

# THE CASE AGAINST OFFICIAL MONOLINGUALISM: THE IDIOSYNCRASIES OF MINORITY LANGUAGE RIGHTS IN ISRAEL AND THE UNITED STATES

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## I. INTRODUCTION

Both Israel and the United States are multi-ethnic societies with a large percentage of linguistic minorities. Hebrew and Arabic are the two official languages of Israel whereas the United States lacks an official language at the

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federal level. There are legal, cultural, sociological, and political differences between the two countries. Yet, when it comes to the individual and collective use of minority languages vis-à-vis the government – i.e., in communications with the government, in public notices (street signs and the like), in official government publications for public distribution, in the legislature, the judiciary, and the administrative agencies – both countries show a distinct preference to the majority language, and for the most part, make exclusive use of that language.

By 1999, half of the states in the United States have enacted official English legislation, and currently “English-Only” initiatives are under congressional review. In the United States, English has great supremacy over other languages and a privileged and dominant position. In Israel, the status of Arabic as an official language does not accord Arabs equal language rights to those of Hebrew-speaking Jews. The status of Arabic as official is a historical anomaly, rather than a vigorously enforced protection. Therefore, Hebrew enjoys a superior status to Arabic. A similar trend to the “English-Only” movement in the United States is the call for the abolition of Arabic as an official language in Israel.

This article questions the desirability of the move toward official monolingualism in both Israel and the United States, criticizes the de facto “official” status of English in the United States and further discusses the superior status of Hebrew in Israel. The article’s main argument is that adopting one official language is objectionable. Declaring a language “official” may constitute a mere symbolic statement regarding the role of the language; but it is often used in order to protect the dominant status of that language and to outlaw all public uses of other languages. Thus, official monolingualism could serve to formally exclude the use of other languages; serve as a pretext for discrimination on the grounds of national origin, ethnicity, and race; and deprive linguistic minorities of equal rights. In an officially monolingual state, linguistic minorities are forced to learn the dominant language and are disadvantaged in accessing public employment, benefits, and state services.

Part II of this article concerns the nature of language diversity and language policy in Israel and the United States. It also examines the tension between the concept of Israel as a Jewish, Hebrew-speaking country and the existence of a large Arabic minority within it. Part III examines the history and the current legal status of Hebrew, Arabic and English in Israel and contrasts it with the status of English and that of minority languages in the United States.

In Parts II and III the term “official language(s)” demonstrates a language declared in a constitutional provision or by a statute as the official language of the country or state. Part IV examines the complexity and the various other meanings of an “official language” and attempts to define the term more accurately. This part considers the implications of having and maintaining an

official language. For example, it discusses linguistic requirements and practices in the field of education, an area in which official monolingualism would cause the most harm. Furthermore, it analyzes “Hebrew-Only” trends in Israel in light of the “English-Only” movement in the United States and provides a critique of official monolingualism. It examines the de facto and the de jure status of languages in both countries and disputes the assumption that the status of a language is determined by its “official” designation.

Part V of the article provides a definition of “linguistic minorities” and offers a view of language rights as basic constitutional and human rights. It discusses leading court decisions pertaining to language rights in both countries. It contrasts the United States Constitution with the informal Israeli Constitution and Bill of Rights in terms of the extent to which these instruments provide protections for linguistic minorities.

In conclusion, the article proposes to accord language rights to linguistic minorities as a group by virtue of basic principles of equality, pluralism, and tolerance and by viewing language rights as fundamental, notwithstanding the official or unofficial status of a language.

## II. THE NATURE AND HISTORY OF LANGUAGE DIVERSITY IN ISRAEL AND THE UNITED STATES

The United Nations’ General Assembly Resolution on the future Government of Palestine of 1947 stated that the British Mandate in Israel would end and that a Plan of Partition should be implemented by dividing Israel into two states: one Jewish and the other Arabic. Following this resolution, the Jews in Israel established a transitional government and a small parliament. On May 14, 1948, the official date on which the British Mandate ended, the Jewish-Israeli Parliament and Government declared the foundation of an Israeli state. This later became known as the “Declaration of Independence.” The declaration fully corresponded with the part of the United Nations’ Resolution regarding the foundation of an Arabic state, but, like the United States Declaration of Independence, did not contain any statement regarding the borders of the state. The Arab state was never founded. Soon after the declaration, the Arabs in Israel and the surrounding Arabic states declared a war against Israel and denied the Jewish-Zionist entity’s right to establish a state. The 1948 war ended in victory for Israel, which occupied a larger territory than that designated by the United Nations resolution. This area included the territory of the former Palestine, which was originally to have been divided according to the United Nations resolution. Many Arabs, who lived in Palestine before the war, fled to the surrounding Arab states and became refugees. The ones who stayed in Israel during and after the war automatically became citizens of Israel.

The first Israeli legislation declared the incorporation of the statutes from the Mandatory period into Israeli law. Thus, from the date of Israel's initiation, and according to the incorporated British legislation, it has been an officially bilingual country. Hebrew and Arabic are its two formal languages.

The United States is a multi-lingual country with a monolingual – English – majority and no official language. In the United States, the founders assumed that the de facto “official” language would be English because that was the tongue of the first settlers and of the settler majority. Newcomers automatically accepted the situation. Therefore, there was no need for a constitutional mandate to give English special recognition.<sup>1</sup> Yet, when we examine the history of language diversity in the United States, from the outset, the United States has been characterized by a multiplicity of language groups. Further, this linguistic diversity originally reflected the vying for supremacy in North America among different colonial powers and that later linguistic diversity persisted largely because of continued immigration to America.<sup>2</sup>

Israel is a young country confronting the challenges of nation-building and the constant threat of war. The United States, by comparison, is a well-established, long-standing, and stable democracy at peace. However, important similarities between the two countries exist. In both countries there is a growing concern regarding the relationship between language policy and national identity. Both Israel and the United States are countries established on the basis of immigration. Notwithstanding this original intent, both countries have many restrictions on accepting immigrants. In the United States most restrictions are applied equally to immigrants from all national and ethnic origins and religions. In Israel there is a clear distinction between Jewish immigrants and non-Jewish immigrants. Moreover, the language rights of minorities in Israel apply to a population that has (or should have) equal legal rights; the Israeli Arabs are citizens of Israel, while in the United States, the debate over language policy is shaped by the fact that a large number of linguistic minorities are illegal immigrants or permanent residents. In Israel, the factors of immigration, legality and non-citizenship are irrelevant to language policy.

Both Israel and the United States have a large percentage of linguistic minorities. The largest linguistic minorities in Israel are Jewish Russians, Jewish Ethiopians, and Arabs. Israel's total population is five and one-half million, nineteen percent of which are Israeli Arab citizens, i.e., the Arab minority amounts to approximately one fifth of Israel's population. This

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1. ALBERT P. BLAUSTEIN & DANA BLAUSTEIN EPSTEIN, *RESOLVING LANGUAGE CONFLICTS: A STUDY OF THE WORLD'S CONSTITUTIONS* 1 (1986).

2. See E. GLYN LEWIS, *BILINGUALISM AND BILINGUAL EDUCATION: A COMPARATIVE STUDY* 130-143 (1980).

minority is comprised mainly of Muslims, Christians and Druze.<sup>3</sup> In the United States, nearly fourteen percent of persons aged five years or over speak a language other than English at home. Of these persons, over one half are Latinos.<sup>4</sup> The United States has become the world's fifth largest Spanish-speaking nation.<sup>5</sup> In thirty-nine states and the District of Columbia, Spanish is the most common language spoken other than English.<sup>6</sup> More than half of all non-English language speakers reside in California, New York and Florida.<sup>7</sup> Thus, a large percentage of the linguistic minorities in the United States live in English-speaking cities. In Israel, however, most Arabs are segregated in their own towns and villages, where they speak solely Arabic and aspects of cultural life are carried on in Arabic. Furthermore, in the United States, a large percentage of linguistic minorities are not proficient in English. In contrast, Israeli Arabs are proficient in Hebrew. Yet most of them use Arabic at home, in schools and in their neighborhoods. In the United States, exclusion often is defined on the basis of inability to speak English, but the Israeli experience reveals that even Arabs who speak Hebrew can be deprived of language rights. This is due to the fact that while the United States treats most racial, national, and ethnic minorities equally, Israel shows a clear preference for Jews over other nationals or ethnic minorities.<sup>8</sup>

There are two interconnected principles unique to Israel, affecting language policy in Israel, and contributing to the inferior status of Arabic. The first is the concept of Israel as a Jewish state;<sup>9</sup> the second is the concept of

3. See Ori Stendel, *THE ARABS IN ISRAEL* 40 (1996). See also Ori Stendel, *THE MINORITIES IN ISRAEL: TRENDS IN THE DEVELOPMENT OF THE ARAB AND DRUZE COMMUNITIES 1948-1973* (1973).

4. United States Dep't of Commerce, Bureau of the Census, Population Division, Education and Social Stratification Branch, 1990 Census Special Tabulation, Table A: Language Spoken at Home and Ability to Speak English Ranked for Persons 5 Years and Over for United States, Regions, and States (1990) [hereinafter *The 1990 Census*]. See also Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Customers*, 47 VAND. L. REV. 1107, 1109 n.7 (1994); Stephanie L. Kralik, *Civil-Rights – The Scope of Title VII Protection for Employees Challenging English-Only Rules*, 67 TEMP. L. REV. 393, 393 nn.2-3 (1994).

5. Blaustein, *supra* note 1, at 1.

6. See *The 1990 Census*, *supra* note 4.

7. United States Department of Commerce, Bureau of Census, 1980 Census of Population and Housing, doc. PHC80-S1-1, at 14 (Mar. 1982).

8. In this respect it is important to note that my concern here is with *linguistic* minorities, as opposed to religious or national origin minorities, although there is usually an obvious overlap between language and nationality.

9. The tenet that Israel is a Jewish state should not be confused with preservation of Judaism as a religion. There is only a partial overlap between the principle of Israel as a Jewish state and the status of the Jewish religion in Israel. The uniqueness of Judaism is that it has a dual meaning: nationality and religion. The greater part of the Israeli population is secular and non-observant, as were the founders of the state, for the greater part, whereas the religious Jews are a minority. Thus, this principle has to do with the preservation of Israel's *national* identity. One could claim that this distinction is not completely accurate

Israel as a Hebrew-speaking country.

The essence of Israel, in the eyes of its founders, was its status as a Jewish country and Hebrew, as the language of the state, is essential to the country's identity as a Jewish state. Israel's Declaration of Independence states the foundation of "A Jewish State in the Land of Israel." The importance of Israel being a Jewish state has been asserted in many Israeli Supreme Court decisions.<sup>10</sup> Additionally, the principle of Israel as a Jewish state can be found in numerous Israeli statutes. First and foremost, the statutory concept of Israel as a Jewish country is demonstrated by the "Law of Return" of 1950. This law provides every Jew with the automatic right to immigrate and settle in Israel. The Nationality Law of 1952 further provides automatic citizenship to every Jewish immigrant. Israel views Jews all over the world as potential citizens. Non-Jews do not have similar rights. Thus, in areas other than language rights, there is both overt and covert discrimination against the Arab minority.<sup>11</sup> Furthermore, section 7(a) of the Knesset (the Israeli Parliament) Act of 1985 provides that "Israel is the state of the Jewish people" and that whoever denies that principle is not eligible to participate in parliamentary elections. This Act was used as a basis to deny the right of participation in the parliamentary elections vis-à-vis a few political parties that "endangered the preservation of Israel as a Jewish country."<sup>12</sup>

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because, unlike the United States Constitution, Israeli law does not require the separation of religion and state, and some statutes are based on Jewish-Hebrew law. However, the existence of such statutes is due in part to the disproportionate political power of religious parliamentary parties in the Israeli Knesset and their significance should be attributed to the preservation of the Jewish tradition and nationality, rather than the Jewish religion as such.

10. See, e.g., H.C. 1/65, *Yardor v. The Election Committee for the Sixth Knesset*, 19(3) P.D. 365, 386 (stating that Israel being a Jewish state is a basic constitutional fact "which heaven forbid should any authority of the State – be it an administrative authority, a judicial authority or a quasi-judicial authority – deny it in exercising any of its powers").

11. This terminology was employed by David Kretzmer, who defined "overt discrimination" as statutes that expressly distinguish between the rights of Jews and Arabs, and "covert discrimination" as statutes not using the explicit criteria of Jews or Arabs but in fact imply discrimination between the two. See DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 84-85 (1990). Examples of overt discrimination are the Nationality Law and the Law of Return, both using the criterion "Jew" as a condition for a right or a privilege (the right to settle in Israel provided to Jews by the Law of Return, and the right of Jews to acquire Israeli citizenship under the Nationality Law). Covert discrimination is exemplified by the policy to exempt Arabs from military service, which, among other things, is a source of various benefits (it should be noted however, that the exemption stems from the unique position of Arabs vis-à-vis the surrounding Arab countries). *Id.* at 89-107. Israeli Arabs are further discriminated against by unequal allocation of resources, e.g., in the field of education. *Id.* at 115-127. See also Stendel, *The Arabs in Israel*, *supra* note 3, at 191.

12. See AMNON RUBINSTEIN, *CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 164-5, 197 (4th ed. 1991) (Hebrew).

There is a close connection between Israel being a Jewish state and the superiority and importance of the Hebrew language. As the Supreme Court stated in the case of *Reem Engineers*:<sup>13</sup>

[L]anguage is not just a means for individual speech. It is a means for national speech. It is a cultural asset. It is an asset of the nation ... language exemplifies national unity ... it is a symbol ... this is doubly true regarding the Hebrew language. The revival of the state of Israel was accompanied by the revival of the Hebrew language ... without the Hebrew language Israel would lose its soul. The struggle for national independence was part of the struggle for reviving the Hebrew language ... The preservation, development and growth of Hebrew are a major value of the state of Israel ... Hebrew is one of the most important cultural assets of the Israeli society ... Hebrew is the spoken language of the Israeli people.

Hebrew was essentially a dead language, the language of the Bible and of subsequent religious and secular literature. Hebrew was revived and modernized as a spoken language after centuries of exile, during which it was not the spoken language for the vast majority of the Jewish Diaspora. Only in the last century and only in Israel has Hebrew fully regained its status as a native tongue.<sup>14</sup> The Hebrew language in Israel has a traditional, ideological, and national significance. The concept of the Hebrew language in Israel is based upon national pride. It was a major component of the Jewish identity, culture, religion, history and tradition for thousands of years and became a symbol of the independence of Jews in Israel.

Israel is comprised of generations of immigrant Jews from all over the world, mostly from Europe and the Arab countries. Traditionally, a feature of the immigration process, especially on the part of young immigrants and of those who left their countries of origins under less than favorable circumstances, was a reluctance to preserve their former way of life. These immigrants usually maintained a traditionally Jewish way of life when living in their countries of origin. Thus, when immigrating to Israel, these Jews wish to become rapidly assimilated into the Israeli society. A major part of this

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13. C.A. 105/92, *Reem Engineers v. The Municipality of Nazareth*, 40 (5) P.D. 189, 203, 208.

