The Supreme Court sitting as the High Court of Justice

HCJ 10662/04
HCJ 3282/05
HCJ 7804/05

Before: The honorable President D. Beinisch
The honorable Justice M. Naor
The honorable Justice E. Arbel
The honorable Justice E. Rubinstein
The honorable Justice S. Joubran
The honorable Justice E. Hayut
The honorable Justice U. Fogelman

Petitioners in HCJ 10662/04:
1. Salah Hassan
2. Sawt el-Amel/The Laborer's Voice – Defending the Rights of Workers and Unemployed
3. Adalah – The Legal Center for Arab Minority Rights in Israel

Petitioners in HCJ 3282/05:
1. Meirav Ben-Nun
2. Yael Be'er Salaman
3. Chen Hazan-Gilboa
4. Sigalit Bakar
5. Avigayil Avihu
6. Mechuyavut -- Commitment to

Peace and Social Justice
7. Itach – Women Lawyers for Social Justice

Petitioners in HCJ 7804/05: Idit Edan

v.

Respondents in HCJ 10662/04:
1. National Insurance Institute
2. Ministry of Industry, Trade and Labor

Respondents in HCJ 3282/05:
1. National Insurance Institute
2. Minister of Social Affairs

Respondents in HCJ 7804/05:
1. National Labor Court
2. National Insurance Institute

Petitions to grant an order nisi

Date of hearing: 11 Heshvan 5772 (November 8, 2011)

On behalf of the Petitioners in HCJ 10662/04	Sawsan Zahr, attorney at law

On behalf of the Petitioners in HCJ 3282/05	Keren Shemesh Perlmutter, attorney at law; Netta Ziv, attorney at law

On behalf of the Petitioners in HCJ 7804/05	Eduardo Wasser, attorney at law

On behalf of the Respondents in HCJ 10662/04, HCJ 3282/05 and HCJ 7804/05	Chani Ofek, attorney at law; Orna Rosen-Amir, attorney at law; Carmit Naor, attorney at law

Judgment

President D. Beinisch:

Preface

1. The petitions before us deal with the policy of the National Insurance Institute, under which the ownership or use of a vehicle precludes eligibility for an income support benefit. Initially, the petitions were directed against the entire gamut of arrangements that reflected that policy, as they were in effect in 2004, when the first petition was filed (HCJ 10662/04). After an order nisi was granted in the original petitions, the Income Support Law, 5741-1980 (hereinafter: the Income Support Law or the Law) was amended and the policy that was challenged in the petitions was established in section 9A of the Law. Following that development, the Petitioners requested leave to amend their petitions, challenge the constitutionality of section 9A of the Income Support Law. The main claim made in the petitions is that section 9A (b) establishes a conclusive presumption that anyone who owns or uses a vehicle is deemed to have an income the size of the benefit and, therefore, he is not eligible for an income support benefit. This presumption, by virtue of which the benefit is denied, is alleged in the petition to be an unconstitutional violation of the right to a minimum dignified subsistence.

The Petitioners

2. The Petitioner in HCJ 10662/04 is married and the father of five children. The Petitioner has received an income support benefit since October 2001. The Petitioner submitted an application to the National Insurance Institute (hereinafter: the NII) to approve his use of a vehicle for the purpose of transporting his blind daughter without having to forfeit his income support benefit, to which he was entitled at that time. His request was refused because the Petitioner did not prove a medical need of the type that would enable him to possess a vehicle under the Law, while receiving an income support benefit. The petitioner was joined by Sawt el-Amel/The Laborer's Voice and Adalah – The Legal Center for Arab Minority Rights in Israel (hereinafter: Adalah), which also represented the Petitioners in this petition.

3. The Petitioners in HCJ 3282/05 are five single-parent women, who, due to the provisions in section 9A of the Income Support Law concerning the ownership or use of a vehicle and, prior to that, the parallel provision in the National Insurance Regulations, were denied the income support benefit. For that reason, Petitioners 1-3 were required to repay the amounts they had received as a benefit from the National Insurance, the claim for the benefit by Petitioner 4 was denied and monies were deducted from the benefit of Petitioner 5. The Petitioners were joined by Mechuyavut -- Commitment to Peace and Social Justice and Itach – Women Lawyers for Social Justice (hereinafter: Itach), which also represented the Petitioners in this petition. The Petitioner in HCJ 7804/05 was also a single-parent at the time the petition was filed, and her income support benefit was canceled when it was learned that she maintains a joint household with her ex-husband and makes frequent use of his vehicle.

4. Each one of the women Petitioners before us has a harsh and complex life story. All are single-parents who were shouldering the burden of supporting and caring for small children at the time the petition was filed. Some of the Petitioners earned their livelihoods by working in jobs for meager pay and others had no livelihood at all and subsisted from the income support benefit and/or solely from child support payments. In their petition, the Petitioners claimed that the use of a vehicle enabled them to go to work and, for some of them, even lowered the cost of travel compared with public transportation. Petitioner 1, a single-parent of two who has a hearing handicap, required a vehicle for the purpose of caring for her children and for transporting the equipment she requires for her work. She alleges that the cancellation of the income support that she received from the NII led her to give up the vehicle in her possession and to stop working. However, when it came to light afterwards that she uses her parents' vehicle about three times a month, her income support benefit was canceled altogether, which left her and her children to live solely from child support payments and the child allowance totaling NIS 1,841 per month. At the time the petition was filed, Petitioner 2 lived in a remote town without any public transportation, and she required a vehicle to obtain basic services of food, health and education for her son, who suffers from a chronic disease. Over the years she had worked and received income support pursuant to the Income Support Law. When it came to light that she was regularly using a vehicle owned by her mother, her benefit was canceled retroactively and her debt to the NII was set at NIS 114,000. Petitioner 3 also required a vehicle due to lack of frequent public transportation to her place of residence. During the period of time in which she required the income support benefit, the business she owned failed, she divorced her husband and was caring for a-year-old baby. Her benefit was also canceled when it came to light that she was using her ex-

husband's vehicle. The decision to cancel her benefit ultimately compelled her to move her place of residence to a central location where she could manage without the use of the vehicle. With regard to Petitioner 4, it was alleged that travel on public transportation required her to change four bus lines on every trip to her workplace and to take her child – who, at the relevant time, was a year old infant – along with her. The Petitioner's claim for the income support benefit was denied because of the vehicle that was placed at her disposal by her family, who financed most of the expenses. Petitioner 5 also required a vehicle to reach her workplace – various prisons in the north of the country, which are not accessible by public transportation. As long as she used her father's vehicle, and due to the father's medical disability, her income support benefit was not canceled. After her father sold his vehicle, and the Petitioner began to use the vehicle of one of her acquaintances, her income support benefit was canceled. Cancellation of the benefit compelled her to quit her job and submit a claim for a full income support benefit. That claim was approved and Petitioner 5 received an income support benefit for a period of time until she no longer needed it.

5. The petitioner in HCJ 7804/05 was divorced and the mother of a little girl at the time the petition was filed. Her income support benefit was canceled after the NII came to the conclusion that she was running a joint household with her ex-husband (which, in itself, does not negate eligibility for an income support benefit, but requires examination of the eligibility of such a nuclear family) and, accordingly, the debt to the NII was said at about NIS 17,000. Afterwards, it transpired that the Petitioner also made frequent use of her ex-husband's vehicle and the Regional Labor Court ruled that even though there was not enough evidence of the existence of a joint household, the Petitioner should be denied the benefit

due to the use of a vehicle. The National Labor Court agreed with the conclusions of the Regional Labor Court regarding the use of the vehicle, but added, above and beyond the necessity, that the gamut of evidence indicated the existence of a joint household (NII Appeal 300/03 Idit Idan– National Insurance Institute (unpublished, March 15, 2005)). In the petition, the Petitioner challenged the arrangement established in the law and requested that we vacate the judgment of the National Labor Court.

The normative basis

Before we discuss the main claims raised by the parties in the petitions before us, we will describe the normative basis required for the matter.

The purposes of the Income Support Law

6. The Income Support Law, which establishes the arrangement that is attacked in the petitions, was enacted in 1980. Its intricate provisions create the last safety net available to residents of the state who suffer privation. The main purpose of the law is to support residents of the state who find themselves in a situation in which they cannot obtain their basic needs. As established in the explanations to the Income Support Bill, "The purpose of the proposed law is to ensure every person and family in Israel, who are unable to provide themselves with the income required for subsistence, of the resources to obtain their basic needs" (Bill 1417 of September 30, 1979, 5740, at p. 2 (hereinafter the Income SupportIncome Support Bill); see also Abraham Doron and Johnny Gal "The Income Support System in Israel in a Comparative International Perspective," 58 Social Security 5, 5-6 (2000) (hereinafter:

Doron and Gal); for details on all the welfare systems available to the needy population, see Ruth Ben Israel, Social Security, at 898-899 (2006) (hereinafter: Ben Israel)). That support is implemented by means of a differential benefit that is adapted to the age and family status of the applicant. Beginning in 2006, the benefit has been derived from a basic amount that is updated each year in accordance with the rate of the rise in the economy's Consumer Price Index, which enables it to be updated and adapted according to the economic situation and the cost of living in Israel (see the definition of "the basic amount" in section 1 of the Income Support Law, and the benefit rates established in the second addendum to the Law. In the past, it was updated according to the average salary in the economy – see section 1 of the Law; Ben Israel, at p. 872).

7. The basic presumption inherent in the Law is that the best way to achieve and ensure a minimum dignified subsistence is by working. This presumption reflects two complementary aspects of the Law: first, an assurance income benefit is given only to someone who is not capable of supporting himself on his own. The nature of the benefit, by definition, is residual: it is only given to a resident of the country who does not receive sufficient income from working, a pension or another source of income, and does not have sufficient resources to cover his basic subsistence (Income Support Bill at pp. 2-3). Second, the supplementary aspect of providing alternative income to an individual is to prevent a situation in which that income becomes, in itself, an incentive not to work. The purpose of the benefit is to provide the individual with subsistence during the intermediate period in which he finds himself without resources, but not to prevent him from reentering the job market. To the contrary – the state wants to encourage its

residents to work, and not to remain needy and dependent on public support for a lengthy period of time. The Law therefore strives to ensure that the benefit will be a temporary – and not a permanent – alternative to working (cf.: Doron and Gal, at pp. 8, 23-24; Arieh Lieb Miller "Income Support Laws in Israel Compared with the Law in West Germany, Labor Law Yearbook A91, 92-93 (1989); Ben Israel, at pp. 843-845). It should be noted that along with the income support benefit, which is designed to help those who cannot support themselves, the Income Support Law also enables the provision of an income supplement benefit, which is designed to help individuals who have succeeded in finding jobs, but whose pay is low and is not sufficient for basic subsistence.

8. The two main tests that establish a person's eligibility are derived from these principles: the income test and the employment test. The income test, which is the focal point of the petitions before us, delineates rules for quantifying and estimating the income of the benefit applicant. Its purpose is to examine whether the applicant has sufficient income to cover his basic subsistence needs, or he requires the benefit. The rules for examining different incomes, quantifying them and considering them in the decision on granting the benefit are established in Chapter D of the Law and the Income Support Regulations, 5742-1982 (Ben Israel, at pp. 872-874; National Labor Court Hearing 43/04-162 Haviv Dahan– National Insurance Institute, Labor Court Judgments 15 351 (1984)). The employment test makes eligibility for the benefit contingent upon the applicant's making every possible effort to find work that provides income, which exceeds the amount of the

benefit (and, in the language of the Law, he has maximized his earning power). Therefore, the applicant must be lacking in sufficient work or be unfit for work (pursuant to a list of exemptions set forth in section 2 (a) of the Law and in the First Addendum): and if he is able to work, he must be willing to accept any work offered to him by the Employment Service that is compatible with the state of his health and physical fitness (Ben Israel, at 880; National Insurance Appeal 232/99, Idit Uri v. National Insurance Institute, Labor Court Judgments 38 157, 163-168 (2002); hearing no. 41/91-3 Ahias Meir – Employment Service, Labor Court Judgments 13 61 1981)). Therefore, the purpose of the employment test is double: it ascertains that the benefit applicant is, indeed, in need of assistance from the state and is not choosing a life of willful unemployment and, concomitantly, it refers the individual to obtaining assistance by finding work, thereby improving his chances of extracting himself from the cycle of poverty and advancing toward self-fulfillment and becoming self-supporting. The employment test therefore gives expression to the second purpose of the law, whereby state support of the individual is intended to be a temporary arrangement, by virtue of, and after which, the individual can recover and stand on his own two feet.

9. In addition to these two substantive tests, the Law also specifies conditions of residency and age. The residency condition focuses on the boundaries of the social safety net for residents of the state who hold residency status for at least two consecutive years. The age condition limits the benefit to residents over 25 years of age, on the assumption that at a younger age, the person can usually support himself or he is still dependent on others – mainly members of his family – and, therefore, he

should not be deemed as someone who requires support from the state. Alongside this rule, exceptions were established that also enable the benefit to be granted to someone who is below the threshold age. By their nature, those exceptions were designed to provide a response to situations in which the circumstances of the applicant's life attest to the fact that he is incapable of supporting himself, notwithstanding his youth.

The ramifications of ownership or use of a vehicle for entitlement to the benefit

10. Based on the purposes of the Income Support Law, the provisions of the law that were enacted establish the significance of ownership or use of a vehicle with regard to eligibility for the benefit. The main chapter dealing with the benefit and its rate is Chapter C of the Income Support Law. Section 5 (B) in Chapter C of the Law states:

Rate of the benefit

The benefit for an eligible person who has an income shall be an amount equal to the difference between the benefit to which he would have been entitled under subsections (A) or (E) if not for the income, and the income.

This section reflects that the income test is conducted individually for each benefit applicant, in order to assess his eligibility for the benefit and the rate of the benefit that he will receive, if he is found to be eligible. "Income," for the purpose of calculating eligibility for the benefit and the amount of the benefit, is defined in Chapter D of the Law, in sections 9 – 12 (B). These sections enumerate a long series of data that must be taken into account when determining the income of a benefit applicant. Among these data, for example, the applicant's direct income is examined –

including, e.g., other pensions paid to him, maintenance payments or payments made to someone undergoing vocational training, and "indirect" payments, such as income from property. Chapter D also enumerates income that will not be taken into account in the income test, among them, for example, the child allowance and grants to discharged soldiers.

Among the provisions listed in Chapter D of the Law, the relevant provision to the matter at hand is set forth in section 9 (A) (5) as follows:

Income

9 (A). In this Law,

"Income" means income from sources set forth in section 2 of the Ordinance [the Income Tax Ordinance – D.B.], even if it was not generated, produced or received in Israel, including…

(5) Amounts that shall be deemed income from property that is a vehicle as stated in section 9A (emphasis added – D.B.).

Section 9(A)(5) therefore shows that in calculating the income of the benefit applicant, income from property that is a vehicle must also be taken into account. It should be emphasized that the Petitioners before us are not attacking the constitutionality of section 9(A)(5), i.e., the actual determination that a vehicle can be taken into consideration in determining a person's income. Their claims focus on the concrete arrangement determined in this matter in section 9A, which specifies the situations in which a vehicle will be deemed property from which monthly income is generated and the significance of this income on the rights to the benefit. The following is stated in section 9A(a) and 9A (b):

Special provisions in the matter of property that is a motor vehicle

9A. (a) In this section, "vehicle" means a motor vehicle as defined in section 1 of the Transportation Ordinance that is owned by the claimant or used by the claimant or his child who is with him, except for a motorcycle.

(b) In the matter of this Law, subject to the provisions of subsection (c), a vehicle is deemed property from which monthly income is generated in an amount that is no less than the amount of the benefit that would have been paid to the claimant if not for the provisions of this subsection.
(emphasis added – D.B.)

The insertion of the sections – section 5(b) and sections 9A (a)and 9A (b) – leads to the conclusion that anyone who owns or uses a vehicle is not eligible for an income support benefit, as his "income" from the vehicle is deemed equivalent to the amount of the benefit that would have been paid to him if he did not own or use a vehicle. The meaning, therefore, is that the benefit applicant is deemed to have an income that is above the income threshold that entitles him to the income support benefit and, therefore, as someone who does not need the assistance of the state. It should be noted that at the start of adjudication of the petitions before us, section 9A (b) did not contain the connection of use of a vehicle even

though, *de facto*, the NII interpreted section 9A as also precluding the regular use of a vehicle. The section was amended in 2007, during adjudication of the petitions, and this interpretation was established in the Law, so that now, both ownership and use of a vehicle are deemed a presumption that precludes granting the income support benefit.

11. Section 9A (c) continues and establishes a series of exceptions for which the income support benefit will not be denied to someone who owns or uses a vehicle. This section was also amended during adjudication of the petitions before us, so the range of exceptions set forth therein was expanded. Prior to the amendment, the exceptions focused on cases in which the vehicle is required by the benefit applicant for medical reasons. In 2007, two more exceptions were added to the Law (sections 9A (c) 6 and 9A (c) 7)), which enable payment of the income supplement benefit under certain conditions, even to someone who is working and using a vehicle, or to someone whose earnings ceased a short time before the time for which the benefit is claimed. Section 9A (c), which enumerates the exceptions to the rule of ownership or use of vehicle, states as follows:

> 9A. (c) A vehicle shall not be deemed property from which income is generated if one of the following conditions is fulfilled –
>
> (1) (deleted)
>
> (2) The claimant or a member of the claimant's family requires the vehicle for the purpose of medical treatment provided outside their home, pursuant to a prearranged treatment program or at least 6 times a month for a period of time exceeding 90 consecutive days, all pursuant to the rules and conditions established by the minister; in this matter, "family member" means someone whom the claimant drives to medical treatment, as stated in this section, who is the

claimant's spouse, son, daughter or parent, provided that the family member as stated does not have an additional vehicle.

(3) The claimant, his spouse or child is disabled in his legs and receives payments from the state treasury for maintaining the vehicle and, with regard to someone who does not receive payments as stated – a qualified doctor, as defined pursuant to the provisions of section 208 of the Insurance Law, determined that he requires transportation due to his being disabled as stated, pursuant to the rules, conditions and the period of time determined by the minister.

(4) The child of the claimant is paid an allowance pursuant to the provisions of Part 6 of Chapter 9 in the Insurance Law.

(5) The vehicle registration was deposited with the authority authorized to issue that same registration, and as long as the registration is deposited, one of the following conditions is fulfilled:

(a) The claimant is not capable of working at any job whatsoever due to illness, provided that the period of time in which the vehicle shall be deemed property from which no income is derived as stated in subsection (b) does not exceed six months from the date on which he submitted a claim for the benefit.

(b) The vehicle is a tractor as stated in the Transportation Regulations, 5721-1961, provided that the tractor is not in use and the claimant has a farm that is not operational.

(6) The claimant has a monthly income from the sources set forth in section 2 (1) or (2) of the Ordinance [the Income Tax Ordinance – D.B.], in an amount that exceeds 25% of the average salary, and if he or his spouse have reached retirement age – in an amount that exceeds 17% of the average salary, the claimant does not have an additional vehicle and the vehicle meets one of the following conditions:

(a) The engine volume does not exceed 1300 cc and in the month for which the benefit is paid, seven or more years have passed since its year of production.

(b) The engine volume does not exceed 1600 cc and in the month for which the benefit is paid, twelve or more years have passed since its year of production.

(7) The claimant does not have a monthly income from the sources set forth in section 2(1) or (2) of the Ordinance [the Income Tax Ordinance – D.B.], or his income as stated is less than the amounts at the beginning of paragraph (6), provided that all the following conditions are fulfilled:

(a) In the month for which the benefit is paid or the two months preceding it, the claimant was dismissed from his job; in this matter, "dismissed" includes resignation under circumstances that would entitle him to unemployment pay for the first 90 days from the date of termination of the job, pursuant to the provisions of section 166 (b) of the Insurance Law.

