HCJ 366/03

Commitment to Peace and Social Justice Society and others

v

1. Minister of Finance

2. National Insurance Institute

HCJ 888/03

Bilhah Rubinova and others

v

1. Minister of Finance

2. National Insurance Institute

The Supreme Court sitting as the High Court of Justice

[12 December 2005]

Before President A. Barak, Vice-President M. Cheshin and Justices D. Beinisch, E. Rivlin, A. Procaccia, E.E. Levy, A. Grunis

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

Facts: The government decided to reduce the amount of income supplement benefit paid to individuals and families, and to cancel several subsidies given to persons receiving income supplement benefit. The reduction in the amount of income supplement benefit and the cancellation of the subsidies were incorporated into the Income Supplement Law by means of the State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002.

The petitioners attacked the reduction in the benefit and the cancellation of the subsidies, on the ground that they violated the human right to live with dignity

included in the right to dignity in the Basic Law: Human Dignity and Liberty. The petitioners claimed that the reduced amount of the benefit did not allow its recipients to live with dignity, since it fell below the minimum required to allow the recipient to pay for his subsistence requirements.

Held: (Majority opinion — President Barak, Vice-President Cheshin and Justices Beinisch, Rivlin, Procaccia and Grunis) The petitioners did not prove a proper factual basis for their claim that the reduction in the income supplement benefit violated their human right to live with dignity. Therefore the petitions should be denied.

(Minority opinion — Justice Levy) The petitioners succeeded in discharging the initial burden of proof showing that their right to live with dignity had been violated. Therefore the burden passed to the state to show that the violation was constitutional. The respondents failed in this regard, because it was clear (even from the respondents' own submissions) that they had not taken into account the human right of the recipients of income supplement benefit to live with dignity when making the changes to the Income Supplement Law. Consequently, the reduction in the amount of the benefit and the cancellation of the subsidies should be declared void.

Petition denied, by majority opinion (President Barak, Vice-President Cheshin and Justices Beinisch, Rivlin, Procaccia and Grunis), Justice Levy dissenting.

Legislation cited:

Basic Law: Human Dignity and Liberty, ss. 1A, 2, 4, 11.

Broadcasting Authority (Fees, Exemptions, Fines and Linkage) Regulations, 5734-1974, s. 5(a)(8).

Economic Emergency Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2002 and 2003 Fiscal Years) Law, 5762-2002, s. 10.

Income Supplement Law, 5741-1980, ss 2, 2(a), 2(a)(1), 2(a)(2), 2(a)(3), 2(a)(7), 2(a)(8), 2(d), 2(e), 3A, 5, 5(e)(3), 24, 30A, schedules 1, 2, 4.

Minimum Wage Law, 5747-1987.

National Insurance Law [Consolidated Version], 5755-1995, s. 378.

State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002, ss. 17(2)(a)(1), 17(2)(c), 17(3)(a), 17(11), 17(13).

State Economy Arrangements (Reduction in Municipal Property Tax) Regulations, 5753-1993, r. 2(7).

Supervision of the Prices of Commodities and Services (Fares for Travel on Bus Lines) Order, 5763-2003, s. 9.

Israeli Supreme Court cases cited:

HCJ 5578/02 *Manor v. Minister of Finance* [2005] IsrSC 59(1) 729. [1]

HCJ 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221. [2]

HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481. [3]

CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464. [4]

HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [1996] IsrSC 50(2) 769. [5]

HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749. [6]

HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812. [7]

CA 214/89 *Avneri v. Shapira* [1989] IsrSC 43(3) 840. [8]

HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998-9] IsrLR 567**. [9]

HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] IsrSC 54(2) 164. [10]

HCJ 5394/92 *Hoppert v. Yad VaShem Holocaust Martyrs and Heroes Memorial Authority* [1994] IsrSC 48(3) 353. [11]

HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503. [12]

HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**. [13]

HCJ 161/94 *Itri v. State of Israel* (unreported). [14]

CA 3295/94 *Parminger v. Mor* [1996] IsrSC 50(5) 111. [15]

LCA 4905/98 *Gamzu v. Yeshayahu* [2001] IsrSC 55(3) 360. [16]

CA 3553/00 *Aloni v. Zend Tal Feed Mills Ltd* [2003] IsrSC 57(3) 577. [17]

LCA 5368/01 *Yehuda v. Teshuva* [2004] IsrSC 58(1) 214. [18]

CA 9136/02 *Mister Mani Israel Ltd v. Rize* [2004] IsrSC 58(3) 934. [19]

HCJ 3512/04 *Shezifi v. National Labour Court* (unreported). [20]

HCJ 494/03 *Physicians for Human Rights v. Minister of Finance* [2005] IsrSC 59(3) 322. [21]

LCA 3297/90 *Revivo v. Bank HaPoalim* (unreported). [22]

HCJ 6741/99 *Yekutieli v. Minister of Interior* [2001] IsrSC 55(3) 673. [23]

HCJ 1384/04 *Betzedek Society v. Minister of Interior* (unreported). [24]

HCJ 935/89 *Ganor v. Attorney-General* [1990] IsrSC 44(2) 485. [25]

CrimApp 537/95 *Ganimat v. State of Israel* [1995] IsrSC 49(3) 355. [26]

HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235. [27]

HCJ 4885/03 *Israel Poultry Farmers Association v. Government of Israel* [2005] IsrSC 59(2) 14; **[2004] IsrLR 383**. [28]

HCJ 3106/04 *Association for Civil Rights in Israel v. Knesset* (unreported). [29]

HCJ 164/97 *Conterm Ltd v. Minister of Finance* [1998] IsrSC 52(1) 289; **[1998-9] IsrLR 1**. [30]

CA 1165/01 *A v. Attorney-General* [2003] IsrSC 57(1) 69. [31]

HCJ 6126/94 *Szenes v. Broadcasting Authority* [1999] IsrSC 53(3) 817; **[1998-9] IsrLR 339**. [32]

HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**. [33]

LCA 7504/95 *Yassin v. Parties Registrar* [1996] IsrSC 50(2) 45. [34]

HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**. [35]

HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1. [36]

HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367. [37]

HCJ 6698/95 *Kadan v. Israel Land Administration* [2000] IsrSC 54(1) 258. [38]

HCJ 142/89 *Laor Movement v. Knesset Speaker* [1990] IsrSC 44(3) 529. [39]

CA 311/57 *Attorney-General v. M. Diezengoff & Co. (Navigation) Ltd* [1959] IsrSC 13 1026; **IsrSJ 3 53.** [40]

HCJ 5503/94 *Segal v. Knesset Speaker* [1997] IsrSC 51(4) 529. [41]

For the petitioners in HCJ 366/03 — A. Feldman, A. Benish.
For the petitioners in HCJ 888/03 — S. Abraham Weiss, D. Yakir.
For the respondents — O. Mandel, I. Altschuler.

JUDGMENT

President A. Barak

Is a reduction in the amount of income supplement benefits, which was made in the legislation of the Knesset, lawful? This is the main question brought before us in these petitions.

The petitioners

1. The first petitioner in HCJ 888/03 is Mrs Bilhah Rubinova, an Israeli citizen and resident born in 1967, a mother of two minor children, who lives in Beer-Sheba. She is separated from her husband and does not work. According to her affidavit of January 2003, her monthly income amounts to an income supplement benefit in a sum of NIS 2,744, and in addition a child allowance in a sum of NIS 290. She also receives assistance from the Ministry of Housing in the form of a rent subsidy in a sum of 200 dollars a month. According to the same affidavit, her monthly expenses for her subsistence and the subsistence of her children amount to approximately NIS 3,500, which is more than her income. The second petitioner in HCJ 888/03 is Mr Yosef Pedalon, an Israeli citizen and resident born in 1950. According to his affidavit of January 2003, since his business failed and he separated from his wife, he has not succeeded in finding alternative work, *inter alia* because of his age. He does not have an apartment and lives with friends. At the Enforcement Office he has many debts to his name, and he is liable to pay maintenance to his minor son. His only income is an income supplement benefit in a sum of NIS 1,587. The third and fourth petitioners in HCJ 888/03 are societies that seek to advance human rights and eliminate poverty. The petitioners in HCJ 366/03 are a society and eight academics and activists who

are concerned with social and welfare issues. They all argue that the amendment made to the Income Supplement Law, 5741-1980 (hereafter — the Income Supplement Law) is void. Let us now turn to consider this law.

The legislation under scrutiny

2. The State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002 (hereafter — the Arrangements Law) was passed by the Knesset on 17 December 2002. It provided that it would come into effect on 1 January 2003. Among the arrangements in the law are a series of amendments to the Income Supplement Law, which restricted the scope of the benefits granted by it and changed additional characteristics in the structure of the benefits granted by virtue of the Income Supplement Law. The two petitions before us challenge the constitutionality of some of the amendments:

a. The amendment to s. 5 of the Income Supplement Law, which is provided in s. 17(3)(a) of the Arrangements Law.

b. The addition of s. 30A to the Income Supplement Law, which is provided in s. 17(11) of the Arrangements Law.

c. The addition of column B in the second schedule and the addition of the fourth schedule of the Income Supplement Law, which were introduced by s. 17(13) of the Arrangements Law.

3. These amendments only concern persons entitled to income supplement who are under the age of 55. The entitlement of persons over the age of 55 was not changed by the Arrangements Law. The following is the significance of the amendments (for persons under the age of 55):

a. The increased benefit for new recipients was cancelled. Before the amendment the law stipulated several groups, who received an income supplement benefit at a higher rate than the ordinary benefit. As a result of the amendment, the increase was cancelled, and all the new recipients of income supplement will from now receive the ordinary amount only. Before

the amendment, persons over the age of 46, single-parent families and new immigrants who had exhausted their entitlement to the absorption basket were entitled to an increased benefit.

b. The increased benefit for existing recipients was reduced. Whoever received an increased benefit prior to the amendment will continue to receive a benefit that is higher than the ordinary benefit, but less than the increased benefit that they received previously. Their entitlement to the (reduced) increased benefit will cease if they stop receiving income supplement for a period that exceeds six months.

c. The amount of the ordinary benefit for all recipients (with the exception of a recipient who is an individual) was reduced. The amount of the ordinary benefit was reduced proportionately, so that the lower the amount of the original benefit, the smaller the reduction made to it.

4. The petitioners submitted for our inspection a document that was prepared by the Research and Planning Administration at the National Insurance Institute before the Arrangements Law was passed, and this analyzes the effects of the amendments ('The 2003 Arrangements Law: the Main Government Decisions concerning the National Insurance Institute and their Ramifications on Recipients of Benefits and the Activity of the Institute' (October 2002) (petitioners' exhibit no. 8 in HCJ 366/03, petitioners' exhibit no. 2 in HCJ 888/03; hereafter — the National Insurance document)). The conclusions of the document are consistent with the figures that appear in the responses of the state with regard to the amendments made in practice. In table no. 1, which is attached to the document, all the reductions made to the income supplement benefits within the framework of the aforesaid amendments are summarized. The following are the figures:

Family composition	The benefit before the amendment	The benefit after the amendment	The difference

	As a percentage of the average salary	In NIS	As a percentage of the average salary	In NIS	As a percentage	In NIS
Ordinary amount						
Single person	20%	1,393	20%	1,393	0	0
Couple	30%	2,089	27.5%	1,915	8.3%-	174
Couple with child	36%	2,507	30%	2,089	16.7%-	418
Couple with two children	42%	2,925	33.5%	2,333	20.2%-	592
Increased amount (for existing recipients)						
Single person	25%	1,741	22.5%	1,567	10%-	174

Single parent with child	42.5% less a benefit point	2,789	33.5%	2,333	16.4%-	456
Single parent with two children	52.5% less a benefit point	3,485	39%	2,716	22.1%-	769
Couple	37.5%	2,612	30%	2,089	20%-	523
Couple with child	43.5%	3,029	33.5%	2,333	23%-	696
Couple with two children	49.5%	3,447	39%	2,716	21.2%-	731

These figures do not take into account a temporary provision that reduced the income supplement benefits by an additional 4% in the years 2002-2006 (s. 10 of the Economic Emergency Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2002 and 2003 Fiscal Years) Law, 5762-2002; see HCJ 5578/02 *Manor v. Minister of Finance* [1]). These show that the Arrangements Law led to a significant

reduction in most types of benefits paid as income supplement to entitled persons who are under the age of 55. According to the National Insurance document, the average reduction in these benefits amounts to approximately NIS 670, which is a reduction of an average of 31% in the amount of the benefits paid to those groups. Approximately 100,000 families of the approximately 150,000 families entitled to income supplements are affected by the amendments.

5. In addition to these amendments, s. 2(a) of the Income Supplement Law was amended (in s. 17(2)(a)(1) of the Amendments Law), so that the minimum entitlement age for income supplement was raised from 20 to 25 years. At the same time, exceptions were made for persons under the age of 25 years (the addition of s. 2(d) and as provided in the first schedule to the Income Supplement Law; these amendments were made in ss. 17(2)(c) and 17(13) of the Arrangements Law). In addition, the Minister of Welfare, the Minister of Justice and the Minister of Finance were authorized (subject to various conditions) to provide, in an order, additional categories of entitled persons who have reached the age of 20 (the addition of s. 2(e) of the Income Supplement Law, which was introduced by s. 17(2)(c) of the Arrangements Law). The petitioners in HCJ 366/03 ask us to suspend the validity of these provisions, which deny entitlement to income supplement for persons who have not yet reached the age of 25, until the exceptions are provided in an order as aforesaid.

6. In a combined measure, the Government of Israel decided (in decision no. 2331 of 30 July 2002) to cancel certain concessions and exemptions, which were given to recipients of income supplement within the framework of the various actions of the government. The cancellation of the benefits that are set out in the following subordinate legislation was applied only to new recipients of income supplement:

a. Regulation 5(a)(8) of the Broadcasting Authority (Fees, Exemptions, Fines and Linkage) Regulations, 5734-1974, which grants an exemption from the television licence fee to recipients of income supplement (para. 7 of decision 2331);

b. Regulation 2(7) of the State Economy Arrangements (Reduction in Municipal Property Tax) Regulations, 5753-1993, which authorizes local authorities to grant a concession of up to 70% of the liability for municipal property tax (*arnona*) to recipients of income supplement (para. 9 of decision 2331);

c. Section 9 of the Supervision of the Prices of Commodities and Services (Fares for Travel on Bus Lines) Order, 5763-2003, which entitled recipients of income supplement to a reduction when travelling on public transport (para. 10 of decision 2331).