14. See Jacob M. Landau, *Hebrew and Arabic in the State of Israel: Political Aspects of the Language Issue*, 67 INT'L J. OF THE SOCIOLOGY OF LANGUAGE 117, 118 (1987). See also Jacob M. Landau, *THE ARAB MINORITY IN ISRAEL, 1967-1991: POLITICAL ASPECTS* 84-97 (1993). For studies on the revitalization of Hebrew see Benjamin Harshav, *LANGUAGE IN TIME OF REVOLUTION* (1993); Haim Blanc, *The Israeli Koine as an Emerging National Standard*, in *LANGUAGE PROBLEMS OF DEVELOPING NATIONS* 237 (J. A. Fishman, C. A. Ferguson & J. Das Gupta, eds., 1968); Moshe Nahir, *Language Planning and Language Acquisition: The "Great Leap" in the Hebrew Revival*, in *INTERNATIONAL HANDBOOK OF BILINGUALISM AND BILINGUAL EDUCATION* 275 (Christina Bratt Paulston ed., 1988).

assimilation is learning and speaking Hebrew. In the last decade there were major immigration waves of Jews from Russia and Ethiopia. These linguistic minorities, as others before them, quickly learned Hebrew and their linguistic problem was only a transitional one.<sup>15</sup> They are part of the Jewish culture, nationality and religion. The only reason for their being a “temporary minority” is the fact that they emigrated from other countries. Hence, they should not be viewed as ethnic-linguistic minorities whose language rights need to be addressed.

The status of the Arabic Israeli minority, on the other hand, calls for a different approach than that which applies to Jewish immigrants. There is a political, national and ideological tension between the Israeli Arabs and Jews. Unlike the Palestinians, most Israeli Arabs do not view Israel as an enemy, nor are they viewed by it as such. Although many of them define themselves as “Palestinians” and tend to identify with the Palestinians in the occupied territories and with the surrounding Arab countries, they regard themselves as citizens of Israel.<sup>16</sup> Still, many political and ideological tensions persist. Israeli Arabs are segregated from the Jewish society and rarely become assimilated in the Israeli Jewish society.<sup>17</sup> These Arabs originally lived on what later became Israeli territory, and stayed on despite its foundation, rather than because of it. They are Israeli citizens and they preserve their own tradition and language. Thus, these Arabs did not actively strive to become part of the state of Israel,

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15. See Eliezer Ben-Rafael, LANGUAGE, IDENTITY AND SOCIAL DIVISION: THE CASE OF ISRAEL 76 (1994).

16. For a discussion of the problem of the Palestinians in the occupied territories and the tensions between Israel and the Palestinians, see generally JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE (1990).

17. The virtual segregation between Jews and Arabs in Israel is well demonstrated by C.A. 2991/91, X v. Y, 92 Takdin-Elion (1992) (not published): The case involved a custody dispute between divorced parents of a 13-year-old Arab-Moslem child whose mother was Jewish and converted to Islam after her marriage. Before the proceedings, the father had moved with the child from a Jewish city to an Arabic village and sent the child to an Arabic school. The Supreme Court upheld the lower court’s ruling to accord the father custody over the child and stated that the natural place for the child, as a Moslem, was with the people of “his nationality and religion.” However, and in contradiction to its own rationale, the court held that the child should attend a Jewish-Hebrew school in order to preserve his connection to Jewish society and culture. Moreover, the court ordered the father to move within three months to a Jewish city near the school. The main reason for giving the father custody over the child was to preserve the continuity in the boy’s life, as the boy had been living with him for the six years before the litigation, and not to “harm his relationship with his father and his tradition,” as the court stated. However, by forcing the father to move to a Jewish city and send the boy to a Jewish school, the court’s ruling in fact eliminated the possibility of preserving the Arabic-Moslem religion, tradition, and culture. The fact that the court did not consider a combination of living in an Arabic village and, at the same time, studying in a Jewish-Hebrew school or vice-versa, reflects the court’s view that social-cultural and educational integration between Jews and Arabs is impossible: one must reside and conduct all matters of daily life either in a totally Jewish community or in a totally Arabic one. The Supreme Court’s decision reflects the reality of actual segregation in Israel today.



unlike most of the minorities in the United States. Indeed, those groups in the United States that did not evolve as a result of voluntary immigration, i.e., Native Americans, Mexicans after conquest, and Puerto Ricans after conquest,<sup>18</sup> present knotty problems. At least Native Americans have received special treatment with respect to language policy.<sup>19</sup>

The national identity issues and political-ideological views are factors in the debate regarding the use of English and the rights of linguistic minorities in the United States as well. As Shirley Brice Heath observes:

Ideological or political views about the status of a particular language may arise in response to issues that have no direct or necessary relation to language. Within these motivations, language may be considered a tool or a symbol, and politicians may not concern themselves with changing the language itself, but rather with promoting it for status achievement and extension to speakers of other languages. For example, within the United States, ideological adherence to English has been supported by the ideal of a 'perfect union,' a coming together of diverse peoples in a creative force. Individuals, groups and the national government have promoted the idea at different times throughout our history that speaking the same language would ensure uniformity of other behavioral traits, such as morality, patriotism, and logical thinking.<sup>20</sup>

### III. THE LEGAL STATUS OF LANGUAGES IN ISRAEL AND THE UNITED STATES

#### A. *The Status of English and the Absence of an Official Language in the United States*

The Constitution of the United States contains no reference to an official or national language. The legacy of the colonial and revolutionary periods

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18. As to the special status of languages in Puerto Rico, which is now officially bilingual, and the current debate over Puerto Rico's statehood and its implications for language rights, see Lisa Napoli, *The Legal Recognition of The National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 182-185 (1998).

19. See Native American Languages Act, 25 U.S.C.A § 2901 (1990) (P.L. 101-477) (providing federal protection for linguistic rights of Native Americans and establishing the right of Native Americans to preserve, practice, and develop their indigenous languages). See also Scott Ellis Ferrin, *Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J. LEGAL. EDUC. 1 (1999) (arguing that "English-Only" referenda are in conflict with the Native American Languages Act and must include exceptions for Native American Students).

20. Shirley Brice Heath, *English in Our Language Heritage*, in LANGUAGE IN THE USA 6, 45 (Charles A. Ferguson & Shirley B. Heath, eds., 1981).

includes tolerance of diverse languages and the freedom to choose among languages in different areas.<sup>21</sup>

Some early national leaders, such as John Adams, proposed to set up a national language academy, and English as the official language. These efforts were debated and rejected by the founding fathers. The idea of government regulating American speech was deemed to be incompatible with the spirit of freedom of speech in the United States. During the nation's first century, there was a *laissez-faire* attitude governing language issues. For example, the Articles of Confederation were printed in German, and at different times federal documents appeared in French, German, Dutch, and Swedish. Bilingual instruction was common throughout the nineteenth century in both private and public schools.

By the middle of the nineteenth century, a stronger central government reduced the importance of tongues other than English. It was not until the late nineteenth century and the first half of the twentieth century that legal, social and political forces strongly opposed maintenance of languages other than English. Only then was a monolingual English tradition mandated in some states and espoused as both natural and national. There was a fear that language diversity would lead to political separation and a national split within the United States. Massive immigration to the United States at the beginning of this century and, as a result, the development and prominence of large ethnic-linguistic minorities, led to negative stereotyping and aroused antipathy towards newcomers. For the first time in American history, an ideological link was forged between language and "Americanism." During the 1920s, legal and social forces restricted the use and teaching of foreign languages. Since the 1960s, linguistic minorities have stressed the multilingual, multicultural nature of the national society. These minorities insist on the necessity of bilingualism in education, judicial matters, and the workplace. These efforts to revitalize the bilingual tradition in the United States have brought forth questions regarding the historical and current role of linguistic uniformity in national unity and the place of English in the United States' language heritage. The possibility of a linguistically-divided nation has been discussed with great fervor and frequency. The solutions currently offered are similar to those made periodically over the past two hundred years.<sup>22</sup> Many bills and proposals to amend the United States Constitution to declare English as its official language have been consistently introduced over the years and have always been rejected. Various forms of such bills are currently being considered in Congress.<sup>23</sup> At the

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21. *Id.* at 42.

22. Carol Schmid, Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 67-70 (1992); see also Heath, *supra* note 20, at 6-20.

23. See *infra* Part IV B for discussion of the various proposals.

state level, before 1984 only five states had “English-Only” legislation on their books.<sup>24</sup> By 1999 that number has risen to twenty-five.<sup>25</sup>

An additional reason for English not becoming an official language at the federal level has to do with the protection of immigrant-minorities’ rights under the Constitution. Linguistic minorities are protected indirectly by the Constitution for reasons of discrimination based on race, ethnicity, or national origin. Finally, the vision of the United States as a pluralistic nation, with an emphasis on freedom of speech, has contributed to the lack of an enactment of an official English statute at the federal level.

#### B. *Formal Bilingualism and the Status of Hebrew, Arabic, and English in Israel*

During the period of the British Mandate over Palestine, English, Arabic, and Hebrew were the three official languages of Palestine. Two legal provisions dealt with the status of official languages in Palestine. According to Article 22 of the Mandate for Palestine, “English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew and any statement or inscription in Hebrew shall be repeated in Arabic.”<sup>26</sup>

Although this was the first legal provision dealing with official languages in Palestine, the Supreme Court of Palestine, sitting as the High Court of Justice, concluded in the case of *Jamal Huseini v. The Government of Palestine*<sup>27</sup> that it did not govern the legal status of the three official languages. The Court determined that the official, domestic status of the three languages did not stem from the mandate, and therefore, this provision was inoperative in the internal law of Palestine. It had implications only in the field of international law. The Court held that for a mandatory provision to have effect in the internal law of Israel, it had to be incorporated into the Palestine Order in Council.<sup>28</sup>

Therefore, the only applicable legal provision that declared the official languages and established their status was Article 82 of the Palestine Order-in-Council, 1922, which states:

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24. See Yvonne A. Tamayo, “Official Language” Legislation: *Literal Silencing/Silenciando la Lengua*, 13 HARV. BLACKLETTER J. 107, 120 n.104 (1997).

25. See *U.S. English: States with Official English Laws* (last modified April 26, 1999) <<http://www.us-english.org/states.htm>>. See *infra* Part IV B for discussion of these statutes and their constitutionality.

26. United States Dept. of State, *Mandate for Palestine*, Article 22 (Washington, 1927).

27. H.C. 55/25, 24 October 1925, 1 Palestine Law Reports 50.

28. Avigdor Saltoun, *Official Languages in Israel*, 23 HAPRAKLIT 387 (1966/7) (Hebrew).

All Ordinances, official notices and official forms of the Government and all official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner shall be published in English, Arabic and Hebrew. The three languages may be used in debates and discussions in the Legislative Council, and, subject to any regulations to be made from time to time, in the Government offices and the Law Courts.<sup>29</sup>

The Article provides that, on the one hand, the Mandatory Government and the Branches of Administration have the *duty* of using the three languages. On the other hand, the population and the administration have the *right* to use any of the three languages. A 1939 amendment established that in case of a discrepancy in the text of an ordinance, official notice or official form in the three languages, the English version should prevail.<sup>30</sup>

The official *Gazette*, official notices and forms were published in all three official languages. Correspondence could be addressed to any governmental department in any of these languages. All railway and road notices had to appear in the three languages. Areas with considerable Jewish population, i.e., not less than twenty percent, were designated as "tri-lingual areas." In these areas, every official document of the courts was to be issued in the language of the person to whom it was addressed. Written and oral pleadings could be conducted in any of the three official languages. It was mandatory for the notary public of a court in a tri-lingual area, and permissible in any other area, to accept a declaration and register a document in any of the three languages. In all other districts, Arabic alone or Arabic together with English could be used as convenient, provided that the use of Hebrew was not prevented when needed.<sup>31</sup>

According to the U.N. Plan of Partition of 1947, the Constituent Assembly of each state, Arab and Jewish, was to draft a democratic constitution guaranteeing all persons "freedom of religion, *language*, speech and publication, education, assembly and association."<sup>32</sup> The United Nations resolution further stipulated that the provisional government of each of the proposed States had to make a declaration to the United Nations that would be recognized as part of the fundamental law of the state and prevail over other laws. In the area of religious and minority rights, the declaration would stipulate that "[n]o discrimination of any kind shall be made between the inhabitants on the

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29. R.H. Drayton, 3 LAWS OF PALESTINE 2569, 2588 (rev. ed., 1934).

30. See Interpretation Ordinance 1945 § 34 [1939] Palestine Gazette (no. 898) (Supp. 2) 465; [1945] Palestine Gazette (no. 1400) (Supp. 1) 48, 58.

31. Mala Tabory, *Language Rights in Israel*, 11 ISRAEL YEARBOOK ON HUMAN RIGHTS 272, 274 (1981).

32. U.N. General Assembly Resolutions, *Plan of Partition of 1947*, Vol. 1.

grounds of race, religion, *language* or sex.” Each state was to ensure adequate primary and secondary education for its Arab or Jewish minority respectively, in its own language and cultural traditions. Furthermore, the right of each community to maintain its own schools for the education of its own members in its own language, while conforming to educational requirements of a general nature imposed by the state, would not be denied or impaired.

Finally, no restriction would be imposed upon any citizen of the state with respect to the free use of any language in private intercourse, in commerce, in religion, in the press or publications of any kind, or at public meetings. The declaration by the Jewish State was to contain an additional stipulation to the effect that adequate facilities would be given to the Arabic-speaking citizens for the use of their language, either orally or in writing, in the legislature, before the courts and in the administration.

Under the terms of the Partition Resolution, Arabic and Hebrew would be the official languages of the City of Jerusalem. As mentioned above, in the aftermath of the 1948 War, the Plan of Partition was never implemented. Nevertheless, the Plan demonstrates how the United Nations viewed the rights of Arabs in the Israeli State. This view will later be compared with the rights of the Arab minority as reflected in language policy in the independent state of Israel, which was no longer formally subject to the United Nations’ resolution.

When the British Mandate over Palestine ended and the independent State of Israel was founded, English, Arabic and Hebrew were no longer the official languages of the State of Israel as they were in the Mandatory period. The first statute enacted by the Israeli Parliament was the “Law and Administration Ordinance” of 1948. The ordinance regulated the transition from the mandatory rule to the new Israeli independent rule. According to section 11 of the Law and Administration Ordinance, the law which existed in Palestine on May 14, 1948, i.e., all British legislation from the Mandatory period, shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of the State, and *subject to such modifications as may result from the establishment of the State and its authorities.*<sup>33</sup>

Thus, Israeli law integrated Article 82 of the Palestine Order-in-Council of 1922 and it is still in effect. However, the absorption of Article 82 into the Israeli Law, subject to the conclusion of Section 11, influenced the applicability of the Article.<sup>34</sup> By virtue of the section’s conclusion, the status of the official languages in Israel did in fact change. Only Arabic and Hebrew remained the official languages of Israel, and the scope and nature of protection and use of these two languages have been totally transformed since the Mandatory period.