(b) In the month for which the benefit is paid, the claimant does not have an additional vehicle, and his vehicle fulfills the provisions of paragraph 6(a) or (b).

(c) In the ten months preceding the month in which the claimant was dismissed, the claimant was paid a benefit under this Law and the claimant fulfilled the conditions set forth in paragraph (6).

Therefore, the meaning that emerges from all the aforementioned sections is that a benefit applicant who owns or uses a vehicle, and whose situation is not included in one of the exceptions, is not entitled to receive an income support benefit.

The constitutionality of that arrangement is the issue to be decided in the petitions before us.

The Petitioners' arguments

12. The Petitioners in HCJ 10662/04, the Petitioners in HCJ 3282/05 and the Petitioners in HCJ 7804/05 (hereinafter, for the sake of convenience, we will term all of them together: the Petitioners) submitted their arguments separately, but the petitions were heard together. Even though not all the Petitioners challenged the same aspect of the Law, there is a series of pivotal arguments that is common to all of them and we will focus on those below.

13. The main argument that arose in the pleadings of the Petitioners is that section 9A (b) of the Income Support Law establishes a conclusive presumption that denies the benefit to someone who owns or uses a vehicle. According to the argument, this presumption violates the right to a minimum dignified subsistence, since it denies a person's' right to an income support benefit even if, under the circumstances of his life, the user's ownership of a vehicle does not attest to the fact that he possesses the means for a minimum dignified subsistence. The categorical denial, it was argued, prevents examination of whether the user's ownership of a vehicle attests to an exceptional standard of living, and it applies whether the use or ownership entail only small expenses, or they are required for a minimum dignified subsistence. The Petitioners point out that such a need may arise due to illness, residence in a remote area with no public transportation connection, or due to a desire to go to work. It was further argued that the violation of the right to a minimum dignified subsistenceis increased in cases of denial of the benefit because the income support benefit lies at the core of the protection of human

dignity. Therefore, when analyzing the violation of the right, it was argued that the lack of the benefit should not be balanced against other means that the state provides or may provide to its citizens, since other government support is not stable like the income support benefit and, in some cases, is also not established in law. The Petitioners in the three petitions did not argue that the ownership or use of vehicle is a vital component of a minimum dignified subsistence, but they did argue that the use of a vehicle can help them to lead normal lives: to appear at the employment bureaus, to search for new jobs, to access medical treatment, and to maintain social lives. The Petitioners in HCJ 10662/04 (who are represented by Adalah – The Legal Center for Arab Minority Rights in Israel), added that for the Arab recipients of the benefit, who constitute 26% of all the benefit recipients, the use of public transportation cannot serve as an alternative to the use of a vehicle, since most of the Arab villages have no regular and frequent public transportation at all.

14. Another argument made in the petitions, particularly in HCJ 7804/05, is that the legislature did not address the question of what constitutes "use" of a vehicle, for which the income support benefit will be denied – even though it is now expressly established in section 9A (a) of the Law. According to the arguments, the tests that were formulated in the rulings of the Labor Court greatly expanded the definition of the use so that, in fact, any use of a vehicle leads to denial of the benefit, even if it is not equivalent to the use made by an owner. It was further argued that the exceptions that were added to the Law in 2007 do not mitigate the violation of the right, for several reasons: first, because they are relevant to only a small number of needy people who earn at least 1,850 shekels a month (an amount equivalent to 25% of the

average salary in the economy, as stated in the exceptions) and possess an old vehicle. Second, many benefit applicants utilize a vehicle that belongs to family members or acquaintances, and they cannot affect its value. Third, there are many groups that are not working at all but the use of a vehicle is still vital to running their own lives and fulfilling their parental duties. Finally, many benefit applicants, primarily women, do not hold permanent jobs and, therefore, their income varies from month to month in a manner that does not enable them to regularly rely on the existence of the exception. For all these reasons, the Petitioners argue that the exceptions added to the Law do not resolve the problem arising from the fact that a conclusive presumption has been established in the Law which denies receipt of the benefit.

15. We will note that a dispute arose between the Petitioners and the Respondents on the question of the constitutional review that should be implemented in this case. According to the Respondents – whose position will be described in detail below – the mechanism of judicial review of the violation of social rights and the conditions of eligibility for social rights should be limited, and it should be separated from the judicial review of the constitutionality of civil and political rights. The Petitioners, particularly the petitioners in HCJ 3282/05, opposed the constitutional analysis model proposed by the Respondents. They argue that the proposed model – which endeavors to focus the constitutional examination on the stage of determining whether a right has been violated – does not allow for effective judicial review of laws that violate the right to a minimum dignified subsistence. Moreover, the Petitioners conceded the Respondents' detailed argument, whereby the interest protected by the Law should be defined as the interest of preventing a life of existential deprivation only in regard to those persons who find

themselves in that condition because of reasons beyond their control, but they argue that that last component of duress should not be added to the definition of the right itself. In their opinion, the requirement of duress must be examined as part of the examination of the purpose of the legislation and the proportionality of the violation, while an examination of the circumstances under which a person finds himself in a state of existential deprivation and an examination of the existence of the conditions justifying his extraction from that deprivation, must be made, only after it has been proven that the person is suffering from existential deprivation and that his right not to live in such a manner has been violated. The Petitioners further argued that since the examination of whether the benefit applicant suffers from existential deprivation because of reasons beyond his control is founded on a factual system that is based on various eligibility tests, which include, *inter alia*, an examination of the family's situation, the requirement to maximize earning power and to conduct a detailed test of income – there is also a practical logic in conducting it at this stage of examining compliance with the tests in the limitations clause, and not at the stage of determining violation of the right. To this the Petitioners added that the position whereby a condition of duress must be read into the definition of the right to a minimum dignified subsistencereflects the outlook whereby people choose a life of poverty and that the individual has a scope of autonomy in choosing his economic status. Such a position, it was argued, ignores the fact that people's economic situation is also derived from the social status into which they were born and to their ethnic, religious and sectoral affiliation. It was argued that emphasizing the individual's scope of choice in circumstances where his ability to choose is limited undermines the state’s obligation to adopt arrangements that narrow the social gaps.

16. With regard to the conditions of the limitations clause, the Petitioners focus their arguments on the conditions of proportionality. With regard to the first subtest, it was argued that there is no rational connection between the use or ownership of a vehicle and the purpose of the law, since no income – even conceptual – could be generated from the use they made of the vehicle. The Petitioners pointed out the fact that from a factual standpoint, the family support that was given to the benefit applicant by placing a vehicle at her disposal several times a week cannot, for the most part, be converted into a monetary payment, and that such assistance is equivalent to the assistance provided by the family in minding and caring for the children – assistance that is given by means of existing personal and family capital. It was further argued that the fact that a conclusive presumption from which there could be no deviations had been established for a basic matter such as a subsistence benefit, is contrary to the natural rules of justice and, hence, is not proportional.

17. The Petitioners further argued that the second subtest, the test of the means with the lesser violation, does not exist in this matter either. The main argument that was made in this matter is that with a conclusive presumption that cannot be refuted and from which there can be no deviations, the legislature should have chosen a means that allows for the assessment of the economic value of the use of a vehicle and deduction of that value from the amount of the monthly benefit. The Petitioner in HCJ 7804/05 emphasized that a person who works and receives a vehicle from his employer is entitled to deduct the value of the benefit generated by the vehicle pursuant to the rate for deducting the benefit in accordance with the income tax regulations, while someone who uses a vehicle that he did not receive from his employer, even if such use is required for his work, is denied that benefit completely. The Petitioners further argued

that the law does not comply with the third test of proportionality either. They argue that the Respondents' insistence on quantifying the family assistance given to the benefit applicants constitutes a negative incentive for family members to help one another, and attests to the state's shirking its responsibilities vis-à-vis the individuals. Additionally, the savings and efficiency attained by the sweeping denial of the benefit do not match the damage caused by denial of the benefit from those who need it for a minimum dignified subsistence.

18. It should be noted that the Petitioners in HCJ 10662/04 chose to focus their petition on the claim of discrimination, whereby Amendment 28 to the Income Support Law, in which two exceptions that are set forth in sections 9A(c)6 and 9A(c)7 of the Law were added, discriminate between recipients of the Income support benefit and the income supplement benefit. This is because these sections enable recipients of the income supplement benefit, under the conditions set forth therein, to possess a vehicle without losing their benefit, and do not allow for a similar arrangement for recipients of the income support benefit. The Petitioners argue that this arrangement discriminates in an arbitrary and comprehensive manner between recipients of the income support benefit and recipients of the income supplement benefit, and violates the constitutional right to a minimum dignified subsistence, and the right to property by recipients of the income support benefit. This discrimination, it was argued, is not for a proper purpose. The Petitioners are not protesting the concrete arrangements set forth in these sections but, rather, are asking to apply it, *mutatis mutandis*, to the group of income support recipients as well.

The Respondents' arguments

19. The Respondents focused their responses and the affidavit in response on the question of whether section 9A (b) of the Law does, indeed, violate the right to a minimum dignified subsistence. According to the Respondents, section 9A (b) embodies the "pure" socioeconomic policy of the legislature. This policy, it was argued, is not given to judicial review because it establishes a series of social rights that have not reached the status of basic rights. Only a narrow and very limited part of this policy is covered by the constitutional right to dignity in the sense of the right to not live a life of existential deprivation caused by duress and, according to the Respondents, the current case does not fall within the boundaries of the right at all.

20. The Respondents argue that a distinction should be made between the constitutional analysis in a claim of violation of a civil right and the constitutional analysis in a claim of violation of a socioeconomic right, in two main ways. First, the scope of the constitutional right should be limited and the interest protected by law should be narrowly defined as the interest of preventing a life of existential deprivation caused by duress. Second, the Respondents believe that the constitutional examination should be focused on the first stage and the question of whether the protected right has been violated at all should be examined. They argue that the importance of focusing on the stage of the violation is designed to delineate the boundaries of the right to a minimum dignified subsistence, and to ascertain that the judicial review is applied only to the core of the right, and not to its

marginal parts, to which an economic policy can be applied that is not subject to constitutional judicial review. Accordingly, it was argued, the Court must examine only the existence of the rational connection between the conditions of the eligibility (i.e., the ownership or use of a vehicle) and the interest protected by the Law. This test is a test of relevancy – i.e., it is sufficient that there is some connection of relevancy (absence of arbitrariness) between the protected interest and the means for constitutional review so that the Law will stand the test of constitutionality. According to the Respondents, focusing on the first stage of the constitutional examination (i.e., at the stage of the violation) "does not render the constitutional analysis superfluous but, rather, moves the substantive tests that are implemented in the second stage, to the first stage of determining the existence of the violation" (affidavit in response on behalf of the Respondents, dated November 12, 2009, at p. 8).

21. As to the essence of the Petitioners' arguments, the Respondents argue that the rationale underlying denial of the benefit from someone who owns or uses a vehicle is the high cost and the significant expenses entailed in maintaining a vehicle. According to the Respondents, calculations of the monthly cost of maintaining a vehicle, based on the statistical models, indicate that the monthly expense is very close to the amount of the average benefit and, therefore, justifies denying eligibility for the benefit. This rationale encompasses the presumption, pointed out by the Respondents, that it is highly possible that the vehicle's maintenance expenses are funded from the benefit recipient's independent income, which he did not report to the National Insurance Institute at the time his eligibility for the benefit was examined. Hence, it was argued, since the income test is the main test for examining

eligibility for the benefit, denying the benefit is justified where there is a basis for assuming that the benefit applicant has unreported sources of income. According to the Respondents, this rationale is also valid in cases in which the vehicle is not owned by the benefit applicant and another person pays for the ongoing expenses of maintaining the vehicle. In such a situation, they argue, the benefit applicant should be deemed to have been given the amount of the vehicle's value and the amount of the value of the vehicle's use by the vehicle's owner. The Respondents emphasize that in many cases, the vehicle is made available by family members, who are obligated under Israeli law to care for members of their family. Therefore, it was argued, we should not encourage a reality in which the public treasury finances the existential needs of a person, thereby enabling others to finance needs that are not of an existential nature.

22. From the standpoint of the right to dignity, which is the main right under examination, according to the Respondents, the interpretive model for extending the scope of the right to dignity is the model of existential deprivation caused by duress. According to that model, the constitutional obligation of the state arises only where a danger is created that a person will be forced, because of reasons beyond his control, to live in existential deprivation. When an individual can be required to make a proper change from a normative standpoint, a range of choices opens up before him, which negates the assumption that he is forced to live in a state of existential deprivation. This interpretive model ascribes a limited and narrow meaning to the right to not be forced to live in existential deprivation, which relies, according to the argument, on the fact that that right is derived from the right to human dignity.

The questions that must be decided

23. The petitions before us raise the constitutional question of the arrangement established in section 9A(B) of the Law. The main question to be decided by us is whether this arrangement – which means a universal denial of the right to the income support benefit for anyone who owns or uses a vehicle (and whose case does not fall within the realm of one of the exceptions set forth in the Law) – violates a constitutional right. If we find ourselves responding to this question in the affirmative, we must further examine whether that violation fulfills the requirements of the limitations clause and, therefore, constitutes a permitted violation. This pivotal question raises a series of "derivative" questions, which are also required for the decision. These encompass the question of the scope of the violated right, which is the right to a minimum dignified subsistence(or, by its other names: the right to minimal subsistence conditions or the right not to live in existential deprivation), and the question of the connection between it and the right to dignity. In the wake of the position presented by the Respondents, the question also arises as to what judicial review model should be applied in examining the constitutionality of a law that is alleged to violate social rights, and if, as argued by the Respondents, a different constitutional model should be adopted with regard to the violation of social rights. These are the questions that we will deal with first.

The stages of judicial review

24. Since the enactment of the new Basic Laws in 1992, the generally accepted constitutional examination in our legal system is

divided into three main stages (see, among many others: HCJ 6821/93, United Mizrahi Bank Ltd. v. Migdal Cooperative Village, IsrSC 49 (4) 221 (1995) (hereinafter: the Mizrahi Bank Case); HCJ 1715/97, Israel Investment Managers Association v. Minister of Finance, IsrSC 51 (4) 367 (1997); HCJ 6055/95, Tzemah v. Minister of Defense, IsrSC 53 (5) 241 (1999); HCJ 4769/95, Menahem v. Minister of Transport, IsrSC 57 (1) 235 (2002) (hereinafter: the Menahem Case); HCJ 1661/05, Gaza Coast Regional Council v. Knesset, IsrSC 59 (2) 481 (2005) (hereinafter: the Gaza Coast Case); HCJ 6427/02, Movement for Quality Government in Israel v. Knesset, IsrSC 61 (1) 619 (2006) (hereinafter: the Movement for Quality Government Case). In the initial stage, the question of violation is examined, during which the Court examines whether the relevant law violates a right or rights that are established in the Basic Laws. If the answer to this is negative, the constitutional examination comes to an end (see, e.g., the analysis of the question of violation of the right to dignity in HCJ 366/03, Commitment to Peace and Social Justice Society v. Minister of Finance, IsrSC 60 (3) 464 (2005) (hereinafter: the Commitment Society Case). If the answer is affirmative, meaning that the existence of a violation has been proved, the constitutional analysis proceeds to the second stage: examining the constitutionality of the violation.

A constitutional examination of the violation of the basic right is conducted by applying the requirements established in the limitations

clause in Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. A violation that fulfills the requirements of the limitations clause is a permitted violation of basic rights. Such a permitted violation reflects the concept that basic rights are not absolute and, under certain conditions, may be violated (see, e.g., the Mizrahi Bank Case, at 433; Gaza Coast Case, at 545). A constitutional violation of the basic right concludes the stages of constitutional review and the law is declared to be constitutional. If it is found that a law violates a basic right in a way that does not fulfill the requirements of the limitations clause, the third stage commences, which is the stage of determining the remedy. In this stage, the Court determines the result of the unconstitutional law (see, e.g., HCJ 7505/98, Corinaldi v. Israel Bar Association, IsrSC 53 (1) 153, 162-163 (1999); Criminal Appeal 586/94, Azor Sports Center Ltd. v. State of Israel, IsrSC 55 (2) 112, 133-134 (2001)).

As noted by President A. Barak in the Movement for Quality Government Case: "This division into three stages is important. It is of assistance in the legal analysis. It is intended 'to clarify the analysis and focus the thinking'... It clarifies the basic distinction, which runs like a golden thread throughout human rights law, between the scope of the right and the degree of protection afforded to it and its de facto realization" (*id.*, 670). This division into stages laid the foundations for a uniform judicial review of violation of all of the rights encompassed by the Basic Laws which, as a result, achieved a constitutional, supra-legal status. This division circumscribed the boundaries of constitutional discourse, as part of the limitations imposed by the establishing authority

on the legislative authority's use of its power to violate rights set forth in the Basic Laws. This division also created the analytical basis for a distinction between the conceptual scope of constitutional rights and the scope of the protection given to them by the limitations clause. In fact, given the many years that have elapsed and the large number of judgments dealing with constitutional analysis, it can be stated that this division has become a basic axiom of constitutional law in Israel.

25. Nonetheless, the Respondents have devoted most of their energies to establishing the argument for adopting a different method of constitutional analysis for examining the petitions before us – a method of analysis that is affected by the fact that the right scrutinized by the constitutional examination is the right to a minimum dignified subsistence. Their main argument is that the judicial review of legislation alleged to violate that right should be limited, compared with the judicial review exercised for other rights, so that the examination would focus solely on the first stage – the examination of violation of the right. At the same time, the Respondents argue that considerations taken from the second stage of constitutional review should be "imported" into the first stage of the examination. In other words, the Respondents think it appropriate to make use of some of the tests in the limitations clause, even at the stage of examining the violation of the right.

Several reasons for this argument were cited. First, the Respondents argue that the restricted format in which the right to exist with dignity has been recognized in our legal system – a minimum dignified subsistence – requires the application of stricter criteria than usual in examining the violation of a right, and that the Court should reduce the transition to the second stage of the constitutional

examination. Second, the Respondents argue that the methodology used for the constitutional analysis of socioeconomic rights should be different from that used by the Court to examine other basic rights, because legislation that deals with allocating resources for socioeconomic issues does not usually involve constitutional aspects, while, on the other hand, it reflects determinations that concern pure policy. As such, the Court, as a general rule, should reduce the exercise of judicial review in legislation that affects the right to minimal conditions of existence, in contrast to other basic rights. Both of these reasons should be rejected.

The distinction between civil and political rights and socioeconomic rights

26. First we will examine the Respondents' argument that a different constitutional model should be applied when we examine a social, or economic right, in contrast to a civil or political right. This argument requires us to address the nature of the rights and the historical background that led to the current development with regard to the status of the social rights.

It is customary to classify the historical development of human rights into two "generations" of rights. The first generation encompasses human rights that are called "civil-political" and the second generation encompasses human rights that are called "socioeconomic." At the heart of the first generation rights, which developed at the time of popular uprisings for democratization at the end of the 18th century, was the desire to limit the power of government. Accordingly, these rights are characterized by the fact that the obligation of the government facing them is “negative” in nature and proclaims that the government must not

impair the life of the individual, interfere in his actions, or restrict his liberty. In the second generation, the social concept developed, whereby rights that impose "positive" obligations on the government to care for the individual, to protect him against violations of his rights by others and to promote his welfare must also be recognized (Yuval Shany, "Economic, Social, and Cultural Rights in International Law," Economic, Social, and Cultural Rights in Israel, 297, 302-304 (edited by Yoram Rabin and Yuval Shany, 2004) (hereinafter the book will be termed: Economic, Social, and Cultural Rights in Israel and the article will be termed: Shany); Guy Mundlak, "Socioeconomic Rights in the New Constitutional Discourse: From Social Right to the Social Dimension of Human Rights" (Yearbook of Labor Law 7, 65, 93 (1999) (hereinafter: Mundlak), Theodor Meron, On a Hierarchy of Human Rights, 80 AJIL 1 (1986). A kind of "intergenerational struggle" developed between the two generations of rights, over the priority to be given to each one of the generations in national and international law. In international law, this issue found expression in the splitting of the international human rights covenant into two separate covenants: the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966 (hereinafter: the Covenant on Social Rights). The two covenants were ratified by Israel in 1991.