According to the government's decision, the ministers concerned amendment the aforesaid provisions, and the aforesaid benefits are no longer given to recipients of income supplement merely because of their status as such. The petitioners in HCJ 888/03 ask us to order the cancellation of paras. 7, 9 and 10 of the government decision no. 2331, and to reinstate the entitlement of recipients of income supplement to the benefits that have been taken away from them.

The proceeding

7. The two petitions before us were filed in January 2003, shortly before the commencement of the amendments under scrutiny. First, the petitioners were required (on 21 May 2003) to complete their petition and to attach to it an opinion on the injury to dignity arising from the aforesaid amendments. On 5 January 2004, an order *nisi* was made (by Justices D. Dorner, E. Hayut and S. Joubran), which ordered the respondents to show cause 'why they should not determine a standard for human subsistence with dignity as required by the Basic Law: Human Dignity and Liberty.' After an affidavit in reply was filed, the hearing of the petitions was reinstated (before President A. Barak, Vice-President E. Mazza and Justice M. Cheshin), and with the consent of the parties an amended order *nisi* was issued (on 16 March 2004), which related only to the validity of the various pieces of legislation, as described above. When an additional affidavit in reply was filed by the respondents, it was decided (on 14 September 2004) to expand

the panel that would hear the petitions. The expanded panel heard oral argument once again (on 30 November 2004). Now the time has come to make a decision.

The arguments of the parties

8. The petitioners' main argument is that the amendment reduces the amount of the income supplement benefits to below the very lowest level of subsistence, such that the right to persons receiving the benefits to a dignified existence is violated. This violation, which was made (mainly) in statute, does not befit the values of the State of Israel, and it violates human dignity to an extent that is excessive. The respondents were required to respond to this claim in an affidavit. In their reply they asked us to dismiss it. The respondents are of the opinion that the right to dignity enshrined in the Basic Law: Human Dignity and Liberty — and the accompanying duty of the state to protect human dignity — concerns protection against a lack of subsistence only. According to them, the state's duty is limited to preventing a situation in which a person will live in degrading physical conditions. This duty, according to the respondents, was not violated by the legislation under discussion in these petitions. They emphasize that income supplement is a part of a complete system of assistance and support measures that the state gives the weaker strata of society. In order to determine whether it satisfies its duty to ensure a minimum of human subsistence, all of the services provided should be examined. A reduction of any amount in a particular benefit does not, in itself, violate dignity. The respondents argue that the reduction in the benefits was essential in order to achieve a real cut in the state budget, and that it is a part of other steps that are intended to encourage those who are able to do so to join the work force. The respondents insist that even after the reduction, the buying power of the benefits — which are linked to the average wage in the economy — remains what it was when the Income Supplement Law was enacted, and even today the amount of the benefits is close to the amount of the minimum wage, which (in the respondents' estimation) is the relevant alternative income for most recipients of income supplement. The respondents also point out that the amount of income

supplement in Israel today is also reasonable in relation to the corresponding benefits paid in other developed countries. From all of these they deduce that the amount of the income supplement benefits after the Arrangements Law does not violate human dignity.

9. The petitioners ask us to reject the respondents' reply. They reject the 'minimum human subsistence' approach of the respondents as a basis for defining the right to human dignity. According to them, the right to human subsistence with dignity — which is agreed by everyone, and it is only the content of which that is in dispute — 'is not restricted to the right to physical subsistence needs… but includes also spiritual and social needs and it should also take into account needs that are accepted in society' (para. 5 of the petitioners' reply of 12 July 2004). It is therefore insufficient for the state to guarantee an ability to subsist materially; instead it should guarantee that the individual also has a tolerable standard of living, which is reasonably proportionate to the general standard of living at a given time. The petitioners presented a series of works of economic and statistical research that seek to show that the amounts of the benefits paid today do not allow an ordinary household in Israel to exist with dignity. They argue that the reduced income supplement benefits, together with reductions that were recently made in the amounts of child allowances and rent subsidies place their recipients far below the 'poverty line,' and they allow only a meagre and depressing material subsistence. Thereby, according to the petitioners, human dignity is violated. This violation conflicts with the values of the State of Israel as a welfare state. It is disproportionate, since the state has not been able to show a rational connection between the reform to the benefits system and the purpose of encouraging people to go to work; no less harmful measures were examined, such as improving the employment tests or grading the benefits according to chances of finding work; and in particular, there is no reasonable correlation between the benefit produced by the amendments and the harm deriving from a significant reduction, in one thrust, of the main component of the national welfare system, during a difficult economic period which is accompanied by many additional 'cutbacks' affecting the weaker

strata of society. Finally the petitioners complain also of the hurried and superficial legislative process in which the amendments were enacted as a part of the Arrangements Law.

Income supplement

10. The Income Supplement Law provides a complex mechanism of granting benefits to Israel residents without means who have no earnings or whose earnings are very low, and who are not entitled to a benefit by virtue of another social insurance framework. A mechanism of this kind exists in many western countries, in a format that is similar in some degree or other to the one practised in Israel. Under the Income Supplement Law, income supplement benefits are paid on the basis of whether a person belongs to one of the groups listed in the law as having an entitlement (s. 2), which depends on a periodic examination of the economic and employment ability of the person claiming the benefit. It is calculated as a percentage of the average wage in the economy (s. 5, second schedule), and it is permanently linked to the state of the economy. The number of persons entitled to income supplement, since the law was enacted, has continuously risen, since the 1990s, by a rate that is higher than the increase in the population (for detailed surveys of the arrangement in Israel, see A. Doron and J. Gal, 'The Income Supplement System in Israel from a Comparative International Perspective,' 58 *Social Security* 5 (2000); B. Morgenstein, N. Shammai, T. Haroon, 'The Income Supplement Law in Israel: Background and Future Legislation,' *Menachem Goldberg Book* (2001) 404).

11. The Income Supplement Law is intended to provide individuals and families that have limited means with the (material) economic basis required to subsist in the State of Israel (see the explanatory notes to the draft Income Supplement Law, 5740-1979 (*Hatzaot Hok* (Draft Laws) 1417, at p. 2). According to the petitioners' approach, this purpose *de facto* is concerned with ensuring that the level of subsistence of the residents of the State of Israel who have limited means does not result in a violation of their human dignity. According to the petitioners, the significant reduction in the amount of the benefits for income supplement violates human dignity in a prohibited

manner, and therefore it is void, in accordance with the provisions of the Basic Law: Human Dignity and Liberty. The respondents, by contrast, are of the opinion that the income supplement benefits are not the only means of ensuring that human dignity is maintained, and the reduction in them does not amount to a prohibited violation of the constitutional right. The claim that we must scrutinize in these petitions is therefore a constitutional claim. The accepted method of scrutiny for claims of this kind is comprised of three stages (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at p. 428); HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [3], at para. 56): in the first stage, we examine the question whether the law (in our case: the amendment to the Income Supplement Law) violates the right to human dignity. If it is held that a violation exists, the second stage examines whether this violation satisfies the conditions of the constitutional limitations clause. In a situation where the scrutiny shows that the violation does not satisfy the provisions of the limitations clause, we turn to the third stage, which concerns the constitutional relief. The first question that we must ask, therefore, is whether the amendment to the Income Supplement Law violated a right enshrined in the Basic Law. Let us now turn to consider this.

The right to a dignified existence

12. It is now more than a decade that human dignity has enjoyed the status of a constitutional super-legislative right in our legal system. The Basic Law: Human Dignity and Liberty, provides as follows:

> Purpose
>
> 1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to enshrine in a Basic Law the values of the State of Israel as a Jewish and democratic state.
>
> Safeguarding life, body and dignity
>
> 2. There shall be no violation of the life, body and dignity of a human being , in as much as he is a human being.
>
> …

Protection of life, body and dignity

4. Every human being is entitled to protection for his life, his body and his dignity.

…

Application

11. Every organ of government is liable to respect the rights under this Basic Law.

Sections 2 and 4 of the Basic Law: Human Dignity and Liberty provide a constitutional-legal norm, like every other (constitutional) legal norm. The role of the court is to interpret it according to its purpose, so that 'every organ of government' will be able to uphold it. Indeed, the Basic Law does not merely declare 'policy' or 'ideals' (cf. art. 20(1) of the Basic Law of Germany). The Basic Law does not merely delineate a 'plan of operation' or a 'purpose' for the organs of government (cf. art. 27(2) of the constitution of South-Africa; art. 39 of the constitution of India). It does not merely provide an 'umbrella concept' with interpretive application (see Y. Karp, 'Several Questions on Human Dignity under the Basic Law: Human Dignity and Liberty,' 25 *Hebrew Univ. L. Rev. (Mishpatim)* 129 (1995), at p. 136). Sections 2 and 4 of the Basic Law provide a right — a right that guarantees human dignity. This right corresponds with the duty of the organs of government to respect it (s. 11). I discussed this in the past:

> 'The centrality of the value of human dignity does not merely reflect rhetoric of the importance of this value. It is translated into legal language with the positivist approach that human dignity gives rise to rights and duties, determines authorities and powers and affects the interpretation of every piece of legislation. Human dignity in Israel is not a metaphor. It is a normative reality, from which operative conclusions are implied' (CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [4], at p. 524).

The duty of the state is two-fold: first, it has a duty not to violate human dignity. This is the negative aspect (the *status negativus*) of the right. It is

enshrined in s. 2 of the Basic Law: Human Dignity and Liberty. Second, it has the duty to protect human dignity. This is the positive aspect (the *status positivus*) of the right. It is enshrined in s. 4 of the Basic Law: Human Dignity and Liberty. The two aspects, the negative (passive) aspect and the positive (active) aspect are different parts of the whole, which is the constitutional right to dignity. They both derive from the interpretation of the right to dignity, as enshrined in the Basic Law. Neither aspect takes precedence over the other (see R. Gavison, 'On the Relationship between Civil-Political Rights and Socio-Economic Rights,' *Economic, Social and Cultural Rights in Israel* 25 (2005), at pp. 40-48). The prohibition against violating dignity and the duty to protect dignity both impose significant duties on the state and the individuals living in it.

13. In the petition before us, the petitions request that we order the voidance of a law, which (in their opinion) unlawfully violates the 'positive' aspect of the right to dignity, in the context of the demand to live with dignity. What is the content of this 'positive' aspect'? The answer to this question lies in the constitutional interpretation of the provisions of the Basic Law. In order to characterize the right, the judge is required to consider the circumstances of time and place, the basic values of society and its way of life, the social and political consensus and the normative reality. All of these are tools that the judge has at his disposal for interpreting the legal concept of human dignity (A. Barak, *Purposive Interpretation in the Law* (1993), at pp. 453-445). The judge-interpreter makes continual use of these, when he is required to interpret rules and principles set out in the various legal texts. He uses them also when he wishes to determine the scope of the right to live with dignity. Thus, a state with the economic strength of a developed nation cannot be compared to a state with a weak economy. A state under a continual threat to its existence cannot be compared to a state that lives peacefully without any security concerns. A society that has chosen to enshrine human dignity as a constitutional right cannot be compared to a state that has not done so (see HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [5], at p. 787); also a state that has comprehensive social

security legislation cannot be compared to a state that has a rudimentary and partial welfare framework. On the other hand, a state where the corpus of social rights has been enshrined expressly and consensually in the constitution cannot be compared to a state where the question is still subject to a dispute that has not yet been resolved by its constitutive organs (A. Barak, 'Preface,' *Economic, Social and Cultural Rights in Israel*, 9 (2005)). By relating to these (and other) distinctions, the judge will realize the relevant modern meaning of the right to live with dignity. Thus he will discover 'values and essentials, while rejecting what is temporary and fleeting' (HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [6], at p. 780). Thus he will give effect and substance to the choice of the constitutive authority to enshrine the right to dignity in the constitution.

14. What is the meaning of the right to dignity in the context before us? Underlying our outlook on the right to dignity is the approach that:

> 'Human dignity is a complex principle. In realizing it, we must avoid the attempt to adopt the moral outlooks of one person or the philosophical outlooks of another… What underlies this concept is the recognition that man is a free entity, who develops his body and spirit in accordance with his will, within the social framework with which he is associated and upon which he is dependent. "Human dignity" extends to a broad range of human characteristics' (HCJ 5688/92 *Wechselbaum v. Minister of Defence* [7], at p. 827; see also *Gaza Coast Local Council v. Knesset* [3], at para. 82).

This approach has led to the development of the outlook that human dignity, which may not be violated (s. 2 of the Basic Law) and which is entitled to protection (s. 4 of the Basic Law), does not merely concern the prohibition against violating a person's reputation (CA 214/89 *Avneri v. Shapira* [8]) or preventing the possibility of his being tortured (HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel* [9]). The right to human dignity, in the substantive sense, constitutes a collection of rights that need to be protected in order that dignity may exist. These are

those rights without which there is no significance to a person being a free entity, since his power to develop his body and spirit in accordance with his will, within the society in which he lives, has been taken away. These rights are likely to be included within the framework of 'civil' (or 'political') rights, and even within the framework of 'social' (or 'economic') rights. Thus, for example, among the civil rights it is possible to hold that the right to equality is derived from the right to dignity, since discrimination denies the dignity of a human being as a human being, and leads to humiliation and rejection (see HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [10], at pp. 186-187; HCJ 5394/92 *Hoppert v. Yad VaShem Holocaust Martyrs and Heroes Memorial Authority* [11], at p. 362). At the same time, the variety of aspects of human endeavour to which human dignity extends also includes the 'social' aspect, which concerns the standard of living to which the human being is entitled. Indeed, the human right to dignity is also the right to have living conditions that allow an existence in which he will realize his liberty as a human being.

15. Notwithstanding, one should not 'read' into the right to dignity more than it can support. Not all rights can be derived from an interpretation of the Basic Law: Human Dignity and Liberty. I discussed this in one case:

> 'Constitutional interpretation of the right to dignity must determine its constitutional dimensions. It should not be restricted merely to torture and humiliation, since thereby we would fail to achieve the purpose underlying it; it should not be extended in such a way that every human right is included in it, since this would make all the other human rights provided in the Basic Laws redundant. The proper interpretation of the right to dignity should find its path between the two extremes' (HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 518).