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33. Law and Admin. Ord. S11, *Official Gazette*, No. 2 of the 12th Iyar, 5708 (21st May, 1948).

34. Saltoun, *supra* note 28, at 389.

### 1. *The Legal Status of Hebrew*

There is no doubt that Hebrew continues to be an official language in Israel. Although there is no original Israeli statute regarding the official languages in Israel, Hebrew maintains its official language status by virtue of Article 82, because there is nothing in section eleven of the Law and Administration Ordinance which could lead to a different conclusion.<sup>35</sup> Moreover, the Supreme Court of Israel suggested that even without the provision in Article 82, Hebrew would have been recognized as the official language of Israel as a basic fact that stems from the mere initiation of the state.<sup>36</sup> Due to Israel's unique national identity, Hebrew has enjoyed superiority over Arabic, although Arabic remains an official language as well. Certain legal provisions explicitly give Hebrew a superior status to all other languages. One of these provisions is Section 32 of the Interpretation Ordinance [New Version], which provides that where a discrepancy exists between the Hebrew text of any enactment or public notice and the official translation thereof into a foreign language, the Hebrew text shall prevail. Other provisions exemplify the preference for and superiority of Hebrew: the Nationality Law of 1952 provides that to acquire Israeli nationality by naturalization, a person must possess some knowledge of the Hebrew language; the state seal is designed only in Hebrew; according to the Chamber of Advocates Law of 1961, the conditions for registration as a law clerk include proof of a "sufficient knowledge of the Hebrew language."

Moreover, all post-independence legislation is drafted in Hebrew. Hebrew is the language in which the laws and regulations are enacted; it is the language in which speeches are made at the dais of the Knesset, the language of the discussions in the committees of the Knesset and at its meetings. It is the language of the government's publications for the general public and in which the public addresses the government. Hebrew is the language in which the deliberations of the courts are carried on, the language of instruction in the (Jewish) schools, and the language of the public institutions.<sup>37</sup> British legislation from the Mandatory period, which is still in force, is translated into Hebrew, and after its translation and formal publication, it constitutes the

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35. See Rubinstein, *supra* note 12, at 88; Saltoun, *supra* note 28, at 389.

36. H.C. 1/65, *Yardor v. The Election Committee for the Sixth Knesset*, 19(3) P.D. 365, 385.

37. Haya Fisherman & Joshua A. Fishman, *The "Official Languages" of Israel: Their Status in Law and Police Attitudes and Knowledge Concerning Them*, in MULTILINGUAL POLITICAL SYSTEMS: PROBLEMS AND SOLUTIONS 497, 508 (Jean-Guy Savard & Richard Vigneault eds., 1975).

binding version of the law. No plea that the Hebrew version deviates from the original law will be entertained.<sup>38</sup> All the above establishes the legal superiority of Hebrew as the principal official language.

## 2. *The Legal Status of English*

Section 15(b) of the Law and Administration Ordinance repeals any provision in the law requiring the use of English language.<sup>39</sup> The reason English had been an official language in the Mandatory period was the British occupation of and mandate over Palestine. This period, a relatively short one, gave no rise to an ingrained use of the English language. As soon as the British mandate came to an end, a reason to maintain the formal status of English no longer existed. Furthermore, unlike Arabic, the English language is not the actively exercised primary language within any minority in Israel.

The Israeli Ministry of Justice translates Hebrew statutes into English, and some transactions of the Knesset appear in English. The only instance in which English retains its preferred status concerns mandatory legislation that has not yet been replaced by a new Hebrew version. The English version of such legislation takes precedence over the Arabic and Hebrew and is decisive in case of discrepancy.<sup>40</sup>

## 3. *The Legal Status of Arabic*

No legislation subsequent to Article 82 has altered the status of Arabic, and therefore it remains Israel's second official language. Moreover, the provision repealing the required use of English does not mention Arabic, further confirming the official status of Arabic.<sup>41</sup> According to Article 82, a legal obligation exists to publish all official orders and forms of the government and

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38. Tabory, *supra* note 31, at 278.

39. This is the only original legal provision enacted by the state of Israel dealing directly with official languages. A few Israeli commentators argue that section 15(b) did not entirely terminate the official status of English by abolishing the requirement that the authorities use English, because it did not alter the right of citizens to employ English in all Government offices and courts. See Tabory, *Id.* at 279; Saltoun, *supra* note 28, at 391. However, although citizens have the right to employ English in certain circumstances, it should be stressed that the *duty* to use English has been abolished and only the *right* to use it remains. Because section 15 stipulates that it is no longer necessary to publish official notices and legislation in English, it is clear that English no longer enjoys the status of an official language in Israel in any respect.

40. This, however, does not grant English the status of an official language. The court must turn to the original English version only for the purpose of an accurate interpretation. Moreover, Hebrew version statutes have already replaced most of the mandatory legislation and the few British Ordinances that are still in effect are in the process of being replaced.

41. See Elazar L. Globus, *On the Status of the Arabic Language in the State of Israel*, 7 HAPRAKLIT 328, 329 (1950) (Hebrew); Mahsan Sabri, *The Legal Status of the Israeli Arabs*, 3 EYUNEI MISHPAT 568, 581 (1973/4) (Hebrew); Fisherman & Fishman, *supra* note 37.

all official announcements of the local authorities and municipalities in Arabic as well as in Hebrew. The only question left is whether the stipulation at the end of Section 11 of the Law and Administration Ordinance affects the official status of Arabic. In a District Court case, *Jerusalem Municipality v. Kaha*,<sup>42</sup> the judges expressed the opinion that it was no longer necessary to insist on the publication of a certain municipal notice in Arabic based on Section 11, i.e., implicit in the establishment of the State of Israel was a decision that dual publication was no longer necessary notwithstanding Arabic's status as an official language. The Supreme Court rejected the appeal on grounds of standing, but expressed doubt regarding whether an obligation to publish in Arabic persisted in light of the concluding part of Section 11.<sup>43</sup> In another case, the Israeli Supreme Court decided that a police officer, taking down a statement of an accused or a witness, was not required to write it in the original language. Thus, a statement to the police made in Arabic was admissible although it was written in Hebrew. The court added that if the person signed the statement without expressing opposition, this did not infringe the rights of the citizen or the equality of the official languages.<sup>44</sup> In *El Harawi*, the Supreme Court concluded that publishing statutes in Hebrew is sufficient, unless the plaintiff has suffered a distortion of justice.<sup>45</sup> Frequent violations of Section 82, i.e., traffic signs, signs in public institutions, and street and road signs written in Hebrew and English but not in Arabic, further exemplify the lack of implementation of Arabic as an official language.<sup>46</sup> Even in areas populated by a majority of Arab citizens, most street and road signs are in Hebrew and English alone.<sup>47</sup> Moreover, most government and public institutions use only Hebrew and English, ignoring the official status of Arabic.<sup>48</sup> Although the statute requiring the usage of English was abolished and the requirement to use Arabic has not been changed; in reality, there is a much greater use of English in Israel, both officially and unofficially, than Arabic. In practice, no real obligation to use Arabic in government offices exists, only permission to do so.<sup>49</sup>

However, one should note that although Hebrew is in fact the main official language of Israel, there are a few aspects in which Arabic maintains its status

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42. C.A. (T.A.) 48/53, 10 Psakim Mehoziim (Law Reports of the Israeli District Courts).

43. C.A. 148/54, *Kaha v. Jerusalem Municipality*, 9 P.D. 1247, 1250.

44. C.A. 48/54, *Isa Ali Irshif v. Attorney General*, 8 P.D. 690, 691.

45. C.A. *El Harawi v. The Ministry of the Interior*, 19(3) P.D. 279.

46. See Fisherman & Fishman, *supra* note 37, at 514.

47. See D.K. (March 22, 1995).

48. See, e.g., Arabic is not being used in nearly all public hospitals. See D.K. (July 29, 1998). Similarly, all correspondence and documents issued by Social Security Services are sent to Arab citizens in Hebrew alone. See D.K. (June 24 1998).

49. See Fisherman & Fishman, *supra* note 37, at 528.



as a second official language; e.g., Hebrew laws and regulations must be translated into Arabic. Nevertheless, it takes time until the translations are available, and failure to fulfill the duty to translate laws and regulations into Arabic does not affect their validity.<sup>50</sup>

The position no longer requiring the government to use Arabic in all official publications is unacceptable. First, the official status of Arabic obligates the state to employ Arabic in official publications and entitles citizens to use that language in Government offices and courts. Second, Section 15(b) of the Law and Administration Ordinance, repealing the use of English, did not include Arabic, and if the conclusion of Section 11 to the same Ordinance provided a basis not to publish in Arabic, there would have been no need to specifically address English in Section 15(b).<sup>51</sup> Third, the Supreme Court of Israel has decided in other matters that Section 11 refers only to technical modifications. A decision regarding the status of language used by a national minority cannot be regarded as a technical change effected by the establishment of Israel.<sup>52</sup> It is inconceivable that the Judiciary should infringe upon an area where the legislature would not tread.<sup>53</sup> However, because there is no statute regarding the status of Arabic except for Article 82, the other provisions of that Article can be applied. The Article enables the Government to relieve councils of the obligation to publish official notices in Arabic and to limit the use of Arabic in Government offices and in the courts. However, such implementation contradicts the essence of an official language.

The foregoing court decisions dealt with limitations on the use of Arabic and have granted inferior status to Arabic in Israel. However, no statute or court decision to date has doubted the fact that Arabic is an official language. On the contrary, ministers of the Government and members of the Knesset have continuously stated the importance of Arabic as an official language in Israel.<sup>54</sup> The Israeli Supreme Court has made similar statements.<sup>55</sup>

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50. See Directives of the Attorney General, *Use of Arabic Language*, no. 21.556 of May 1, 1971. See also KRETZMER, *supra* note 11, at 166.

51. Tabory, *supra* note 31, at 282; Directives of the Attorney General, no. 21.556 ¶ 7.

52. See Saltoun, *supra* note 28, at 393.

53. Rubinstein, *supra* note 12, at 91.

54. Saltoun, *supra* note 28, at 395. For example, the Minister of the Treasury, Pinhas Sapir, recognized Arabic as an official language in the name of the government when he replied from the platform of the Knesset on February 16, 1966 to a complaint of an Arabic Knesset member regarding the use of Arabic in public institutions. He stated, *inter alia*, that "the Arabic language is an official language having equal rights to those of Hebrew." See D.K. (1966) 4726.

55. See, e.g., C.A. 105/92, *Reem Engineers v. The Municipality of Nazareth*, 40(5) P.D. 189, 209.

### C. Comparative Observations

The development of language diversity, the historical background and the status of languages in the United States are, obviously, very different from those found in Israel. Unlike Israel, the United States witnessed no “development” that led to the institution of an *official* language. The issue of English as the official language of the United States was raised at the federal level, debated and rejected throughout history. Moreover, unlike Israel, which gained independence after having been a colony, the colonials were the ones who created the United States and have never left it. The founders of the United States and its majority spoke English. Therefore, in the United States there was never a shift from a colonialist regime that spoke one language, to an independent regime, which spoke a different language than their former colonizers.

The process by which English became the predominant language of the United States was a natural one, and for that reason Congress never had to make a legal declaration as to the country’s formal language. Only the immigration of linguistic minorities to the United States prompted debate regarding English as an official language. In contrast, the minorities who immigrated to Israel were Jews who aspired to speak Hebrew. In this respect, the Arabic minority’s status in Israel more closely resembles that of the Native Americans in the United States; each population resided in its respective country before independence and both were subject to the language introduced by the majority.

In both countries, the language of the majority became the dominant language. If not for the statute of official languages enacted by the British colonizers that became automatically part of the Israeli law, Israel might never have had official languages. All efforts to enact an original Israeli statute regarding language status have failed, just as official English provisions have in the United States at the federal level. Furthermore, the incorporation of Article 82 into Israeli law was due to the Law and Administration Ordinance that stated very generally that *all* the mandatory legislation shall remain in force in the independent state of Israel under certain conditions. In addition, Israel’s Declaration of Independence did not address the legal status of languages. It simply stated, *inter alia*, that “The State of Israel ... shall guarantee freedom of religion, conscience, [and] language ...”<sup>56</sup> When a member of Israel’s

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56. The legal status of Israel’s Declaration of Independence has always been problematic. Most of its parts are considered declarative in nature. The declaration does contain a few explicit legal provisions and general binding legal principles, which are a kind of informal bill of rights. See Rubinstein, *supra* note 12, at 38. One of these binding legal provisions is the provision regarding the freedom of language. Although the general view is that the Declaration does not itself have the force of law and is not regarded as positive law, the Declaration has a special status, with a profound effect on Israeli law in relation to the basic rights of Israeli citizens, and has been widely used by the courts in the interpretation of laws. It manifests the vision of the people and the credo of the state and provides guidance for the interpretation and implementation of

transitional parliament suggested that the phrase “freedom of language” be included in the Declaration of Independence, Israel’s first Prime Minister, David Ben-Gurion, said that the reason he did not oppose the inclusion of this phrase was *not* because of the need to ensure the equality of Arabic and Hebrew. He asserted that it was because “the fact that *Hebrew is the state’s language* should not deprive other citizens of using their language in Israel.”<sup>57</sup> Thus, it seems that in 1948, the Israeli legislature and the founders of Israel were not aware of the implications of Article 82. Only soon afterwards did Israel realize that it had two official languages. Therefore, the Israeli legislature never consciously or intentionally decided to establish Arabic as an official language in Israel or to maintain equality between the two languages. The fact that scholars have been debating the origin of the status of the official languages in Israel and the extent to which Article 82 still applies, further substantiates these conclusions. The observation from this point of view reveals that behind the legal complexities, there are more similarities between Israel and the United States than seem to emerge at first. In other words, neither country has in fact committed itself to an official language policy – and that, despite the *de jure* status of languages in Israel.

However, at the same time, differences exist between the development of the status of languages in both countries. The English language in the United States had supremacy over other languages from the very beginning. In contrast, Israel was subject to a major and extreme change regarding the dominant languages of its population: Arabic was the dominant language in the 1930s because more Arabs than Jews lived at that period in Palestine. During the 1940s, a large number of Jews emigrated from Europe to Israel and changed its demography. The legal status of languages was already established during the British Mandate, and was incorporated into the Israeli law. Unlike the United States, no debate ensued regarding the status of languages in the first few decades following Israel’s foundation. Thus, the differences between the United States and Israel regarding the development of the status of languages have also led to the differences in the current legal status of languages in both countries.