27. Behind the concept that there is competition between social rights and political rights, is the supposition that the two types of rights are inherently different from one another and are exercised at the expense of one another. One of the arguments akin to the arguments made by the

Respondents in the petitions before us is that while social rights impose an "affirmative" obligation on the state, the political and civil rights impose a "prohibitive" obligation. The former, so the argument goes, must be limited in their implementation because they require the allocation of state resources, which ultimately come from the pockets and property of the state's citizens. In practice, a natural limitation applies to the exercise of those rights because they are always dependent upon the resources available to the government and their implementation is connected to allocation of the state's resources (see, e.g., HCJ 3071/05 Gila Louzon v. Government of Israel (not yet published, July 28, 2008) (hereinafter: the Louzon Case); and Ruth Gabizon "On Relations Between Civil-Political Rights and Socioeconomic Rights" in: Economic, Social, and Cultural Rights in Israel 23, 42 (hereinafter: Gabizon); Shany at p. 304)).

28. Even though that is the traditional approach, it is not the only approach. Over the years, critical voices have been increasingly heard to the effect that the dichotomous classification of social rights as "positive" and political rights as "negative" is far from reflecting the practice of exercising human rights and that every human right actually has positive and negative aspects alike (C. Taylor, What's Wrong with Negative Liberty? 2 Philosophy and the Human Sciences: Philosophical Papers 211, 215, 221, 228-229 (1985); S. Holmes and C.R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes, 35, 39, 44-48 (1999)). Thus, "defending civil-political rights may entail the imposition of positive obligations and public expenses no less than those required to protect socioeconomic rights, and handling socioeconomic interests may only require refraining from interfering." (Gabizon at p. 42-44; see also

Aharon Barak, *Preface*, in Economic, Social, and Cultural Rights in Israel 5, 7). Take, for example, the right to life, which heads the list of civil and political rights in the Covenant on Political Rights. In order to preserve human life, the state is required "to implement actions" at the broadest scope: for that purpose military forces are established to protect the lives of the citizens from outside threats; for that purpose, police forces are established to protect the lives of the citizens from crime and the undermining of the social fabric; for that purpose the state is required to restrain its power and act with caution – and the means of caution cost a great deal of money in themselves. Similarly, the right of a person not to be discriminated against and not to be treated with prejudice also requires the allocation of considerable resources at times. Sometimes the right to equality is only of a negative nature but many times it imposes a positive obligation on the state to rectify discriminatory wrongs in the society and make facilities, services and public functions fully accessible to all members of the population (HCJ 4541/94 Miller v. Minister of Defense, IsrSC 49 (4) 94 (1995); HCJ 7081/93 Botzer v. Maccabim-Reut Local Council, IsrSC 50 (1) 19 (1996)). This is also the case with regard to other classic civil-political rights, such as the right of expression. For the purpose of exercising the right, the state is required to protect anyone who says things that are not to the public's liking and maybe attacked or threatened because of his words. Therefore, the police are required, as a matter of course, to allocate public resources for the purpose of safeguarding protests and marches and for the purpose of protecting the freedom of expression of public personages and political figures. This is also the case when the state itself has not prohibited expressing opinions, nor has it intervened or interfered with their

expression (see in this context: HCJ 153/83 Levi v. Southern District Police Commander, IsrSC 38 (2) 393 (1984); HCJ 2557/05 Majority Camp v. Israel police (not yet published, December 12, 2006)). The most prominent example of the political right that requires the state to allocate resources might be the right to vote and to be elected, in which enormous resources are invested, from the actual holding of elections every few years to the resources required to ensure the accessibility for every person to exercise his right to vote (see, e.g., Gabizon, at p. 42). Therefore, these examples attest to the fact that even when the state itself is willing to fulfill its part and to refrain from action, it may still be obligated to take action to protect the exercise of civil and political rights. With that in mind and according to the accepted outlook today, there is no basis for distinguishing clearly and unequivocally between social rights and political rights based on the positive or negative obligations of the state or based on the question of allocating resources. The ostensible gaps between the rights are mainly the result of historical evolution and not of real differences between the rights themselves. Indeed, "affirmative" and "prohibitive" alongside one another are integral parts of the protection of human rights, whatever their nature may be.

29. Moreover, insofar as there is a certain distinction between civil-political rights and social rights – if only in the scope of the positive obligations that is generally imposed on the state in each one of the groups of rights – the question still remains as to whether that justifies deviating from the constitutional review model that was established among us more than two decades ago? In my opinion, the answer to that is negative. There are several reasons for that conclusion.

First, we must remember that precisely in the context of the right to dignity that lies at the heart of the petitions before us, the constitutional obligation imposed on the legislature is an expressly positive obligation, in accordance with section 4 of Basic Law: Human Dignity and Liberty, which establishes that "All persons are entitled to protection of their life, body and dignity" (for the two aspects of the right to human dignity, see the Commitment Society Case at p. 749 and also below). Against the obligation is the right, and alongside it is the judicial remedy, and those are not subject, in the Basic Law, to a constitutional examination that differs from the one given to the other rights established therein. Therefore, the distinction that the Respondents wish to make has no basis in the internal structure of the Basic Law.

Second, it seems that the Respondents' arguments rely in principle on the claim that exercising the right to a minimum dignified subsistencerequires the allocation of resources that may "overflow" into areas which, in essence, are a policy decision that is not given to judicial review. But this reason also does not justify the application of a different model of judicial review of social rights. It is a well-known rule that the Court will not intervene in questions of pure policy, but it would be proper to examine the constitutionality of various actions, even if they have, or might have, budgetary ramifications. No one disputes the fact that the exercise of many rights entails budgets available to the state and the manner of their allocation. This is certainly the case with regard to the exercise of social rights (See the Louzon Case, paras 10-11 of my judgment). In effect, even the Covenant on Social Rights establishes that the state is not exempt from implementing the measures that are

essential for exercising those rights, but it recognizes the fact that the state's ability to promote those rights depends on the resources at its disposal (see section 2 (1) and section 11 of the Covenant on Social Rights). Indeed, the positive protection of human rights – civil, political or social – tends, as a rule, to require ongoing sources of funding which may, by nature, be limited by, and dependent on, the financial situation of the state and the scope of the resources at its disposal (see: Barak Medina, The State's Duties to Provide Basic Needs: From a "Discourse of Rights" to a "Public Finance Theory" in Economic, Social and Cultural Rights in Israel 131; see also section 2 (1) of Covenant on Social Rights). But in a legal system in which the relativism of human rights is preserved, as in our system, the place for arguments about budgetary constraints and conflicting interests is generally in the second stage of the constitutional examination, which examines the purpose of the violation of the right and its proportionality. That stage provides a broad platform for justifying a violation of the right for reasons of lack of budgetary resources, and those considerations should not be transferred to the first stage of examining the essence of violation of the right.

Third, accepting the Respondents' position may lead to the application of a different constitutional model with regard to two violations of exactly the same right. The right to human dignity is a prominent example of that because of the many facets of that right. "The right to human dignity," noted President A. Barak "… constitutes a collection of rights that need to be protected in order that dignity may exist…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 (the Commitment Society Caseat p. 481).

Indeed, the right to dignity encompasses a variety of rights. Some of them are derived from it and some of them express the basic meaning of the term "human dignity." In our legal system, the right to equality, under certain conditions, has been declared an integral part of the right to human dignity, as has the right to family life (see: the Movement for Quality Government Case; HCJ 7052/03 Adalah – Legal Center for Arab Minority Rights in Israel v. Minister of Interior, IsrSC 61 (2) 202 (2006); hereinafter: the Adalah Case). Alongside those rights, the right to a minimum dignified subsistencehas been recognized. Can some legal basis be found for the argument that a violation of one aspect of human dignity will lead to the application of one model of judicial review, and a violation of another aspect of human dignity will lead to another model of judicial review? Clearly, the answer to that is negative. Such selective application is inconsistent and has no part in the prima facie distinction between the rights, in the language of the basic laws, or in the tradition of constitutional law in our legal system.

30. I also cannot accept the additional argument made by the Respondents that the narrow scope of the right to a minimum dignified subsistencejustifies narrowing the constitutional analysis to the first stage – the stage of the violation. First, the "safety belt" that is required, according to the Respondents, to prevent a situation in which the constitutional protection will be broadened and will be "stretched" to cover rights that are not established in the Basic Laws, exists in the narrow definition of the right. There is no theoretical reason to apply different and stricter rules of analysis to the right, which, in any case, is narrowly defined. Second, this argument – insofar as it is designed to indicate the difficulty of lifting the burden of the violation of a right that

is narrowly defined – states the obvious. In any case, when a court exercises judicial review on legislation, at the first stage the burden of proving the fact that the law violates the right rests with the petitioners (see, e.g., the Commitment Society Case, at p. 484, 491-492; the Movement for Quality Government Case, at p. 671-672) and there should be no transition to the second stage of examination if no violation of the right has been found. Moreover, adopting the Respondents' approach means passing the burden of proof to the Petitioners almost completely. If we accept their approach, the Petitioners would have to prove both the violation of the right and the relevancy of the means that were chosen in the legislation. However, the burden of proving the relevancy or, in other words, the rational connection test, is generally that of the Respondents as part of the customary division of the burden in constitutional law. Changing the rules of the constitutional examination in the case before us means releasing the Respondents from the need to prove the constitutionality of the means that were chosen by them.

31. The argument made between the lines by the Respondents, to the effect that the ambiguity of the social rights makes it difficult to pinpoint their violation and, therefore, justifies the application of stricter tests in the first stage of the constitutional review, should also be rejected. Like the arguments pertaining to the distinction between "positive" and "negative" aspects or between "affirmative" and "prohibitive" obligations, the arguments about ambiguity that are ascribed precisely to social rights should also be rejected. Ambiguity is not a problem reserved only for social rights (and it is doubtful whether the argument in itself is accurate: for developments in the concretization of the social rights in international law, see Shany, at p. 321-325). This court has struggled more than once

with the issue of the scope and boundaries of political and civil human rights. Does freedom of expression also spread its protection over pornographic expression? Does affirmative action constitute a violation of equality or does it express a relevant distinction? What are the boundaries of the right to privacy in the workplace (see, e.g., HCJ 5432/03 SHIN, Israeli Movement for Equal Representation of Women, and 11 others v. Council for Cable TV and Satellite Broadcasting, IsrSC 58 (3) 65, 79, 82 (2004); HCJ 454/94 Israel Women's Lobby v. Government of Israel, IsrSC 58 (5) 501 (1994); Labor Court Appeal 90/08 Inbar – State of Israel – Supervisor of the Employment of Women Law (not yet published, February 8, 2011)). These are but a few examples of the inherent difficulty of examining the scope of rights of all kinds. The theoretical difficulty is basically interpretive. It does not pertain to the distinction between civil rights and social rights but, rather to the distinction between the essence of the right and its marginal aspects. The more the violation pertains to issues at the core of the right, the easier it is to discern the violation and the protection of the right will be expanded, and vice versa when we are dealing with the marginal aspects of the right. Pinpointing the "geometric location" of the violation of the right is in the purview of the court as an interpretive action, whether the matter involves civil rights or social rights.

Indeed, decisions on the scope and boundaries of social human rights are sometimes complex and since they are new rights in our legal system they have not yet been given sufficient legal interpretation in this Court. Even the academic and legal discourse on social rights developed at a slower pace and there are many reasons for that, but this is not the place to discuss them. The ambiguity will, therefore, be removed as the Court addresses the interpretation of the social rights. Indeed, in the

words of Prof. Guy Mundlak, "The problem is one of cause and effect. The more social rights are pushed outside the walls of judicial forums due to their inferiority and due to the problem of ambiguity, the more the ambiguity of their meaning will increase. The best way to clarify the ambiguity is by a judicial confrontation with the meaning embedded in those rights. This is not an unknown type of judicial task. It is hard to imagine private law in Israel without ambiguous terms that have been clarified comprehensively in case law, such as reasonableness, good faith and negligence" (Mundlak, at p. 99).

Therefore, the very fact that we are dealing with the right to dignity, which encompasses the right to a minimum dignified subsistence, does not justify applying a different judicial model for constitutional review. We will therefore turn to analysis of the alleged violation of the right to a minimum dignified subsistence, in an orderly manner.

Violation of the right

32. In the first stage of the constitutional examination that is customary in our legal system, as stated, we must examine whether section 9A(b) of the Income Support Law violates the right to dignity and, in its framework, the right to a minimum dignified subsistence. The answer to that question requires us to interpret and determine the scope of the constitutional right to dignity in the context adjudicated by us and the provision that allegedly violates that right. We will begin, therefore, with the interpretation of the right to dignity; we will move on to interpretation of the provisions of section 9A(b); and, finally, we will examine the relationship between the right to dignity and the Income Support Law, and its ramifications for analysis of the violation of the right.

On human dignity and the right to a minimum dignified subsistence

33. The right to human dignity is established in Basic Law: Human Dignity and Liberty (hereinafter: the Basic Law). The Basic Law establishes, as stated, both the prohibition on violating the right to dignity and the obligation to protect it:

Purpose	1.A	The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.
Preservation of life, body and dignity	2.	There shall be no violation of the life, body or dignity of any person as such.
		…
Protection of life, body and dignity	4.	All persons are entitled to protection of their life, body and dignity.
		…
Application	11.	All governmental authorities are bound to respect the rights under this Basic Law.

A person's right to dignity under the Law is a right with two facets: a negative facet, which proclaims that violation of the right must be prevented, and a positive facet, which imposes an obligation on the government authorities to protect the right. In the words of President A. Barak, "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" (the Commitment Society Case, at p.749).

34. A series of judgments has already established that human dignity, in the constitutional sense, also encompasses and includes the right to a minimum dignified subsistence. This Court held that human dignity includes the right to a minimum dignified subsistence, both in cases that raised the negative aspects of the right and in cases that raised the positive aspects of the right (cf.: HCJ 161/94 Atari v. State of Israel (unpublished, March 1, 1994); Leave for CA 4905/98 Yosef Gamzu v. Na'ama Yishayahu IsrSC 55 (3) 360, 375-376 (2001); Leave for CA 5368/01 Pinchas Yehuda v. Attorney Yosef Teshuva, Receiver, IsrSC 58 (1) 214 (2003); HCJ 4128/02 Adam, Teva Va-Din – Israel Union for Environmental Defense v. Prime Minister of Israel, et al., IsrSC 58 (3) 503, 518 (2004); HCJ 5578/02 Rachel Manor et al. v. Minister of Finance et al., IsrSC 59 (1) 729, 736 (2004) (hereinafter: the Manor Case) Administrative Petition Appeal 3829/04 Yisrael Twito, Chairman, Mikol Halev Association v. Jerusalem Municipality, IsrSC 59 (4) 769, 779 (2004); HCJ 1384/04 BetZedek Association – American-Israeli Center for Promoting Justice in Israel. Minister of Interior (unpublished, March 14, 2005); HCJ 4634/04 Physicians for Human Rights v. Minister of Internal Security, paragraph 12 of

the decision of Justice A. Procaccia (not yet published, February 12, 2007); the Commitment Society Case, at p. 482-484). Indeed, the extension of human dignity to the right to a minimum dignified subsistenceis now understood and this position has already been established in our case law (see: A. Barak, Legal Interpretation – Constitutional Interpretation, 423 (1994) (hereinafter: Barak, Constitutional Interpretation): "Human dignity assumes a minimum of human subsistence… This concept is shared by all models with regard to human dignity").

35. The right to a minimum dignified subsistenceis at the heart and core of human dignity. A life of starvation and homelessness and a constant search for help are not a life of dignity. A minimum dignified subsistenceis a condition not only for preserving and protecting human dignity, but also for exercising other human rights. There is nothing poetic about living in poverty and deprivation. Without minimal material conditions, a person cannot create, aspire, make his own choices and exercise his liberties. In the fine words of Justice Y. Zamir, "Human rights must not be just for those who have enough. Every person must have enough, so that he or she can enjoy human rights, in actuality and not just by law." (HCJ 164/97 Conterm Ltd. v. Ministry of Finance, Customs and VAT Division, et al., IsrSC 52 (1) 289, 340 (1998); and see also Gabizon at p. 45: "A person who struggles to attain minimal subsistence conditions does not have the real freedom to strive to achieve any goals").

36. In their arguments, the Respondents claimed that the right to a minimum dignified subsistenceis a right derived from the right to human dignity and, as such, it does not enjoy the scope of protection given to the right to human dignity as a right that is expressly enumerated in the Basic Law. I believe that the right to a minimum dignified subsistenceshould not be deemed a right that is derived from the right to human dignity but, rather, should be viewed as a right that constitutes a genuine expression of human dignity. The right to a minimum dignified subsistenceis not, as argued by the Respondents, a right that expands the content and scope of the constitutional right to dignity but, rather, it is rooted very deeply in the core of the constitutional right to dignity (see the analogy used by Judith Karp: "The value 'human dignity' can be viewed as being surrounded by circles of content. As though the legislature had cast the 'human dignity' stone into the smooth waters of the lake of the Basic Law, and when it touched the water it created ever-widening circles that strike one another on their margins and are filled by one another, and each circle is the result of another, and they flow into one another and move away from their source until they fade away." Judith Karp, "Questions on Human Dignity According to the Basic Law: Human Dignity and Liberty," Mishpatim 25 129, 136 (1995); see also Hillel Sommer, The Non-Enumerated Rights: on the Scope of the Constitutional Revolution, Mishpatim25 257, 329-330 (5757)). Can the right to dignity exist without respecting a person's right to minimal conditions of human subsistence? Doesn't a person's right to not live in hunger, without a home and without the ability to cover himself with clothing express his human dignity? Indeed, among the many meanings that can be given to the concept "human dignity," particularly when emphasis is placed on the word "human," the most

fundamental of them is the one pertaining to the unique dignity of man, to the most essential conditions of his survival. If we have defined the fundamentals of the right to dignity metaphorically, as reliant on the fact that man was created in God's image, it appears that that image is harmed, first and foremost, if he is reduced to abject, humiliating poverty.

What is the connection between the Income Support Law and the right to a minimum dignified subsistence?

37. What is the connection between the right to a minimum dignified subsistenceand the Income Support Law, whose purposes and structure we discussed above? As I noted above, the right to a minimum dignified subsistenceis inherent in the core of human dignity. The obligation of the government authorities is-à-vis the right is twofold, as indicated in sections 2 and 4 of the Basic Law, which state that they must preserve it from violation and ensure that it is protected. This obligation can be fulfilled in many ways. It is implemented by a variety of means, systems and arrangements in Israeli law – all closely connected to the resources available to the state and the manner in which they are allocated. Protection of the right is woven into the welfare legislation like a golden thread, *inter alia*, by providing state health insurance to every resident, free education, and providing public housing to the needy under certain conditions. The income support benefit provided under the Law is only one of the mechanisms that ensure protection of a person's right to a minimum dignified subsistence, however, it has a pivotal position in protecting the right. As an income-replacing benefit, it is designed to enable those who are eligible to receive it to procure what they need for their basic and minimal subsistence. In the absence of another means, such as purchase coupons or direct supply of vital commodities, it has no

substitute. The importance of this is so great that I doubt whether it does not have ramifications for the protection and preservation of other human rights, such as the right to life (see: Yosef Katan, The Problem of Poverty: Causes, Components and Coping Mechanisms, Review of Professional Literature 7, 11-12, 45, 75 (2002); Lia Levin, A "coalition of exclusion": Non take-up of social security benefits among people living in extreme poverty. Access to social justice in Israel,225, 225 [sic] (2009)).

