HCJ 4124/00

1. Arnon Yekutieli, deceased
2. Ya'akov Gazit
3. Michael Lustman
4. Jenny Baruchi
5. Am Hofshi
6. The Student Union of the Hebrew University of Jerusalem
7. The Medical Student Union of Jerusalem
8. The Agricultural Student Union in Israel
v.
1. The Minister of Religious Affairs
2. The Minister of Finance
3. The Budget Director of the Ministry of Finance
4. The Chairman of the Knesset Finance Committee
5. The National Insurance Institute
6. The Minister of Labor and Social Affairs
7. The Movement for Fairness in Government
8. Baruch Steinmetz
9. Yitzchak Berlovitz

The Supreme Court sitting as the High Court of Justice
[14 June 2010]

Before President D. Beinisch, Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor, S. Joubran

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: Section 3(4) The Income Support Law, 5752-1982 provides that students in institutions of higher education or in other post-secondary institutions, including students in religious institutions, are not entitled to the income support benefits that are paid in accordance with that law. Nevertheless, each annual budget law since 1982 has included a budget item pursuant to which kollel students are paid minimum income support benefits. The petitioners challenged the support benefits paid pursuant to the budget item, arguing that the payment of these benefits constitutes

discrimination against all other students who are excluded from eligibility for payment of support benefits pursuant to the Income Support Law.

Held: Majority opinion (President D. Beinisch, with the concurrences of Justices M. Naor, S. Joubran, A. Procaccia, E. Hayut and A. Grunis): The budget item creates an arrangement in which kollel students [married students in institutions of advanced Talmudic studies] receive payments that the other students, who are excluded from the payment of such benefits according to the Income Support Law, 5741-1980, do not. This differential treatment violates the principle according to which state funds are to be distributed on the basis of equality, in accordance with uniform tests – a principle embodied both in the case law and in s. 3A of the Budget Principles Law, 5745-1985. The budget item, as part of an annual budget law, is subordinate to the provisions of the Budget Principles law, although the court must act with restraint when reviewing economic policy matters. Budgetary matters may be overturned by the court only when they involve a severe violation of a basic right. Given that the criteria for determining eligibility for the benefits pursuant to the budget item relate to the economic situation of such students, the distinction that this arrangement creates between the kollel students and the other students constitutes discrimination in that it is not based on a relevant distinction between the two groups of students. This discrimination is in fact a violation of a basic right – the right to equality.

Nevertheless, the differential treatment would be permissible if the discriminatory act is covered by the limitations clause of the Basic Law: Human Dignity and Respect. But the payments do not qualify under the third of the conditions set out in that clause. The payments made pursuant to the budget item are based on a statutory provision and, according to the state's position, the objective of these payments is the legitimate purpose of supporting Torah study. However, the payments do not meet the third condition, requiring that the measure not be an excessive one. With respect to the income support payments, there are other possible arrangements that would support the stated objective, but without violating the right to equality to the same degree. The budget item must therefore be repealed and may not be included in future budget laws; however the repeal will not be immediate, so as not to violate the reliance interest of those who have been receiving the payments pursuant to an item that has been a part of all budget laws over the course of many years.

Concurring opinion (Justice A. Procaccia): The government has a legitimate interest in supporting groups within society who wish to maintain their unique lifestyles. However, this interest may not be furthered by an act which violates the principle of equality, a principle which assumes that all citizens who are able to do so will bear the burden of providing for their own subsistence.

Minority opinion (Justice E.E. Levy): The decision to support kollel students was made in the context of the policy making power properly exercised by the Government and the Knesset, and cannot be overturned by the court. Although the government may not take discriminatory action, this action does not fall within that category, as it is based on a legitimate distinction between kollel students who study Torah as a full time occupation and other students who are pursuing their studies for a limited period of time.

Petition granted.

Legislation cited:

Arrangements in the State Economy Law (Legislative Amendments), 5752-1992, ss. 1(a), 1(b).

Arrangements in the State Economy Law (Legislative Amendments for Attaining the Budget Goals and the Economic Policy for the 2003 Fiscal Year), 5763-2002.

Basic Law: Human Dignity and Liberty, and s. 8.

Basic Law: State Budget for 2009 and 2010 (Special Provisions) (Temporary Provision).

Basic Law: The State Economy, ss. 3(a)(2), (3)(b)(1), 3A.

Budget Principles Law, 5745-1985, ss. 2, 3A, 4, 33 and Chapters D-E.

Council for Higher Education Law, 5718-1958, and s.21A.

Deferral of Service for Full Time Yeshiva Students Law, 5762-2002.

Income Support Law, 5741-1980, ss. 2, 2(a)(2), 3(4).

Income Support Regulations, 5742-1982, r. 6(a).

Israeli Supreme Court cases cited:

[1] HCJ 366/03 *Society for Commitment to Peace and Social Justice v. Minister of Finance* [2005] IsrSC 60 (3) 464.

[2] HCJ 6427/02 *Movement for Quality Government v. Knesset* (2006) (unreported).

[3] HCJ 3267/97 *Rubinstein v. Minister of Defense* [1998] IsrSC 52 (5) 481.

[4] HCJ 7142/97 *Council of Youth Movements in Israel v. Minister of Education, Culture and Sports* [1998] IsrSC 52 (3) 433.

[5] HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [1999] IsrSC 53 (5) 337.

[6] CrimA 213/56 *Attorney General v. Alexandrovich* [1957] IsrSC 11 695.

[7] HCJ 240/98 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [1998] IsrSC 52 (5) 167.
[8] HCJ 4769/95 *Menachem v. Minister of Transportation* [2002] IsrSC 57 (1) 235.
[9] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51 (4) 367.
[10] HCJ 780/83 *Yeshivat Tomchei Temimim Merkazit v. State of Israel* (1984) (unreported).
[11] MP 166/84 *Yeshivat Tomchei Temimim v. State of Israel* [1984] IsrSC 38 (2) 273.
[12] HCJ 59/88 *MK Tzaban v. Minister of Finance* [1989] IsrSC 35 (1) 421.
[13] HCJ 8569/96 *Federation of Working and Studying Youth v. Minister of Education, Culture and Sports* [1998] IsrSC 52 (1) 597.
[14] HCJ 3792/95 *National Youth Theater v. Minister of Science and Arts* [1997] IsrSC 51 (4) 259.
[15] HCJ 1/98 *Cabel v. Prime Minister of Israel* [1999] IsrSC 53 (2) 241.
[16] HCJ 1113/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] IsrSC 54 (2) 164.
[17] HCJ 5290/97 *Ezra – National Haredi Youth Movement in the Land of Israel v. Minister of Religious Affairs* [1997] IsrSC 51(5) 410.
[18] HCJ 6741/99 *Yekutieli v. Minister of the Interior* [2001] IsrSC 55 (3) 673.
[19] HCJ 869/92 *Zvili v. Chairman of the Central Elections Committee for the Thirteenth Knesset* [1992] IsrSC 46 (2) 692.
[20] HCJ 1703/92 *C.A.L. Cargo Airlines Ltd. v. Prime Minister* [1998] IsrSC 52 (4) 193.
[21] HCJ 98/69 *Bergman v. Minister of Finance et al.* [1969] IsrSC 23 (1) 693.
[22] HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49 (4) 94.
[23] HCJ 678/88 *Kfar Vradim v. Minister of Financ*e [1989] IsrSC 43 (2) 501.
[24] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* (2006) (unreported).
[25] HCJ 2618/00 *Parot Co. Ltd. v. Minister of Health* [2001] IsrSC 55 (5) 49.
[26] HCJ 4906/98 *Am Hofshi Organization for Freedom of Religion, Conscience, Education and Culture v. Ministry of Construction and Housing* [2000] IsrSC 54 (2) 503.
[27] HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* (2006) (unreported).
[28] HCJ 3434/96 *Hoffnung v. Speaker of the Knesset* [1996] IsrSC 50 (3) 57.
[29] HCJ 3648/97 *Stamka v. Minister of the Interior*, [1999] IsrSC 53 (2) 728.
[30] CA 6821/93 *United Mizrahi Bank Ltd., et. al. v. Migdal Cooperative Village*[1995] IsrSC 49 (4) 221.

[31] HCJ 1030/99 *MK Oron v. Speaker of the Knesset* [2002] IsrSC 56 (3) 640.
[32] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58 (5) 807.
[33] HCJ 5264/05 *Yeshivat Shavei Shomron v. Minister of Education, Culture and Sports* (unreported, 2005).
[34] HCJ 6671/03 *Munjid Abu Ghanem v. Ministry of Education* [2005] IsrSC 59 (5) 577.
[35] HCJ 637/89 *Constitution for the State of Israel v. Minister of Finance* [1991] IsrSC 46 (1) 191.
[36] HCJ 6051/95 *Recanat v. National Labor Court* [1997] IsrSC 51 (3) 289.
[37] HCJFH 4191/97 *Recanat v. National Labor Court* [2000] IsrSC 54 (5) 330.
[38] HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58 (2) 358.
[39] HCJ 721/94 *El Al Israel Airlines Ltd. v. Danielowitz* [1994] IsrSC 48 (5) 749.
[40] HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Social Affairs* [1998] IsrSC 52 (3) 630.
[41] HCJ 9722/04 *Polgat Jeans Inc. v. Government of Israel* (2006) (unreported).

American cases cited:

[42] *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).
[43] *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971).
[44] *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (CA8 1972).
[45] *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).
[46] *Planned Parenthood Affiliates of Ohio et al. v. Rhodes et al*., 477 F. Supp. 529 (S.D. Ohio, 1979).

For the petitioners – G. Barnea
For respondents 1-6 – O. Mandel
For respondent 7 – C. Indig
For respondents 8-9 – E. Yavneh, M. Saviyon

JUDGMENT

President D. Beinisch

Students who are studying in a kollel have been eligible for the payment of a minimum income support benefit by virtue of a budget item included in the annual budget laws, since 1982. However, under the provisions of the Income Support Law, 5741-1980, students studying in institutions of higher education, post-secondary institutions, or in religious institutions, as well as

those in yeshivas and Torah study institutions are not eligible for payment of the income support benefit. Is the arrangement for the payment of income support benefits to the kollel students [*avrechim*], pursuant to the budget item, legal and constitutional? Is the distinction between the various groups of students lawful? These are the questions raised in the petition before us.

The factual background

1. Since 1982, the annual budget laws have contained a budget item entitled "Minimum Income Support for Kollel Students" (hereinafter: the Budget Item). Originally, the Budget Item was part of the budget of the Ministry of Religious Affairs, but with the dissolution of that Ministry in 2004, the Budget Item was transferred to the budget of the Ministry of Education. Pursuant to the Budget Item, kollel students who meet various conditions for eligibility are paid an income support benefit. In 2009, the annual allocation for the item was NIS 121,161,000 and benefits were paid to some 10,000 kollel students. The amount of the benefit was determined by the distribution of the annual allocation among the number of entitled kollel students.

The legality and constitutionality of the Budget Item are at the heart of the petition before us. The petition was filed by a group of students and student representatives from various universities in Israel, and by a nonprofit organization which has declared that it acts to promote freedom of religion, conscience, education and culture. Petitioner 4, Jenny Baruchi, who was among the petitioners from the outset, has also been involved in the public effort to promote the issue which is the subject of the petition. She also voiced these matters to us at the last hearing that we held. The petitioners' main claim is that the payment of income support benefits to kollel students by virtue of the Budget Item is discriminatory. The claim of discrimination is based on the distinction between the two legislative arrangements that deal with the payment of income support benefits – the Income Support Law, 5741-1980 (hereinafter: the Income Support Law or the Law) on the one hand, which regulates income support benefit payments to all in Israel who are entitled to support; and the Budget Item on the other hand, which regulates payments of income support benefits solely to kollel students.

The Income Support Law

2. The Income Support Law was passed by the Knesset in April of 1980 and went into effect in January of 1982. The Law regulates the payments of income support benefits to all those eligible for them in Israel. The Law establishes, *inter alia*, the conditions for eligibility for the benefits, the rates of the benefits, the manner of calculating the income of the benefit applicants, the grounds for denying the benefits and the authority to adjudicate claims regarding payment of the benefits. The benefits that are distributed pursuant to the Law are paid from the state treasury through the National Insurance Institute. Chapter B of the Law sets out the three basic conditions for eligibility, according to which a resident of Israel who is at least 25 years of age is eligible for the benefits, provided that he does not have the ability to work and support himself or cannot be placed in any job whatsoever; he has no income from any source whatsoever; and he has been a resident of Israel for at least 24 months. Along with the basic conditions, the Law specifies various grounds that establish eligibility for income support benefits, and a number of exceptions that enable receipt of the benefits even if the basic conditions for eligibility are not met. It should be noted that during the years since its enactment, several amendments have been made to the Law in an effort to reduce the number of income support benefit recipients and to reduce the amount of the monthly benefits (see, e.g., HCJ 366/03 *Society for Commitment to Peace and Social Justice v. Minister of Finance* [1]).

3. The disagreement between the parties is based on s. 3 of the Income Support Law, which describes the qualifications that negate eligibility for the benefits. Section 3 defines the groups of people who are not eligible for the income support benefits, even if they meet the general eligibility conditions set out in s. 2 of Law. Section 3 states that a person will not be eligible for the benefit if he is either institutionalized and his entire maintenance is paid by the State treasury, the Jewish Agency, a local authority or another entity as determined in the regulations; or he is a person serving in compulsory IDF service; or he is a member of an incorporated entity that is responsible for the sustenance of its members. Section 3(4) of the Income Support Law sets out the qualification that is relevant to the petition before us, pursuant to which "a student learning in an institution specified by the Minister in the regulations and under conditions stipulated by the Minister" will not be eligible for the benefit. It should be noted that in 2008, an exception was made to this qualification, pursuant to which an undergraduate student who is a single parent and who was eligible for income support benefits for at least

16 out of the 20 months preceding the month in which he commenced his studies will remain eligible for income support after commencing his studies as well (Amendment No. 33 to the Law, 5768-2008). This exception, which was added to the Law after the filing of the petition before us, did not, according to the petitioners, resolve the discrimination between kollel students and other students in general, and we will return to this matter later in the discussion.

When the Income Support Law went into effect in 1982, regulations were enacted regarding those institutions, attendance at which will negate eligibility for income support benefits. Section 6(a) of the Income Support Regulations, 5742-1982 (hereinafter also: the Regulations) provides as follows:

> 6. (a) The following shall be deemed an institution for the purpose of s. 3(4) of the Law:
>
> (1) Any institution of higher education that has been recognized under the Council for Higher Education Law, 5718-1958, and an institution that requires a permit under s. 21A of the same law;
>
> (2) Any other institution for post-secondary studies;
>
> (3) A yeshiva or Torah study institution;
>
> (4) An institution for training religious clerics;
>
> (5) Any other educational institution in which students are taught systematically, excluding –
>
> (a) An educational institution whose purpose is other than to train students for government examinations or to provide education that is recognized by a government ministry or under any law;
>
> (b) An institution that provides training as defined in s. 2(a)(2) of the Law – if the trainee would have been eligible for benefits but for the provisions of s. 3(4) of the Law.

Therefore, pursuant to the provisions in the Regulations and in accordance with s. 3 of the Income Support Law, students in universities, in institutions of higher education and in institutions of post-secondary education, students in yeshivas and in Torah study institutions, and students in institutions for training religious clerics are not eligible for income support benefit payments.

The Budget Item

4. The same year that the Income Support Law went into effect, the Budget Item, which is the subject of the petition before us, was added to the annual budget law. As stated, the item was at first a part of the budget of the Ministry of Religious Affairs (budget item no. 22–04–21), and since 2004, the Budget Item has been included in the budget of the Ministry of Education (where its number is now 20–38–21). Unlike the provisions of the Income Support Law, the Budget Item does not specify the conditions for eligibility for receiving the benefits, or the rates of the benefits or the grounds for denying them. All that is included in the Budget Item is the item heading, the scope of the annual expenditure and various data pertaining to utilization of the expenditure. From 1982 to this day, the Budget Item has remained in an almost identical format, and what distinguishes between the Budget Items from one year to the next is the amount of the annual allocation.

