

THE NATION STATE LAW AND THE ARABIC LANGUAGE IN ISRAEL: DOWNGRADING, REPLICATING OR UPGRADING?

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Article 4 of the Nation State Law (NSL), entitled ‘Languages’, stipulates that Hebrew is the language of the state (Article 4(a)); the Arabic language has a special status in the state and regulating the use of Arabic in or by state institutions will be set in law (Article 4(b)); and this clause does not harm the status given to the Arabic language before the law came into effect (Article 4(c), the ‘validity of laws’ clause). The question is whether, how, and to what extent these provisions hinder the present legal status of the Arabic language in Israel. The legal status of Arabic had never been determined decisively before enactment of the NSL. The High Court of Israel has always been divided on this matter, particularly between judges who perceived Arabic as an official language and judges who deemed it solely as having been granted its acknowledged ‘special legal status’. Furthermore, the judges who perceived Arabic as an official language of the state were also in dispute among themselves as to the meaning, the scope and the consequences of such recognition. Considering these circumstances, my view is that the NSL perpetuates the legal status of Arabic as prescribed in the laws and case law that already existed, and that the validity of laws clause, coupled with the special status granted to Arabic in a basic law, suggests that the door is still open for the Court to further endorse the legal status of Arabic in Israel.

Keywords: Nation State Law, King’s Order in Council, Arab minority, Israel, official language, special status

1. INTRODUCTION

This article concerns the possible implications of the 2018 enactment of Basic Law: Israel – The Nation State of the Jewish People (NSL)¹ on the legal status of the Arabic language in Israel.

Upon its establishment, the State of Israel adopted section 82 of the King’s Order-in-Council,² entitled ‘Official Languages,’ which stipulates, inter alia, that ‘[a]ll Ordinances, official notices and official forms of the Government and all official notices by local authorities and municipalities in areas to be prescribed by order of the High Commissioner shall be published in both Hebrew and Arabic’. Leading among other normative

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¹ Basic Law: Israel – The Nation State of the Jewish People (2018) (NSL). It is worth noting that the constitutionality of the NSL has been challenged before the High Court of Israel through more than a dozen petitions, including concerning the question with which this article is concerned; thus the matter is currently pending before the Court.

² The King’s Order in Council, 1922–1947, as amended in 1948 by s 15(b) of the Government and Legal System Organization Act. This is legislation of the British Mandate, which was described as the constitution of Eretz Yizrael (the Land of Israel); see Amnon Rubinstein and Barak Medina, *Constitutional Law of the State of Israel*, Vol II (5th edn, Schocken Books 1997) 1172.

In fact, the legal status of Arabic has never been decisively determined in the past, and even the Court has been divided on the matter, particularly between judges who perceived Arabic as an official language and judges who deemed it as solely enjoying an elevated special status. Furthermore, I contend that the judges who perceived Arabic as an official language were in disagreement over whether section 82 establishes factual recognition of the special legal status of Arabic, or provides a limited list of instances in which Arabic is recognised as ‘official’. Moreover, I have reasonable grounds to believe that the interpretation of the term ‘official language’, and even more so the consequences of such recognition, have largely been disputed among judges. One way or another, were there to be any consensus among judges, it would be that even if Arabic is perceived as an official language in Israel, Hebrew still remains its dominant and first official language. Bearing this in mind, I can claim that the NSL has not affected the legal status of Arabic in Israel, and has certainly not downgraded its legal status, particularly in the light of the validity of laws clause. Rather, the NSL maintains the legal status of Arabic as prescribed in the laws and case law that already existed.

Having said that, I consider claims that the NSL hinders any further enhancement of the legal status of Arabic to be incorrect and baseless. On the contrary, the validity of laws clause coupled with the acknowledged special status granted to Arabic in a basic law suggest that the door is still open – and widely so – for the Court to further reconsider this controversial debate. It is the first time in the history of Israeli legal jurisprudence that the legal status of Arabic is protected by constitutional legislation (moreover, a basic law). Given that other common spoken languages in Israel have not received the same treatment, this incorporation indicates clearly that future recognition of the Arab minority in Israel as a national indigenous minority entitled to collective rights, at least such as the right to its own language, is possible. This is particularly true given the specific nature of the NSL, namely, as concerned with the question of the state’s national identity. Among the other common spoken languages in Israel, it is only the language of the Arab nationality that has received constitutional attention and recognition in the NSL. To that extent, not only has Arabic not been downgraded but rather an optional upgrading has been constituted.

Section 2 presents Article 4, while Section 3 provides a broad picture of the legal status of Arabic before the enactment of the NSL; and Section 4 presents and addresses the arguments, voiced shortly after the enactment of the NSL, claiming that it demotes the legal status of

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Arabic. I will argue that the NSL does not necessarily demote the legal status of Arabic but rather re-establishes it, as it was on the eve of its ratification. Additionally, I claim that future judicial development of the Arabic language has not been obstructed by the NSL, and point out several legal grounds for such possible future developments. Furthermore, I suggest that the incorporation of the legal status of Arabic in a basic law, particularly one such as the NSL, constitutes formal recognition of the right of Israel's native Arab minority to preserve the status of its original historic language, paving the road for the Court to abandon its previous reluctance to tangle with the issue of collective rights. In Section 5 I point out several recent cases that support certain judicial suggestions that the NSL has not affected the legal status of Arabic and that the Court is still willing and capable of enhancing this status. I summarise the article in Section 6, with an epilogue voicing my personal note of alarm regarding the NSL as it stands today, and claiming that it does not reflect the way Israel was envisioned by the Founding Fathers as a Jewish and democratic state.

2. ARTICLE 4 OF THE NATION STATE LAW

2.1. THE MEANING OF 'BASIC LAW'

When the Israeli state was established, all efforts aimed at introducing a written constitution failed, basically because there were major and unbridgeable disagreements between Knesset members on many fundamental constitutional issues. Ultimately, in 1950 the Knesset endorsed the famous Harari Resolution, according to which the Israeli constitution would be established 'chapter by chapter' in the form of a series of basic laws.¹³ Yet, until 1992 all of the enacted basic laws were not granted constitutional status, mainly because they had not been formulated as anticipating essential aspects of the future Israeli written constitution. The most significant turning point was in 1992 with the enactment of Basic Law: Human Dignity and Liberty, which focused on protecting a number of basic human rights against their infringement by governmental branches. In the 1995 case of *Bank Hamizrahi*,¹⁴ the Court held that Israel's basic laws were adopted as supra-legal chapters of Israel's future and final constitution. As they evidently include characteristic constitutional elements, the Court, through its rulings, uplifted these basic laws to a supreme normative status rising above the ordinary laws. Thus, a norm in a basic law overrides a norm contained in an ordinary law.

Basic Law: Israel – The Nation State of the Jewish People, is the fourteenth basic law enacted by the Knesset since the Harari Resolution. It stands next to other basic laws – leading among which is Basic Law: Human Dignity and Liberty, which defines Israel as a Jewish and democratic

¹³ Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Hart 2014) 36–37; Mohammed S Wattad, 'Israel's Laws on Referendum: A Tale of Unconstitutional Legal Structure' (2015) 27 *Florida Journal of International Law* 213, 221–26.

¹⁴ CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* (9 November 1995) (this is considered a touchstone case in the constitutional legal history of Israel, in which the normative status of Israel's basic laws was discussed as well as the Court's power on judicial review).

state, and mandates that basic human rights shall be ‘respected in the spirit of the principles set out in the Proclamation of the Establishment of the State of Israel’. However, this basic law does not position itself above other basic laws, and certainly not above the Israeli Declaration of Independence; in fact, it forms part of the entire Israeli basic laws project.