38. In view of the network of welfare mechanisms available in Israel and the relative place of the Income Support Law in those mechanisms, it can be established that the Income Support Law is designed to complete the protection of the right to a minimum dignified subsistence(cf.: the words of President A. Barak in the Commitment Society Case, at p. 483-484). The law is designed to ensure the residents of Israel with the minimum resources they require to satisfy their vital needs when they are unable to do so themselves. The purpose of the law is, therefore, to ensure a minimum dignified subsistence. There is no debate about this purpose among the Respondents and the Petitioners. While the Income Support Law is not the only means utilized by the state for exercising the right to a minimum dignified subsistence, it is one of the main means for protecting it. The importance of the income support benefit in ensuring a minimum dignified subsistenceis the basic reference point for deciding the petition before us.

Does section 9A(b) violate the constitutional right to a minimum dignified susbsistence?

39. Section 9A(b) relies on the test established in section 9A(5) of the Law, whereby a vehicle is property that must be calculated in the income test of a person applying for a benefit. This income, by its nature, is not considered income in the regular sense of the word, because it does not refer to income such as income generated from work or from income-yielding property. Income from a vehicle is conceptual income. It is based precisely on the concept of the expense that is required for the purpose of maintaining and using a vehicle and that expense is calculated as though it was part of the income of the benefit applicant – under the presumption that the person must have sufficient income to finance the expense.

However, section 9A(b) establishes a fiction. The fiction lies in the incontrovertible presumption that the amount of income "produced" from the vehicle is equal to at least the amount of the benefit. The meaning of this is clear: the very ownership or use of a vehicle is sufficient to lead to denial of the benefit. In such a case, the benefit applicant is held to be someone whose income attests to the fact that he does not require the safety net provided by the state.

40. The question asked in the petitions before us is whether this arrangement violates the right to a minimum dignified subsistence. The answer to that is affirmative. The arrangement violates the right to a minimum dignified subsistencebecause it establishes a categorical rule whereby anyone who owns or uses a vehicle will not be eligible for the income support benefit, with no connection to the individual question of whether that same person does, indeed, have income in an amount that will ensure his ability to exercise his right to a minimum dignified

subsistence. Hence, it is clear that when the income support benefit is denied to someone who needs it for the purpose of minimal subsistence, the right to a minimum dignified subsistenceis violated.

41. No one disputes the fact that ownership of a vehicle or use of a vehicle may help in estimating a person's income. The Petitioners did not dispute the assertion in the Law that a vehicle is property from which income is generated, and justifiably so. A vehicle is, indeed, a possible means for estimating income. Accordingly, the ownership or use of the vehicle has a certain economic significance, which can be estimated and quantified for the purpose of including it in the test of a person's income. The problem that lies in the conclusive presumption is not actually the need for ownership or use of a vehicle as a component in estimating a person's income but, rather, in the fact that it becomes the only component in determining the estimated income. The ownership or use of a vehicle – because they are held to be income of at least the same amount as the benefit – obviate the need to examine a person's economic state more thoroughly. The meaning is, therefore, that ownership or use of a vehicle become threshold conditions for eligibility for the benefit. That threshold condition is unequivocal and incontrovertible. It is sufficient to prove ownership of a vehicle or regular use of another person's vehicle in order to deny the benefit.

42. This result violates the right to a minimum dignified subsistencefor all the benefit applicants who, in actuality, do not have sufficient income for minimal subsistence. That is the situation, for example, in cases in which the benefit applicant does not have a vehicle of his own but makes some use of the vehicle of another person – a relative or acquaintance. In such a situation, for the most part, the benefit

applicant does not bear the regular payments for maintaining the vehicle (such as payment of the insurance and vehicle registration), nor does he enjoy the potential income that exists by the very ownership of a vehicle. Where a person also uses the vehicle of another person and, at most, pays for token gasoline expenses, what is the justification for ascribing to him the whole gamut of costs borne by the owner of the vehicle? According to the Respondents, even in a case of use of a vehicle, those users should be deemed to have been given the value of the ownership in money. That claim is dubious, in my opinion. After all, it cannot be said that the possibility given to a person of using a vehicle that is owned by another attests necessarily to the fact that the vehicle owner has the ability to assist the benefit recipient in other ways. More than once, a person will enable another person to make use of property (including a vehicle) in their possession because, at that time, he does not need it for his own purposes, even if he is unable to give the other person direct assistance – financial or otherwise. In a situation in which a person makes use of the vehicle of a relative or acquaintance when they do not need it, without the vehicle being placed at his disposal for him to use on a regular basis, we cannot conclude that those who assist him necessarily possess the means to give that person alternative income equivalent in value to the vehicle, with its various expenses. At most, the family assistance can be deemed to be equivalent in value to income in the amount of the value of the actual use made of the vehicle which, in itself, may be significantly less than the value of the minimum income.

As such, it emerges that the provisions of section 9A(b) of the Law may lead to denying the benefits to individuals who need it and do not have alternative source of income, nor the ability to obtain such sources from others. The fact that section 9A(b) of the Law ostensibly

enables any use of a vehicle to deny eligibility for the benefit – and the National Labor court judgment interpreted this to mean that using a vehicle only twice a week will also lead to that result – strengthens that apprehension.

43. The situation of the petitioners in HCJ3282/05 demonstrates the problem with the conclusive presumption and the violation that it causes. Most of the Petitioners did not own vehicles but made use of a vehicle that was made available to them by relatives or friends. Petitioner 1, for example, was denied the benefit after it was proven that she used her father's vehicle three times a month, and no more. After cancellation of the benefit, the Petitioner was left to support herself on NIS 1,800 a month from child support and child allowances. The benefit of Petitioner 2 was canceled after it transpired that she made regular use of a vehicle owned by her mother, notwithstanding the fact that she lived in a remote town without any public transportation. No effort was made to quantify the value of her use of the vehicle, in order to examine whether she was, indeed, given assistance in the amount of the benefit. Petitioner 3 was forced to move to another place of residence so that she would not have to make use of a vehicle, and only then was she found eligible for the benefit. All the Petitioners argued that they did not have alternative sources of income and they did not bear the expenses of maintaining the vehicle, except for extremely limited gasoline expenses.

Among them all, it seems that the case of Petitioner 5 demonstrates, more than anything, the main difficulty inherent in the conclusive presumption and the negative results that its implementation may generate. Petitioner 5 worked for her livelihood and was found eligible for the income supplement benefit because her income from work

was not sufficient. She used the vehicle to reach her job in various prisons in the North that are not accessible by public transportation. As long as she used her father's vehicle, her benefit was not canceled because of her father's disability. When her father sold his vehicle, one of her acquaintances enabled her to use his vehicle and this led to cancellation of the benefit. As a result, she was forced to resign from her job and submitted an application for a full income support benefit (instead of the income supplement that she had received beforehand). The result of canceling the benefit that was paid to Petitioner 5 was, therefore, not only a blow to her ability to stand on her own two feet, but also a violation of one of the purposes of the Income Support Law – encouraging people to go out to work.

44. In the nature of things, we must assume that the aforementioned violation of the right to a minimum dignified subsistencedoes not extend to all the benefit applicants. Indeed, there may be benefit applicants who have sufficient income to supply their own basic needs and, therefore, canceling the benefit as a result of the conclusive presumption does not harm their ability to live with dignity. However, it can harm anyone to whom the aforementioned presumption does not apply and the use of a vehicle does not prove that he is not in need of income support. As a result, the conclusive presumption established in section 9A(b) violates the right to a minimum dignified subsistencewith regard to some of the benefit applicants, even if it does not violate the rights of all of them. This is a real and significant violation. Considering the pivotal place of the income support benefit in the network of welfare mechanisms in Israel, denying the benefit means denying the last safety net for those who need it the most.

45. This harsh result is exacerbated by the fact that the conclusive presumption established in section 9A(b) is contrary to the customary manner of examining eligibility for an income support benefit in Israel – by means of an individual examination that is conducted for each and every benefit applicant, the purpose of which is to assess the extent of their need for the benefit. As part of the individual test, the NII examines, *inter alia*, the age of the benefit applicant, his income, his assets and the various payments made to him by the state. In the individual examination, the family unit to which the benefit applicant belongs is also examined and NII representatives examine the applicant's ability and desire to integrate into the job market. All these are designed to present the NII with a detailed picture that is as accurate as possible regarding the applicant's status, to ensure that the benefit is given to those who really need it. To enable the NII to stay abreast of the situation, section 20 of the Law also instructs the benefit applicants and recipients to notify the NII in writing within three days of any change that occurs in their family status and income, and any other change that might affect their eligibility for the benefit or the rate of the benefit.

However, contrary to the individual examination of a person's income, the presumption set forth in section 9A(b) creates a categorical rule whereby the ownership or use of a vehicle is equivalent to income in the amount of the benefit. Irrespective of a person's actual income, from the moment it is proven that he owns or uses a vehicle, the NII deems him someone who has a sufficiently high income and, therefore, he does not require assistance. In practice, the ownership or use of a vehicle obviate the need for the other income tests established in the Law, and there is no real need for an individual examination of the benefit applicant and for examining his true economic ability, because, in any

case, the same fiction that is inherent in section 9A(b) cannot be refuted by it.

It is important to clarify that in our decision, that section 9A(b) of the Law violates the right to a minimum dignified subsistence, we did not address the definition of what a minimum dignified subsistenceis, what it includes, or what it should include. The starting point for our discussion is that the state has an obligation to determine what the minimum subsistence conditions are, and to establish the welfare system accordingly (see, in this context, the judgment of the German constitutional court BVERFG, A7: 1BVL 1/09, 1BVL 3/09, 1 BVL 4/09 from 09.02.2010. For an abstract of the judgment in English, seehttp://www.bundesverfassungsgericht.de/en/press/bvg10-005en.html). For the purpose of this discussion, we assume that that is, indeed, what was done for the purpose of determining the overall welfare system provided by the state, which also includes the Income Support Law, based on that determination. We therefore assume that the entire gamut of welfare arrangements provided in Israel supplies the "package" required for a minimum dignified subsistence. Within the "package" of welfare services, the income support benefit plays a pivotal role. Without it, and without other sources of income, the needy cannot attend to the most basic conditions of subsistence and, as such, its denial leads immediately to violation of their right to a minimum dignified subsistenceas part of their right to human dignity.

47. It is also important to explain that this conclusion of ours is not meant to determine that a vehicle cannot serve as an estimation of income, and the Petitioners did not dispute the legislature's determination that a vehicle should be deemed property from which income is

generated. This conclusion should also not indicate that ownership or use of a vehicle constitutes a condition for a minimum dignified subsistence. However, it should be recognized that a vehicle, under certain circumstances, is not a luxury and can help in the search for work and in getting to the workplace. This is particularly true in places in which public transportation is undeveloped. The violation created by the law does not lie in the concept of the vehicle as property for which the cost of the benefit from the ownership or use can be quantified. The violation occurs as a result of the conclusive presumption set forth in the Law, whereby any case of ownership or use is viewed as though the owner or user of the vehicle has income at a level that removes him from the circle eligibility for the benefit. Such a presumption ignores the individual data of each and every case, and ultimately leads to denial of the benefit without distinction, even from someone who, without having received it, could not have attained a minimum dignified subsistence. The result is, therefore, that section 9A(b) violates the right to a minimum dignified subsistence.

The argument of duress

48. Before we go on to examine the compliance with section 9A(b), I think it proper to address one of the main points made by the Respondents in the written and oral arguments. When discussing the interpretation of the right to a minimum dignified subsistence, the Respondents argued extensively that another element should be read into the right, and that is the element of duress. In their opinion, the state's constitutional obligation to provide the safety net in the Income Support Law arises only when there is a danger that the person will be forced, because of reasons beyond his control, to live in existential deprivation.

They argue that that situation obtains as long as there is no mode of action that the individual can take, which would prevent his reaching existential deprivation. In contrast, when a life of existential deprivation is the result of choice – a choice which, from a normative standpoint, would be advisable to demand that the individual implement – the state's constitutional obligation does not apply and, in any case, the right to a minimum dignified subsistencehas not been violated.

49. According to the argument, the need to examine the question of whether the individual was forced to live in existential deprivation or he had the option of making another choice is based on the narrow scope of the right to a minimum dignified subsistence, and it rests on three main elements: first, as a policy based on just distribution between the general public and all those receiving support, due to the fact that provision of the benefit entails taking from the public, it is appropriate to reduce the scope of the constitutional obligation. Second, a policy that promotes just distribution internally among those receiving support, requires releasing the state from the need to support those who can take care of themselves. Third, as a matter of policy, the Income Support Law aspires to increase participation in the job market. Hence, the right to benefit from the last safety net will be available only to someone who is forced to live in existential deprivation, i.e., someone who, even with reasonable diligence, cannot integrate into the job market.

According to the Respondents, the ownership or use of a vehicle are expressions of the range of choice available to the Petitioners in the petitions before us. According to the argument, each and every one of the petitioners – and anyone else in a similar situation – has the option of choosing between ownership or use of a vehicle (which would lead to

denial of the benefit) and forgoing ownership or use of a vehicle (which would result in receiving the benefit). Therefore, anyone who, of his own free will, chose to maintain ownership of a vehicle or to continue to use the vehicle of another, cannot be said to have been forced to live in existential deprivation and, as such, the state is not obligated to provide him with the last safety net. This argument is based on the presumption inherent in the law – which we addressed above – whereby ownership or use of a vehicle has economic value that is estimated to be at least equivalent to the value of the benefit.

50. The argument of duress appears, at first glance, to be captivating, but a closer look shows that there is no connection between the argument and the Petitions before us. Indeed, no one disputes that the state should only be obligated vis-à-vis someone who does not choose on his own to live in existential deprivation. This argument in itself was not at all disputed by the parties to the petitions before us. The Petitioners, like the Respondents, believe that the state is only obligated to distribute its resources to those in a state of existential deprivation by force and not by choice. But they objected to the inclusion of the duress requirement as part of the definition of the right to a minimum dignified subsistence.

51. The requirement of duress is also accepted, in one form or another, in international law and, as argued by the Respondents, also in some of the countries that have established the right to a minimum dignified subsistencein their constitutions.

For example, in interpretive comment 12 to the Covenant on Social Rights, paragraph 15 states that "Whenever an individual or group is unable, <u>for reasons beyond their control</u>, to enjoy the right to adequate

food by the means at their disposal, States shall have the obligation to *fulfill (provide)* that right directly." (Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Art. 11), U.N. Doc. E/C/12/1999/5 (1999), at paragraph 15 (the first emphasis was added, the second emphasis was in the original, D.B.)). Even though the requirement of duress or "for reasons beyond their control" appears to be justified on a theoretical level, on a practical level the distinction between choice and lack of choice is not at all simple. The question of what constitutes circumstances that are the result of free choice and circumstances that are the result of duress and constraint is often complex. Where is the boundary between free choice and social structure? After all, the possibilities of choice are affected, *inter alia*, by the environment in which the person grew up – his family, economic and social status. This raises the question, which was also recognized by the Respondents, of how to identify the choices that should be decided in the autonomous sphere of the individual. These are complicated questions. They raise problems of various types, and they are not easy to decide. However, they do not arise in the matter before us because in the choice offered to the benefit applicants by the Respondents– vehicle or benefit – they do not attest to the existence or nonexistence of the element of duress. As we explained in detail above, according to the Respondents, and in accordance with the provisions of the Income Support Law, a vehicle serves as an estimation of income of at least the amount of the benefit. This means that the ownership or use of a vehicle proves that the benefit applicant has income in the amount of the benefit. As such, that benefit applicant is not eligible for the benefit because he cannot satisfy the income test set forth in the law, i.e., he is deemed to be someone whose income is higher than the threshold entitling him to the benefit. In that state of affairs, what is the advantage in the requirement of

choice, which ostensibly serves to prove the existence or nonexistence of duress? If the conclusive presumption (the problematic nature of which we addressed above) is correct, and a person has income in the amount of the benefit, what is the difference if he chooses a vehicle or he chooses to do without it? Either way, he will not be found eligible for the benefit because of the income test. And if the conclusive presumption is incorrect, i.e., the existence of a vehicle is not sufficient to estimate a person's income and is insufficient to attest to his neediness, then what is its relevance in determining eligibility for the benefit? Why is it used at all in the income test? The purpose is not to prohibit men and women from driving a vehicle. If that is the case, why force a person to make the choice and give up the use of a vehicle if the vehicle does not prove his neediness? Hence, the question of coercion in itself is not up for discussion in the petitions before us.

Does the violation of the right meet the conditions of the limitations clause?

52. Once we found that the provisions of section 9A(b) of the Income Support Law violate the constitutional right to a minimum dignified subsistence, we are compelled to examine whether the violation is lawful. That examination is conducted in accordance with the conditions set forth in the limitations clause in section 8 of the Basic Law: Human Dignity and Liberty, which states as follows:

Violation of rights

8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a

> proper purpose and to an extent no greater than is required, or by law as stated, by virtue of express authorization in such a law .

The provisions of the limitations clause express our constitutional concept, whereby human rights are relative and no human right is absolute. Therefore, the legislature may, under certain conditions, violate constitutional rights. These rights are set forth in the limitations clause and express the balance in our constitutional law, between the constitutional rights of the individual and the needs, interests or rights that may justify the violation of those rights.

53. Four cumulative conditions are specified in the limitations clause to examine the constitutionality of a norm that violates a human right, which is protected by the Basic Law: Human Dignity and Liberty. The first condition is that violation of the constitutional right is implemented under law or by virtue of express authorization in a law. The second condition is that the violating the law befit the values of the State of Israel. In that context, the intention is to the values of the State of Israel as a Jewish and democratic state, in accordance with the Purpose clause set forth in section 1A of the Basic Law: Human Dignity and Liberty (see HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department, Ministry of Labor and Social Affairs, IsrSC 60 (1) 38, 53 (2005)). The third condition specified in the limitations clause is that a violation of a constitutional right must be for a proper purpose. The fourth condition is that the violation must be to an extent no greater than required. If one of those four cumulative conditions is not fulfilled, it means that the

violation of the protected constitutional right is unlawful and the piece of legislation that establishes the violation of the right is unconstitutional. We will therefore turn to examining whether the violation of the constitutional right to a minimum dignified subsistence, which is caused by the provisions of section 9A(b) of the Income Support Law, meets the conditions of the limitations clause.

54. With regard to the first condition specified in the limitations clause, which requires that the violation of the constitutional right be "by law" – everyone agrees that section 9A(b) of the Income Support Law fulfills that condition. The Petitioners did not elaborate on the question of the existence of the second condition in the limitations clause – which requires that the piece of legislation befit the values of Israel as a Jewish and democratic state and, indeed, it does not raise any problems in the petitions before us.

55. The third condition established in the limitations clause is that the piece of legislation that violates a protected constitutional right must be for a proper purpose. The purpose of the law will be deemed proper if it is designed to promote human rights or realize an important social or public objective (see the Menahem Case at p. 264). In the framework of that test, the nature of the violated right and the extent of the violation, *inter alia*, must also be taken into consideration, because the more significant the violation of the right, the more important and vital the social objectives must be to justify it (see HCJ 6304/09 Lahav – Bureau of Organizations of Self-Employed and Businesses in Israel v. Attorney General (not yet published, September 2, 2010), paragraph 107 of the judgment).

56. The Respondents' position shows that the purpose of section 9A(b) of the Income Support Law is to ascertain that the state's support is given to those who need it, and to prevent a situation in which a person receives the income support benefit from the state when he actually has other income (including conceptual income). The Respondents wish to deduce the existence of that income from the fact that a person owns a vehicle or uses a vehicle on a regular basis and, therefore, he can ostensibly bear the ongoing costs entailed in the possession and use of the vehicle. The test of ownership and use of a vehicle are therefore designed to serve as an indirect estimate of the "real" income of an individual who claims that he is entitled to the income support benefit. The Respondents further argue that section 9A(b) of the Income Support Law leads to the fact that the support that a needy person receives from others (relatives or friends) will be channeled first and foremost into satisfying his existential needs, since Israeli law "does not encourage a reality in which the public treasury finances the existential needs of a person, thereby enabling others to finance other needs that are not of an existential nature" (affidavit in response at page 15).