For example, this is how the Budget Item looks in the 2009-2010 budget law (in thousands of New Israeli Shekels):

Item	*Item name*	*Net expen-diture*	*Income contin-gent expen-diture*	*Total expen-diture*	*Author-ization for under-taking*	*Max-imum man-power*	*Total utilized*	*Percen -tage utilized*
203821	Minimum income support for kollel students	121,161	1,500	122,661	0	0.0	96,818	74.31

(The state budget for 2009 and 2010 was established in a biennial budget law, in accordance with the amendment set out in Basic Law: the State Budget for 2009 and 2010 (Special Provisions) (Temporary Provision), 5769-2009, which states that notwithstanding in the provisions of ss. 3(a)(2) and (b)(1), and of s. 3A of Basic Law: The State Economy, the state budget for 2009 and 2010 would be a biennial budget).

Notwithstanding the provisions of the Income Support Law and of the Regulations promulgated pursuant thereto, according to which students and pupils in yeshivas and religious institutions are not eligible for income support payments, the Budget Item enables the payment of income support benefits to kollel students only. At the time that the petition before us was filed with the court, the Ministry of Religious Affairs customarily distributed the benefits pursuant to the Budget Item in accordance with internal conditions for eligibility that were determined by the Ministry. (A document entitled "Clarifications to the Conditions for Eligibility for Income Support

Benefits," dated December 27, 1998, along with an application form for income support for 1999, were attached to the petition and marked F1 and F2, respectively). After the petition was filed, the director-general of the Ministry of Religious Affairs appointed a committee to examine the criteria for granting income support benefits to kollel students and later, when the allocation was transferred to the Ministry of Education, another examining committee was appointed in collaboration with the Ministry of Education and the Ministry of Finance. The committee formulated eligibility criteria which were submitted for the perusal of the court and the parties on March 10, 2005. The eligibility conditions with respect to the Budget Item, as formulated in the said criteria, are different from the conditions set out in the Income Support Law. According to these criteria, a kollel student is eligible for income support benefits if he is an Israeli citizen or a permanent resident who studies in one kollel for a full-day, or in two half-kollels and he meets the following conditions: (1) he has at least three children; (2) his total monthly income (which is calculated in accordance with rules set out in the criteria) does not exceed 60% of the amount of the monthly support (which is determined by the Ministry of Education, taking into account the number of those entitled to the benefits, the scope of their eligibility and the amount of the allocation for the budget item in the State budget); (3) he and his immediate family have no property such as an additional apartment, real estate, a business or a vehicle (subject to the conditions set out in the criteria). The eligibility criteria further specify the manner in which the application and the documents that the kollel student must attach thereto are to be submitted, the conditions pursuant to which ownership of additional property will not preclude eligibility for the benefits, and the manner in which the Ministry will examine eligibility. The response of respondents 1-6 (hereinafter: the state) shows that due to the application of the criteria, each year only about 20% of the population of all kollel students are found to be entitled to income support benefits. It should be noted, however, that over the years, the number of kollel students eligible for benefits has increased, even though the annual allocation has remained relatively unchanged. In 1986, for example, 2,650 kollel students received income support benefits, while in 2009, benefits were distributed to approximately 10,000 kollel students.

The essence of the dispute

5. The differences between the two legislative arrangements – the Income Support Law on the one hand and the Budget Item on the other – are at the heart of the dispute between the parties. The petitioners have asked us to declare the Budget Item invalid. Alternatively, they request that, at the

least, we order the cessation of the income support payments pursuant thereto, for so long as the Budget Item is not applied equally to women, students in institutions of higher education, and members of other religions and other denominations of Judaism. Their claim, in short, is that the Budget Item "circumvents" the provisions of the Income Support Law and grants kollel students income support benefits notwithstanding the fact that such benefits have been expressly denied them in the Income Support Law, just as they were denied to students in institutions of higher education. The petitioners further claim that the Budget Item violates the provisions of s. 3A of the Budget Principles Law, 5745-1985, and constitutes a preliminary arrangement which should not be prescribed in a budget law. The petition is directed against the Minister of Religious Affairs, the Minister of Finance, the Budget Director of the Ministry of Finance, the Chairman of the Knesset Finance Committee, the National Insurance Institute and the Minister of Labor and Social Welfare. After the petition was filed, and at their request, three more respondents were joined: the Movement for Fairness in Government – a movement which states that it "identifies…with the aspirations and desires of the [the kollel student] public to continue on its unique path which stems from pure ideology, and which is worthy of esteem and protection" – and two kollel students who are studying in a kollel and are eligible for payment of the income support. The respondents filed separate responses to the petition, but there is one pivotal claim common to all of them – in their view, the distinction between kollel students and non-kollel students is not tantamount to prohibited discrimination, because it is based on relevant distinctions. The respondents, whose individual responses will be presented below, a distinction should be made between students in institutions of higher education and kollel students, with respect to the purposes of the studies undertaken by the two categories of students, the nature of the studies and their duration. While non-kollel students pursue their studies for the purpose of acquiring a profession, kollel students study for the sake of the study itself and their studies have no other objective. Therefore, the period during which they study is not an intermediate stage for them, and is instead a way of life that the legislature has chosen to support and encourage.

The factual sequence in the petition

6. The petition before us was filed in 2000. The issue raised by the petitioners – the consideration of the nature of the special arrangement that has been established for kollel students for whom "Torah study is their profession [*Toratam Omanutam*]" – has, for years, occupied various relevant

entities, among them the executive branch and the Knesset. On June 13, 2001, this Court issued an order *nisi* (Justices E. Mazza, T. Strasberg-Cohen and E. Levy). Initially, the petition was heard before a panel of three justices, although later on that panel was expanded. The petition has been pending for many more years than is customary in this Court. In the years that passed between the date the petition was filed and the rendering of this judgment, the factual and legal framework pertaining to the petition has been clarified and developed, and it has undergone several changes. Initially, the state requested that the professional entities be allowed to formulate criteria for implementing the Budget Item, and the court granted several motions for continuances that had been submitted by the state with the aim of enabling the committee at the Ministry of Religious Affairs – and, upon that Ministry's dissolution, a committee at the Ministry of Education – to complete the formulation of the criteria. The conditions for eligibility were formulated and submitted for the perusal of the court and the parties in 2005. That year, the panel of judges also ruled that a judgment in the petition before us would be given only after a judgment was rendered in HCJ 6427/02 *Movement for Quality Government v. Knesset* [2]. That case and the petitions that were joined to it dealt with the constitutionality of the Deferral of Service for Full Time Yeshiva Students Law, 5762-2002, (hereinafter: the Deferral of Service Law), which regulates the deferral of military service for yeshiva students whose profession is Torah study. Due to the importance of the issue and the practical connection between the petitions pertaining to kollel students and the prohibition that had been in effect in the past, preventing such students from being employed, we believed that it was best to wait for a judgment to be rendered in those petitions before deciding the petition before us. On May 11, 2006, a judgment was rendered in those petitions and the court ruled that the Deferral of Service Law violated the principle of equality and the right to dignity of those Israeli citizens who serve in the Israel Defense Forces, a right which is anchored in the Basic Law: Human Dignity and Liberty. Notwithstanding this, the court refrained from ruling that the Deferral of Service Law was unconstitutional, on the ground that no assessment could be made as to whether that law meets the requirement of proportionality, so long as there had not been an opportunity to examine its operation and its results over time. Therefore, the majority opinion held that there was grave concern about the law's unconstitutionality, and that it was liable to become unconstitutional if a significant change did not occur in the results of its implementation during the time designated until its expiration. This judgment invited additional petitions that were directed

against the application of the Law (HCJ 6298/07 *Ressler v. Knesset of Israel*). These petitions are also relevant to the discussion before us and they can shed light on the changes that have occurred in Israeli society in general and in ultra-orthodox society in particular, with regard to induction into the army and, in this case, with regard to integration into the job market. A judgment in these petitions has not yet been rendered; however, an interim judgment was issued on September 8, 2009. In that judgment, the court noted that the pace of handling the mechanisms for implementing the law, like the pace of the allocation of resources to the application of the law is "very far from what could have been expected in the circumstances of the matter" (per Justice E. Hayut, at para. 9). However, the court ruled that the mechanisms designed to implement the law must be given an additional period of 15 months before a final position could be taken with regard to the constitutionality of the Deferral of Service Law, so as to enable an examination of their effectiveness and of their ability to lead to significant change.

7. Because the issue of the special arrangement of the payment of income support benefits to kollel students was not resolved following the determination of the criteria for distributing the allocation to the kollel students, the legislature was also required to deal with the issue before us. In 2008, the Knesset passed Amendment 33 to the Income Support Law – named for petitioner 4 and thus known as the "Jenny Baruchi Law." The amendment provided that income support benefits would not be denied to single parents who begin to study toward an undergraduate degree. The amendment was the result of public pressure from single parents, among them, as stated, one of the petitioners in the petition before us, who wanted the opportunity to pursue studies in a higher education framework in order to break the cycle of dependency on state support. Prior to the passing of the amendment, single parents who had been receiving income support benefits and who decided to study in an institution of higher education were forced to give up the benefits, since, upon commencement of their studies, they became subject to the provisions of s. 3(4) of the Income Support Law, pursuant to which the benefits are denied to a student in an institution of higher education. Amendment 33 resolved the issue of students in the same situation that petitioner 4 had been in at the time the petition was filed, and the petition, insofar as it relates to discrimination against students who are not single parents, remains in place.

8. It is in the nature of these matters that during the time that has passed from the date the petition was filed to the rendering of the judgment, changes

and permutations have occurred, not only at the factual and legal levels, but also at the public-social level. The judgment in the petitions regarding the legality of the arrangements for exemption from military service (HCJ 3267/97 *Rubinstein v. Minister of Defense* [3]) led to the end of a long period during which the court deliberated various petitions demanding the induction of yeshiva students into the army. In the wake of the judgment rendered by this Court – which held that the arrangements of exemptions from military service are unconstitutional in that they violate the principle of equality – the Knesset passed the Deferral of Service Law and began proceedings for its gradual application to the ultra-orthodox population. As a result, an increasing number of the ultra-orthodox – albeit still low in absolute terms – have been referred for induction into the army or into civilian service. The Deferral of Service Law also gives the kollel and yeshiva students the option of taking a "decision year," in which they can examine the issue of whether they wish to continue with their Torah studies or enter the job market. During the decision year, the ultra-orthodox may discontinue their studies, while their temporary exemption from military service remains in place. The decision year enables the ultra-orthodox yeshiva students, for the first time, to integrate into the job market without this step first involving induction into the army. This is a change from the situation that existed before enactment of the Deferral of Service Law, and from the limitations that had previously been imposed on yeshiva students in the arrangement for those for whom "Torah study is their profession." These changes conform to the growing support from rabbis and leaders in the ultra-orthodox community for the idea of ultra-orthodox men and women going to work and acquiring a profession in the framework of higher or academic education. The objective of these trends is to enable ultra-orthodox families to support themselves honorably and to leave the cycle of poverty. Indeed, data from the Council for Higher Education indicates that there has been a dramatic increase in the number of ultra-orthodox students in academic institutions. For example, some 2,000 ultra-orthodox men and women began their studies in the 2009-2010 academic year in university extensions that had been established specially for the ultra-orthodox population – extensions that enable ultra-orthodox men and women to study a variety of subjects in separate tracks for men and women, while providing identical content to that which is taught at the universities, but with the appropriate emphases for the ultra-orthodox population. These and other changes are the background for the discussion of the petition before us.

9. Before we present the positions of the parties to the petition, we wish to note that the adjudication of the petition before us has continued for an extremely and unusually protracted period of time. The complexity of the issues that arise in the petition and the connection of these issues to other petitions that were heard by this Court have compelled a slow examination of the factual and legal frameworks relevant to the petition. Indeed, in general, it is not proper that adjudication of a petition continue for such a long period of time. However, sometimes issues reach the court which require out of the ordinary preparation – including, *inter alia*, preparation that takes the form of giving various entities, including the executive authority and the legislative authority, the opportunity to examine the extent of their involvement in the matter and thus to possibly render a judicial decision unnecessary. Regarding the petition before us, the first years were devoted to clarifying the factual framework and determining the conditions for eligibility for the income support benefits, when the benefits are actually paid. Afterwards, adjudication of the petition was delayed until the judgments were rendered in various petitions in the matter of deferral of military service. We believe that this wait was important and it was intended, *inter alia*, to allow important social and legal changes to develop at the proper pace. However, we recognize the fact that this wait violated the legitimate expectations of the petitioners that their petition would be decided within a reasonable period of time, and we can only regret that.

The parties' arguments

10. The petitioners have focused the petition on the claim of a violation of the principle of equality. They argue that the Budget Item – as an item which discriminates on the basis of gender, religion and faith, nationality and education – is in violation of the principle of equality and of human dignity. The petitioners argue that pursuant to the Budget Item, income support benefits are paid solely to kollel students while the rest of those who belong to the same peer group – women, students in institutions of higher education, members of other religions learning in institutions that train religious clerics, and students in Reform and Conservative yeshivas – are not eligible for similar payments or for an assurance of minimum sustenance. Additionally, the petitioners point out the differences between the conditions for eligibility pursuant to the Income Support Law and pursuant to the Budget Item. Thus, for example, the petitioners note that in contrast to the eligibility requirements set out in the Income Support Law, kollel students are not required to prove that they have maximized their earning capacity and they are permitted to work concomitantly with studying in a kollel; the rate of the

benefits for kollel students is not determined on the basis of an estimation of the amounts required for the purpose of minimal sustenance with dignity – as set out in the Income Support Law – but rather by division of the annual allocation amount by the number of those eligible for the benefits that year; and in calculating the benefits, the criteria do not take into account all the income of each entitled person. Thus, any other stipend or payment which is paid to the entitled person in the framework of his studies and in the framework of the institution in which he is studying, up to a total of NIS 3,500, is not included in the calculation of the monthly income. The petitioners further claim that the payment of income support from the budget of the Ministry of Religious Affairs – now the Ministry of Education – also creates a mechanism that circumvents the arrangements set out in the Income Support Law, pursuant to which income support payments to those entitled to them are provided through the National Insurance Institute. Another claim raised by the petitioners is that the Budget Item contradicts s. 3A of the Budget Principles Law, 5745-1985, pursuant to which the state's support of public institutions must be provided according to uniform tests, established by the appointed ministers in the fields covered by their ministries, and after consultation with the Attorney General. They further claim that it violates the provisions of s. 3 of the Basic Law: The State Economy, which provides that the budget law will include the government's planned and anticipated expenditures, but cannot determine substantive preliminary arrangements. Finally, the petitioners claim that the Budget Item purports to determine a substantive arrangement in the guise of budget provisions and, it therefore oversteps the bounds of what the legislature is permitted to establish in the annual budget law.

11. The state's main response is based on the claim that the distinction between kollel students and other, non-kollel students, women and members of other religions or other denominations in Judaism is based on relevant differences. The state argues that what makes the group of kollel students unique is their inner faith, which dictates the study of Torah as a daily occupation. Studying Torah, the state argues, "is not in the realm of temporary training and is not intended, as a rule, to enable them to acquire a profession. It involves a continuing lifestyle, without any time limitation. It is a lifestyle that compels them, due to their occupation with learning, to suffice with minimal subsistence." The state believes that this distinction justifies a separate budget item for the group of kollel students, in a manner that reflects the government's and the legislature's set of priorities, according to which the state of Israel has chosen to provide support for kollel students.

According to the state, this value-based decision is not subject to review by the courts, and constitutes a policy matter which is to be decided by the legislative and executive branches.

According to the state, the distinction between the groups is reflected in the different budgetary support given to each one of them. For example, while the state supports kollel students by means of the income support mechanism and other budgetary mechanisms, other students are eligible for a variety of assistance funds and loans, and they benefit from subsidized tuition and from the allocations that the state gives to the institutions of higher education. Thus, the state claims that when comparing the two groups, all the benefits that each group receives must be taken into account, without focusing on a single budget item.

With regard to the petitioners' claim that the budget provision is inconsistent with the Income Support Law and that it is particularly inconsistent with that law's requirement that entitled persons maximize their earning capacity, the state notes that the arrangement set out in the Income Support Law is not an exhaustive arrangement, that the income support provided to kollel students by virtue of the budget law is lower than the support given to those with families pursuant to the Income Support Law, and stands at 18% of the average salary in the economy. The state further argues that the purposes underlying the two arrangements are different. The Income Support Law is designed to provide a last and temporary safety net to someone who has maximized his earning capacity, while encouraging him to continue to seek a source of livelihood. In contrast, the purpose of the arrangement supporting the kollel students is to assist those who lead a lifestyle devoted to the study of the Torah.

