be dismissed. Nevertheless, there are nuances that distinguish us. In my opinion, they are of importance especially in regard to the future – and old age has a future – and I have therefore deemed fit to present them.

Discrimination on the Basis of Age – Innovation, Uniqueness and Gravity of the Infringement

1. The prohibition of discrimination – or as formulated on the positive side of the coin, the protection of equality – is a developing doctrine. The canopy of equality is expanding. Consequently, distinctions between different groups, based on some or other characteristics, that used to be socially or legally acceptable without question or a second thought, are no longer such at present. One of the examples of this is age as a basis for discrimination in the labor market.

Historical, economic, social and legal changes have led to the status of the "working elder" experiencing many changes over the years. Prof. Ruth BenIsrael, in her article (Ruth Ben-Israel, "Retirement Age in light of the Principle of Equality: Biological or Functional Retirement", 43 *Hapraklit* 251, 253-257 (5757)) described the position in the following way: in the distant past, the status of the elder was lofty and exalted and he was regarded as having power, status and influence. It can further be said that in those years the elderly were distinguished from the rest of the population, but "discrimination for the better" was involved. In the opinion of the learned author, in the 18th century there was a sharp decline in the social image of the old, who came to be identified with inaction and dependence upon others. This, of course, also affected his position in the labor market. The trend intensified in the 20th century, during the period that Prof. Ben-Israel calls "the cult of youth". The metamorphosis in the labor market – like the disappearance of certain professions, and new, mainly technological, professions that have replaced them – has necessitated constant change that has mainly affected the elderly who are employed in the waning professions, and displaced them from the market. These days, and especially in very recent years, the pendulum has been swinging, slowly but surely, back to the other side. That is to say that opinions are being aired and research conducted that seek to emphasize the value – to workers and society in general – involved in the employment of older workers, *inter alia*, in view of the experience and professionalism that they have accumulated.

2. The foregoing description is, of course, a very brief summary of very significant moves and shifts. Nevertheless, it would appear that it suffices to illustrate what I began with: reference to discrimination (or equality) is dynamic and so too – and perhaps especially – in respect of age. This is true in at least two senses: *first*, the index of social sensitivity. In recent years there has been far greater sensitivity to discrimination on account of age and its legal and constitutional implications in the labor market, as well. As Fredman stated, the idea that differentiation based on age might be unconstitutional is a "new phenomenon", driven by the ageing of the population and the declining birthrate (S. Fredman, *Discrimination Law*, 101-102 (2002)). The increasing prominence of individual rights in recent decades, and the

importance attributed to them in liberal countries have, of course, also contributed to the shift.

Second, the extent of the infringement – age discrimination in the context of the labor market involves extensive, deep violation of emotions, fundamental rights and values that are at the heart of the system. Like my colleague President M. Naor, I too believe that in the circumstances of the petition there is an infringement of equality, which amounts to an infringement of human dignity. Indeed, ", in the case before us, we are not concerned with a trivial infringement ' (para. 33 of the President's opinion). However, in my opinion, a much broader, more deeply rooted infringement is involved, which ought to be emphasized. The description by Justice I. Zamir in *HCJ Recant* in respect of discrimination concerning retirement age and its accompanying affront is apt in this regard: "a person who was active and effective, involved and useful is suddenly, in his own eyes and the eyes of those around him, made irrelevant (HCJ 6051/95 *Recant v. National Labour Court*, IsrSC 51 (3) 289, 342 (1997)). In addition, in my opinion, the infringement of equality – which amounts to an infringement of human dignity in the instant circumstances – is not the only violation. The freedom of the individual to work, create and express himself, which reflects another salient aspect of human dignity, is also infringed here, and substantially. And not only is there an infringement of equality, dignity and the freedom of occupation, but also of liberty and autonomy.