2.2. QUESTIONS RELATING TO ARTICLE 4

4. Language:

- (a) Hebrew is the State language.
- (b) The Arabic language has a special status in the State; arrangements regarding the use of Arabic in state institutions or vis-à-vis them will be set by law.
- (c) Nothing in this Article shall affect the status given to the Arabic language before this law came into force.

What does it mean that Hebrew is the state language and that Arabic enjoys a special status? Does that necessarily mean that Hebrew is an official language and that Arabic is not? Why has the legislature omitted the term ‘official language’ with regard both to the Hebrew and to the Arabic languages, and instead refers solely to the term ‘languages’? Should the term ‘special status’ in relation to Arabic necessarily be interpreted as downgrading its legal status? Should the NSL be perceived as invalidating the laws and case law that existed establishing Arabic as an official language? What does the validity of laws clause mean, and what does it aim to achieve? Is it to be interpreted as preserving the official legal status of both Hebrew and Arabic? If so, then what sense did it make to enact Article 4 in the first place? Whatever the answer may be, is it possible that despite the validity of laws clause – and maybe precisely because of it – the NSL seeks to prevent any further reinstatement of the Arabic legal status in the future? What does it mean that the Arabic language in particular, unlike other commonly spoken languages in Israel, is legally protected in a basic law, especially one such as the NSL? Would it be possible to interpret the NSL as upgrading the legal status of Arabic in Israel? Given that, among other matters, the basic laws constitute the fundamental constitutional principles of Israel, does not the incorporation of Arabic in a basic law now mean that Arabic is part of the fundamental constitutional principles of Israel? Does such incorporation establish *prima facie* legal recognition of the Arab minority in Israel as a national indigenous minority entitled to recognition of its collective rights and native language? These are just some of the legal queries that challenge my professional curiosity upon reading Article 4. These very complicated questions require interpretation of a constitutional text, which will be discussed later in the article.

3. THE STATUS OF THE ARABIC LANGUAGE PRIOR TO THE NATION STATE LAW

The unequivocal language of the validity of laws clause, which manifestly recognises and endorses the legal status of Arabic in the pre-NSL era, demands a thorough inquiry into the expression of this legal status before the enactment of the NSL.

At this stage it is of the utmost significance to note that inquiring into the case law reveals three possible terms that require clarification: (i) ‘state language’: the term implies that Hebrew is the official first and dominant language of the state of Israel; (ii) ‘official language’: the term refers not only to Hebrew as the ‘state language’, but also possibly to Arabic as a second official language in the state of Israel, thus granting Arabic legal recognition in particular contexts in the public sphere; (iii) ‘special status’: the term refers to Arabic as enjoying legal recognition in a particular context in the public sphere, whether or not it is described as ‘official’.

3.1. ARABIC AS AN OFFICIAL LANGUAGE: RECOGNITION IN PRINCIPLE

The starting point for discussing the legal status of the Arabic language in Israel before enactment of the NSL is section 82 of the King’s Order, entitled ‘Official Languages’. The King’s Order is legislation of the British Mandate in Mandatory Palestine, of which certain parts were adopted upon the establishment of the State of Israel in 1948, and are still valid and binding under present Israeli law. Shortly after the establishment of the state, this provision was amended with regard to the English language by section 15(b) of the Government and Legal System Organization Act, which states: ‘Any law requiring the use of the English language is void’.¹⁵ In its present form section 82 stipulates:

All Ordinances, official notices and official forms of the Government and all official notices by local authorities and municipalities in areas to be prescribed by order of the High Commissioner shall be published in both Hebrew and Arabic.

In several cases the establishment by the Court of the official legal status of the Arabic language in Israel was based on section 82,¹⁶ as well as on the promise, made in the Declaration of Independence, to guarantee the Arab minority rights to freedom of language, equality and dignity.¹⁷ The Court emphasised that Arabic is the language of the largest minority in Israel. The Court further emphasised that the Arab minority, despite the Arab-Israeli conflict,¹⁸ has lived in Israel as loyal citizens. Additionally, the Court added that the Arabic language has the potential to bridge the gaps between the state and its Arab citizens, and all the more so its Arab neighbour states.¹⁹ The words of Chief Justice Aharon Barak are apt in this context:²⁰

The desire to guarantee the peaceful coexistence of the children of Abraham, our father, through mutual tolerance and equality justifies the recognition of the use of Arabic on municipal signs in cities containing a sizeable Arab population (between 6% and 19% of the population) alongside the country’s main language, Hebrew.

¹⁵ Government and Legal System Organization Act (1948).

¹⁶ See, eg. *Wael & Co* (n 4) opinion of Justice Salim Jubran; *Adalah* (n 3) opinion of Justice Dalia Doner.

¹⁷ See, eg. sources at n 4.

¹⁸ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 25.

¹⁹ *Wael & Co* (n 4) opinion of Justice Eliakim Rubinstein, paras B and H.

²⁰ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 25 (author’s translation).

However, this has been solely recognition in principle, as it was accompanied by wide-ranging disputes on the scope, the meaning and the consequences of such recognition.

3.2. THE SCOPE OF THE RECOGNITION

As far as section 82 is concerned, the Court has expressed various opinions on the question of the scope of the recognition that it accords the Arabic language. Among the various opinions it is important to highlight three main and leading approaches: (i) section 82 grants Arabic a special elevated status, but not an official status;²¹ (ii) section 82 accords Arabic limited recognition as an official status;²² and (iii) section 82 stipulates the absolute and principled legal status of Arabic as an official language.²³

3.2.1. ARABIC AS ENJOYING A SPECIAL ELEVATED STATUS

The first approach emphasises that the term ‘official languages’ appears only in the heading of section 82 but not in the text itself. According to this approach, the term holds multiple meanings; it is a vague term the scope of which can change over time and from one legal system to another. In some cases the legislature has explained in detail what it meant in designating a particular language as ‘official’; this is the case, for instance, in Canada. However, there should be a reason why section 82 did not provide any clear definition of its title, namely, the implications of the term ‘official languages’. Accordingly, it is difficult to reach a decisive and clear legal conclusion based on tagging a language as an ‘official language’, and thus nothing positive is to be inferred from the title of section 82.²⁴ Indeed, in Ruritania the term ‘official status’ means that it has some kind of ‘special elevated status’. Hence, all that can be learned from the legal status of Arabic in Israel is that Arabic holds an ‘elevated special status’, but not an equivalent status to that held by English and French in Canada.²⁵

3.2.2. LIMITED RECOGNITION OF THE STATUS OF ARABIC AS AN OFFICIAL LANGUAGE

The second approach reads section 82 as limited in nature. First, Arabic as an official language binds central government but not local authorities. Second, Arabic is recognised as an official language solely with regard to the limited instances listed in section 82, on which I shall elaborate further.²⁶

²¹ *Adalah* (n 3) opinion of Justice Mishael Cheshin; *Mar'ei* (n 4) opinion of Justice Mishael Cheshin.

²² *Adalah* (n 3) opinion of Chief Justice Aharon Barak.

²³ *ibid*, opinion of Justice Dalia Dorner.

²⁴ *ibid*, opinion of Justice Mishael Cheshin, para 10.

²⁵ *ibid* paras 10–12.

²⁶ Consider Saban and Amara (n 4) 21 (‘In sum, the scope and strength of the legal obligation with regard to the status of Arabic is more limited than is commonly thought’); Ilan Saban, ‘Appropriate Representation of Minorities: Canada’s Two Types Structure and the Arab-Palestinian Minority in Israel’ (2006) 24 *Penn State*

To start with, section 82 deals only with central government but not local authorities. Section 82 mandates, *inter alia*, that all ordinances, official notices etc. shall be published in both Hebrew and Arabic. However, no such orders were ever issued. Accordingly, section 82 applies to and binds central government only; it does not apply to, nor it does bind, local authorities.