This leads to the approach that when deriving rights that are not mentioned expressly in the Basic Laws dealing with human rights but are

included in the concept of human dignity, it is not always possible to incorporate the whole scope that the 'derived' rights would have had if they had been included separately as 'named rights' (in the term used by H. Sumer in 'Unmentioned Rights — On the Scope of the Constitutional Revolution,' 28 *Hebrew Univ. L. Rev. (Mishpatim)* 257 (1997)). Deducing the rights implied by human dignity is therefore done from the viewpoint of human dignity, and to the extent that it corresponds to this conception. This approach determines the scope of the implied rights. This is the case both with regard to the implied civil rights (see, for example, the position of Justice D. Dorner with regard to finding a partial basis for the right to equality in human dignity: HCJ 4541/94 *Miller v. Minister of Defence* [13], at pp. 132-133 {[redacted]}), and with regard to the implied social rights. Indeed, social rights are not mentioned expressly in the Basic Laws (with the exception of property). Various legislative proposals exist in this regard, but these have not yet matured (see, for example, the draft Basic Law: Social Rights, *Hatzaot Hok* (Draft Laws) 5754, at p. 337). In such a situation it cannot be said that the existing Basic Laws give full and complete protection to social rights. The Basic Laws protect the right to dignity, which includes the physical existence aspect that is required in order to realize the right to dignity. From this viewpoint, the human right to dignity is also the right to conduct one's ordinary life as a human being, without being overcome by economic distress and being reduced to an intolerable poverty. This is the outlook according to which the right to live with dignity is the right that a person should be guaranteed a minimum of material means, which will allow him to subsist in the society where he lives. This outlook has found its expression more than once in the case law of this court, in a variety of contexts. Thus, with regard to a petitioner who applied to be allowed to trade his kidney for the purposes of a transplant, we said in the past:

> 'The dignity of the petitioner as a human being requires concern for a minimal subsistence as a human being' (HCJ 161/94 *Itri v. State of Israel* [14]).

The same is true in a host of cases, which concerned the scope of the rights of debtors in enforcement proceedings. Justice T. Strasberg-Cohen held:

> 'Human dignity is a basic constitutional value in our society. No one will dispute that the dignity of a person must be protected even if he has failed in business and fallen into debt, and he should not be left without a roof over his head' (CA 3295/94 *Parminger v. Mor* [15], at p. 121).

I expanded on this in another case:

> 'Human dignity includes… protection of a minimum level of human subsistence… a person who lives in the streets and has no accommodation is a person whose dignity as a human being has been violated; a person who is hungry for food is a person whose dignity as a human being has been violated; a person who has no access to elementary medical treatment is a person whose dignity as a human being has been violated; a person whose is compelled to live in degrading physical conditions is a person whose dignity as a human being has been violated' (LCA 4905/98 *Gamzu v. Yeshayahu* [16], at pp. 375-376; see also CA 3553/00 *Aloni v. Zend Tal Feed Mills Ltd* [17], at p. 599; LCA 5368/01 *Yehuda v. Teshuva* [18], at p. 221; CA 9136/02 *Mister Mani Israel Ltd v. Rize* [19], at pp. 942-943, 953, *per* Justices E. Rivlin and D. Dorner).

In a petition that was heard before an extended panel of justices, in which the court was asked to recognize a constitutional right to environmental protection, I repeated the remarks, which were agreed by six of the justices on the panel:

> 'I accept that the right to human dignity and liberty includes the right to a minimum of human subsistence' (*Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 518).

Again, within the framework of a petition that dealt with a reduction of pension benefits:

> 'In the case before us the petitioner claims a constitutional right to social security whose content is limited to guaranteeing basic living conditions only as a part of the constitutional protection of human dignity. The recognition of the constitutional right to social security on this scale raises no problem. It is identical to the constitutional right to a minimal subsistence with dignity that has been recognized in the case law of this court' (*Manor v. Minister of Finance* [1], at para. 10).

In a case that concerned the interpretation of the Minimum Wage Law, 5747-1987, the matter was discussed by Justice E. Arbel:

> 'The Basic Law: Human Dignity and Liberty, is intended to guarantee basic human subsistence for each individual in society… The Basic Law includes the right to dignity, and this includes the right to basic human subsistence, so that the employee should not be dependent on welfare. Denying a person the minimum means of subsistence, which includes a minimum income, violates his dignity, as the prophet Isaiah says: "Is it not to extend food to the hungry and to bring the downtrodden poor into the house, and when you see a naked person, to cover him and not to ignore your own flesh?" (Isaiah 58, 7)' (HCJ 3512/04 *Shezifi v. National Labour Court* [20]).

16. It can be assumed, therefore, for this case — without making a firm determination on the subject — that the duty of the state under the Basic Law: Human Dignity and Liberty gives rise to the duty to maintain a system that will ensure a 'protective net' for persons in society with limited means, so that their physical position does not reduce them to a lack of subsistence. Within the framework, it must ensure that a person has enough food and drink in order to live; a place to live in which he can realize his privacy and his family life and be protected from the elements; tolerable sanitation and

medical services, which will ensure him access to the facilities of modern medicine. Against this background, does the actual reduction in the income supplement benefits indicate a violation of human dignity?

The amendment to the Income Supplement Law — reduction of the benefits

17. The petitioners' claim is that the amounts of the benefits paid as income supplement as a result of the amendment to the law are too low to allow their recipients to live with dignity. The petitioners ask us to determine that a payment of a certain amount by the state to groups of persons with limited means does not discharge its duty to guarantee their human dignity. To this end, they present a series of works that estimate — each in its own way and with its varying results — the subsistence needs of a person whose dignity is maintained, and they show that the income supplement benefits are significantly lower than these calculations.

18. The respondents dispute this method of analysis. They argue that the state has a general commitment to ensure the right of a person to live with dignity. Its compliance with this commitment cannot be assessed by examining the amount of the benefits paid as income supplement, when it is not possible to examine its compliance with this commitment by examining the amount of the benefits paid as pension benefits (see *Manor v. Minister of Finance* [1]). According to the respondents, the duty of the state is discharged by means of a variety of national and local measures in statute and in subordinate legislation, by direct grants, exemptions and subsidies, comprehensive arrangements and individual programmes. Among these the respondents mention, in addition to income supplement, the assistance of the Ministry of Housing in financing private accommodation, public accommodation services through the state housing companies, child allowances, national health insurance, free education, assistance given by the welfare units of the local authority, reductions in municipal property tax, subsidies for infant day care centres, legal aid, assistance from persons serving in National Service, government support of welfare enterprises, individual aid to families in distress and new immigrants.

19. Are all of these services sufficient in order to discharge the duty of the state to protect human dignity? We are unable to provide an answer to this question within the framework of the petitions before us. Within the first stage of the constitutional scrutiny (see para. 11 *supra*) the petitioners have the burden of proving that, notwithstanding all of the services, there live in Israel persons whose dignity is violated because their living conditions are insufficient. The petitioners have not discharged this burden. A reduction – and even a significant reduction — in the amount of the income supplement benefits does not in itself indicate a violation of dignity. Indeed, there is no doubt that the reduction in the benefits will make the lives of those entitled to income supplement, which are already difficult, even harder. The state assumes that this extra burden will encourage persons to enter the work force, reduce the periods of time during which persons receive income supplement, and in the long term ensure better welfare for the whole public and an increase in the living standard of the poorer individuals among it. At the same time, it undertakes that the other support systems will provide the conditions necessary for guaranteeing dignity. We are also unable to examine these assumptions on a theoretical and abstract basis. The scrutiny is always concrete and dependent upon results.

20. Indeed, the duty of the state not to harm and to protect human dignity does come with a fixed and uniform 'price tag,' which the court can discover. It is not characterized by a specific kind of benefits that the court is required to order the state to create. The right to dignity, and even the right to live with dignity, is not a right to a monthly benefit in a certain amount. It is the right that, when all the support and aid systems are provided, human dignity is preserved in the end result. Admittedly, there is no doubt that the Income Supplement Law has a significant role in achieving this result, namely in realizing the duty of the state to ensure that the persons living in it, who have no means, live in dignity. This is a law that *ab initio* is concerned with a 'minimum,' and as such it is capable of furthering the goal of protecting the dignity of the weak. But the Income Supplement Law, and the system of benefits provided in it, is not a guarantee that ensures human dignity. It is not

an essential condition; apparently, it is not even a sufficient condition. It is a possible measure — one of many alternatives — that fits into a broad array of aid and support measures, provided by the state and others. It is possible, for example, to imagine a situation in which there would be no Income Supplement Law or a similar law in Israel at all, and yet human dignity would be preserved. Indeed, the duty of the state to ensure the human right to live with dignity may be discharged in many ways. Income supplement is only one of these ways, and it cannot even be said that it is designed to realize the whole scope of the right to dignity.

21. Even from the Income Supplement Law itself it can be seen that the arrangement provided in it can be insufficient and that it requires additions and changes outside the main structure of the benefits. For this reason, s. 24 of the law provides a general authorization for the Minister of Welfare to determine 'rules, tests and conditions' for the participation of the state in additional expenses 'for rent, medical insurance and other special needs.' This power, like any other administrative power, must be exercised with a view to the basic rights of the individual. It cannot be denied that those 'special needs' may exist when the benefits granted in a specific case, together with the other support services that the state provides, are insufficient for guaranteeing that a person will live with dignity (cf. s. 378 of the National Insurance Law [Consolidated Version], 5755-1995; HCJ 494/03 *Physicians for Human Rights v. Minister of Finance* [21]). This arrangement is capable of showing that the legislature created a basis for taking into account cases that 'fall between the cracks.' It is capable of showing that the income supplement benefits are not everything, and that human dignity is not necessarily guaranteed by means of them alone.

22. It transpires that human dignity in the State of Israel depends on all of a person's living conditions, as they are reflected by the state of society and the basic values that guide it. Human dignity is violated if that person wishes to live as a human being in the society to which he belongs, but he find that his means are too limited and his strength too run down to allow this. Such a person is entitled to expect the state to act in order to protect his dignity. If,

notwithstanding all of the support mechanisms that it operates, the state is found to violate this duty — whether in legislation (that does not satisfy the conditions of the limitations clause) or in another sovereign act (that does not satisfy the rules of administrative law) — that person is even entitled to an order of the court that will order the state to comply with its duty and to provide him with the means that are required for him to live with dignity. Such an order may apply to an individual case or to a class of similar cases, all of which in accordance with the case and the circumstances. In order that the court should be able to make the order, it must be presented with a complete factual basis, from which the violation of dignity can be deduced. Thus the court will require details, based on appropriate documentation, of the sources of income and the current and fixed expenditure of that person (cf., for example, the information that an appellant is required to present in order to be exempted from depositing a guarantee: LCA 3297/90 *Revivo v. Bank HaPoalim* [22]). It should examine the functioning of all the national and other support systems that assist that person and the steps he takes in approaching them in order to exhaust his rights. It will be necessary to clarify whether the person works, and what are the employment alternatives available to him. If the claimant argues on behalf of a group, he will be required to establish the common characteristics of that group, which show the violation of the dignity of all of its members. In view of this factual basis, which will convince the court — in accordance with the correct interpretation of the right to dignity enshrined in the Basic Law: Human Dignity and Liberty — that the situation of a person has indeed reached a prohibited violation of dignity, it will be necessary to order the government authorities to act to remove the violation.

23. In the petitions before us, there is no basis for making such an order. We have not been asked within the framework of the petitions to order the state to discharge its duty to protect the dignity of a specific person, whether by means of increasing the benefit or in any other manner; even the order *nisi* that was made in the petitions, according to the language of the petitions themselves, did not address this aspect. All that the petitioners asked was that

we should determine that the reduction in the income supplement benefits was capable of violating dignity. We are unable to make such a determination. As aforesaid, the violation of the right to live with dignity — namely the breach of the duty to protect dignity — is examined in accordance with its consequences; and in these petitions no factual basis has been established from which it can be seen that, as a result of the reduction in the income supplement benefits, the dignity of certain persons has been violated. The concrete factual basis presented to us in this case is limited to the affidavits of the first and second petitioners in HCJ 888/03, which were made at the beginning of 2003. More than two years have passed since the affidavits were submitted, and despite this no updated affidavit has been filed with regard to their position. At the hearing which we held on the petitions (on 30 November 2004) we asked to be informed as to the current position of those petitioners; their counsel was unable to provide a satisfactory answer to our questions. Even the affidavits themselves were not supported by any documentation or evidence. This is especially the case with regard to the affidavit of the second petitioner, which lacks many details concerning the expenses that the petitioner incurs and the pecuniary resources available to him. The affidavit of the first petitioner is more complete, but in the absence of current and well-founded information we cannot rely on it either for the purpose of determining whether her right to dignity has been violated. The first stage of the constitutional scrutiny therefore ends with the conclusion that a violation of the right to dignity has not been proved. In this situation, we do not need to continue to carry out the other stages of the constitutional scrutiny. The petitions against the amendment should be denied.

The amendment of the Income Supplement Law — the change to the entitlement age

24. In addition to the reduction in the amount of the benefits, the amendment to the Income Supplement Law also raised the initial age for entitlement to receive benefits under the law from 20 to 25 years (s. 2(a) of the Income Supplement Law). At the same time, twenty-three statutory exceptions were provided (in the first schedule), and these entitle persons

who have not yet reached the age of 25 to an income supplement benefit. The law also provides for the power of the Minister of Welfare, the Minister of Justice and the Minister of Finance to determine rules for the purpose of recognizing the entitlement of persons who have not yet reached the age of 20 (s. 2(e)), provided that this entitlement shall not be less than 50% nor more than 80% of the ordinary amount of the benefit (s. 5(e)(3)). The petitioners in HCJ 366/03 requested, when they filed their petition, that we order the commencement of the amendment changing the entitlement age to be postponed until the aforesaid rules are made by the ministers. In response to the petition, the respondents said that as long as those rules are not made, the entitlement of anyone who has reached the age of 20 years to income supplement stands at 80% of the amount of the ordinary benefit. Since then, even though many statements and replies were filed in the proceeding, we have heard no further argument in this matter. Consequently, we assume that the response of the state satisfied the petition in this regard, and we are not considering the argument on its merits.

Cancellation of the accompanying benefits in accordance with the government's decision

25. Already before the amendment to the Income Supplement Law the Israeli government made a decision that led to the cancellation of three economic benefits that were given to recipients of income supplement. These were an exemption from the television licence fee, a reduction in fares on public transport and a reduction in the amount of municipal property tax. The first two benefits (which are smaller in their economic value) were cancelled in their entirety. With regard to the reduction in municipal property tax, which is likely to have a more significant value, this was cancelled only as a benefit given to recipients of income supplements as such. The reduction in municipal property tax will continue to be given based on individual income tests, which in any event will usually include those persons entitled to income supplement. The reason for this step is based, according to the respondents, on budgetary considerations (with regard to cancellation of the television licence fee and transport fares benefits) and the desire to neutralize the

'poverty trap,' by denying an inducement to continue entitlement to income supplement instead of applying for work (with regard to cancelling the municipal property tax benefit). The argument of the petitioners in HCJ 888/03 is that the government decided upon the cancellation of the benefits without properly considering the extent of the harm that this would cause — together with the reductions in the aid mechanisms and the transfer payments — to persons entitled to income supplement. This harm is too extreme and is therefore unreasonable, and the government was not entitled to make this decision.