The severity of the infringement essentially derives from a combination of the following: *first*, the major place that work has in our lives, and its being a means of self-fulfilment for many, beyond its being a source of income. This can also be learned from Jewish law. "Shmaayah would say: Love work" (*Ethics of the Fathers* 1:10)**.** Of that Rabbi Eliezer said: "Work is so important that even Adam tasted nothing until he worked, as it is said,'and placed him in the Garden of Eden, to till it and tend it (Genesis 2:15)" (Minor Tractates, Avot de-Rabbi Nathan, Recension B, Chapter 21). Rabbi Soloveitchik also wrote on this: "there is no doubt that the term 'image of God' in the first account refers to man's inner charismatic endowment as a creative being. Man's likeness to God expresses itself in man's striving and ability to become a creator. Adam the first who was fashioned in the image of God was blessed with great drive for creative activity and immeasurable resources for the realization of this goal" (Rabbi Joseph B. Soloveitchik, "The Lonely Man of Faith," 7 (2) *Tradition* 5, 11 (1965). *Second*, the understanding that leaving the labor market is caused merely by reaching a particular age, in circumstances independent of the worker, which he cannot avoid. The creation of distinctions between people because of characteristics at the very heart of the definition of being human, over which he has no control – like race and sex – constitutes a salient sign of illegitimate discrimination, that might involve arbitrariness.

In this sense, age might belong to that list of characteristics that are "forced" on a person. Moreover, ageism has other characteristics that might aggravate the infringement, For example, it is not static, but a variable that worsens.

Another related point is the difficulty of protecting against the infringement caused by age discrimination. There are several reasons. The first, the boundary between "equal" and "different" is not so clear with age, compared with other characteristics, which leads to vagueness. Expression of this can be seen in the fact that European law recognizes all age groups as groups that are protected against discrimination, while the 1967 statute in the United States extended the protection against discrimination based on age only to those aged 40 or more (see *Fredman,* 101). The second derives from the universal nature of the characteristic of age. The aspiration is for everyone to experience the whole "cycle of life". In the words of the wisest of men, "one generation goes and another generation comes" (Ecclesiastes 1:4). However, specifically because of that, there is a tendency to minimize the severity of the infringement caused by age discrimination. This is because it appears that there is "equality of infringement". That is to say that age discrimination is unkind to a person at a certain stage of life, but might be kind to him at other stages. The matter is complex and even creates something of a contest of rights between generations, and even between man and himself at different times of life. However, constitutional review stands at the ready, and the story of man’s life does not prevent him demanding his rights, dignity and liberty at any given time.

One should, of course, take care to avoid discrimination in all its forms, but it appears to me that the unique aspect of age discrimination is such as to affect the way in which the matter is analyzed and looked upon. With all the importance of a broad view of society and the general public, it should not be forgotten that Basic Law: Human Dignity and Liberty places the emphasis on the individual. There are people who welcome and accept the obligation to retire at a given age with open arms. The question when to retire at the upper limit does not have to be decided by them. There is acceptance and even, perhaps, peace in the knowledge that it is not to be determined by them. It is perfectly possible to create in different ways, not merely at work. That is certainly a legitimate approach. But alongside this there are also people for whom there is a close link between their definition of self and their contribution through work. And suddenly, bidden by the calendar, they have to break the link completely. This is despite the fact that some of them are still able and willing to contribute, even at a high standard. Time, which is man's dearest asset, seeks alternative substance but in vain. Such a person can feel worthless, lonely and even degraded. He might also feel that he is outside the main fabric of society, and as we know, it is sometimes very cold outside.

And note well that I concur with my colleague the President's statement that constitutional review of legislative arrangements that delineate far-reaching social and economic policy necessitates extreme caution (para. 24 of her opinion). Indeed, the problem that the petition presents is "a polycentric' one in which as a rule the Court rarely intervenes" (*ibid.*, para. 57). I further agree that the very determination of a mandatory retirement age is supported by proper purposes: the protection of workers' dignity and the improvement of job security in the economy; granting the employer certainty and stability and the ability to manage and plan manpower in the workplace; and intergenerational fairness (paras. 38-40 of the President's opinion). Despite all the aforegoing, and perhaps specifically because of it, I have considered it appropriate to emphasize and concentrate on the gravity of the infringement of the values and rights on the agenda. Based on the President's persuasive reasoning, I have not found intervention appropriate in the present petition, especially because of job security. Nevertheless, as regards both the real and the ideal, this result is far removed from being the final word.