Moreover, section 82 is limited to the list of instances as manifestly provided in the section, namely, ordinances, official notices and official forms. Hence, Chief Justice Aharon Barak in *Adalah* held that even if section 82 was intended to apply to local authorities, it would require assuming that the term 'official notices' be interpreted as extended to municipal signage.²⁷

3.2.3. ABSOLUTE RECOGNITION OF THE STATUS OF ARABIC AS AN OFFICIAL LANGUAGE

The third approach views section 82 as comprehensively establishing the legal status of the Arabic language as an official language in Israel, and the list of instances provided in this section are merely illustrative. In support of this view, it was noted, for instance, that several specific legislative instruments elaborate on this official legal status; these include the 1933 Education Regulations;²⁸ the 1953 Public Education Law, as amended in 2000;²⁹ the 1996 Public Education Regulations (Advisory Council for Arab Education),³⁰ the 1965 Broadcasting Authority Law,³¹ and the 1990 Second Television and Radio Authority Law.³² This understanding of section 82 is deduced from its legislative history, which was enacted by the British Mandate in governing two populations: Jewish and Arab. The Mandate guaranteed that all residents of Palestine would have freedom of religion, conscience and worship along with the guarantee that there would be no discrimination

International Law Review 587 ('It is true that Israeli law *prima facie* grants the Arab language the status of an official language; however, for various reasons, its official status holds little weight in practical terms').

²⁷ An assumption that Chief Justice Barak admits not to be made without doubts: *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 13. For the sake of clarity, it is worth noting that although Chief Justice Barak ultimately accepted the petition, he did not ground this on s 82 but rather on freedom of language and the rights to dignity and to equality as promised for the Arab minority in Israel in the Declaration of Independence: *ibid* paras 16–18.

²⁸ See Education Regulations, regs 2 and 9(b), which recognise separate education systems in both the Arabic language and the Hebrew language.

²⁹ s 2(11) of which recognises 'the language, culture, history, heritage and unique tradition of the Arab population'.

³⁰ reg 5 of which requires the council to recommend an educational and pedagogical policy that would guarantee the equality of Israeli Arab citizens while taking into account their unique language, culture and heritage.

³¹ s 3(3).

³² s 61 of which requires the government to broadcast in Arabic in order to meet the needs of the Arabic speaking population. The election laws allow for Arab voters to vote in their language by providing them with the ability to select a party ballot under the Arabic letter and name that the Election Committee has determined to correspond with the Hebrew version; voters can vote using the Hebrew ballot or the Arabic translation: Knesset and Prime Minister Elections Act, 1969 (integrated version), s 76(b); Local Government Act, 1965, s 51(b) (elections); Local Councils Order, 1958, s 184 (district councils); Local Government Act, 1975, s 7(c)(2) (electing a chairman, his deputies and their terms). Three out of these four laws explicitly provide for the use of a handwritten Arabic ballot, containing the Arabic letter alone: see Regulations for Knesset and Prime Minister Elections, 1973, reg 82(6); Local Councils Order, 1958, s 184(c); Electing Local Government Chairman Act, s 7(c)(4), all of which allow a handwritten Arabic ballot containing only Arabic writing. A similar provision does not exist in the Local Government Elections Act; however, the Court in *Mar'ei* (n 4), in a majority opinion, broadly interpreted the statute, determining that a handwritten Arabic ballot may be used, even for local elections.

on the basis of race, religion or language. To implement these goals, the allies granted the Mandatory authority the power to enact laws and administer the land, and exclusive discretion as to the form of government that is to be set up in Palestine. The adoption of section 82 by Israel should be viewed through the new societal norms within which Israel was established, namely, the Arab community which became a minority within the Jewish and democratic state. Accordingly, section 82 should be interpreted in the light of this historical background, particularly when recalling the historic decision of the United Nations of 29 November 1947 to recognise the establishment of a Jewish State in the Land of Israel, which provided:³³

The following stipulation shall be added to the declaration concerning the Jewish State: ‘In the Jewish State adequate facilities shall be given to Arabic-speaking citizens for the use of their language, either orally or in writing, in the legislature, before the Courts and in the administration’.

3.3. THE CONSEQUENCES OF RECOGNISING ARABIC AS AN OFFICIAL LANGUAGE

As far section 82 is concerned, the question of the consequences of recognising Arabic as an official language has not been so obvious and decisive.³⁴

On the one hand, it is hard – almost impossible – to trace any clear and coherent judicial policy in the case law; on the contrary, should any such policy be pointed out, it could only be the policy of ad hoc determination – namely, case by case. In one case, the Court forced municipalities with sizeable Arab populations to add Arabic to all signage in their jurisdictions.³⁵ In another case, the respondent, the National Insurance Institute (NII), agreed that the official status of Arabic means that all forms should be translated into Arabic and that the NII should be ready to accept documents that are written in Arabic.³⁶ In a third case, the Court held that the official status of Arabic requires summons for public hearings before administrative authorities to be published also in the Arabic language in Arabic newspapers.³⁷ In a fourth case, the Court voided a notice for a hearing for a criminal indictment as it was sent to an Arab suspect without being translated into Arabic.³⁸ Finally, the Court held that in instances where Arabic-speaking litigants before the Court are many, the expense of translating the litigation documents is to be borne by the Court and not the litigants in order to comply with the Court’s duty to treat all litigants equally.³⁹

³³ UNGA Res 181(II) The Future Government of Palestine (29 November 1947), UN Doc A/RES/181.

³⁴ Saban and Amara argue that the reason that s 82 of the King’s Order recognises Arabic as an official language in Israel ‘owes its origins to certain historic and political constellations’; however, this recognition carries ‘almost no practical sociolinguistic consequence’: Saban and Amara (n 4) 8 and 34.

³⁵ *Adalah* (n 3) opinions of Chief Justice Aharon Barak and Justice Dalia Dorner.

³⁶ HCJ 2203/01 *AVI – The International Association for Children Rights DCI – Israel v The National Insurance Institute* (15 December 2005).

³⁷ *Wael & Co* (n 4) opinion of Justice Salim Jubran.

³⁸ Crim File (District Court – Jerusalem) 333/09 *The State of Israel v Husin* (5 January 2010), para 8.

³⁹ Civil File (Jerusalem Court of Peace) 2636-09 *Mustafa v Ali* (24 June 2012) (all the litigants and witnesses in this case were Arabic speakers; it was only the Court that needed translation into Hebrew. The Court held that the legal status of Arabic as an official language is derived from s 82).

On the other hand, inquiring into the case law, it is possible to identify two judicial views. The first view⁴⁰ proposes that Arabic is not just the language of a British-ruled community, but the language of a minority that is guaranteed to be protected by the Israeli Declaration of Independence. Accordingly, section 82, as amended upon the establishment of the state, must be interpreted in line with its purpose in the state of Israel, as a Jewish and democratic state.⁴¹ Therefore, in accordance with section 82, the legal status of Arabic as an official language is intended to realise the Arab minority's freedom of language, religion and culture. This freedom is not only realised through permitting the Arab community to use its language, but also by requiring authorities to allow the Arab minority to live their lives in the state of Israel in their own language. The assumption is that Arabic might be the only language that Arab citizens in Israel know or speak fluently.⁴²

The second view⁴³ suggests that section 82 – although entitled 'official languages' – distinguishes between the obligations of central government and those of local authorities. Section 82 obligates central government to post '[a]ll Ordinances, official notices and official forms of the government' in Hebrew and Arabic, but does not place any such obligation upon local authorities. All it says is that all official notices of local authorities and municipalities are to be published in Hebrew and Arabic in areas to be prescribed by order of the High Commissioner. Therefore, local authorities are not obligated to publish 'official notices' unless ordered by the High Commissioner and, even then, only in the areas specified in those orders. Where such orders are not issued, it seems that the King's Order cannot serve as a basis for requiring the publication of notices in Arabic.

