

Autonomy of Indigenous Peoples in the Federation of Malaysia: A Tale of Three Institutional Settings

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Abstract

Previous research has offered mixed results regarding whether federalism and other mechanisms of multi-level governance (MLG) present advantages or disadvantages for civil society and, in particular, impoverished ethnic minorities. Since self-determination is a key element of the political autonomy of indigenous peoples (IPs), this paper explores under which circumstances different mechanisms of MLG foster the rights of IPs in the Federation of Malaysia from the perspective of indigenous activists. This work relies on face-to-face, semi-structured interviews with indigenous activists, advocates, and stakeholders from different states of the federation, with different levels of self-government and quality of democracy. The main findings suggest that any attempt to evaluate the performance of MLG arrangements in the fulfillment of the rights of IPs should consider the relationship between indigenous organizations and state and local governments—a relationship that depends on the distribution of indigenous populations—and the degree of political accountability in specific territories.

Keywords: indigenous peoples, federalism, self-determination, multi-level governance.

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INTRODUCTION

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). At this time, a curious situation occurred where four states voted against the adoption, including three of the largest federal countries in the world (the United States, Canada, and Australia), while other relevant federal countries, such as the Russian Federation and Nigeria, abstained from voting. Although over the years some of these United Nations (UN) member states have changed their position, and none of the aforementioned states officially still oppose the UNDRIP, the complex relationship between federalism and the rights of IPs is far from being disentangled. It can also be questioned whether federalism and other mechanisms of MLG foster or curtail the rights of IPs and indigenous autonomy.

The literature on MLG and social movements has offered mixed results on whether MLG arrangements empower or disadvantage civil society, especially impoverished ethnic minorities (Mesfin, 2017; Miller, 2010; Tarrow, 2011). Moreover, most studies on the relationship between the rights of IPs and MLG focus on a handful of cases, such as those in the United States, Australia, and Canada (Alcantara & Morden, 2019; Papillon, 2012). These are relatively democratic and post-industrial societies that can introduce theoretical biases when discussing the performance of MLG. However, can MLG arrangements empower ethnic minorities, under radically different circumstances? More specifically, can the rights of IPs be improved by MLG mechanisms in settings with low-quality democracy? Besides this geographical bias present in the literature, most of the assessments on mechanisms of MLG often do not include the evaluation and perspective of IPs themselves. Building upon previous works that state the importance of evaluating institutions, which are supposed to enhance collective rights, in dynamic relation to advocacy networks (Keck & Sikkink, 1998; Kostiner, 2003; Laurie et al., 2005) a fundamental question arises: Are these MLG mechanisms working in favor of IPs at all for those entitled to them?

Therefore, the contribution of this paper to the literature on MLG mechanisms and IPs is twofold: First, it incorporates the perspective of IP themselves when evaluating the performance of MLG mechanisms. Second, it analyses the relationship between MLG and the self-determination enjoyed by IPs across different levels of democracy. In order to do so, I have focused on the Malaysian case. The Federation of Malaysia offers

an excellent scenario to evaluate and understand how different settings may lead to different outcomes, especially as its federal design is asymmetric.

Since the aim of this work was to include the perspectives of IP in these different settings, face-to-face, semi-structured interviews with indigenous activists, advocates, and stakeholders from different regions of Malaysia were carried out. The main findings suggest that direct effects of MLG mechanisms on indigenous self-determination are moderate. Obstacles identified refer to higher bureaucratic burdens and conflicts resulting from overlapping jurisdictions, although these largely depend on the level of accountability and conflict at the state level between state government and indigenous movements (IMs). However, indirect effects of MLG mechanisms on the rights of IPs through the balkanization of Malaysian IM are more pervasive.

This paper is structured as follows: First, it relates research on MLG to multiculturalism, neo-institutionalism, and the indigenous right of self-determination. Second, it introduces the specificity of the Malaysian case. Third, it describes how the interviews with indigenous activists, advocates, and stakeholders were conducted. Fourth, it presents the direct and indirect effects of MLG mechanisms on indigenous rights in three different Malaysian settings. The final section summarizes the main findings and opens the door for new lines of research.

THEORETICAL BACKGROUND

To understand what influences the extent to which IMs are satisfied with MLG arrangements, this article draws on three sources of socio-political literature closely connected to MLG: multiculturalism, neo-institutionalism, and the indigenous right of self-determination. In order to understand the complex relationship between these concepts, this section first explains the difference between IPs and ethnic minorities and its implications for multicultural arrangements. It then applies a neo-institutional approach to understand how MLG mechanisms could affect satisfaction within the scope of self-determination. As a result, it summarizes previous findings on how federal institutions might affect ethnic minority rights, both directly and indirectly (by constraining the behavior of ethnic social movements).

All over the world, IPs share certain similarities with other national and ethnic minorities. In both cases, their culture and integrity as a group are impeded by their minority status, to the extent that some measure of self-government is required to overcome these impediments (Kymlicka, 1995). However, IPs and other ethnic minorities differ in important matters. On the one hand, the latter do not question the cultural and legal foundations of the nation-state and its laws, whereas the former do (Kymlicka, 2001). As a result, they have different understandings of what self-determination entails and different attitudes toward nation-states boundaries. According to James Anaya, former special rapporteur on the rights of IPs, while national minorities seek substantial self-determination, which in turn leads to the creation of new states, IPs usually seek remedial self-determination, as a way to undo norm violations that occurred during colonization, but without challenging the boundaries of existent states (Anaya, 2004).¹ On the other hand, as opposed to other ethnic and national minorities, IPs have a collective connection to an ancestral land, the territory, the natural resources, and sacred places attached to these (Mesfin, 2017).