The Choice between Different Models, and the Necessary Broad Factual Basis

3. In accordance with the way in which matters have been presented by the Petitioners, my colleague the President's opinion concentrated on the question of which of the two models should be chosen: biological retirement or functional retirement. From that point of view, a contest is evident between two different philosophies, two ends of the spectrum, each of which is fair and reasonable. Each of the conflicting philosophies has advantages and disadvantages, as described at length by my colleague. It should also be noted that the point of view of the employee does not necessarily oblige the adoption of biological retirement rather than functional retirement, or vice versa. Thus, for example, the term "dignity" can serve both conflicting approaches: compulsory retirement does involve some infringement of the employee's dignity, as described above, but such infringement might also occur, albeit practically, when he is subjected to competence tests.

In any event, for the reasons detailed at length in her opinion, my colleague believes that the legislature's choice of the first of the two models is legitimate and passes the hurdle of constitutionality. As I see it, insofar as we must choose between the two options against the overall background that has been presented to us, that conclusion is indeed required. Nevertheless, I do not believe that the present situation is a desirable one that exhausts the choice. In my opinion, the time is right to expand the discussion about the range of different possibilities, if only because of the uniqueness and complexity of the matter. Before going into detail, I would make it clear that I am aware that the choice of the biological retirement model in our system is

not located right at the end of the spectrum, because there are certain qualifications and subtleties. First, section 10 of the Retirement Age Law, 5764-2004, establishes that, with the employer's agreement, it can be agreed " *that the age at which an employee can be required to retire from work because of age shall be higher than mandatory retirement age* ". Secondly, in *Weinberger* (LabA (National) 209/10 *Weinberger v. Bar Ilan University* (December 6, 2012)), the Labor Court held that if the employee wishes to continue working after the age of 67, the employer is obliged to give relevant, individual consideration to that request. Nevertheless, in view of the complexity of the matter and the gravity of the infringement, I do not believe that those qualifications and subtleties are adequate in the circumstances.

4. To be more precise, as the President stated (para. 46), there is a wide range of retirement arrangements between the model of compulsory retirement because of age and the model of functional retirement. Alongside the examples that were cited (*ibid*.), and with the object of expanding, I shall refer to three matters: the first, other arrangements; the second, greater focus on different jobs; and the third, the arrangement of a comprehensive, up to date examination of the issue.

As regards other arrangements, it would appear that one solution is to increase retirement age. This point is important, but I would like to augment it. In my opinion, an approach should not be taken whereby one size fits all. As aforesaid, the issue should be examined as a whole, not merely through the lens of dignity, but also through the lens of liberty. If the social security that is expressed in tenure is what necessitates retirement at a fixed age, one can also think of a model whereby the employee chooses between different types of benefit at different stages of his life and career. In that sense, the age at which the employee starts working at a particular workplace might be important. These are, of course, mere examples to indicate that it is necessary to think outside the box.

As regards focusing on different jobs, the case before us in fact illustrates the point. Working as a professor in academia has certain characteristics (regarding which, see the opinion of Justice D. Barak-Erez). Indeed, new ideas can be raised in this work environment. For example, evaluation mechanisms can be formulated in the universities for professors who have tenure (and there has been such experience, for example, in the United States. See: Samuel Issacharoff & Erica Worth Harris, “Is Age Discrimination Really Age Discrimination? The ADEA’s Unnatural Solution,” 72 *N.Y.U.L Rev*. 780, 790 (1997)). The existing mechanisms can be expanded in the form of enabling professors in academia to work solely in research or solely in teaching, also in a limited format, for example, in accordance with such criteria as would be decided. Here again, because of the complexity of the matter, an approach should not be taken

according to which one solution is suitable for everyone. Among other things, it is necessary to examine whether a private or public workplace is involved, whether the employees there enjoy tenure or other job security, the economic implications of the various different alternatives – both to the employee and the employer, and to the market as a whole, etc.