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all laws in force in Israel. See Shimon Shitreet, *International Protection of Human Rights in Israeli Law*, in ISRAELI REPORTS TO THE XII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 307, 333 (Stephen Goldstein ed., 1986); Haim H. Cohn, *Comparative Law and International Protection of Human Rights*, in ISRAELI REPORTS TO THE XI INTERNATIONAL CONGRESS OF COMPARATIVE LAW, 263 (1982); Ori Stendel, *THE ARABS IN ISRAEL*, *supra* note 3, at 189-91.

57. Rubinstein, *supra* note 12, at 88.

## IV. "OFFICIAL LANGUAGE:" IMPLICATIONS AND MOVEMENTS

Based on the foregoing overview of the de jure status of languages in Israel and the United States, I shall now attempt to define in a more specific and detailed manner the term "official language" – and a related term - "national language" – in order to examine whether and to what extent such definition corresponds to the de facto status of English in the United States, and of Hebrew and Arabic in Israel. Subsequently, this will assist us in realizing the implications of having or not having official languages.

In general, an official language is one used by the government and promoted through the power of the state; it constitutes the major means of communication between the state and its citizens.<sup>58</sup> The official language is the language of record; it is the language of the constitution, of legislation, the language of parliament and the language of the courts. It is the normative language of internal correspondence to and from the government, that of judicial and administrative affairs, that which represents the government and state to its citizens. Language has become a sign of nationalism; a struggle between languages often accompanies a conflict between national movements.<sup>59</sup> The official language of a country is not necessarily the same as its national language.<sup>60</sup> For the most part, the national languages are also "permitted" languages in the schools and in commerce, as well as the languages of the ethnic home.<sup>61</sup> National languages imply nationality membership. Official languages imply governmental citizenship.<sup>62</sup> The United Nations once defined *official language* as "[a] language used in the business of government (legislative, executive, administrative and judicial) and in the performance of the various other functions of the state;" and *national language* as "the language of a social and cultural entity which is in widespread use in a country."<sup>63</sup>

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58. Fisherman & Fishman, *supra* note 37, at 497. Following national and political changes, the status of a language as official may also change; the official status of a language is not permanently fixed and is exposed to fluctuation according to political circumstances. *Id.* at 498. See generally, JOSHUA FISHMAN, LANGUAGE AND NATIONALISM (1972).

59. *Id.* at 498.

60. Thus, as Fisherman & Fishman observe, there are countries in which a number of languages are used as official languages, e.g., Switzerland (which recognized three official languages: German, French, and Italian), India (in which there are fourteen official languages), Belgium (where two official languages are recognized, Dutch and French), and Israel (recognizing Arabic and Hebrew as official). However, it does not follow that the official languages are national ones or vice-versa. Thus, for example, in Switzerland the official languages are German, French, and Italian, while the national languages are German, French, Italian, and Romansch. *Id.*

61. Blaustein, *supra* note 1, at 2.

62. Fisherman & Fishman, *supra* note 37, at 498.

63. *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc.

This definition lacks a major component. For a language to be an official language of the state there must be a constitutional provision or a statute declaring it as such. However, a constitutional provision by itself is insufficient, if not accompanied by the government's obligation to use and implement the language. The following definition would thus be more appropriate: An official language is a language that has a special status binding the authorities and the government by virtue of the state's laws and which has a priority over another language or languages that have no such status. It is not enough to declare a language "official." The law must explicitly prescribe the boundaries of the "formality" of a language by defining and fixing the limits of its legal status.<sup>64</sup>

The United Nations, in one of its reports, depicted the process whereby languages become official or national as follows:

During the historical process of nation building, a particular language, usually that of the segment of the population which gains supremacy and imposes itself socially, politically and militarily on other segments in various regions and whose language dominates the other languages or dialects in the country, becomes, because of these extra-linguistic factors, the language of highest standing and, ultimately, the official language. Official recognition is of great importance to this and the other languages spoken in the country because, whether or not it is provided for in the Constitution or other basic law, such a selection means that this privileged linguistic instrument will be used in the various activities of the State ... At the end of the colonial dependence ... the people of many countries ... faced the problem of having to decide which language would henceforth be the official language of their new State. During this process, what became the official language – either the single official language or one of them – was often the language introduced by the colonizers; in a few cases, a national language was chosen.<sup>65</sup>

This is a general portrayal supposedly applicable to all countries. As to Hebrew, the foregoing description is accurate, since Israel chose Hebrew, which had been the national language, as one of the official languages. However, the description of the development of an official language does not apply to Arabic, as it is only *de jure* an *official language* and in practice it has an inferior status to Hebrew. As for English in the United States, this description is accurate except that English became a national language, rather than an official one.

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E/CN.4/Sub.2/476/Add.6 [hereinafter *U.N. Report*]; Text in Blaustein, *supra* note 1, at 2.

64. See Saltoun, *supra* note 28, at 387.

65. U.N. Report, *supra* note 63, at 9.

There is no equality between Hebrew and Arabic in Israel, although both are official languages. The major reason for that, I would suggest, is the perception of an official language and the scope of its implementation. The policies, court decisions and statutes discussed in the previous section indicate the erosion of the status of Arabic as an official language. To declare Arabic as the official language is one thing; to implement it by giving equal linguistic rights to the Arabic minority is another. Arabic's status as an official language of Israel is a vestige of British legislation. However, confusion ensues because coexistent with the official language status is a lack of linguistic rights for the Arab minority. As explained above, Israel incorporated Article 82, but the status of languages has never been the subject of original Israeli legislation. Original legislation could clarify the Israeli Legislature's intent, and if there is intent to accord Hebrew priority over Arabic, as is the practice in Israel, the legislature should state this explicitly in a statute. Such a preference should not be inferred from the existing provisions regarding official languages.

#### A. *The Implications of "Official Language"*

It appears that a statutory declaration that two languages are official languages necessitates total equality between them and a duty of the government to provide various services in both. The Israeli example proves that this assumption is far from being accurate.<sup>66</sup> The supremacy accorded to the Hebrew language is apparent in all aspects. If we set aside for a moment the requirement for a statutory or constitutional provision establishing the language's official status and go back to the United Nations' definitions, we can throw interesting light on the relative status of English, Hebrew, and Arabic. English in the United States and Hebrew in Israel would both be considered official and national languages. In the United States, the English language is the predominant and commonly the exclusive language in all branches of the government. For example, the United States requires English proficiency as a prerequisite to citizenship similar to the Israeli law requirement of Hebrew

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66. The status of languages in Canada is another example for both the lack of equality between two official languages and the lack of government implementation of their status as such. Under Article 16 of the Canadian Constitution, the recognition of two official languages did not in fact guarantee a right to any type of service in either official language. See *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*, (1986) S.C.R. 549. In Canada, official language status was interpreted to be merely a "political" declaration which had to be further developed in other constitutional or legal provisions. Moreover, even when the use of English and French in Canada is guaranteed by a statute, it is still limited to certain categories of public services provided by the federal government and only a few specific federal services are, in theory, available in both languages in the whole of the country. See FERNAND DE VARENNES, *LANGUAGE, MINORITIES AND HUMAN RIGHTS* 174-75 (1996). Similarly, the recognition of eleven official languages by the new South African Constitution is misleading, because official status does not actually imply guaranteed access to administrative or public services in all of these languages. *Id.* at 175.

proficiency.<sup>67</sup> The existence of such a requirement is one example of the de facto official status of English in the United States. Thus, despite the absence of a federal law declaring English as the official language of the United States, some federal laws, such as the above-mentioned provision requiring English literacy, produce in effect this result.<sup>68</sup>

In such a light, and if we accept the United Nations' definition of a national language as the majority's language, Arabic in Israel would be considered neither an official language nor a national language. Therefore, the de jure status of the languages in both countries does not reflect their actual status. For this reason, both formal recognition and equal treatment must be implemented in order for a language to qualify as official and the mere statutory provision regarding Arabic is in itself insufficient.

One of the most important implications of having an official language is that the minorities whose language is not official must become bilingual or multilingual. In addition to full access to government and administrative agencies, many other reasons exist to learn the dominant language, such as integration and participation in the social and cultural life of the majority. Nevertheless, the effect of having an official language formally excludes by law the use of minorities' languages in government branches. Thus, the minorities must learn other languages in addition to their own and not as a matter of choice. Minority linguistic groups who are forced to become bilingual or multilingual because of their powerless linguistic status have less power than those whose native tongue is the official language.<sup>69</sup> This also demonstrates the de facto formal status of English in the United States. English-speaking Americans do not need to learn any of the languages spoken in the United States apart from English. However, Native Americans, Latinos and other minorities in the United States need to learn English in addition to their mother tongues. It also illustrates the de facto unofficial status of Arabic in Israel. Arabs are forced to learn Hebrew to function effectively in the state's institutions and in society at large. Furthermore, by excluding the use of most other languages, a linguistic majority can control a government and enjoy the privileges, jobs, and services provided by the state in their own language.<sup>70</sup> Individuals for whom the official language is not the primary vernacular find themselves at a disadvantage in terms of access to jobs and services, education,

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67. The first English language proficiency statutory requirement. See THOMAS ALEXANDER ALENIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 50 (3d ed. 1995). Today, § 312(a)(1) of the Immigration and Nationality Act, 8 U.S.C § 1423 (1997) requires proficiency in English for naturalization.

68. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 332 (1992).

69. Tove Skutnabb-Kangas, MINORITY RIGHTS GROUP REPORT: LANGUAGE, LITERACY AND MINORITIES 6 (1990) [hereinafter *Minority Rights Group Report*].

70. De Varennes, *supra* note 66, at 86.

and in private business activities.<sup>71</sup> Moreover, by adopting a one-language-for-all policy, a state uses linguistic criteria to determine who will have access to services provided by the government, such as public schooling or public employment opportunities. It also creates a distinction, based upon language, on the degree to which individuals will be able to enjoy and benefit from these activities or services. Depending on the types of governmental service involved, language proficiency requirements by the state may disadvantage a non-native speaker depending on his or her level of fluency.<sup>72</sup>

By definition, official monolingualism means that in the majority of cases linguistic minorities experience violations of their linguistic human rights.<sup>73</sup> Moreover, bilingual government services should be provided in countries where there is a large enough linguistic minority.<sup>74</sup> They are necessary to ensure that minorities have full access to all resources and are able to participate in government and administration. This is essential in a democratic and pluralistic society. A state that fails to adequately support the bilingualism of its minorities or at least provides some degree of official recognition to a minority language is denying group identity and full human rights from minorities.<sup>75</sup> Official monolingualism which excludes the use of other languages, or is interpreted or implemented to prohibit public authorities from using other languages, is exceptionable. In the United States, the declaration of English as the official language of some states led to repressive and discriminatory measures.<sup>76</sup> Official language status should not entail exclusion of other languages. While the state may freely designate a preferential language, and thus recognize its legal obligation to respond in the official language (or languages), such a designation should not allow public authorities to violate the fundamental human rights of individuals.<sup>77</sup>

Considering all of the above, we can conclude that of the three languages, English, Arabic, and Hebrew, only Hebrew's status accords with the common definitions of an official language in all of its aspects. Although English in the United States has most of the characteristics of an official language, it cannot be regarded as such because of the lack of a statutory or a constitutional

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71. *Id.* See also Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 J. L. REFORM 265, 290-91 (1990).

72. De Varennes, *supra* note 66, at 55.

73. See MINORITY RIGHTS GROUP REPORT, *supra* note 69, at 6.

74. For a discussion of which minorities deserve equal language rights and the question of a numerical threshold, see *infra* Part V.

75. See MINORITY RIGHTS GROUP REPORT, *supra* note 69, at 8.

76. Denying parole to non English-speaking prisoners in Arizona is one example. See De Varennes, *supra* note 66, at 175. The Arizona "English-Only" statute was eventually struck down by the State's Supreme Court, see *infra* Part V.

77. See De Varennes, *id.*, at 175-76.



provision. Arabic in Israel, which is formally an official language, has the status of a non-official language.

B. *"Hebrew-Only" Trends in Israel in Comparison to the "English-Only" Movement in the United States*

Both the United States and Israel originally had a national commitment to tolerance of linguistic diversity.<sup>78</sup> In recent years, however, both countries have experienced pressure to adopt a single language as the official one.<sup>79</sup>

Over the years, many individual Knesset members suggested legislation making Hebrew the only official language in Israel. In 1952, a member introduced the "State's Language Law," the first of its kind.<sup>80</sup> This bill assumed that Article 82 of the Order-in-Council applied to Arabic, and therefore necessitated repeal. The Knesset rejected this bill, which would have abolished any legal requirement to use the Arabic language.<sup>81</sup> In March of 1976, the Israeli Minister of Justice stated before the Knesset that the status of the official languages was not regulated under legislation and that the government intended to include a provision in a basic law to be presented to the Knesset making Hebrew the official language of the state.<sup>82</sup> Another bill, proposed in 1981, was "The Hebrew Language Law." The aim of this bill was to encourage the Hebrew language without making it the only official language.<sup>83</sup> This proposal would have imposed on the government the duty to use only Hebrew in state sponsored press and media, in state institutions, in international contracts, in Israel's consulates and embassies abroad, on sign posts, in advertisements and so on.<sup>84</sup> This bill was also rejected.

An important bill was brought before the Knesset on October 8, 1996. This bill also provided that Hebrew should be the sole official language of Israel. The bill further provided that ministers and Knesset members be allowed to use only Hebrew in the Knesset. Proposed by a member of a right-wing party, this bill was a reaction to a declaration by Arabic Knesset members that they intended to use only Arabic when speaking in the Knesset. The Knesset member who proposed this bill stated that its purpose was to strengthen

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78. As to the United States, *see supra*, Part II and Part IIIA. As to Israel, its Declaration of Independence stipulates that the State of Israel shall guarantee, among other things, freedom of religion, conscience, education, culture, and language. *See supra*, Part IIIB.

79. *See supra*, Part III.

80. D.K.(1952) 2528; *See also* KRETZMER, *supra* note 11, at 165.

81. *Id.*

82. D.K. (1976) 2048.

83. KRETZMER, *supra* note 11, at 172.

84. D.K. (1981) 719; D.K. (1982) 758.

Israel's identity as a Jewish country.<sup>85</sup> The timing of the Arabic Knesset members' declaration and the subsequent bill came as no surprise. Israel was in the midst of extreme political tension between Arabs and Jews, and its government (based on a right-wing coalition) was clearly seen to deploy a consistent policy prejudicing minority rights and the pluralism of Israel.