Additionally, even when the normative context of protecting the legal status of Arabic is set outside the realm of section 82 – that is, the Declaration of Independence⁴⁴ – it is possible to read the case law as being divided between three judicial approaches. The first approach refrained from protecting Arabic as an official language, particularly in order to avoid extending judicial recognition to the Arab minority as an indigenous national minority in Israel, regarding the issue to be of a political nature that needs to be determined by the legislature.⁴⁵ The second approach suggests protecting the legal status of Arabic as an official status on the basis of the right to equality entitled for all citizens alike, but not on the grounds of the concept of collective rights as granted to native minorities.⁴⁶ The third approach emphasises that equal protection of freedom of language of the Arab minority is an exception to the rule whereby the equality principle between Jews and Arabs applies only to individual rights.⁴⁷

⁴⁰ *Adalah* (n 3) opinion of Justice Dalia Dorner, para 6.

⁴¹ See HCJ 680/88 *Shnitzer v The Military Censor* (10 January 1989), para 8; *Re'em* (n 4) para B(4).

⁴² See *Mar'ei* (n 4) (Justice Mishael Cheshin assumed that voters in Arab villages might only know Arabic); see also David Wippman, 'Symposium: Human Rights on the Eve of the Next Century: Aspects of Human Rights Implementation: The Evolution and Implementation of Minority Rights' (1997) 66 *Fordham Law Review* 597, 605.

⁴³ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 12; opinion of Justice Mishael Cheshin, paras 12–15.

⁴⁴ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, paras 14–18; opinion of Justice Dalia Dorner, paras 5–7; *Re'em* (n 4) opinion of Chief Justice Aharon Barak, para 13.

⁴⁵ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 6; opinion of Justice Mishael Cheshin, paras 55–62.

⁴⁶ *ibid*, opinion of Chief Justice Aharon Barak.

⁴⁷ *ibid*, opinion of Justice Dalia Dorner, paras 6–8.

However, as official as Arabic has been recognised, and in spite of the above-mentioned judicial differences of opinion, the Court has been in absolute agreement that Hebrew is the state language; it is Israel's first official language and is the dominant language in Israel.⁴⁸ Moreover, it is in agreement that recognising Arabic as an official language does not jeopardise the legal status of Hebrew as the dominant language,⁴⁹ and that section 82 must, first and foremost, be interpreted in the light of legislation granting the Hebrew language, the language of the majority, preference and a superior status in a Jewish and democratic state.⁵⁰ In cases where the legal status of Arabic was discussed, the Court has emphasised that the Hebrew language is 'one of the ties that bind us as a nation'.⁵¹ Ultimately, it has been the Court's view that Hebrew is the language of the Israelis, and it is an element of the definition of Israel as a sovereign state, just as French and English, respectively, constitute an element in the definition of France and England as sovereign states.⁵²

4. THE STATUS OF ARABIC AFTER THE NATION STATE LAW

Having sketched the legal status that the Arabic language enjoyed on the eve of enacting the NSL, the question is then to what extent and how, if at all, has the latter affected this legal status. This question is compelling for two reasons: first, because, unlike the King's Order, the NSL does not refer to Arabic as an official language; second, because the NSL expressly preserves the legal status of Arabic as it existed prior to its enactment.⁵³

4.1. ARABIC: A DOWNGRADED FROZEN LEGAL STATUS

It has been argued that the NSL has divested the Arabic language of its official status⁵⁴ and prevents the potential to further enhance its legal status.⁵⁵ Underpinning the first argument is the assumption that prior to enacting the NSL Arabic enjoyed an official legal status, primarily but not only by means of section 82 of the King's Order. Underlying the second argument is

⁴⁸ *ibid*, opinion of Chief Justice Aharon Barak, para 23; opinion of Justice Dalia Dorner, para 6.

⁴⁹ *ibid*, opinion of Chief Justice Aharon Barak, para 23.

⁵⁰ *ibid*, opinion of Justice Dalia Dorner, paras 6–8.

⁵¹ *ibid*.

⁵² *ibid*, opinion of Chief Justice Aharon Barak, para 21. The word 'Israelis' refers to all citizens of the state of Israel, Jews and Arabs alike. Is it really true that Hebrew is also the language of Arab citizens?

⁵³ Consider Pinto (n 12). Pinto is an expert in the field linguistic rights and is among the leading scholars in Israel who has written extensively on the legal status of Arabic in Israel; see, eg, Meital Pinto, 'On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights' (2007) 20 *Canadian Journal of Law & Jurisprudence* 143.

⁵⁴ Consider Pnina Sharvit Baruch, 'The Ramifications of the Nation State Law: Is Israeli Democracy at Risk?' Institute for National Security Studies, 1 August 2018, <https://www.inss.org.il/publication/ramifications-nation-state-law-israeli-democracy-risk>; Jamal Amal, 'Israel's New Constitutional Imagination: The Nation State Law and Beyond' (2019) 18(20) *Journal of Holy Land and Palestine Studies* 193, 210.

⁵⁵ Consider Tamar Hostovsky Brandes, 'Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination and Social Solidarity' (2020) 29 *Minnesota Journal of International Law* 65, 79–80.

the concern that Article 4 aims to invalidate section 82, and that the validity of laws clause seeks to freeze the possibility of further development of the Arabic language.

The first argument is based on the positive recognition of the legal status of Arabic as an official language, as explained in Section 3. It could be argued that removing from Arabic its title as an official legal status while it enjoys a special status should be understood as removing its official legal status. Such violation should not be perceived as a result of the legislature's decision to mandate Hebrew only as the state language, but particularly through invalidating the official legal status of Arabic in Israel. In doing so, the legislature has knowingly downgraded the legal status of Arabic.

The second argument suggests that it is possible to interpret the validity of laws clause as preserving the legal status of both the Arabic and the Hebrew languages as enshrined in section 82. However, it is also plausible to assert that Article 4 implicitly invalidates section 82, so that Arabic is no longer an official language in Israel but rather simply enjoys a special status. In the latter context, the validity of laws clause serves the legislature as a legal means to prevent any possible future judicial reinstatement of Arabic's legal status, for instance, with regard to municipal signage in large cities that do not meet the definition of 'mixed municipalities', but still provide important services for the population of their surrounding geographic environment, including Arab communities.⁵⁶

Underlying this reading of Article 4 is the legal position that it is improper to expect the Court to establish a creative interpretation in order to protect the official legal status of Arabic. This is particularly true in the light of the manifested legislative intention, which can be derived simply from the protocols of the various discussions in the Knesset, thus pointing out that the legislature was well aware of the option of describing Arabic as an official language but chose not to do so.⁵⁷ Moreover, not only was this the clear intention of the legislature, but it was also the objective purpose of enacting the NSL, which grants national Jewish (Hebrew) symbols and values of the state of Israel a unique higher position, when compared with other possible non-Jewish (Hebrew) national symbols, such as the Arabic language.

4.2. ARABIC: A LIVING LEGAL STATUS

Addressing the arguments presented in the previous section, I claim cautiously that such a reading of Article 4 relies on sharply disputed assumptions. Furthermore, were these assumptions true, they still would not carry the legal consequences referred to above.