Therefore, IPs are distinct indigenous communities that share the above characteristics, while IMs are political actors themselves. These movements encompass one or more indigenous organizations that mobilize various indigenous communities and individuals around an indigenous identity and that have demands including recognition of indigenous territories, customary rights and law, bicultural education, and some sort of political autonomy (Yashar, 1998). In the Americas, IMs have advocated for multiculturalism. Multiculturalism entails the recognition of a set of collective socio-economic and political rights, necessary for the full autonomy and dignity of the members of a particular ethnic group, in this case IP (Kymlicka, 1995). This approach transcends pluri-culturalism, which simply involves recognition of cultural diversity within society, but without recognizing further collective rights (Sieder, 2007). As a result, scholars on the rights of IPs have agreed that for a legal framework or constitution to be multicultural, recognition of diversity and the existence of IPs is certainly needed, but states also need to recognize indigenous languages, bicultural education, indigenous customary law, indigenous lands and territories, and indigenous political autonomy (Van Cott, 2000).

However, in certain regions, multiculturalism has faced some resistance due to its liberal foundations, notably from Asian leaders (Kymlicka & He, 2006). As a result,

across the world, there are different ways of managing diversity and the political autonomy of IPs (Kymlicka & Norman, 2000), from ethno-federalism in Ethiopia (Erk, 2017) to the extremely localized recognition of collective rights in Bolivia (Bottazzi & Dao, 2013). But does any one of these MLG mechanisms fulfil the promise of substantial self-determination for IPs to a more satisfactory degree than the others?

According to neo-institutionalism, institutions matter. They matter because most real social change comes from changing institutions themselves, but also because institutions constrain individuals and group behaviour (Ostrom, 1990). It follows that: 1) some MLG mechanisms might uphold indigenous rights better than others; 2) some MLG mechanisms might ultimately influence the fulfilment of rights by coercing or enforcing the actions and behaviour of IMs, and therefore their ability to advocate for particular rights.

Regarding the first corollary, since economic well-being and the political rights of IPs are highly and intrinsically related to localized territories, the mechanisms of MLG that enhance decentralized political autonomy and decision-making power can actually result in greater satisfaction with federalism and other MLG arrangements for IPs. In other words, MLG could create instances of indigenous self-determination by excluding national and distant actors from decision-making processes. Indeed, Article 3 of the UNDRIP specifically relates the economic, social, and cultural development of IPs to their ability to exercise their collective right to self-determination.² In practice, the ways of recognizing and implementing the right of self-determination of IPs have been diverse: through federalism and or other political autonomies with a territorial character (municipalities, counties, regions, etc.); through bilateral agreements between indigenous and non-indigenous actors; and (in its simpler form) through the guarantee of the right to free, prior, and informed consent (FPIC) of actions, measures, and projects that will have an impact on indigenous territories or communities.

Studies on the relationship between federalism and the right to self-determination of IPs are scarce, adopt a legal perspective, and, as stated before, are mostly related to the United States, Canada, New Zealand, and Australia. These investigations highlight the importance of analyzing the relationship between federalism and self-determination of IPs from the perspective of indigenous MLG and indigenous bilateral agreements, either with private or public entities (Alcantara & Morden, 2019; Papillon, 2012).³ This

form of governance may be either federal or quasi-federal systems or power-sharing systems for specific tasks, with multiple memberships, poorly defined jurisdictions, and flexible designs (Hooghe & Marks, 2003). The former create spaces of political autonomy, while the latter involve sharing both policy- and decision-making powers and authority in the issues that affect them.

There are several problems that arise from the relationship between MLG and indigenous self-determination. First, hierarchies are almost unavoidable, be they vertical (usually federal over state, state over local, etc.) or horizontal (because of the preeminence of executives over other powers and over civil society). Previous studies have shown that in long-standing democracies, these unequal positions of power put IPs and their indigenous governments in the most disadvantaged position in most cases when entering into bilateral negotiations or agreements (Alcantara & Morden, 2019). Second, MLG can undermine democratic accountability by making MLG procedures (including the selection of relevant decision makers and veto players) more obscure to the public, and favoring horizontal over vertical accountability (Papadopoulos, 2007, 2010). While the effects of federalism and other MLG arrangements on accountability and democracy have already been explored in long-standing democracies and transitional regimes, more accounts are needed to explore whether MLG arrangements can actually uphold other collective rights in places where democracy is absent or flawed.

Regarding the second corollary, the literature on social movements often argues that systems with territorial decentralization and power-sharing structures present more windows of opportunity for civil society organizations. Since in federal countries a greater number of political spheres are close to the citizens, several political institutions exist where the demands of citizens can be addressed, influencing the decision-making process (Tarrow, 2011). With regard to IPs in Latin America, some authors contend that when political autonomy is officially granted through legislation for the creation of indigenous autonomous governments, it can contribute to the enhancement of democracy and to the policies aimed at tackling social, ethnic, and economic inequality, while increasing the responsiveness of authorities (Faguet, 2014). However, some studies focused on the same countries have found that the collective rights of IPs are not recognized homogenously but instead granted in special cases in remote areas with low

economic productivity (Bottazzi & Dao, 2013). In addition, previous work has suggested that indigenous rights and autonomy can be exercised even in non-democratic countries, especially in areas or regions where the central state is absent (Yashar, 2005, p. 76).