Nonetheless, the chances of this bill becoming law were slim for two reasons. First, as opposed to the Government, the composition of the Knesset was one that would have probably not allowed such a bill to pass, as the Knesset had rejected similar bills before it. Moreover, the political right may have viewed the statement by the Arab members of the Knesset as a provocation. However, the usage of Arabic in the Knesset is not only a long-standing tradition, beginning with Ben Gurion's statement that the Arabs were not to be denied the right to use Arabic in the Knesset<sup>86</sup> and continuing to this very day, but is also explicitly provided for by Article 82 of the Order-in-Council. Article 82 provides that Hebrew and Arabic be used in debates and discussions of the Legislature. Furthermore, although the actual language of the proceedings in the Knesset has generally been Hebrew with simultaneous translation available into Arabic, Arabic has also been used in speeches and has been simultaneously rendered into Hebrew.<sup>87</sup> Thus, Arabic has always had a special status in the House. The latest bill of this sort went before the Knesset in May 1998. Like previous bills, it proposed to abolish the official status of Arabic, and the Knesset rejected it.<sup>88</sup>

During the past decade, the United States has been in the midst of linguistic conflict. Various ethnic groups, dominantly, but not exclusively, Spanish-speaking, are demanding linguistic rights. Others are finding it necessary to assert that speaking English is essential to preserve national unity and national strength and is key in shaping individual opportunities. In their concern over government support for bilingual programs and services, some proponents lobbied for a Constitutional Amendment making English the nation's official language.<sup>89</sup> Although the proposed English language amendment has been stalled repeatedly in Congress, proponents of "English-Only" laws had considerable success at the state and local levels.<sup>90</sup> The current "English-Only" movement has produced state resolutions, statutes and

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85. Allon Gideon, *Proposed Bill: Hebrew-Only in the Knesset*, HA'ARETZ DAILY NEWSPAPER (Israel), October 10, 1996, at 7.

86. D.K. (1976) 2520.

87. See Tabory, *supra* note 31, at 284.

88. See Michael Noach, *Own House in Order*, THE JERUSALEM POST, June 5, 1998; Liat Collins, *MKS Decry Bill to Remove Arabic as Second Language*, THE JERUSALEM POST, May 29, 1998.

89. Blaustein, *supra* note 1, at 2.

90. Michele Arington, Note, *English Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325 (1991).

constitutional amendments establishing English as the official language. "English-Only" rules are intended to eliminate governmental services in languages other than English. So far, official English legislation has been enacted in half the states,<sup>91</sup> and most states have considered "Official-English" laws.<sup>92</sup> "English-Only" laws were also enacted by initiative and referendum and approved by the voters themselves and not by state legislatures.<sup>93</sup> At the federal level, official English bills were consistently introduced over the years and Congress is currently considering various forms of such bills.<sup>94</sup> However, the courts did not strike down official English State laws unless they were extremely over-broad and restrictive, and it would seem that the United States Constitution does not prohibit official English.<sup>95</sup> Most official English laws

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91. As of June, 1999, the following states enacted "English-Only" legislation: Alabama (1990); Alaska (1998); Arkansas (1987); California (1986); Colorado (1988); Florida (1988); Georgia (1996); Hawaii (1978); Illinois (1969); Indiana (1984); Kentucky (1984); Louisiana (1811); Massachusetts (1975); Mississippi (1987); Missouri (1998); Montana (1995); Nebraska (1920); New Hampshire (1995); North Carolina (1987); North Dakota (1987); South Carolina (1987); South Dakota (1995); Tennessee (1984); Virginia (1996); Wyoming (1996). See *U.S. English: States with Official English Laws* (last modified April 26, 1999) <<http://www.us-english.org/states.htm>>. Most of these laws state in a general and somewhat symbolic manner that English is regarded as the official language of the state (except for Arizona's broad "English-Only" Amendment, which was subsequently struck down). See *infra*, Part V. Many states also have incidental provisions regarding the language of the judiciary and other government acts. See Leila Sadat Wexler, *Official English, Nationalism, and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 348 (1996). See also Perea, *supra* note 68, at 323.

92. See Martina Stewart, *Recent Development: English-Only Laws, Informational Interests, and the Meaning of the First Amendment in a Pluralistic Society*, 31 HARV. C.R.-C.L. L. REV. 539, 541 n.15 (1996). See also Jack Citrin et al., *The "Official English" Movement and the Symbolic Politics of Language in the United States*, 43 W. POL. Q. 535, 539 (1990).

93. The process of direct legislation has been criticized especially when it has to do with minority rights. See, e.g., Arington, *supra* note 90, at 343-51.

94. In 1997, the House of Representatives passed the English Empowerment Act of 1996, which declares English the official language of the United States. The bill did not pass in the Senate, but a similar proposal is currently pending in Congress. See Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1104 (1997). Current "English-Only" bills that have been introduced before the 106th Congress include H.R. 50, The Declaration of Official Language Act (requires the government to function in English and specifically bans bilingual ballots and bilingual education); H.R. 1005, The National Language Act (requires all government business to be conducted in English. It repeals the federal bilingual ballot mandate, the Bilingual Education Act and terminates the Office of Bilingual Education and Minority Languages Affairs); H.R.J. Res. 21, The English Language Amendment (a Constitutional Amendment to make English the official language of the United States), and the English Empowerment Act, which was re-introduced before the 106th Congress. See English First: List of Official English Bills in the 106th Congress (last modified Feb. 22, 1999) <<http://www.englishfirst.org/efbills.htm>>.

95. See, e.g., *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), *aff'd* *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994), *aff'd on reh'g*, 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated as moot* *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). The Arizona State Supreme Court eventually struck down the Constitutional "English-Only" Amendment as over-broad; this is the only statute of its kind not to pass constitutional muster. See *Armando Ruiz v. Jane Dee Hull*, 957 P.2d 984 (Az.

survive equal protection challenges because they are facially neutral: applying to English and non-English speakers alike. In the absence of a showing of intent to discriminate against non-English speakers, courts do not invalidate rational legislation merely because of its disparate impact.<sup>96</sup>

The motivation for these trends is different in each of the two countries. In the United States, the impetus has always been the fear that language diversity would lead to a national split coupled with the fear of immigration endangering national unity. The current “English-Only” movement is mostly a reaction to the large wave of immigration,<sup>97</sup> the perception that newcomers are no longer learning English, and the concern that the majority of immigrants seem to speak one “rival” language, i.e., Spanish. The perception that a majority of the immigrants speak only Spanish and are unwilling to learn English is contradicted by empirical evidence. A study by McCarthy and Valdez confirms a classic three-generation pattern of language acquisition. The first generation is primarily monolingual, the second generation is bilingual, and the third generation prefers English. Thus, Spanish monolingualism persists because of continued immigration, not because Spanish immigrants fail to learn how to speak English.<sup>98</sup>

A concern for the primacy of the English language thus motivates the proponents of “English-Only” laws.<sup>99</sup> There is no material reason to declare English the official language in the United States; it would probably not change the actual status of English and serve only political goals of depriving various rights of minority groups. In Israel, Hebrew is and has always been a privileged official language in relation to Arabic. Unlike the United States, there is no fear in Israel of a national split and the matters relating to immigration were irrelevant to language rights. Therefore, it seems that the purpose of demanding that Hebrew’s status as the only official language in Israel and undermining the status of Arabic are part of an inclination to deprive Arabs of their rights in general, and not solely to accord Hebrew a new status. At the same time, there are certain similarities between the trends in Israel and in the United States. The purpose both of having Hebrew as the only official language in Israel and of having English as an official language in the United States is to further emphasize the superior standing of these languages and to prevent linguistic minorities from claiming equal language rights. The fact that these attempts have thus far failed in Israel and at the federal level in the United States also

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1998). For discussion of these cases, see *infra* Part V.

96. See Arington, *supra* note 90, at 336.

97. Perea, *supra* note 68, at 344.

98. See Schmid, *supra* note 22, at 71; Perea, *supra* note 68, at 347; Arington, *supra* note 90, at 327.

99. Arington, *supra* note 90, at 327.

stems from the same rationales: the notion of pluralism, the significance of the freedom of speech, and the protection of minorities' rights.

It seems that these latter principles have always outweighed the reasoning behind the English/Hebrew-Only trends. One may hope that they will continue to prevail, because these trends are dangerous in that they may deprive linguistic minorities of equal language rights that they deserve.<sup>100</sup> Moreover, the main reason traditionally given by the supporters of official monolingualism in both countries, that it would contribute to national unity, is empirically wrong. The fact that the United States has never had English as its official language and that Israel has always had both Hebrew and Arabic as official languages, actually contributed to national unity in both countries. Depriving minorities of their basic rights can lead to a national split. The assumption that multilingualism divides a nation whereas one language unites it is wrong. National unity can be built only upon respect for the languages and cultures of all the people who make up the nation.<sup>101</sup> As mentioned above, providing language rights is not only important to minorities in its practical implementation, it is also a symbol of pluralism and tolerance.<sup>102</sup>

Furthermore, the national unity reasoning is actually a pretext for discrimination. Supporters of official monolingualism do not want to prevent a national split and the erosion of the status of the predominant language. Language rights are a matter of politics and culture, and a demand for monolingualism in a multi-ethnic society constitutes an intent to discriminate on the grounds of national origin, ethnicity, and race. Language is a poor proxy for political unity and community of language and culture does not necessarily give rise to political unity any more than linguistic and cultural dissimilarity prevents political unity.<sup>103</sup> Some have contended that monolingualism in one country is domination of one language at the expense of others and is a reflection of "linguicism," i.e., an ideology akin to racism. "Linguicism" is defined as "[I]deologies, structures and practices which are used to legitimate, effectuate and reproduce an unequal division of power and resources, both

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100. See Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999) (arguing that "English-Only" regulations violate the basic right of personality of non-English-speaking and bilingual Americans, based on both an economic theory and a general theory of rights which is modeled in Kantian moral and political theory; the authors conclude that language rights are weighed against state-imposed norms of assimilation). See also Andre Sole, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 FLA. L. REV. 803 (1993).

101. MINORITY RIGHTS GROUP REPORT, *supra* note 69, at 8.

102. The view of language as a symbol is discussed in detail by Perea, *see supra* note 68, at 350.

103. *Id.* at 35, citing William M. O'Barr, *Boundaries, Strategies, and Power Relations: Political Anthropology and Language*, in LANGUAGE AND POLITICS, 405, 411 (William M. O'Barr & Jean F. O'Barr eds., 1976).

material and non-material, between groups which are defined on the basis of language.”<sup>104</sup> This concept replaces biologically based racism by a more sophisticated form in connection to language, using the languages of different groups as a defining criterion and as the basis for hierarchy. Moreover, it is the fear of diversity and the view of the “different” as “opposite” that drives these movements:

A pluralistic view of culture conceives of dissimilar value systems and civilizations not in terms of opposition to one another, but simply as expressions of different historical and linguistic environments. To the monolingual mind, different cultural systems are perceived as being in opposition to one another ... monolingual thinking perceives other cultures as hierarchically inferior, and thus subordinate to the superior system.<sup>105</sup>

Moreover, an “English-Only” policy in the United States or a “Hebrew-Only” policy in Israel is a preference based upon language, which favors those who speak English or Hebrew respectively as a primary language. This creates a situation where others do not receive the same privileges or advantage of using their primary language. “English-Only” and “Hebrew-Only” policies are based on an unreasonable language preference that constitute differential treatment, favors individuals speaking English or Hebrew as their primary tongue, and disadvantages those who do not.<sup>106</sup>

The demand for official monolingualism as a pretext for discrimination and the extent to which the official status of a language is implemented are best exemplified by exploring the practices in the field of education. This is also the arena in which official monolingualism would cause the most harm.

### C. *Linguistic Requirements and Practices in the Field of Education*

All languages have equal worth for those speaking them yet they are rarely entitled to equal support or equal resources. One area where this is especially true is education. Children belonging to the majority are educated in their mother tongues and this is accepted as a natural human right. The same is not true for all minorities. Majorities act as if minority mother tongues were somehow inferior (cultural linguicism), and emphasize educational efforts geared toward the learning of the majority language while neglecting or assigning a much lower priority to measures geared toward the learning of

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104. MINORITY RIGHTS GROUP REPORT, *supra* note 69, at 8.

105. Jose Faur, *Monolingualism and Judaism*, 14 *CARDOZO L. REV.*, 1713, 1716-17 (1993).

106. *See De Varennes, supra* note 66, at 89.

minority mother tongues (institutional linguicism).<sup>107</sup> These precepts apply to both the United States and Israel.

In Israel, the Compulsory Education Act of 1949, which also applies to elementary schools in the Arab sector, does not specify any language of instruction. Israeli Arab pupils study in their own separate schools in each of their towns and neighborhoods. At the same time, Arab children have the right to study in Jewish schools, and individual Arab students do so. According to the State Education Law of 1953, the Ministry of Education "shall prescribe the curriculum of every official educational institution, [and] the curriculum shall be adapted to the special conditions thereof."<sup>108</sup> Special curricula were drawn up for Arab education institutions, emphasizing Arab culture, literature and history, as well as the Arabic language. All curricula in the Arab schools use Arabic as the language of instruction, with Hebrew and English as compulsory foreign languages.<sup>109</sup> The goal is fluency in the Hebrew language, both in oral and written form.

In contrast, Arabic is taught in many Jewish elementary schools but is only optional in Jewish academic high schools and is studied by relatively few with a generally low level of achievement.<sup>110</sup> There is a low level of interest in this subject, and most students prefer studying English, which, unlike Arabic, is compulsory from second or third grade until the end of high school.<sup>111</sup> It is clear then that Israel views English as more important than Arabic as a second language, despite the fact that Arabic is an official language in Israel and that English no longer has such a status. The rationale for the emphasis on English language studies in Israel, as in many other non-English speaking countries, stems of course from its international status as a lingua franca. However, not only do Arabs constitute a fifth of Israel's population, but Israel is also located in the Middle East where Arabic is the predominant language. Furthermore, the preference for English does not serve any domestic objective that has to do with a specific minority. Incidentally, it also validates the inferior status of Arabic as viewed by the Israeli authorities.

In 1976, the Knesset Education and Culture Committee recommended that the Ministry of Education and Culture make the instruction of Arabic in elementary and secondary schools compulsory. A similar recommendation was brought before the Knesset in 1986, based on a committee report regarding the

107. MINORITY RIGHTS GROUP REPORT, *supra* note 69, at 14-15.

108. State Education Law, 1953, 7 L.S.I. 113.

109. Landau, *Hebrew and Arabic in the State of Israel*, *supra* note 14, at 124.

110. *Id.* Moreover, a large dose of Hebrew literature and Jewish history is compulsory in Arab schools, while Arab history is studied only to a modest degree in Jewish schools and Arabic literature hardly at all. *Id.* at 126-7. See also Immanuel Koplewitz, *Arabic in Israel: The Sociolinguistic Situation of Israel's Linguistic Minority*, 98 INT'L J. SOC. LANGUAGE 29 (1992).