57. In my view, section 9A(b) of the Income Support Law fulfills the requirement of the proper purpose. Preventing the abuse of the state support and welfare system and endeavoring to ensure that the state support is given only to those who need it the most are proper social purposes. Indeed, the state's financial resources are not unlimited and it may try to ensure that the financial support that it provides will reach those who need it to the greatest extent. This is particularly true when the state support system is financed from public funds and expresses the mutual involvement among individuals in the society. Mutual involvement has two aspects: alongside the public support of a needy

individual is also the legitimate requirement that individuals who have sufficient income for a minimum dignified subsistencedo not abuse the public support system and not become a burden on other individuals in the society. Moreover, as explained above, the calculation of the ownership or use of a vehicle for the purpose of testing a person's income is legitimate and there is nothing wrong, in principle, with weighting those characteristics in the income test established in the Law. The question is whether the assessment of income from ownership or use of a vehicle is implemented in a manner that does not violate, to a greater extent than necessary, the right to a minimum dignified subsistence. We will now address this issue, which is the pivotal question that arises at this stage of the constitutional examination.

58. The fourth condition for examining the constitutionality of the provision of a law that violates a constitutional right, which is protected by the Basic Law: Human Dignity and Liberty, is that the right be violated "to an extent no greater than is required." This condition deals with the proportionality of the violation of the constitutional right. The proportionality requirement examines the relationship between the proper purpose of the Law, which has been found to befit the values of the State of Israel, and the means chosen by the legislature for the purpose of implementing that purpose. The proportionality of the violation of the constitutional right is established according to the three subtests that have been recognized in the case law of this Court. Only if the violation of the constitutional right meets the three subtests will the violation of the constitutional right be deemed a proportional violation.

The first subtest in the cause of proportionality is the test of the rational connection. This test examines whether the means chosen by the

legislature does, indeed, fulfill or contribute to fulfilling the purpose of the provision of the law whose constitutionality is in question. The second subtest is the test of the means with the lesser violation. This test examines whether the means that violates the constitutional right to the smallest degree was chosen among all the possible means for fulfilling the legislative purpose. The third subtest is the test of proportionality "in the narrow sense." This test examines the existence of a proper ratio between the benefit arising from the piece of legislation that violates the constitutional right, and the damage caused by the violation of that right (see, e.g.: the Movement for Quality Government Case at p. 706-708; the Gaza Coast Case, at p. 550).

It is also important to note that the use of the three subtests described above does not necessarily lead to a situation in which the legislature is entitled to choose only one means (if any) to fulfill the (proper) legislative purpose. Generally, the legislature can choose the most suitable means for fulfilling that purpose from among a variety of proportional means. The range of possible choices available to the legislature in these circumstances is called the "range of proportionality," and the Court will intervene in the legislature's decision "only when the means chosen by him deviates significantly from the boundaries of the legislative maneuvering space available to him, and it is clearly disproportional" (see HCJ 2605/05 Academic Center of Law and Business, Human Rights Division v. Minister of Finance, paragraph 46 of my judgment (to be published, 19.11.2009) hereinafter: the Prisons Privatization Case).

59. Is the legislative means chosen by the legislature in section 9A(b) of the Law – a conclusive presumption whereby the ownership or use of a vehicle is equivalent to income in the amount of the income support benefit – within the range of proportionality?"

First we will analyze the first subtest of the proportionality, which is the rational connection test, in which we must examine whether section 9A(b) of the Income Support Law fulfills the legislative purpose for which it was enacted. It is important to note that this test does not require that the means chosen will fulfill the legislative purpose in full. It is sufficient that there is a "genuine correlation" between the means chosen and the purpose (see: the Movement for Quality Government Case at p. 508; HCJ 1030/99 MK Oron v. Speaker of the Knesset, IsrSC 56 (3) 640, 666 (2002)). Similarly, absolute certainty that the means chosen will fulfill its purpose is not required, but on the other hand, just a slight or theoretical probability cannot suffice either (see: the Adalah Case, at p. 323). The rational connection test is based to a large extent on the factual basis available to the legislature, as well as life experience and plain common sense (see Aharon Barak, Proportionality in Law – Violation of the Constitutional Right and its Limitations, 382 (2010) (hereinafter: Barak – Proportionality)).

As stated, the legislative purpose of section 9A(b) is to ensure that the income support benefit is given to those who really need it and not to those who have sufficient income or the ability to generate such income. Can the conclusive presumption fulfill that purpose? In other

words, can the ownership or use of a vehicle serve as a suitable estimate for identifying the individuals who have income (including potential income) aside from the income support benefit and, therefore, their minimum dignified subsistence may be fulfilled even without the benefit? The answer to this question is mainly affirmative however, it is not without some doubts. Indeed, the use of a vehicle is generally accompanied by significant expenses, even when the vehicle in question is old and also when the amount of travel is significantly less than the average in Israel. We can assume that in view of the significant expenses entailed in maintaining a vehicle (including insurance, gasoline and ongoing maintenance), the ownership or use of a vehicle may serve as a certain indication of the fact that the person has additional sources of income aside from the income support benefit or, alternatively, that that person is receiving assistance from others which is also equivalent to income.

60. Therefore, the very ownership or use of a vehicle as an estimate of income and neediness is not arbitrary and unreasonable. The conclusive presumption set forth in section 9A(b) is a test that can fulfill the legislative purpose, if only because there is a "genuine correlation" between it and the purpose, even if there is no “absolute certainty” that the presumption has fulfilled its purpose. However, we cannot ignore the fact that there may be cases in which the ownership of a vehicle, and particularly the use of a vehicle by someone who is not its owner, does not attest to income that is equivalent to the income support benefit, for example, in circumstances in which the cost of maintaining the vehicle is lower than the rate of the income support benefit. The arguments of the respondents themselves indicate that certain circumstances are extremely possible: according to the calculation appearing in the affidavit in

response, the average monthly cost of maintaining a used vehicle that travels 10,000 km a year (as at October 1, 2008) is NIS 1,161 for a vehicle with a 1300 mL engine, and NIS 1,324 for a vehicle with a 1600 mL engine. In contrast, the rates of the income support benefit on the same date range between NIS 1,537 for an individual under the age of 55, to NIS 2,574 for a couple under the age of 55 with two children. The last update notice of the Respondents indicates that the benefit rates are even higher now – between NIS 1,632 and NIS 2,044 for an individual, and between NIS 2,447 and NIS 3,549 for a couple with a child (the amounts are similar to those for a single parent with a child). Up-to-date data on the cost of using a vehicle were not provided. Even though we can assume that the cost of maintaining the vehicle has also increased in the time that has passed, the data that were provided shows that there may be a very significant gap between the cost of maintaining the vehicle and the amount of the income support benefit (which ranges between approximately NIS 200 for an individual who possesses a vehicle with 1600 mL engine, to NIS 1,400 for a couple with two children who possess a vehicle with a 1300 mL engine). This does not justify deeming maintenance of a vehicle, in and of itself, as attesting to income equivalent to the benefit. To this we must add the argument that we addressed above, that there may be cases in which the option given to the benefit recipient – to use a vehicle owned by another person – does not mean that the vehicle owner has the ability to assist the benefit recipient in other ways.

61. Nevertheless, when it was found that the use of a vehicle can constitute a certain estimate of income, and because the rational connection test does not require complete fulfillment of the legislative purpose, and it also recognizes the possibility of the existence of some

uncertainty with regard to the extent of fulfilling the purpose, I have reached the conclusion that in the circumstances of the matter, the provision in section 9A(b) of the Income Support Law intersects with the rational connection test (see Barak – Proportionality, at pp. 380-382), even if barely so. However, the doubts that arise about the correlation between the means and the purpose will accompany us to the next test of proportionality – the test of the means with the lesser violation of the right.

62. The function of the second subtest of proportionality is to examine whether, among all the possible means for fulfilling the legislative purpose, the means that violates the constitutional right the least was the one that was chosen. The comparison is conducted with regard to other means that might also fulfill the legislative purpose. In this context, it is important to note that:

> The second subtest of proportionality does not merely examine whether there is a measure that violates the protected constitutional right to a lesser degree, but it requires us to examine whether that less harmful measure realizes the legislative purpose to the same degree or to a similar degree as the measure chosen by the legislature (see the Prisons Privatization Case, paragraph 46 of my judgment)

Moreover, the obligation imposed upon the legislature as part of the second subtest is not to choose a means that is absolutely the least harmful. The legislature must choose – among the reasonable options at his disposal for fulfilling the legislative purpose – the option that violates the constitutional right to the smallest extent. (see the Adalah Case, at pp. 324-325). In the case before us, the provisions of section 9A(b) of the Income Support Law do not satisfy this test for the simple reason that

establishing a conclusive presumption whose result is the absolute denial of the income support benefit to someone who needs it for a minimum dignified subsistence, in circumstances in which means can be used that violate the right to a lesser degree (if at all) – is not proportional.

63. As we have seen above there are individuals who fall into the realm of the conclusive presumption established in section 9A(b) even though the (proper) purpose of the section – preventing payment of the benefit to someone who has access to sufficient means to ensure a minimum dignified subsistence– does not apply to them. Those individuals also do not comply with the exceptions established for the presumption set forth in section 9A(b) of the Law. In the absence of suitable exceptions, establishing a conclusive presumption in which the ownership or use of a vehicle is equivalent to income that is at least in the amount of the income support benefit, does take into consideration the individuals who make use of a vehicle that is of less value – sometimes significantly less – than the value of income in the amount of the benefit. This is the case either because their expenses for maintaining the vehicle are less than the benefit to which they would be entitled if not for the vehicle, or because the assistance they are receiving from others by means of use of the vehicle cannot be converted into other assistance that would ensure their minimum dignified subsistence. With regard to those individuals, the question arises as to whether the purpose of the legislation in question could have been fulfilled in other ways, which violate the constitutional right to a minimum dignified subsistenceto a lesser extent.

64. It appears that the answer to that question is affirmative. There are several reasonable possibilities that could fulfill the legislative

purpose underlying the provisions of section 9A(b) of the Income Support Law, with a lesser violation, and even no violation at all, of the constitutional right to a minimum dignified subsistence. For example, a non-conclusive presumption could have been established that would give a benefit applicant, who possesses or uses a vehicle, the opportunity to prove that his ownership or use of vehicle does not attest to the fact that he has other income (or potential income). Alternatively, a mechanism that assesses the value of the use of a vehicle could have been established (when it does not involve a vehicle owned by the benefit recipient) according to the frequency of its use, and reducing the rate of the benefit accordingly and in a graduated manner.

Another possibility available to the legislature (when the matter involves a vehicle owned by the benefit recipient) is to establish a hierarchy that takes the vehicle's value into account, so that the benefit would be denied only to someone whose vehicle exceeds a certain value which, together with the ongoing maintenance expenses, can reflect the financial status of the benefit recipient. This was done, for example, by the legislature in Germany. In the German welfare system, there are a number of social grants. The social grant that is conceptually closest to the income support benefit in Israeli law is given to someone who has the potential to return to the job market, and it is granted after a year in which the recipient is given a benefit that is close to the unemployment benefit provided in our system. That benefit – which is called "lack of employment benefit II" in German law – is established in The Second Book of the Code of Social Law (SGB ii). In accordance with German law, in making the decision on granting this benefit, all the property in the individual's possession must be estimated. The grant is given to anyone whose property value does not exceed the amount specified in the

law, which depends on the age of the benefit applicant (which ranges between €3,100 and €9,900). However, German law establishes that there are types of property that are not deemed part of the total property calculated for the purpose of granting the benefit. Among these assets are a "reasonable vehicle." In 2007, the German Supreme Court, which deals with social welfare matters, ruled in Bundessozialgericht, AZ: B 14/7b AS 66/06, 06.09.2010 that a vehicle whose cost does not exceed €7,500 constitutes a "reasonable vehicle," which is not taken into account in estimating the amount of the grant. When the value of the vehicle is higher than that amount, the difference between the value of the vehicle and the reasonable amount is calculated as part of all the property that is weighted in the grant evaluation. The reason for this arrangement, as indicated in German case law, is the importance ascribed to ownership of a vehicle as a means for promoting the individual's return to work and leaving the cycle of neediness. For that reason, the individual must be given the possibility of possessing a vehicle of reasonable value without losing the grant. It should be noted, however, that the attitude to a vehicle in the provision of other grants under German law changes according to the purpose of the grant (see, e.g., in this context, the judgment of the Saxon Administrative Supreme Court in the case Sächsisches Oberverwaltungsgericht, AZ: 4 D 228/09, 29.06.2010). Another possibility in this matter was raised by the Petitioner in HCJ 7804/05, who proposed offsetting the value of the benefit produced by the vehicle from the income support benefit according to the rate at which the benefit is deducted under the Income Tax Ordinance.

In the nature of things, the aforementioned possibilities are only possible examples. They are not an exhaustive solution. We can even assume that within the legislative maneuvering space available to the

legislature, there are other arrangements that could fulfill the legislative purpose, while violating the constitutional right to a minimum dignified subsistenceto a lesser extent. The main point is that these alternative means would also have fulfilled the proper purpose of preventing payment of a benefit to a person who has other income (including potential income) that ensures his minimum subsistence needs, while violating the protected constitutional right to a lesser extent. In this matter, I would like to emphasize the fact that the state refrains from providing data, statistical or otherwise, to show that other modes of examining, estimating and quantifying are not possible and cannot replace the conclusive presumption. Thus, no information was presented to us about the estimated costs of an arrangement for individual examination or arguments about other arrangements that were examined and ruled out due to one shortcoming or another. All that was argued was that the state is not able to supervise the individual use of vehicles – at the same time that extensive use is now made of private investigators who, in effect, are supervising the scope of vehicle use.

65. In this context, I cannot accept the Respondents' argument that the fact that the basis for usage is not defined in the Law allows for flexibility that blunts the conclusive presumption. To my mind, the absence of the definition in the Law neither adds to nor detracts from this matter. If we say that the Labor Courts are free to interpret the term "use" – and even if we were to interpret the term in the framework of the petitions before us – that would not change the fact that from the moment a person is found to be using a vehicle, he is deemed to have income in the amount of the benefit. The problem, as I noted above, is not in quantifying the income from ownership or use of a vehicle. The problem lies in the fact that the ownership or the use – in accordance with the

definition that was accepted by the Labor Courts – employ that same conclusive presumption whereby the eligibility of a benefit applicant is denied because he is deemed to have income equivalent to at least the amount of the benefit. Moreover, we cannot except the Respondents' argument that section 9A(b) should not be deemed to have established a conclusive presumption because it specifies exceptions. Indeed, we welcome the fact that the legislature saw fit to add additional exceptions to the list of exceptions in the Law during adjudication of the petitions before us, but their applicability remains limited. The exceptions apply only to someone who is compelled to utilize a vehicle because of medical necessity or someone who is in the work force (who was recently dismissed) and is found eligible for payment of income support. As noted by the Petitioners in HCJ 3282/05, even if the exceptions were valid before their petition was filed, except for Petitioner 4, none of them would have been included in them because even the Petitioners who were working at that time did not meet the income threshold required by the exceptions in order to be eligible for exemption from section 9A(b).

66. It seems that the case before us further demonstrates the problem inherent in applying universal arrangements to cases in which eligibility for any state assistance is denied. Universal arrangements, by their very nature, do not take into account the individual status of each and every person. They are based on statistical tests and an assessment that is applied in a uniform manner without distinction. They are inherently problematic because they can ignore the circumstances of concrete cases. The Court has addressed this problem more than once. Thus, in the case that adjudicated a universal arrangement, which denied the candidacy of anyone older than 35 for police service in the Israel

Prison Service and in the Customs and VAT Division, the following was ruled:

> The employer will find it difficult to satisfy the 'smallest possible harm test' if he does not have substantial reasons to show why an individual examination will prevent the attainment of the proper purpose that he wishes to achieve (HCJ 6778/97 Association for Civil Rights in Israel v. Minister of Public Security, IsrSC 58 (2) 358, 367 (2004); and the further HCJ 5627/02 Ahmed Saif v. Government Press Office, IsrSC 58 (5) 70, 77 (2004); HCJ 2355/98 Israel Stamka v. Minister of Interior, IsrSC 53 (2) 728, 779 (1999); IsrSC 3477/95 Israel Ben Atiya v. Minister of Education, Culture and Sports, IsrSC 49 (5) 1, 15 (1996); the Adalah Case, at p. 325-330).

Indeed, there are cases in which an individual examination will not attain the legislative purpose. In such situations, there is no choice but to establish a universal arrangement. However, that is not the case in the matter before us. In the Income Support Law, the legislature, was aware of the importance of establishing a clear and individual mechanism. That is appropriate for the importance of the right in question, and the pivotal nature of the income support benefit in protecting the right (cf. in a closely related matter, which dealt with the denial of food stamps to the needy, the importance ascribed by the United States Supreme Court to reducing the scope of the violation and eliminating the universal arrangement: United States Department of Agriculture v. Moreno, 413 U.S. 528, 543 (1973); and see further: Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 899 (1990); Aptheker v. Secretary of State, 378 U.S. 500, 504, 515 (1964)). Indeed, the mechanism for examining income, which is established in the

Law, ensures that a meticulous individual examination will be conducted for each person who claims an income support benefit. Since that is the case, and an individual examination is conducted in any event to examine the other components of a person's income, I am not convinced that there is any justification for transitioning to a universal arrangement precisely with regard to the ownership or use of a vehicle.

67. The state further argues that the comprehensive nature of the arrangement is justified, since it is difficult to quantify the cost of vehicle usage on an individual basis, because it cannot supervise the vehicle usage habits of each benefit applicant. We cannot make light of that problem. It can justify less harmful violations of the constitutional right, such as establishing a hierarchy for quantifying – even if imprecisely – the value of the vehicle usage, or establishing a non-conclusive presumption that transfers the burden of proof to the benefit applicant, to prove the exact nature of the use he makes of the vehicle. Indeed, a more precise estimation can be made – albeit not absolutely precise – of the value of the vehicle usage, in a way that will make it easier for the state to implement the income test without absolutely denying the individual's right to a minimum dignified subsistence, as is now done through the conclusive presumption established in section 9A(b) of the Law. The Respondents did not provide us with data showing that the problem they indicated cannot be resolved by alternative, less harmful means and, as such, there is no choice but to conclude that the universal arrangement that is expressed in the conclusive presumption is unjustified and the second test of proportionality is not satisfied in the petitions before us.

68. Therefore, the conclusive presumption established in section 9A(b) of the Income Support Law, which leads to full denial of the

benefits to anyone who possesses or uses a vehicle beyond the limited and non-exhaustive exceptions delineated in the Law, is an inflexible and unsuitable means that unnecessarily violates the constitutional right to a minimum dignified subsistence. Once we found that the provision in section 9A(b) of the Income Support Law does not satisfy the second subtest of proportionality, it is sufficient to determine that its violation of the right to a minimum dignified subsistenceis not proportional and, therefore, does not meet the conditions of the limitations clause of section 8 of the Basic Law: Human Dignity and Liberty.

69. Nevertheless, and above and beyond the requirement, we will also address the third subtest of proportionality, which is the test of proportionality in the narrow sense. This test centers on the question of the ratio between the public benefit produced by the piece of legislation that violates the constitutional right, and the damage caused to the constitutional right by that same piece of legislation (see the Prisons Privatization case, paragraph 50 of my judgment). This is a test of moral balance that places the clashing values against one another and balances them by their weight (see the Adalah Case at p. 331).