This leads us to the third point – a comprehensive, up-to-date examination of the issue. The choice between biological retirement and functional retirement is "forced" upon us by the petition in the absence of adequate foundation in support of other alternatives (see also para. 46 of the President's opinion). Although the fundamental controversy surrounding these matters in the public arena, with all its complexity and characteristics, does indeed support the conclusion that it is not for us to intervene now, it does appear to me that it is proper, necessary and even vital to lay down a broad, thorough and up to date factual foundation. The effect of mandatory retirement age on emplyees' standing, and on the labor market as a whole, is a highly complex issue that is context and society dependent. The answer requires social-science evidence, adapted to the prevailing economic, social and legal system. Evidence of that type has not been produced to us, but it should be made clear that no criticism of the parties' attorneys is implied thereby. A comprehensive, up-to-date examination requires proper supervision and resources. Individual workers cannot be expected to perform that task. The importance of the contribution is in actually raising the matter, and perhaps indicating what is deficient. In my opinion, a public commission, composed fro various areas, should be established in order to collect the relevant material, including empirical data, and hear testimony, and it should recommend proper policy for the current period.

In order to illustrate the dimensions of the deficiency, it should be borne in mind that the recommendations of the public commission that was appointed to examine the issue of retirement age, together with its social and economic aspects, headed by Justice (Emeritus) Shoshana Netanyahu were submitted in 2000. The Commission itself was appointed back in 1997, some two decades ago. The Netanyahu Commission sat and deliberated the various different factors and the possibilities on the agenda for changing the mandatory retirement age, including the possibility of abolishing it altogether. However the Commission's work – comprehensive and thorough as it was – is far less relevant now, a generation after it convened (see and compare the opinion of my colleague Deputy President E. Rubinstein, according to which there should be an examination every 10 years). The assumptions and data upon which it relied, like the labor market in general, have changed. In my opinion, that fact necessitates an organized and thorough rethink – and as soon as possible. I therefore wholeheartedly join in the opinion of my colleague Justice E. Hayut, in para. 2 of her opinion.

To this we might add that the approach of different countries, that served, *inter alia*, as a source of comparison for the Netanyahu Commission, changed a few years ago, primarily afger the Commission's recommendations were submitted (in 2000). In some of the countries there has been a major change in outlook, in the same direction – namely the abolition by legislation of a compulsory retirement age (subject to certain exceptions, see para. 55 of the President's opinion). This has happened, for example, in England, where mandatory retirement in numerous sectors, including institutes of higher education, was abolished in 2011. In Canada too, mandatory retirement (in the public sector) was abolished in 2012.

As I have mentioned, I am conscious of the fact that issues of the type that the petition involves are dependent upon concrete context and society. For that reason, among others, extreme care should be taken when drawing analogies through comparative law. Another reason can be that social sensitivity in regard to social security is greater in Israel than it is, for example, in the United States. Nevertheless, it does appear to me that the tool of comparative law can also assist us in the complex issues facing us, provided that it is used in a careful, measured manner. Just as the experience of a worker in a particular job is of value, so too, is the experience of various different legal systems, even if it is necessary to make certain adaptations to the conditions of the country and its labor market.

5. In conclusion, my opinion is that the legislature's choice of a compulsory retirement model because of age, at the time, *reflected* an informed choice among different possibilities. Changing times and developments along the way, the severity of the infringement involved in compulsory retirement, which is at the heart of man and his sense of self, the sensitivity of the matter and its complexity that is dependent upon context, society, and concrete, up-to-date data all now necessitate a thorough review by the legislature (and perhaps also by certain workplaces like universities), and an ensuing informed choice. Insofar as such a review is not made within a reasonable time, in my opinion the parties' arguments should be reserved. We, as a society, ought to properly contend with the issue and consider it in the best way, as required. This is especially the case in our day and age when not only is life expectancy changing, but so is the way in which quality of life is perceived. Subject to my foregoing statements, I concur with the result reached by President M. Naor that the petition should be dismissed. Let me conclude by saying "ageing is what we all hope for and all fear. Let there be more hope and less fear".

Decided as stated in the opinion of President M. Naor.

Given this 13th day of Nissan 5776 (April 21, 2016).

The President	The Deputy President	Justice
Justice	Justice	Justice
Justice	Justice	