The state's position did not change even after the judgment was rendered in the matter of the constitutionality of the Deferral of Service Law. According to the state, the rule established in that judgment regarding the deferral of military service should not be applied to the case before us. The state argues that while induction into the army involves an obligation imposed on most of the population – an obligation from which a person for whom Torah study is a profession is exempt – the acquisition of higher education constitutes a choice, both from the standpoint of the individual and from the standpoint of society. The state claims that this distinction between obligation and choice affects the legal analysis of the extent to which a particular legal arrangement can violate the relevant individual's autonomy and, hence, his human dignity. According to this argument, where the

disparate legal treatment does not entail the imposition of an extra obligation on the general population but rather the granting of a general benefit to a minority, the severity of violation of the scope of an individual's autonomy is minimal, if it exists at all. Therefore, such different treatment need not be viewed as a violation of the principle of equality that is tantamount to a violation of human dignity. Alternatively, the state claims that even if there is a violation of the principle of equality, the provisions of the budget law satisfy the conditions set out in the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty.

12. Respondent 7, the Movement for Fairness in Government, argued that groups whose activities are designed to promote different values cannot be included in the same peer group. The Movement for Fairness in Government claims that the group of kollel students and the group of all other students are each funded by the state in accordance with their special needs; and for the purpose of examining whether the principle of equality has been violated, the entirety of the allocation to which each group is entitled must be examined, without focusing on a single budget item. The Movement for Fairness in Government notes that in practice, while the kollel students are eligible for income support, other groups of students receive special financial assistance in the framework of the Student Assistance Center, and a calculation of all the state investments for the student shows that the state participates in funding non-kollel students at a higher cost than that which is invested in funding yeshiva students or kollel students. Alternatively, the Movement for Fairness in Government claims that even if there has been a violation of the principle of equality, the fact that it involves a relatively small amount of support for a needy public should be taken into account.

The Movement for Fairness in Government further claims that the Budget Item cannot be canceled because of an alleged conflict with the Budget Principles Law, as the option of repeal is not expressly stipulated in the Budget Principles Law. It is therefore not appropriate, the Movement for Fairness in Government argues, to discuss, in the framework of the petition before us, the repeal of income support benefits for kollel students as a means of advancing the purposes of the Deferral of Service Law before such an option has been discussed by the appropriate authorities and without a comparison having been made between such repeal and other measures that are available for achieving that purpose.

13. Respondents 8 and 9, two kollel students who meet the conditions for eligibility for benefits pursuant to the Budget Item, argue that a distinction

should be made between non-kollel students, on the one hand, and kollel students, on the other hand, who devote all of their energies to the study of Torah and are therefore not able to perform any kind of work. Respondents 8 and 9 also argue that the state has supported kollel students for decades and that for this reason, a decision to compel the legislature to change this policy will violate their reliance interest and will contravene the Basic Law: Human Dignity and Liberty, in that it will strike a mortal blow to their spiritual world, their dignity and their property. Respondents 8 and 9 further emphasize the grave financial situation of the kollel students and the fact that the support amount being discussed here is a minimal amount, which they require for basic subsistence.

The legal framework

14. The normative basis for payment of the benefits granted to the kollel students is, as stated, a provision in the annual budget law. We must therefore first discuss the normative provisions that govern the budget laws in Israel, at the center of which are the provisions of the Budget Principles Law, 5745-1985 (hereinafter: the Budget Principles Law). The Budget Principles Law constitutes a piece of framework legislation governing the annual budget laws. The law defines the types of issues that are presented in the annual budget laws, and outlines the discretion given to the government and the Knesset in determining the annual budget. We will therefore examine the validity of a provision in the annual budget law that contradicts an explicit provision in the Budget Principles Law. The discussion itself will focus on the question of the violation of the principle of equality and the state's claim that there is no prohibited discrimination before us but, rather, a permissible distinction based on relevant differences. We will end the discussion with the question of the appropriate remedy under the circumstances of the case, taking into account the legal and public issues raised in the petition.

The normative framework that governs the Budget Item

15. The normative framework for the annual budget laws is found in two main pieces of legislation – the Basic Law: The State Economy and the Budget Principles Law. Section 3 of the Basic Law: The State Economy outlines the basic principle whereby the state budget is to be established in a law, it is to be a one-year budget, and it must include anticipated and planned government expenditures. (As noted above, the state budget for 2009 and 2010 is a biennial budget, in accordance with the provisions of the Basic Law: The State Budget for 2009 and 2010 (Special Provisions) (Temporary Provision), 5769-2009). The Basic Law: The State Economy establishes the

outlines of the main work on the budget, pursuant to which the government is entrusted with preparing the budget and presenting the proposed budget to the Knesset at the time designated by the Knesset, or by the Knesset committee authorized to make that designation. In any event, the proposed budget is to be submitted for the Knesset's review no later than 60 days before the start of the fiscal year.

While the Basic Law: The State Economy determines the division of labor between the government and the Knesset, the Budget Principles Law lays the foundation for the annual budget laws. As its name implies, the Budget Principles Law determines the essential foundations for all annual budget laws. The Budget Principles Law is very detailed and includes a long list of provisions that regulate various matters pertaining to the structure of the annual budget law, the manner in which the annual budget is determined and the actions permitted in the framework of the budget. As such, the Budget Principles Law specifies what items are required in the annual budget law, delineates the government's authority to change the budget during the year, and places credit restrictions on local authorities and budgeted entities. The Budget Principles Law also establishes special provisions regarding the defense budget and budgeted entities, and designates criminal and disciplinary sanctions to be imposed for violations of its provisions. The Budget Principles Law does not deal with decisions to allocate or not to allocate funds in general, and it deals "neither with shekels nor with agorot" (HCJ 7142/97 *Council of Youth Movements in Israel v. Minister of Education, Culture and Sports* [4], per Justice Cheshin, at p. 438). The law has one purpose: to establish the normative framework for future budget laws.

16. The question of the nature of the relationship between the Budget Principles Law and the annual budget law, which is derived from the special nature of each one of the laws in itself and in relation to the other, was at the heart of this Court's judgment in HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [5]. The issue arose during the deliberation regarding a budget item in the budget law for 1997, which provided for government support for Torah-based and ultra-orthodox culture in a manner that was found to be in contravention of s. 3A of the Budget Principles Law (hereinafter: "s. 3A" or the "section"). That section provides that government expenditures for the purpose of supporting public institutions must be set out in the budget law as a comprehensive amount for each type of public institution, and must be distributed among the relevant institutions according to uniform criteria. In his opinion in that case, Judge Zamir examined the

relationship between the Budget Principles Law and the annual budget law, and ruled that although these are two pieces of legislation that are located in the same "square" within the pyramid of norms, they are not on the same "tier." As stated in Justice Zamir's opinion – with which I agreed – a "unique relationship" (*ibid.* [5], at p. 357) exists between the budget law and the Budget Principles Law, in which the annual budget law is substantively subordinate to the Budget Principles Law (*ibid.* [5], at p. 355). Justice Zamir noted the following:

> 'It can be argued that the Budget Principles Law and the annual budget law are not on the same tier in the pyramid of norms. Both of them are indeed located in the pyramid within the same square – the square of statutes – which lies beneath the square of basic laws and above the square of secondary legislation. However, even norms that are situated in the same square are not necessarily on the same tier. Within each square on the pyramid of norms there are tiers. Thus, for example, the basic laws contain both ordinary provisions and "protected" provisions, and secondary legislation also includes regulations (which are sometimes called orders) that are issued by force of other regulations, and which are therefore subordinate to the other regulations. Similarly, we cannot rule out the possibility that in the square of statutes as well, there will also be a situation in which one statute is situated above another statute' (*ibid.* [5], at p. 357).

Justice Zamir based his position that the annual budget law is substantively subordinate to the Budget Principles Law on the special nature of the budget law. Justice Zamir wrote:

> 'An annual budget law, notwithstanding the fact that it is officially a law, is not a law in substantive terms and is in any event not an ordinary law, from that perspective. A law, from a substantive standpoint, determines a general norm. An annual budget law does not determine a general norm. Alongside the determination of the expenditures, it grants permission to the government, on behalf of the Knesset, to expend a certain amount of money for the purpose of a certain action in a certain year, such as expending a certain amount of money to support institutions of a certain type. From this standpoint, it is more like an administrative act than a piece of legislation' (*ibid.* [5], at p. 356).

Justice Zamir also addressed, *inter alia*, the fact that the budget law is passed in a special "summary" procedure, in which "the annual draft budget is not publicly distributed as a draft law memorandum by the Ministry of Justice, nor is it published in a blue paper with the other bills, for the public's knowledge and for public debate, and it does not undergo a full first reading, as is standard for ordinary bills" (*ibid.* [5], at pp. 356-357). Justice Zamir further stated that by their nature, the provisions of the Budget Principles Law are designed to apply in a binding manner to the annual budget laws. For example, Justice Zamir referred in his judgment to the provisions of the Arrangements in the State Economy Law (Legislative Amendments), 5752-1992 which, in s. 1(a), enacts s. 3A of the Budget Principles Law and which provides in s. 1(b) that "[s]ub-section (a) shall apply to the amounts of the expenditure in the budget for the 1992 fiscal year *and thereafter*" (emphasis added - D.B.). If an annual budget law can effectively ignore the provisions of s. 3A of the Budget Principles Law, ruled Justice Zamir, "then the Budget Principles Law and the principle of equality in distributing supports are liable to remain an empty vessel. If that is the case, what good was accomplished through them?" (*ibid.* [5], at p. 357).

17. Justice M. Cheshin, who concurred with the holding of the judgment in *Conservative Movement v. Minister of Religious Affairs* [5] and with the reasoning supporting it, added that the purpose of the Budget Principles Law directly influences "the interpretation, the inner power arising therefrom and the areas to which it extends" (*ibid.* [5], at pp. 382-383). As a law that is supposed to exist "in perpetuity" and whose purpose is to assemble "the genetic code of every annual budget law," Justice Cheshin held, the Budget Principles Law is meant to prevail over an item in an annual budget law that deviates from its provisions. Justice Cheshin added that his view that the Budget Principles Law prevails over a conflicting provision in the annual budget law will apply where the conflict is an implied one. According to Justice Cheshin, "if a provision in an annual budget law implicitly conflicts with any provision of the Budget Principles Law, the presumption is that the Knesset did not intend to give it force and it is invalid" (*ibid.* [5], at p. 388). However, Justice Cheshin added that in his opinion, the Knesset does have the authority to pass legislation contrary to the Budget Principles Law, but only if it does so expressly (*ibid.* [5]).

The court further noted in that case that the supremacy of the Budget Principles Law over the annual budget laws signifies that the court is authorized to nullify an item in an annual budget law if it conflicts with the provisions of the Budget Principles Law. The possibility of nullification did

not need to be decided in that judgment, and it was therefore left for further examination. (For criticism of the court's holdings in *Conservative Movement v. Minister of Religious Affairs* [5], see Suzy Navot, "Comment on the Normative Status of the Budget Laws," 6 *HaMishpat* 123 (2001)).

18. Thus, as we held in *Conservative Movement v. Minister of Religious Affairs* [5], the Budget Principles Law and the provisions set out therein apply to every annual budget law. The two statutes – the Budget Principles Law on the one hand and the annual budget law on the other hand – create a sort of micro-cosmos that deals with the manner of allocating state resources and the use of those allocations. One law delineates the main provisions pertaining to the principles for determining the budget, and the other carries these principles out each year. This conclusion arises from both the special nature of the Budget Principles Law as a law designed to regulate and delineate the legislative procedure and the content of the annual budget laws, and from the nature of the annual budget law, which deals mainly with authorizations for budgetary actions.

19. The Budget Principles Law constitutes a type of substantive "protected" provision that applies to the annual budget laws, and it was legislated in an effort to tighten supervision of the budget (see Dafna Barak-Erez, "Enforcement of the State Budget and of the Administration Contracts," 1 *HaMishpat* 253 (1993), at p. 254). This can be deduced from both the law's own provisions and from the circumstances in which it was passed. An examination of the provisions of the Budget Principles Law shows that it has two main objectives. One is to regulate the normative framework for the budget laws and to ensure that the annual budget laws that are passed, from the date of the Budget Principles Law's enactment and thereafter, are legislated in accordance with a specified series of provisions. The other is to increase the supervision over the allocation and use of the annual budget of budgeted corporations, local authorities and other supported entities.

20. The Budget Principles Law is an example of what is called "framework legislation" in the comparative literature. Framework legislation consists of statutes that structure the manner of legislating laws within the field of the particular matter that they regulate. For the most part, framework legislation contains provisions pertaining to the manner of voting and deliberating in the legislature during the voting on the legislation covered by the particular framework legislation. In some instances, as in the Budget Principles Law, it also contains provisions pertaining to the content of such

legislation. (For a discussion on framework legislation, see E. Garrett, 'The Purposes of Framework Legislation,' 14 *J. Contemp. Legal Issues* 717 (2005), at p. 718.) Laws such as the Budget Principles Law, which regulate the legislation of annual budget laws, are considered prototypes of framework legislation. (See, e.g., Garrett, *ibid.*, at p. 723: "The congressional budget process is the prototypical framework law.") Framework legislation, as presented by Garrett in her aforementioned article, has several goals. Such legislation makes it possible to address recurring problems, in principle; it establishes neutral procedures for the process of enacting future laws; it provides a solution to various problems arising from the need to coordinate between various entities responsible for making decisions (for example, among several Knesset committees or among entities in various government ministries); and it defines broad general goals in a manner that ensures that future legislation will be consistent with those goals (see Garrett, *ibid.*, at p. 733).

21. The Budget Principles Law, as the framework legislation for the annual budget laws, contains various provisions designed to regulate future budgetary legislation, both at the level of the legislative procedure for the passage of the annual budget laws and at the level of the content of those laws. Some of the provisions in the Budget Principles Law are of a procedural nature, dealing with the scope of details that must be included in an annual budget law. Thus, for example, s. 2 delineates the structure of the annual budget law and specifies the types of budgets that must appear therein; s. 4 regulates the manner of utilizing receipts that were received in excess of the projected receipts and loans for the fiscal year; Chapters D-E include various provisions relating to budgeted corporations, local authorities and religious councils; and s. 33 provides that a budgeted entity and a supported entity must provide the director-general of the Ministry of Finance with any information that is necessary for the purpose of monitoring implementation of the Budget Principles Law or of the annual budget law. Alongside these provisions, the Budget Principles Law sets out provisions of a substantive nature. Section 3A of the Budget Principles Law, which is the section relevant to the petition before us and which we will discuss in detail below, is an example of such a provision and its subject matter is the application of the principle of equality in distributing state funding to public institutions. Section 3A also demonstrates the manner in which framework legislation provides a response to a recurring problem that preceded its enactment – in this case, the problem of the "earmarked funds" that the

legislature wished to eliminate with the addition of s. 3A to the Budget Principles Law.

22. Alongside the Budget Principles Law's status as a law that was designed to form the basis of the annual budget laws, there is the unique nature of the annual budget law. The budget law, as its name indicates, is a law passed by the Knesset, although the hearing thereof, like its content, differs from the ordinary in comparison to other primary legislation. Section 131 of the Knesset Rules of Procedure, which is entitled "Special Hearing Procedures," provides that "[i]n a hearing on the state budget, and in other exceptional cases, the Knesset committee may determine special hearing procedures." The annual budget proposal, which the government is required to submit to the Knesset no later than 60 days before the fiscal year, is not distributed as a draft law memorandum by the Ministry of Justice, it is not published like any other bill, and it does not go through a full first reading (see: A. Rubinstein and B. Medina, *The Constitutional Law of the State of Israel: Government Authorities and Citizenship* (vol. B, 2005), at p. 898).

