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Contrastive aspects of multilingual justice and human rights policy in the Asian region
アジア地域に於ける多言語司法と人権政策との関係の調査

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Working paper: Contrastive aspects of multilingual justice and human rights policy in the Asian region: アジア地域における多言語司法と人権政策の対照的側面

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Through this research, we examined the status of multilingual justice and human rights policies in contrastive Asian contexts. The first section, on Malaysia, reviews the situation of a Muslim majority that still sees itself as a minority, wheras the second section, focusing on Palestinians with Israeli citizenship, concerns an indigenous Muslim population that has now become a minority in their ancestral land.

(1) An exploratory study of Malaysian bijural lawyers' role in multicultural and multilingual rights protection. マレーシアの二法制弁護士の役割の探索研究

Richard Powell リチャード・パウエル　1

1. Background to study

This pilot study has emerged from investigations conducted under the umbrella of a Nihon University Global Research Project grant (グローバル社会文化研究プロジェクト) into the relationship between multilingual justice and human rights policy in the Asian region. Embarked upon on the eve of a global pandemic, the project presented the main researcher with a number of unanticipated challenges while also offering an incentive for innovative data-collection and reflective analysis. While the funding period has expired, it has allowed for data collection and research presentations covering several aspects of the original investigation theme, specifically laying the groundwork for this ongoing research into the linguistic, educational and professional underpinnings of bijural lawyers in Malaysia, one of the investigation sites originally targeted.

The study aims to shed light on the role played by lawyers engaged not only in bilingual but also bijural practice. The cohort was targeted for the bilingual and bicultural resources they employ in legal practice and because conflict between civil and religious law has an important place in discourses about human rights in the Malaysian context. Research on language and human rights all too often becomes bogged down in abstract theorisation and shallow polemic, but by focusing on grounded professional practice this study aims to offer concrete examples of pragmatic efforts to ameliorate language-and culture-based disadvantage before the law.

2. Aims and Scope

In her (mostly document-based) comparative study of the legal underpinnings of language equality, Leung (2019) argues that existing measures typically fall short of the promises they declare in constitutions and language laws, typically achieving a shallow and symbolic equality at best in a world where socioeconomic and political realities dictate that some languages must be more equal than others. In my own investigations into language policy in Malaysia (e.g. Powell, 2020), what very often emerges is evidence of the rights of languages themselves taking precedence, rather than the rights of the people who use them, again resulting in the marshalling of language in superficial and symbolic ways rather than as an effective tool to support and enhance human and civil rights. The rather extensive literature on language rights and linguistic human rights is rich in idealism and rhetoric, but rather poorer in focused and grounded investigations into language practices in legal and administrative systems and the way they influence access to justice for individuals.

The current study aims to go some way toward redressing this imbalance by highlighting the work and perspectives of individual professionals who not only employ at least two languages but also straddle two legal traditions, each aiming to seek justice through distinct epistemological means and reference systems. While at a preliminary stage, the longer-term aim remains the construction of a more nuanced and detailed picture of the relationship between the two jurisdictions that come together in the work, professional outlook and personal experiences of individual practitioners.

3. Legal-linguistic overview of research site

Malaysia, a federation of some 33 million people covering some 330,000km^2, no longer collects language data on its national census[1], but in 2019 it was ranked 50th among the world's polities for linguistic diversity with 134 living languages, the largest being Malay (13.5 million first-language speakers), Hokkien (2.6 million), Iban (1.4 million), Tamil (1.2 million), and Hakka (1 million). While less than half a million report English as a first language, at seven million it is the most important second language after Malay (Ethnologue, 2019), and although lacking official status, it has been described in official publications such as the Third Malaysia Plan as a "strong second language" (Government of Malaysia, 1976). At the last census, 63.5% reported their religion as Islam, the majority of these being ethnically Malay. According to the Constitution (Art.160), all Malays are categorised as Muslim, and Muslims are required to have certain legal matters such as marriage and divorce, inheritance, and religious compliance, administered by the *Syariah* rather than the civil courts.

Syariah is regulated by each of Malaysia's 13 states and three federal territories, but in recent years there have been drives to harmonise administration nationally, together with calls for the establishment of an apex court. A still older legal tradition, *adat*, has largely been absorbed into the civil law jurisdiction in West (or Peninsular) Malaysia but is supported by a separate system of tribunals and a separate set of enabling legislation in East Malaysia (the Bornean states of Sabah and Sarawak). Federal law, based on English common law, was introduced incrementally as British colonialism spread throughout the 19th century, firstly in the Straits Settlements, and not displacing *Syariah* and *adat* in more rural areas until well into the 20th century.

As Fig. 1 (below) shows, legal pluralism is supported by complex multilingual polices, and reports of grounded practice suggest still more nuanced multilingualism. Powell (2020) found that while Malay predominates in the lower civil courts and English prevails at apex level, both could be heard at most court levels in West Malaysia, with the balance between them dependent not only on the background of participants but also on the location of the court and nature of the case. Although the use of Malay in East Malaysia requires prior approval, Powell (2020) also observed it being used spontaneously in some cases there. In a rural *Syariah* Court, Sharifah (1995) reported Arabic being used to question witnesses, as well

[1] According to an interview conducted by the researcher with former census officers at the University of Malaya in 2018, the main reason for dropping language-related questions was doubt about the reliability of responses.

as cite religious authorities, while Powell & Azirah (2011) observed the use of English without interpreting in *Syariah* proceedings in an affluent urban setting.

Multilingualism is also evident in written law. New federal legislation is gazetted bilingually in Malay and English, with the former to prevail in the event of a dispute, and during the Covid-19 pandemic the Movement Control Orders were issued bilingually (Zarina & Powell, 2023). Judgments, which incorporate summaries of courtroom arguments and cite extracts of legal authorities, are often linguistically hybrid and frequently reflect a shift from more Malay in the subordinate courts toward more English at appeal level. State-level *Syariah* enactments usually have English as well as Malay versions. The enabling legislation supporting *adat* is generally in English as this is the official language of law in East Malaysia, even though the medium of largely oral customary tribunals is likely to be Malay or another Austronesian language. Civil law and *Syariah* texts also reveal a great deal of lexical borrowing, the former employing extensive English and Latin terms in Malay texts and the latter drawing on English (and some Latin) as well as Arabic.

Fig. 1: Malaysian legal pluralism and multilingualism

System	Competence	Official languages	Authority
Federal	All legal matters except family- and religion-related affairs deemed within the purview of Syariah.	*West Malaysia*: Malay. English permitted in "interests of justice". English prevails for pre-1967 legislation (unless otherwise stipulated by Chief Justice). *East Malaysia*: English. Malay with prior agreement.	e.g. National Amendment Act, 1990.
Syariah	Marriage and divorce, inheritance, religious conduct of Muslims.	Malay. Arabic authorities frequently cited untranslated. Most enactments also in English, but Malay prevails in the event of a dispute.	e.g. Syariah Court Civil Procedure (Selangor) Enactment, 2003.
Adat	Usurped by civil courts in Malaya but supported at local level in Borneo for applying customary laws and resolving minor disputes.	Malay, Bornean languages, with English for most enabling legislation.	e.g. Native Courts Ordinance, 1992

The liminal discursive spaces that exist between institutionally separate jurisdictions harbour instructive commentary on language choice. Former Chief Justice Abdul Hamid Mohamad once revealed that he chose Malay when writing decisions pertaining to jurisdictional conflict to ensure that they were accessible to *Syariah* judges (*The Star Online,* 2013). Discussing the 2006 *Lina Joy* case, legal academic and former Election Committee deputy chair Azmi Sharom surmised similar reasons behind the use of Malay for the majority opinions in a religious conversion case, which marked the globally rare use of a language other than English in a common law-based apex court[2].

[2] Interview in Powell (2020).

4. Research approach

As an initial exploration of an area that has received little attention, either in the field of sociolinguistics (including forensic linguistic and the semiotics of the law) or within the paradigm of the sociology of the law, this study has adopted an interview-based qualitative research design. In-depth interviews with 20 bijural legal practitioners have been planned, with half of these completed so far. In order to minimise the risk of confirmation bias, quantitative analysis of this relatively small sample has been avoided. However, if a sample of more than the targeted number appears feasible and better data concerning the potential representativeness of the sample emerges, a larger study will employ quantitative analysis of informant responses.

There is a dearth of reliable and up-to-date information on the number of bijural lawyers in Malaysia as registration for the relevant civil law and religious law bodies is institutionally discrete, but given that some 8000 civil lawyers are registered in the city of Kuala Lumpur, representing a third of lawyers across the nation (Majlis Peguam, 2022), and that no more than 200 *syarie* iare working n the corresponding area[3] , even if all the *syarie* were also admitted to the civil bar association the total number of bijural practitioners appears to number in the hundreds rather than thousands. A survey of the nation's some 20,000 civil lawyers (Powell, 2020) found regular patterning in answers once an initial target of 60 practitioner interviews had been reached, and so the current target of 20 interviews is expected to be productive, even if not statistically representative in terms of randomised sampling.