However, the problem for movements and groups representing ethnic and economic minorities is that the multiplicity of institutions with diverse and separated powers reinforces and exacerbates the classic dilemma of collective action, by which trying to reach different levels of government causes the balkanization of social movement efforts, both in democratic (Brooks & Manza, 2008) and non-democratic (Marti, 2019) settings. According to Miller (2010), organizations representing minorities have fewer economic, human, and social resources at their disposal to put pressure on different levels of government. Indeed, some studies have shown that not all ethnic groups equally benefit from ethno-federalism, even if their rights are recognized in a constitution, particularly if the IPs in question are small, isolated groups that lack the resources needed to engage in institutional politics (Mesfin, 2017). As a result, collecting the perspective of activists on the ground becomes fundamental since activists can make unique assessments of the implementation of particular rights in terms of allocation of resources, empowerment of marginalized communities and wider transformation of social norms (Kostiner, 2003).

Therefore, I contend that the mixed results found in relation to MLG and indigenous self-determination could be overcome by exploring whether the indigenous activists' satisfaction with MLG is somehow mediated by the sociodemographic composition of indigenous populations in each state or region, and their perception of state officials' accountability to their demands following changes in coalition governments at the state level. In short, do federalism and other mechanisms of MLG contribute to the implementation of self-determination for IPs in flawed democracies? I argue that to answer this question, we should focus on the evaluations of IP themselves. To that end, the Malaysian case offers an exceptional opportunity, because of its asymmetric federalism, the demographic and ethnic structure of the different territories, and the uneven state-level experience with democracy.

MALAYSIA'S FEDERAL INSTITUTIONAL DESIGN

Figure 1 Administrative Divisions of Malaysia



Source: Courtesy of the University of Texas Libraries, The University of Texas at Austin. Retrieved from Perry-Castañeda Library Map Collection, University of Texas:
<https://maps.lib.utexas.edu/maps/malaysia.html>

The territories in Peninsular Malaysia (West Malaysia) gained their independence from British colonial rule in 1957, becoming the Federation of Malaya. In 1963, these 11 peninsular states were joined by the territories of Sabah and Sarawak (East Malaysia) as depicted in Figure 1. These two new states retained specific and special powers and (on paper) most of the native customary rights prior to the formation of the Federation of Malaysia under what was called the 20-Point Agreement, which was later introduced in the constitution of the federation. These rights included political autonomy (exercised through the state governments), customary rights, the recognition of native courts, and land rights that include not only the right to land, but to the territory itself. In contrast, the formal recognition of the rights of IPs in Peninsular Malaysia was much lower (Inguanzo, 2014). Additionally, this agreement gave Sabah and Sarawak state government control over immigration and softened the requirement for the introduction of Malay as a national language and for Islamization (Case, 2007)

Accordingly, and on paper at least, Malaysia is a federation in which Sabah and Sarawak have more autonomy than other states in Peninsular Malaysia; however, the

reality is often different. First, Malaysia has long been considered a hybrid regime, since the same party coalition ruled the national government from the country's independence to 2018 through undemocratic procedures. As a result, it is commonly argued that Malaysia has been going through a centralization process, whereby the central government often intervenes in state matters, partly due to the semi-authoritarianism resulting from the same party coalition ruling the country since independence until 2018 (Hutchinson, 2014; Ostwald, 2017). Nevertheless, from the fifties to 2018, the opposition was able to seize 7 out of 13 state governments. Subsequently, before the historic federal electoral victory of the opposition in 2018, democracy was mainly absent at the national level, although almost half of the states had experienced it at the state level in some way. Second, the national government has tried to impose its greater power over opposition-led state governments (by trampling federal provisions or even purging state chief ministers), particularly in Sabah and Sarawak, where there have been threats of secessionism (Case, 2007).

Another important feature that differentiates East and West Malaysia is the distribution of indigenous populations across states. The IP of Malaysia are called the Orang Asal, and this term includes the Orang Asli of the 11 states in Peninsular Malaysia and the native people of Sarawak and Sabah. The main point here is that while the Orang Asli represent a small minority in Peninsular Malaysia—not even 1% of the population—in Sabah and Sarawak, native people represent more than 58.6% and 70.6% of the population, respectively (IWGIA, 2020).

Finally, one of the fundamental issues in Malaysian federalism that helps us to understand its relationship with IPs is that land is a state matter. State governments are the ones regulating indigenous land rights and ultimately recognizing the ancestral domains of IP, but also “overseeing the usage of lands that [states] control, especially timber concessions and plantation schemes [...] Much local corruption and in many states environmental degradation and the dispossession of IP have resulted” (Case, 2007, p. 134). In any case, the law recognizes a very limited collective ownership of Orang Asli land in West Malaysia, while native and customary land in Sabah and Sarawak are far more protected under the constitution, the Sabah Land Ordinance (1930) and Sabah Forest Enactment, (1968) Sabah's Rural Administration Ordinance (1995), the Sarawak Forest Ordinance (1953), and the Sarawak Land Code (1958). However, throughout the country, “recognition of traditional land tenure systems fall

short for three main reasons: (a) a lack of recognition by the authorities of the concept of customary land, or what constitutes customary land, resulting in considerable land not being registered as customary land with the relevant government departments; (b) inefficiency on the part of the government agencies concerned in ‘processing’ land ownership claims; and (c) a lack of consultation with the IP” (United Nations, 2014, p. 18).