In the circumstances of the case before us, the state argues that the public benefits from the savings in state resources by simplifying the work of the welfare institutions and preventing the provision of public monies to those who are not entitled to the benefit and wish to defraud the welfare institutions. Opposite that is the damage caused to all those who are in need of the income support benefit for the purpose of fulfilling their right to a minimum dignified subsistence, but do not receive it because of the conclusive presumption. This is an extremely serious violation of the core of the right of someone who, in any case, is

at the bottom of the socioeconomic ladder and needs the benefit as the last safety net against starvation and poverty. Under those conditions, it is hard to accept that the savings alone – which are partially attainable with less harmful means – exceed the harm caused to individuals whose right to live with minimum human dignity is violated. Indeed, we cannot deny that this means streamlines the work of the welfare services – universal arrangements always tends to be simple to apply and to implement, compared with individual rules of examination. However, the ends do not justify the means. As I have already noted in the past, " 'efficiency' (whatever the meaning of this concept is) is not a supreme value, when we are dealing with a violation of the most basic and important human rights that the state is obliged to uphold (see the Prisons Privatization case, paragraph 55 of the judgment). This is true, in general and in particular, when we are dealing with examining a person's income, which is implemented in any case – as noted – on an individual basis.

For all the above reasons, the provision in section 9A(b) that leads to denial of the income support benefit to a person who possesses or uses a vehicle and does not comply with one of the exceptions established in section 9A(b) – is not proportional and, therefore, does not satisfy the test of constitutionality.

70. As we have reached the finish line, and we have established that section 9A(b) cannot stand because of the disproportional violation of the right to a minimum dignified subsistence, there is no more need to discuss the argument of discrimination made by some of the Petitioners. We will also note that we do not accept the argument on the merits because there is a relevant difference between the group of income

support recipients and the group of income supplement recipients, which is based on the nature and purposes of the Law.

The remedy

71. We have found that the provision in section 9A(b) of the Income Support Law, whereby ownership or use of vehicle must be deemed income that is no less than the amount of the benefit, disproportionately violates the right to a minimum dignified subsistence. Denying the last safety net required to ensure a minimum dignified subsistenceto those who need it the most, and in a universal and comprehensive manner, contradicts the Basic Law: Human Dignity and Liberty. This calls for a declaration of the invalidity of section 9A(b) of the Income Support Law.

In the nature of things, in view of the fact that the state will have to formulate an alternative arrangement in place of the arrangement whose repeal we are ordering, section 9A(b) should not be repealed immediately and it is advisable to give the legislature time to formulate a new arrangement. In view of the importance of the right in question and the mortal blow dealt, in the meantime, to someone in need of the income support benefit as the last safety net, who is not receiving it, that timeframe cannot be prolonged. Therefore, I propose to my colleagues that we order that the declaration of repeal go into effect on September 1, 2012, six months from the rendering of our judgment, and that it be effective from that date onwards. It should be noted that the new arrangement, whatever it may be, can be established in principle by authorization in primary legislation, but the individual arrangements can also be established in secondary legislation. In the interim, until a new

statutory arrangement goes into effect, the NII would do well to establish interim arrangements that take into account the rulings in this judgment, including applying a narrow interpretation to the term "use" that is set forth in the Law.

72. Before concluding, I would like to note that the Petitions before us were conducted at the level of the principles. We did not address the individual issues of the Petitioners and, in any case, we are not the appropriate judicial forum for such an examination, which requires proceedings from the outset, both before the NII and before the competent courts. However, considering the battle conducted by the Petitioners over many years to change the legal situation, and in view of the result they have achieved, it is fitting to enable the Petitioners, insofar as the issue is still relevant, to resubmit their cases to the NII. This is especially true with regard to the Petitioners whose eligibility was denied retroactively.

73. In conclusion. I propose to my colleagues that we rule that the order nisi become an order absolute in the sense that we will declare the repeal of section 9A(b) of the Income Support law due to its unconstitutionality, which will go into effect within six months of this day, on September 1, 2012.

The President

Justice M. Naor

I agree that an *order absolute* should be issued in the format proposed by the President. In my view as well, the difficulty lies in the fact that the presumption established in section 9A(b) of the Income Support Law,

5741-1980, is a conclusive presumption that leads to full revocation of the benefit to the owners or users of a vehicle (except for the exceptions listed in the Law). Indeed, the ownership or use of a vehicle can constitute an indication of one's financial situation. So can a high standard of living that is *prima facie* inconsistent with the declared sources of income (cf. in connection with bankruptcy: CA 404/87Vasing v. Verker, IsrSC 44 (2) 593 (1990)). Indeed, a conclusive presumption facilitates a fast and simple decision on the benefit application by the authority. That is its advantage. However, a conclusive presumption may violate the constitutional right which, in my opinion, is the most important of the constitutional rights – the right to a minimum dignified subsistence. A solution for the violation – even if it is a violation of the constitutional right in only some of the cases – must be found. The solution may lie in reversing the burden. There may be other solutions that are not necessarily based on the ownership or use of a vehicle. The solutions that must be explored are those that would examine the true status of someone who wishes to receive a benefit without using the fictions inherent in conclusive presumptions, which do not always reflect the actual situation.

Justice

Justice U. Fogelman

I concur with the comprehensive judgment of my colleague, President D. Beinisch, and the comments of my colleague, Justice M. Naor.

I concur with the ruling of my colleague, the president, and her reasoning, that there is no practical reason to apply a different model of constitutional review to the social human rights that are established in the Basic Laws, as distinguished from other basic rights.

No one disputes the importance of the distinction between the various stages in the constitutional review model. The first stage, on which the state focused its arguments in the context of the Knesset's legislation before us, which is under constitutional review, is the stage that examines the existence of a violation of a constitutional right that is protected in the Basic Law: Human Dignity and Liberty. In the second stage, the protection provided by the Basic Law with regard to that violation is examined by means of the tests in the limitations clause. I accept the state's position that we must avoid over-expanding the sphere of the constitutional right. A sweeping expansion of the boundaries of the constitutional right in the first stage, and "automatic" transition to the limitations clause tests whenever there is a claim that a piece of legislation violates it, may lead, in the final analysis, to erosion of the protection granted by the Basic Laws (cf.: CA 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village, IsrSC 49 (4) 221, 471 (1995); HCJ 1715/97 Israel Investment Managers Association v. Minister of Finance, IsrSC 51 (4) 367, 419 (1997)). However, that is not the case before us.

As noted by my colleague the president, this Court has already ruled that the right to dignity, which is established in sections 2 and 4 of the Basic Law: Human Dignity and Liberty, also extends to the right to a minimum dignified subsistence. I also believe that said right is at the core

of the constitutional right to dignity. I also believe that the arrangement established in section 9A(b) of the Income Support Law, 5741-1980 violates the right to a minimum dignified subsistence, since it also leads to the categorical denial of the income support benefit to someone who does not have sufficient income for minimum subsistence. I also believe that the arrangement established in that section (the conclusive presumption that the ownership or use of a vehicle is equivalent to income in the amount of the benefit) is not proportional, since the purpose of the law can be attained by a means with a lesser violation, such as a presumption that is not conclusive. Please note: this does not rule out the state's position that the ownership of a vehicle and, in the appropriate cases, also the use of a vehicle, may constitute a reliable indication of a person's economic status. However, in establishing a universal arrangement by way of establishing a conclusive presumption that does not enable the authority to thoroughly examine the facts and prevents a benefit applicant from proving that ownership or use of the vehicle is not equivalent to income in the amount of the benefit in the special circumstances of his case, disproportionately violates the right of some of the benefit recipients to a minimum dignified subsistence.

For those reasons, I agree that the order nisi should be made absolute, as proposed by my colleague the president.

Justice

Justice E. Arbel

Human dignity is a complex concept that encompasses many and varied values – some of a physio-existential

> nature, and some of an emotional-spiritual nature. Violation of human dignity may find expression in emotional humiliation and contempt, and it may find expression in denying physio-existential needs, without which a person cannot subsist with dignity. Take away the roof over a person's head, his food, water and basic medical treatment, and you have taken from him the ability to exist with dignity and to fulfill his existence as a human being (CA 9535/06 Abu Musa'ed v. Water Commissioner(unpublished)).

1. In the petition before us, a question was raised regarding the constitutionality of the arrangement established in section 9A(b) of the Income Support law, 5741-1980, 991 LSI 30 (1980) (hereinafter: the Law or the Income Support Law), which states that anyone who owns or uses a vehicle is deemed to have income in the amount of the income support benefit and, therefore, is not eligible for the benefit. At the core of this issue is the question of whether this section violates the constitutional right to a minimum dignified subsistence.

I concur with the comprehensive judgment of my colleague, the president, on the constitutional aspect therein and her determination that section 9A(b) of the Law disproportionately violates the constitutional right to a minimum dignified subsistence, for the reasons she cited. If I have seen fit to add my own words, it is only on a number of points.

2. I agree with my colleague, the president, that the methodology of the constitutional review of socioeconomic rights should be no different

from that utilized by the Court to examine other basic rights, as well as the fact that there is no reason to narrow the judicial review of legislation that affects the right to a minimum dignified subsistence, as distinguished from other basic rights.

3. The source of the right to a minimum dignified subsistencelies in the nucleus of the basic right to human dignity which was given constitutional recognition in the Basic Law: Human Dignity and Liberty. The right to a minimum dignified subsistenceis found, as stated by the president, in the core and nucleus of human dignity. In my opinion, the right to a minimum dignified subsistenceis rooted deeply in the core of the constitutional right to dignity – to human dignity:

> Indeed, in Israeli law, it is becoming an entrenched view that that human dignity as a constitutional right also encompasses the right to minimum human subsistence, which includes shelter, basic food and elementary medical treatment, and that the state is obligated to ensure that a person's standard of living does not drop below the threshold required to live with dignity (AdminA 3829/04 Yisrael Twito, Chairman, Mikol Halev – Kikar Lechem Association for Reducing the Social Gap in Israel v. Jerusalem Municipality, 59(4) IsrSC 769, 779 [2004]).

The Income Support Law is a central means, among other welfare laws, which is designed to ensure a minimum dignified subsistence. The purpose of the Income Support Law is to ensure that every person and family in Israel, who are unable to provide themselves with the income required for subsistence, will receive the resources to supply their vital needs (see the Income Support Bill, 5740-1979, para. 2). The insertion of section 9A(5) and sections 9A(a) and 9A(b) in the

Law leads to the fact that anyone who owns or uses a vehicle is not eligible for the income support benefit, because his "income" from the vehicle is deemed to be in the amount of the benefit that would have been paid if he did not own or use a vehicle. The result is that the very ownership or use of a vehicle is sufficient to lead to the denial of the benefit. The assumption is that the income of the applicant is high and attests to the fact that he does not need the safety net provided by the state. I agree with the president that this arrangement arbitrarily violates the right to a minimum dignified subsistence. The unequivocal rule under which anyone who owns or uses a vehicle is not entitled to an income support benefit, with no connection to the question of whether that person does, indeed, have income that would ensure his right to a minimum dignified subsistence, is arbitrary and is not based on an individual examination suited to the status of the applicant. Like the president, I believe that there may be cases in which the use of a vehicle does not necessarily indicate the fact that that person has independent income, due to which he is not eligible for the last safety net provided by the state, in whole or in part. That is the case when the vehicle serves as a tool for producing a certain income, but does not come under the exceptions in the Law, and when a person makes use of a relative's vehicle and bears only small expenses, when his relatives cannot help him in an alternative manner and in another way. As such, I concur with the conclusion that this is an expansive threshold condition which results in a disproportional violation of the right to a minimum dignified subsistenceof the person who is denied the benefit.

4. My colleague, the president, criticizes the sharp division between civil and political rights and social and economic rights, between a "positive" right and a "negative" right. I agree with her that the

division is not dichotomous and, in any case, the two types should be recognized as supra-constitutional rights in a democratic welfare state. Indeed, in contrast to the civil-political rights, the social rights pertain primarily to the conditions of a person's subsistence on the socioeconomic-cultural level. However, there is an inseparable connection between them because without the existence of social rights, a person would find it extremely hard to exercise his civil rights. Without food, water, housing, healthcare and education, it would be difficult for the individual to give content and true meaning to his civil rights. He would have trouble exercising the right to vote, to freedom of expression, to freedom of occupation and the right to property.

5. Indeed, insofar as the matter involves exercising rights in a manner that requires the allocation of substantial resources, the need for restraint has been recognized by the Court. Thus it was ruled that when a case involves matters of budgetary policy connected to the state economy, the Court acts with great restraint in its judicial review for two main reasons: one – judicial interference in economic policy may have real ramifications for the stability of the economy and its proper functioning. Second – the issue of establishing economic policy is the responsibility of the public authorities, whose job it is to formulate it on the basis of their expertise and the relevant data in their possession, and they bear the public responsibility for the results (HCJ 4769/95 Menahem v. Minister of Transport 57(1) IsrSC 235, 263 [2002]; HCJ 4885/03 Israel Poultry Farmers Association v. The Government of Israel 59(29) IsrSC 14, 60 [2004]; HCJ 6407/06 Doron, Tikotzky, Amir, Mizrachi, Attorneys at Law v. Minister of Finance, para. 66 (unpublished, Sept. 23, 2007)).

The restraint that the Court imposes upon itself in these matters stems from the perception that the distribution of the state's resources must be arranged comprehensively by the legislator, who has the required lateral view for handling such issues. A comprehensive arrangement by the legislator is also required in the matter of the social rights that have not yet been established in a Basic Law that enjoys a constitutional status. Recognizing these rights in the form of a Basic Law is particularly important in a democratic state that views itself as a welfare state and endeavors to ensure human subsistence to every person and a minimum dignified subsistencewithin the concept of "human dignity" (Ayala Procaccia, Supreme Court Justice Emeritus, "Social Rights in Law" delivered at the Knesset conference "Basic Law: Social Rights, Social Justice in the Knesset?" to mark the International Human Rights Day (Dec. 6, 2011), http://www.acri.org.il/he/?p=18275).

6. Social rights are recognized sporadically and gradually, either by way of the ordinary legislation of rights, which only deals with certain rights, or by way of case law, which develops slowly and randomly, in dependence on whether a petition is filed and merits recognition of a social right (see, e.g., HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance (unpublished, Dec. 12, 2005); CA 4905/98 Gamzu v. Yeshayahu 55(3) IsrSC 360 [2001]; CA 9535/06 ; HCJ 11044/04 Solomatin v. Minister of Health (unpublished, Jun. 27, 2011); HCJ 1181/03 Bar Ilan University v. National Labor Court (unpublished, Apr. 28, 2011); HCJ 3071/05 Louzon v. Government of Israel (unpublished, Jul.

28, 2008)). This situation still leaves dark pockets of poverty, hardship, discrimination and a lack of equality in the allocation of state resources.

7. With the aforementioned in mind, the Court cannot refrain from conducting a constitutional review of the violation of these rights, in order to protect those who need it. The Court deems itself obligated to protect the rights of those who come through its gates, when those rights are violated by existing legislation. The Petitioners who assembled in the petitions before us are downtrodden and shoulder the burden of subsistence. They are at the bottom of the socioeconomic ladder and in need of the benefit as the last safety net against hunger and poverty. Because of some use or other that they make of a vehicle, usually not their own vehicle, the benefit is denied them. The result at which we have arrived in our judgment is, first and foremost, a response to their cry for help and the cries of others like them. We are not ignoring the fact that there are other groups in society in distress, aside from the petitioners before us, who are living below the poverty line at an even lower rung on the ladder. However, the matter of the petitioners is the one that has come before us and we must provide a response to it.

The distress of one group cannot infringe and obscure the needs of another group. The Court can only address the matters that come before it. It does not choose these matters and does not catalog them. For that reason, *inter alia*, the aforementioned rule was established, regarding the restraint practiced by the Court when it discusses the distribution of resources to the various strata in society. However, in cases in which the Court discovers a disproportional violation of the social rights of a particular group, in a manner that undermines the minimum subsistence

conditions of that group, it is obligated to intervene, notwithstanding the restraint to which it usually subjects itself. That is the case before us.

In conclusion, I would emphasize again that it is important to ensure human subsistence to every person. Recognition of social rights in the form of a Basic Law is the only way to lay the proper normative foundation for providing basic constitutional protection for those rights, and for clarifying their supreme status and the obligation to honor them. That should be done sooner rather than later.

Justice

Justice E. Hayut

The right of every person to a minimum dignified subsistenceis, indeed, a social right that is enumerated with the most important constitutional rights. The judgment of my colleague, the President, analyzes with wisdom and sensitivity the issue that has been set before us in these petitions with regard to this right, and I concur with what is stated therein. In paragraph 35 of her judgment, my colleague, the president, quotes from the pertinent and apposite words written in this context by Justice Y. Zamir at HCJ 164/97 Conterm Ltd. v. Ministry of Finance, Customs and VAT Division, et al., IsrSC 52 (1) 289, 340 (1998), when he said "...Every person must have enough, so that he or she can enjoy human rights, in actuality and not just by law." That message is echoed in a poem by poet Dalia Ravikovitch, "Declaration for the Future," which I have seen fit to present here:

Declaration for the future

A person, when he's hungry
or insecure,
he will make compromises,
he will do things
he never dreamt of in his life.

Suddenly he's got a crooked back,
and what happened to his back
that it got so crooked?
Loss of pride.
And his smile is frozen
and both hands filthy,
or so it seems to him,
from coming in contact with moist objects
whose touch he cannot escape.

And he has no choice,
or so it seems to him,
and it's a marvel
how for years he'll forbear,

and merely record the annals of his life
within,
year after year.

Therefore, the result, according to which an order absolute will be issued in these petitions in the version proposed by my colleague, the President, is accepted by me

Justice

Justice E. Rubinstein

A. I concur with the opinion of my colleague, the president, and the comments of my other colleagues.

B. Minimum subsistence is the core of the Income Support Law, 5741-1980. It represents a worthy social concept whereby the public spreads a safety net at the feet of any person in Israel so that he will not fall into the shame of hunger. The explanation to the law (Bills, 5740, 2), noted by the president, states that the purpose is "to ensure that every person and family in Israel, who are unable to provide themselves with the income required for subsistence, will receive the resources to supply their vital needs." This concept has been well entrenched in Jewish tradition throughout the generations and the State of Israel, as a Jewish and democratic state, would not be able to adhere properly to its values if it had not designed such a safety net. It integrates into the social security system which is structured in the National Insurance Law (Consolidated Version), 5755-1995, and in other extensive social legislation. It is clearly one of the values of the State of Israel – the "value of the human being," which is mentioned in section 1 of the Basic Law: Human Dignity and Liberty – and it is found in the sphere of charity, from those same "foundations of liberty, justice and peace in light of the vision of the prophets of Israel," on which the state was founded according to the declaration of independence. Even without my citing references, no one would dispute the fact that someone who does not have enough for minimum subsistence has lost his dignity as a person, and he comes under sections 2 and 4 of the Basic Law: Human Dignity and Liberty. In Administrative Petition Appeal 3829/04 Twito v. Jerusalem Municipality, IsrSC 59 (4) 769, 779, Justice Procaccia wrote," Indeed, in Israeli law, the concept is taking root that human dignity as a constitutional right also encompasses the right to minimum human subsistence…and the state is obligated to ensure that a person's standard

of living does not drop below the threshold required to live with dignity." See the references, *id*. I concurred with her opinion in that judgment, which was written in 2004, and my opinion has even strengthened since then. This purpose of the legislation justifies exercising fairness, which is doubtlessly a guiding factor for the Knesset and the public authorities.