Informants were accessed by means of snowballing, interviews were completed either in person or via Zoom, and most lasted about an hour, with additional information obtained through follow-up questions by email. All interviews were predominantly in English, but several were conducted bilingually in English and Malay so that informants could express themselves as freely as possible. The sites of practice were either the capital city of Kuala Lumpur and surrounding urbanised state of Selangor, or the East Coast state of Terengganu. Future interviews are planned for the large West Coast city of Penang and semi-urbanised state of Melaka. Should regional differences in practice or professional outlook emerge then the geographical research net will be cast more widely going forward with this investigation.

5. Summary of relevant recent studies

With little literature to draw on dedicated to the phenomenon of bilingual and bijural legal practice, this study positions itself within academic discourse surrounding the construction and deconstruction of linguistic justice, linguistic human rights, and language planning in legal and administrative systems. For reasons of space, the following summary is restricted to the more relevant recent studies in each field.

5.1 Linguistic justice and linguistic human rights

Current multilingual legal practice in Asia draws on a range of disparate ideas. The most influential is anticolonialism. While some colonisers were more parsimonious about spreading their language than others, most privileged its use in formal law, and from Central Asia to Southeast Asia the main motivation behind introducing local languages into the legal domain has been to construct or reconstruct national sovereignty. Linguistic rights studies typically highlight the crucial role of the state. In their critique of attempts to develop a theory of linguistic justice, De Schutter, Helder and Robichaud (2016:3) contend that while governments might adopt a laissez-faire stance on civil society issues such as religion, when it comes to language they cannot avoid involvement. A concise yet insightful example of the unavoidable involvement of the state in language-related decisions comes in the context of courtroom language from Kymlicka

[3] Interview with chair of Bar Council Syariah Committee (2023.8.10).

(1995:111), who points out that while "[t]he state can and should replace religious oaths in courts with secular oaths (…) it cannot replace the use of English in courts with no language."

The uniquely privileged position of the English language in global power structures today is of particular relevance to the current study as English in postcolonial law. English was the language of colonial administration in Malaya, is used extensively in West Malaysian civil law and predominantly in East Malaysian civil law, and it remains the means of importing the concepts and practices from global common law. Many Malay nationalists argue that the revival of precolonial conflict resolution traditions should be prioritised over colonial impositions (e.g. former Chief Justice Ahmad Fairuz, in Bell, 2007, and civil law advocate Farid Sufian, 2008:2). Momentum for localisation continually comes up against the barriers of global English, however, which is pervasive in nearly all professional domains but especially ingrained in law. Over a decade ago Lo Bianco (2011) already noted a general retreat in the face of globalisation from support for languages other than English.

But if the state cannot avoid getting involved in language, its propensity to prioritise political concerns rather than communicative needs has significant consequences for language reform. As Leung (2019) argues, evidence for multilingual orders being fairer than monolingual ones is weak, given that social equity requires something more than language laws, with attenuated institutional implementation also reflecting the practical implausibility of treating all languages equally. Leung (2019) further concludes that protecting language minorities does not necessarily protect other social minorities, and that for many people language may not be a fundamental indicator of social inequity.

5.2 Language planning for legal and administrative systems

The uncomfortable fit between language rights and social rights does not necessarily invalidate attempts to reduce linguistic and other forms of injustice through legislation, and there is a growing body of work on language planning for legal systems. In the far west of the region, for example, Takahashi (2019) has examined the rights theoretically accorded to Palestinians with Israeli Citizenship (PICs) within Israel within pre-1967 borders, concluding not only that rights to education and access to legal services in the Arabic have been inconsistently upheld, but also that legislative support for such rights has been weakened in recent years to such an extent that Israel appears to be failing to meet its obligations under international human rights law.

In the context of Central Asia, Ashurova (2019) has looked at the nuanced complexities of language planning as part of the process of de-Sovietisation and de-Russification, addressing many of the questions raised by Leung (2019) about how the rights of privileged (if not necessarily majority) language communities may impinge on the rights of other communities (including ethnic Russian and non-ethnic Russian speakers formerly in a position of privilege themselves). Notwithstanding different geographical and political contexts, such research is relevant to a key rights discourse in postcolonial Malaysia that positions Malay speakers as a cultural and socioeconomic minority despite having been in a demographic majority throughout the nation's post-independence history. Of direct relevance to *Syariah* practice is Peletz's (e.g. 2013) comparison of local conflict resolution institutions following a ten-year process of 'modernisation', in which he observed a shift in procedural practices closely modelled on common law that suggests the influence of civil law on religious law to be considerably stronger than the reverse, despite frequent academic and media claims of religious law encroaching upon civil law.

Powell (2019) deconstructed opposition from Malay rights groups to the Malaysian government's plans to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), finding the positioning of numerically majority Malays as linguistic, cultural and religious group under threat of marginalisation or even minoritisation to have been a highly successful political strategy. To date, Malaysia remains one of just 14 non-signatory countries. The 1957 constitution, devised to restore the Malays' historical claims over the land and compensate for economic disadvantages suffered under colonialism, safeguards the "special position" of Malays and other communities classified as indigenous while acknowledging the "legitimate interests" of Chinese, Indian and other groups classified as settlers

(Art. 153). Language underpins this construct of restorative justice. While the state supports schooling in Chinese and Tamil, and English court proceedings in the Bornean states, Malay is the national language and official medium of national schools, government and the law, as well as the main inter-ethnic lingua franca. Yet the language's inclusiveness is compromised by its designation as *Bahasa Melayu*, rather than the popularly used *Bahasa Malaysia*. To be Malay, and hence accorded special constitutional consideration, is to "habitually speak[s] the Malay Language" while practising Malay customs and Islam (Art. 160).

5.3 Bilingual legal practice

While there is a substantive body of work on bilingual and hybrid legal texts, little attention has been given to bilingual legal practice itself. Powell's (2020) survey of Malaysia's bilingual civil courts, which includes interviews about office practice, remains one of the most extensive, but Vijay Bhatia's use of genre analysis has also shed a good deal of light on grounded practice within postcolonial legal professions, with some explorations of multilingualism even though the overriding focus is on communicative choices within English. Bhatia (2011, 2019) argues that the growing dominance of the English language in fields such as international arbitration, a practice originally developed through non-English legal and linguistic traditions, had brought with it an influx of adversarial practices that amount to the colonisation of alternative dispute resolution by common law culture.

There are a handful of studies on bilingual discourse in legal proceedings themselves, with Powell and Azirah's (2011) observation of arbitrations and Azirah and Powell's (2011) observation of *Syariah* proceedings remaining of most relevance to the current study, despite the decade that has passed since their findings were published. Emerging from both studies is evidence of the formal language policy of highly formal institutional legal settings being mitigated in less formal settings through tolerance for bilingualism in the interests of communicative equity and effectiveness. However, both these studies raise the possibility that the relative rigidity of civil court practices and their strict rules of speaking and requirements for interpreting non-official languages may be better at reducing language-based disadvantage before the law.

One further and relatively recent research paradigm of direct relevance to the current study is the application of semiotics to legal practice. Notably, Ricca (2023) refutes the plausibility of culturally neutral rights law, citing the incompleteness of western secularisation in culturally diverse societies. Asia offers a number of cases of legal pluralism that have arisen largely out of religious traditions, including Islamic law in Malaysia, the southern Philippines and Singapore, and Hindu legal traditions in Sri Lanka, and many of these traditions involve multilingual practices and a degree of national support for minority languages. As argued above, Malaysia's Muslim and Malay-speaking community can hardly be categorised as a national minority on numerical grounds, but its self-definition as a community under threat makes studies of religious-based legal pluralism pertinent to framing of the current research, presenting bijural practitioners with the opportunity to compare secular and religious traditions at first hand. Malaysia also has a tradition of *adat* customary law. Much of this has been absorbed into common law institutions but some of it overlaps with *Syariah* practices.