While land is a state matter, in Peninsular Malaysia, most of the issues concerning the Orang Asli are under the authority of the federal government. In 1953, during the Malayan Emergency, federal legislature issued the Aboriginal Peoples Act (APA), intended to regulate all issues related to Orang Asli rights. The rights recognized under this law have a very narrow scope compared to those recognized for natives in Sabah and Sarawak. Additionally, and as a result of the uneven indigenous population distribution and the history of de-colonization, in Peninsular Malaysia, issues related to the Orang Asli other than land are usually managed by the Jabatan Kemajuan Orang Asli (JAKOA),⁴ a federal agency that previously had a paternalistic and assimilationist approach to the Orang Asli, where they were considered backward collectives that had to be civilized (Duncan, 2008). After the change in the ruling coalition at the federal level from 2018 to 2020, an Orang Asli scholar with a more emancipatory view on the rights of IPs was appointed as Director General of JAKOA.

METHODS

This research analyzes the scope of self-determination of IP from the perspective of indigenous activists, advocates, and stakeholders across different states within the Federation of Malaysia. Some of these states have a high degree of formal political autonomy recognized under the constitution, such as Sabah and Sarawak, while some have less autonomy, such as the peninsular states, where IP are very much a minority. Assessing the implementation of self-determination is quite challenging as there are no established or agreed-upon indicators regarding this matter. In addition, there is a huge gap between the formal recognition of the rights of IPs and the implementation and fulfillment of these same rights. Consequently, this work relied on semi-structured interviews with indigenous activists, advocates, and stakeholders linked to the IMs from Sabah, Sarawak, and Peninsular Malaysia. Semi-structured interviews also make it

possible to capture how activists' perceptions of different political scenarios affect the resonance of the movement itself (Miller, 2010; Muncie, 2020) and assess power relations within institutions and the implementation of particular rights (Kostiner, 2003; Laurie et al., 2005).

All fieldwork was carried out in November 2019, 18 months after the first change of government at the national level in Malaysian history. This time frame allowed the federal government structure from the former United Malays National Organization (UMNO), the ruling coalition, to be further analytically detached, and therefore separated from (un)democratic performance. The interviews were conducted in Kuala Lumpur (Peninsular Malaysia), Kuching (Sarawak), and Kota Kinabalu (Sabah) during November 2019; the interviewees included four indigenous activists, four lawyers (who have brought land rights cases before the High Court of Malaysia), two politicians, and two scholars.

Following the principles of Indigenist research methods (Evans et al., 2014; Smith, 2013), I chose to give weight to the voices of indigenous activists as they have traditionally been absent from academic discussions on MLG. To this end, those activists interviewed were selected due to their being or having been spokespersons for organizations related to the rights of indigenous civil society. As such, the intention was not to represent the views of all IP in Malaysia, but to reflect on some of the positions of the most prominent indigenous organizations in Sarawak, Sabah, and Peninsular Malaysia,⁵ while occasionally counterbalancing these positions using reports and studies gathering other voices from within and outside the Malaysian indigenous network.

All participants in the interviews volunteered their responses to the researcher after the purpose of the study had been clearly explained to them and they had been given information on the project. They freely signed both prior and post consent sheets.⁶ Confidentiality was granted to all the respondents, and the interviewer asked each participant how they wanted to be quoted. The fieldwork, processing, and analysis of interviews was done following the model proposed by Blee & Taylor (2002). Interviews were conducted in English. They were audio-recorded, transcribed, and sent back to the interviewees via e-mail in the event that they may have wanted to modify any of their statements before the manuscript was written. Only two participants slightly modified

the content of their interview transcripts. Interviews were categorized based on region and the identity of the interviewee (activist, advocate, or stakeholder) and responses were coded to capture experiences (of MLG mechanisms and relationships with political authorities and other civil society actors) and assessments (of MLG mechanisms, responsiveness of different states and federal governments, and resonance of different IM organizations in the country).⁷

RESULTS

Self-determination, [...] involves restoring to the IP their ownership and control over ancestral lands, but also involves allowing them to re-establish their indigenous social order as they themselves determine it. (AIPP, 1989, p. 34)

Malaysian Multiculturalism and the Implementation of Indigenous Self-Determination in Different States

Self-Determination through Self-Government

As stated above, East Malaysia has more indigenous rights recognized both in the constitution and state legislation than West Malaysia. IP in Sabah and Sarawak have more economic, cultural, and judicial rights than those inhabiting states of Peninsular Malaysia. With regard to political autonomy, self-government of native states of East Malaysia is recognized under the constitution and formally implemented. However, self-government within nation-state structures does not mean indigenous self-determination. As explained by Colin Nicholas, the Director of the Center for Orang Asli Concerns: “Self-government is one of [the] categories for self-determination. Because even though you have self-government, like the one you have in Sabah and Sarawak, it doesn’t mean you are doing it the indigenous way. Because even if the person in charge is [indigenous], it doesn’t mean the rights are fulfilled or that other UNDRIP articles are met.”⁸

This insight is key, since in both Sabah and Sarawak, the native states of East Malaysia, there are indigenous legislators and leaders in government. However, in Sabah, indigenous activists are far more satisfied with the status of indigenous self-determination in their state than the indigenous activists from Sarawak. A famous

indigenous activist and lawyer from Sarawak describes what he perceives is the real situation of Sarawak as follows:

We have been colonized [by] many colonizers [...]. From the British to the Brunei, and now we are part of the Malaysian Federation. At the political stance, yes [there is supposed to be autonomy]; however, if you look at the legislation [...], you will find our rights have been eliminated [...] They amended the law that initially recognized our rights. It has been amended and our rights have been eliminated, and if not eliminated, they've been reduced.⁹

In Sabah, however, activists are fairly satisfied, as illustrated by the following sentence from a well-known indigenous leader in the state: “The IP in Sabah are especially very lucky, because we are one of the few parts in the world where native customary law is recognized, and *adat*—that is actually how we call it—is very integral to the identity and culture of IPs. So being able to practice and actually enforce our native law is actually part of self-determination.”¹⁰

In contrast to Sabah, indigenous self-determination is experienced in an entirely different way in the states of West Malaysia. As explained by Colin Nicholas,

you cannot compare Dayaks and Ibans [majoritarian indigenous groups in Sarawak] with the Orang Asli, it is totally different. [...] So, you must differentiate that, you cannot generalize. You need to understand how different autonomy is here [...] In Peninsular Malaysia, [...] what they are talking about when they talk about self-determination is autonomy at the very, very local level, at the village, or small region [level]. They want full control over the territory. To some extent, they have it. If you are far in the forest or far away from so-called, the government, then [...] you can do whatever you want, you can have your court system [...], make decisions and so on. Because there is a hole. Because the government has not reached them yet. So, in that sense, the Orang Asli have autonomy, at the local level—the very, very local level. Until and unless the government decides “We want your land,” or, “We need your land,” or, “We [want to] log your land,” or, “We want to build a dam,” or something. Then any resemblance of autonomy you thought you have all disappears, and you have to fight for it.¹¹

Moreover, Section 3(3) of the APA states that “any question whether any person is or is not an aborigine shall be decided by the minister” in charge of Orang Asli issues.¹² According to the Malaysian National Commission on Human Rights

(SUHAKAM), this provision was enacted in order to fight Communist insurgency during the Malayan Emergency, but now there are serious doubts as to whether this provision is relevant or even legitimate, since it “goes against Orang Asli self-ascription and self-determination” (SUHAKAM, 2013, p. 164).

Self-Determination through Other MLG Mechanisms

When the interviewees were asked about their level of satisfaction with other instances of MLG, such as co-management or FPIC, in the best-case scenario, most of these differences were reproduced. Experiences of co-management are again different in Sarawak, Sabah, and Peninsular Malaysia. As for Peninsular Malaysia, none of the interviewees knew about any cases of truly co-managed resources.

Usually, a private enterprise that comes onto legally protected Orang Asli land will probably have a license or some permission from the state. Whether the enterprise is licensed or not, they usually speak to someone in the community, but this action is more out of courtesy than a legal obligation. The resource exploitation activity may give the local Orang Asli some jobs, but that is not co-management. I have not come across any co-management arrangements between the state or private enterprises and a local Orang Asli community that equitably make the Orang Asli community partners.¹³

Two different indigenous activists in Sarawak revealed highly pessimistic views about any example of co-management. In terms of forest management, the state government declares it has authority, since forest land is government land, and cases of forest management usually lead to conflicts that are ultimately resolved in court. Furthermore, other types of management of native lands are required to adhere to the Joint Venture Company Agreement, according to which,

the land is under the local Land Custody and Development Authority (LCDA). That is a government-funded body, developing native land together with the companies, the corporations. There is an agreement that includes indigenous communities [...]. They recognize their rights, but then, the shareholding—the company holds 60%, the landowners 30%, and the LCDA 10%. So, the company controls everything [...]. They are exploiting, there is no debate or anything. Natives, they don't control anything, because the company controls everything.¹⁴

In Sabah, assessments of co-management are mixed. According to a well-known indigenous leader in the state, conflicts sometimes arise with Sabah parks, usually due to procedural issues and communities not being notified, with the outcome usually seeing the rights of indigenous communities curtailed. However, from 2000 to 2001, the state government changed its policy and created the Forest Management Units (FMUs). Under the FMUs, land is privatized by companies and long leases are issued.

So, they will manage [the forest lands] for 99 years. So, whatever management practice or whatever they want to do is up to them. Of course, there [are] also guidelines, under the Sustainable Forest Management License Agreement (SFMLA), so part of it [has] a very clear component on community [...]. The result was that each of the FMUs will identify the (as they call it) “community compartments.” These compartments will not be locked, but they will be co-managed by the community and the FMU based on what the community wants. If it [is] for watersheds, for watersheds, if it is for hunting, for hunting, but they have agreed on having a special category within that larger FMU [...]. If you want to do something, these are the procedures, this is the process you need to follow: community workshops, consultation, community-based natural resource monitoring team ... something like that.¹⁵

Regarding FPIC, the dissatisfaction was general. None of the activists, advocates, or stakeholders were able to identify any experience in their states that fully adhered to international standards of FPIC. This reflects what was also found by multiple UN visits to the country. Indeed, FPIC is absent not only in development projects on traditional lands (which jeopardize economic subsistence, food security, and access to rituals and sacred places) in Malaysia, but has also been found to be missing in “projects aimed at collecting and transforming IPs’ knowledge about plants and the forest for the purpose of commercializing medicinal and beauty products” (United Nations, 2019).