However, not only the hearing procedures differentiate the annual budget law from other primary legislation. From a substantive standpoint, it also cannot be said that the budget law is like any other law that is passed by the Knesset. Basically, the budget law is a law that gives the government authorization for an action. The law is essentially composed of many sections that specify the amount of the allocation for various actions within government ministries, in accordance with the economic policy determined by the government. For the most part, the budget law does not contain a substantive normative dimension or norms that determine enforceable permitted and prohibited behavior. The budget law is, in effect, a framework for actions to be taken by the government, which, in our governmental requires the approval of the Knesset for the expenditures it needs in order to perform its ongoing activities and to implement its policy. The budget law is also limited in scope. As a rule, it is valid for one year only (or for two years, such as this year, in the case of a biennial budget law), and the budgetary provisions set out therein grant the government permission to expend monies for certain purposes or to engage in monetary undertakings, but they do not impose an obligation on the government to expend these funds; under s. 3 of the Budget Principles Law, the government *may*, in a particular fiscal year, expend the amount specified for an expenditure in the budget law, but it is not obligated to do so.

23. The Israeli courts have recognized the special nature of the budget laws. For example, Justice Sussman characterized the annual budget law as follows, in CrimA 213/56 *Attorney General v. Alexandrovich* [6], at p. 698:

> '…Such a law, which is, indeed, a law in form, but not in substance, is the state budget: it does not contain any norm aimed at the citizens of the state. Nevertheless, due to the importance of the matter, the budget is determined by the Knesset in the form of a law, so that that its determination is not in the hands of the executive authority. But this does not change the nature of things: it involves an administrative matter implemented by the legislative branch and this is done in the form of a law.'

Similarly, Justice Cheshin ruled that "an annual budget law contains many thousands of details and, in essence, it is no more than a collection of items of authorization for expenditure" (*Conservative Movement v. Minister of Religious Affairs* [5], at p. 387). It has also been stated that the annual budget laws are "singular and special laws, different from all other laws, and their unique characteristics automatically require a special manner of treatment" (HCJ 240/98 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [7], at p. 189).

24. The budget laws are of a special nature, not only in Israel's parliamentary system, but also in other countries with similar democratic systems. In those countries as well, the budget constitutes parliamentary approval for the actions of the executive authority. See, in comparison, W. Eskridge Jr. and J. Ferejohn, 'Super-Statutes,' 50 *Duke L. J.* 1215 (2001) on the status of budget laws in American law:

> 'Appropriations laws perform important public functions, but they are usually short-sighted and have little effect on the law beyond the years for which they apportion public monies.'

Similarly, see, with regard to the budget laws in Germany, T. Knörzer, *Budget System of the Federal Republic of Germany* (Bundesministerium der Finanzen, 2008, at p. 8):

> 'The budget is a systematically classified presentation of the expenditure estimated for the fiscal year and the revenue intended to cover it. The budget provides the basis for the government's budget and economic management. It authorizes the administration to effect expenditure and to incur liabilities. The budget in itself neither establishes nor terminates any claims or liabilities. This can be done only by force of law. As the budget confers only an

> authorization, government is not legally required to actually effect any expenditure that has been included in the budget.'

In Germany, while the budget laws are laws for all intents and purposes, the constitution restricts their content. Pursuant to Article 110 (4) of the Basic Law, the budget laws can include

> 'only such provisions as apply to the revenue and expenditure of the Federation and to the period for which the Budget Statute is being enacted.'

Moreover, the German law subordinates the annual budget law to other budgetary legislation in the same manner that the annual budget law in Israel is subordinate to the Budget Principles Law. In Germany, the budgetary legislative system creates an extremely clear hierarchy. At the top of the pyramid stand the provisions of Chapter X of the Basic Law (which include the aforementioned Article 110 (4)), dealing with the state budget. Below the Basic Law is the Budgetary Principles Act of 1969, which was legislated as part of the reform of the German budgetary system that was enacted that year. The Budgetary Principles Act of 1969 specifies the principles for budget legislation that apply to both the federation and to the states. Beneath the Budgetary Principles Act are the Federal and State Budgetary Acts of 1969-1971, and beneath them are municipal laws and federal and municipal regulations (see K. Luder, "Government Budgeting and Accounting Reform in Germany" in 'Models of Public Budgeting and Accounting Reform,' *OECD Journal on Budgeting* (vol. 2, supp. 1), at p. 228). In Germany, the budget laws *cannot* change the provisions set out in the Budgetary Principles Act, which, like the Israeli Budget Principles Law, delineates provisions and principles pursuant to which the federation and the states are obligated to legislate the annual budget laws. (For a review of the provisions that delineate the main principles in German budget legislation, see *Budget System of the Federal Republic of Germany*, *supra*, at pp. 8-9.)

25. It appears, therefore, that the budget law – in Israel as in other countries around the world – is enacted as primary legislation by the legislature, but this does not signify that its status is the same as that of other laws, especially in light of other legislation that regulates the matters that may appear in annual budget laws, such as the Budget Principles Law. The budget law is a unique law, and its unique characteristics, both from the standpoint of the procedures involved in the process of its legislation and from the standpoint of the scope and type of matters that it regulates, have several ramifications. As we ruled in *Conservative Movement v. Minister of*

Religious Affairs [5], the annual budget law is subordinate to the Budget Principles Law. Clearly, in the normal course of events, no similar relationship exists between any two pieces of legislation since, in general, all laws are situated on the same tier in the pyramid of norms – except for the subordination of ordinary legislation to Basic Laws – and no one law can lead to the nullification of sections of another law. From this is derived the basic rule in our legal system whereby a provision in a later law will prevail over a provision in an earlier law, provided that the two provisions are of equivalent status. Underlying this rule is the principle of the legislature's sovereignty, the purpose of which is to prevent the fettering of a future legislature and to allow the Knesset the option to deviate from the provisions and the legislation enacted by an earlier Knesset. However, alongside this important rule there are exceptions, such as the choice of law rules, which deal with regulating conflicts between various pieces of legislation. The exceptions are also joined by the special relationship that exists between the Budget Principles Law and the annual budget law, which stems from the material dealt with in the two laws and the unique nature of each of them.

26. The hierarchy between the Budget Principles Law and the annual budget law indicates that in preparing the annual budget, the Knesset and the government are required to ascertain that the budget's provisions are compatible with the provisions set out in the Budget Principles Law. The ineluctable result of this is that, in general, a provision in the annual budget law that conflicts with a provision in the Budget Principles Law cannot stand. However, due to the nature of the annual budget law, any judicial review that involves an examination of the budget law at the constitutional level, against the background of the Basic Laws and in the framework of its subordination to the Budget Principles Law, will be, by its nature, restrained and limited. The budget law reflects the policy of the government and the ideological and substantive choices made by the Knesset – choices that are implemented through the allocation of resources. Determining the economic policy of the state is one of the basic and fundamental powers exercised by the government and the Knesset, and the court will refrain from interfering therein in the framework of its review, unless the violation of basic rights expressed in the budget provisions under review is significant and severe. Indeed, in a series of judgments, this Court has established a rule of caution and restraint regarding intervention in the economic policy determined by the legislature. Thus, for example, in HCJ 4769/95 *Menachem v. Minister of Transportation* [8], at pp. 263-264, the court held that in exercising judicial review regarding the economic field, a field that entails far-reaching social

and economic aspects, the court would act with judicial restraint. In that case, the court stated that with regard to the economy, "there may often be several possible goals and modes of operation; the choice between them is often based on an assessment that involves uncertainty, and will involve professional forecasts and considerations that are not always within the sphere of the court's expertise." Therefore, it was held, "the authorities in charge of the economic policy – the executive branch and the legislative branch – must, as the branches who determine the overall policy and who bear the public and national responsibility for the state economy, be given a broad field of choice." See also, President Barak's remarks in HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [9], at p. 389:

> 'Especially in the realm of the economy there may often be several modes of action; there are several options open to the government authorities; the decision is based on an assessment in which a great deal of uncertainty is inherent. The tools and devices for "understanding the subtleties and differences in the proportionality between the various possibilities" are often lacking. . . . Generally, the legislative measures are characterized by the existence of a variety of actions and a mix of actions, whose comprehensive effect must be examined and tested. All these lead to the conclusion that the court will not turn itself into an economic super-authority that examines the justification for the economic options that were chosen. The court will fulfill its classic role of judicial review of government activities.'

To these considerations we must add that the budget law is structured so that the various budget items are connected to one another. Thus, it may be that the repeal of one budgetary provision will affect other provisions in such a manner that the court does not have the tools to examine the scope of its ramifications. (See, in this context, the remarks of Justice Cheshin in *Adalah Legal Center v. Minister of Religious Affairs* [7], at p. 190.) The character and the nature of the impact must also be considered. In this matter, it should be noted that the Budget Principles Law contains a long series of provisions, some substantive, some of which were designed to ensure the protection of basic rights, and some of which have a more technical nature. It may be that not every deviation from the provisions of the Budget Principles Law would justify nullifying an item in the annual budget law, and that instead only a deviation from those provisions that reflect basic rights and principles will provide a ground for nullification. I see no need to determine in advance, in this petition, which provisions will lead to the nullification of budget items in

the budget law, and which will not. The decision in each case is affected by the reasoning underlying the relevant provision in the Budget Principles Law; by the nature of the difference between the provision in the Budget Principles Law and the provision in the annual budget law; and by the importance of the right that was violated, the severity of the violation and its duration. At this time, these questions can be left in need of further examination and can be discussed in the future if the need to do so should arise.

27. Going beyond what is necessary, it should be noted that the petition before us raises another question pertaining to the conflict between the annual budget law and prior substantive legislation. In this case, the question arises in view of the existing conflict between the provisions of the Income Support Law – according to which groups of students, among them kollel students, are not eligible for income support payments – and the Budget Item, pursuant to which income support benefits are paid to kollel students. The question in this context relates to the possibility of deviating from and, at the least, modifying prior substantive legislation by means of a budget allocation in the annual budget law. Similar questions were deliberated extensively in the United States. In a series of cases, the American courts, headed by the Supreme Court, have ruled that a budget law that conflicts with other substantive legislation will be viewed as an implicit change of the substantive law. However, the Supreme Court has held that a change of substantive legislation in an annual budget law is possible only when Congress has expressed its wish to do so explicitly and unequivocally and, even then, the explicit change would be permissible for one year only. In the leading case dealing with this issue, *Tennessee Valley Authority v. Hill* [42], the court held as follows:

> '"The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." *Committee for Nuclear Responsibility v. Seaborg* [43], at p. 785 (emphasis added); *Environmental Defense Fund v. Froehlke* [44], at p. 355. This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to assume that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every

> appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need' (*Tennessee Valley Authority v. Hill* [42], at pp. 190-191 (emphasis in the original - D.B.); see also *Robertson v. Seattle Audubon Society* [45]).

The congressional rules to which the court referred also include House Rule XXI (2), which restricts the introduction changes to prior substantive legislation in the framework of a budget law and provides that:

> 'No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order*' (emphasis in the original - D.B.).

Underlying the United States Supreme Court ruling is the premise that the extensive scope of the matters regulated by an annual budget law and the manner of the technical presentation of the budgetary authorizations provided in the budget make it very difficult to understand the matters that are regulated within the realm of the budget, and these factors do not allow the legislators, in practice, to know fully and comprehensively what matters are included in the budget. In those circumstances, it is hard to say that members of the legislative body, when they vote on the annual budget, are aware of each and every item and are giving their consent to an implicit change of prior substantive legislation. (In this context, see the comments of the Ohio federal district court in *Planned Parenthood Affiliates of Ohio et al. v. Rhodes et al*. [46]).

The approach of the United States Supreme Court raises interesting questions with regard to the scope of the matters that can be regulated in the annual budget law, including the possibility of modifying– explicitly or implicitly – prior legislation by means of a provision in the annual budget law. We are not required to decide these questions in the context of the petition before us, and they will therefore be left at this time in need of further examination.

From the general to the specific

28. Our discussion up to this point has focused on the normative framework that governs the annual budget laws. We have found that the budget laws have unique characteristics. We have also determined that the budget law is subject to the Budget Principles Law in a manner that requires the budget allocations in the annual budget law to conform to the provisions of the Budget Principles Law. The remainder of the discussion below will focus on the question of whether the Budget Item contained in the budget laws since 1982 violates the principle of equality – a basic principle in the Israeli legal system, which is expressed in provision 3A of the Budget Principles Law. The petition before us raises the question of the proper interpretation of s. 3A, and of the significance arising from the need to subordinate an annual budget law to the equality provision that is established, *inter alia*, in s. 3A. We will now address these questions.

Section 3A of the Budget Principles Law

29. Section 3A was added to the Budget Principles Law in 1992 in the Arrangements in the State Economy Law (Legislative Amendments) (No. 3), 5752-1992. The relevant parts of the section provide as follows:

> Support of Public Institutions (Amendment 12) 5752-1992
>
> 3A. (a) In this section –
> "Public Institution" – An entity that is not a government institution, which operates for the purpose of education, culture, religion, science, art, welfare, health, sports or a similar purpose;
>
> "Budget Item" – An item in an annual budget law that establishes the expenditures of a government ministry.
> An annual budget law shall determine the government's expenditures for the purpose of supporting Public Institutions.
> The government's expenditures for the purpose of supporting Public Institutions shall be determined in each budget item in a comprehensive amount for each type of Public Institution.
> The amount set out in a Budget Item for a

> type of Public Institution shall be divided among Public Institutions of the same type pursuant to uniform tests.
>
> (e) The party in charge of the Budget Item shall formulate, in consultation with the Attorney General, uniform tests for dividing the amount determined in that Budget Item for the purpose of supporting Public Institutions (hereinafter – the Tests).
>
> (f) The Minister of Finance shall formulate, in consultation with the Attorney General, a procedure pursuant to which applications by Public Institutions for the receipt of support from the state budget shall be submitted and considered (hereinafter – the Procedure).
>
> (g) The Tests and the Procedure shall be published in *Reshumot* [the Government Gazette].
>
> (h) No amount set out in the annual budget law shall be expended for the purpose of supporting a Public Institution unless it incorporates and complies with the Procedure's provisions, and to an extent consistent with the Tests.

Section 3A delineates the manner in which state support will be provided to public institutions, and specifies that government expenditures for the purpose of supporting public institutions will be determined as a comprehensive amount for each type of public institution, and will be distributed among the relevant institutions pursuant to uniform tests. The purpose of the section was to eradicate the problem of earmarked funds, which had been widespread prior to the enactment of s. 3A. When he earmarked funds practice was in use, the Knesset would distribute state funding to various institutions without known and predetermined uniform criteria. Pursuant to that practice, in accordance with coalition agreements that were signed among various Knesset factions, the budget law would specify a support item detailing the names of the supported entities and the amount of the annual support. Both the supported entities and the amount of

the annual support were determined arbitrarily and without open and uniform criteria (see A. de Hartouch, 'State Support for Public Institutions – The Blossoming of Earmarked Funds, 29 *Hebrew Univ. L. Rev. (Mishpatim)* 75 (1992), at p. 82 (1992)). In the wake of widespread public condemnation and the criticism voiced by this Court regarding the issue of the earmarked funds (see, e.g., HCJ 780/83 *Yeshivat Tomchei Temimim Merkazit v. State of Israel* [10]; MP 166/84 *Yeshivat Tomchei Temimim v. State of Israel* [11]; see also: HCJ 59/88 *MK Tzaban v. Minister of Finance* [12]), the legislature amended the Budget Principles Law by adding s. 3A, which applied the norm of equality in state funding by establishing that the amount of the support in each annual budget law would be determined comprehensively for each type of public institution and would be distributed among the appropriate institutions according to uniform tests. As with the Budget Principles Law in its entirety, s. 3A is designed to apply to every annual budget law and, in that framework, to every state grant: "The essence of the provision in s. 3A is to establish the equality norm as the underlying norm – the supreme norm, if you will – for all the support grants that the state intends to grant in one or another area of life" (*Council of Youth Movements* v. *Minister of Education* [4], per Justice Cheshin, at p. 438).