111. Tabory, *supra* note 31, at 294-96.

status of Arabic studies in the Jewish schools.<sup>112</sup> To date, these recommendations have not been implemented. Arabic language study among Israeli Jews should be compulsory not only because it is a formal language of the state, but also because the knowledge of Arabic will advance the understanding of and tolerance towards the Arab minority among Israeli Jews. Compulsory education in both languages would reinforce the importance of the two languages and cultures in Israel. In countries like Israel and the United States, in which a number of languages are spoken, it is vital that the various languages be used in the school system if linguistic minorities are to survive. This is especially true at the primary level, since language is inextricably connected with education.<sup>113</sup>

As opposed to the United States, in Israel there are parallel and segregated educational systems for Jews and Arabs conducted in Hebrew and Arabic, respectively, and bilingual education exists only in a few selective and experimental schools. Such a distinct separation between linguistic minorities and the majority in the educational system does not exist in the United States. This difference is mostly due to the sociological, political, and demographic differences between the two countries. While Arabs comprise one fifth of Israel's population which itself exists as an enclave in a region populated by millions of Arabs, English is not only the predominant language of the United States, but it is also the second most spoken language in the world. This basic difference suggests dissimilar courses of action in each of the two countries. While the study of Arabic should be compulsory in the Israeli Jewish schools, in the United States, the English speaking majority should not be forced to learn Spanish. Spanish is neither sufficiently pervasive nor central to domestic policy in a measure that would merit such a requirement, nor does it enjoy the status of an official language.

Minorities in *both* countries should, however, receive equal educational opportunities. A few statutes provide some protection for language minorities in education in the United States. The Bilingual Education Act<sup>114</sup> recognized the fact that minority language children were not receiving an adequate education in schools that operated exclusively in English. One of the main impediments to the implementation of the Act, similar to that of the Arabic educational system in Israel, is that the resources and funding for bilingual education have been inadequate for the growing non-English speaking population. The Bilingual Education Act did not provide a right to bilingual education; rather, it offered financial assistance for local bilingual programs

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112. See D.K. (Jan. 29, 1986).

113. See Kathryn J. Zoglin, *Recognizing a Human Right to Language in the United States*, 9 B.C. THIRD WORLD L.J. 15, 34 (1989).

114. 20 U.S.C. §§ 3281-3386 (1982).



designed to meet the needs of children with limited facility in English. The question of whether the failure to provide educational assistance to non-English speaking students violates the Constitution was never resolved.<sup>115</sup> Another protection for linguistic minorities in the field of education is found in The Equal Education Opportunities Act.<sup>116</sup> The Act, among other things, requires school districts to take appropriate action to overcome language barriers that impede equal participation by students in an instructional program. The current debate in the United States over bilingual education stems from some of the same arguments used by official English proponents and opponents. There is strong opposition to bilingual education, exemplified by the recent anti-bilingual education initiative in Arizona,<sup>117</sup> and Proposition 227 – “English for the Children” – in California.<sup>118</sup> Such measures would in effect end bilingual education in these states and will likely lead to the adoption of similar initiatives in other states.

In both the United States and Israel, a high standard of education is usually not available in the language of the minority, at least to the same extent as in the majority’s language. The result is an unavoidable conflict between the minority’s wish to have their children speak their language and learn their history and culture for reasons of communal identity and preservation of

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115. See Schmid, *supra* note 22, at 85.

116. 20 U.S.C. §§ 1701-1758 (1982).

117. Since the Arizona legislature failed to pass a bill to end bilingual education, the matter is now left for the voters, as a ballot initiative modeled on California’s Proposition 227 (see *infra* note 114) was filed in Arizona at the beginning of 1999, and is aimed at the year 2000 election. See Ruben Navarrette, Jr., *Legislature’s Lapse Leaves Bilingual Education to Voters*, ARIZ. REPUBLIC, May 5, 1999.

118. CAL. EDUC. CODE § 300 (1998). Proposition 227, which was approved by the voters on June 2, 1998, dismantles the state’s special programs for students with limited English proficiency; these programs are to be replaced with one-year “immersion classes” (i.e., placing English learners in an English-translation class.). After that, children must be placed in classes in the regular program alongside native English speakers; the law bans most existing forms of bilingual education and in effect ends bilingual education in California. Some districts, such as San Francisco, refuse to implement the new law and continue bilingual classes in which immigrant students are taught primarily in their native languages. See Thomas D. Elias, *Bilingual Classes Ban Gets A in California; Immigrants’ Enthusiasm Belies Critics*, WASH. TIMES, May 16, 1999, at C4. See also Valeria G. v. Wilson, 12 F. Supp.2d 1007 (N.D. Cal. 1998) (upholding the constitutionality of Proposition 227).

A thorough discussion of the debate surrounding the desirability of bilingual education in the United States is beyond the scope of this article. See generally Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249 (1988); Rachel F. Moran, *Strange Bedfellows: The Keyes Case and the Politics of Bilingual Education*, in POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM 89, 94-104 (H. Scheiber & M. Feeley eds. 1989); Michael DiChiara, Note, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L. J. 101, 119-125 (1997); Rosenbaum, *Educating Children of Immigrant Workers: Language Policies in France and the U.S.A.*, 29 AM. J. COMP. L. 429 (1981); C.H. Rossell & M.J. Ross, *The Social Science Evidence on Bilingual Education*, 15 J.L. & EDUC. 385 (1986).

tradition, and the imperative need of Hebrew schooling (in Israel) and English schooling (in the United States) in order to have equal opportunity and participation. It is incumbent upon the United States and Israel to each provide the opportunity for its minorities to achieve both goals. It can do so by acknowledging the importance of these needs and by creating constitutional rights of minorities to equal educational opportunities, through bilingual education or other methods which would achieve this goal and be supported by an equal allocation of financial resources.

#### V. LINGUISTIC MINORITIES AND LANGUAGE RIGHTS AS CONSTITUTIONAL AND HUMAN RIGHTS

We now turn to the question of whether justifications can be found for the privileged status of Hebrew in Israel and of English in the United States and, if not, to what extent and in what ways should minorities be placed on an equal footing with the majority. The main question in this regard is the legal status of language rights, i.e., should they be viewed as fundamental constitutional and human rights. For the purpose of exploring this question, I will attempt to define specifically whose rights come under discussion here.

The definition of linguistic minorities should be a broad one that includes not only those groups whose mother tongues are not *official* languages in the countries where they live, but all groups whose language has a status inferior to that of another dominant language. This definition applies both to countries that do not have an official language, such as the United States, and to countries which may have a language that is official *de jure*, but should be viewed as a language of a linguistic minority because of its inferior status *de facto*, such as Arabic in Israel.

In 1984, the United Nations' Sub-Commission on the Protection of Minorities and Prevention of Discrimination of the Commission on Human Rights proposed to define "minorities" as follows:

A group of citizens of a state, endowed with ethnic, religious or *linguistic* characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.<sup>119</sup>

The Commission on Human Rights never accepted this definition or any other proposed definitions that preceded it and the United Nations has yet to accept any single definition of a minority. The inability to reach an acceptable definition of "minority" and the lack of a formal definition demonstrate the

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119. See Zoglin, *supra* note 113, at 28.

complexities that surround the rights of linguistic minorities. The United Nations' proposal is too narrow since it is based solely on numbers without taking power into account, and since it requires that the minority be citizens of the state. The definition should also include non-citizens and the power of the group and not numbers alone.

For the purpose of this analysis, I find useful the following definitions of "majority" and "minority:"

The "majority" is "a social group that experiences social life from a position of privilege, 'normal' status, or dominance relative to other groups ... A 'majority' does not necessarily contain more than half of the members of the society. According to this model, there is no single 'majority,' since the meaning of this term will vary depending on the social context."

"Minority" is "a social group that, having been constructed by society as different, experiences a relatively subordinate social identity and social status, which often results in fewer opportunities for economic and social advancement. It is usually true, but not essential, that a 'minority' group is comprised of fewer than half of the members of the population."<sup>120</sup>

I use these definitions in conjunction with the foregoing definition of "linguistic minority."

In general, Israel's policy neither recognizes the Arabs as a "minority" nor confers rights on Arabs as a minority.<sup>121</sup> Even though the Arabs in Israel have a common culture, language, traditions, heritage, and economic and social interests that differ from those of the majority, there are no specific statutes that address their rights as a group. Israel's failure to recognize the Arabs as a "minority" group in either the law or the government's policies is due to Israel's emphasis on building its identity as a Jewish state.<sup>122</sup>

One of the crucial questions in regard to language rights in Israel is whether the Arab population has the opportunity to collectively exercise the right to use its own language as prescribed in international human rights instruments. Freedom of language is part of freedom of speech. While freedom of speech is upheld as a basic human and constitutional right, the right to use

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120. See Sylvia R. Lazos Vagras, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 153 (1999). For a different view, see De Varenne, *supra* note 66, at 172 (arguing that a minority should be understood as an objective, numerical minority in a state, i.e., less than fifty percent of its entire population).

121. Ian Lustick, ARABS IN THE JEWISH STATE: *in* ISRAEL'S CONTROL OF A NATIONAL MINORITY 68-82 (1980).

122. See KRETZMER, *supra* note 11, at 169.

one's own language in exercising that right has often been overlooked. The freedom of language, as part of the freedom of speech, should be regarded as a broad and a fundamental constitutional right as well as a basic human right. There are multitudinous meanings to language rights and ways in which language use may be of sociopolitical relevance to linguistic minorities.<sup>123</sup> The freedom of language should include, among other things, the right to state-sponsored education in one's mother tongue; the right to participate in cultural activities in a language easily understood; the right to publish and broadcast in one's own language; the right to correspond with and be informed by the government of any administrative procedures; and, within the judicial system, holding trial proceedings in a language that the parties can understand.

Language rights are human rights and constitute a fundamental element of the international idea of equality. However, there is no declaration of the right to language in the international sphere. The principle of non-discrimination based on language is set forth in Article 2 of the Universal Declaration of Human Rights, according to which "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status."<sup>124</sup> No mention is made in this general provision of linguistic or other minorities as a group being entitled to collective rights.<sup>125</sup> The first and most significant provision in a universal instrument, which refers to the existence of linguistic groups per se, is Article 27 of the

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123. Manfred W. Wenner provides a useful and comprehensive list of language rights and categorizes them as follows: *I. Individual Use*: (a) the right to use the language at home; (b) the right to use the language "in the street"; the right to use the language for personal names (both first and family names); *II. Individual and Collective Use*: (a) the right to use the language in personal communications (letters, telephone conversations and the like); (b) the right to use the language in activities designed to perpetuate its use: (i.) schools, (ii.) newspapers, journals, magazines, books, etc., (iii.) radio and television broadcasting, (iv.) movies; (c) the right to use the language in private economic activities: (i.) business and manufacturing enterprise between workers, (ii.) advertising (storefront, media, etc.), (iii.) record-keeping (orders, invoices, inventories, and the like), (iv.) other communications (letterheads, etc.); (d) the right to use the language in private associations in: (i.) clubs of all types (social, sport, cultural), (ii.) churches and religious organizations; (e) the right to use the language in public meetings; *III. Individual and Collective uses vis-à-vis the government*: (a) in courts of law (with or without an interpreter supplied at government expense); (b) in communications with the government, such as license forms, filing required affidavits, tax forms, and applications for governmental services; (c) in public notices (street signs, public information signs, and the like); (d) in campaigning and running for public office; (e) in government reports, documents, hearings, transcripts, and other official publications for public distribution; (f) in the national legislature (in debates), the national judiciary, and the national administrative agencies, bureaus, and departments. See Manfred W. Wenner, *The Politics of Equality Among European Linguistic Minorities*, in *COMPARATIVE HUMAN RIGHTS* 184, 193 (Richard P. Claude ed., 1976).

124. Article 2 of *Universal Declaration of Human Rights*, U.N. High Commissioner for Human Rights, 1999.

125. Mala Tabory, *Language Rights as Human Rights*, 10 *ISRAEL YEARBOOK ON HUMAN RIGHTS*, 167, 175 (1980); KRETZMER, *supra* note 11, at 163-65.

International Covenant on Civil and Political Rights. The Article is the most positive provision on the subject of language rights of minorities and it provides that:

[I]n those States in which ethnic, religious or *linguistic* minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use *their own language*.<sup>126</sup>

Some regional arrangements also address language rights. The 1948 American Declaration of the Rights and Duties of Man parallels the Universal Declaration of Human Rights. It includes the following non-discrimination clause: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, *language*, creed or any other factor." Hortatory and non-binding, this Declaration enjoys lesser international legal status than the Universal Declaration because it is a "customary, internal recommendation."<sup>127</sup>

Thus, international instruments provide very limited protection to linguistic minorities as a group. Notwithstanding the limitations of international law, it seems that the implementation of some language provisions is more suitable at the national level, where they can be adapted to the particular linguistic circumstances of each country. Neither the United States Constitution nor the unwritten Israeli Constitution give any language special recognition. However, minorities' language rights are partially protected by these Constitutions and by constitutional court decisions.

The original intention of the founders of Israel was to enact as soon as possible a written constitution containing a Bill of Rights. The first Knesset was indeed elected as a Constituent Assembly. Several draft constitutions were laid before it, but the first Knesset decided, after lengthy and tedious deliberations, not to enact a constitution at that stage but to enact a series of "Basic Laws." These laws were eventually to be consolidated into a single constitution, but they never were. Such basic laws have meanwhile been enacted on almost all aspects of constitutional life.<sup>128</sup> In Israel, as in the United

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126. *Id.* at 182. See also De Varennes, *supra* note 66, at 134-57.

127. *Id.* at 205.

128. The reasons for the delay and hesitation in enacting some of these basic laws and gathering them into a written constitution are mainly the political opposition of the Jewish religious parties in the Knesset. They fear that a formal Bill of Rights would enable the courts to strike down some religion-based statutes. For example, marriage, divorce, and other important aspects of family law are based on religious Jewish law and consequently they discriminate against women and deprive them of equal protection. Under current law, the courts cannot strike down these statutes.

Kingdom, which also lacks a written constitution and Bill of Rights, opinions vary as to the desirability of introducing a Bill of Rights into the legal system.<sup>129</sup> Generally, a Bill of Rights must be a written document that cannot be amended by the regular legislative process, and has supreme legislative status. The latest Israeli basic law that was enacted in 1992 and titled "Basic Law: Human Dignity and Freedom," seems to correspond to these requirements. This statute can be regarded as a basic law on civil rights. It contains provisions for almost all the human and civil rights traditionally guaranteed in constitutional instruments. However, it does not explicitly include freedom of speech and the principles of equality and non-discrimination.<sup>130</sup> Even before the enactment of this statute and other basic laws, the legal situation in the field of human and civil rights in Israel proved to be quite satisfactory due to protection of these rights by the courts.