In summary, the perception of all interviewees is that recognition of indigenous land is often missing, which in turn makes their participation in these alternative mechanisms almost inexistent. This argument was also stressed by the United Nations Special Rapporteur on the right to food: “[There are] problems faced by communities in acquiring official recognition of native customary land rights and in participating in the decision-making processes related to major development projects affecting their lands

and livelihood” (United Nations, 2014, p. 17). In any case, for some of the interviewees, FPIC itself is not a tool for self-determination.

Self-determination means you are in control. That means [...] being part of the decision-making is not self-determination. [...] FPIC is not self-determination. You are taking part in the decision-making, but you are not in a situation of self-determination. Self-determination means you make the decisions. You don't take part in the decision. You are the one deciding for yourself.¹⁶

Direct Effects of Federalism on Indigenous Self-Determination

Responsive? Responsive meaning positively responsive? Of course the federal government is more responsive, because they don't have decision-making. It is the states' [decision]. And the states are never responsive.¹⁷

Most interviewees agree that federalism per se was not an obstacle. For them, the main problem was the lack of political will in certain government instances to pursue reforms. However, they pointed to certain barriers within the institutional framework to the fulfilment of the rights of IPs, particularly self-determination.

According to a well-known lawyer who has brought Orang Asli cases to the Supreme Federal Court of Malaysia,

there are definitely flaws in the institutional design [...]. For example, the Orang Asli cannot apply for the reservation of their land locally, as only the JAKOA can apply for the reservation of land. And the federal government often reduces the amount applied for, based on its own federal priorities for Orang Asli, not on local community priorities. Most of the time, the state government further reduces the amount finally approved and gazetted for reservation based on its priorities and, again, not on the priorities of the local Orang Asli community. [...] These institutional layers function to limit the lands claimed to be Orang Asli customary lands. In this regard, and in many other situations, the institutional framework is problematic.¹⁸

In Sabah, however, the multiplicity of government instances becomes problematic when political authorities start a sort of “ping-pong” when facing specific demands of IMs.

It's always a table tennis game. Because when it comes to indigenous issues, the obligation to protect everybody is [with] the federal government [...] but then a lot of the things related to IPs—like land, the *adat* (the native law)—are a state matter. So, when you want to bring something, they say, “OK, [go to] the federal government.” The federal [government] will push it to the state government, [...], the state pushes it to the [federal] government, so it is like a ping-pong game.¹⁹

Finally, for activists in Sarawak, it is all about political will. They perceived state authorities as so repressive, so business oriented, and so closed to IM claims, that they prefer to lobby the federal government directly or try to defend their rights in the judicial system. However, the problem is that most cases related to land titles entail overlapping jurisdictions, and in those cases, the chances of losing a case increase. In any event, when asked whether they perceived federalism as an obstacle to claims made by IPs, they said, “It very much depends on the issue you are talking about. With the land, yes, because state government is the one that has authority over land.”²⁰

Indirect Effects of Federalism on Indigenous Self-Determination: Balkanization of Indigenous Movements

Numbers play a role in whether minority voices are heard at the national level. Definitely.²¹

As explained in the previous sections, IMs in Malaysia need to pursue advocacy at both the state and federal level if they want their rights to be upheld or at least respected. Effective advocacy requires accountable governments willing to respond to those demands and to recognize IMs as valid speakers; however, it also requires resonant movements with widespread popular support and the social and economic resources needed to put pressure on those governments (Inguanzo, 2018). These elements are critical to understanding the different impact of Malaysian federalism on the relationship between IMs and the various government bodies when defending the rights of IPs.

In West Malaysian states, IPs represent a small minority of the population, both in their states and in relation to the federal government. As a result, their ability to exert

pressure in either area on their own is very limited. While they belong to JOAS and have good relationships with organizations in Sabah and Sarawak, they do not fully identify themselves with major native peoples of Sabah and Sarawak. According to the director of COAC,

you cannot compare Dayaks and Ibans with the Orang Asli, it is totally different. You can compare Dayaks with Ibans [...] here to the Malays. Because they are in government, they make decisions, they control the finances, they control everything. There are minority groups there that are being suppressed or exploited or marginalized by their own people. So, you must differentiate that [...]. You need to understand how different autonomy is there.²²

In West Malaysia at least, numbers and resources are not on the side of IMs. What is therefore more interesting is why indigenous activists' satisfaction with the status of the rights of IPs is so different in Sabah and Sarawak, where they constitute a majority and have very similar forms of self-government and rights recognized under the constitution and secondary legislation. Some interviewees from different states point to how the different levels of openness and responsiveness to IM claims from state governments in Sabah and Sarawak lead to different relationships between the local IMs and the state government. In Sabah, the relationship is more cooperative, while in Sarawak, it is more conflicting. In addition to these differences, or as a result of them, some activists suggest that the IM in Sarawak is more divided, while the Sabah IM is more united. According to a well-known Sabahan activist, who was himself a former important leader of JOAS, the advocacy network for all Malaysian IMs,

in Sabah [...] we have changed government many times. [...]. Compared to Sarawak, they never change government [...]. And then, also the IPs' politicians, compared to Sarawak, [...] we know we don't have the numbers [at the federal level], so [...] Sabahans just stick together, irrespective of whether [you belong to an ethnic group] or what sort [...]. Because in the bigger context of Malaysian politics, we are a very small minority, but if we are close together, then we are much stronger. So, no one ethnic group dominates everybody here. If you compared that to Sarawak, you know, you will be surprised. [...] And the Dayak are also hopeless, because they are so divided. This is a result of divide-and-[conquer] tactics of the people in power, using resources and money.²³