Section 3A was added to the Budget Principles Law after a stormy debate in the Knesset and after various government ministries and this Court had responded to the issue. (See, e.g., Justice Cheshin's remarks in HCJ 8569/96 *Federation of Working and Studying Youth v. Minister of Education* [13], at p. 600: "And once again we are required to decide the question of the financial support that the state should provide – or not provide – to this or that public entity. I say 'and again' because the petitions on the issue of the support funds follow one another, and we must bear the burden of deliberating, considering and deciding." See also Justice Y. Zamir's comments in HCJ 3792/95 *National Youth Theater v. Minister of Science and Arts* [14], at p. 262: "This petition raises, yet again, the problems entailed in distributing support to public institutions from state funds.") The innovation in s. 3A is that it prohibits the provision of support funds in the framework of the state budget to certain organizations and institutions chosen surreptitiously by Knesset members, in accordance with coalition agreements and waivers, and not in accordance with open and uniform criteria. Section 3A expressly states that instead of specifying the names of the supported entities in the annual budget law, an annual amount of support will be determined for each type of public institution, which will be distributed among the public institutions of that type, according to uniform tests. The

goal underlying s. 3A was to prevent a situation in which, in the words of Justice Y. Zamir, "the annual state budget became, knowingly and openly, a device for distributing state monies, as though they were loot from the elections, in a manner that discriminated against good institutions worthy of support, only because they were not close to the seat of power" (*Conservative Movement v. Minister of Religious Affairs* [5], at p. 344).

30. As worded, s. 3A is designed to apply to support for public institutions. "A public institution" is defined in s. 3A(a) as "[a]n entity that is not a government institution, which operates for the purpose of education, culture, religion, science, art, welfare, health, sports or a similar purpose." The question before us is whether s. 3A also applies to income support payments to kollel students that are paid by virtue of the Budget Item, since these payments are not given to what is clearly a "public institution," but are instead distributed to kollel students who meet the conditions for eligibility.

The question of the possibility of applying the provisions of s. 3A to support for individuals has arisen in the past. In HCJ 1/98 *Cabel v. Prime Minister* [15], the court examined the legality of guidelines for determining eligibility for public housing assistance. While the guidelines were formulated in a comprehensive manner, the court found that, in practice, they were guidelines that were drafted solely for the sake of appearance, since they were actually directed at a specific population group and therefore constituted a unique grant. Those who met the conditions for eligibility according to the guidelines were not public institutions, but rather private individuals who, because of their financial situation (and the fact that they met certain additional conditions), were found to be eligible for the assistance. Justice Cheshin, speaking for the Court, addressed the question of the applicability of s. 3A to support for individuals, and stated:

> 'In this matter, we will note that the provision in s. 3A of the Budget Principles Law does, deals with support funds that the state grants to public institutions (as the concept "public institution" is defined in s. 3A (a)), and does not in any event apply to this case. Nevertheless, the analogy is self-evident, if only for the reason that, in both cases, we are talking about benefits that are granted from the state budget, benefits that are granted without a substantive law that establishes guidelines for granting them. Indeed, it would be advisable for the authorities – and for the Attorney General – to also apply the spirit and the wording of the provisions of s. 3A,

mutatis mutandis, to financial benefits that are not given specifically to public institutions' (*ibid.* [15], at p. 263).

31. These remarks are pertinent to this case. Indeed, s. 3A was not enacted in a vacuum. State support for individuals and public institutions preceded the enactment of s. 3A, and this Court, in examining the legality of such support, reiterated the principle that has existed in our law from time immemorial, according to which state funding must be provided equally and along with the establishment of clear, uniform and open criteria. See, e.g., the comments of Justice Barak in *MK Tzaban v. Minister of Finance* [12], which preceded the enactment of s. 3A:

'Budget funds are state funds. The government authorities that are authorized to utilize them are not entitled to do with them as they please. The government authorities are trustees for the public and the expenditure and distribution of these funds must be implemented in a way that is consistent with that trusteeship. In terms of substance, this requires convincing proof that the goal for which the funds are intended is a goal that the state is interested in supporting. The support must be implemented according to principles of reasonableness and equality…and with relevant considerations…the financial support must be implemented "according to clear, relevant and uniform criteria." In terms of form, clear and overt criteria must be established, pursuant to which a decision will be made regarding the financial support, along with the establishment of control mechanisms to ensure that the funds are serving their designated purpose. Only in this manner will the support be given in a way that is consistent with the trusteeship obligation of the government. Only in this manner is assurance provided for the public's faith that the state funding is given according to the importance of the issue and not the importance of the interested party' (*ibid.* [12], at pp. 706-707).

The obligation to distribute state funding in a uniform manner exists, as stated, independently of s. 3A, and the courts imposed this obligation both before the section was enacted and after it was enacted. In that spirit, Justice Zamir made the following statement in HCJ 1113/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [16], at p. 172:

'The principle of equality in allocation of funds from the state budget is not limited to the provision of support to public institutions, as established in s. 3A of the Budget Principles Law, but it also applies, even without a law that establishes this

explicitly, in allocation of funds from the state budget in another manner, and for other purposes.'

The clear advantage of s. 3A does not necessarily lie in its declaration of the obligation to act in accordance with the principle of equality – an obligation that also existed, as stated, before the section was enacted – but, rather, in the fact that it established an orderly mechanism for providing state funding in the framework of the state budget, and for distributing that support among the appropriate institutions. Indeed, notwithstanding the fact that the wording of s. 3A is directed at state funding that is provided to public institutions, the principle established therein is far broader – the obligation to act in accordance with the principle of equality in distributing state resources in the framework of the state budget. Section 3A was designed to ensure that the distribution of the support funds in the state budget "will be implemented in an open manner, and that the principle of equality is what shall guide us. The principle of equality is the backbone, and without it, there can be no support" (HCJ 5290/97 *Ezra – National Haredi Youth Movement in the Land of Israel v. Minister of Religious Affairs* [17], per Justice Cheshin, at p. 414). Underlying s. 3A, as noted above, was the desire to eradicate the earmarked funds phenomenon and to ensure that state funding would be provided according to uniform criteria, and not as a result of one coalition agreement or another. In this context, the words of Justice Zamir, in *Adalah Legal Center v. Minister of Religious Affairs* [16] are relevant:

'The principle of equality binds every public entity in the State. First, it binds the State itself. The principle of equality applies to all the areas in which the State operates. It applies first and foremost to the allocation of the State's funds. The resources of the State, whether in land or money, as well as other resources, belong to all citizens, and all citizens are entitled to benefit from them in accordance with the principle of equality, without discrimination on the basis of religion, race, gender or other illegitimate consideration.

The principle of equality must also guide the legislative authority, which too, like any other authority in the State, must act as a fiduciary to the public in accord with the basic values of the State of Israel as a Jewish and democratic state, which include equality. This is the case in each and every law, and this is also the case in the Budget Law.'

32. While the Budget Item, by virtue of which income support benefits are paid to kollel students, is not aimed at public institutions, it is an example

of the support model to which s. 3A relates and to which the principle of equality underlying s. 3A is intended to apply. While the Budget Item does not bear the title "earmarked funds," a precise examination of the procedures for passing it and for distributing the support pursuant to it leaves no doubt that it involves the same matter in a different guise. The Budget Item was added to the budget law in 1982 following a coalition agreement which sought to ensure payment of the income support benefits to kollel students, notwithstanding the provisions of the Income Support Law that went into effect that same year. As stated, the Income Support Law explicitly established – by means of the regulations promulgated pursuant thereto – that kollel students (like students in institutions of higher education) are ineligible for income support payments. By inserting the Budget Item into the annual budget law, the provisions of the Income Support Law were circumvented in a way that benefited only certain population groups. In actuality, the detailed and specific arrangement, which ensures payments of income support benefits to a particular defined group of people in accordance with a coalition agreement, and not pursuant to – and even in contravention of – an explicit law that prohibits the provision of funds of this type to various populations, including kollel students, is basically a camouflaged earmarked funds arrangement. Indeed, in the state's response to the petition, it was explicitly argued that "[t]he arrangement for support of yeshiva students began even before the Income Support Law went into effect – as a welfare payment – *and the parties involved in the matter agreed that this arrangement would not be violated as a result of the Income Support Law*" (supplementary argument on behalf of respondents 1-6, 21 April, 2005, at p. 16; emphasis in the original - D.B.). What did this involve? An agreement between "the parties involved in the matter" to point to a particular group in the budget law, and to give it state funding and grants for the purpose of distribution to individuals without the authorization of the primary law and notwithstanding the provisions of a law that rules out payment of a support to that group. That, in essence, is the definition of earmarked funds, the distribution of which the legislature wished to prevent by means of s. 3A, even if the funds are transferred to private individuals and not to institutions (see *Conservative Movement v. Minister of Religious Affairs* [5], at p. 343).

33. Additional support for the position whereby the Budget Item constitutes a type of earmarked funds is found in the fact that the criteria for distributing an income support benefit by virtue of the Budget Item are not published. This court, in HCJ 6741/99 *Yekutieli v. Minister of the Interior*

[18], at p. 673, addressed the problem arising from the absence of criteria for determining eligibility, and noted:

> 'Who are those who are eligible for the payment of minimum income support from the Ministry of Religious Affairs? What are the criteria utilized by the Ministry of Religious Affairs when it determines that someone is eligible for minimum income support? Do the criteria change from time to time? Who determines those criteria? In vain, an answer to these questions was sought in the regulations – these and questions deriving from them. The answer to these questions was a mystery to us' (*ibid.* [18], per Justice Cheshin, at p. 692).

Only after the petition was filed did the state begin to formulate criteria for determining eligibility for income support benefits pursuant to the Budget Item. The petitioners attempted several times during the adjudication of the petition to receive an update on the procedures for determining the criteria, and they applied to the state to receive a copy of the various committees' recommendations, but their request was denied. Even after the criteria were established, the state refused to submit a copy of the criteria for the perusal of the petitioners and the Court. Only in 2005, some two decades after commencement of payments of the benefit, did the state provide the parties with the criteria.

The principle of equality

34. Once we have determined that the principle established in s. 3A applies to the support for kollel students, if not simply and directly, then in spirit and in accordance with the rationale underlying it, the question arises as to whether the Budget Item is in compliance with the equality requirement.

35. Much has already been written about the principle of equality and its pivotal position in our law (see, e.g., Y. Zamir and M. Sobel "Equality Before the Law," 5 *Mishpat Umimshal* 165 (1999); HCJ 869/92 *Zvili v. Chairman of the Central Elections Committee* [19], at p. 707; HCJ 1703/92 *C.A.L. Cargo Airlines Ltd. v. Prime Minister* [20], at p. 229). It has been said in the past that the principle of equality was analogous to "the life's breath of our entire constitutional government" (HCJ 98/69 *Bergman v. Minister of Finance et al.* [21], *per* Justice M. Landau, at p. 699), and, recently, the principle was established constitutionally in the judgment in *Movement for Quality Government v. Knesset* [2]. The court ruled that in accordance with the model established in that judgment, the right to equality is a part of

human dignity and, as such, it enjoys super-statutory constitutional protection.

The obligation to act in accordance with the principle of equality means that equal treatment must be provided to those who are equal, and different treatment will be provided to those who are different (see HCJ 4541/94 *Miller v. Minister of Defense* [22] at pp. 110-111; HCJ 678/88 *Kfar Vradim v. Minister of Finance* [23], at p. 508). This is one of the basic rules of our legal system. However, not every distinction constitutes discrimination. There are situations in which the principle of equality recognizes a relevant difference that justifies separate treatment for individuals or groups. In such situations, the distinction is not tantamount to prohibited discrimination (see, e.g., *C.A.L. Cargo Airlines Ltd. v. Prime Minister* [20], opinions of Justices M. Cheshin and T. Orr). A claim of discrimination will arise only when different and unfair treatment is provided to parties who are equal (see, e.g., HCJ 11163/03 *Supreme Monitoring Committee v. Prime Minister* [24]).

The other aspect of the principle of equality is the prohibition against discrimination. A sense of discrimination damages the fabric of society and adversely affects the willingness of its citizens to contribute to the state and to integrate into society. Discrimination undermines the public's trust in the governmental system and increases the feeling that the government is run arbitrarily; it is "an evil that penetrates the underpinnings of democratic government, permeates and destroys the foundations until, ultimately, it leads to its collapse and destruction" (HCJ 2618/00 *Parot Co. Ltd. v. Minister of Health* [25], per Justice Levy, at p. 58). This is particularly true with regard to a distribution of budget funds that contravenes the provisions of the primary legislation and is implemented on the basis of criteria that are not made public and are not subject to public scrutiny.

36. It is not a simple matter to determine whether a particular norm violates the principle of equality. By its very nature, the question calls for a discussion of the characteristics and purposes of the norm, and a determination of the "peer group" relevant to the matter at hand. The peer group is the group of individuals or entities to which the obligation to act in accordance with the principle of equality applies (see *National Youth Theater v. Minister of Science and Arts* [14], at p.281), and it is derived, *inter alia*, from the norm's purpose and from the scope of its application. Sometimes the legislature determines the peer group as a part of the norm itself, and sometimes the court must define, by means of a number of variables, what the peer group is in each specific case.

The petitioners in the petition before us claim that the peer group was determined by the legislature in the regulations that were promulgated pursuant to s. 3 of the Income Support Law. As stated, the regulations establish that eligibility for income support payments was denied to students studying in institutions of higher education or post-secondary institutions, students in religious institutions and students in yeshivas and Torah study institutions. The petitioners argue that by including the various groups in one framework – one that denies them the right to the benefit (subject to exceptions set out in the statute) – the legislature expressed its wish that all the groups studying in the various institutions listed in the regulations be deemed to be a single peer group.

In contrast to this argument, the respondents reason that the fact that the Budget Item was added to the budget law in the same year in which the Income Support Law went into effect indicates that the legislature wanted to designate, in that framework, one particular group of students, and to allow that group to receive income support payments. According to the respondents, there are disparities that justify the difference in treatment between students in institutions of higher education and kollel students. The state argues that while the group of non-kollel students study for a limited period of time and for a specific purpose (i.e., to acquire a profession), kollel students study solely for the sake of the Torah. Torah study is their profession, and their studies do not constitute a means to any other end. According to the state, this difference is what justifies a distinction between the groups.

37. In view of the dispute between the parties, the main question that must be decided is not whether there is a difference between the groups – such a difference certainly exists. Rather, the main question is whether there is a distinction – or a difference – that is relevant to the matter under discussion. There is no dispute that there are many differences between the group of petitioning students and the group of kollel students. Thus, for example, their lifestyles are different, the purposes for which they are studying are different, and the subject matter of their studies is different, as is the nature of their studies. However, the very fact that a distinction can be made between the groups on the basis of the differences that exist between them does not mean that such a distinction is legal. Distinct treatment of those who are different is something other than prohibited discrimination only when the difference is relevant to the purpose of the norm that distinguishes between them. In HCJ 4906/98 *Am Hofshi Organization for Freedom of Religion, Conscience, Education and Culture v. Ministry of*

Construction and Housing [26], which dealt with the question of equality in housing benefits that were given solely to the residents of Elad, I noted the following:

> 'A discriminatory norm that is prohibited by law is a norm that establishes different treatment for people who should be treated equally. A group that must be treated equally is a group whose unique characteristics are relevant to the purpose of the norm, to the substance of the matter and to its special circumstances – a group that must be deemed distinct from others for the purpose of that matter' (*ibid.* [26], at p. 513)

In order to determine whether the characteristics that distinguish the group of kollel students are relevant to the purpose of the norm, we must first investigate the purpose underlying the income support payments. Income support payments, as their name suggests, were designed to ensure a minimum level of income to anyone who cannot provide himself with the income required to subsist and to meet basic vital needs. (See the explanation to the Draft Income Support Law, 5740-1979, Draft Laws 1417, at p. 2.) The purpose of income support payments is to provide financial assistance to needy population groups, and it is based on a perception of the state as a welfare state that provides a safety net for those in need of it. The purpose, therefore, is basically socio-economic. To that end, various tests were established in the Income Support Law and in the criteria for the distribution of the income support benefits by virtue of the Budget Item – tests which were designed to examine the financial need of the benefit applicant and which include an investigation regarding the amount of the applicant's monthly income and of the assets registered in the applicant's name.