26. From the outset, the petitioners directed their arguments against the provisions of government's decision no. 2331, in which it decided upon the cancellation of the benefits. Meanwhile the decision went from theory into practice, by means of the regulations enacted by the relevant ministers. In these circumstances, it is questionable whether granting the relief requested in the petition (cancelling the paragraphs in the government's decision) would reinstate the benefits, when they have been cancelled in the interim in subordinate legislation. But even if it would, my opinion is that the petition in this regard should be denied. When examining the cancellation of the accompanying benefits, we should distinguish between two types of benefit that were cancelled. One is the reduction in the amount of municipal property tax. The other is the benefits with regard to the television licence fee and bus fares. With regard to the reduction in municipal property tax, the respondents made it clear that this was not cancelled absolutely, but only as a benefit that was given 'automatically' to persons entitled to income supplement benefits. The reduction in municipal property tax will continue to be given to persons who satisfy the individual income tests of the local authorities. This approach is reasonable. It does not discriminate against the entitled persons on the basis of their economic ability or the group affiliation. It does not necessarily deny the benefit to any entitled person. All that it does is to replace one entitlement test (the test of entitlement to income supplement) with another entitlement test (the individual income test). The two tests are intended for the same purpose — giving reductions in the payment of municipal property

tax to persons with a low income (see HCJ 6741/99 *Yekutieli v. Minister of Interior* [23], at pp. 688, 707; HCJ 1384/04 *Betzedek Society v. Minister of Interior* [24]). Both of these fall within the same administrative 'zone of reasonableness' in which the court is not required to intervene (HCJ 935/89 *Ganor v. Attorney-General* [25], at p. 514).

27. With regard to the cancellation of the exemption from the television licence fee and the reduction in bus fares, no alternative source was offered for these. These payments will now fall entirely on the shoulders of the persons entitled to income supplement. This is to be regretted. Admittedly, access to television services or public transport is not essential for human subsistence. Yet we are speaking of two kinds of service that are basic to the social life of human beings in our times. They are capable of allowing a person to take an active and involved role in our environment. By means of these he can be exposed to the cultural, social and political reality that surrounds him. They allow a significant realization of basic rights (freedom of expression, the right to information, freedom of movement). From these viewpoints, the access to accessible and cheap media and public transport is essential for conceiving the individual as a part of the public. Indeed, 'human rights are the rights of man as a social creature. Human dignity is the dignity of man as a part of society and not as someone who lives on a remote island' (CrimApp 537/95 *Ganimat v. State of Israel* [26], at p. 413).

28. This is especially correct with regard to travel possibilities. The ability of a person to go from one place to another at an affordable price can be essential for a livelihood, for having a proper family life, for conducting a full social life. Accessible public transport is an interest of the public as a whole (see HCJ 4769/95 *Menahem v. Minister of Transport* [27]); it is a necessity for those members of society who have limited means. Therefore the significance of the cancellation of the reduction is one of two possibilities: a certain additional part of the income of the person entitled to income supplement will be directed henceforth to paying for transport (and television), instead of being used for immediate subsistence needs; alternatively, the person entitled to income supplement will be required to

give up using public transport (and having access to television). These are serious consequences. They should be reconsidered. There is a basis for taking into account with regard to these matters an examination of the individual situation of a person claiming a violation of dignity (see para. 22 *supra*). But is there any legal defect in the cancellation of the exemption from the television licence fee and the reduction in bus fares in themselves? My answer to this question is no. The importance of the bus fares and the medium of television does not give rise, in itself, to a duty on the part of the state to reduce the costs of these services for persons in society with limited means. The duty of the state is to ensure that people can live with dignity. As I explained, this duty can be realized in different ways. The state does not have a legal duty to act specifically by way of subsidies for one commodity or another. We therefore return to the point where we concluded the discussion of the constitutionality of the reduction in the income supplement benefits: the scrutiny should be result-orientated. There is no obligation *ab initio* to prefer one measure over another in realizing the duty. Consequently, the petition against the provisions of the government decision (and the subordinate legislation made on the basis thereof) should also be denied.

The legislation process

29. The petitioners in the two petitions also attacked, in addition to the content of the amendment to the Income Supplement Law, the manner in which the amendment was made. Their arguments are directed against the rushed legislative process of the Arrangements Law, in which, according to them, the basic principles of social security in Israel were changed. The petitioners emphasize the difference between the legislative process of the Arrangements Law and that of the Income Supplement Law itself, which took many years, was studied by several professional committees and was considered in the course of dozens of significant sessions of the Welfare Committee of the Knesset. I think that everything there is to say on the regrettable legislative process of the various 'Arrangements Laws' has already been said in several judgments that this court has given in the last year: see HCJ 4885/03 *Israel Poultry Farmers Association v. Government of*

Israel [28]; HCJ 3106/04 *Association for Civil Rights in Israel v. Knesset* [29]. Those judgments admittedly did not address the Arrangements Law that is under discussion in these petitions, but what was said there is correct in our case also. Therefore, notwithstanding the serious defects that befell it, we do not find that the legislative process of the amendment to the Income Supplement Law, in itself, undermines the validity of the amendment.

Application to be joined as a petitioner

30. We have before us an application of Mr Ehud Livneh to be joined as a petitioner in the petitions. The applicant is an Israeli citizen and resident, born in 1945 (now aged 60), who lives alone. According to the affidavit that he attached to his application, because of his age and disability (as a result of military service) he is unable to find work, and his only income is from an income supplement allowance in a sum of NIS 1,670 per month. In view of this background, he is applying to join in the arguments of the petitioners against the amendment to the Income Supplement Law. The application should be denied. As the state says in its response to the application, the reduction of benefits made in these amendments does not apply to entitled persons over the age of 55, so that in any case the amendments to the law do not affect the applicant directly. The arguments that he raises in his application attack the constitutionality of the amendment to the Income Supplement Law in general language. As such, they do not add to the large quantity of material brought before us by the existing petitioners. His potential contribution as an additional petitioner in the petitions, especially at the advanced stage of the proceedings when his application was filed, does not therefore justify his being joined as a petitioner.

Summary

31. The result is therefore that the petitions — on the basis of the reliefs that were requested in them — should be denied. This is because we have not been persuaded that the amendment to the Income Supplement Law, in itself (even with the cancellation of the accompanying benefits), is capable of violating human dignity. In this judgment we do not say anything with regard

to the existence in Israel of persons who are subject to extreme poverty to the point of a violation of their dignity. We know that the economic position of many families in Israel is very difficult, and that the impoverished sector of society is very considerable; this knowledge is shared by everyone who lives in Israel and has a pair of eyes. We do not know whether the position of any person has reached a violation of dignity, according to the legal-constitutional meaning of this concept. In order to reach such a judicial conclusion, accompanied by an order to the state to correct what is wrong, we need a proper factual basis. Such a basis has not been brought before us in these petitions. The claim that was made in them is a general one. The response given to it is also a general one.

32. This ruling does not prevent the filing of petitions concerning the human right to live with dignity. This is a constitutional right, which must be upheld in all the avenues of public law. The courts are competent to enforce it. If there is a specific and well-founded petition, it will be their duty to do so. By denying the petitions, the respondents are also not being allowed to rest on their laurels. The serious claim of the petitioners that in our country there live persons whose dignity is violated, merely because they do not have the means to live at a tolerable standard of living, has not been properly clarified in these petitions, and in any case it has not been rebutted. The respondents should examine this claim in depth. In so far as it is found to have merit, they should act quickly to eliminate the phenomenon, in some lawful manner.

The petitions are denied. There is no order for costs.

Justice E. Rivlin

I agree with the opinion of my colleague, President Aharon Barak.

Justice A. Procaccia

I agree with the opinion of my colleague, President A. Barak.

Justice D. Beinisch

Justice D. Beinisch

I agree with the result reached by President Barak, but I see a need to add several remarks concerning the petitions before us.

1. In his opinion, my colleague the President discussed how within the framework of the constitutional right to human dignity 'social' rights may be included. I agree with his position that it cannot be said that the Basic Laws provide full and complete protection to the aforesaid rights that are not mentioned expressly in the Basic Laws. Accordingly, like him I am also of the opinion that the constitutional right of a person to live with dignity does not extend to all the spiritual and social needs of a human being, and it concerns the physical subsistence perspective required in order to realize the right to dignity. According to this approach, the constitutional right to live with dignity is the right that a person will be guaranteed a minimum of material means that will allow him to subsist in the society in which he lives.

The main question before us in these petitions is whether the reduction in the amount of income supplement benefits that was made within the framework of the State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002 (hereafter — the Arrangements Law) led to a significant violation of the petitioners' constitutional right to human subsistence with dignity in the aforesaid meaning.

2. Like the president, I too am of the opinion that the petitioners have the burden of showing that as a result of the reduction in the amount of the income supplement benefits their constitutional right to dignity has been violated in the sense that the minimal material living conditions are insufficient. As President Barak said in his opinion, the mere reduction in the amount of the income supplement benefits, in itself, cannot prove a violation of the aforesaid constitutional right. Notwithstanding, I doubt whether it is right to demand that the petitioners prove that their constitutional right to

dignity has been violated specifically 'when all the support and aid systems are provided,' as the state claims (para. 20 of the President's opinion).

Indeed, I accept the basic position of the state that income supplement is a part of a comprehensive system of aid and support measures that the state provides for the weak strata of society. Income supplement is not the only or the best means of ensuring a dignified subsistence, if the state is capable of offering other alternative forms of support that provide what is lacking. According to the state, in order to determine whether it is discharging its duty to ensure a minimum of human subsistence, we must examine all the national and local measures in statute and subordinate legislation, whether in the form of direct grants, exemptions or subsidies, both in general arrangements and individual programmes. In this the state is correct, since income supplement is merely a part of the total economic system that is intended to ensure the minimum subsistence conditions required by a human being; but the full information for the purpose of a comprehensive examination of the aforesaid minimum subsistence conditions is in the possession of the state and not in the possession of the petitioners. In view of this, I am of the opinion that the petitioners had the initial burden of proving with appropriate documentation their sources of income as compared with the essential regular and permanent expenses that they incur, and the actions adopted in order to exhaust their rights in the national and other support systems that they are able to realize. But, unlike the President, I am of the opinion that were the petitioners to discharge this burden, the state would be required, already in the first stage of the constitutional scrutiny, to prove its claim that notwithstanding the *prima facie* violation of the constitutional right as a result of a reduction in income supplement, all the national and other measures that exist are sufficient for ensuring a minimum human subsistence with dignity, and this burden should not be placed on the shoulders of the petitioners.

3. With regard to the petitions before us, these were filed in January 2003, more than two years ago. We do not have current figures concerning the position of the petitioners, and *ab initio* we also did not have a proper basis of fact with regard to their claim as to the violation of their right to live

with dignity within the constitutional meaning, even though there is no doubt that the petitioners are persons with daily difficulties in eking out an existence. In the absence of such figures, I agree with the conclusion of President Barak that it is not possible to decide the claims of the petitioners with regard to the violation of their constitutional right under discussion. Therefore, I believe that the question whether the state presented us with a proper basis for establishing its claim that there exists an overall aid system that is capable of preventing a substantial violation of the constitutional right to live with dignity does not arise. For these reasons, I agree with the conclusion of the President that the petitions should be denied. Notwithstanding, like the President, I too think it right to emphasize that the aforesaid conclusion is based on a lack of a sufficient preliminary and *prima facie* basis of fact in the petitions brought before us. Therefore, this judgment does not prevent the filing of petitions in the future with regard to the right to live with dignity.

Justice A. Grunis

I agree with the opinion of my colleagues that the petitions should be denied.

Justice E.E. Levy

I agree with the conclusion of my colleague the President in so far as it concerns the constitutionality of para. 9 of government decision no. 2331 (this is the clause that determines the cancellation of the benefit concerning the reduction in the amounts of municipal property tax given to recipients of income supplement before the decision). I also accept the conclusion of my colleague with regard to ss. 17(2)(a)(1) and 17(2)(b) of the State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002 (hereafter — the Arrangements Law), which concerns a change of the entitlement age for receiving income supplement benefit. This is because of the position of the

respondents that until the rules for entitlement to a benefit amount in this age group are determined, its amount shall be 80 per cent of the amount of the ordinary benefit, and because there was no additional argument on this point from the petitioners. By contrast, I cannot agree with the conclusion of my colleague with regard to ss. 17(3)(a), 17(11) and 17(13) of the Arrangements Law, which are the sections that contain the reduction in the income supplement benefits, nor can I agree with his conclusion concerning the constitutionality of paras. 7 and 10 of government decision no. 2331, which are the paragraphs that determine the cancellation of the benefits concerning an exemption from the television licence fee and a reduction in the fares on public transport that were given to recipients of income supplement before the decision. Were my opinion to be accepted, we would declare the aforesaid sections of the law and paragraphs of the decision to be void, on the grounds that they disproportionately violate the human right to live with dignity, which is enshrined in the Basic Law: Human Dignity and Liberty.

The human right to live with dignity

> As though it were possible to draw a line and say: below this is poverty.
>
> Here is the bread that with cheap cosmetic colours
>
> Became black
>
> And the olives on a small plate
>
> On the tablecloth.
>
> In the air, pigeons fly in an aerial salute
>
> To the sounds of the kerosene seller's bell on the red cart,
>
> And there too was the sound of rubber boots falling on the swampy ground.
>
> I was a child, in a house they called a hut,
>
> In a neighbourhood they said was a transit camp.
>
> The only line I saw was the horizon, below which all seemed

Poverty.

R. Someck, 'The Poverty Line' (1996), *Rice Paradise Anthology*, 1976-1996).

1. The human right to live with dignity is an integral part of the right to human dignity. It is difficult to exaggerate the importance of this basic right. 'A life characterized by a constant struggle for basic living conditions is completely contradictory with the idea of human dignity' (R. Gavison, 'On the Relationship between Civil-Political Rights and Socio-Economic Rights,' *Economic, Social and Cultural Rights in Israel* (Y. Rabin, Y. Shani, eds. 2004) 25, at p. 39). It is a *sine qua non* for the ability to realize other basic rights, since, in the eloquent words of Justice Zamir, 'human rights should not serve only those with a full stomach; every person must have a full stomach so that he can enjoy human rights in practice and not merely in theory' (HCJ 164/97 *Conterm Ltd v. Minister of Finance* [30], at p. 340 {[redacted]}). Real freedom — which also includes freedom from want — is not possible otherwise (see M. Atlan, 'An Example of a Model for the Right to Decent Living Conditions,' *Economic, Social and Cultural Rights in Israel* 395, at p. 399; see also J. Raz, 'Autonomy, Toleration and the Harm Principle,' *Issues in Contemporary Legal Philosophy* (R. Gavison, ed., 1987) 313, at p. 316).