Throughout Israel's history, the Supreme Court had a prominent role in establishing and developing basic principles and freedoms and has been intensively involved in human rights issues. Most of these fundamental freedoms were recognized, implemented and enforced by the Supreme Court, sitting as High Court of Justice, notwithstanding the lack of any statutory authority. Fundamental freedoms and liberties are recognized and implemented by the judiciary, whenever redress is required.<sup>131</sup> Condemnation of discrimination, freedom of expression, and the principle of equality are protected by case law of the Supreme Court. According to this case law, unless given clear statutory authority to do so, governmental bodies may not discriminate between citizens on grounds such as national, racial, or ethnic origins.<sup>132</sup> Despite the

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129. One of the major arguments against a Bill of Rights is that entrenched clauses limit the legislative supremacy of Parliament. See Shitréet, *supra* note 56, at 338-39. Moreover, as has been proven in Israel, the system of law could reach similar results irrespective of the existence of a written constitution. On the other hand, it can be argued that a Bill of Rights ensures judicial review of legislation and may be used to limit the powers of the majority, particularly where rights of the minority are concerned. In Israel it could be used to protect the civil rights of the minority Arabic population and could be more effective in dealing with discrimination. *Id.*

130. This basic law invests the courts with the power to strike down any law enacted by the Knesset that is not in accordance with it. Therefore, it has an explicit constitutional status. The term "human dignity" is not defined in the basic law and may be employed in the future through court interpretation to include many fundamental rights not expressly mentioned, such as language rights. "Basic Law: Human Dignity and Freedom" is not entrenched and may be amended by simple majority; further, it grants immunity against judicial review to all existing legislation. Only legislation that was enacted after the basic law itself was enacted will be subject to judicial review on the grounds that such legislation violates a protected right. See *Introduction to the Law of Israel* 52 (Amos Shapira & Keren C. De Witt-Arar, eds.,(1995)).

131. Cohn, *supra* note 56, at 267-69.

132. See Shapira & De Witt-Arar, *supra* note 130, at 50. See also Itzhak Zamir & Allen Sysblat, *PUBLIC LAW IN ISRAEL* (1996); Gary Jeffrey Jacobsohn, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993); Daphna Sharfman, *LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL* (1993).

fact that the protections provided by Israeli law are more easily reversed than similar protections under the United States Constitution, the informality of the Israeli Constitution does not undermine the *scope* of protection that can be provided by the Israeli courts regarding the rights of minorities in general. This is specifically true for the rights of linguistic minorities.

In the case of *Reem Engineers*,<sup>133</sup> the Supreme Court of Israel dealt for the first time with the issue of language rights from a constitutional perspective. This decision provides new status for language rights of minorities with important constitutional implications. The suit was brought by a contractor who asked the municipality of Nazareth for a permit to publish a notice to Arab citizens in Arabic about the construction of buildings in an Arabic neighborhood. The municipality refused to issue the permit because, according to one of its bylaws, advertisements on billboards should be written in Hebrew or Hebrew and another language, as long as the Hebrew is at the top of the advertisement and does not occupy less than two thirds of the notice's space. The District Court held that the bylaw does not prohibit the use of Arabic and that its requirement to add Hebrew does not infringe on any fundamental right. On appeal, the Supreme Court reversed the District Court's judgment and struck down the provision. The court held that the bylaw's provision is unreasonable and illustrates an unjustifiable constriction on the freedom of speech, part of which is the freedom of language.

The court stated that freedom of speech has always been a basic principle in Israeli law.<sup>134</sup> The court held as follows:

Speech is linked to language ... language is more than a means of communication, it is equivalent to speech ... *[t]he basic constitutional concept is that the freedom of speech encompasses the freedom of language.* There is no freedom of speech unless there is freedom of language. This freedom may be at odds with other interests or values, and a balance may be needed which would render partial protection to this value ... as a relative, and not an absolute right.<sup>135</sup>

The court discussed the two conflicting interests in this case: freedom of speech and language and the public interest in the Hebrew language. Regarding the public interest in the Hebrew language, the court asserted the importance of Hebrew as a national language, as the language of the majority of the citizens in Israel, and as a means for national unity. Hebrew readers have an interest in reading in their own language. In general, there is a public interest that every

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133. C.A. 105/92, *Reem Engineers v. The Municipality of Nazareth*, 40(5) P.D. 189.

134. *Id.* at 201.

135. *Id.* at 201-03.

notice be understood by all.<sup>136</sup> Regarding the freedom of speech, this principle received considerable prominence as a basic human right. The Court also found it applicable to the freedom of language mentioned in the Declaration of Independence.<sup>137</sup> The court balanced the relative weight of these two conflicting interests. In doing so, the Court distinguished between state actions, e.g., sign-posts regarding names of streets and regarding traffic, which must be “in the official language;” and actions in which the state has a minimal role, such as in the case of state billboards, on which every individual can communicate. In the latter instance, freedom of language prevails, so the contractor could write exclusively in Arabic.<sup>138</sup>

The court also justified its decision by noting that there is an Arabic minority living in Israel whose language is Arabic and that Arabic is the language of its speech, religion, and culture.<sup>139</sup> The Arabic language is an official language and the language of many of the country’s citizens. It further noted that pluralism and tolerance are inherent to the Israeli concept of democracy. Finally, the court added that the strong status of Hebrew in Israel today is not threatened and could not be jeopardized by awarding minorities the freedom to express themselves in their own language.<sup>140</sup>

The court’s decision was based upon freedom of speech and language and *not* on Arabic being a formal language in Israel. Therefore, there was no need to scrutinize the special status of Arabic as an official language, which was not disputed. The court continued by saying that the status of Arabic as an official language has always been recognized in Israel based on Article 82 and based on the social reality that a large minority of Israel’s citizens are Arabic speakers.<sup>141</sup>

Because the decision was not based on Arabic being an official language, the court’s decision applies to any language. Other than in the obiter dictum of the decision, the court does not address the issue of Arabic as an official language with special status in Israel. The court accorded an important status to language rights in general, but its decision did not accord Arabic any special status. Presumably, the court would have reached the same decision had the notice been written in any other language. The only apparent reason for the court’s mentioning the status of Arabic and Arabs in Israel, was because Arabic was the “foreign language” in dispute. In fact, since the court dealt with the

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136. *Id.* at 203, 208.

137. *Id.* at 201-202, 207.

138. *Reem Engineers*, 40(5) P.D. at 209.

139. The Israeli Supreme Court has recently reaffirmed this principle in C.A. 12/99, *Jamel Mar'i v. Farid Sabek* (February 23, 1999, Justice M. Cheshin).

140. *Reem Engineers*, 40(5) P.D. at 210-212.

141. *Id.* at 214.



language rights of Arabs, it could have struck down the bylaw by stating that a requirement to publicize only in Hebrew, or primarily in Hebrew with less space for another language, is unconstitutional due to the status of Arabic as an equal official language. I would surmise that one of the reasons the court avoided striking down the bylaw on the basis of Arabic's official status was to emphasize the supremacy of Hebrew over Arabic and to avoid the need to define the scope of protection given to Arabic as an official language.

The court implicitly viewed Hebrew as if it were the only official language in Israel and its approach was that Arabic should be given the protection given to any other language. A view of Arabic as an equal official language could have led the court to explicitly declare, when it discussed state actions, that they should be performed in both Arabic and Hebrew. Instead, the court used the singular rather than the plural: "the official *language*," meaning clearly Hebrew alone. Furthermore, the concurring Justice was of the opinion that all official publications should be in Hebrew "as the language of the state."<sup>142</sup> Although the court did state the importance of Arabic and its status, it stressed that it did not base its opinion on these factors. It would appear then that it is one thing to claim that Arabic is an official language and quite another to implement it.

Furthermore, viewing freedom of language as part of freedom of speech, is not the exclusive or essential approach for the granting of freedom of language and language rights. An alternative approach is viewing language as an independent right.<sup>143</sup> Some consider language as a collective right, and not as part of freedom of speech.<sup>144</sup> Others view linguistic rights as linked to the right to education and the principle of equality.<sup>145</sup>

Nevertheless, this is the first court decision to grant freedom of language a special and new constitutional status, never before accorded to language rights in Israel. Yet the right accorded was individual, and there is no Israeli court decision granting collective rights to linguistic minorities.

American law offers an impressive range of protections for the individual but, like the Israeli law, it has its limitations with respect to the rights of linguistic minorities. The constitutionality of language rights in the United States has been addressed in connection with the First Amendment and the Equal Protection Clause. The First Amendment prohibits the government from abridging freedom of speech, expression, and association. The First Amendment is implicated when the government restrains the private use of

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142. *Id.* at 216.

143. *See, e.g.,* Leslie Green, 'Are Language Rights Fundamental?', 25 OSGOOD HALL L. J. 639 (1987).

144. *See* Wenner, *supra* note 123, at 184.

145. Perea, *supra* note 68.

foreign languages.<sup>146</sup> The two cases that implicated the First Amendment are directly related to the "English-Only" movement. In the matter of *Asian American Business Group v. City of Pomona*,<sup>147</sup> the facts and the decision were similar to those in the Israeli case discussed above. However, *Asian American* is one decision of a District Court that has yet to be followed in other circuits. In this case, the city restricted the size and language of business signs. The 1988 Ordinance provided that "on-premises signs of commercial or manufacturing establishments which have advertising copy in foreign alphabetical characters shall devote at least one-half of the sign area to advertising copy in English alphabetical letters."<sup>148</sup> In effect, this restricted the use of foreign script, and specifically Chinese characters. The District Court held the ordinance unconstitutional because it burdened the freedom of expression, which is a fundamental interest: "Choice of language is a form of expression as real as the textual message conveyed. It is an expression of culture."<sup>149</sup> The decision in *Yniguez v. Mofford*<sup>150</sup> was the first appellate decision to strike down a state official English measure. The Ninth Circuit relied on the First rather than the Fourteenth Amendment. In 1988, Arizona voters passed Proposition 106, which became Article XXVIII of the Arizona Constitution entitled "English as the Official Language." This measure amended the state constitution, requiring the state, its political subdivisions, and all government officials and employees during the performance of government business, to speak in English only. Yniguez, a Latina employed by the state Department of Administration to handle medical malpractice claims was accustomed to speaking Spanish with claimants who had difficulty communicating in English. She sought an injunction against the Article. Writing for an en banc court, Judge Reinhardt struck down Proposition 106 as violating the First Amendment. The court found the provision unconstitutionally over-broad because it burdened the right of public employees to speak on matters of public concerns. The court held that Yniguez's speech was of public concern because the public had a strong interest in receiving it. Judge Reinhardt concluded that, because the Article restricted the speech rights of all government employees and banned the dissemination of critical information to non-English speaking Arizonians, the speech interests impaired by the Article outweighed the government's interests in the Article's operation.<sup>151</sup> The United

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146. Schmid, *supra* note 22, at 75.

147. *Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328 (C.D. Cal. 1989).

148. *Id.* at 1329.

149. *Id.* at 1330; A similar approach can be found in Canadian court decisions, *see, e.g.*, *Ford v. Quebec (Attorney General)* (1988) D.L.R. 577, 604-05.

150. *Yniguez v. Arizonans for Official English*, 730 F. Supp. 309 (D. Ariz. 1990).

151. *Id.* at 314.

States Supreme Court refrained from reviewing the case on procedural grounds and vacated it as moot, since Yniguez had resigned from state employment.<sup>152</sup> However, another challenge to the law brought by ten bilingual individuals (elected officials, state employees, and a public school teacher) who, like Yniguez, spoke Spanish during the performance of their job, has met with success. In April of 1998, after a decade-long battle over Arizona's Official English Amendment, a unanimous Arizona State Supreme Court struck down the "English-Only" Amendment as a violation of the First Amendment and the Equal Protection Clause. The Court found this Amendment among the strictest and the most sweeping of all states' "English-Only" laws.<sup>153</sup> Consequently, Arizona public employees and officials may now speak languages other than English. Nevertheless, a less restrictive "English-Only" ballot measure is anticipated in the year 2000 election and is likely to pass.<sup>154</sup>

The most obvious source of constitutional protection against government

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152. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). However, the Ninth Circuit's analysis of the substantive issues involved still provides useful legal analysis which proponents of any official language statute might face. See Lucy Chiu, Note, *The Emerson English Language Empowerment Act: The House's "Straw Man" Bill*, 23 J. LEGIS. 231, 242 (1997). But see Chris Boehler, *Yniguez v. Arizonians for Official English: The Struggle to Make English the Official Language*, 34 HOUS. L. REV. 1637 (1998) (arguing that Article XXVIII of the Arizona constitution was a proper exercise of state government power and criticizing the Ninth Circuit's reasoning as erroneous, asserting that Article XXVIII applies to conduct and not to the message it conveys and suggesting an alternative analysis of the provision as a time, place or manner restriction). See also Michael W. Valente, Comment, *One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of Yniguez v. Arizonans for Official English*, 8 SETON HALL CONST. L.J. 205 (1997) (arguing for the constitutionality of official English laws). For further commentary on the Ninth Circuit's decision see Jennifer A. Nemeck, *Yniguez v. Arizonans for Official English: Free Speech May Have Lost the Battle, but in the End it will Win the War*, 22 MD. J. INT'L L. & TRADE 117 (1998); Vicki L. Osgood, *No Habala Espanol: Yniguez v. Arizonans for Official English*, 18 WHITTIER L. REV. 371 (1997); Yvonne A. Tamayo, *supra* note 24; Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 HAWAII L. REV. 221 (1997).

153. See *Armando Ruiz v. Jane Dee Hull*, 957 P.2d 984 (Ariz. 1998) (en banc), cert. denied, 67 U.S.L.W. 3436 (1999) (applying strict scrutiny and holding that the measure had violated the First Amendment by depriving elected officials and public employees of the ability to communicate with their constituents and with the public. The court further held that the measure violated the Equal Protection Clause of the Fourteenth Amendment since it impinges upon both the fundamental right to participate equally in the political process and the right to petition the government for redress without materially advancing a legitimate state interest; the Amendment's goal of promoting English as a common language did not require a prohibition against the use of other languages by state and local governments, the court reasoned). This decision offers both a more expansive reading of the First Amendment than that of the Ninth Circuit in *Yniguez* and a parallel equal protection ground for invalidation. Pending a definitive federal court ruling, however, the constitutionality of restrictive official English statutes remains an open question. See Cornell & Bratton, *supra* note 100, at 616.