6. Informants and interview questions

Ten interviews have been conducted so far. All informants were based either in the greater Kuala Lumpur area or in East Coast Malaya, with ages ranging between 30s and 60s. While it is unsurprising that the stated areas of Syariah practice were broadly the same, given that most cases are confined to family and inheritance matters or religious offences, the main areas of civil practice also cover much the same ground (civil and criminal litigation and conveyancing), with only three informants involved in commercial practice. There is also relatively little diversity in educational background, eight informants having gained their *Syariah* qualification at UIA (International Islamic University) or UiTM (Universiti Institut Teknologi

MARA) in the Kuala Lumpur area, with three of them obtaining both their civil law and *Syariah* qualification from UniSZA (Universiti Sultan Zainal Abidin) on the East Coast. This relative homogeneity may reflect the relatively small number of institutions offering qualifying courses to date. All informants were admitted to the civil bar before qualifying in Syariah, but it is too early in the investigation to conclude whether this is the default route to bijural practice.[4]

Fig. 2: Current informants

	Civil law school	**Religious law school**	**Main civil work**	**Main Syariah work**
H1	LLB (UIA) LLM	Dip. Syariah (UIA)	Islamic finance	estate planning, family
A1	LLB (UIA) PhD (Islamic Fin.)	Dip. Syariah (UIA)	conveyancing, loans, defamation	estate planning, family
A2	LLB (UM)	Dip. Syariah (UIA)	litigation, ADR	Divorce, inheritance, Islamic offences (e.g. *fitnah*)
P	BA (Islamic Studies) LLB (UM)	Dip. Syariah (UIA)	Islamic finance, criminal	estate planning, inheritance
F	LLB (UK) +CLP	Dip. Syariah (UiTM)	civil & criminal litigation	family, inheritance
M	LLB (UiTM)	Dip. Syariah (UiTM)	civil & criminal litigation	family, inheritance
H2	LLB (UM)	Dip. Syariah (UIA)	conveyancing, civil litigation	family
A3	LLB (UniSZA)	Dip. Syariah (UniSZA)	conveyancing, criminal litigation	estate planning
I	LLB (UniSza)	Dip. Syariah (UniSZA)	civil litigation, law lecturer	family
T	LLB (UniSza)	Dip. Syariah (UniSZA)	civil litigation	family

Semi-structured interviews were conducted with reference to the following topics:

(1) Motivations for become a *peguam* (civil lawyer) and *syarie* (religious lawyer)
(2) Comparing legal education across two professions
(3) Comparing vocational education across two professions
(4) Language choice in education, training and practice
(5) Comparing office practices
(6) Comparing courtroom practices
(7) Interjural conflict and collaboration

7. Initial findings

7.1 Motivations

[4] The trend for successful civil law advocates to add a *Syariah* qualification to their repertoire can be traced back at least to the early 1990s, exemplified by the recently deceased Haji Sulaiman Abdullah, known for prosecution of high profile corruption cases in the civil courts and also religious dispute cases at apex level.

Despite the small size of the current sample, the motives cited for joining the civil legal profession cover most of those offered by the 60 advocates interviewed by Powell (2020), including family background ("There had long been lawyers in the family", H1), perceived personal aptitude (e.g. "interest in debate", I; I didn't like maths and science, P), personal and economic opportunities ("Islamic finance was just taking off at that time", H2), and a desire to advocate for disadvantaged groups ("I wouldn't say I was a feminist, but I saw opportunities for helping women", A2).

There was a narrower range of motivations for become *syarie*, and these were clearly shaped by the fact that all informants were already involved in civil law prior to *Syariah* work. Business opportunity was the most commonly cited, such as finding increasing numbers of civil case clients making enquiries about *Syariah* matters, or partners involved in *Syariah* work complaining of bulging caseloads, or a general sense that the sector was expanding and in need of advocates. No specifically religious motives wre offered, although one informant mentioned that they had been educated at a religious school (P). Two informants mentioned rights issues: "I was concerned that more justice and human rights issues were being decided after civil court judges directed parties to go to *Syariah* courts" (F).

7.2 Legal education

Most LLB programmes seem to have included a limited number of Islamic law classes, including core courses comparing civil and Islamic tort and rules of evidence at UIA, and an optional course in Islamic law taken at a British university.

Several informants described *Syariah* civil & criminal procedure, evidence, family law and Islamic legal maxims as core components of their diploma in *Syariah,* with A2 reflecing that there was a lot of emphasis on the maxims. Although one advocate (P) was of the opinion that cases, such as the reports in the local *Jurnal Hukum,* were considered binding, most remembered case law as playing a minor role at best in their diploma courses, with local state enactments cited as the main legal authorities.

7.3 Vocational training

Recollections of the amount of time required to qualify as a *syarie* varied partly according to the location of study and training and partly according to when an informant embarked on a *Syariah* career, indicating that training has become longer and more comprehensive. H1, one of the older informants, believed it was possible to qualify for *Syariah* in as little as three months provided the practitioner already had a civil law licence, whereas the younger A1 recalled rather lengthier training, including pupillage with a qualified practitioner, which since 2022 has become compulsory for six months. One informant found the exams consisted mostly of memorisation – "but it can't have been too repetitive as I failed three times, and each time the format was different!" (F). It was also noted that whereas many civil judges are raised from the bar, *syarie* rarely became *hakim* (*Syariah* judges) as the training was different, and few would want to anyway as the "pay is poor" (F).

7.4 Language

All informants described their LLB education as entirely or predominantly in English, which is consistent with Powell's (2020) findings. At UM (and also UKM, which is not represented in the current sample), a limited number of courses and exams must be taken in Malay, and at UiTM some Malay instruction is introduced in the final year before graduates go into practice, but almost everywhere else the medium of instruction is English. One informant (I) thought this logical, despite the fact that most new graduates will initially be working primarily in the Malay-dominant lower courts, as legal study includes the analysis and citing of a large body of case law available only in that language. The dependence of civil law education

on English was underlined by an informant who described his command of his 'mother tongue' as barely adequate when first entering professional practice (F). Even at UIA, the LLB is taught in English, although students must also take Arabic language classes.

English plays a key role in *Syariah* education too, but by relating responses to the period an informant took their diploma it is apparent that the role of Malay has increased. Hence two of the older informants recalled nearly all their courses to have been mainly in English - "even the Arabic course, lah!", according to A2. The more recently qualified F having studied law in the UK in English and practised civil law largely in that language, recalled surprise at the degree to which he needed Malay in order to get through the diploma. Although most *Syariah* enactments have English versions, the Malay seems to be preferred when citing for essays and exams as it is considered the authentic version.

Alongside English and Malay, Arabic plays a central role in *Syariah* education. Yet most informants commented that they entered their diplomas with only 'Qur'anic Arabic', i.e. ability to read and recite the *Qur'an*, but not to produce arguments or enter into discussions. H1 commented that coping with Arabic was the biggest burden on the diploma, but largely surmountable as the main skill required on the course was reading. While A2 said she would cite English translation of the *Qur'an*, *Hadith* and *Sunnah* where available, H1 would refer to the original Arabic as he found direct quotation easier – "Just like we prefer the original English when citing common law cases". From the responses it appears that partial proficiency in Arabic may be enough to get through the diploma, with one informant going as far to say that he and his friends passed the course despite entirely ignoring an exam question requiring translation of an Arabic passage. This leaves room for thought, given that one of argument often put forward against admitting non-Muslim but otherwise qualified *syarie* is the likelihood that their knowledge of Arabic would be insufficient (e.g. Wan Azhar, 2016).

As for courtroom practice, most informants were prepared to use both Malay and English at all but the subordinate civil courts (where Malay alone might suffice) but had a strong expectation that Malay would be used for *Syariah* proceedings: "Language in civil court depends on place and case, but in *Syariah* court it is mostly Malay" (A1). An informant who had struggled with Malay in his early years of civil court practice felt he adapted well to the mostly Malay environment of the *Syariah* court because of having nine years to work on his legal Malay in the civil system, which offers further evidence of the similarity between the two. Several informants nevertheless mentioned using English in Islamic proceedings, with one going so far as to say her facility in the language overcame any cultural disadvantage she might experience as a female *syarie* (A2). The same informant reported submitting written Arabic citations directly but discussing them orally in English, while F noted that both the Arabic and a Malay translation could be given in written submissions, allowing for discussion in Malay.

While more informants, and cross-referencing with location and nature of case, will be necessary before patterns emerge, the initial impression given by the current cohort is that Arabic plays a significant yet somewhat symbolic role in *Syariah* proceedings. It was confirmed that Arabic is the language of courtroom oaths, for example, although no informant to date knew if this language requirement would be imposed on non-Muslims, who are at least in theory eligible to appear as witnesses. Substantive argument was reported to be predominantly in Malay, with some English if it was the preferred medium for key participants. These observations suggest that Malaysian Islamic courts may be a productive site for exploring the relationship between formal citation and persuasive argument in legal contexts.

7.5 Office practice

Most comments offered on office practice pertained to *Syariah*, but many informants said they often advised the same clients on both civil and Islamic matters. One reported a 60%-40% balance between civil and *Syariah* work, adding that the latter tended to be more straightforward and predictable, while another reported an even balance in work across the two jurisdictions but with a steady shift toward Syariah, "mainly because of all the divorces" (A1), and another stating that Syariah work was becoming as lucrative as civil work "as more wealthy Malays have cases" (F).