'An individual is entitled to live with dignity as a basic right, not by virtue of a feeling of empathy or a moral outlook of doing charity. A society that leaves its poor to their distress demonstrates that it does not respect persons as human beings' (Atlan, 'An Example of a Model for the Right to Decent Living Conditions,' *supra*). As a basic right, the right to live with dignity enjoys constitutional protection. It may only be violated by law. The law must befit the values of the State of Israel as a Jewish and democratic state. It must serve proper purposes with proportionate measures. These principles have been accepted by us for some time, and they contain no innovation or difficulty (see *Itri v. State of Israel* [14]; *Gamzu v. Yeshayahu* [16], at p. 375; *Man, Nature and Law Israel Environmental Protection Society v. Prime*

Minister of Israel [12], at p. 518; *Manor v. Minister of Finance* [1], at para. 7; *Betzedek Society v. Minister of Interior* [24], at para. 15).

The human right to live with dignity is not enshrined merely in our internal law. It is also recognized in international law, where it is defined as a right to 'a proper standard of living.' Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, to which Israel became a party on 3 October 1991, provides that:

> 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

2. The petitioners and the respondents are divided on the question of how a violation of the right to dignity should be defined with regard to human living conditions. The respondents ask us to adopt a level that they call the 'lack of subsistence model,' according to which only the 'absence of a roof, hunger and a lack of clothing will be considered a violation that degrades human dignity.' By contrast, the petitioners argue for a wider model, which includes 'also spiritual and social needs' and which is related to 'the accepted needs in society.'

I have devoted much time to examining this question, as well as my colleague's approach to it. As stated in his opinion, my colleague's approach is that the human right to live with dignity means ensuring the human right 'to conduct one's ordinary life as a human being, without being overcome by economic distress and being reduced to an intolerable poverty' (para. 15 of his opinion). It would appear that the advantages of this approach — and especially the fact that it *prima facie* allows the cloak of vagueness that enshrouds the term 'human right to live with dignity' to be dispelled by

delineating its content — are clear. It is also possible to hold the opinion that the failure of the various attempts to enshrine what is usually referred to as 'social rights' expressly in the Basic Laws requires a restrictive and particularly careful interpretation of this right, an interpretation that reflects the judicial restraint ordinarily required in matters concerning economic priorities and distributing national resources.

As for myself, without needing to delineate the exact boundaries of the right, I am of the opinion that the purposes of the protection of the right lead to the conclusion that this right includes the right to *proper* living conditions, and that its purpose is not merely to protect the human being from an intolerable lack of subsistence, as the respondents claim. The right to basic living conditions and the provision of essential needs, including a roof, clothing and food are, of course, included in the protection given to the human right to live with dignity, but it should not be said that it is limited to these.

3. Can it indeed be definitively said that living conditions, which only permit a purposeless subsistence that does not contain any potential for human achievement, do not violate the constitutional human right to dignity? How can we determine that living conditions, which do not allow even a minimal degree of correlation with the accepted standard of living in society, or which prevent a person having an opportunity, no matter how small, of developing himself, of defining his goals and ambitions and of acting in order to achieve them, do not violate the constitutional right to dignity? Is a person, whose living conditions do not allow him a minimal degree of civic participation and prevent him from being integrated into the society around him and from affecting what happens in it, the person to whom we refer when we speak of his dignity? To tell the truth, I find it hard, very hard, to reach a definitive conclusion that a person who is protected only from 'intolerable want' has not been injured with regard to his constitutional right to dignity. Human life must contain hope and value. They must hold out a promise for the foreseeable future. A monotonous and purposeless existence cannot be regarded in my opinion as 'living with dignity.'

I do not mean to say that the human right to live with dignity is an all-embracing right. It is self-evident that 'human dignity does not mean everything that is good and beautiful in life' (A. Barak, *Constitutional Interpretation* (1994), at p. 419). Human life is naturally based on a compromise and balance between inclinations and desires on the one hand, and constraints and restrictions on the other; certainly not every caprice, wish or need that is unrealized violates the constitutional human right to dignity. It should therefore be said that the living conditions of a person should allow him a reasonable ability to function socially in the society in which he lives. Underlying this approach is the outlook that a person is not an island. A person is a part of a society (HCJ 6126/94 *Szenes v. Broadcasting Authority* [32], at p. 833 {____}). Human rights are therefore the rights of a person in an organized society; they concern the individual and his relationship with his fellow-man (HCJ 5016/96 *Horev v. Minister of Transport* [33], at p. 41 {____}). It follows that human dignity is the dignity of the individual as a part of society and not as someone living on a desert island (*Ganimat v. State of Israel* [26], at p. 413; LCA 7504/95 *Yassin v. Parties Registrar* [34], at p. 64; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [35], at p. 365 {____}).

4. My colleague the President discussed extensively the scope and economic significance of the amendments that were made to the Income Supplement Law, 5741-1980 (hereafter — the Income Supplement Law) by the Arrangements Law, whose legality is under consideration. As he says in his opinion, the average reduction in the benefits amounts to NIS 670. It represents a reduction of approximately an average of one third of the amount of the benefit that was in force before the law was passed. In the highest category, the reduction amounts to NIS 769 (for a single parent with two children). This is the case without taking into account the Economic Emergency Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2002 and 2003 Fiscal Years) Law, 5762-2002, which deducted an additional four per cent from the income supplement benefits. We are therefore speaking of a drastic reduction, which is of critical economic significance for most of those persons who receive

income supplement. My outlook is that the picture that emerges from the series of amendments made to the Income Supplement Law by the Arrangements Law, and certainly together with the provisions of the Economic Emergency Programme Law, raises difficult and problematic questions both with regard to the ability of individuals and families to support themselves with dignity, and with regard to the image of society in Israel.

However, and this too should be made clear, these general questions are not the questions that we must decide. We are not required, nor is it a part of our function, to determine a position with regard to the logic or wisdom of the economic policy that the government wishes to advance. It alone has the prerogative to decide questions in the sphere of national priorities, the distribution of resources in society and the ideal welfare policy. This was discussed by my colleague the President, when he said:

> 'The court should examine the constitutionality of the law, not its wisdom. The question is not whether the law is good, effective, justified. The question is whether the law is constitutional. A "socialist" legislature and a "capitalist" legislature may enact different and conflicting laws, and all of these may satisfy the requirements of the limitations clause' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at p. 438).

The only question before us is, therefore, whether government decision no. 2331 (hereafter — the government decision) and the amendments made to the Income Supplement Law by the Arrangements Law violate the human right to live with dignity, and — assuming that the answer to this question is yes — whether this violation is constitutional, or in other words, whether it satisfies the requirements of the limitations clause in the Basic Law: Human Dignity and Liberty. I will now turn to consider these questions.

Violation of the human right to live with dignity and proof thereof

5. As stated in my colleague's opinion, the duties of the state under the Basic Law include a negative side, which is expressed in its duty to refrain

from violating the human right to live with dignity, and a positive side, which is reflected in its duty to afford protection to it. The Income Supplement Law, 5741-1980, is an expression of this positive duty. It has the very important function of guaranteeing the active aspects of the human right to live with dignity. It serves as a central component in Israeli social legislation. Its clear purpose is to ensure that individuals and families, whose circumstances in life have reduced them to an inability to support themselves, have a safety net of economic security, which will guarantee them a minimum subsistence and allow them to provide for their essential needs. This purpose can be seen clearly from a reading of the explanatory notes to the draft law:

> 'The purpose of the proposed law is to guarantee every person and family in Israel, who are unable to provide for themselves an income required for subsistence, the resources required to *provide for their essential needs*. A benefit under this law will be sole income of persons who are totally unable to work and support themselves, *and it will supplement an income that is less than the amount needed for subsistence*… The purpose of the proposed law is to bring about a more complete integration, on the basis of a uniform policy, of the programmes that exist in this field, *and to establish the right to be guaranteed a subsistence* and the principles governing this right in a law *that will clearly express the national responsibility to guarantee subsistence for everyone in order to prevent economic distress among the weaker sectors of the population*' (*Hatzaot Hok* (Draft Laws) 5740-1979, at p. 1417 — emphases supplied).

The respondents certainly agree with the approach that recognizes the central role played by the Income Supplement Law in guaranteeing the human right to live with dignity, since they expressed it before this court recently. I am referring to the remarks made by the state in *Manor v. Minister of Finance* [1], which considered the question of the constitutionality of the reduction in the amount of pension benefits under the Economic Emergency Programme Law, which can be seen from the judgment in that case:

> 'The respondent claims in its reply that the reduction in the pension benefits does not violate constitutional rights of a person entitled to the benefit, and in any case its violation satisfies the conditions of the limitations clause. According to the respondent, guaranteeing a minimal level of subsistence is achieved by means of an income supplement benefit which is given in accordance with economic criteria. By contrast, a pension benefit is a universal benefit, which is given to everyone who reaches the retirement age, irrespective of economic criteria. On the basis of this distinction, the respondent claims that the reduction in the pension benefit does not violate the constitutional right to dignity' (para. 4 of the judgment [1]).

6. I am in complete agreement with my colleague that 'the right to dignity, and even the right to live with dignity, is not a right to a monthly benefit in a certain amount,' that 'the Income Supplement Law… is not a guarantee that ensures human dignity' and also that 'it is possible… to imagine a situation in which there would be no Income Supplement Law or a similar law in Israel at all, and yet human dignity would be preserved' (s. 20 of my colleague's opinion). Admittedly, the benefit mechanism is not the only possible guarantee for realizing the human right to live with dignity. The Income Supplement Law is not the only legal solution that can give protection to it. Notwithstanding, when we examine the constitutionality of the amendments that are the subject of the petitions before us, we must give great weight to the fact that the Income Supplement Law — and not another theoretical arrangement — is the main tool that the legislature chose to realize its obligation to guarantee for everyone the human right to live with dignity. As we have explained, the express purpose of the Income Supplement Law is to supplement income 'that is less than the amount needed for subsistence.' It is the only mechanism that provides money benefits that serve as a *sole income* for people who for various reasons are incapable of supporting themselves with their own efforts.

7. The significance of this is not that the Knesset is not sovereign and therefore cannot change the Income Supplement Law or any of the provisions set out therein; it is not that the Income Supplement Law will always be immune to changes; not *every* reduction in income supplement benefit will be regarded as violating the human right to live with dignity. It is also possible to adopt the position, as stated in my colleague's opinion, that it is possible to cancel the Income Supplement Law and replace it with another normative arrangement. The only requirement is that the human right to live with dignity must survive the changes that the Knesset wishes to make to the arrangement that guarantees this. As long as the Income Supplement Law is the main tool that has been chosen to act as a guarantee of the human right to live with dignity, then the reduction in the benefits paid by virtue of the Income Supplement Law should be examined in view of this purpose. For this reason, in so far as the reduction in the benefit paid to the persons entitled is consistent with the purpose of the law, and in so far as the amount of the benefit after the reduction — on its own or together with means that are external to the law — continues to allow the recipients to live with dignity, the reduction in the benefit is legitimate and permissible. Within this framework we must address, *inter alia*, the circumstances in which the reduction is made, its purpose and scope, the sectors of the population that are harmed by it, together with their special needs, and alternative arrangements that were formulated in order to supplement the shortfall that has been created, if at all, in the income required for subsistence following the reduction.

Against this background, can it really be said that the petitioners have not succeeded in establishing a basis for their claim that the reduction in the income supplement benefits has violated the human right to live with dignity? As he says in his opinion, my colleague's conclusion is that it has not been proved that human dignity, in its legal-constitutional sense, has been violated by the reduction in the income supplement benefits. I do not agree with this conclusion. I am of the opinion that all of the material that was presented to us allows us to determine that the constitutional human right to

live with dignity has been violated as a result of the reduction, or at least that the petitioners have succeeded in raising a real doubt as to whether the recipients of the benefits are able to support themselves with dignity.

Of prime importance in this matter — the question of the violation — are the petitioners' affidavits, which were filed within the framework of HCJ 888/03. Admittedly, these should have been updated and supported by additional documentation and evidence, but this does not undermine their value. The affidavits include details of the expenses incurred by the petitioners and the extent to which the benefit helps them to pay for these expenses. It can be seen from these affidavits that the vast majority of their expenses are used for subsistence requirements, which are included within the framework of the protection of the right to live with dignity in its limited subsistence sense, and mainly for accommodation, food, clothing and medications. The amount of the benefit to which the petitioners are entitled — even taking into account additional support networks, such as assistance with rent payments — is far from being sufficient to cover these subsistence expenses.

Let us take, for example, the affidavit of the first petitioner, Mrs Bilhah Rubinova, a mother of two small children. The income supplement benefit, together with child allowance, is her only income. Details of her outgoings in the affidavit shows that the (reduced) benefit to which she is entitled is far short of covering very sparse subsistence needs. Her main monthly outgoings include, according to the details, payment of rent (NIS 675, after a contribution of $200 by the Ministry of Housing), municipal property tax (NIS 66), water (NIS 110), electricity (NIS 140) and gas (NIS 85), baby food and diapers for her baby daughter (NIS 296), kindergarten and day care expenses for her son (NIS 370) and food, clothing and medications for her and her children (NIS 1,600). These expenses amount to approximately NIS 3,400. Before the amendment, the petitioner was able, with difficulty, to meet these outgoings. Now, after the reduction, the income supplement benefit to which the petitioner is entitled amounts to NIS 2,660 (NIS 2,744 less NIS 84 health insurance), with an additional child allowance of NIS 290. What, then,

will the petitioner be compelled to give up? Will it be baby food for her daughter? Will it be clothing for herself and her children? Will it be electricity and water? Is there anyone who can determine that the human right of the petitioner to live with dignity is not violated in these circumstances?

8. An even more wretched picture can be seen from other figures that are before us. These figures show that, even *before* the present reduction in the income supplement benefits, the ability of recipients of income supplement benefit to support themselves with dignity was questionable and partial. This can be seen from research that was conducted by the National Insurance Institute in the years 1999-2000, which was recently published (Y. King, G. Maor-Shavit, 'Quality of Life of Recipients of Income Supplement Benefit,' 2005).