⁵⁶ Consider Saban and Amara (n 4) 35 ('We thus hold to our conclusion as outlined above: no deep change in the lingual reality of Israel is forthcoming either in the short or medium term').

⁵⁷ On this matter see the comments of Advocate Gur Blai, legal adviser to the Constitution, Law and Justice Committee in the Knesset, stating that to the best of his understanding it is largely agreed between the members of the Committee that Arabic should be considered as enjoying a second official legal status, but not a special status; thus Hebrew is the state language: Protocol No 15, Joint Committee of the Knesset Committee and the Constitution, Law and Justice Committee discussing the Bill on Basic Law: Israel – the Nation State of the Jewish People, 10 July 2018 (in Hebrew), <https://main.knesset.gov.il/Activity/committees/Pages/AllCommitteeProtocols.aspx?ItemID=2073485>.

The question at stake is of a jurisprudential nature, which deals with the proper interpretation of a legal text – not any legal text, but a particular constitutional legal text.⁵⁸ The importance of identifying the nature of the interpreted legal text lies in the particularity of the constitutional text. The constitutional norms, which are at the top of the normative pyramid, represent and reflect the nation's social values and principles, as well as its goals and aspirations, promises, commitments and obligations.⁵⁹ A particular constitutional norm must be interpreted according to its purpose,⁶⁰ especially when drafted with an eye to the future.⁶¹

The starting point for the interpretation of a legal norm is the language of the law.⁶² When the language of the text is capable of holding more than one meaning, the Court is bound to choose the meaning that better fulfils the purpose of the legislation,⁶³ which consists of both a subjective and an objective element.⁶⁴ In this context, it is worth emphasising that a constitutional language does not only set the boundaries for the legal integrator, but also establishes the source of its purpose.⁶⁵ In determining the purpose of the legislation, judges have a level of discretion within which they act in order to strike a balance between the subjective and the objective elements.⁶⁶

The subjective purpose of a particular piece of legislation concerns the actual purposes as intended by the legislature, namely, the legislature's original intent, which can be ascertained first and foremost not only from the language of the text⁶⁷ but also from its parliamentary history,⁶⁸ including relevant explanatory notes and protocols. Speaking of the legislature's intent, it is important to explain that we are not concerned with the intention of particular members of the parliament, or the way in which they understand or interpret the legislation in question, but rather with the intention of the legislature as such, as manifested in the original legal text.⁶⁹

Facing the subjective purpose of the legislation stands the objective purpose. The latter concerns the values and principles which the particular legislation purports to fulfil in a democratic society.⁷⁰ Among the various legal sources that might assist the judge in determining the objective purpose of particular legislation, the fundamental constitutional principles enjoy a special status for they constitute the normative environment within which the legislation exists.⁷¹

⁵⁸ Thomas C Grey, 'The Constitution as Scripture' (1985) 37 *Stanford Law Review* 1, 14.

⁵⁹ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 370.

⁶⁰ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (Can), 344; Peter Hogg, *Constitutional Law of Canada* (4th edn, Carswell 1997) 819.

⁶¹ *Hunter v Southam Inc* [1984] 2 SCR 145 (Can), 156.

⁶² Hans Kelsen, *General Theory of Norms* (M Hartney trans, Clarendon Press 1991) 346; Johan Steyn, 'Interpretation: Legal Texts and Their Landscape' in Basi Markesinis (ed), *The Coming Together of the Common Law and the Civil Law* (Hart 2000) 73, 81.

⁶³ James C Tomas, 'Statutory Construction When Legislation is Viewed as a Legal Institution' (1996) 3 *Harvard Journal of Legislation* 191, 203.

⁶⁴ Barak (n 59) 86–88.

⁶⁵ Stephen R Munzer and James W Nickel, 'Does the Constitution Mean What It Always Meant?' (1977) 77 *Columbia Law Review* 1029.

⁶⁶ Barak (n 59) 81–94.

⁶⁷ Akhil Amar, 'Intratextualism' (1999) 112 *Harvard Law Review* 747.

⁶⁸ Laurence Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) 67.

⁶⁹ H Jefferson Powell, 'Rules for Originalists' (1987) 73 *Virginia Law Review* 659.

⁷⁰ Tribe (n 68) 40.

⁷¹ *Dubois v R* [1985] 2 SCR 350 (Can), 356; Tribe (n 68) 70.

These are the conceptual grounds that will assist me in interpreting Article 4 in relation to the legal status of Arabic in Israel. This is a legal mission, not an emotional one. The question is not whether or not Article 4 constitutes a symbolic emotional insult to the Arabic language and Arabic speakers. Rather, the question is whether it is necessary to read Article 4 as removing from Arabic its official legal status, downgrading it, and preventing any future re-endorsement of the former status it had long enjoyed prior to the NSL.

Approaching this question requires us to interpret Article 4 simply as it stands – namely, as it was ultimately drafted by the legislature. The interpretive mission concerns the legal text as it appears in Article 4 itself. The objective of this mission is to point out the purpose of this legislation – namely, to identify the subjective and objective purposes of Article 4 and to strike a balance between them. This is the conceptual framework within which an interpretation inquiry should operate. It is none of my concern what a particular member of the Knesset meant by choosing this word or another; nor am I concerned with how a particular member of the Knesset understands the words of Article 4; and it is not my concern what a particular member of the Knesset sought to achieve by supporting or opposing the ultimate draft of Article 4.

Therefore, in dealing with the subjective and the objective elements of Article 4 my main concerns involve the legislature. This means that no legislation can exist in a vacuum; rather, it is one of many parts in the chain of legislation of one legislature – as distinguished from changing members of the parliament – and thus it is of the utmost significance to achieve legislative harmony between the various enactments. In sum, any interpretative inquiry starts from the language of the text, and it is within this linguistic framework that the purposive interpretation should be applied.

4.2.1. MAINTAINING/RETAINING, NOT DOWNGRADING

I strongly believe that the NSL was enacted precisely in order to highlight the legal status of Hebrew as the state language and not, as I will further elaborate, necessarily in order to deny Arabic its official legal status.

Indeed, on its face, it would be conceivable to think that the NSL demotes the legal status of Arabic from ‘official’ to ‘special’, particularly in the light of the explicit language of section 82, which – regardless of the questions on the scope, the meaning and the consequences of recognition – in principle perceives Arabic as an official language in Israel, a position which is largely supported in the case law.

This reading of Article 4 is indeed a credible reading; however, it ignores several compelling legal complexities. Therefore, as reasonable as it might sound, this reading of Article 4 does not carry the legal consequences referred to above. It is my opinion that the outcome of a proper interpretation of Article 4 will indicate that it is not necessarily true that the latter has violated, hence downgraded, the legal status of Arabic in Israel. On the contrary, it is more likely to be true if asserting that the NSL has solidified the pre-NSL legal status of Arabic.

Although in a wide range of cases the Court has referred to section 82 as establishing the primary legal grounds for recognising Arabic as an official language, there are those who perceive

section 82 solely as establishing the special elevated status of the language, and not its official status.