The lawyer who found her proficiency in English to be an advantage also thought her experience in civil law weighed heavily in her favour in comparison with lawyers qualified only to work on the Islamic matters as she could advise clients in both areas. However, she felt there was a need for tightening up professional standards for *syarie*, who are not subject to the provisions of the Legal Profession Act unless also admitted to the civil bar, especially regarding confidentiality. Most *Syariah* cases involve marital and family disputes inheritance claims, and religious conduct violations, and are hence by their nature highly personal.

7.6 Courtroom practice

All informants described a great deal of formal similarity between civil law and *Syariah* courtrooms, with participants sitting in similar places – "except that the public galley is segregated by gender, of course" (H1) – and clerks and interpreters sitting between the judge and the lawyers. A2 felt that the civil rules of court were followed as much as possible "unless they contradict Islamic principles", and described procedures such as introductory speeches, examination in chief, cross-examination and closing arguments, while A1 reported playing more or less the same role in both sets of courts. The same informant also felt *Syariah* advocacy had become more adversarial than inquisitorial, whereas most of the other informants thought proceedings were still mainly inquisitorial, judges playing a more active role in questioning witnesses than their civil counterparts. It was also noted by several advocates that many clients in the Islamic courts are unrepresented, and many proceedings allow much of the evidence to be submitted in writing beforehand, both practices opening up space for actively performing judges. This seems particularly to be the case in the urbanised state of Selangor, where "lawyers are sometimes quite passive as nearly everything is filed in advance" (H1).

Several informants reported less formality in the *Syariah* courts, but also less civility (F). H1 felt the latter had "more drama, as *Syariah* lawyers do not control the discourse as tightly as civil lawyers". And whereas female advocates now outnumber men in the Malaysian civil bar (Majlis Peguam, 2022), they are still outnumbered in *Syariah*, with most *hakim* also being male. The role of gender imbalance upon courtroom culture emerged as a key area to follow up in future interviews, perhaps to be supplemented by observations since enrollment figures are only part of the story. A2 commented that despite the rise of women in civil law, many of them abandoned court work early on in their career for office-based and non-contentious law, apparently preferring to leave the rough and tumble of the courtroom to men.

7.7 Conflict and collaboration

The relationship between the two jurisdictions, and their respective roles in supporting clients' rights, emerged as an important part of discussions and suggested a more nuanced and collaborative picture of bijural law than the confrontational one often painted in media reports.

Two informants did discuss conflict: "Civil law is very broad; it seems to be trying to challenge Syariah in some areas" (H1); "Syariah judges tend not to talk to civil court judges, they may consider them competition or may even be scared of them". But most of the others took collaboration and compromise to be the norm: "*Syariah* is a much smaller system, so it is unlikely to challenge civil law" (A1). Several described clients coming to them unsure whether they had a civil or Islamic matter: "Many people do not know where their case should be heard. And this expands the role of those of us working in both" (F). While the Penal Code states that the same case cannot be dealt with by both systems, and the press often reports cases of disputed jurisdiction, many bijural lawyers see their role as firstly advising clients on where they must – or might best – have their case dealt with and then as advising them on how to deal appropriately with each set of procedures and each culture: "There are gaps between the two systems. My practice tends to be in that gap" (F).

It was noted, that filing *Syariah* cases is less centralised, not only because it is administered at the level of individual states but also because related matters that would carry a common case number in civil proceedings were often tagged separately, so a child custody matter might be dealt with by a different court from the divorce that triggered it.

Some of the most informative interviews yielded details of cases that involve both systems. This was typical of complex inheritance matters, for example, where a civil court might require its *Syariah* counterpart to determine the rights of family members before dealing with probate, or in landed dispositions where a caveat on alienation might have to be removed in civil proceedings before property could be inherited according to *Syariah* principles. Some informants also referred to religious conversion cases that have gone through both systems when there were doubts about which had competence. While *Syariah* judges may be allowed to adjudicate Islamic matters free of interference from the civil courts, the question of whether they have the sole right to determine whether someone is a Muslim is less clear-cut.[5]

Several informants took pride in the fact that they were able to support their clients across two jurisdictions, rather than employ a second advocate as would be the case with practitioners qualified to work in only one system. Few of them saw any professional or personal conflict in working both systems, and as one of them put it: "We are not there just to uphold a system but also for the interest of clients, so varying our role can help them" (A2).

8. Discussion and interim conclusions

As argued from the outset, the qualitative data gathered so far is inadequate to hazard more than tentative conclusions, let alone to subject comments to quantitative analysis, but it is enough to form the basis of research questions to expand on for future interviews.

Further, the picture emerging so far is one of considerable cultural and professional diversity for a relatively small, if growing, profession for which admission is through a small number of gatekeeping institutions. Individual motivations for embarking upon and pursuing bijural work appear be very much an individual rather than an ethno-religious affair, with some practitioners seeing adherence to Islamic principles as a key instrument for supporting people suffering possible injustice in family or property matters, and others taking it upon themselves to look for more enlightened or socially progressive interpretations of Islamic law than the conservative traditions they feel have been dominant in the past.

This pilot study offers some support for Peletz's (2013) findings of the encroachment of common law practices upon what was once a less formal and more community-oriented dispute resolution system, with the import of formal rules of court and institutional hierarchies. While this may be viewed as cultural colonisation by some, for others it represents a degree of professionalism necessary for a world that has gone beyond the oral adjudication of simple cases before local village heads. Ensuring that former husbands pay child maintenance, for examples, requires sophisticated data bases and comprehensive enforcement policies. Islamic banking has been put under the purview of the civil courts, presumably because there is more financial expertise in the civil profession, but estate planning and a consequent awareness of banking is becoming indispensable for many *syarie*.

Despite highly reported jurisdictional and cultural conflicts, in practice a great deal of pragmatic and practical collaboration appears to characterise Malaysian bijuralism, with bijural lawyers themselves feeling they are responding to a growing need for clients using both systems. As for language, with a typically Malaysian stance most advocates take it for granted that they will need to marshal several of them in order to get their job done effectively.

[5] In Rozliza Ibrahim (2021), for example, the petitioner went through both systems before the Federal Court finally determined she was never a practising Muslim.

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(2) Linguistic Rights of 48 Palestinians and Self Determination in International Human Rights Law

48 年パレスチナ人の言語に対する権利及び国際人権法における民族自決の権利

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1. Introduction

It is axiomatic that every single internationally recognized human right is violated on a systemic basis in Palestine. Report after report issued by national NGOs, international NGOs, various bodies of the United Nations (UN), and countless other bodies explore in great detail how various rights of the Palestinian people are violated by Israel, from the right to freedom of expression, the right to a fair trial, the right to be free from torture, the right to health, the right to education, and many others. The extensive and systemic nature of the human rights violations in Palestine, as well as their character aiming at maintaining racial hegemony of Jewish Israelis, has led leading human rights actors to denounce the regime as constituting the international crime of apartheid. {Lynk 2022: 17. See also Human Rights Watch 2021; Amnesty International 2022). However, until recently, commentators in the area of international human rights law have rarely pointed to what is the most fundamental human right of all, namely the right of self determination.

2. The Right to Self Determination in International Human Rights Law

The road to the recognition of self determination as a human right was not a smooth one. The concept was popularized by the American President Wilson at the Paris Peace Conference after World War I, but, as many colonized peoples soon found out, in the minds of the victorious countries, self determination was never meant to indicate that British, French, and other European powers' colonies in Asia and Africa would be granted political rights. Rather, the concept was utilized mainly to facilitate the carving up of former Ottoman colonies. (Teso 2016; Macmillan 2019) What Wilson truly intended remains somewhat unclear, but in practice only Europeans were deemed deserving of self determination. Self determination was not a right as such, to be claimed by the subjugated peoples themselves, but a political principle to be applied in cases where the imperial powers found it expedient: "the principle of national self≠ determination, it turned out, was less about nationhood than it was about the continuing normalization of the Westphalian order." {Teso 2016: 49)

Self determination is included in the UN Charter, as one of the purposes of the organization: purpose number two, after the maintenance of international peace and security, states that the UN will "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". The language indicates, once again, that self determination was a political principle, not a right to be claimed by colonized peoples. Self determination was not included in the Universal Declaration of Human Rights (UDHR), adopted in 1948, with proposals to that effect "rejected by the then preponderant Western group, and dismissed outright by influential members of the human rights program." (Burke 2010: 37)

None of the above is surprising: after World War II, the victorious colonial powers assumed that the global situation would return to business as normal, and they would retain control over their vast networks of colonies. Indeed, the UN Charter establishes the Trusteeship system, largely based on the Mandate system of the ill-fated League of Nations. Though the ostensible objective of both of these systems was to

aid former colonies in becoming independent, the mere existence of an international framework that allowed colonial powers to decide and to what extent former colonies would "stand on their own two feet" betrays the true objectives of both systems - as well as, arguably, the international regime of international economic aid. Anghie notes that though, in a legal sense, the Mandate system was replaced by the Trusteeship system, in fact "it is the Bretton Woods institutions that are thecontemporary successors of the Mandate system This shift from a discourse based on race to a discourse based on economics is crucial to the conventional narrative of international law." (Anghie 2004: 191, 193. See also Haddad 2016)

However, subsequent to the adoption of the UN Charter and the UDHR, many former colonies were able to gain independence, usually through brutal wars of independence. These newly independent countries joined the UN, enabling them to negotiate international treaties and make international law on (at least theoretically) an equal footing with their former colonial oppressors. At the time, international treaties were being prepared to formulate the rights of the UDHR in legally binding form, and the newly independent countries naturally insisted that self determination of peoples be recognized in those documents as a human right. Burke notes that while there was a range of positions evident amongst the newly independent states, "Individual freedom and national independence were rarely separated, and the former was never considered without the latter.There could be no respect for human rights under
colonialism" (Burke 2010: 45, 46).