38. In view of the purpose underlying the income support payment arrangements, which is to provide financial assistance to kollel students, the question arises as to whether the distinction between kollel students and other students – based on the differences in the scholastic objectives of each one of the groups – is a relevant distinction. This is not the first time that this Court has been required to examine whether different rules should be established for kollel students and for other students, with respect to the matter of state funding and various financial benefits. In *Am Hofshi v. Ministry of Construction and Housing* [26], we examined the legality of various financial benefits that were given by the state to purchasers of housing units in Elad, a new ultra-orthodox city that had been established in the center of the country. The petition made the argument that the benefits were not given to

purchasers of apartments in other places in the center of the country. In the judgment, we found that the housing assistance policy was determined according to individual eligibility conditions that were established by the Ministry of Construction and Housing, and which took into consideration the economic, social and family status of the eligible person, in accordance with the policy and preferences of the government vis-à-vis the supported housing areas. Insofar as the determination of the level of eligibility was based on financial need and socioeconomic status, we ruled that this must be done according to uniform criteria for the entire population. The following was noted in the judgment:

> 'When the purpose is assistance due to financial need, the extent of the assistance is affected by the size of the family, its income, the housing conditions available to it and other personal particulars that indicate neediness. Housing hardship is the same hardship for every needy family. All those in need of assistance constitute one peer group, whatever their national, religious, communal and social affiliation may be…for that reason, no distinction should be made regarding the people within that group, based on a detail that is not relevant to the hardship and to the need for housing assistance – the fact that they are a part of the ultra-orthodox community' (*ibid.* [26], at pp. 513-514).

Similarly, in *Cabel v. Prime Minister* [15], both this Court and the state – in various opinions and in press releases – noted that with respect to entitlement to housing assistance, kollel students and other students are in the same peer group. The case dealt with the plans for construction of state-subsidized rental apartments for kollel students whose profession is studying Torah. The general procedures for determining eligibility for housing assistance provide that every candidate must meet the prerequisite of having "maximized earning capacity." The deputy minister of Housing and Construction at that time, who wanted to promote the construction plans for kollel students, had proposed new criteria for determining eligibility, in which he sought to exempt the kollel students from the need to meet the maximization of earning capacity condition. In response, the then deputy Attorney General stated in an opinion that "[a]mending the criteria as requested, in such a manner that the condition of 'maximization of earning capacity' would not apply to yeshiva students, raises a dual problem: first – discrimination vis-à-vis other population groups who are required to meet this condition, such as other students and the unemployed" (*ibid.* [15], at. p.248). Notwithstanding the deputy Attorney General's opinion, the Ministry

of Construction and Housing began to build the apartments and, in anticipation of the hearings on the state budget for 1998 and following an undertaking that had been given to the United Torah Judaism faction in the Knesset, the Ministry of Construction and Housing sought to change the criteria. A press release published by the Ministry of Justice stated that according to the new criteria, apartments could be allocated to kollel students whose profession is studying Torah – however, any relief that would be given to kollel students "would apply equally to other similar populations (non-kollel students), and that such eligibility must be qualified and limited in time" (*ibid.* [15], at p. 250). New criteria were established, as stated, pursuant to which the category of "learner" was added – a category that included married students and also those whose profession is the study of Torah. However, as indicated by Justice M. Cheshin in the judgment, the criteria were for the sake of appearance only and, in actuality, they applied only to yeshiva students. Justice Cheshin held as follows:

> '[The criteria] do not reflect the truth, which is that they have always been intended – and this is also how they operate – to benefit those whose profession is the study of Torah, while discriminating against other students. Yeshiva students and other students are included (for our purposes) in the same peer group and rights that are granted to some by law must also be granted to others. Once we have found that – according to the guidelines – yeshiva students will be receiving rights that are not given to other students, we also understand that the state's actions are prohibited. This discrimination in distributing public resources – regarding which the actuality is discrimination whose only justification is fulfilling an agreement between coalition partners – is intolerable and the Court will not allow it to become established and to remain in place' (*ibid.* [15], at p. 261).

The court reached a similar conclusion in *Yekutieli v. Minister of the Interior* [18], which dealt, *inter alia*, with the legality of a regulation enacted by the Minister of the Interior that enabled a local authority to give a discount on municipal taxes to kollel students who receive income support benefits (the same benefit whose legality is under discussion in this petition). The court found that the regulation distinguished between kollel students and other students in institutions of higher education, and noted the following:

> 'Here they are before us: one is a yeshiva student, the other is the student in an institution of higher education. Both are married,

> neither is working (neither they nor their wives), they have no income, and each one of them has three children. Neither of the two is eligible for benefits under the Income Support Law; one, because he is a student in a "yeshiva" (or in a "Torah study institution"), the other because he is a student in an institution of higher education…the financial situation of the two may be identical, but even so – as set out in Regulation 2 (7) (a) of the discount regulations – the kollel student will receive a discount on municipal taxes, only because he is a kollel student, i.e.: only because he is eligible for payments to ensure minimum income from the Ministry of Religious Affairs. While the other student, as a non-kollel student, will not be eligible for the discount. What is the justification for this? What is the reason for this discrimination – to the detriment of the other student?' (*ibid.* [18], at p. 700).

39. This court's holding in a series of judgments – that the distinction between kollel students and other students is not based on a relevant difference if the benefit given to one of these groups is based on an objective of assisting members of the group financially – is also pertinent to this case. The difference in the purpose of their studies (i.e., study for the purpose of acquiring a profession or for purely spiritual purposes) is not a relevant fact when the purpose of the support is basically economic assistance whose goal is to provide the recipient and his family with minimum income. The need that arises for income support is identical, whether it involves a student in an institution of higher education or a student in a Conservative institution of religious study, or a student studying in a kollel. Because of their studies, none of them can work to support themselves. All of them invest all their time and energy in their studies in a manner that prevents them from supporting their families. However, under the existing legal situation, only one of them is eligible for income support benefits.

In its responses to the petition, the state argued that the purpose underlying the Budget Item is not economic, and is instead an ideological purpose at the basis of which is the encouragement of Torah study. As stated, we cannot discern from the wording of the Budget Item that that is, indeed, the purpose, and perhaps it is even the opposite. The heading of the item, "Minimum Income Support for Kollel Students," attests to the fact that the main purpose is to provide financial assistance and not to encourage study, even though encouraging study can be a side effect of financial assistance. The criteria for determining eligibility for the benefit support this conclusion. According to the criteria, not all kollel students are eligible for the benefit.

For example, a kollel student who has two children (and not three, as required by the criteria) is not eligible for the benefit. Does this mean that the state does not desire to encourage the Torah study of this kollel student? The obvious answer is that the criteria were designed to determine a minimum threshold based upon economic status, and this threshold assumes, for example, that the economic situation of a family with three children is graver than that of a family with two children; just as an ultra-orthodox family that owns another asset, aside from their residential apartment, is not eligible for an income support benefit. Even though it is not disputed that there is also an ideological basis underlying any budgetary support, the essence of which is to promote and encourage the supported activity, the economic need is the foundation for the conditions for eligibility for income support benefits, because if the purpose had been solely to encourage learning, all kollel students would be eligible for the benefit.

Moreover, even if the state's argument regarding the ideological purpose underlying the Budget Item was accurate at the time, there have been many developments that have occurred concerning this matter within the ultra-orthodox community, relating to the various legal mechanisms involved in the arrangements for exemptions given to yeshiva students, and the encouragement of the ultra-orthodox to seek employment – and these create more than a few problems regarding this reasoning for the support. For example, in the judgment in *Movement for Quality Government v. Knesset* [2], the Court determined that the Deferral of Service Law has four main purposes: to lawfully establish the arrangement for deferring the service of yeshiva students whose profession is the study of Torah; to establish more equality in distributing the burden of military service; to increase the participation of the ultra-orthodox population in the job market and to encourage ultra-orthodox men to go to work (this being especially the case in light of the situation that had preceded the Deferral of Service Law, in which deferment of service was contingent upon the deferring student refraining absolutely from engaging in any occupation except learning in a yeshiva); and to provide a gradual resolution of the problems that existed in the arrangement for those exempt from service (*ibid.* [2], at p. 44). In the state's arguments in response to a petition that was filed with regard to the law's implementation (the above-mentioned *Ressler* petition, HCJ 6298/07), the state reiterated and specified the various arrangements that had been established in the Deferral of Service Law, whereby kollel students were permitted to work with certain restrictions, with the aim of "enabling the older students to earn a living after study hours, in order to allow them to

increase their income by means other than support from the state budget." (The state's response, dated May 18, 2008, at p. 12). The explanation of the Deferral of Service Law that accompanied its enactment also indicated that "the purpose of the decision year is to enable those who are uncertain about whether to continue with their studies or to enter into other frameworks that will enable them to integrate into the economy, the job market and society in general, to consider their course of action…in addition to the above, the decision year is designed to enable yeshiva students to learn a profession and seek employment, without losing the status of a person whose 'profession is the study of Torah,' and to ease the transition from a lifestyle of Torah learning to a different lifestyle." (Explanations to the Draft Military Service (Deferral of Service for Yeshiva Students Whose Profession is Studying Torah) (Temporary Order) Law 5760-2000, Draft Laws 2889, at p. 457 (2000)). All of this indicates that the validity of the ideological purpose – even if it was originally the basis for the 1982 Budget Item – has eroded, and the legislature itself is adapting the various legal arrangements to the changing reality of life in Israeli society in general, and in the ultra-orthodox community in particular.

Furthermore, over the years the scope of the support provided under the Income Support Law has also diminished. As we noted in para. 2 above, changes in the economic policy have led to a narrowing of the conditions for eligibility for income support benefits under the Law and to cutbacks in the rate of the income support benefits (see, e.g., the Arrangements in the State Economy Law (Legislative Amendments for Attaining the Budget Goals and the Economic Policy for the 2003 Fiscal Year), 5763-2002; see also the Court's discussion in *Society for Commitment to Peace and Social Justice v. Minister of Finance* [1]). A cutback in the scope of the benefits granted under the Income Support Law was the result of changes in the economic trends that were applied to recipients of benefits under the Income Support Law. These changes were not discussed and, in any event, were not applied, in the context of income support benefits distributed pursuant to the Budget Item.

40. The conclusion that emerges from an analysis of the normative framework that applies to the budget laws in Israel, and from a comparison of the Income Support Law and the Budget Item, is that the income support benefit for kollel students under the Budget Item violates the obligation to act in accordance with the principle of equality with regard to the distribution of state funds. The income support benefit for kollel students constitutes a type of earmarked funds, which were prohibited with the enactment of s. 3A. The benefit is paid to kollel students in contravention of the provisions of the

Income Support Law, pursuant to which students in various institutions, among them kollel students, are not eligible for the benefit. As we noted above, in view of the economic purpose underlying the income support payments, the distinction made between different groups of students based on differences in the nature of the studies is not a distinction based on a relevant difference and it therefore constitutes a prohibited distinction.

41. The obligation to distribute state funding equally and without discrimination is derived from the right to equality, which has been recognized in our legal system as a super-statutory constitutional right. It is unique in that the conditions essential for its implementation in the context of distributing state funding have been established in the case law of this Court and in s. 3A of the Budget Principles Law. Thus, for example, case law has established the principle that state grants are to be distributed according to uniform, clear and open criteria (see, e.g., *MK Tzaban v. Minister of Finance* [12]). Similarly, s. 3A established a detailed process for determining the entities to which state funding would be given. These and other arrangements are designed to adapt the principle of equality to the distribution of state funds from the state budget and they therefore constitute a specific instance of the right to equality. The obligation to distribute state funds equally is also based on the constitutional aspect of this right – the right is an integral part of that obligation, and the long tradition of case law and legislation regarding this matter expresses the unique aspects of equality in this area.

42. We therefore find that the income support benefits that are paid under the Budget Item violate the principle of equality. However, the examination does not end here, since there is no dispute that notwithstanding the importance of the right to equality, it is not an absolute right. Like other rights in a modern society, the right to equality also recedes, in the appropriate cases, before opposing rights or interests, and there are cases in which discrimination, or a violation of the principle of equality, will not be deemed to be unconstitutional. Therefore, we must examine whether the violation of the right to equality that has been created by the support provided to kollel students pursuant to the budget law is a type of violation that falls within the provisions of the limitations clause of the Basic Law: Human Dignity and Liberty (see: HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* [27]). See, in this context, President Barak's remarks in *Supreme Monitoring Committee v. Prime Minister* [24]:

> 'Even when a violation of equality has been proved, we should therefore examine whether the violation satisfies the requirements of the limitations clause in s. 8 of the Basic Law, namely whether the decision befits the values of the State of Israel, whether it is intended for a proper purpose and whether the violation of equality is not excessive. There may therefore be permitted discrimination (see HCJ 3434/96 *Hoffnung v. Speaker of the Knesset* [28], at p. 76). Indeed, the right to equality, like all other human rights, is not an "absolute" right. It is of a "relative" nature. This relativity is reflected in the possibility of violating it lawfully, if the conditions of the limitations clause are satisfied.' (*Supreme Monitoring Committee v. Prime Minister* [24], per President Barak, at para. 22).

The limitations clause contains four conditions: the violation must have been prescribed in a statute or pursuant to a statute or by virtue of an express authorization therein; it must conform to the values of the State of Israel; it must be intended for a proper purpose; and it must not exceed what is required.

43. There is no dispute that in the petition before us, the requirement of a statutory basis is fulfilled, as the Budget Item has been included in the annual budget laws since 1982. For the sake of the discussion, I am prepared to assume that the conditions requiring the existence of a proper purpose that befits the values of the State of Israel are also realized in this case. In our above discussion we examined the purpose underlying the Budget Item and we found that its purpose is to provide financial assistance to kollel students who meet a series of eligibility conditions. We also noted that, according to the state, the Budget Item also encompasses an ideological goal of encouraging Torah study. We determined that we cannot ignore the objective tests for eligibility, which attest to the fact that the dominant purpose of the Budget Item is the provision of financial assistance to kollel students – even if such assistance also involves an expression of the goal of encouraging Torah study. Indeed, the questions regarding the manner of encouraging Torah study and the scope of the encouragement that the state provides for this purpose are complex questions that are currently pending before the various government authorities and before this Court as well, and they pertain to the manner in which priorities are determined, according to society's ideological goals. The issue of encouraging Torah study is pending, *inter alia*, in petitions relating to the determination of priorities in inducting kollel students into the army and assisting their entry into the job market. I do not wish to elaborate on this matter. I do wish to note that even if we

accepted the state's position that the Budget Item allows for recognized and conscious support of Torah study, and we do not say that this is true, it is doubtful whether the vehicle of providing financial assistance only for this group fits that proper purpose. In any case, for the sake of the discussion, I am prepared to assume that, from the constitutional aspect, the purpose here is a proper one.

However, even if we assume that the purpose in itself is proper, the question arises as to whether the means that were chosen to realize the purpose are proper; and whether the extent of the violation that has been caused by the use of these means, is not excessive. This is the proportionality test.

44. A law or an administrative action fulfills the requirements of proportionality when there is a proper relation between the purpose that the law or the action is designed to realize, and the means employed to realize that purpose (see, e.g., *Movement for Quality Government v. Knesset* [2], per President Barak, at para. 57). Various considerations affect a determination as to whether the proportionality requirement has been met; among these are the nature of the violated right, the extent of that violation and the importance of the values and the interests that the law or the administrative action are intended to realize (see, e.g., *Menachem v. Minister of Transportation* [8], at p. 280). As a rule, the more significant the violation of a right, the more meticulous the examination of proportionality must be (see, e.g., HCJ 3648/97 *Stamka v. Minister of Interior* [29], at p. 777).

Three subtests will help in determining whether a law or administrative action fulfills the proportionality requirement: the rational connection test; the less harmful measure test; and the test of proportionality in the narrow sense (see, e.g., *Movement for Quality Government v. Knesset* [2], per President Barak, at para. 57, and the sources cited therein). These tests are designed to ensure that the violation of the basic right, assuming that it is in fact necessary in order to promote the proper purpose, is proportional. To that end, we must examine whether, from a factual standpoint, there is a rational connection between the means and the end, in the sense that there is a real probability that the means will accomplish the end; we must examine further whether the means that were chosen violate the basic right to only a minimal degree; and, finally, we must examine whether there is a correlation between the extent of the benefit that arises from the law or the administrative action, on the one hand, and the extent of the violation of the basic right, on the other hand.

45. Naturally, most of the discussion regarding the petition before us will focus on the second and third subtests, because in terms of the first issue – whether the means are rationally connected to the desired end, it is reasonable to assume that monthly support provided through the payment of income support benefits to kollel students who have no income from work will improve their financial situation. The second subtest, the less harmful measure test, is designed to examine whether, of all possible measures for realizing the proper purpose, the one that has been selected is one that involving a minimal violation of the basic right (see *Menachem v. Minister of Transportation* [8], at p. 279). In this case, the question is whether it would not have been possible to achieve the financial purpose – which is, in any case, the dominant purpose underlying the Budget Item – with a lesser violation of the right to equality. It is important to note in this context that the less harmful measure test (or "the need test") does not require the selection of the least harmful measure that is available. It is sufficient to show that among the relevant means, it can be said that the chosen means – considering the violated right and the severity of the violation – allowed for a lesser violation of the basic right (*Adalah Legal Center v. Minister of the Interior* [27], per President Barak, at para. 68).