It is section 82, in particular, that has received most judicial attention. In seeking to examine its actual legal meaning, this attention has ignited a very complex discourse. As aptly described by Justice Salim Jubran, section 82 establishes the official status of Arabic, together with Hebrew, in Israel; however, there is nothing in the case law that can decisively reach a conclusion regarding the consequences of such recognition.⁷²

Yet, as we have learned, establishing the official status of Arabic in Israel has not been solely the concern of section 82. Further legal grounds for such recognition were located beyond the realm of section 82, such as in the Israeli Declaration of Independence, in which the state of Israel promised its Arab minority citizens the rights to dignity and equality and freedom of language, culture and religion. When referring to the Declaration, the Court has emphasised several reasons for granting the Arabic language this particular legal attention, leading among other reasons the fact that this is the language of the largest minority in Israel – a minority that has lived for generations in Israel, and a minority which despite the Arab-Israeli conflict has always sought to be loyal equal citizens.⁷³ In addition, the Court has noted the great benefit of protecting Arabic as a bridge between the state and its Arab citizens, and all the more so between the state and its Arab neighbour states. Having said that, we cannot ignore other legal perspectives, which have voiced serious rejection of the legal conclusions drawn with regard to the general promises made in the Declaration, including the conclusion that Arabic is an official language.⁷⁴

Whatever it might be, the common ground among all judges is the promise that recognising Arabic as an official language in Israel is conditioned on perceiving Hebrew as the state language and the dominant language, as well as that such recognition does not jeopardise this superior status of the Hebrew language. Furthermore, it has been the Court's view that section 82 should be interpreted in the light of other legislation that grants preference and superiority to the Hebrew language, which is the national language of the majority in Israel, and which constitutes a vital element in defining Israel as a sovereign state. In a different context, the Court made it clear that even if Arabic were to be perceived as an official language, it would still remain another foreign language spoken in Israel.⁷⁵

Here we are then. While it is possible to agree, in principle, that before the enactment of the NSL Arabic enjoyed an official legal status – primarily, but not only, based on section 82 – there is still much dispute about the meaning, scope and consequences of such recognition. Additionally, even when Arabic was recognised as a fully official language, it was on the condition that Hebrew is the state language and the dominant and superior language in Israel. In fact, Arabic has never been equal to Hebrew; at best, it has been perceived as a second official

⁷² *Wael & Co* (n 4) opinion of Justice Salim Jubran, paras 21–22.

⁷³ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 25.

⁷⁴ *ibid*, opinion of Justice Mishael Cheshin.

⁷⁵ *Re'em* (n 4) 216, opinion of Justice Dov Levin.

language. Accordingly, it is more likely that Article 4 reinstates, rather than downgrades, the legal status of the Arabic language as it was perceived prior to the enactment of the NSL.

In my view the distinction between the different status of both languages, as incorporated in Article 4, does not necessarily lead to the conclusion that Hebrew is an official language and that Arabic is not. This could be viewed rather as a distinction between official languages and the state language: both Hebrew and Arabic are official languages in Israel, but Hebrew is the state language. In support of this understanding, I shall refer to the opinions of Chief Justice Aharon Barak and Justice Dov Levin who, while declaring both languages to be official languages in Israel, still emphasised that Hebrew is the state language.⁷⁶ In this context, Justice Levin noted that Arabic, though an official language, is another common spoken language in Israel. According to Justice Levin, it is possible for Israel to have more than one official language, while only one can be the state language.⁷⁷

Whatever this matter might be, the case law does not support the view that the term ‘special status’ alludes necessarily to an inferior position and a downgrading approach. In one case Justice Mishael Cheshin referred to Arabic as enjoying a special, but not official, elevated status in Israel.⁷⁸ In another case, however, Chief Justice Aharon Barak referred to the same term – ‘a special elevated status’ – in order to establish that by means of section 82, Arabic, as distinguished from other common spoken languages in Israel, is an official language from which it acquires its special elevated status.⁷⁹ In addition, following the enactment of the NSL, the Court referred to Article 4 by defining both Hebrew and Arabic as having ‘special status’.⁸⁰

Reading through Article 4, including its title, it is notable that the legislature does not use the term ‘official language’ either with regard to Hebrew or in the context of Arabic; the fact that Hebrew is described as ‘the state language’ but not the ‘state’s official language’ does not necessarily void its official status. Hence, precisely in the light of the validity of laws clause, describing Arabic as enjoying a special status does not mean that it automatically ceases to be an official language. Eventually, when the legislature aspired to invalidate the official status of English in Israel, this was explicitly stated by the legislature, which enacted section 15(b) of the Government and Legal System Organization Act, which provided that ‘[a]ny law requiring the use of the English language is void’. This has not been the case in relation to the legal status of Arabic. The legislature’s choice not to use the term ‘official languages’, with regard both to Hebrew and to Arabic, should not be viewed as downgrading the legal status of Arabic from its ‘official status’ to ‘special status’, but rather it should be viewed as an attempt by the legislature to dull the symbolic abuse – not the legal abuse – of the Arabic language. At the end of the day the legislature had consciously chosen to refrain from using the term ‘official language’ in

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *Mar’ei* (n 4) 142, opinion of Justice Mishael Cheshin.

⁷⁹ *Adalah* (n 3) opinion of Chief Justice Aharon Barak, para 13.

⁸⁰ BL 31534-05-18 (The Court for Local Issues in Tel-Aviv-Jaffa) *The State of Israel v Mehgistsv Desslg Zelalem* (10 February 2019), para 3. It is worth noting that the Court did not refer at all to the term ‘official language’ either with regard to Hebrew or with regard to Arabic.

both contexts, Hebrew and Arabic, and this must be for a reason. To be honest, it seems that the legislature is not aware of the meaning of the distinction, if any, between 'special status' and 'official status', a conclusion which can be ascertained decisively from the protocols of the Knesset committee.⁸¹

There was a large consensus that a hierarchy between the two languages must be established; but there was a question, at the symbolic level, that it is difficult for us, and we said that, as a legal issue, to distinguish between the issue of special status and the issue of official status. However, indeed there was a general perspective according to which from a symbolic point of view, if today both languages are official languages in accordance with section 82 of the King's Order, in practice Hebrew is deemed as the State language and the principal language, and here is the basic law [the NSL] approval to this matter.

4.2.2. BEATING, NOT FROZEN

It has also been argued that although Article 4(c) preserves the pre-NSL status of Arabic, it does not prevent the potential to further upgrade it.

I disagree with this interpretation of the validity of laws clause. The language of this clause is clear and speaks for itself. It also provides explicit recognition by the legislature of the pre-NSL legal status of Arabic. However, as presented above in Section 3, the question of the legal status of Arabic has never been decisively settled. Accordingly, the validity of laws clause paves the way for all judicial approaches to retain the validity of Arabic's pre-NSL legal status for further elaboration and discussion.

Furthermore, just like section 82, Article 4 is a legal norm which remains a subject for interpretation and debate. The same variety of legal interpretations that led to the development of the legal status of Arabic before the enactment of the NSL are still valid after its enactment. Ultimately, Article 4 has not invalidated section 82. If it had done so, it still did not nullify the particular legislation that served the Court in establishing the legal official status of Arabic, and all the more the further legal grounds as borrowed from the Declaration of Independence, in particular the rights to equality and dignity and freedom of language. Accordingly, I do not see the grounds on which the concerns that the NSL prevents further reinstatement of the legal status of Arabic are established. Moreover, the extra-legislative grounds that were presented by the Court to establish the official status of Arabic are still valid after, and especially following, enactment of the NSL. The Arab minority is still the largest minority in Israel; a minority that seeks to maintain its loyalty to the state and, despite the Arab-Israeli conflict, aspire to live in Israel on the basis of equal citizenship. Protecting the legal status of Arabic still constitutes a significant ground for bridging the gaps between the state and its Arab citizens, particularly in the light of the NSL.

⁸¹ Protocol No 15, Joint Committee of the Knesset Committee and the Constitution, Law and Justice Committee (n 57).