Indigenous activists, advocates, and stakeholders in Sarawak also pointed to divide-and-conquer tactics employed by state government through gerrymandering, corruption, and cooptation.²⁴ In fact, while the JOAS former leader recognizes that even in Sabah, the status of self-determination is uneven among communities, based on different levels of resources, awareness, and activism, he contends that the unity of different IPs in Sabah is greater than in Sarawak, which make things easier when it comes to political fights. However, when asked about the situation of Orang Asli in West Malaysia, he answered,

I have different answers. As a Sabahan, I need everything to be Sabahan. I am very stingy: Sabah for Sabahans. I want it [...]. But then, if I am asked about Orang Asli, as an Orang Asal of Malaysia, I also have an obligation toward the Orang Asli. For them, the only way to have something is to have a national policy [...]. It depends on the context of what you want. If it's education, yes, [federalism] is a good thing, but if you are talking about land rights ... land is a matter of state. So, with this jurisdiction, you start having problems because of the fragmented powers between the state and the federal [...]. I think it is easy to have a federal government. At least you have [...] one united voice.²⁵

The reference to education as a good federal policy is key here. Nowadays, the federal government of Malaysia through JAKOA has launched some initiatives for Orang Asli children to have better access to education. Although there is room for improvement, these initiatives have not been equally implemented in East Malaysia, which accounts for why native children in Sabah and Sarawak face greater obstacles with regard to access to education (United Nations, 2009).

Finally, in Sarawak, since state government is perceived as not responsive and even repressive with regard to claims made by IMs, their hopes are pinned on the federal government, which is the one they lobbied more intensely after the change in government at the federal level. When asked about whether they would prefer a national policy or leaving the state to pursue its own indigenous policy, a Sarawak activist answered: "To me there is no option. [...] Because if, *if*, the UNDRIP can be enacted as a [national] law, we hope the law will cover the state too."²⁶

Therefore, when comparing the different assessments of federalism for IPs in different states of the country, it is important to consider the inequality and diversity within the IPs themselves and how this affects the resonance of the IMs at different

levels. Inequality, even among IPs, is key to explaining the uneven influence indigenous social movements may have in different states. In general terms, in the case of Sarawak and Sabah, numbers can help exert social pressure when compared to Peninsular Malaysia. However, this is not always so, as exemplified by the Sarawak case. In fact, at the end of the day, it is all about whether people (indigenous or not) in decision-making positions are accountable to the indigenous communities and grassroots movements in their constituencies.

I think those states that are traditionally or truly indigenous states, with indigenous governments, it is easier [for them] to pressure the government. [...] Among the IP, there are different categories [...]. There are the people who are just marginalized and the people who are just something in the middle, exploiting others. So, there [is] no reason not to be able to change the system, in care of the people, or have UNDRIP accepted as a different law in the federation. It is not a standing law in the Federation, it is the people who are in government, in the position, not making the decision to adopt it, so it is not the federal system.²⁷

To sum up, when asked about how the same form of self-government in Sabah and Sarawak leads to such different results for IP, indigenous activists, advocates, and stakeholders throughout the country provide diverse answers. In Sarawak and Peninsular Malaysia, where indigenous activists are less satisfied with the current status of the rights of IPs, activists suggest that the underlying cause of the lack of responsiveness is that much of the IP who reach decision-making positions (in Sarawak) or are consulted by the government (in Peninsular Malaysia) usually belong to the better-off, well-educated, and upper-class IPs; they are easily coopted by the system, and forget their commitments to the most vulnerable sectors of the IPs. From a different perspective, activists in Sabah suggest that Sabah's government is more responsive to indigenous demands than Sarawak's, due to the indigenous unity that resulted from a long history of community organization, popular revolutions, and subsequent changes in state government, making the latter more responsive to the will of the people, differentiating Sabah from Sarawak and West Malaysia. For a more parsimonious comparison of the three settings, Section B of the Online Appendix shows a table summarizing the main assessments of direct and indirect effects of MLG mechanisms on the rights of IPs in Peninsular Malaysia, Sarawak and Sabah.

DISCUSSION

One of the benefits of federalism is that it provides multiple instances of access for civil society organizations. In addition, decentralization is supposed to make subnational governments more responsive to local and regional needs and increase civil participation and responsiveness in decision-making processes concerning matters that affect local communities, especially for subnational majorities concentrated in specific states. However, the responsiveness of federal institutional frameworks for impoverished ethnic minorities seems to be much lower (Miller, 2010). While there are several alternatives of MLG to foster indigenous autonomy according to the literature, these examples have been explored through a legal and usually nonindigenous lens. This paper contributes to this debate by incorporating the evaluations and perspectives of indigenous activists, advocates, and stakeholders in the assessment MLG aimed at improving indigenous autonomy. In doing so, it follows the approach Laurie et al. (2005) used for understanding power relations in ethno-development institutions in Latin America. This allows for a deeper understanding of power relations present in MLG mechanisms that affect IP, and thus follows the recommendation of Alcantara and Modern (2019).