Though met with resistance from European powers that wanted to exempt colonies from the application of human rights law altogether (Burke 2010: 39, 40), the right to self determination was included in the 1960 UN Declaration on the Granting oflndependence to Colonial Countries and Peoples (UN General Assembly Resolution 1514), and eventually formed common Article 1 of the two most fundamental human rights treaties, namely the International Covenant on Economic, Social, and Political Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of which were adopted in 1966. That Article states: "I. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and
resources, .. "

The two Covenants therefore clearly stipulate the right of self determination as a human right, and its inclusion in the first Article also indicates that it is the most fundamental of rights. If citizenship is the "right to have rights" from the point of view of the individual, to paraphrase Arendt, self determination is the basis of the state to ensure all rights. In other words, in addition to being a human right in and of itself, self determination is fundamental in that only in a political system where a people is enjoying it can any other human right be protected. The case of the Palestinian people is, of course, a prominent example of this truism. Discussions of violations of particular rights are of course important, if only to highlight the oppressive nature of the Israeli regime. However, without ensuring the Palestinian right to self determination, discussions of particular provisions of international human rights treaties will not lead to fundamental improvement in the situation of Palestinians.

Though clearly stipulated as a human right, the right to self determination has remained one of the least elaborated of all rights, and there remains a general lack of clarity as to what it actually entails. The Human Rights Committee, the independent body charged with monitoring compliance with the ICCPR, has issued a General Comment on Article I. The General Comment reiterates that self determination "is of particular importance because its realization is an essential condition for the effective guarantee of individual human rights" (Human Rights Committee 1984: 1), and notes that state parties have obligations under the Article "not only in relation to their own peoples but vis-a-vis all peoples which have not been able to exercise" self determination. (Ibid.) Nevertheless, the UN human rights bodies have generally avoided providing opinions on specific allegations of violations of self determination, preferring to view specific cases through the lens of individual cultural rights. As noted by Megret, this evasiveness "effectively reduces the right to self-determination to very little, disaggregating its collective dimension into an infinite quantity of individual aspirations". (Megret 2016: 45-69)

In particular, two, intertwined questions arise with regard to self determination: who exactly is entitled to self detem1ination, and what exactly does it constitute? (Megret 2016) The Westphalian nation state is

based on the purported homogeneity of its population, either ethnic, religious, cultural, or a mix of the above. At the same time, many, perhaps most states have significant minority populations, whose existence challenges the dominant narrative of homogeneity. If each one of those minority communities have the right to self detem1ination, how can the state function as a coherent entity?

The answer to the second question also becomes key: is full independence, meaning secession from the state, the only way to ensure self detem1ination? A right to secession for all minority groups would arguably be catastrophic for the current, state centered order. Perhaps to alleviate these fears, there is an increasing body ofliterature arguing against secession as the only, or at least the main, avenue to exercise a people's right to self detem1ination.[6] (See Odello 2016: 60-61) Nevertheless, even supposing that is accepted, the question still remains as to when secession would be legitimate. International practice around the breakup of Yugoslavia indicates that this remains a highly political question yet to be resolved.

To be clear, it is not the intention of this author to argue that the need for stability in international relations is an overriding concern that should legitimately trump the right of a people to self determination (or any right). Rather, it is to point to the obvious: in the current, state centered international system, it is states -i.e. governments - that make international law.[7] The governments of some states are more representative of their populations than others, but generally speaking, they have little interest in creating standards that may challenge their hegemony. Adding flesh to the bones of the right of self detem1ination, and creating an international framework that would defend that right, is something that no state was, and is, keen on doing - including the newly independent states that joined the international debate in the 1950s and 60s, most of which harbored large minority communities themselves.[8] (Burke 2010: 37) Indeed, the reticence of states to clarify the right to self detem1ination can be viewed in the lackluster standards that have been created to protect minority rights, and the rights of indigenous persons, as shall be examined below.

With regard to Palestine, as noted above, discussion of self detem1ination as a human right of the Palestinian people has, until recently, been lacking. Farsakh touches on the ambiguity in the conceptualization of self detem1ination when she notes that Palestinian self detem1ination has been in essence hijacked by the state centered international system (in particular within the Oslo process), resulting in an approach that prioritized the building ofa state over the protection of Palestinian rights. At the same time, she notes that "the rights based discourse has not been sufficient for articulating a political alternative to the current impasse" (Farsakh 2021: 12), and argues for an approach "transcending nationalist frames, given that such frames prioritize the creation of a state over the Palestinian people." (Fasrakh 2021: 13)

In September 2022, Francesca Albanese, the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, submitted a thematic report on Palestinian self determination to the UN General Assembly in October 2022. In this report, she notes that self determination "constitutes the collective right par excellence" (Albanese 2022: 7), a necessary condition for the realization of other human rights. She argues rightly that the right of self determination is a fundamental principle of international law and an erga omnes one, i.e. that "all States have an inherent interest in the realization of and obligation to respect the right to self-determination, owed by and to the international community as a whole." (Albanese 2022: 9) Albanese's report is significant in bringing the

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[6] In 1996, the Committee on the Elimination of Racial Discrimination, the body of experts mandated to monitor implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, even stated in 1996 its view "international law has not recognized a general right of peoples unilaterally to declare secession from a State." General Recommendation 21 on the Right to Self Determination (Geneva).

[7] Macklem states that "The current status of the right of self-determination law underscores the fact that human rights in international law have less to do with essential features of our common humanity and more to do with how international law organizes global politics into an international legal order." Macklem, Patrick, "Self-Determination in Three Movements", in Teson ed. The Theory, pp. 94-119 at 119.

[8] Burke argues that the definition of self determination "underwent a dramatic shift ... [which] mirrors the broader fate of democracy in the Third World, as the first wave of nationalist governments transformed into antidemocractic regimes." Burke, Decolonization at 37.

issue of self determination to United Nations human rights fora. However, her mandate constrains her to referring only to the occupied West Bank (including East Jerusalem) and Gaza, and not, for example, Palestinians residing in Israel.[9]

As one example of how the right to self determination is violated, this paper will examine the linguistic rights of Palestinians who reside, as Israeli citizens, within the territory of Palestine conquered by Zionist settlers in 1948. Though there are several different names in common use for this community (e.g. "Palestinians with Israeli citizenship", "Israeli Arabs"), in this paper they shall be referred to as 48 Palestinians. The paper will focus specifically on the right of 48 Palestinians to use Arabic in their dealings with Israeli official bodies, in particular within the legal and judicial areas.

3. The Right to Langnage and Self Determination

Though there remains a lack of clarity surrounding the concrete content of self determination, it is self evident that the right of a community to use their language is an important component of that right. Any community that speaks a language other than the dominant one requires special measures for the protection of that language. It is submitted that such measures should include not only the speaking of the minority language in private settings (for example, homes of the community), but also in public settings, such as in dealings with administrative and judicial authorities. Whether that would entail the designation of particular languages as "official languages" would depend on the particular situation, but it is certainly a possibility.

Still, there is a paucity of international human rights standards regarding the right to speak a minority language. ICCPR Article 19 stipulates the right to freedom of expression, which specifically "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers", and would naturally include the right to choose any language as a medium of expression. However, like most other rights in international human rights law, this right has generally been interpreted in an individualized manner, and not as a collective right that would state the right of a particular community to use their language as part of self determination. It also should be noted that Article 19 allows for various limitations on freedom of expression, including "the protection of national security or of public order (ordre public), or of public health or morals." Such limitations provide governments with tools to limit freedom of expression in a manner that would restrict the right to self determination.