C. The question at hand focuses on whether the categorical provision – the conclusive presumption – in section 9A(b) of the Income Support law, i.e., "In the matter of this law, subject to the provisions of subsection (c), a vehicle is deemed to be property from which monthly income is generated, the amount of which is no less than the amount of the benefit that would have been paid to the claimant if not for the provisions of this subsection." Subsection (c) enumerates the exceptions that have been inserted over the years in amendments to the Law in 5761 and 5767, which were designed to soften the conclusive presumption, such as in the case of requiring a vehicle for the purpose of medical treatment or in cases of disability or other cases of limited income and a small or old car. I do not minimize those and it is clear that, over the years and after lessons learned, the legislature took steps toward helping those in need of income support in amendments to the legislation. Still, in reviewing the cases in the petitions before us, which were filed by people at the bottom of the socioeconomic ladder whose use of a vehicle does not raise them at all to the level of someone who has attained a minimum dignified subsistence if they are denied income support, it is clear that they must be entitled to a safety net, and denying them the income support, even if that is not done willingly, is disproportional in a manner that justifies intervention. I admit that I hesitated initially out of respect for the Knesset and the knowledge that, in its legislation, it has also softened the requirements with regard to vehicles, as stated. However, the

constitutional examination with all its stages, as enumerated by the president and, ultimately, "the power of the locked door" facing the Petitioners, against the possibilities for individual examination, where such an examination is already built into the Income Support Law (see Part C), tips the balance in favor of the decision that we have reached. It should be emphasized that we are not trying to say, under any circumstances, that possession of a vehicle will not constitute a criterion for an eligibility test. Our approach lies within the realm of ensuring a minimum dignified subsistence by means of individual examination, and we are dealing with a situation in which, as stated, there is an existing and built in feasibility of individual examination, which is not unattainable.

D. I believe that it is appropriate to write briefly about the vehicle and its place in human existence in Israel in our time. We are living in a dynamic reality, of which the legislature is also aware, in which something that was perceived as a luxury in the past, as the provenance of a select few, has become common to all. This can be said of the electric refrigerator, which has long since been called a "Frigidaire" after a certain model of refrigerators and which 60 years ago began to replace the ice boxes. At that time, it was considered a financial achievement by someone who purchased one. The same is true of the telephone for which my parents, may they rest in peace, waited their turn for about six years before they received one (they did not have any "connections") and, of course, the television which, since it appeared in Israel in 1968, was initially a luxury and a source of pride to anyone who purchased one. Eventually the personal computer, the mobile telephone and the Internet, which were not even imagined by our forebears, but by us as well, and now they are the provenance of the masses. It would be difficult to

imagine our lives – and not just the lives of the wealthy, but far wider circles – without them. The vehicles that we are discussing in this matter are very similar.

E. Indeed, in days past, a vehicle was a luxury to most people. In the high school in which I studied in the old north of Tel Aviv around 1960, only the school principal and the parents of one of the students in my class had a car. My parents were from the middle-class and they lacked nothing by the standards of that time, as was the case with most of my classmates, but they did not have a car nor even a driver's license. The next generation – my generation – was the first generation of drivers and vehicles, and that was also the case in my wife's family and the families of most of my friends. Since then, a great deal of water has passed under the bridge and today it is hard to impart these stories to our generation, which is stuck in traffic jams and exasperatedly seeking parking spots in the cities. I have written these lines in order to emphasize that it is clear to everyone that a vehicle is no longer what it once was, even if it is not an existential matter as a rule.

F. Indeed, these issues have also arisen in Knesset discussions in this very context. Amendments to the Income Support Law in 5761 and 5767 were implemented at the initiative of Members of Knesset (see the Income Support Bill (Amendment 13) (Motor Vehicle), 5758-1998 and the 5758 Bill, 350, and the Income Support Bill (Amendment 29) (Vehicle as Property That Does Not Generate Income), 5767-2006, Knesset Bills 5767, 119). In a meeting of the Labor and Welfare Committee on December 6, 1999, which discussed the 5758 Bill, MK Nissim Zeev said (p. 3) "Just as a Frigidaire was once something special, and a computer, today these things (vehicles – A.R.) are a routine part of

life. However, the Ministry of Finance representative responded "I think that saying that a car is no longer a luxury…is view from an ivory tower." In one of the discussions, the legal advisor to the National Insurance Institute noted (minutes of the meeting of the Labor, Welfare and Health Committee on October 31, 2011), "If we now say that subsistence includes a vehicle, we have to view the ramifications of that statement from the standpoint of the scope of payments. The perception of Israeli society may be that the time has come to view this as part of subsistence." In bringing the 5761 Bill for a second and third reading, the chairman of the Labor, Welfare and Health Committee, MK David Tal (January 1, 2001) noted that "The ownership of a vehicle in the circumstances discussed in the bill no longer constitutes a sign of wealth or luxury. In certain cases, the ownership of a vehicle is even crucial for subsistence, even if it involves a very poor family, for example, and families living on the periphery, for whom a vehicle provides the only possibility of reaching their workplace and keeping their jobs" (Record of the 15th Knesset, session 3, p. 2342). Likewise MK Taleb El-Sana ("Maintaining a vehicle these days is not a reason to deny the right" p. 2343)). On the other hand, Minister of Finance A. Shochat noted that this would contribute to creating circles of people who would not go out to work (2343). We see that the discussion in the committee and the plenum ranges between a more social oriented approach and an economics oriented approach, even though it would be reasonable to assume that everyone wants the circle of employment to expand, and the parliamentary reality which, by its nature, requires compromises, has created balances. As stated, a vehicle in itself is not necessarily and generally an existential matter, of course, and that should be emphasized. But the constitutional question is whether the results of the balances in the law are not disproportional, considering the matter before us, and the

Court can only address what it sees – and, for the sake of constitutional proportionality, is there no room to turn the issue of the vehicle and its use into a criterion instead of a padlock? It seems that a vehicle as a criterion and as a basis of examination, instead of the locked door, is a proportional way that does not impair the minimum dignified subsistence in cases like the ones before us.

On the examination stage

G. I concur with the president and my colleagues who believe that even when we are dealing with social and economic rights, there is no reason for moving the constitutional stage of examining balances to the stage of delineating the right itself. I concur with the position once voiced by President Barak, that the public interest must be taken into consideration in the framework of the conditions of the limitations clause… and not in the framework of determining the scope of the constitutional right itself" (HCJ 7052/03 Adalah v. Minister of Interior, unpublished, paragraph 105); A. Barak, Proportionality in Law – Violation of the Constitutional Right and its Limitations (5770) 102, 114). The founders of the Basic Law did not make any distinction between socioeconomic rights and other rights. We should remember that section 3 of the Basic Law: Human Dignity and Liberty, which deals with property rights – a socioeconomic right of the highest order – is at the same level as the other rights in the law which are of a different nature. Indeed, in HCJ 466/07 Galon v. Attorney General (unpublished) I had the opportunity to recall (in paragraph 8), that "Not every right or privilege that provides protection to one extent or

another for human dignity in its broadest sense, comes within the realm of the constitutional right." Clearly the Court, which does not have a purse – or a sword – in the words of Alexander Hamilton, one of the fathers of political thought in the United States in its infancy (The Federalist 78), can only practice caution in imposing an actual financial expense upon the Knesset and the government. To that approach of such restraint we must adhere. However, the place of the examination is not at the stage of determining the scope of the right but, rather – as in every constitutional examination – at "the stage of the limitations clause," and, in this case, at the bottom line – proportionality – and that has been found to be defective.

On poverty and a minimum dignified subsistence in Jewish law

H. It is impossible in such a matter not to cite the Jewish legal sources and the world of Judaism in this matter. The Bible is strewn with private and public obligations to the poor. This can be found in the Torah and repeatedly in the Prophets, and even more so in the Writings – and not just once or twice, but many times. Those that we will cite here are but a drop in the ocean. "You should not abuse a needy and destitute laborer, whether a fellow countrymen or a stranger in one of the communities of your land. You must pay him his wages on the same day, before the sun sets, for he is needy and urgently depends on it, else he will cry to the Lord against you and you will incur guilt" (Deuteronomy 24:14-15); and of the gifts of the field it is stated, “You shall leave them for the poor and the stranger, I the Lord am your God.” (Leviticus 19:10); the prophet Isaiah said (Isaiah 49:13) “For the Lord has comforted his

people and will have mercy upon his afflicted." The prophet Ezekiel says of the righteous man (Ezekiel 18:7) that "… he has given bread to the hungry and clothed the naked…"; It is written in Psalms "Happy is he who is thoughtful of the wretched, in bad times may the Lord keep him from harm" (Psalms 41:2); "…he hears the cry of the afflicted" (Job 34:28).

Below are words that I had occasion to write in Administrative Petition Appeal 3829/04 Twito v. Jerusalem Municipality (pp. 781-782):

> The public's obligation to its poor is established in the biblical ethos, which is cognizant of the fact that "… For there will never cease to be needy ones in your land" (Deuteronomy 15:11) i.e., poverty is a phenomenon that frequently accompanies human society. "It is to share your bread with the hungry, and to take the wretched poor into your home, when you see the naked, to clothe him and not to ignore your own kin" (Isaiah 58:7; I would add, as a personal note, that this passage is engraved on the tombstones of my grandmother and my mother, may they rest in peace). Food, shelter, clothing – these are man's obligation to others as kindness and certainly as obligations of the society. "The wretched poor," says Midrash Raba, "are homeowners who have lost their dignity and their assets" (and there are other interpretations). If we wish, caring for the poorest of the poor will ensure that the human dignity – a basic right in our legal system – of the weakest part of society, is not violated. And the Babylonian Talmud states, "Rabbi Elazar said, 'The effecter of charity (someone who causes others to give to the poor – A.R.) is greater than the doer, because it is stated, 'The effect of righteousness is peace'" (Emphasis added – A.R.) (see also Maimonides, Gifts to the Poor, 10:6).

(2) Social justice is an established element of Jewish law. It has been emphasized by the prophets of Israel: "Zion shall be saved in the judgment: her repentant ones, in the retribution" (Isaiah 1:27). Charity is established in the commandments but we should not confuse the concept of charity and kindness, which is a voluntary act, with the public-social obligation. The halachic approach to the public aspect is that "Charity is to be enforced;" in other words, people are required to give for charitable purposes, in amounts commensurate with their means (see the Shulchan Aruch, Yoreh Deah, Marks 247-248; and Aruch Le-shulchan of Rabbi Yechiel Michal Epstein. Russia, 19th-20th centuries, Yoreh Deah, particularly end of Mark 250).In the modern world, charity has been translated in part into the obligation of taxes which, aside from the expenses for security and other matters, also includes social issues. However, the individual is still obligated to pay a tithe, i.e., to give charity, and, in principle, he is restricted to not expending more than one fifth (two tenths) for that purpose. Law and charity are intertwined: "He has told you, O man, what is good and what the Lord requires of you: only to do justice and love goodness and to walk modestly with your God" (Micah 6:8); and our sages addressed this (Babylonian Talmud. Sukkah, 49b): 'Rabbi Elazar said, to do justice – this is the law; to love kindness – this is the performance of kind deeds; and to go discreetly – this is taking out the dead and bringing a bride to the nuptial canopy,' i.e., social obligations.

(3) The author of the Book of Principles (Rabbi Yosef Albo, Spain, 15th century) notes that 'Doing justice includes all the laws between man and his fellow man, and the love of kindness includes performing all types of kind deeds' (article 3, chapter 30). Indeed, the stranger, the orphan and the widow, the weaker parts of society from time immemorial ("Cursed be he who subverts the rights of the stranger, the fatherless, and the widow," Deuteronomy 27:19) are given massive protection in the Torah. And the most worthy charity for the needy is that which enables him to rehabilitate himself economically: "There are eight categories in giving charity as follows: In the highest category is one who strengthens a fellow Jew in need (who is poor – A.R.) by a gift, or loan, or offer of partnership, or employment. This

sets him on his feet so that he does not require charitable aid" (Shulchan Aruch, *ibid.*,249, 6). See also the text of the Hafetz Chaim, Loving Kindness (to which I will return – A.R.

(4) The approach is immersed in mutual responsibility: "Let a man consider that every moment he seeks his livelihood from the Holy One Blessed Be He, and even as he desires that the Holy One Blessed Be He shall hear his cry, so let him hear the cry of the poor. Let him further consider the fortune is a wheel that keeps turning in the universe, and the end of man is that he or his son or his son's son will come to a similar state (of neediness, Heaven forbid – A.R.) – men take pity on those love shown pity for others" (Rabbi Moshe Isserles, in his commentary on [Shulchan Aruch] *ibid.*, 247, 3). See also the series of articles in edition no. 1 of Bema'aglei Tzedek – Paths of Righteousness, Journal of the Torah, Thought and Social Justice (Nisan 5764). It should be noted, however, that the needy person also has obligations (see Babylonian Talmud, Baba Metzia 78b).

(5) The commandment of charity has public aspects, such as providing food for the poor (Baba Batra, 8b). 'We have never seen or heard of a Jewish community that does not have a charity fund" (Rambam, Gifts to the Poor, 9, 13). See also Rabbi E. Afarsemon, Rabbi D. Wiskott and Rabbi Yechiel Ozeri, "Allocating Resources and Treatment Priorities in Public Medicine," Melilot, Volume I, 5758-1958, 11).

(6) We can obviously see that the public's obligation vis-à-vis the needy among them is rooted in the Jewish legal ethos.

See also the words of former Justice M. Cheshin in AFH 11230/04 Twito v. Jerusalem Municipality (unpublished).

I. The Rambam, in Hilchot Yom Tov, 6, 18, reminds everyone enjoying the jubilation of the holiday, "And when he eats and drinks, he must feed the stranger and the orphan and the widow along with the other

wretched indigents." On the classification of the poor and the tests of poverty in Jewish law, see Aviad Hacohen, Gladdening the Poor and Gifts to the Indigent in Parshiot Vemishpatim, Jewish Law in the Portion of the Week, 2011, 272-277; M. Weinfeld, Law and Justice in Israel and Among the Nations (5748). In his comprehensive book, Loving Kindness, the Hafetz Chaim discussed the public's obligation to maintain a charity fund in every city (chapter 16) and, *inter alia*, (p. 206) "and the collar hangs upon the necks of everyone… for the many who carry out the precept [of giving charity] are nothing like the few who carry out the precept". At the end of the book, he also addresses the fact that "the requirement to perform acts of charity and righteousness varies according to the recipient and according to the giver" (p. 331).

In his preface to the book, the Netziv (Rabbi Naftali Zvi Yehuda Berlin of Volozhin) says: "The rule of charity is the existence of the world, and as it is written (Psalms 89:2), 'Your steadfast love is confirmed forever', and this is the duty of humankind and this is the form thereof... The people of Sodom were doomed to extinction because they did not support the poor and the needy and they behaved corruptly and inhumanly... Besides being commanded to do charity on the basis of one human being's duty to another, we are also commanded to do so by the Torah."

J. And, indeed, as Dr. Michael Wygoda has noted in his comprehensive article, "Between Social Rights and Social Duties in Jewish Law" [Hebrew], in Economic, Social and Cultural Rights in Israel (Y. Rabin, Y. Shany, eds., 5765-2004) 233, 249-250, the duty of helping the weak "has not merely remained the duty of the individual;

rather, it has become one of the principal duties of society and the community; in the words of Moses Maimonides (Gifts to the Poor, 9, 3), 'We have never seen nor heard of an Israelite community that does not have a charity fund'"; the institution of the charity fund began in the days of the Mishnah; see discussion and references, *ibid*. see also Y.D. Gilat, "'Open Your Hand to the Poor and Needy Kinsman' – The Precept of Charity: Legal Obligation or Generosity" [Hebrew], Parashat Ha-Shavua 179, and in his words there: "... The precept of charity entails two things: the precept of charity by the individual, which is based on the generosity of the giver, and is not to be enforced; and the 'public' duty of charity, which is founded on the mutual consent of the city's residents, and is often also forcibly collected"; see references, *ibid*.

Respect for fellow human beings in Jewish ethical theory

K. Jewish ethical theory emphasizes a point listed in the Mishnah (Aboth 6:6) among the 48 things by virtue of which the Torah is acquired: "bearing the burden with the other" – the duty of lending one's heart and one's hand to sufferers, and, in the words of the interpreter, Rabbi Pinchas Kehati, "he sympathizes with his fellow and helps him, whether physically or financially or with good counsel and proper instruction". This concept was strongly expressed by Rabbi Yerucham Levovitz, the *mashgiach* (spiritual counselor) at the Mir Yeshiva between the two World Wars, in his articles which appeared in his book, Knowledge, Wisdom and Ethics [Hebrew], Volume I (5727-1967). In his words, "Respect for fellow human beings is the highest point" (2, 33); it is (34) "the middle post which runs from one end to the other,

encompasses the entire Torah, all of which is but a matter of respect, respect for the Deity and respect for fellow human beings"; and furthermore (35), "that this matter of respect for fellow human beings, respect for the image of God, this is the form of the entire Torah". Bearing the burden with the other, in his words (27), is "to feel his fellow's sorrow in every possible way... because feeling a person's sorrow, feeling all of his pains... requires a great deal of heartfelt attention and observance, to the point of bending oneself down to feel the burden of the weight". And in another place (50): "that bearing the burden is the virtue of empathizing with all of the sufferer's sorrow and agony, being troubled by all of his troubles, and feeling as if those stabbing pains are stabbing into his own flesh". I shall add that Rabbi J.D. Soloveitchik sees the image of God in respect for fellow human beings (The Lonely Man of Faith, 15).

L. What is before us is a halachic duty, and not only a mere "ethical counsel"; and this applies in cases where binding norms – laws – "are sometimes pushed aside and given the status of an 'ethical counsel', which is ostensibly less binding" (see my article, "Halachah and Ethics for Everyone: The Life and Work of the 'Hafetz Haim'" [Hebrew], Blessing for Abraham (a compendium of articles in honor of Rabbi Prof. A. Steinberg), 5768-2008, 461, 467). This also gives rise to the duty toward the poor, "sufficient for whatever he needs" (Deuteronomy 15:8), which was interpreted in the Talmud (Babylonian Talmud, Kethuboth 67b) as "You are commanded to maintain him, but you are not commanded to make him rich" – although, in certain cases, the duty extends to providing a certain degree of comfort, as in the case of persons who have lost their assets, as described there; see Maimonides, Gifts to

the Poor, 7, 3: "You are commanded to give to the poor man according to what he lacks"; and with regard to eligibility for charity in this regard, see Rabbi N. Bar Ilan, "The Eligibility of the Poor for Charity" [Hebrew], Tehumin II (5741-1981), 453; Rabbi S. Aviner, "Your Luxuries Do Not Come Before Your Fellow's Life" [Hebrew] , Tehumin LXIX (5769-2009) 54; Rabbi S. Levi, "Giving Charity to a Poor Person Who Is Able to Earn a Living" [Hebrew], *ibid.*, 57.

Guaranteed minimum income – charity by the public

M. Guaranteed minimum income is in the nature of charity and righteousness done by the legislators – that is, the public – for the needy. The Torah (Deuteronomy 15:7-8) teaches us: "If, however, there is a needy person among you, one of your kinsmen in any of your dwellings in the land that the Lord your God is giving you, do not harden your heart and shut your hand against your needy kinsman. Rather, you must open your hand and lend him sufficient for whatever he needs." Maimonides, in his legal treatise Gifts for the Poor (7, 1), says: "It is a positive commandment to give charity to the poor of Israel according to the needs of the poor, as far as the giver can afford"; it should be noted that this precept also applies to resident aliens (Leviticus 25:35), as well as to "your kinsman".

N. Maimonides further says (*ibid.*, 10, 1): "We are obligated to be more observant of the commandment of charity than of any other positive commandment, for charity is the sign of the righteous of the seed of Abraham, as Scripture states: 'For I have singled him out, that he may

instruct his children [...] by doing what is just and right' [Genesis 18: 19]. And the throne of Israel cannot be established and the true faith cannot stand, except for charity, as Scripture states: 'You shall be established through righteousness' (Isaiah 54:14). And Israel will not be redeemed except for charity, as Scripture states: 'Zion shall be saved in the judgment; her repentant ones, through charity' (Isaiah 1:27)." See also Sefer Ha-Hinnuch [the Book of Education, a list of the 613 positive precepts of Judaism], Precept No. 479 ("to give charity according to one's means") and Precept No. 66 ("lending to the poor – the root of this precept is that God desired that God's creatures be accustomed to and trained in the characteristic of kindness and mercy, for it is a praiseworthy characteristic").