154. The *Ruiz* court stated that had the statute been more narrowly crafted, like official English statutes in most other states, which are substantially less encompassing and less proscriptive than the Arizona law, it would have passed constitutional muster. See *id.* Thus, the decision should be viewed as only a temporary setback to states' "English-Only" measures.

sponsored language-based discrimination is the Equal Protection Clause of the Fourteenth Amendment.<sup>155</sup> The Supreme Court has not resolved the question of whether language-based classifications constitute a “suspect” category. Language-based discrimination should be afforded strict scrutiny or at least intermediate level scrutiny.<sup>156</sup> In general, the courts have rejected an equal protection challenge by language minorities unless the law in question involved a very close relationship between language and race, ethnicity, or national origin. These forms of discrimination are suspect classes. Strict scrutiny will also be employed if law infringed on rights considered fundamental.<sup>157</sup> In *Gutiérrez v. Municipal Court*, the Ninth Circuit did not reach the validity of California’s “English-Only” law under the Equal Protection Clause. First, the court said that the California Constitution simply asserts that English is the state’s official language. It does not require that English be the only language spoken. In addition, the Ninth Circuit held that even though an individual is bilingual, his primary language remains an important link to his ethnic culture and identity. Thus, the decision sheds no light on equal protection issues arising out of “English-Only” legislation.<sup>158</sup> In both private employment<sup>159</sup> and public employment,<sup>160</sup> courts have refused to treat “English-Only” rules as creating a suspect classification and have held that the rules do not result in discrimination. The discriminatory intent requirement compounds the difficulty of confronting discrimination against linguistic minorities under the Equal Protection Clause. In *Frontera*, the court added that English is the national language of the United States and that there is a national interest in having English as a common language.<sup>161</sup> The same approach is found in other cases dealing with linguistic rights.<sup>162</sup> Courts seem to accord heightened protection to minority language groups only when a fundamental right, such as the right to vote, is also at stake.<sup>163</sup>

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155. Schmid, *supra* note 22, at 72.

156. See *id.* at 74. See also Cornell & Bratton, *supra* note 100, at 691 (setting forward a theory of rights that compels the law to accord suspect status to discrimination based on language). Cornell & Bratton further suggest that official English be condemned based on a right to cultural and linguistic freedom under the Thirteenth Amendment. Their argument builds on David A. J. Richards’s interpretation of the Thirteenth Amendment as including and forbidding all forms of moral slavery, and on his concept of suspect classification (see David A. J. Richards, *WOMEN, GAYS, AND THE CONSTITUTION* 5, 355 (1998)). *Id.*

157. See, e.g., *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983).

158. *Alva Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 838 F.2d 1031, 1039, 1043-44 (9th Cir. 1988); Zoglin, *supra* note 113, at 17.

159. See, e.g., *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

160. See, e.g., *Frontera v. Sinell*, 522 F.2d 1215 (6th Cir. 1975).

161. *Id.* at 1220.

162. See, e.g., *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983).

163. See *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986).

Thus, language rights are protected under the Fourteenth Amendment only when the victims prove that the discrimination is based upon race, ethnicity, or national origin.<sup>164</sup> Language minorities must establish a nexus between race, national origin, or ethnicity and language in order to advance a successful claim under the Equal Protection Clause.<sup>165</sup> Because language bears an extremely close relationship to race, ethnicity, and national origin, state actors may use language as a subterfuge for invidious discrimination.<sup>166</sup> Therefore, it is necessary to distinguish between classifications that use language as a means of promoting efficiency, and those that impermissibly use language to differentiate people along ethnic or racial lines.<sup>167</sup> To date, neither access to education nor cultural preservation for linguistic minorities received more than rational basis scrutiny under United States constitutional doctrine.<sup>168</sup> The United States courts do not consider language as a fundamental right. If the United States Supreme Court viewed language rights as part of freedom of speech, language rights would hence be fundamental. Thus, one could claim that the Israeli Supreme Court has provided a higher constitutional recognition and protection of language rights than is afforded by United States law. In Israel language rights are considered part of freedom of speech which has always been regarded as a fundamental constitutional right. On the other hand, although language rights are not recognized by the United States Supreme

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164. Language is not recognized as a prohibited ground of discrimination; despite efforts to include language implicitly under another prohibited ground of discrimination such as race, national origin, or ethnicity, there is obviously an imperfect match and some individuals will occasionally “escape” protection. See De Varennes, *supra* note 66, at 113. It is interesting to note, in this context, that the Equal Employment Opportunity Commission has interpreted the concept of national origin to encompass an individual’s language rights. 29 C.F.R. § 1606.7 (a) (1996) (“The primary language of an individual is often an essential national origin characteristic.”). See Lisa L. Behm, Comment, *Protecting Linguistic Minorities under Title VII: The End for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 570 (1998). However, this definition is not binding upon the courts. See also Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 901 (1986) (arguing against the view of language as part of national origin not only because the two are not the same, but also since such a link may perpetuate the fear of some monolingual individuals that the use of a language other than English is “foreign”).

165. Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?* 74 B.U.L. REV. 481, 484 (1994).

166. See *id.* at 483.

167. See, e.g., *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (implementing an objective test to determine whether a language classification uses language as a pretext for race, ethnicity or national origin. According to the objective test, certain language classifications mandate strict judicial scrutiny because their very terms single out particular language groups for special treatment; thus, classifications imposing the same requirements on all people, regardless of their language and regardless of the intent of the state decision maker, do not establish a sufficient nexus with race, ethnicity, or national origin to justify strict scrutiny).

168. Zoglin, *supra* note 113, at 23.

Court as fundamental constitutional rights at the practical level, it seems that linguistic minorities in the United States were afforded the same rights as those in Israel, if not more.

The argument that language rights should be regarded as fundamental human, civil, and constitutional rights brings us back to the definition of linguistic minorities, and to the question: whose rights come under consideration? The proposed definition was to view all groups whose language has a status inferior to that of another dominant language as linguistic minorities. However, one should not infer that all linguistic minorities deserve equal rights. The view of language as a basic human and constitutional right is the only means by which a state could provide adequate protection for linguistic minorities. This view should be fully implemented as far as the private usage of a language is considered, i.e., the right to freely use one's own language. However, it does not follow that the status of the languages of all linguistic minorities should be the same as that of the majority language vis-à-vis the state. Unlike other fundamental rights, such as religion and race, the prohibition of discrimination on the ground of language is not an absolute. There is no obligation for a state to conduct all of its activities in any language spoken by the inhabitants in its territory. Non-discrimination does not prohibit every distinction involving a language, only those that are "unreasonable" when one considers all relevant factors: those that relate to the state's interests and goals, and those that relate to the individual's interests, rights and how the individual is affected.<sup>169</sup> Thus, some minority languages do not warrant equal status or similar status to that of the majority language and should not be accorded "official" status or have characteristics of an official language.<sup>170</sup>

A "sliding scale" approach is an appropriate means in order to arrive at a linguistic policy which does not discriminate based on language.<sup>171</sup> The "sliding scale" formula takes into account factors such as: the number of speakers of a language, their territorial concentration, the level of public services being sought, the disadvantages, burdens or benefits a state's linguistic practice imposes on individuals, and even a state's human and material resources.<sup>172</sup> Such a model can provide a balanced and reasonable response to

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169. See Varennes, *supra* note 66, at 126.

170. For example, no one would think that a single minority language child would warrant construction of a school, and most would feel that the more children there are the more pressing is the concern. See Green, *supra* note 143, at 666. Thus, although I argued that the definition of "minority" and "linguistic minority" should not include a numerical threshold, when it comes to determining which language minority should be accorded equality to the majority language in acts of government, the size of the group should matter and be taken into account. There should be a sufficient number of speakers of a language in order to impose any duties on a state. See De Varennes, *supra* note 66, at 129.

171. See De Varennes, *supra* note 66, at 177.

172. *Id.* at 247.

the presence of various numbers of speakers of minority or non-official languages. When public authorities face a sufficiently high number of individuals whose primary language is not that of the majority or the official state language, it would be discriminatory not to provide a level of service appropriate to the relative number of individuals involved. The major factor, according to this model, is the percentage and geographical concentration of individuals using a language distinct from that of the majority or the official one.<sup>173</sup> There are thus minimum requirements that the public authorities must respect. The sliding scale implies (beginning at the lower end of the scale and moving to a progressively higher end), e.g., (i) making available official documents and forms in the non-official language or in bilingual versions; (ii) the acceptance by authorities of oral or written applications in the non-official language, and response thereto in that language; (iii) being able to use the non-official language as an internal and daily language of work within public authorities.<sup>174</sup>

To provide a more precise guideline as to when a state must mandate measures to avoid imposing an unreasonable burden or disadvantage upon too many people, adding some kind of a numerical threshold may be of assistance.<sup>175</sup> However, because the variables in each country are so different, it is difficult to establish clear numerical criteria, and different countries have adopted dissimilar thresholds.<sup>176</sup> Such numerical thresholds would seem appropriate and justifiable only in countries that have no official language statute, like the United States at the federal level, and in the states that have adopted official English legislation.<sup>177</sup> Numerical thresholds should not be

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173. *Id.* at 177.

174. *Id.* at 178.

175. *Id.* at 179. See also Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U.L. REV. 1027, 1058 n.176, 1069-70 (1996).

176. In India, for example, whenever a language is spoken by thirty percent or more of the population, the state should be recognized as bilingual and the relevant minority language should be placed on the same footing as the formal/majority language by public authorities; whenever the linguistic minority constitutes fifteen to twenty percent of the population in a certain area, government notices, rules, laws and the like should be reproduced in the language of the minority in that particular area. In Canada, where both English and French are official languages, most bilingual federal government services are only available where the population includes at least five percent of speakers of the official language minority. See De Varennes, *supra* note 66, at 179.

177. As previously asserted, official monolingualism is objectionable. See *supra* Part IV. The solution for the problems of linguistic minorities should be either official bilingualism or multilingualism (which include the language of the majority and that of the largest minorities in a given country), or not declaring any language as official. However, when faced with official monolingualism, adopting a sliding scale with a numerical threshold is one of the ways to protect the rights of linguistic minorities in these states, rights that are not available according to the current legal scheme.

adopted when a country recognizes more than one language as official. The declaration of two languages or more as official should be viewed as encompassing in itself the assumption that there is a sufficient number of speakers of all official languages to warrant equality between them in terms of government services. The fact that Arabs constitute one fifth of Israel's population justifies the maintenance of the status of Arabic as an official language. Once Arabic has been accorded equal status to Hebrew, all government services should be bilingual notwithstanding any numerical threshold.<sup>178</sup>

In the United States, on the other hand, where there is no official monolingualism at the federal level, numerical thresholds should be used to decide where and to what degree the government should provide rights to linguistic minorities. Thus, federal requirements in the United States to provide public services in languages other than English should be encouraged and expanded where a sufficiently large number of individuals who speak a minority language exist. An example of such a requirement is that of state agencies that administer "food stamp" programs to have bilingual staff and to translate written materials in areas where there are a substantial number of low income, non-English speaking families.<sup>179</sup> Similar policies, if applied in the state level, would allow for such services to exist at a widespread level.

## VI. CONCLUSION

The superiority of Hebrew over Arabic and the disparity between the two languages exist due to the basic concept of Israel as a Hebrew-speaking, Jewish country. The essence of Israel has to do with its Jewish identity and the reason for its establishment as a nation was to provide the Jews with a safe haven. These factors seem to contradict formal bilingualism. On the other hand, one cannot ignore the existence of the large minority of Arabic-speaking citizens within Israel's population who deserve equal rights. Providing equality would not only implement the law that provides that both Arabic and Hebrew are the official languages of Israel, but also would promote national unity and integration and diminish some of the animosity Arabs hold toward Jews in Israel. The status of Hebrew in Israel will not be threatened by providing equality to Arabic, just as there is no danger to the status of English in the United States.

Official monolingualism in both the United States and Israel is objectionable. By adopting an official-monolingualism-statute, which in fact

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178. Thus, for example, if Canada wishes to accord some governmental services in only one language, as it in fact does, it should not have adopted a statute declaring two languages to be the official languages of the state.

179. See De Varennes, *supra* note 66, at 180.



will serve to exclude the use of most other languages in all government branches, linguistic minorities in both countries will not be able to enjoy many privileges. For example, they would not have access to jobs and services provided by the state. These minorities would be disadvantaged and will assume a heavier burden by not being able to use their primary language. Those who are not fluent in the official language will not be permitted to receive the same benefits and services that the state confers to the majority and would be forced to learn the official-dominant language. Moreover, such a demand for monolingualism could constitute an intent to discriminate on the grounds of national origin, ethnicity, and race. Thus, the legal status in both countries should not be changed.

English in the United States has, *de facto*, all the characteristics of an official language apart from a constitutional provision. Making English official at the federal level would only promote the political objectives of the opponents of immigration and would elevate discrimination against linguistic minorities.

Arabic in Israel does not have the characteristics of an official language because it does not enjoy equal status and respect in governmental proceedings. Arabs in Israel are a distinct minority that constitutes one fifth of its population. Coupled with the fact that Arabic and Hebrew are both official languages by law, this fact certainly warrants equality between Arabic and Hebrew. It further warrants full protection against discrimination with respect to language rights of Arabs in Israel, state intervention, and promotion of their language. Abolishing the status of Arabic as an official language in Israel is unacceptable. If Israel wishes to change the status of Arabic and grant Hebrew priority, it should do so by enacting an explicit statute that would change the languages' status in Israel. Inequality between the two formal languages should not be inferred from the existing provision regarding official languages.

Alternatively, Israel could drop official languages altogether, as has been the practice in the United States. However, preserving Israel's commitment to both official languages and strengthening the equality between them is preferable. This is because dropping official languages in Israel would lead to less protection for the Arabic-speaking minority than it has under the current legal status. There is no linguistic minority in the United States with characteristics similar to those of the Arabs in Israel. The political animosity between Jews and Arabs in Israel; the treatment of Arabs as second class citizens by the Jews in other areas of legal and social life; and the fact that Arabs constitute a large minority within Israel's population, necessitate full implementation of Arabic as an official language. The official status of Arabic should bind the authorities and the government. The government should accord full equality to the Arab linguistic minority regarding the use of Arabic in all institutions of the state: legislative, executive, administrative, and judicial, and in the performance of various other functions of the state. That would include,

for example, changes in the educational system, i.e., making the study of Arabic in Hebrew schools compulsory and equally allocating resources to both educational systems.

The United States has proven that without having an official minority language, or for that matter, any official language, it can provide equality in some areas to linguistic minorities. Israel does not have a long-lasting tradition of providing rights for minorities and its pluralism is limited due to, among other things, the ongoing tensions between Arabs and Jews. Paradoxically, due to the different paradigms of protection for linguistic minorities that have developed in each country, the dangers that an “English-Only” statute at the federal level in the United States would permit discrimination against linguistic minorities, is similar to the danger of discrimination that would arise in Israel if Arabic lost its official status. Not having official languages in Israel would lead to similar consequences as enacting an “English-Only” statute in the United States: Hebrew, *de facto*, would be the only language used and spoken in all aspects of life in Israel, the segregation between Arabs and Jews would increase, and Arabic would be used only individually and only in the Arabic enclaves.

In both the United States and Israel, linguistic minorities should be accorded language rights as a group by virtue of basic constitutional principles of equality and by viewing language rights as fundamental. Yet, the right not to be discriminated against on the ground of language is not absolute. Thus, the degree to which a state should be bound to use a language other than that of the majority for the conduct of its affairs depends on various factors, such as the number of speakers of a minority language, their territorial concentration, and the level of public services being sought. Countries where no official language statute exists, like the United States, should adopt a sliding scale approach with an appropriate numerical threshold. However, this model is inappropriate when a state already has more than one official language, such as Israel. Thus, where there is more than one official language, the official languages should be equal in the conduct of all state affairs.