Besides Article 19, Article 27 ICCPR states that "In 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 practise their own religion, or to use their own language." However, this text merely prohibits a blanket ban on the use of the minority language within the community, and says nothing regarding using that language in dealings with the authorities. The General Comment on Article 27, issued by the Human Rights Committee in 1994, does state that "Positive measures of protection are ... required [to protect the right] not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party." (Human Rights Committee 1994: 38) Nevertheless, the right of the minority community to use its language in dealing with the state remains unsolidified, and Paz points to the lack of clarity of the obligations entailed by states in noting that "Article 27 ... may be interpreted as guaranteeing a broad right that places positive obligations on the state to assume an active role in accommodating minority language rights, or as a [narrowly defined] right that imposes on states only a negative duty to refrain from regulating language use in certain domains." (Paz 2013: 172-173)

Finally, Article 14(3) states that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

[9] Albanese states clearly that those limitations "do not prejudice the examination of this collective right as it applies to Palestinians who hold Israeli citizenship, and to Palestinian refugees of 1948 and 1967." At.3.

... ". This provision requires states to provide linguistic assistance in various stages of court proceedings, but says nothing about protecting minority languages as such. In addition, it should be stressed that this Article refers only to criminal proceedings, not even civil trials.

Aside from those provisions, there is no mention oflinguistic rights in either ICCPR or ICESCR. Minority communities in various contexts have advanced the argument that linguistic rights are implied in, for example, ICESCR Article 13, which stipulates the right to education and states, inter alia, that primary education must be accessible to all persons, and most individual petitions that have been brought to the Human Rights Committee[10] have been based on either the right to education or the right to a fair trial. (See e.g. Human Rights Committee 1999; Human Rights Committee 1990) ICCPR Article 25(3), which states that "every citizen shall have the right and the opportunity ... without unreasonable restrictions ... To have access, on general terms of equality, to public service" in the country, has also been the basis for petitions. (Human Rights Committee 2000)

While the Committee has found violations of the ICCPR with regard to some of the petitions, it has leaned towards the prerogative of the state to impose the dominant language, especially in dealings with public authorities. In one of the few academic examinations of the issue, Paz calls linguistic rights in international human rights law a "failed promise", stating that though international standards provide an "unconditional commitment" to linguistic rights, "the decisions of international judicial or quasi≠ judicial bodies in language protection cases have consistently favored linguistic assimilation, rather than the robust protection oflinguistic diversity that is formally espousedThis jurisprudence treats
minority language not as a valuable cultural asset worthy of perpetual legal protection, but as a temporary obstacle that individuals must overcome in order to participate in society." (Paz: 157. See also Paz 2014; Vacca 2017)

In 2013, Rita Izsak, the Independent Expert on Minority Issues of the UN Human Rights Council, focused her periodic report on the theme of linguistic rights. (Izsak 2012) An expanded version of that report, titled Language Rights of Linguistic Minorities: A Practical Guide for Implementation, was published by the UN Human Rights agency in 2017. The Handbook does have a section dedicated to the use of minority languages in "administrative, health, and other public services". However, though it does list the relevant international legal standards, the Handbook is relatively weak, focusing on practical (as opposed to principled) arguments for access to services "[w]here practicable". It states, for example, that "Inclusiveness requires the use of minority languages where appropriate - the best way for authorities to reach, communicate with and engage individuals is to use their language where possible Not using minority languages where reasonable and justified is ineffective (people may not understand or be comfortable with using the official language) and wasteful (resources are not spent on the most cost≠ effective form of communication)." (Izsak 2017: 23, 24)

One major recent development in international human rights law is the increasing recognition of the rights of indigenous peoples, in particular through the adoption in 2007 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Though the protection of indigenous peoples had been stipulated in Convention 107 ("Indigenous and Tribal Peoples Convention, 1957") of the International Labour Organization, that convention had widely been criticized as being based on a colonial viewpoint, for example through its treatment of indigenous peoples as a "less advanced" community (Article 1) that should be incorporated into the dominant national mainstream.

Reflecting the views of the multitude of indigenous communities that had lobbied for more recognition for decades, UNDRIP provides for the rights of indigenous peoples on a more solid footing: it states clearly that "Indigenous peoples have the right to self-determination. By virtue of that right they freely deter- mine their political status and freely pursue their economic, social and cultural development." (Article 3) The Declaration also states that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples

[10] Israel is not state party to the ICCPR's first Optional Protocol, and therefore individual claims of violation of ICCPR's provision cannot be lodged.

concerned and after agreement on just and fair compensation and, where possible, with the option ofretum." (Article 10)

Nevertheless, UNDRIP is a mixed bag with regard to recognition of the right to self determination. Article 4, inunediately after the above Article on self determination, states that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs"', thereby seemingly ruling out any question of secession. To stress the point once again, UNDRIP Article 46 states that "Nothing in this Declaration may be ... construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." Once again, it is not clear what exactly "self determination" is supposed to mean under these circumstances: can simple autonomy or self government truly be sufficient? Where does the state draw the line between "autonomy" and whatever goes further? There are no clear answers.

Regarding specific mention oflinguistic rights, UNDRIP does contain stronger provisions than the two Covenants, stating, mainly for the present purposes, that "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their ... languages ... and to designate and retain their own names for communities, places and persons. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings" (Article 13, emphasis added). Nevertheless, UNDRIP remains a declaration, not legally binding on states, and there is little impetus amongst states to create a binding international framework for indigenous rights.

4. 48 Palestinians

Already in the months immediately preceding the Declaration oflndependence of the state oflsrael in May 1948, Zionist militias started a campaign of violence and destruction to forcibly expel Palestinians from the land of Palestine. Culminating in the war with several Arab states in 1948, Israel expelled approximately 750,000 Palestinians - roughly two thirds of the Palestinian population- from their homes, villages, and cities. Detailed information regarding this campaign, called the Nakba (Arabic for "catastrophe") by Palestinians, was long designated top secret by the Israeli government, with official information regarding mass graves and massacres only recently having come to light through the work of historians such as !Ian Pappe (Pappe 2006)-though, naturally, Palestinians have been denouncing the atrocities for decades.

Pappe's research has gone far in popularizing the use of "ethnic cleansing" in English to describe this campaign of violence. On the other hand, other commentators argue that the appropriate term is genocide, defined in Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part "

Those commentators stress that the term "ethnic cleansing" is not clearly defined in international law, and was coined during the conflict in the former Yugoslavia in the 1990s precisely to allow the international community to avoid the legal responsibility of intervention in cases of genocide. Lentin, for example, cites Shaw in calling "ethnic cleansing" a "euphemistic perpetrator term which has no place in social science or history", and argues that the term "[ignoresJ the racial aspects of settler colonialism". {Lentin 2020: I0-11) Certainly there appears to be no valid argument to avoid the language of genocide in what is arguably a clear case in Palestine. Genocide or "ethnic cleansing", the forced expulsion of Palestinians from their land continues, albeit usually in less overt manner than in 1947-48.

Some Palestinians were able to escape expulsion during the Nakba, and were eventually incorporated into the Israeli state. Those Palestinians (48 Palestinians), who were almost universally viewed as enemies of the state by Jewish Israelis, were immediately placed under military rule. 48 Palestinians only later on received Israeli citizenship, and even then as a gradual process, as it became clear they were not willing to leave their land: Baeuml notes that 40 percent of 48 Palestinians were granted citizenship in 1952, 40

percent only gradually after that, and the "remaining 20 percent were defined by Israeli law as 'present absentees' or internal refugees, including their children who had been born in the state oflsrael. These people were not granted citizenship at the time, with the clear purpose of encouraging them to leave Israel voluntarily." (Baeuml 2017: 111)

During military rule, which lasted until December 1966, 48 Palestinians were subjected to numerous rights restrictions, restrictions that in many ways have been mirrored in Israeli military rule of the West Bank and Gaza since Israel conquered those territories in 1967. Pappe lists some of the most infamous military regulations 48 Palestinians were subject to, including regulations that allowed military governors to expel residents, to summon any resident to the police station for any reason, and to engage in administrative detention: arrest for an unlimited period without any trial or the presenting of any charges. (Pappe 2011) In case there was any doubt, military regulations applied only to Palestinians, and often explicitly excluded Jewish Israelis from their application. (Baeuml 2017: 113)\

48 Palestinians no longer live under military rule, and the government of Israel frequently points to its purported respect for the rights of what it calls "Israeli Arabs" as evidence of the country being a liberal democracy. (See e.g. Govenrment oflsrael 2017)[11] However, 48 Palestinians endure numerous forms of official discrimination, including over 65 discriminatory laws. {Adalah 2017) Prominent examples of discriminatory legislation include Israeli laws that prohibit Palestinians who had been driven out of their homes in 1947-48 from returning, while at the same time allow any Jewish person living in any country in the world to claim Israeli citizenship and live in Israel (or in Jewish-only colonies established by Israel in the West Bank) without hindrance. Others include laws that bar Palestinians from owning land, enable Jewish communities to block Palestinians from moving into the area, and prohibit any person that express opinions against the Zionism from standing for public office.