In *Israel Investment Managers Association v. Minister of Finance* [9], President Barak compared this test to climbing a ladder, stating that "[t]he legislative measure can be compared to a ladder, which the legislature climbs in order to achieve the legislative purpose. The legislature must stop on the rung at which the legislative purpose is achieved, and on which the violation of the human right is the least." In examining the severity of the violation and whether there is a less severe means by which to attain the purpose of the legislation, the court does not place itself in the shoes of the legislature. The underlying assumption of the needs test is that there is a range of possible action, within which there may be a number of ways to attain the purpose of the legislation, from which the legislature can choose one. As long as the chosen measure is within that margin, the court will not intervene in the legislature's decision. The court will be willing to intervene in the legislature's choice only where it can be shown that the violation that is caused is not a lesser one, and that the legislative purpose can be attained by utilizing less harmful means (see, e.g., CA 6821/93 *United Mizrahi Bank Ltd., et. al. v. Migdal Cooperative Village* [30] at p. 444; *Israel Investment Managers Association v. Minister of Finance* [9], at p. 387; HCJ 1030/99 *MK Oron v. Speaker of the Knesset* [31], at pp. 666-667).

46. When we examine the Budget Item and the criteria that were formulated in the course of the petition for the purpose of distributing the funds among the kollel students, it is hard to say that the means that were chosen are means that ensure a lesser degree of violation of the principle of equality, considering the purpose that the Budget Item is intended to achieve. It is worth reiterating that the Budget Item enables kollel students to receive income support benefits in contravention of the Income Support Law and the regulations promulgated pursuant thereto, pursuant to which various groups of students are not eligible for payment of income support benefits. The Budget Item circumvented these provisions and established that income support benefits would be given to only one group among the four groups of students to which the benefits are denied pursuant to the Income Support Law. The violation of the principle of equality resulting from the provision of benefits to only one group among those belonging to that peer group is significant and severe. The Budget Item relates only to kollel students, and anyone who is not a kollel student cannot come within the bounds of the Item. The result is that university students or students in a religious institution or in a Torah study institution – even if they are in the same financial situation as kollel students who are eligible for income support benefits, and even if they meet the conditions established in the Income Support Law – are not eligible for benefits. In contrast, their colleagues, the kollel students, are eligible for income support benefits by virtue of the Budget Item.

Would it not have been possible to ameliorate the financial state of the kollel students in a way that would reduce the violation of the principle of equality? As I noted above, in the long series of judgments issued by this Court about the distinction between kollel students and other students, the Court ruled that where the purpose of the assistance is financial support, uniform tests must be employed, tests that are based on the extent of neediness or of financial need, and not on other considerations. For example, in *Am Hofshi v. Ministry of Construction and Housing* [26], which dealt, as noted, with preferential housing treatment given to residents of Elad, the Court stated:

> 'Even if there is a basis for assuming that the ultra-orthodox population has many needs, and that there are many families suffering from financial distress among this community, the level of "eligibility" of apartment purchasers, in terms of financial need and socioeconomic status, must be examined according to uniform criteria for the entire population. The needs of a needy family

> which, according to its data, should be granted assistance for its housing needs, are determined according to the purpose for which the assistance is given – the socioeconomic need' (*ibid.* [26], at p. 514).

In its arguments, the state did not specify the reason for applying different eligibility tests to kollel students and to students in institutions of higher education or to other yeshiva students. The argument that the basis for the benefit is a desire to promote Torah study – even if we accept the position that that is actually the purpose of the Budget Item – does not explain the distinction made between kollel students, on the one hand, and, on the other hand, students in religious institutions or other yeshiva students, for example, who are also denied benefits under the Income Support Law. This is particularly true in light of the fact that the criteria for distributing the benefits under the Budget Item are based on economic tests. Since the tests are economic in nature, what is the point of distinguishing between the different groups of students in a manner that significantly violates the right to equality?

Moreover, a perusal of the provisions of the Income Support Law shows that the financial welfare of specific population groups can be promoted in the framework of conditions set out in the Law, without the need to employ an entire set of separate eligibility conditions. In this context, it is sufficient to mention s. 3(4)(b) of the Income Support Law, which we discussed above, and which enables single parents who had received income support benefits for 16 of the 20 months that preceded their studies to continue receiving such benefits during the course of their studies towards an undergraduate degree, subject to the conditions specified in the Law. The importance of these arrangements and others like them lies in the fact that they allow for support of a discrete group while preserving the overall framework of the Income Support Law. Within that framework, these arrangements continue to apply the eligibility conditions specified in the Income Support Law to the discrete group – particularly those pertaining to the investigation of the financial status of the benefit applicant. These arrangements also promote the goal underlying the Income Support Law, which is to concentrate all the welfare payments that preceded its enactment within one framework, that of the National Insurance Institute. The arrangements listed in the Income Support Law naturally constitute only an example of the type of arrangements that promote the economic welfare of special groups, and which have the potential to reduce the violation of the right to equality. There are, of course, other courses of action that the legislature can choose, among them those that

are not limited to direct financial assistance, and which could promote the purpose with a lesser violation of the right to equality.

In its responses to the petition, the state endeavored to distinguish between the support given to kollel students under the Budget Item and the income support benefit provided under the Income Support Law. Thus, for example, the state noted that the benefits given to kollel students are significantly lower than those given to others with similar qualifications under the Income Support Law. This distinction attests to the fact that, according to the state, the assistance is proportional, since it is a relatively small amount and is not given to all the kollel students, but only to those who meet the eligibility criteria. Indeed, as argued by the state, there are in fact various differences between the assistance provided under the Income Support Law and the assistance provided under the Budget Item, but this does not mean that the differences make the means proportional. Indeed, the amount of the monthly benefit given to kollel students may be lower than the amount of the benefit provided under the Income Support Law (which is determined according to the level of eligibility). However, the criteria for calculating eligibility for benefits under the Budget Item, including the provisions regarding the calculation of the amount of a kollel student's monthly income that will not violate his right to the benefit, are also very different, and they allow for receipt of benefits under the Budget Item even in situations that would have denied the benefits to those otherwise eligible for them under the Income Support Law. We should add to this that for many years the benefits were distributed without any orderly, overt and uniform criteria, and once the criteria were established after submission of the petition, they were adapted to the unique needs of the kollel students. The differences between the benefits provided pursuant to the Budget Item and the income support benefits provided pursuant to the Income Support Law do not make the chosen means proportional. The opposite is true. The differences exacerbate the inherent problem that exists regarding the Budget Item – the fact that it was tailored especially to the kollel students, in the form of earmarked funds, and in a manner in which conditions were adapted to the nature of the income and family status of the kollel students. This special design of the conditions is in contrast to the form of the conditions set out in the Income Support Law, which are designed to apply to all benefit applicants in Israel, including kollel students.

47. We therefore conclude that the Budget Item, pursuant to which the income support benefits are paid to kollel students, does not meet the second condition of proportionality, which is the lesser harm test. Naturally, this

finding also affects the conclusion to be drawn regarding the third test of proportionality, which examines the correlation between the extent of the advantage arising from the law or the action, and the extent of the violation of the basic right (see HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [32], at p. 850 (2004)). This third test examines the results of the legislation or the administrative action that creates the violation of a right. It is essentially a normative test, balancing between the benefit in realizing the proper purpose and the violation of the right.

It is undisputed that promoting the welfare of a population with a low socio-economic status is an important purpose that should be promoted. For the sake of discussion, I am also prepared to assume that the financial support for kollel students can encourage Torah study. That is also an important goal, which expresses recognition of the uniqueness of the ultra-orthodox population and the importance of the value of Torah study. However, in view of the severe violation of the right to equality, it cannot be said that there is a reasonable relation between the severity of the violation and the social benefit deriving from that violation (see *Menachem v. Minister of Transportation* [8], at p. 279).

Even when the purpose of the legislation is proper and can promote important social goals, there must be assurance that the means chosen to promote it are proper as well. Indeed, the ends do not justify any type of means. The requirement that the violation of a right be "to an extent that is not excessive," reflects the accepted constitutional balance in our law, whereby rights are not absolute, but are instead relative. Rights, even if they are constitutional rights, are examined in light of the specific violation and in light of the goal that the violation was intended to achieve. The balancing is not an exact process. It requires a case-by-case examination of the purpose, of the means chosen to accomplish it and of the extent to which a right has been violated. The more significant the right and the greater the violation of that right, the more necessary it is to indicate a real public interest that would justify the violation.

In the circumstances of the case before us, I have not seen that there is an appropriate relation between the violation of the right to equality and the social advantage deriving from the income support benefit paid pursuant to the Budget Item. Even though there is no dispute that the legislature is entitled to promote unique populations – whether by means of financial assistance or by recognizing their unique lifestyle – such support must be provided while preserving the rights of other groups in similar situations and

while taking into account the gamut of legal arrangements available in our legal system. In view of the significant violation of the right to equality – which is a basic constitutional right – the legislature should have examined the use of less harmful means that would reduce the violation of that right. Such an examination was not implemented, *inter alia*, because of the fact that the support is provided in the framework of the annual budget law.

48. In this context, I wish to address another claim made by the state. In its responses to the petition, the state argued that the violation of the principle of equality with respect to the various groups of students should not be examined solely on the basis of the Budget Item, but that the entire range of support arrangements relevant to each group should be examined. In principle, I find this acceptable. There are situations in which examination of the support arrangements in general can shed light on the scope of assistance given to a particular group, particularly as compared to the scope of assistance given to other groups (see also *Adalah v. Minister of Religious Affairs* [7], per Justice Zamir, at pp. 175-176). However, in general, the state cannot simply make this affirmation, without doing anything more – without presenting for our perusal the data with which we can determine whether the totality of the support arrangements that are provided shows that there is no violation of the principle of equality, or at least that the violation is proportional. I discussed this in *Society for Commitment to Peace and Social Justice v. Minister of Finance* [1], which dealt with cutbacks in the rate of income support benefits. The state's argument there was similar to the argument it has made here. In that case, the state argued that in order to determine whether a cutback in income support benefits violated the petitioners' constitutional right to dignity in the sense that their minimum material subsistence conditions would remain at an insufficient level, it would be necessary to examine the entire gamut of national and local means provided in both primary and secondary legislation for the purpose of supporting the petitioners and ensuring them the minimum conditions required for human subsistence. In my opinion, I noted that "the full information for the purpose of a comprehensive examination" was in the state's possession and, therefore, since the petitioners in that case had borne the initial burden of proving the violation, the burden of proof regarding the existence of a set of means and allocations that could prove the absence of a violation passed to the state at the first stage of the constitutional examination (*ibid.* [1], at pp. 491-492). In the petition before us, the state did, indeed, mention the subsidized tuition in institutions of higher education and the mechanisms of aid and scholarship funds that are available to students –

examples of the direct and indirect support given to students. But this information was extremely general and did not indicate the extent of the assistance provided to the students. The state also did not provide any information on the extent of the overall assistance given to kollel students in such a way as to enable us to make a comparison between all the assistance provided to each of the relevant groups.

49. Under these circumstances, the conclusion to be drawn is that the Budget Item violates the principle of equality and does not meet the conditions of the limitations clause of the Basic Law: Human Dignity and Liberty. It is important to note that our conclusion does not mean that the legislature cannot support a specific population group in a manner that enables it to preserve its uniqueness. Such support expresses an ideological societal decision to enable individuals to belong to a community and to preserve their lifestyles and values within the community – including values such as encouraging the study of Torah. I discussed this in *Am Hofshi v. Ministry of Construction and Housing* [26], and I held that for the purpose of allocating land, the option of allocating separate housing to groups with special characteristics "is consistent with the outlook that recognizes the right of minority communities to preserve their uniqueness if they wish to do so; this outlook represents an approach that is now widespread among jurists, and societal and educational experts, whereby the individual also has the right – among his other rights – to realize his affiliation to the community and its special culture as part of his right to personal autonomy" (*ibid.* [26], at pp. 508-509; see also, in this context, Justice Procaccia's comments in *Movement for Quality Government v. Knesset* [2]). However, even if the allocation of resources to a distinct population group is not invalid in itself, it must be done legally and in accordance with the principles of Israeli constitutional law. Among other things, the allocation must be implemented according to uniform criteria, without discrimination, and taking into account the gamut of existing arrangements that are available within the legal system.

Conclusion

50. The discussion of the legality of the Budget Item in the petition before us has focused, as stated, on the normative framework that dominates the annual budget laws and, primarily, on the provisions of the Budget Principles Law. We have found that the Budget Item violates the obligation to distribute state funds equally, an obligation that has been established in a long series of this Court's judgments, and which is also anchored in s. 3A of the Budget Principles Law. We also found that a provision in the annual

budget law that conflicts with a substantive provision in the Budget Principles Law and which violates a basic right cannot stand. We noted, however, that judicial review of budget legislation, in view of the unique characteristics of the annual budget law, should be restrained and that such review should be implemented while taking note of, *inter alia*, the right that has been violated and the extent of that violation.

51. We have found that the Budget Item is a disproportionate violation of the right to equality. Therefore, the Budget Item which is the subject of the petition before us cannot stand. Under the circumstances of the matter, I propose to my colleagues that we order that the Budget Item remain in place as it appears in the annual budget laws for 2009 and 2010, which were established as part of a biennial budget; however, it cannot continue to be included – at least not in its present format – in future budget laws. If the legislature should wish to continue to support all or some of the kollel students, it will have to reexamine the arrangement, subject to this judgment. While we have decided not to repeal the Budget Item on the spot, we have done so only in an effort to reduce the violation of the interests of the benefit recipients who rely upon it. We cannot ignore the fact that the benefits have been paid to kollel students for over two decades, and the immediate cessation of payments would cause harm to an impoverished population. Presumably, the families of the kollel students receiving benefits rely on those benefits in calculating their monthly income for the purpose of basic subsistence. Therefore, we have seen fit to enable them to prepare to find alternative sources of income.

52. However, not only the reliance interest leads to the conclusion that the Budget Item in the present budget law should not be canceled. One of the problems arising from the fact that the income support payment arrangement for kollel students has been included in the annual budget laws is that there has been no comprehensive examination of it, of the purpose underlying the arrangement, of the precise definition of the target population, of the conditions for denying eligibility, or of the ramifications entailed in providing the benefits to a particular group in contrast to other groups that are not eligible for similar benefits. Therefore, the decision to refrain from declaring the immediate repeal of the Budget Item is also motivated by our wish to enable the legislature to examine the range of existing arrangements, thereby giving the Knesset time to conduct practical discussions on the issue.

53. In conclusion, for the reasons set out above, we have found that the Budget Item constitutes a disproportionate violation of the right to equality.

Taking into account all the circumstances involved in the matter, we do not see fit to order the immediate repeal of the Budget Item. However, the Budget Item in its present form cannot be included in the next budget law. If the legislature should choose to support kollel students, it will have to do so while taking note of all the existing legal arrangements, and while taking into account all the reasoning laid out in this judgment.

54. The petition is therefore granted. Budget Item No. 20-38-21 will continue to remain in effect as set out in the biennial budget law for 2009 and 2010. The order *nisi* will become absolute in the sense that as of the 2011 budget year, the Budget Item in the annual budget law regarding support to kollel students will not remain in place.

Justice M. Naor

I concur in the judgment of my colleague, the President.

Justice S. Joubran

I concur in the comprehensive judgment of my colleague, the President.

Justice A. Procaccia

I concur in the judgment of my colleague, President Beinisch, and in her conclusion that the arrangement pursuant to which income support benefits are paid to kollel students under a budget item is illegal and unconstitutional, as it is inconsistent with the principle of equality, and does not pass the test of the limitations clause of the Basic Law: Human Dignity and Liberty.