This research reveals a particularly serious picture of reality with regard to the population of recipients of income supplement. It shows that twenty per cent of the families that receive income supplement reported that during the previous five years there were times when they had nowhere to live. Twenty per cent of these families reported that they were left on the street or they stayed in a public bomb shelter or in the basement of a building in which relatives lived (p. 5). Moreover, the amount of space per person in apartments where recipients of income supplement lived was lower in comparison to the amount of space per person in apartments of people not receiving income supplement, and a significant number of the families live in apartments that are in disrepair (p. 6). It was also reported that in twenty-one per cent of the families that receive income supplement each person does not have his own bed, and forty-three per cent of the families do not heat their apartments in the winter even when it is cold (p. 10). Moreover, it was found that 40 per cent of the recipients of income supplement reported that they did not buy medications that they needed because they did not have the means. Sixty-four per cent reported that they did not have dentistry treatment when they needed it. Almost all of them stated the reason to be the inability to pay for the treatment (pp. 17-18). Finally, twenty-eight per cent of the families reported that they did not eat meat or meat substitutes even once a week. Seven per

cent of the families reported that they never or usually do not have enough food and twenty-four per cent of them reported that sometimes they suffer from a shortage of food. In total, approximately a third of the families that receive income supplement suffer from a shortage of food all or most of the time (p. 17).

The figures before us, which were complied as aforesaid by the National Insurance Institute — which is, after all, a respondent in this case — can show, *even according to the restrictive model proposed by the state*, a substantial violation of the human right to live with dignity in a large sector of society. A large question mark arises in view of this situation, in which the party responsible for compiling these troubling figures is the same that appears before us and claims that the human right of recipients of the income supplement benefit to live with dignity has not been violated as a result of the reduction in their benefit.

9. In addition to the aforesaid there is other material, such as the *opinion of the chairwoman of the Israel Social Workers Association, Mrs Etti Peretz*, which was submitted for our inspection within the framework of the petition in HCJ 366/03. This opinion pointed to a substantial and irreversible harm that the reduction in benefits would cause children in families that were supported by the income supplement benefit, including the physical injuries that they would suffer as a result of poor nutrition that did not include all the necessary nutrients required for proper physical development. It also emphasized the serious harm that would be dealt to population groups defined as 'risk groups,' which mainly include chronically ill persons and disabled persons who are not entitled to a disability allowance. These groups, it was explained, would be compelled to stop taking essential medications as a result of the reduction in the amount of the benefit.

10. These statistics are not merely figures on a page. They indicate a day-to-day reality. They describe the persistent life experience of many people. We are dealing with 'creatures of flesh and blood, of people in pain, of living and breathing human beings' (CA 1165/01 *A v. Attorney-General* [31], at p. 80). These are figures to which the court is entitled to refer when it places a

piece of legislation under constitutional scrutiny (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at pp. 439 *et seq.*, and see the references cited there). They are used in determining the effect of an executive act on basic rights as well as in assessing the alternatives to the chosen executive act. This was discussed by Prof. Barak, who said:

> '[In order to determine the constitutionality of a statute] the court must be presented with the various legislative alternatives, their advantages and disadvantages. Sometimes the difficulty can be solved with the aid of the principle of judicial knowledge. According to this principle, there is no need to prove information that every educated person is supposed to know, since the court also is supposed to know it. Some social facts fall within this framework. Notwithstanding, most social facts do not fall within judicial knowledge. Many social facts are sometimes based on economic, social, psychological and sociological research. How is it possible to discharge the burden of proof with regard to such social facts? The answer is that it is possible to present to the court the various research… It is desirable to present the court with a comprehensive factual picture with regard to the factual basis on which the legislation and its ramifications are founded. The burden in this regard lies with the party claiming that the statute is constitutional. Only by means of this social information can the court discharge its "burden" and make a responsible decision on the question whether the law satisfies the requirements of the limitations clause' (Barak, *Constitutional Interpretation*, 479).

I am of the opinion that the figures — the 'social facts' — that are before us have succeeded in establishing the petitioners' claim that the human right to live with dignity has been violated. They discharge the initial burden of proof with regard to the violation of the right. They point to a *prima facie* conclusion that, even when taking into account the other support networks that the state provides (a fact whose existence received excessive emphasis in

the affidavits of the respondents), the right to human dignity of too many citizens and residents of the State of Israel is not protected. In these circumstances, the respondents should have proved how, according to them, the right to human dignity is not violated notwithstanding the major reduction in income supplement benefits. This proof is required, according to the approach of Justice Beinisch, with which I agree, 'already in the first stage of the constitutional scrutiny' (para. 2 of her opinion *supra*).

11. The affidavits of the state in reply — with regard to the denial of the claim of a violation — did not satisfy me in this matter. Apart from general declarations about the existence of a 'safety net,' which despite the aforesaid amendments 'maintains its function as a safety net,' there is nothing in them that succeeds, or even purports to prove, concretely, how the human right to live with dignity is maintained. This is particularly clear in view of the fact that these dramatic changes that were made to the Income Supplement Law were not accompanied by any other statutory amendment with the purpose of reducing their adverse effect. In such circumstances, there is an even greater need to explain and to clarify how the dignity of a person as a human being continues to be protected notwithstanding the major and drastic reduction of approximately a third of the benefit that is his only income. This question was left without any real answer.

12. As my colleague the President says, the approach of the respondents is that the reduction in the income supplement benefit, in itself, does not indicate a violation of the human right to live with dignity. At most, it was claimed, we are speaking of a reduction in the scope of the last safety net that the state provides for those persons who need it. The scope of the safety net, according to the respondents, provided it does not lose its function as such, is a matter that is subject to their absolute discretion. This approach of the respondents seems to me problematic. It denies any ability to exercise judicial scrutiny of alleged violations of the human right to live with dignity. Suppose the Income Supplement Law was repealed in its entirety by the Knesset (without this step being accompanied by a parallel step of formulating an alternative normative arrangement). Would it still be possible

to argue, in such circumstances, that we are dealing merely with a 'change' in the aspects of the 'last safety net' that the state provides, a change that does not indicate, in itself, a violation of the constitutional right to dignity? The approach of the state allows it to answer yes to this question. This indicates its problematic nature. Admittedly, it is possible to adopt the opinion that the human right to live with dignity is characterized, as the state claims, with 'inherent vagueness' (even though not everyone agrees with this approach; see, for example, G. Mondlack, 'Socio-Economic Rights in the New Constitutional Dialogue: From Social Rights to the Social Dimension of Human Rights,' 7 *Labour Law Annual* (1999) 65, at p. 96). But one cannot use the vagueness of the right to negate it and empty it of content. This outcome is possible where it is held that a drastic and indiscriminate reduction in the benefits that serve as the sole income of individuals and families does not prove — even *prima facie* — a violation of the constitutional human right to live with dignity, notwithstanding the existence of figures that blatantly contradict this assumption.

13. I reach a similar conclusion with regard to the government's decision. As stated at the beginning of my opinion, I accept the conclusion of my colleague the President with regard to the constitutionality of the cancellation of the benefit concerning the reduction in the amounts of municipal property tax (para. 9 of the government decision). This is because of the fact that in practice this cancellation represents merely a transition from one entitlement test to another entitlement test, which is designed to achieve the same purpose. By contrast, the exemption given to recipients of income supplement from the television licence fee and the reduction in bus fares were cancelled in their entirety. They will not be given on the basis of an individual income test, or on the basis of any other test. Recipients of income supplement will, from now on, pay the full price.

Freedom of movement, the right to information and the freedom of expression are constitutional basic rights in Israel. These rights stand on their own and they have a constitutional status in their own right. Alongside their status as independent rights, it can be said that certain aspects of them — or

to be more precise, the effective ability to exercise them — are essential factors in guaranteeing a person's ability to function socially, which serves him in realizing his right to dignity. It is difficult to exaggerate the importance of the abilities to move from place to place, to be exposed to what is happening in society and to participate in the social activity taking place in it. My colleague the President expressed this well in his opinion, and I see no need to add to his remarks. Against this background, so I believe, we should understand the purpose underlying the granting of an exemption from paying the television licence fee and the granting of a reduction in bus fares to persons who receive income supplement. The choice to subsidize these services does not reflect a mere whim. Its purpose is to allow a person who receives income supplement to take a part in social life. This purpose, as has been explained, is directly related to the human right to live with dignity.

As I stated above, the reduction that was made to the income supplement benefits is inconsistent with the human right of recipients of income supplement to live with dignity. It follows that we cannot regard the use of an additional part of the already meagre amount in the possession of the recipient of the benefit for these purposes — an act that would in many cases mean giving up essential and basic items — as a real possibility. Therefore, the alternative of the recipients of the benefit — and the only practical possibility available to them — is to stop using these services. This, in my opinion, also involves a violation of the human dignity of the recipients of the benefit. The lack of any real ability to enjoy freedom of movement in its most basic sense and being cut off from the world of information, content and public debate in which the other members of Israeli society take part deal a mortal blow to the ability of a person to function reasonably in society. It leads to feelings of alienation, estrangement and isolation. Thereby the dignity of a person as a human being living within a social framework is violated.

14. It should be emphasized that I do not intend to establish a rule and principle that the duty of the state to ensure that every person lives with dignity automatically implies a duty to grant exemptions and reductions in

the purchase of basic services. It is clear that the cancellation of arrangements of this kind will not be regarded, in all cases, as violating the constitutional right to dignity. But, the more closely these services are associated with the human right to live with dignity — especially when they are also associated with additional basic rights, and this, in my opinion, is the case before us — the more the decision to cancel them or to change them must take into account their aforesaid purpose. The duty of the respondents in this regard is to show that, in the final analysis, the human right to dignity is protected. In this matter too, I am of the opinion that the respondents have not discharged the constitutional burden of proof that rests with them.

My premise is that the reduced income of recipients of income supplement does not allow human beings to live with dignity. In such circumstances, any additional economic burden, which makes it still harder to realize this right and also places in doubt the ability to realize other basic rights, naturally intensifies this violation. Consequently, the burden of proof in this matter also must pass to the respondents. The respondents must explain why the cancellation of these benefits does not violate the constitutional human right to dignity. Moreover, the respondents must explain that the *cumulative effect* of the actions that they have adopted with regard to recipients of income supplement does not amount, when taken together, to a prohibited violation of their dignity. The respondents have done neither of these. Similar to the general arguments that they made to the effect that the reduction in the income supplement benefits did not violate the right to live with dignity, with regard to the government decision that is subject to our scrutiny they have also not tried to show, concretely, that the cancellation of the aforesaid benefits thereby does not violate the constitutional right to dignity. The ramifications of the cancellation of these arrangements on the recipients of income supplement was not assessed at all, and no weight was given at all to their most important role in guaranteeing the basic rights of the recipients of the benefit. In summary, unlike my colleague I am of the opinion that the petitioners have shown a *prima facie* basis to their claim that the human right to live with dignity has been violated, and that this claim has

not been rebutted by the respondents. It follows that the path is open to continue the constitutional scrutiny.

Proper purpose

15. A violation of a constitutional right is permitted in so far as it is intended to serve a proper purpose. A purpose is a proper one if it serves an important social purpose that is sensitive to human rights (see *Szenes v. Broadcasting Authority* [32], at p. 838 {___}) or if the need to realize it is of social or national importance (see *Horev v. Minister of Transport* [33], at p. 52 {___}). From the respondents' affidavits in reply, we see that the reduction in the amount of the income supplement benefit was made within the framework of a comprehensive economic programme that sought, in its own way, to contend with the difficult position in which the Israeli economy found itself. This was done, *inter alia*, by means of a reduction in the amounts of the income supplement benefit, in order to encourage its recipients to enter the work force. In addition, it emphasized the need to neutralize the 'poverty trap,' which was allegedly created as a result of the amount of the benefit and other benefits to which persons who received the benefit before the amendment were entitled and which, according to the respondents, were the sole factor that prevented the petitioners and recipients of the income supplement benefit from extricating themselves from their problematic situation.

No one will dispute that a reduction in the amount of poverty and the aim of bring unemployed individuals into the work force are proper legislative purposes. This is, of course, also the case with regard to complying with budgetary goals and keeping within budgetary limits. There is therefore no difficulty in determining that the reduction in the benefits was intended to advance a proper purpose.

Proportionality

16. The requirement of proportionality focuses on an examination of the measures chosen by the legislature in order to achieve a legislative purpose that has been found to be a proper one:

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> 'The principle of proportionality focuses… on the correlation between the purpose and the measures for achieving it… it examines whether the measures adopted by the government in order to realize the proper purpose are commensurate with the purpose that they seek to realize… The principle of proportionality is intended to protect the individual from the government. It is intended to prevent an excessive violation of the liberty of the individual. It determines that the executive measure must be determined carefully in order to befit the realization of the purpose. Thereby it gives expression to the principle of the rule of law and the legality of government' (HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [36], at p. 11).

According to our accepted approach, the requirement of proportionality is satisfied if the executive measure used to achieve the purpose satisfies three subtests. According to the first subtest, there must be a rational connection between the purpose and the executive measure that is chosen to achieve it. This test provides that 'the measure should be designed into order to achieve the purpose' and that 'it should lead, in a rational manner, to the realization of the purpose' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at p. 436). According to the second subtest, the executive measure should harm the individual as little as possible. This test 'is comparable to a ladder, which the legislature climbs in order to achieve the legislative purpose. The legislator must stop at the rung on which the legislative purpose is achieved and on which the violation of the human right is the least' (*Israel Investment Managers Association v. Minister of Finance* [37], at p. 385). According to the third subtest, the measure chosen by the government is proportional in so far as its violation of the right is commensurate with the benefit arising from it. 'The measure chosen — even if it is (rationally) appropriate for achieving the purpose, and even if there is no more moderate measure than it — must achieve a proper correlation between the purpose that will arise from it and the scope of the violation of the constitutional human right' (*ibid.*).

Does the violation of the human right to live with dignity, which is caused as a result of the reduction in the income supplement benefits, satisfy the proportionality tests? We are unable to answer this question, or, to be more precise, the figures that the respondents have submitted to us do not allow us to answer it in full.