Most of these laws are formulated in a seemingly neutral manner, not expressly targeting Palestinians but rather giving preference to Jewish citizens. Nevertheless, the International Convention on the Elimination of All Forms of Racial Discrimination prohibits all forms of"distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights" (emphasis added).

The public discourse not only explicitly treats Palestinians as second class citizens, but frequently as a fifth column or a "demographic threat". (See e.g. Yerushalmi 2022; Sokatch 2022) Law enforcement is also often discriminatory, a recent example being the events of May 2021, when 48 Palestinians in many areas of Israel engaged in large scale protests against the Israeli expulsion of Palestinians in East Jerusalem and a large scale military offensive against Gaza. Throughout this period, Israeli police often allowed armed Jewish right wing bands to attack Palestinians with impunity, while suppressing non violent Palestinian demonstrations. (Interviews conducted by author; see also e.g. Human Rights Watch 2021b) The official data reportedly shows the overwhelming majority of persons arrested in connection with violence during the unrest was Palestinian. (Ha'aretz 2021a and 2021b)

The situation of 48 Palestinians is perhaps best described by Molavi, who described their paradoxical status as "stateless citizenship": exclusion by virtue of their inclusion in an apartheid system that by definition excludes them. She argues that "it is the provision of citizenship itself, the actual inclusion within the exclusionary Israeli citizenship regime that creates the inherent contradictions and paradoxes of Arab citizenship in a Jewish state. *In other words, it is through the granting of Israeli citizenship that Arabs are deemed stateless; it is through inclusion within the Israeli citizenship regime that they are excluded."* (Molavi 2013: 180-181, emphasis in original) Indeed, the discriminatory treatment of 48 Palestinians was one of the factors in the open designation of the Israeli regime as constituting apartheid by the prominent human rights NGOs B'tselem, Human Rights Watch, and Amnesty International in 2021 and 2022. (B'tselem 2021; Human Rights Watch 2021; Amnesty International 2022) Amnesty International, for example notes that "Demographic considerations have from the outset guided Israeli legislation and

[11] "Israeli Arab", as generally used by the Israeli government, also includes Druze and other populations, but is predominantly Palestinian.

policymaking. The demography of the newly created state was to be changed to the benefit of Jewish Israelis, while Palestinians -whether inside Israel or, later on, in the OPT- were perceived as a threat to establishing and maintaining a Jewish majority, and as a result were to be expelled, fragmented, segregated, controlled, dispossessed of their land and property and deprived of their economic and social rights." (Amnesty International 2022: 14, emphasis added)

5. Linguistic Rights of 48 Palestinians

The rights of 48 Palestinians, therefore, are violated on a systemic basis throughout Israel. This is true with regard to the individual rights so often focused on within the human rights discourse, but also with regard to collective, national rights - first and foremost, the right to self determination. One element of this oppression of the right to self determination is the treatment of the Arabic language, and the restricted ability of 48 Palestinians to use Arabic in their dealings with Israeli official bodies. Israel has never attempted to ban the use of Arabic outright, and, indeed, provides for the use of the language in various areas - something it stresses in international fora in its attempts to promote its commitment to liberal democracy. Nevertheless, Arabic has always been marginalized within the Israeli state, and, as shall be examined, the public space for the language is shrinking.

The first law to be adopted by the newly declared state of Israel in 1948 was the "Law and Administration Ordinance, 1948", which incorporated military and other orders of the British Mandate administration into Israeli law. However, one important change was made regarding the list of official languages. In Palestine Order-in-Council 1922, the British Mandate authorities had designated English, Hebrew, and Arabic as the three official languages; the Israeli government decided to strike English, leaving Hebrew and Arabic as the two official languages. As noted by Saban and Amara, retaining Arabic was clearly an intentional decision, and not an oversight. (Saban and Amara 2002: 11) Nevertheless, no records remain regarding any discussions that may have taken place at the time.

Citing the mention of linguistic rights in the UN Partition Resolution, Saban and Amara state that the Israeli authorities must have left Arabic as an official language to avoid international criticism - though they also note that "the wording of the Partition Resolution apparently did not require the preservation of 'official language' status for Arabic in the Jewish state (nor for Hebrew in the Arab state), but rather the preservation of the minority's right to use it." (Saban and Amara 2092: 18) Saban and Amara argue that the right to use Arabic vis-a-vis at least central government and judicial bodies is clear in the British order, and that Israel took over the obligation to ensure that right. They state: "the legal commitments set... are significant and even far-reaching. It manifestly goes beyond recognizing the right of the Arab minority to use its own language. It shapes a framework in which three (and since 1948, two) official languages co-exist and in the context of which the government is legally bound to use Arabic and to ensure access in Arabic on all levels and in every branch of the central authority." (Saban and Amara 2092: 13)

Though Arabic remained an official∑language in theory, in practice Hebrew has been dominant throughout the history of the Israeli state. This is perhaps unsurprising, given that the entire raison d'être of the country is to create an ethnocratic Jewish state, with Jews given preference over all others in all walks of life. There has never been any attempt at banning Arabic outright, but, in the eyes of the Israeli ruling class, Arabic has remained a second tier language for a second class citizenry.

Israeli operates state run Arabic language schools for 48 Palestinians. However, the schools are managed with heavy intervention by the security authorities, including, for example security screenings for all prospective teachers. (See e.g. Adlah 2020) Pappe notes that "The segregation [of schools] was not meant to allow Palestinians to develop cultural autonomy. Quite to the contrary, it was meant to supervise it closely so that such autonomy would not develop. It also allowed the government to discriminate in terms of resources and budgets. The standard of an average school or class in the Palestinian areas was much worse by any parameter or criteria compared to that of the average Jewish school." (Pappe: 99) Citing an analysis conducted by the Mossawa Center, Amnesty International states that "Arab students from disadvantaged backgrounds received 30% less funding per learning hour in primary education, 50% less funding at the

intermediate school level and 75% less funding at the secondary school level than Jewish students with the same socio-economic status." (Amnesty International 2022: 29)

Arabic language schooling is only provided through the secondary level. Universities in Israel all hold classes only in Hebrew, and the Israeli baccalaureate (secondary school graduation examination) is also only available in Hebrew. There are 48 Palestinians qualified to, for example, practice law in Israel, but legal education in the country is only available in Hebrew, as is the bar examination. Studying law in an Arabic speaking country and returning to practice in Israel is possible, but qualifications still need to be taken in Hebrew: there is no special dispensation for Arabic speakers.

Mundane qualifications such as driver licenses can be taken in Arabic, and many application forms for e.g. social assistance are also available. However, there is a considerably higher bar with regard to access to the judiciary: court proceedings (both criminal and civil) are all in Hebrew, as are court judgements.

Criminal suspects who speak a language other than Hebrew are provided with interpretation, but that is true of all languages, not just Arabic. With regard to civil proceedings, no interpretation or translation of documents is provided for, and plaintiffs must undertake those on their own expense. One 48 Palestinian lawyer this author spoke to described Kafkaesque situations, where everything needed to be conducted in Hebrew, even when the plaintiff, the attorney, and the judge were 48 Palestinians.

The internet website of the Israeli Supreme Court[12] has Hebrew, Arabic and English versions. The difference in the amount of information available is obvious at first glance, with far much more information in Hebrew, and even in English, than in Arabic. Just as an indicative example, the English site has a database of selected court judgments that have been translated into that language. No such database exists in the Arabic site, and it does not appear that any effort has been made to provide official Arabic translations. This paucity of information provided in Arabic is common across most Israeli government websites, notwithstanding the government's statement to the UN that this translation is a "well-developed and ongoing project". (Government oflsrael 2021: 3)

5.1 Road Sign Case

A key case in examining the linguistic rights of 48 Palestinians in public spaces in Israel is the so called Road Signs case, which was decided by the Israeli Supreme Court in July 2002. (Supreme Court oflsrael 2002)[13] Two important human rights organizations (Adalah - the Legal Center for Arab Minority Rights in Israel and the Association for Civil Rights in Israel) had petitioned the court to order the authorities in several so called "mixed" cities (Tel Aviv, Jaffa, Ramie, Lod, and Upper Nazareth) to provide all road signs in not only Hebrew but also Arabic. The petitioners pointed to the status of Arabic as an official language in Israel, and argued that street signs in those cities should all be in both languages. They stated that the prevailing government guidelines on the subject, which relied on the discretion oflocal authorities with secondary roads (major trunk roads already had signage in both language), was an "affront to the Arab minority. Arabs are excluded from the general population such that, in cities in which they are residents, they can have signs posted in their language only in their neighborhoods and on major thoroughfares. This position harms their feeling of inclusion and personifies feelings of alienation. The [current policy] sends a message of humiliation, exclusion and alienation towards the Arab residents and their status as equal citizens." (Supreme Court oflsrael 2002: 19)

The Court did fmd in favour of the petitioners, ordering the cities to provide signage in Arabic. However, the reasoning of the judgement is not based on the national right of self determination of 48 Palestinians as a group: rather, it stresses factors such as the convenience of residents and access to services, and at places even explicitly denies any notion of Palestinian self determination. The three judges sitting for the Court all stressed that Israel was a Jewish state, and that though Arabic might also be an official language, it was

[12] https://suprerme.court.gov.il/sites/ar/Pages/Home.aspxo (last viewed on 16 July 2023)

[13] Other cases on similar issues had already been decided by the Supreme Court, but on freedom of expression grounds that had essentially sidestepped the issue of 48 Palestinians as a collective.

in no way equal to Hebrew, and that the Court had the prerogative - indeed, given the Jewish character of Israel, even the duty- toprotect Hebrew's privileged position.