1. The distinction between kollel students and other students in educational institutions in Israel with regard to income support monies, which exists under the current legal arrangement, is a specific example of a broader, more general question. The broader question deals with the profound dilemma arising between a multicultural society's obligation, on the one hand, to recognize and respect the unique character of various population segments living in its midst, notwithstanding their differences and, on the other hand, the basic principle that forms a part of the foundation of the state's existence, whereby all citizens of the state, whoever they may be, are obligated to accept the basic values of the governmental system and take up the burden of the basic responsibilities and duties that each citizen must bear, as an essential condition for the existence of a democratic society. The necessity of maintaining a full partnership in bearing

the burden of civic responsibilities and obligations is the main link connecting the various population segments, notwithstanding their points of uniqueness and the differences between them. It ensures the existence of a basic common denominator that unifies all parts of the population, which enables the existence of social harmony while safeguarding sectoral singularity. The need to bridge the gap between sectoral uniqueness and equal partnership in bearing the burden of civic responsibilities and obligations is at the heart of this petition. The petition deals with the issue of drawing the proper boundaries between providing protection and publicly funded support for sectoral uniqueness on the one hand, and, on the other hand, the need to maintain the principle of equality among members of all sectors regarding the obligation to bear the basic burdens of existence along with the other civic obligations imposed on every person in society; such obligations include service in the army, paying taxes, and incorporating into education the basic values of the state, including basic concepts of universal thought.

2. The protection of sectoral uniqueness is the right and, perhaps, the duty of a democratic society. Such a society is required to recognize the existence and needs of various communities living within it – communities that maintain their own cultures, traditions and lifestyles. The diverse human fabric of a free society is consistent with the existence of multicultural groups, with their own characters and styles, who wish to preserve their unique ways of life. However, within the variegated and multifaceted sectoral structure, there is a connecting link that unifies all of the communities, which seeks to transform them into a single reference group. This link reflects the basic values shared by all sectors, values that are a part of the physical and ideological basis of the state's existence. Among these values are the foundations of the constitutional system and the character of the state as Jewish and democratic. Another aspect of this link expresses the shared responsibility for bearing the burden of individual and collective existence, without which the society cannot exist. Within this shared responsibility lies the obligation of every capable person to see to his own existential needs and to the needs of those who are dependent upon him, and to fulfill other civic obligations, including the obligation to serve in the army, the obligation to impart through education the core values that are common to all those who are raised and educated in Israel, and other basic obligations vis-à-vis the state – obligations and values that are shared by all sectors of society.

3. The principle of equality is a basic value in the law; it prohibits discrimination among equals, and it prohibits unequal and unfair treatment of

those who deserve the same treatment. It is based on the concept of relevance, which prohibits differentiating between people or matters for irrelevant reasons, but allows distinctions to be made on the basis of relevant factors. Equality does not require identical arrangements, and sometimes, in order to attain equality, differential treatment is, in fact, necessary.

4. The allocation of state funds for various objectives is subject to the requirement that it be based on equal treatment, and such allocations must be rooted in pertinent considerations and in clear and explicit criteria. It must be carried out according to "the importance of the subject matter and not the importance of the interested party" (*MK Tzaban v. Minister of Finance* [12], at pp. 706-7).

5. A social policy which provides support to those needy communities that are worthy of reinforcement in various areas of life may comply with the constitutional test of the principle of equality. Such a policy will be in compliance with the equality test when it is designed, in essence, to promote the status of these communities, to strengthen them, and to open before them possibilities for attaining genuinely equal opportunities in relation to other sectors of society. The provision of such reinforcement is designed to promote inter-sectoral equality, while respecting and preserving each community's unique attributes. In this sense, the achievement of equality sometimes justifies differential treatment on the part of the state.

6. It is another matter when state support is granted to a certain sector in the society, not in order to help it to advance toward full equality between itself and other sectors, but rather to free its members from certain components of the joint responsibility which is borne by all of the state's citizens. Such support is not designed to strengthen a weak community on its path toward achieving the hoped for social equality. It weakens the common denominator that unifies all sectors of the population, despite their dissimilarities; it undermines the basis that is common to all members of society, which relies on the assumption that every capable person, whoever he may be, must see to his basic subsistence and must not burden the public by requiring that the state provide for his needs, and must also fulfill his other civic duties to his state, such as serving in the army, paying taxes, and imparting educational values that belong to the basic core common to all sectors. This common denominator is the factor that unifies all sectors of the population, and its existence is contingent upon its equal application to every person. This rule can only be infringed in rare and exceptional cases, involving an individual's inability to carry his share of the joint

responsibility, or when a considerable state interest justifies an exception to the rule, according to the established tests for the applicability of the limitations clause of the Basic Law: Human Dignity and Liberty.

Sectoral uniqueness does not constitute a ground for reducing the common responsibility that applies to all sectors of the multicultural society.

7. The ultra-orthodox community is markedly different from other population sectors in its spiritual outlook and in the lifestyle of its people. It is characterized, *inter alia*, by its commitment to learning Torah as part of an internal belief that this is a necessity for the spiritual and physical existence of the Jewish people. This viewpoint is not limited to the sphere of faith and religion. It affects the lifestyles of the members of the ultra-orthodox community, many of whom view Torah study as an absolute and essential value that safeguards the existence and uniqueness of the Jewish people. This outlook has led to great divergence between the ultra-orthodox community and the other sectors within the population, and to the community's segregation from the national life of Israeli society.

8. Notwithstanding the singularity of the ultra-orthodox community in its ideological and religious outlook and lifestyle, the members of the community are obligated to share equally in national responsibilities and in all the civic duties borne by all members of the Israeli public. Without full partnership in this responsibility, the equality among the various sectors is violated at the point of the central link that ties them together, the social structure fractures, and the soundness of the regime weakens at its core.

9. The Income Support Law, 5741-1980, and the regulations promulgated pursuant thereto, provide that students in institutions of post-secondary education and students in yeshivas and in Torah study institutions are not eligible for income support benefit payments. Underlying this rule is the assumption that the public resources intended to finance income support payments for the needy are limited by their very nature. Within the priorities that the state saw fit to establish in this area, students in institutions of post-secondary education were excluded from eligibility for state income support funds, on the assumption that as young people who, for the most part, are not yet responsible for families of their own, they will be able, perhaps with the assistance of their immediate families, to provide for their basic subsistence for the duration of their studies. According to the policy that underlies the Income Support Law, there is no justification for the state's providing students' needs during their studies at the cost of reducing the assistance granted to other needy persons whose welfare situation justifies greater

government support. The budget item that arranges for income support payments to kollel students assumes, as a starting point, that while a student in an institution of general educational is expected to provide for his own basic subsistence during the period that he pursues his studies, the situation is different with regard to a kollel student. Pursuant to this budget item the kollel student is entitled to receive government financed income support, thereby circumventing the general policy implemented with regard to all students in the country, while thwarting the equality-based arrangement which is prescribed by the law for all students.

10. The fact that the kollel students belong to a unique community that sanctifies Torah study as a fundamental part of its existence cannot justify a violation of the basic equality to which all citizens of the state are entitled, at the point of the common link that connects them all. In this case, this link ties together the students of all post-secondary educational institutions spread throughout all sectors of society. This connection is based, *inter alia*, on the assumption that it is the duty of every person and, in this case, every student, to provide for his own basic subsistence, and that this duty is common to all, and that the general public is not expected to shoulder the burden of these individual needs, except in exceptional cases of inability or inherent neediness. If the state chooses to assist citizens in bearing the burden of their personal subsistence at a certain stage in their lives, such assistance must be granted on an equal basis. The creation of a profound gap in this area between members of the ultra-orthodox community and all the other citizens of the state is not based on a relevant difference that justifies a permissible distinction – a difference that would allow for the creation of different rules for the ultra-orthodox community and for other sectors. This gap reflects unequal treatment by the state, which amounts to prohibited discrimination among students of different sectors, all of whom are subject to the same duty to bear the burden of their personal subsistence throughout the duration of their studies. The uniqueness of the members of the ultra-orthodox community, and their commitment to the study of Torah, do not justify a discriminatory arrangement that favors only them. The discriminatory rule that is the subject of this petition does not stand the test of the democratic process, which is built on maintaining a mandatory common denominator among various population groups, while respecting their independence in terms of values and ideology.

11. The borderline between the recognition of sectoral uniqueness and the duty to maintain equality among all sectors is therefore drawn at the point that holds all population groups together: it runs through the common link

shared by all citizens of the state with respect to certain basic responsibilities and obligations that they owe to society. As a rule, an unequal and discriminatory arrangement may not be established in these areas, as it can potentially undermine the common foundation for the harmonious existence of a multicultural society.

12. Unlike other situations, in which the attainment of equality in bearing the burden of civic obligations sometimes requires a prolonged, gradual process, this matter is one in which equality will be achieved through the repeal of the discriminatory preference that was implemented in contravention of the law and of the constitutional principle of equality. The repeal should be accompanied by a transition period that is intended to mitigate the violation of the reliance interest of those who have thus far benefited from preferential treatment.

I concur in the President's fundamental position, and I agree with her operative proposal to allow for a transition period before the discriminatory preference is repealed.

Justice E. Hayut

I concur in the judgment of my colleague, President D. Beinisch, and I agree with the comments of my colleague, Justice A. Procaccia.

Justice A. Grunis

I concur in the judgment of my colleague, the President.

Justice E. E. Levy

1. The budget law reflects a policy and the objectives that it strives to achieve and, as we know, the task of determining this policy was given to the government and the Knesset, not to the Court. Regarding this matter, it has been held in the case law that "[t]he legitimate considerations, which, when mixed together, lead, at the end of the year, to the determination of a budget for the subsequent year, are so numerous and so disparate that it seems that only in special cases is the Court likely to order the repeal of a provision in the budget law. The task of weighting all those considerations that make up a budget law – including the determination of the order of priorities – was given, essentially, to the Knesset and to the government within the scope of its general policy and, in any case, the intervention of the Court in such matters must be limited. If the Court considers the repeal of any budget law

items – as the petitioners have requested – it must be convinced that those provisions mortally wound the rights of the individual and that there is no other remedy for the individual other than the revocation of the law; in such a case, the law will cry out that it has failed to establish its right to exist" (*Adalah Legal Center v. Minister of Religious Affairs* [7], at p. 190).

2. The state, by virtue of the policy that has been determined, may either provide or not provide support funds. The state is empowered to either provide or not provide support grants for particular activities and, in providing a particular activity with a grant, it is authorized to determine the specific amount of money that it will provide (*Conservative Movement v. Minister of Religious Affairs* [5], at p. 38). Of course, the state must exercise the discretion granted to it in the area of support funds, as in any other area, with fairness and reasonableness, and it must comply with the norms of administrative law (HCJ 5264/05 *Yeshivat Shavei Shomron v. Minister of Education, Culture and Sports* [33]). Therefore, it is also understood that a norm which is established within the scope of that same authority must be based on equality. If it is not, it is a discriminatory norm, the use of which will lead in practice to an unequal result.

3. The principle of equality is one of the basic principles of a constitutional government. It is an inherent value of a constitutional government and of the judicial review of administrative actions (HCJ 6671/03 *Munjid Abu Ghanem v. Ministry of Education* [34], at p. 588; *Bergman v. Minister of Finance* [21]; HCJ 637/89 *Constitution for the State of Israel v. Minister of Finance* [35]). Prohibited discrimination that contravenes the equality principle means different treatment for equals, and unequal and unfair treatment for those who deserve equal treatment. Inequality is expressed by the creation of a distinction between one person and another or between one matter and another for irrelevant reasons. In contrast, a practical difference between them may justify the drawing of a distinction between them, provided that the distinction is based on a relevant foundation (*Kfar Vradim v. Minister of Finance* [23], at p. 507; HCJ 6051/95 *Recanat v. National Labor Court* [36], at p. 312; HCJFH 4191/97 *Recanat v. National Labor Court* [37]; HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [38], at p. 365).

As we know, a particular norm is discriminatory even if it is not based on a discriminatory intention on the part of the creator of the norm (HCJ 721/94 *El Al Israel Airlines Ltd. v. Danielowitz* [39], at p. 764; *Supreme Monitoring Committee v. Prime Minister* [24]; HCJ 2671/98 *Israel Women's Network v.*

Minister of Labor and Social Affairs [40], at p. 654). Moreover, in certain circumstances, an infringement of the principle of equality also constitutes the violation of a constitutional right (*Movement for Quality Government in Israel v. Knesset* [2], per President Barak, at paras. 36-40; HCJ 9722/04 *Polgat Jeans Inc. v. Government of Israel* [41]), and it is therefore necessary to examine whether such a violation is permissible under the test of the limitations clause in Section 8 of the Basic Law: Human Dignity and Liberty (*Hoffnung v. Speaker of the Knesset* [28]; *Supreme Monitoring Committee v. Prime Minister* [24], per President Barak, at para. 22).

4. The study of Torah is a commandment in the Bible: "And now, O Israel, give heed to the laws and rules that I am instructing you to observe, so that you may live to enter and occupy the land that the Lord, the God of your fathers, is giving you." (Deuteronomy 4:1); "Take to heart these instructions with which I charge you this day. Impress them upon your children. Recite them when you stay at home and when you are away, when you lie down and when you get up" (Deuteronomy 6: 6-7). At the end of the "Ha'azinu" poem, Moses instructs the people to teach their children "…that they may observe faithfully all the terms of this Torah. For this is not a trifling thing for you: it is your very life; through it you shall long endure on the land that you are to possess upon the crossing of the Jordan" (Deuteronomy 32: 46-47). And in the book of Joshua it is written: "Let not this Book of the Torah cease from your lips, but recite it day and night, so that you may observe faithfully all that is written in it. Only then will you prosper in your undertakings and only then will you be successful" (Joshua 1: 8). The Talmud lists those things whose fruits a person enjoys in this world, but whose principal remains intact for him in the world to come, among which are honoring one's father and mother, acts of kindness, early attendance at the house of study, hospitality to guests, visiting the sick, study and prayer. "And the study of Torah is equivalent to them all" (Babylonian Talmud, *Shabbat* 127a).

5. The commandments that I have cited from the biblical sources have brought many people to view Torah study as the essence and purpose of life, and they devote to it all their time with a dedication that knows no bounds, and with the profound belief that, in this manner, they are preserving the world. And even if there are those who disagree with this outlook, it appears that we cannot deny the fact that Torah study, something that the Jewish people never abandoned even when they were exiled from their land, made a decisive contribution to preserving the Jews as a nation and preventing their assimilation among the nations. Thus, those who remain dedicated to Torah study form a unique group, which has chosen a lifestyle that is almost ascetic

and which views Torah study as a mission. They do not view this study as a part of a time-limited process for acquiring a profession that may also bring financial gain in the future. This means that the component of maximizing earning capacity on which the Income Support Law is based is not applicable to those who are studying Torah, and for whom Torah study is their only profession.

6. The debate about the question of whether the livelihood of those who study Torah should be borne by the public is not new. However, in this case, it is important to note that the people of Israel, through their elected entities – the Knesset and the government – believe that this question should be answered in the affirmative. This is an ideological decision based on a recognition of Torah study as something that is vital to the people of Israel. I do not believe that the court is entitled to change that, especially since extremely modest amounts have been allocated to that end, amounts which are intended to enable only basic subsistence and no more than that. The other question is, of course, whether that decision is discriminatory and that can be answered in the negative. As stated, there is a substantive relevant difference between those who study Torah and the reference group on which the petition relies. Going beyond what is necessary, I will add that even if I believed that the allocation of funds is not equal, I would propose denying the petition because the statutory provision meets the test used for the application of the limitations clause of the Basic Law: Human Dignity and Liberty. The emphasis here is on the extent of the proportionality. As stated, the amounts that were allocated for supporting the kollel students are extremely modest, and the payment of even these modest amounts is contingent upon a recipient meeting the conditions that have been established for eligibility. In contrast, other groups that are in the process of training to acquire a profession receive various benefits, both direct and indirect, to which those who study Torah are not entitled – benefits such as scholarships, grants, loans and subsidized housing.

In view of the above, and if my opinion were to be accepted, I would deny the petition.

Decided as *per* the opinion of President D. Beinisch, in which Justices A. Procaccia, A. Grunis, M. Naor, S. Joubran and E. Hayut concurred and against the dissenting opinion of Justice E. E. Levy – to grant the petition in the following manner: the order *nisi* will become absolute in the sense that as of the 2011 budget year, the support to kollel students will no longer be

provided under budget item 20-38-21 in the annual budget law. This budget item will remain in effect as set out in the biennial budget law for 2009 and 2010.

2 Tamuz 5770.
14 June 2010.