Regarding someone who cannot be placed in any employment

17. In so far as the reduction in the income supplement benefits relates to groups that include individuals who cannot be placed in any employment, my opinion is that it does not satisfy the test of proportionality. As is well known, the Income Supplement Law lists various groups of individuals who are entitled to a benefit. The circumstances causing the need for the benefit among these persons are varied. Thus, for example, among the groups entitled to receive an income supplement benefit are persons who lack the capacity to work and support themselves sufficiently or who cannot be placed in any employment because of their age or state of health (s. 2(a)(1) of the Income Supplement Law); persons who are registered at the employment office as unemployed, and to whom the Employment Service office has not offered suitable work (this applies to persons who are not entitled or who have exhausted their entitlement to unemployment pay under the National Insurance Law — s. 2(a)(2) of the Income Supplement Law); persons whose wages are low (s. 2(a)(3) of the Income Supplement Law); persons whose time is mostly devoted to caring for their spouse or sick children, who need continual supervision (s. 2(a)(7) of the Income Supplement Law); persons who are not employed because they are serving a prison sentence in community service to which they were sentenced (s. 2(a)(8) of the Income Supplement Law) and others. Those among the population who are entitled to income supplement are also varied. They include new immigrants, single-parent families, the homeless, the disabled and others.

These facts have a clear significance for the question whether there is a rational connection between the reduction in the income supplement benefits and the stated purpose. As we have said, the persons entitled to receive income supplement benefit include persons who are *unable* to enter the work

force at all. Even if we assume that there is an expectation that reducing the benefit to those persons who are unemployed but are capable of working (even though these persons are usually required to take on any 'suitable work' as a condition for receiving the benefit, to which I will refer again below), it can be assumed that a reduction, which seeks to achieve the stated purpose of encouraging people to go to work, will not find a logical basis for 'encouraging' persons who have no such capacity to go to work. Taking account of the circumstances causing the need for a benefit and the various needs of its recipients is therefore essential in determining the existence of a rational connection between the legislative purpose and the measure chosen to realize it. The indiscriminate character of the amendment, in view of its stated purposes, does not make it possible to determine that such a connection does indeed exist.

Determining the existence of a rational connection between the legislative purpose and the measure chosen to achieve it is a precondition to examining the other subtests included in the general test of proportionality. This is because, once it is determined that a measure cannot lead rationally to the realization of its purpose, because it is unsuitable for achieving the legislative goal, then there is no benefit in examining the question whether it is possible to achieve the purpose by means of other measures, or whether the benefits brought about by the measure are commensurate with the violation caused by it to the protected basic right (see Barak, *Constitutional Interpretation*, at p. 536), and in any case the proportionality tests are cumulative tests. In view of the fact that the reduction in the income supplement benefit of those persons who cannot be placed in any work cannot be regarded as having a rational connection with the purpose of encouraging people to go to work, the conclusion is that it does not satisfy the proportionality test.

Regarding other unemployed persons

18. Unlike the clear disproportionality of the reduction in the income supplement benefit with regard to persons who cannot be placed in any employment, the question whether the proportionality test is satisfied with regard to recipients of the benefit who are unemployed for other reasons

raises other difficult questions. These question arise in view of the fact that no proper factual basis has been shown by the respondents with regard to the proportionality of the violation of the human right to live with dignity. It is well known that once it has been found that a piece of legislation violates a protected basic right, the burden of proof that the violation is proportionate, and therefore constitutional, rests with the party claiming that the law is constitutional:

> 'The assumption is that a violation of a human right is not constitutional, unless whoever claims otherwise succeeds in showing that the conditions of the limitations clause are satisfied. The burden of proof should be imposed on the party making this claim. It should be noted that this burden is not imposed on him with regard to the interpretation of the offending provision of statute… the imposition of the burden is relevant only with regard to proving those elements of the limitations clause that are based on facts… For this purpose, he must bring to the attention of the court the "social" facts that are capable of supporting his conclusion and discharging the burden' (Barak, *Constitutional Interpretation*, at p. 477).

Discharging the burden of proof with regard to the proportionality of the violation of a protected right involves a factual clarification. This is required in order to examine the rational connection between the purpose and the measure chosen to achieve it. It is essential in order to examine the possibilities available to the legislature for resorting to less harmful alternatives. It is needed in order to assess the correlation between the damage caused as a result of the violation of the right and the benefit arising from it. I am of the opinion that we have no effective ability to assess the proportionality of the violation of the human right to live with dignity of the recipients of income supplement benefit in the circumstances of the case before us, since we are faced with a significant lack of facts and figures. In such circumstances, the question of the proportionality of the human right to

live with dignity remains open. We are unable to conduct the constitutional investigation. The necessary tools are not available.

19. Let me clarify my remarks: let us first take the duty of the respondents to choose the measure that achieves the legislative purpose (the rational connection test). As stated in their response, the purpose of the reduction in the income supplement benefits is to reduce the number of the persons entitled to receive income supplement that are 'voluntarily' unemployed, namely persons who are capable of undertaking work, and for whom work is available, but who prefer to continue to receive an income supplement benefit instead. The measure chosen, *prima facie*, has a rational connection with the legislative purpose, but this does not go beyond mere speculation and conjecture. In so far as the respondents wish to persuade the court that income supplement benefits are given, unlawfully, even to persons who are 'voluntarily' unemployed, as they claim, and therefore the reduction in the benefit paid to them will lead, rationally, to their integration in the work force, they ought to have taken the trouble to support these claims with factual figures that support them. General and theoretical declarations are insufficient. Concrete figures should be presented. These were not presented to us at all. I find myself compelled to ask whether such figures were compiled, and whether they exist.

Indeed, rationality requires facts. We need facts to say whether something is appropriate. It is reasonable to expect that legislation that is based on a purpose of reducing the scope of the abuse of the income supplement system would be supported by facts and figures. The estimated scope of the phenomenon and the number of individuals whose benefit was denied against this background remain unknown to us. It is questionable whether they are known to the respondents. No figure was given with regard to the estimated size of the group that unlawfully abuses the income supplement system, apart from the presentation of general figures that describe the increase in the number of persons receiving the benefit. But the problem is that it is possible to explain this increase by means of many other factors, including the economic recession, the large waves of immigration, the increase in the

number of single-parent families, etc. (this, for example, is how the matter is explained in the opinion of A. Doron and J. Gal of the Hebrew University School of Social Work, which the petitioners in HCJ 366/03 attached to their petition). In these circumstances, we are unable to confirm or deny the existence of a rational connection between the purpose and the measure chosen to achieve it.

20. This is the case with regard to the existence of a rational connection, and it is also the case with regard to the choice of the least harmful measure. As I have said above, an income supplement benefit is given in accordance with an economic means test, and it is conditional — with regard to persons entitled to the benefit who are registered at the Employment Service office as unemployed (s. 2(a)(2) of the Income Supplement Law) — on an employment test. According to this test, a person will be entitled to a benefit only if the Employment Service office has not offered him suitable work, which is 'any work that is suited to his state of health and his physical condition, or training, study or a career change in accordance with a request from the Employment Service or from someone authorized for this purpose at the Employment Service' (s. 2(a)(2) of the Income Supplement Law). It is also provided that someone who is offered suitable work and refuses to accept it will lose his entitlement to a benefit for the calendar month in which the refusal occurred and for the following month (s. 3A of the Income Supplement Law). These conditions are intended to ensure that income supplement benefits will be paid to those who need them, and not to those who are capable of being integrated into the work force.

Is a reduction of the benefit the only solution to reducing the need for income supplement by persons who are capable of taking on work? Are there no less harmful measures that are still true to the legislative purpose? It is, *prima facie*, possible to adopt the approach that in so far as the respondents are of the opinion that the existing conditions are insufficient and that they still allow various recipients of the benefit to continue to enjoy it without any real justification, then by virtue of the duty to choose the least harmful measure they should have tried out other preventative measures. Thus, for

example, it is possible to adopt the approach, almost intuitively, that measures such as increased enforcement of the provisions of the Income Supplement Law, making the conditions of the employment test provided therein more strict, etc., are measures whose harm to the persons that receive income supplement is much smaller, and they still achieve the legislative purpose. We have not heard from the respondents any argument in this respect. No explanation was given with regard to any attempt — if indeed there was one — to achieve the legislative purpose with less harmful measures. No factual basis was presented to us in this matter. This does not mean that the reduction in the benefits is necessarily disproportionate merely for the reason that no other alternatives were tried. It is possible that these alternatives are unsatisfactory. It is possible that choosing them involves difficulties. But in the absence of data in this matter, we are unable to draw any conclusion with regard to the proportionality of the violation in this respect also.

21. If this is the case with regard to the rational connection test and the least harmful measure test, it is certainly the case with regard to the test of proportionality in the narrow sense. An examination of the question whether the harm caused by the reduction in the income supplement benefits to the human right to live with difficulty is commensurate with the benefit obtained from it is not a simple matter at all. Implementing this subtest involves great difficulty in the circumstances of the case before us, because estimating the economic benefit that the respondents expect to derive is not a matter that the court can easily determine. In this matter too, sufficient information has not been submitted to us, and I refer particularly to the fact that the extent of the harm to the human right of the recipients of income supplement benefit to live with dignity — a fact of supreme importance for the purpose of examining the proportionality of the correlation between the harm caused to the right as a result of the reduction and the benefit derived from it — was not assessed by the respondents at all. Therefore, any attempt to make a claim with regard to the correlation that exists between the harm to the right and the benefit arising from this harm will be unsuccessful.

It should be emphasized that I do not mean to say that the duty of the legislature to base its decisions on a proper factual basis is identical in scope and content to the duty of the administrative authority to do this (*Israel Poultry Farmers Association v. Government of Israel* [28], at p. 27). However, in the circumstances of the case, it is a *sine qua non* for proving the proportionality of the violation.

22. As I have said, the conclusion that I have reached with regard to the impossibility of making the requisite constitutional clarification derives also from the fact that the purpose of the Income Supplement Law in guaranteeing the human right to live with dignity was not taken into account at all by the respondents when they decided to reduce the income supplement benefits by the amounts they decided to deduct.

As explained above, the circumstances in which people require an income supplement benefit are very varied. The members of the public that receive income supplement benefits are also varied. These are factors of supreme importance in determining the amount of the benefit and the amounts of the reduction. But in the case before us the amount of the reduction in the benefit is uniform and applies to everyone. It does not distinguish between persons who receive the benefit on the basis of the circumstances in which they receive the benefit, nor does it show any sensitivity to special needs that may be relevant to the recipient of the benefit.

This indiscriminate reduction, the average amount of which is approximately a third of the benefit in force previously, in a manner that does not take into account the circumstances that lead to a person requiring it, and where everyone is treated equally, is, in my opinion, a reduction that is 'suspect' (cf. HCJ 6698/95 *Kadan v. Israel Land Administration* [38], at p. 276). A reduction in the manner and circumstances described (even if one ignores the inherent difficulty involved in the legislative process of the Arrangements Law) is suspect in my opinion because its characteristics — and particularly its amount and the uniform application of this amount to groups for whom the circumstances in which they find themselves in need of the benefit are different and distinct — are strongly indicative of

arbitrariness. They give rise to a concern that proper weight was not given to the constitutional status of the human right to live with dignity in determining the amount of the reduction. Similarly the special purpose of the income supplement benefit in realizing this basic right was not sufficiently taken into account.

23. If any clear additional proof is required that the purposes of the Income Supplement Law in realizing the human right to live with dignity were not taken into account, it can be found in the reply of the respondents themselves. The following was the explanation given by the respondents in para. 41 of their reply dated 15.5.2003 (under the heading 'The rationales underlying the amendments under discussion in the petition'):

> '… The amendment to the law was not made arbitrarily, but was based on several guidelines:
>
> a.First… the income supplement benefit should not exceed the minimum wage; logic dictates that the income of a family that is supported by someone who works full time and is paid the minimum wage (approx. NIS 3,300) should not be less than the income of a similar family in which none of the heads of the family earns money from work…
>
> b. Second, the benefit in its smallest amount that is paid to an individual should not be reduced… since it is the smallest benefit, it was decided not to reduce it.
>
> c.The smaller the amount of the benefit before the reduction, the smaller, as a rule, will be the relative reduction to that benefit.
>
> d. The structure of the benefit will be amended so that the greater the income of a family from work, the greater its available income.
>
> e.There will be no change to the amount and structure of the benefits paid to persons over the age of 55, and persons who are entitled to a dependents' pension, in relation to the position that

> prevailed before the amendment, and therefore no reduction will be made to these benefits.
>
> f. With regard to persons under the age of 55, the amount of the benefit shall be uniform, and no distinction shall continue to be made between an ordinary and increased rate; notwithstanding, someone who was entitled to an increased rate before the amendment shall continue to receive a higher rate than the aforesaid uniform rate (although it will be reduced in relation to the amount of the benefit that he received before the amendment), as long as he has not left the income supplement system for a period of half a year or more…
>
> g. The amendment will lead to the desired budgetary saving.'

Thus we see that the respondents themselves say that the role of the Income Supplement Law in realizing the human right to live with dignity was not a consideration in determining the amount of the reduction in the income supplement benefits. The principles that were adopted by the respondents in determining the new amounts of the benefits do not include the principle that a recipient of the benefit should be able to continue to support himself with human dignity. Consequently, we have, as aforesaid, not heard from the respondents — apart from general statements that the 'security net' provided by the state still retains this function — any explanation, example or clarification as to how the human right to live with dignity will be concretely protected notwithstanding the major reduction in the income supplement benefits. This can only be because the respondents do not know whether the amount of the present benefit allows human beings to live with dignity. And how could we think otherwise? This consideration was never considered by them — as stated expressly in their reply — in their decision to reduce the income supplement benefits. It was not argued before us — even half-heartedly — that an attempt was made to assess the ability of the recipients of the benefit after the reduction in the benefit to support themselves, or that consideration was given to the cost of subsistence needs such as food,

housing, clothing and medications, and the relationship between this cost and the new amount of the benefit. No attempt was made to explain the amount of the reduction that was chosen against the background of the right to live with human dignity. And what the respondents do not know, we too are certainly unable to determine.

The same is true with regard to the government decision. Since we have been presented with no factual basis from which any conclusion can be reached with regard to the proportionality of the violation of the right to dignity of the recipients of income supplement as a result of the aforesaid paragraphs in the government decision, and since in any case the cumulative weight of the legislative amendments and the government decision that are the focus of this petition were not examined carefully, we are unable to carry out the constitutional scrutiny. In such circumstances, I cannot determine positively that the legislative amendments and the government decision are not proportionate. But neither can I determine the opposite. Once the burden of proof was passed to the respondents, the significance of this is that these arrangements should be declared unconstitutional.