Chief Justice Barak, who writes the majority opinion, accepts that Arabic has a "unique status in Israel", (Supreme Court oflsrael 2002: 15) because it is "the language of the largest minority group which has dwelled here for a long time."[14] (Ibid.) The "Arab minority in Israel", according to Barak, "despite the Arab-Israeli conflict, wish to remain in Israel as loyal citizens with equal rights". (Ibid..) In other words, they are "Good Arabs", and therefore deserve some generous consideration. At the same time, Barak insists that Hebrew is "the main language in Israel", and that fact is "one of the most important expressions of the character of the State oflsrael. Any action taken by a municipality that harms the Hebrew language violates one of the basic principles of the State oflsrael." (Supreme Court oflsrael 2002: 12) It is worth noting that, at least at the time, nowhere in Israel law was it stipulated that Hebrew was the "main language" of the state compared to Arabic: indeed, it appears the concept was simply created by Barak for this judgment.

Proceeding on the assumption that Hebrew is the "main language" of Israel, upon which no harm must be inflicted by the use of other languages, Barak then adopts a practical approach:

> It was not argued - and had it been argued, we would have swiftly dismissed such a request because of the value of the Hebrew language - that in areas which have a high concentration of Arabs, street signs should be written exclusively in Arabic. The only claim here is that Arabic should be added, alongside the Hebrew, on municipal signs located in neighborhoods that do not house a sizable Arab population. It is hard to see what harm is suffered by the Hebrew language. Even if there is some sort of harm, it is minimal in comparison to the violation of freedom oflanguage and the need to guarantee equality and tolerance it seems to me that by balancing the relevant considerations, we should require municipal signs to contain Arabic, alongside Hebrew. On one hand, we reach this conclusion because of the clear weight we must give to one's right to freedom oflanguage, equality and tolerance. On the other hand, we reach this conclusion because such a decision would not harm the Hebrew language in any way and any harm befalling national cohesiveness and sovereignty will be relatively light. (Supreme Court of lsrael 2002: 14)

The Court's decision, therefore, was based on the notion of magnanimous "tolerance" being extended by the rights holder (the Jewish Israeli population) to a minority population that has no inherent claim to such treatment - not any right of self determination of a displaced and subjugated people. Indeed, nowhere throughout the judgement does the word "Palestinian" even appear: the population is referred to only as "Israeli Arabs", mirroring the designation of 48 Palestinians in official parlance.

On 19 July 2018, the Israeli parliament adopted the "Basic Law - The Nation-State of the Jewish People" (Nation-State Law). Adopted as a Basic Law, i.e. a constitutional law defining the fundamental principles of the state, (Article I) the Nation-State Law comes close to explicitly denying the right to self determination ofnot only 48 Palestinians, but of Palestinians as a whole, through listing rights that are exclusive to the Jewish people. The Nation-State Law states: "(a) The Land oflsrael is the historical homeland of the Jewish people (b) The State oflsrael is the nation state of the Jewish People, in which
it realizes its natural, cultural, religious and historical right to self-determination. (c) The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People." The Law also keeps Israel "open for Jewish immigration" (Article 5), defines "Jewish settlement" (i.e. colonization of Palestinian land) as a "national value" (Article 7), and announces that "Jerusalem, complete and united, is the capital oflsrael" (Article 3).

The Nation-State Law is "viewed as an absolute triumph by the ultranationalist right-wing Israeli establishment" (Journal of Palestine Studies 2019: 43), and has been subject to severe criticism by human rights NGOs and UN human rights bodies. Human Rights Watch notes that the Nation-State Law "affirms the supremacy of the "Jewish" over the "democratic" character of the state. Unlike Israel's implications for

[14] Saban and Amara argue that Barak's mention of 48 Palestinians having been in the territory oflsrael "for a long time" recognizes the indigeneity of the Palestinians as a "native minority", and may therefore have important

the treatment of 48 Palestinians in general. It is submitted that this assessment is somewhat optimistic. Saban and Amara, "The Status of Arabic" at 32.

Proclamation of Independence, the Nation-State Law contains no language about equality." (Human Rights Watch 2021: 45) Adalah et al. noted that "The Basic Law's overriding objective is to violate both the right to equality and the right to dignity the principle of non-discrimination is irrelevant, because, from the outset, Arabs and Jews are not equal under the Basic Law's constitutional regime. Therefore, discrimination on the grounds of Jewish separation and supremacy is reflected in all articles of the Law." (Adalah 2018: 3)

Several weeks after adoption of the Nation-State Law, human rights NGOs and other organizations filed 15 petitions to the Supreme Court, arguing the illegality of the Nation-State Law and demanding it be annulled. However, the Court rejected all the petitions. (Adalah 2021)

Importantly for the current study, the Nation-State Law revokes Arabic's position as an official language, establishing Hebrew as the only language of the state. (Article 4.a) At the same time, it states that "(b) The Arabic language has a special status in the State; arrangements regarding the use of Arabic in state institutions or vis-a-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." Exactly what impact the Nation-State Law will have on the question of linguistic rights remains to be seen, though it appears clear that petitions based on Arabic's status as an official language, like the Road Sign case, will no longer be possible.

4. Conclusion

As a factual matter, it is clear that the right of 48 Palestinians to speak Arabic, in official dealings with Israeli official bodies and in the public space in general, is increasingly precarious. As already noted, it is hardly surprising that the right to use Arabic was never adequately protected by Israel, even when Arabic was, in theory, an official language of the state. However, now that the Nation-State Law has removed even that veneer of protection, it would not be surprising if the space for Arabic is reduced even further.

Of course, the right to language is hardly the only human right of 48 Palestinians that is affected negatively by Israeli rule: the right to self determination of the Palestinian people as a whole is violated on a systemic basis by Israel. The question is how international human rights law can be used to address this violation.

As a matter oflaw, to call 48 Palestinians a simple "minority" population does not, it is submitted, do justice to their situation. Neither "minority" nor "indigenous people" are clearly defined in international human rights law, but "minority" generally does not indicate (or at least does not stress) indigeneity, which clearly is one of the main points of the Palestinian plight: Israel being a settler colonial state, the denial of Palestinian self determination has always been one of the core principles of the country. Hence the Israeli insistence of referring to 48 Palestinians as "Israeli Arabs" - a minority population, not a national group that (in theory at least) are entitled to recognition of their right to self determination.

The framework of indigenous peoples would appear more appropriate in describing 48 Palestinians within the realm of international human rights law. The indigencity of the Palestinian people - a historical fact that many in Israel attempt to deny- deserves to be stressed. However, as noted above, the UNDRIP has no legally binding effect, and the international framework for the protection of indigenous peoples remains underdeveloped. Indeed, even the comparatively new, and arguably radical, framework of indigenous people's rights does not go far enough with regard to the right to self determination: one minute it appears to prescribe the right clearly, and then the next minute it heaps restrictions on it to make the entire package acceptable.

Both the framework of minority rights on the one hand, and indigenous rights on the other, therefore, do not provide clear and adequate protection for the right of self determination. For their part, United Nations human rights bodies that are tasked with interpreting international standards have proven reluctant to explore issues of self determination.

Categorizing the situation of the Palestinian people into the above legal categories may be difficult, because of the deficiency of those legal boxes, and, more fundamentally, the halfhearted manner in which

the international community has approached the right of self determination. As shrewdly noted by Molavi, it is the seeming inclusion within a citizenship regime that is explicitly based on Jewish supremacy that is at the root of the exclusion of 48 Palestinians. It is submitted that only with a clear focus on self determination as the most foundational of human rights can this situation be addressed adequately.

Much work needs to be done within the legal field on enumerating the content of self determination, and on creating an international framework that genuinely works to ensure it. The situation of the "stateless citizens" of 48 Palestine - and the Palestinian people as a whole - demand it.

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