On the importance of doing and encouraging work

O. In the present case, at least one of the Petitioners (paragraph 5 of the judgment by Supreme Court President Beinisch) was forced to resign from her work under circumstances which involved "the attribution [of use] of the car". We have seen, however, that the highest level of charity in Judaism – and, as set forth above, there are eight such categories of charity – is helping a poor person find work; see also Aruch ha-Shulhan, Laws of Charity, 249, 15, by Rabbi Yechiel Michal Epstein (Russia, 19th-20th centuries), who adds: "And in our time, in many cities, there are societies which assign Jewish boys to craftsmen [to learn a trade], and this is a very great thing, as long as they supervise them to ensure that they walk in the paths of God, pray every day, and be faithful to Heaven and to their fellow human beings."

P. And Rabbi Judah the Hassid (Book of the Hassidim, 5635-1875) said: "There is charity which is not recorded as charity, but is considered by the Creator, Blessed Be He, as excellent charity. For example, a poor man who has an object to sell or book that no one wants to buy, and a person buys it from him, or a poor man who wants to write... There is no greater charity than this, that he should make efforts at writing and you should let him do so...". The importance of giving one's fellow human beings not only respect, but work as well, is also indicated by the interpretation given by the Sages and by Rashi [Rabbi Shlomo Yitzhaki] to Exodus 21:37, "When a man steals an ox or a sheep, and slaughters it or sells it, he shall pay five oxen for the ox, and four sheep for the sheep". Rashi explains: "Rabbi Johanan ben Zakkai said: 'God took pity on human dignity. An ox walks on his own feet, and the thief did not suffer the indignity of carrying him on his shoulders – he pays five; a sheep, which he carried on his shoulders – he pays four, because he suffered indignity.' Rabbi Meir said: 'Come and see how great the power of work is: an ox, which he took away from its work – five; a sheep, which he did not take away from its work – four.'" See also N. Rackover, The Greatness of Respect for Fellow Human Beings: Human Dignity as a Supreme Value [Hebrew] (5759-1999), who cites, *inter alia*, the regulations of "not shaming those who have not" (pp. 145-148); see also E. Frisch, "Rashi's Interpretation of the Payment of Four and Five – a Diachronic and Synchronic Study (Education to Values through the Teaching of Commentary)" [Hebrew], Peraqim VII (5741-1981), Schein College of Education, Petach Tikva, 155, 159-160, with respect to work and the importance thereof; see also Wygoda, *ibid*., 261 ff. Accordingly, if anyone finds a possibility for a poor person to earn a

bit of a living, even if it involves some slight use of a car, this should not block the poor person's way to a guaranteed minimum income; it is sufficient for the car to constitute one of the criteria for examination, in line with the outcome of our ruling.

Summary

Q. Jewish law is saturated with the duties of charity, which begin with the individual and continue with the public. This is one of the values of Israel as a Jewish and democratic state, as set forth above, and the ruling in the present case emphasizes this point.

Before closing

R. This ruling was handed down on the last day of Supreme Court President Dorit Beinisch's term in office. Throughout the years of her public service – almost 50 years, in the Office of the Attorney General and the Supreme Court – she made many contributions to administrative and constitutional law in Israel. Among other positions, she served as Director of the Department of High Court of Justice Cases and the Attorney General of Israel, as a Justice and as the President of the Supreme Court. These lines express appreciation for her work and the blessing which it conferred upon Israeli law – *inter alia*, as a trailblazer for women, as the first woman to serve as Attorney General of Israel and as the President of the Supreme Court. Supreme Court Vice President Menachem Elon, when he retired, stated that the Hebrew word for "retirement" (gimla'ot) comes from the same root as the Hebrew word for "redeemer" (hagomel); and, indeed, those who retire in good health and are satisfied with the work they have done may praise the Redeemer of Israel [a reference to the Deity] for having come out in peace. I would

like to wish President Beinisch much satisfaction in her future endeavors as well.

Justice

Justice S. Joubran:

1. After reading the comprehensive opinion of my colleague the president, I saw fit to add my opinion to hers and to state, as she did in her opinion, that section 9A (b) of the Income Support Law, 5741-1980 (hereinafter: the Income Support Law) violates the constitutional right to a minimum dignified subsistenceto an extent that exceeds the required and, therefore, it should be repealed. In view of the importance of the issue at hand, and the legal questions that arise, I will add a few brief comments.

2. Human rights, civil and social alike, have had a pivotal place in the Israeli legal system since its inception. Human rights, as an integral part of the basic principles of the legal system, were borne in mind by the Court when it interpreted the law, even before the Basic Laws on human rights were enacted. They were also borne in mind by the legislative authority, which gave legal validity to many of those rights, either in its guise as a legislative authority or in its guise as a founding authority. In this context, it should be noted that, as the president stated in her opinion, the distinction between civil rights and socio-economic rights originates in the historical development of the two systems of rights, and is not a substantive distinction (paragraphs 26-29 of her opinion). Clearly, each one of the human rights imposes "affirmative" obligations and "prohibitive" obligations on the state, in accordance with the context and circumstances of the matter. There is, therefore, no difference between

the right to freedom of expression, the right to equality and the right to life – and the right to health, the right to education and the right to a minimum dignified subsistence. However, all human rights differ from one another in their extent and the scope of the legal and constitutional protection afforded them.

3. It is well known that human rights, civil and social, are not absolute rights and they must be balanced – among themselves, and with opposing interests and values. The task of balancing the various human rights, and balancing human rights and other social values, is not a simple matter. The legislative authority is frequently faced with this balancing endeavor, and it must do its job while keeping in mind all the constitutional norms pertaining to the matter, as well as the public's interest. The legislative authority has the ability to gather the data and to examine the issue in depth, while considering all the direct and indirect ramifications of its decision, and it is the authority that most closely reflects the will of the people at any given time. In that framework, it is not for the Court to replace the legislative authority. The role of the Court is a narrow one and its only duty is to ensure that the legislative act honors the constitutional principles of the law, which reflects the basic views of the Israeli public. In that context, in our legal system, the limitation clause established in the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, has been recognized as an auxiliary tool to be borne in mind by the legislative authority when it endeavors to strike a balance between the violation of a protected constitutional right and the public’s interests and needs. It should be noted that, like the president, I believe that there should be no distinction, in the constitutional examination, between the manner of examining the protection of constitutional "civil" rights and the manner of examining the

protection of constitutional "social" rights (see paragraph 29 of the president's opinion).

4. Like civil rights, the social rights have been developed in Israeli law by the legislative authority and the courts. In another matter, in connection with violation of the right to equality, I noted that "The particular law creates a legal framework that reflects the manner in which the legislators decided that it was advisable to contend with a constitutional violation in a given context" (Leave for Civil Appeal 8821/09 Parhansky v. Layla Tov Productions Ltd. (not yet published, November 16, 2011); see also HCJ 721/94 El Al Israel Airlines Ltd. v. Danielowitz, IsrSC 58 (5) 749, 778-779 (1994)). That also holds true for social rights. In a long series of legislative acts, from the first days of the state, the Knesset formulated the relationship between the social rights and competing social interests. Thus, the legislature determined the scope of the right to health, *inter alia*, in the State Health Insurance Law, 5754-1994, the scope of the right to education in legislation such as the Compulsory Education Law, 5719-1949, and so forth. As part of the formulation of the social rights in Israel, a long series of social laws were enacted which establish arrangements that protect the right to a minimum dignified subsistencein accordance with the welfare policy in the State of Israel. These arrangements include disability and old age pensions, financing and operating public welfare services and many others. The Income Support Law was also enacted in the framework of this array of legislation. This law establishes the last social security system designed to assist someone who is unable to secure his own subsistence. In this manner, the Knesset established one of the mechanisms that it deems fitting for exercising the right to a minimum dignified subsistence.

5. For many years, before the enactment of the Basic Law: Human Dignity and Liberty, this large-scale task of formulating the socioeconomic rights of the citizens and residents of the State of Israel was the responsibility of only the legislative authority and the executive authority. While the actions of the executive authority were subject to judicial review, even before enactment of the Basic Law, the actions of the legislative authority were protected from judicial review, and the main contribution of the judicial authority to formulating the rights established in the Law was made by developing the law and its interpretation. Enactment of the Basic Law: Human Dignity and Liberty, which gave expression to the constitutional concept of the Knesset in its role as a founding authority, granted a constitutional – supra-legislative status to the right to human dignity. The change in the legal status of the right to dignity required the Court to develop the Israeli constitutional law, while meticulously maintaining the duty of mutual respect between the branches of government. The Court was required to infuse content into the constitutional right and also to examine the weighty questions that arise when a piece of legislation is examined through the tests of the limitation clause.

6. In this framework, the right to exist with dignity has been adjudicated before this Court in several cases, and there is seemingly no need to elaborate on its importance. Thus, it was stated that "… 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." (HCJ 366/03, Commitment to Peace and Social Justice Society v. Minister of Finance,

IsrSC 60 (3) 464,. 482 (2005); and see also HCJ 5578/02 Manor v. Minister of Finance, IsrSC 59 (1) 729, 738 (2004)). The right to a minimum dignified subsistenceis what enables a person's material existence. As such, this right is of utmost importance and constitutes the cornerstone of a person's right to dignity and, sometimes, even to all the other rights. We know that poverty and hardship create a vicious cycle from which it is difficult for even the strongest to extricate themselves. This is a reality that creates feelings of alienation and lack of identification and smothers the hope for change. Without minimum living conditions, a person cannot exercise his freedom. Without minimum living conditions, a person cannot live a full and autonomous life and cannot become an active part of his society and his community. The following was written in this context: Living in extreme poverty is analogous to a prolonged war of existential survival. Human beings who are forced, for various reasons, to live in the shadow of profound economic deprivation are constantly occupied with the attempt to find their next source of nourishment, a roof under which they can live and their ability to contend with extreme weather conditions… Many research papers indicate the fact that life in extreme poverty is closely connected to negative phenomena, both for the people existing in its shadow and for the society as a collective within which heavy economic deprivation exists… Societies in which extreme poverty exists contend with particularly high rates of domestic violence, drug abuse, debt and petty crime (Lia Levin, A "coalition of exclusion": Non take-up of social security benefits among people living in extreme poverty," 225, Access to Social Justice in Israel, Johnny Gal and Mimi Eisenstaedt, Ed., 2009)).

Moreover, this reality of poverty and hardship has been threaded more than once through the other schisms that divide the society and cause the development of hostility and animosity between those who have plenty and those who cannot obtain even the most basic commodities.

7. As part of the legal formulation of the right to a minimum dignified subsistence, there are two main questions facing the legislators, by which the right is also examined by the Court. First, the question of the scope of the right is examined. In other words, the question of defining the threshold for minimum subsistence – the existence of which the state is obligated to ascertain among all its residents. Second, the question of whether the means that were formulated to ascertain that all residents of the state enjoy that level of subsistence are examined, to see if they are fulfilling their role properly.

8. In the present proceeding, only the second question requires our decision, since the Petitioners made no claim regarding the amount of the income support benefit. The question, therefore, pertains only to the manner of identifying those entitled to the income support benefit. The Respondents' argument in this context is that maintaining or using a vehicle attests, in an absolute and universal manner, to the fact that the vehicle owner or user is not entitled to the income support benefit. This is because the conclusive presumption established in the Law reflects the assumption that the financial burden of maintaining a vehicle cannot be met by means of the income support benefit alone, and that the vehicle owner has additional income that has not been reported. In the context of vehicle usage, the meaning of the argument is that a benefit applicant did not correctly report his options for financial assistance in his immediate environment. My position, like the position of the president, is that this conclusive presumption violates the right to a minimum dignified subsistenceand is a violation that cannot stand.

9. It should be noted that my opinion, like the opinion of the president, that there is nothing wrong with examining the assets of a benefit applicant for the purpose of evaluating his economic ability and to ascertain the veracity of his claims in everything pertaining to his financial status (paragraph 41 of her opinion). However, it is worth emphasizing in this context that the sole purpose of examining the assets is to check the real income of the benefit applicant. The manner in which a person spends the amount of the benefit lawfully given to him is completely within his discretion. Even though the state provides someone who is unable to provide for himself with a minimum dignified subsistence, it is not entitled to violate his autonomy and his choices by intervening in the way in which the benefit is used. If a person can reduce other expenses and save some of the benefit monies that are lawfully allocated to him in order to keep or use a vehicle, that fact cannot nullify his rights to the benefit as long as such savings do not attest to concealed assets and income.

10. Violation of the right to a minimum dignified subsistencein this case, which stems from the conclusive presumption established in the Law, forces a person to choose between possession or use of a vehicle (even if those do not necessarily attest to the fact that he possesses unreported sources of income) – and receiving the benefit. This violation is particularly grave in cases in which the vehicle serves its owner (or someone who uses it) for basic daily needs, which are not included in the exceptions set forth in the Law. There are many areas of the country in which, without a vehicle, people cannot reach the grocery store, the health clinic or educational institutions. In that context it should be noted that even though a vehicle is not necessarily a basic product that is included in the right to a minimum dignified subsistence, it would be advisable to view this right as obligating the state to provide

some means of transportation to its residents. This obligation, which is the positive aspect of the right to freedom of movement, places a particularly heavy burden where the state wishes to deny the use of a vehicle to residents who have no other means of transportation. Hence, denying the possibility of using a vehicle in those areas is an extremely grave violation. It should further be noted in this context that I have not disregarded the Petitioners' argument that the areas in which access to public transportation is particularly scarce are the peripheral areas and, in particular, the regions of Arab villages, and that too could cloud the issue of the constitutionality and proportionality of the section. In any case, once we determined in this proceeding that this section should be repealed due to its violation of the right to a minimum dignified subsistence, I need not delve deeply into this issue.

11. As my colleague, the president, has elaborated on the details of the violation caused by the section, and as I have also briefly mentioned the extent of this violation, I will only add a few words with regard to the disproportionality of the section. It should be noted that there is no disagreement between the president and me with regard to the proper purpose of the section, which is preventing fraudulent receipt of the benefit, based on the general purpose of the Law, which is providing a benefit that will allow for a minimum dignified subsistenceto someone who cannot obtain it for himself. Similarly, and in my opinion, the Law conforms to the values of the State of Israel and there is a rational connection between the means set forth in the Law and the purpose that it endeavors to promote.

12. In her opinion, my colleague, the president, states that the section does not pass the second subtest of the requirement for proportionality, which is the test of the less harmful means. In her

opinion, an individual examination of the benefit applications can lead to fulfilling the purpose to the same extent with less violation of the right to a minimum dignified subsistence. The question of the manner of examining the second subtest has yet to be fully clarified in the case law of this Court. In general, there are those who assert that the guiding principle in examining this subtest is that the alternative means must fulfill the purpose of the legislation to the same extent (see: Aharon Barak, Proportionality in Law – Violation of the Constitutional Right and its Limitations, 399 (2010); HCJ 7052/03 Adalah v. Minister of Interior, IsrSC 61 (2) 202, 344 (2006) and at similar costs (see HCJ 466/07 MK Zehava Galon v. Attorney General (unpublished, January 11, 2012) (hereinafter: the Dual Citizenship Law case), in paragraph 38 of the judgment of Justice E. E. Levy)). In my view, in the case at hand, we cannot establish with certainty that an individual examination meets that threshold. Even without the Respondents providing actual data in the matter, it is clear to all that an individual examination would cost more than a general denial of the benefit. Similarly, it is reasonable to assume that the chance of receiving the benefit fraudulently increases where the presumption is not conclusive.

13. I discussed the difficulty inherent in this concept of the subtest in the Dual Citizenship Law case:

> In this matter, the question may arise about the extent to which the alternative means must fulfill the purpose of the law –must the fulfillment be complete and identical or can we suffice with

> a high extent of fulfillment, albeit not identical (*id*., paragraph 12).

And regarding the costs, I noted in HCJ 1213/10 Nir v. Speaker of the Knesset (not yet published, February 23, 2012) that:

> In my opinion, the concern is that the requirement of identical fulfillment without additional costs is liable to empty this subtest of content and to lead, almost always and inherently, to the conclusion that no means has a more proportional alternative (*id*., paragraph 48).

And that also holds true in the case before us, in which this issue arises. In this matter, I have seen fit to concur with the president's opinion, and to determine that the Law is unconstitutional for the reason that it does not pass the test of the less harmful means.

14. With regard to the extent of fulfillment of the purpose, it seems that the purpose of the section is fulfilled to a lesser extent in the framework of individual examination. However, examination of the alternative means on the backdrop of the Income Support Law as a whole, shows that the alternative means may fulfill the purpose of the Law to an extent that is not less (and perhaps even more) than the manner in which it is fulfilled by means of the present section. As stated, the purpose of the Income Support Law is to allow anyone who is eligible for income support to receive the benefit. The presumption established in this section is an auxiliary mechanism for identifying those entitled to the benefit. Notwithstanding the fact that that mechanism prevents those who are not eligible from receiving the benefit, it also prevents many of those who are eligible from receiving it. As such, the mechanism established in this section impairs fulfillment of the internal purpose of the Law. The question before us, in the context of the second test of proportionality, is whether, on the whole, the purpose of the

legislation is fulfilled to the same extent. In other words, we must examine whether the excessive violation in fulfilling the purpose of the particular law (which arises from excessive exclusion), which stems from the presumption, exceeds the violation that would be created by fulfilling the purpose of the same law if individual examination were to be adopted. The burden of proving that the purpose of the law would, indeed, be fulfilled to a lesser extent if the alternative mechanism were to be adopted, was not met by the Respondents in the case before us. Furthermore, even if the costs of the particular examination would make the mechanism for implementing the Law more expensive, that extra expense is not expected to be very significant because, in any case, with the current mechanism, the state operates a system of personal monitoring in order to ascertain the nonuse of a vehicle, which entails expenses that are not negligible. In any event, the Respondents also did not meet the burden of proving that the alternative means would fulfill the purpose with significantly higher costs.

15. Finally, I believe, as does the president, and for the same reasons, that the section does not meet the third subtest, which is the test of proportionality in the narrow sense. As noted above, the income support mechanism is among the last of the assistance mechanisms available in Israel for a person who is not capable of supporting himself. As such, it is advisable to employ extreme caution when a person is denied this last protective mechanism. It is clear that the damage caused by a person who fraudulently obtains a benefit to which he is not entitled is immeasurably smaller than the damage that would be caused by a person being left without the minimum means of subsistence. It should be noted in this context that it is a well-known phenomenon that precisely the neediest are those who have trouble meeting the threshold

of proof required for receiving state assistance, and the state is obligated to endeavor, to the best of its ability, to reduce the number of people entitled to the benefit who do not receive it (see, *inter alia*, Netta Ziv, "Law and poverty – what is on the agenda? Proposal for a legal agenda for those who represent people living in poverty," Alei Mishpat, D 17 (5765); Amir Paz-Fuchs, "Over accessibility and under accessibility to socioeconomic rights, "Din Vedevarim, E 307 (5770)). It should further be noted that even though there is always a fear that people who are not entitled to the benefit will receive it, in the case of the income support benefit, this concern is relatively limited. This benefit, even if it constitutes the breath of life for those who need it, does not allow for a life of wealth and abundance, and I doubt whether many would be willing to live at the minimum subsistence level if they are able to live at a higher standard of living, only for the purpose of exercising their eligibility to the benefit. In any case, even if someone would do such a thing, that is the reason that the authorities are given broad powers to investigate the benefit applicants and, if necessary, to prosecute anyone who defrauds the state authorities.

16. In view of everything stated above, I concur with the opinion of the president.

Justice

Decided as stated in the judgment of President D. Beinisch, that the order nisi will become an order absolute in the sense that we declare the repeal of section 9A (b) of the Income Support Law, 5741-1980, due to its unconstitutionality. The repeal will go into effect within six months of this date, on September 1, 2012.

In the circumstances of the matter, there is no order for costs.

Given this day, 5 Adar 5772 (February 28, 2012).

The President Justice Justice Justice

Justice Justice Justice