The constitutional relief

24. We have therefore found that as long as the respondents have been unable to show otherwise, the amendments made to the Income Supplement Law and paras. 7 and 10 of the government decision disproportionately violate the human right to live with dignity. What, therefore, is the constitutional relief to which the petitioners are entitled? This question is a difficult one. This court does not have tools that can serve it in 'translating' the human right to live with dignity into numerical values. Moreover, the manner of determining the amount of the income supplement benefit and delineating other social arrangements involve value decisions as well as expert decisions: 'A judge should be wary of employing… complex considerations of economic or social policy, which frequently are also in dispute, which require expertise and information, and which may require making assumptions and hypotheses, which themselves require additional assumptions' (A. Barak, *Judicial Discretion* (1987), at p. 255).

However, what is correct with regard to the court is not correct with regard to the respondents. The court is not capable of determining a numerical value of any other measurement tool that can guarantee a proper protection of the human right to live with dignity. The respondents are capable of this. This is their duty. They must fulfil it. I do not wish to express any position as to the manner in which the respondents should discharge this duty of theirs. They have before them a wide spectrum of legitimate possibilities. They rightly point out that 'there are many varied ways in which the state can provide a final safety net for those who need it. These ways, the manner of calculating them and their nature are within the jurisdiction of the government and the Knesset, *inter alia* because they have the complete information concerning the state's resources and abilities, in addition, of course, to its various needs' (para. 12 of the supplementary reply of the respondents of 26 November 2003).

25. I am aware of the difficulties that the respondents have discussed, at great length, concerning the determination of a minimum level of human subsistence with dignity, below which it will be deemed unconstitutional. However, a methodological difficulty in discovering the level of human subsistence with dignity should not be confused with a normative statement that such a level does not exist. In so far as there is no dispute — and there is no dispute — that there exist certain subsistence requirements below which the human right to live with dignity is violated, then the respondents have the (positive) duty to afford protection to these and the (negative) duty to refrain from violating them. This duty, with its negative aspect as well as its positive aspect, cannot be realized if we do not know its content.

26. It follows from the aforesaid that the respondents have the duty to make changes that they wish to make to arrangements that are designed to ensure the right to human dignity in such a way that real protection will continue to be afforded to this right, and with a view to its normative status. Indeed, the human right to live with dignity is a constitutional basic right. The duty to respect it does not end with ceremonial proclamations. The need to afford it protection is not limited to theoretical statements. Were we to

hold otherwise, then we would empty the human right to live with dignity of any real content, and the ability to carry out judicial review of executive acts and legislation that (allegedly) violate the human right to live with dignity would be frustrated.

Conclusion — on 'constitutional revolutions' and the 'poverty trap'

26. More than a decade ago, in his opinion in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], my colleague the President coined the expression 'constitutional revolution,' an expression which was intended to indicate the fundamental normative change that occurred in Israeli law when the Basic Laws concerning human rights were enacted:

> 'The constitutional revolution occurred in the Knesset in March 1992. The Knesset gave the State of Israel a declaration of constitutional human rights. This constitutional revolution is the result of many years of development and a multi-faceted constitutional process. Underlying it is the recognition that according to our constitutional structure the Knesset has the constitutional authority to give Israel a constitution… in enacting the Basic Laws concerning human rights, the Knesset expressed its position with regard to the legal-constitutional status of two Basic Laws that concern human rights. Today the Supreme Court is expressing its legal position that confirms this supreme constitutional status' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at p. 353).

By virtue of the 'constitutional revolution,' it was held that the Basic Laws defined new reciprocal relationships between the individual and other individuals, and between the individual and society as a whole. A new balance was created between the individual and the government (*Ganimat v. State of Israel* [26], at p. 412). From now on, 'the legislative power given to the legislature is subject to a duty to respect human rights' (Barak, *Constitutional Interpretation*, at p. 477).

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Much water has flowed in the river of constitutional law since the landmark judgment was given in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], and the normative change in the status of human rights has, as we know, brought good news to many. It has benefited creditors and investment portfolio managers. It has benefited women who want to join a flying course and women who wish to be appointed as directors in state corporations. I am of the opinion that in this vein it is right to determine also that the same change also benefits the petitioners, in as much as their concerns are derived from the very heart of the need for constitutional recognition of the right to dignity.

27. Before I conclude my remarks, I think it right to say something about the main argument of the respondents, according to which the reduction of the income supplement benefits is required in view of the fact that it has led to 'poverty traps.' Large parts of the state's affidavits in reply were devoted to a description of the sharp increase in the number of recipients of income supplement benefits, and to explanations about these 'poverty traps' that were created, allegedly, as a result, as a main reason that required a decision that reduced the benefits. This is how the respondents explained it in their reply: 'The meaning of the term poverty trap… is that an analysis of the advantages of the structure of the benefit and its accompanying allowances, in comparison with the alternative of joining the work force, leads a rational person, who is interested in maximizing his available income, to prefer to remain within the benefit system and to refrain from choosing to join the work force or at least to join the work force to such an extent that he will be prevented from continuing to receive the benefit and the accompanying allowances' (para. 33 of the respondents' affidavit of 15 May 2003).

Against the background of these remarks, I think it right to say something that is certainly known even to the respondents. 'Poverty traps' are not created only as a result of benefits that are used to supplement income. This approach is erroneous and misleading. 'Poverty traps' are created also — and perhaps even mainly — as a result of the combined operation of many other factors: 'poverty traps' are created where some people do not have equal

access to education and higher education; 'poverty traps' are created where some people do not have equal access to basic infrastructures; 'poverty traps' are created where protective employment legislation is not enforced, where the freedom of association of workers is not protected and where improper and illegal employment norms become common practice; 'poverty traps' are created where discrimination between persons on the basis of irrelevant considerations is practised, and this exacerbates feelings of alienation and unfair treatment. The respondents did not claim before us — and they certainly did not prove — that they tried other methods in the areas mentioned to prevent 'poverty traps,' before they decided to harm the sole income of some of the weakest social groups in Israel.

We are dealing with a difficult and complex social reality. We should not deny the circumstances that have led to its creation. It is not unrealistic to assume that it is far from being a result solely of the income supplement benefit and the accompanying allowances. The respondents have the national responsibility for acting to change it. Their constitutional duty requires this of them. When doing this, they would do well to pay attention to all the circumstances that create the reality of the lives of persons who are trying to extricate themselves, without success, from the poverty trap, and also to the vision of the founders of the state, who had the courage to imagine a place where there is complete equality of social and political rights.

28. For these reasons, if my opinion is accepted, we would declare ss. 17(3)(a), 17(11) and 17(13) of the Arrangements Law and paras. 7 and 10 of government decision void. The respondents, of course, are entitled to enact and decide these once again, provided that they do so in a manner that takes into account the entitlement of the recipients of income supplement to live with dignity, and the normative status of this right. This is required by the practical recognition of the human right to live with dignity. This is implied by the express purpose of the Income Supplement Law and the purpose underlying the arrangements that were cancelled by the government decision. This is what the respondents should have done *ab initio*.

Vice-President M. Cheshin

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Prior to the commencement of the two Basic Laws of 5752-1992 — the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation — the court did not have jurisdiction to order the legal voidance of a provision in a statute of the Knesset. The word of the legislator was law, and the court was commanded to stand by and remain silent even if it thought that word of the legislature blatantly contradicted first principles of law and justice: HCJ 142/89 *Laor Movement v. Knesset Speaker* [39]. By contrast, when it was found that the content of a *regulation* conflicted with the dictates of statute, the court had the jurisdiction to order the voidance of that regulation. This was the rule with regard to any subordinate legislation, including orders and regulations with legislative force, and even regulations enacted by the government with the approval of one of the committees of the Knesset. Indeed, the higher its status in the hierarchy, the greater the strength of the subordinate legislation, and in line with the doctrine of *ut res magis valeat quam pereat* (that something should have effect rather than be void) the court did not rush to declare any subordinate legislation void. But no one had any doubt that the court was competent to consider whether subordinate legislation was valid or not. When the aforesaid two Basic Laws came into effect, the law and case law changed. This is what those two Basic Laws told us, and we followed in their wake. And so, since 5752-1992, when the court has found that a provision of statute enacted by the Knesset conflicts with any of the substantive provisions in those two Basic Laws, it has the power to declare that provision void. Thus the two Basic Laws have been interpreted in accordance with the interpretive tradition and the case law that has been accepted by us from the beginning, and this interpretation has remained unaltered until this time.

2. The power that the court acquired in these two new Basic Laws — the power to declare a provision in a statute of the Knesset void — once again raised questions that were once critical questions but in the course of time began to diminish even if they did not entirely die away and disappear. I am referring to the claim that the voidance of subordinate legislation by the

court — or should we say, a declaration of a court that a piece of subordinate legislation is invalid and void *ab initio* — involves an overlap of powers, allegedly, between the judicial authority and the subordinate legislative authority, or to put it more bluntly, that the voidance of subordinate legislation by the court amounts to an invasion by the court into territory not within its jurisdiction: CA 311/57 *Attorney-General v. M. Diezengoff & Co. (Navigation) Ltd* [40]. For if the executive authority has the power to enact subordinate legislation, then the power to cancel that subordinate legislation also belongs to the executive authority. Should it therefore not be said that in ordering the voidance of subordinate legislation, the court is taking over the power of the executive authority, that it is invading the sphere of the executive authority? The answer to this question was also given a long time ago. It is that the executive authority enacts subordinate legislation even though the legislature's power of legislation was given to it alone. Thus, just as the executive is competent to enact subordinate legislation and this does not detract even from the legislature that has been deprived, seemingly, of its power and has delegated legislative power to the executive authority, so too the cancellation of subordinate legislation by the court should not be regarded as an invasion by the judicial authority into the sphere of the executive authority. The realities of life dictate a certain mode of operation — authorizing the executive authority to enact subordinate legislation; the same realities of life give the court — at the behest of the legislature — power to cancel that subordinate legislation. Now, when the court has acquired power to cancel one or more provisions of primary legislation, questions that were laid to rest in the ground for a long time have arisen and these questions come back to disturb our repose from time to time.

3. So the question is what legal criteria should we adopt when we examine whether a provision of a certain statute is in conflict with one of the provisions of those Basic Laws of 5752-1992? Should we use the same legal technique that we use in the process of voiding subordinate legislation also with regard to the voidance of statute? And if we say that we should use the same technique in both cases, is the *basic approach* for the scrutiny identical

in both cases? Our answer to this question is that the technique — in principle — is the same technique, but the basic approach when applying the technique to the issue under discussion is a different approach, in quantity if not in quality.

4. Concerning the technique, in our case we are witness to the decisive weight given to the content of the Basic Laws when scrutinizing the constitutionality of subordinate legislation and when carrying out judicial review of administrative acts. We see that since the limitations clause in the two Basic Laws under discussion was enacted, the courts have applied its principles also to the scrutiny of subordinate legislation and administrative acts, and this is particularly the case with the principle of proportionality — a principle which in certain senses is akin to reasonableness. Indeed, the scrutiny of legislation of the Knesset is carried out, and rightly so, in an orderly and strict manner as required by the provisions of the Basic Laws, but in essence we see no fundamental difference between one scrutiny and another.

5. This is the case with regard to legal technique — and for the scrutiny of subordinate legislation, on the one hand, and of the legislation of the Knesset, on the other, is a similar and almost identical technique — but it is not the case with the basic approach. For if with regard to subordinate legislation the question of the overlap of powers between the judicial authority and the *executive authority* arose — and was put to rest — this is not the case in the relationship between the judicial authority and the *legislative authority*, the Knesset, with regard to primary legislation. Here the doctrine of the decentralization of power and the separation of powers weighs us down with its full force, and it is a doctrine that we must take very great care to uphold. We must tread very carefully before we order the voidance of a provision of a statute of the Knesset, even in a case where we are speaking of the basic rights of the individual. This great caution has adopted the form of a doctrine, and this doctrine cautions us expressly and specifically against intervention in the legislative acts of the Knesset, lest the court oversteps itself and trespasses into the sphere of the legislative authority: *United*

Mizrahi Bank Ltd v. Migdal Cooperative Village [2], at pp. 349 *et seq.*; HCJ 5503/94 *Segal v. Knesset Speaker* [41], at pp. 547 *et seq*.. In our case, it can be said that the violation of the right of the individual must be a major violation, a fundamental and profound violation, a violation that has negative strength in quantity, weight and degree, in order that it should prevail over an express provision of statute.

In the final analysis — or, to be precise, in the initial analysis — the voidance of a statute of the Knesset, in whole or in part, is not like the revocation of a fishing licence or a licence to manage a food shop, nor even like the voidance of regulations that were enacted by a competent authority or by a minister or by the government itself. The way in which we make our decision will depend also on the nature of the right, the place of the right in the whole collection of human rights, etc.. With regard to human dignity — and this is the issue here — we should remember that we wish to derive from it a right that the legislator did not mention expressly in the Basic Law. The basic principle on which democracy in Israel is based — the principle of the decentralization of power and the separation of powers — gives the legislative authority, which is the state's house of elected representatives, a considerable margin within which it is free to manoeuvre, and this margin is very wide indeed. The violation of the right of the individual must be so serious that the holder of the legal scalpel will allow himself to penetrate through the surface of the legislation and cut out the offending part. In this context we should recall that there is also a difference between rights of a negative nature — the rights of the individual that the government should not intervene in his affairs, which are the classical rights — and the rights of the individual that the government should be compelled to do something, that the government should give grants, etc..

6. When I take cognizance of all this, I agree with the opinion of my colleague the President — with a heavy heart, like him — and at the same time, by corollary, I have difficulty in agreeing with the opinion of my colleague Justice Levy. We all feel for the petitioners before us — Mrs Rubinova, Mr Pedalon and others like them — and these are not mere words.

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In this case, as in other cases, the judge is confronted by a person in distress who asks for help and brings his supplication before the court. Only a heart of stone would not feel, and in the judge's breast there beats a heart of flesh and blood. We would like to be of assistance to them, to the petitioners, for their life is a life of distress, and we know that only with difficulty, with very great difficulty, are they able to conduct their lives in an orderly fashion. But what is stronger for us are the dictates of the legal system in which we live, and it is our duty to suppress our feelings — and sometimes, also our anger — and not to overstep the boundaries that have been placed around us. For if we overstep these, we will undermine the system of government and administration, and any good that we do will be outweighed by the harm that we cause. It is we who are now under scrutiny, and the question is whether we will succeed in resisting our good intentions and conquer our feelings. I fear that voiding an act of the legislature on the basis of the facts that have been brought before us would amount to a serious and blatant intervention in powers that are not ours. The scalpel in our hands is the scalpel of law, and the law places restrictions and restraints on us that we cannot overcome.

Petition denied, by majority opinion (President Barak, Vice-President Cheshin and Justices Beinisch, Rivlin, Procaccia and Grunis), Justice Levy dissenting.

11 Kislev 5766.
12 December 2005.