4.2.3. THE UPGRADING OPTION

In this section I argue that incorporating the legal status of the Arabic language – as it might be – in a basic law rather than in ordinary legislation, and given the validity of laws clause, does allow for a possible upgrade of its legal status. It is precisely the special constitutional normative status that the basic laws enjoy under Israel's constitutional jurisprudence that constitutes an integral part of the fundamental constitutional principles of the Israeli system of which Arabic has become a part. Such an upgrade in the legal status of Arabic is both vertical and horizontal.

At the vertical level, its legal status is no longer protected by Mandatory legislation but rather by Israel's basic laws. This should not be viewed as a trivial issue. Indeed, the King's Order has been described as the constitution of Eretz Yizrael (the Land of Israel).⁸² However, from the judicial perspective it has never enjoyed constitutional status. The King's Order was eventually enacted in Britain during the period of the British Mandate; it was enacted as an order, which, under the authority of the Foreign Jurisdiction Act 1890, is secondary legislation. Israel's basic laws constitute an important pillar in establishing the fundamental constitutional principles of the state of Israel. Incorporating the legal status of Arabic in a basic law is clear recognition by the legislature of the special elevated status of the language, as has been the case since the establishment of the state of Israel, and even beyond.

At the horizontal level, I mentioned in Section 3 that, with the exception of Justice Dalia Dorner, all judges have shared the view that section 82 recognises Arabic as an official language solely with regard to central government. Unlike section 82, Article 4 is not limited in its scope of recognising Arabic's legal status. Incorporation of this legal status in a basic law also reflects the peculiarity of the Arabic language in Israel, as a language that enjoys a special elevated status, unlike other common spoken languages in Israel. Therefore, such recognition allows not only for protecting the legal status of Arabic against central government but also against local authorities; it also allows the fulfilment of the rationales underlying the Court's reasoning in granting such special elevated status solely to the Arabic language – namely, fulfilling the promise of the Declaration of Independence to guarantee the Arab minority's freedom of language and rights to equality and dignity. This should be understood in the light of the Court's aspiration to provide such legal protection not only within the internal corridors of the official authorities but particularly in the public sphere.

Such a reading of Article 4 can be viewed as upgrading the legal status of the Arab minority in Israel, as well as the legal status of the Arabic language, thus establishing official judicial recognition of the Arab minority as an indigenous national minority that is entitled to collective rights, such as linguistic rights. It is recalled that it was Justice Mishael Cheshin who, before the enactment of the NSL, strongly expressed his objection to the concept of judicial recognition of the Arab minority as an indigenous national minority, noting that this is a political issue to be determined in the political arena.⁸³ However, especially in the light of the enactment of the NSL,

⁸² Rubinstein and Medina (n 2) 1172, fn 2.

⁸³ *Adalah* (n 3).

which is nation-based legislation highlighting the national aspirations and features of the Jewish nation, the inclusion of such legal protection of Arabic should be interpreted as reflecting the national characteristics of the Arab minority at the collective rather than the individual level.⁸⁴ This is not an odd reading of Article 4. By and large, this has been the position of the majority of judges who (i) were willing to extend, as an exception, the Declaration's equal protection, in relation to Arabic, on a collective basis; (ii) were ready to speak of the Arab minority, a minority that had lived in Israel for generations, as a loyal minority despite the Arab-Israeli conflict; and (iii) emphasised the need to teach Arabic in schools as a means to bridge the gaps between the state and its Arab minority. This clear terminology establishes judicial recognition of the Arab minority on the basis of its national features as an indigenous minority, entitled to collective rights.⁸⁵

Article 4 is the first basic law provision in the entire history of Israel that speaks for and refers to a particular national feature of the Arab minority. This is not just any national feature, but rather a linguistic feature; it is a feature that was described by the Court in the context of protecting the rights of minorities as representing their history, culture and tradition. The fact that a basic law such as the NSL – which highlights the national identity and characteristics of the Jewish majority in Israel – refers to such a bold national feature of the Arab minority, a minority that has been living for generations in Israel, is an acute and important matter that reflects official legislative recognition, explicit or implicit, of the Arab minority as a national indigenous minority.⁸⁶ In this context, the words of Meital Pinto are apt: 'Language rights are commonly perceived as group rights or collective rights. In addition, language rights are cultural rights because they protect a minority culture'.⁸⁷

5. CONCLUSIONS

This article has searched the thorny narrative of the legal status of Arabic in the light of the NSL, particularly in comparison with the legal status it enjoyed before its enactment.

My argument, as presented in the article, is that reading the words of Article 4 reveals that it does not invalidate section 82, but rather preserves it by virtue of the validity of laws clause. In fact, Arabic has remained an official language in Israel, not only in the context of section 82 but also in accordance with the case law that has addressed the legal status of Arabic in relation to

⁸⁴ Consider also Saban (n 26) 590; Dafna Yitzhaki, 'The Status of Arabic in the Discourse of Israeli Policymakers' (2013) 19 *Israel Affairs* 290, 337–38.

⁸⁵ Saban (n 26) 589–90.

⁸⁶ Yitzhaki (n 84) 352–54 (Analysis of data from a series of focus group sessions shows the linguistic rights and privileges that may be derived from a group's indigenous status – that is, from the fact that it existed as a unique group prior to the establishment of the state); Meital Pinto, 'Taking Language Rights Seriously' (2014) 25 *King's Law Journal* 231, 232–44 (arguing that 'existing arguments supporting restrained judicial interpretation of language rights are ill founded'). Consider also Meital Pinto, 'Who is Afraid of Language Rights in Israel?' in Ohad Nachtomy and Avi Sagi (eds), *The Multicultural Challenge in Israel* (Academic Studies Press 2009) 26; Yousef T Jabareen, 'The Politics of Equality: The Limits of Collective Rights Litigation and the Case of the Palestinian-Arab Minority in Israel' (2013) 4 *Journal of Race and Law* 23.

⁸⁷ Pinto (2014), *ibid* 240.

section 82, other legislation, and constitutional principles. The subjective purpose of section 82 was to reflect the nature of Hebrew as the state language and the characteristics of Arabic as actually enjoying a special status in the NSL. It is within these premises that the legislature refrained from using the term 'official status' with regard to both Hebrew and Arabic. Respecting the legislature's intent mandates respecting the words chosen in drafting the legislation in question. In the explanatory notes for Article 4, the legislature provides the following:⁸⁸

[I]t is proposed to incorporate in a basic law the special status which is entitled to the Arabic language, as well as to emphasize that nothing in this basic law is aimed at violating the legal status as it exists already today. Additionally, it is proposed to grant the Arabic speakers with the right to linguistic accessibility to the State services, which is not incorporated yet as an independent right in existing legislation of the present day.

As for the objective purpose of Article 4, it must be remembered that the primary aim of the NSL is to highlight the national characteristics of the state of Israel, which among other aspects includes the special superior and favoured status that Hebrew has always enjoyed in the case law, as reflected in Article 4, but not necessarily to downgrade the legal status of Arabic by invalidating its official status. Ultimately, the NSL is not positioned above other basic laws; it was not enacted in order to invalidate the fundamental constitutional principles of the state of Israel, as established and developed by the Court, and certainly not Israel's Declaration of Independence and other existing basic laws. The NSL is the fourteenth basic law to have been enacted by the Knesset since the Harari Resolution. As already mentioned in Section 2, the NSL, to that extent, is not an ordinary law; rather, it enjoys a higher legal status, equivalent to that of a constitutional norm. As such, it stands next to other leading basic laws such as Basic Law: Human Dignity and Liberty, which defines Israel as a Jewish and democratic state, and which mandates that basic human rights shall be 'upheld in the spirit of the principles set forth in the Proclamation of the Establishment of the state of Israel'. Accordingly, the NSL is not positioned above other basic laws or above the Declaration of Independence; rather, it forms part of Israel's entire basic laws project.

Hence, there is nothing in the NSL itself which suggests necessarily downgrading the legal status of Arabic in Israel. Article 4(b), which declares Arabic as enjoying a special status, should be read in the same vein, together with the validity of laws clause (Article 4(c)), as the latter provides explicit recognition and preservation of the official status of Arabic as incorporated not only in section 82 but also in other laws, particularly in the case law. In any event, the hierarchy between Hebrew and Arabic has always been that of downgrading the latter – that is to say, Hebrew has a favoured and superior status. Hebrew is the state language; Arabic is not. Hebrew is the dominant language; Arabic is not. The meaning, the scope and the consequences of recognising Hebrew as an official language are clear, but not so is the case with Arabic. As good or bad as this might be, Arabic has never been treated as an official language equal to

⁸⁸ Bill: Basic Law: Israel – The Nation State of the Jewish People, 13 March 2018.

the Hebrew language; it has never been the state language, nor has it been a dominant language.⁸⁹ To that extent, the legislature has been right in arguing that the NSL simply reflects the existing laws and case law with regard to the legal status of Arabic in Israel.

Here again, this interpretation of Article 4 does not exceed the linguistic premises of Article 4; it represents a reasonable reading of the constitutional text such as that of Article 4, and above all it reflects a proper balance between the subjective and the objective elements of this legislation. Only such a reading of Article 4 allows for preserving the legislative harmony between Israel's various enactments. Ultimately, the NSL, which represents Israeli values, must be interpreted in the light of existing democratic values, including Israel's democratic features, inter alia, its commitment to equality, dignity and freedom of language – particularly towards Israel's Arab minority. These are values that are manifestly protected in Israel's Declaration of Independence and basic laws which will remain valid, particularly following the NSL.

To what extent my assertions are correct only time will tell. At the time of writing this article around 15 petitions are pending before the Court for judicial determination on the question of the constitutionality of the NSL, inter alia, Article 4.⁹⁰ In the meantime, the words of Justice David Mintz, written some seven months after the enactment of the NSL, are apt.⁹¹

The Hebrew language is the official language in the State of Israel, beside the special status that the Arabic language enjoys (see Article 4...; H CJ 4112/99 *Adalah*...). Beyond that, in practice the Hebrew language serves as the principal language, the *Lingua Franca* in the State of Israel ...

It is possible that because of this steadfast status, I was not able to locate an explicit provision in the up to date legislation and regulations, that stipulates in which language a litigant shall submit documents to court ... Hence the legal source is section 82 of the King's Order in Council 1922.

Reading his words, it is reasonable to think that before the NSL only Hebrew was perceived as an official language and Arabic enjoyed only a special status; this is particularly so because, in stating his position, Justice Mintz does not refer only to Article 4 but also generally to the case law (the *Adalah* case). It would be wrong to assume that Justice Mintz was not aware of the various positions in the case law regarding Arabic's legal status. However, it would indeed be plausible to think of Justice Mintz as adopting Justice Mishael Cheshin's position according to which, before the enactment of the NSL, Arabic was not an official language in Israel but rather enjoyed a special elevated status. In sum, Justice Mintz still refers to section 82 as a valid legal norm, namely, that Article 4 has not invalidated section 82.

In another case,⁹² delivered almost a year after the enactment of the NSL, not only did the Court not refer to Article 4 but, relying on the equality principle, it emphasised the importance of Arabic in Israeli life as the language of the largest minority that lives in Israel, the language serving as a means for expressing and preserving their culture and identity.

⁸⁹ Consider Saban and Amara (n 4) 6–9; consider also Amal (n 54) 211.

⁹⁰ eg, H CJ 5555/18 *MK Akram Hasson v The Knesset*.

⁹¹ GCA 815/19 *Gareeb v Fidam Select (in Liquidation) Company no B89058* (5 Feb 2019) (author's translation).

⁹² H CJ 8676/18 *Kabaha v Minister of Justice* (14 May 2019).

These recent cases reveal that (i) section 82 of the King's Order is still valid legislation; (ii) the dispute among judges on the means, the scope and the consequences of recognising Arabic as an official language by virtue of section 82 is still also valid; and (iii) the promise contained in the Declaration to grant the Arab minority freedom of language and treat them equally and with dignity is still valid.

While the meaning, scope and consequences of such recognition are still disputed, these are clear indications that, as far as the legal status of Arabic is concerned, nothing has really changed; Arabic is, de facto, an official language. In the absence of a clear legislative policy, it is for the Court to establish, once and for all, a clear and coherent judicial policy on this matter. Hitherto, such policy has not been established; the only policy that has been constituted is ad hoc determination, i.e. case by case. This can no longer be true, especially not after incorporating the legal status of Arabic in a basic law, legislation that highlights the national aspirations of the Jewish people, but at the same time presents, for the first time in the history of Israel, one facet of the national features of the Arab minority in Israel, namely, its linguistic feature.

6. EPILOGUE: A NOTE OF ALARM

I could have ended my article at this point, but I chose not to. Nothing in the article should be construed as holding a position in favour of the NSL. On the contrary, I contend that the NSL does not reflect the way in which Israel was envisioned by the Founding Fathers as a Jewish and democratic state.⁹³ To that extent, it is my position that the NSL is nothing but half of the truth, half of the dream, and half of the vision. This is a worthy topic to be discussed and debated thoroughly on another occasion.⁹⁴

By defining itself as a 'Jewish and democratic state', Israel should remain as was originally anticipated by the international community, and reflected in the Declaration of Independence and Israel's ensuing basic laws. The Declaration did not include the terms 'Jewish and democratic state', and also omitted the binding term of 'democracy'. However, as correctly held by the Court, a credible interpretation of the Declaration leaves no doubt as to the democratic nature of Israel.⁹⁵ Yet, in order to materialise this policy, a proper balance must be struck between Israel's Jewish identity and its democratic nature. This will be possible only when Israel acknowledges that democracy and Jewishness are not contradictory values in themselves but rather equal means to achieve both. Each can lead to destructive consequences if abused by a governmental power, but can also establish constructive hopes if substantively adhered to.

As for its democracy, the Israeli judiciary, represented by the Supreme Court, has played an important role in advancing and protecting the values of a substantive democracy, and in protecting the rights and liberties of minorities against any possible abuse of power by the

⁹³ Mohammed S Wattad, 'Israel as a Jewish vs. Democratic State' in Asaf Siniver (ed), *Routledge Handbook on the Israeli-Palestinian Conflict* (Routledge, forthcoming 2021).

⁹⁴ Raphael Cohen-Almagor and Mohammed S Wattad, 'The Legal Status of Israeli-Arabs/Palestinians in Israel' (2019) 1 *GNLU Law & Society Review* 1.

⁹⁵ H CJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of the Interior* (16 October 1953) 871, 885.

democratically elected majority.⁹⁶ In such a democracy not only the rights of all minorities should be protected, but particularly the collective rights of the Arab minority, as an indigenous national minority. Among other collective rights, the Arabic language should be presented, manifestly and expressly, as an official right.

The recent enactment of the NSL seems to give Israel's Jewish values supremacy over Israel's democratic pledges. This raises fundamental reservations regarding the future of Israel as was originally defined: a Jewish and democratic state.

⁹⁶ See generally Mohammed S Wattad, 'Israel at 70: The Rule of Law and the Judiciary' (2018) 23(3) *Israel Studies Journal* 172; Menachem Hofnung and Mohammed S Wattad, 'The Judicial Branch in Israel' in Reuven Hazan and others (eds), *The Oxford Handbook of Politics and Society in Israel* (Oxford University Press 2018) 1.