This research on the Malaysian case shows that for the indigenous activists, advocates, and stakeholders interviewed here, federalism and other MLG mechanisms are not the main obstacle for indigenous self-determination in terms of direct effects, although they identified multiple administrative layers and conflicting jurisdictional overlaps as relevant problems in relation to land rights. This supports previous findings of vertical hierarchies and power imbalances across governance levels in very diverse countries in the Pacific, the Americas, and other Southeast Asian countries (Alcantara & Morden, 2019; Di Gregorio et al., 2019). However, according to the activists, these direct problematic issues of MLG arise from a lack of political will and widespread corruption among indigenous and nonindigenous government officials, which in turn resulted from the lack of political accountability toward IP. These accounts reinforce previous works about Bolivian and Indian experiences of participatory forest management and how its scope depends greatly on local dynamics (Arts et al., 2014). These problems of accountability are in turn the product of either a small indigenous population in Peninsular Malaysia or a lack of alternation in power in Sarawak.

However, indigenous activists are aware of the crucial indirect effects of MLG on the rights of IPs. MLG mechanisms put the rights of IPs at risk by balkanizing efforts made by IMs to keep both federal and state authorities accountable and responsive to claims made by IMs. Throughout Malaysia, IMs tend to overcome this pattern by uniting under a single platform, JOAS, and a unified identity, the Orang Asal, to jointly pressure federal institutions. This strategy of convergence of localized actors mirrors other parallel processes in Latin America (Lucero, 2003). However, multiple problems need to be overcome. First, federalism entails a socioeconomic burden for IMs in those states where IP are a small minority, such as East Malaysian states, regardless of whether the political opposition had seized power or not. Second, MLG enhances divisions. IMs from West Malaysia observed that they were at a disadvantage compared to natives from Sabah and Sarawak, and that their claims and problems related to self-determination were not comparable. Moreover, Sarawak's IM is itself divided as a result of divide-and-conquer tactics carried out by state officials. Finally, the fact that indigenous land rights must be defended separately in each state erodes the cohesion and strength of Malaysian IMs at the federal level.

Federalism and MLG mechanisms can work for IMs, but so far, this has only been the case in Sabah, where IMs have the numbers and political leaders are accountable and responsive to demands made by IMs, as a result of various changes in government. This study contributes to the literature stating that both numbers (Mesfin, 2017) and accountable institutions (Papadopoulos, 2010) matter, in the sense that both majority status and political accountability to IMs are jointly necessary for MLG to enhance indigenous self-determination.

At the opposite end of the scale, MLG in West Malaysia does not enforce self-determination as it does in certain areas of East Malaysia. Indigenous self-determination of Orang Asli, if any, is exercised informally, at the very local level, as a product of isolation. In this case, MLG institutions foster indigenous self-determination through their absence. This account offers support to those works that study how remaining out of reach of the state was actually an opportunity to truly exercise indigenous self-determination in Latin America (Yashar, 2005).

Overall, these findings contribute to the literature, first by nuancing those theories based on Latin and North American experiences suggesting that granting subnational

autonomy through self-government instances was a way of ensuring the fulfilment of collective rights of localized ethnic minorities (Faguet, 2014; Kymlicka & Norman, 2000). Second, regarding the debate on whether MLG enhances or coerces ethnic minority movements, this study has found balkanizing dynamics, thus supporting previous works on the negative indirect effects of federalism on minority movements (Brooks & Manza, 2008; Miller, 2010). Federalism erodes efforts of IMs, particularly in states where IP are a minority, such as East Malaysia, as suggested by the above literature; however, I found federalism also erodes IMs in states where accountability and the quality of democracy is lower, such as Sarawak. As a result, future research on how both numbers and accountability influence direct and indirect effects of MLG on indigenous self-determination would be welcome.

Overall, the scope of these findings is difficult to estimate. As stated in the Methods section, the views of the activists, advocates, and stakeholders interviewed should not be interpreted as being representative of all indigenous organizations or people of Malaysia. For example, although a few indigenous female leaders were contacted, it was impossible for them to be interviewed back in November 2019. Therefore, this paper does not incorporate the views of indigenous women, or other relevant social groups with different interests. Therefore, further studies addressing these limitations and other topics involving indigenous rights are still necessary.

CONCLUSION

Overall, this paper aims to answer a fundamental question as to whether the rights of ethnic minorities—specifically, those of IPs—can be improved by MLG mechanisms in settings with low-quality democracy. The results suggest a nuanced response. Federalism can enhance the rights of IPs in regions where IPs constitute a majority and state government is accountable to them. In other words, federalism and other MLG mechanisms work better for IPs in settings where democracy is already performing better. In such cases, a virtuous circle exists between political decentralization, democracy, and the resonance of IMs that end up enforcing the rights of IPs. In less-democratic contexts or in states where IPs constitute a small, scattered minority, existing MLG mechanisms do not contribute to improving the rights of IPs; instead, they reinforce previous hierarchies and balkanize the IMs. In fact, in places such as

these, indigenous political autonomy is better exercised in isolated communities, where the state and MLG mechanisms are virtually absent.

All in all, incorporating the perspective of IP in the assessment of MLG can allow researchers to elaborate more nuanced proposals for institutional arrangements that may foster indigenous autonomy. Innovative arrangements, such as co-management and FPIC, and more traditional frameworks, such as federalism, are neither the solution nor the obstacle for these activists, advocates, and stakeholders. Based on the different responses, none of these arrangements are likely to work for IPs, unless there are mechanisms to hold stakeholders and governments accountable, and unless the IPs themselves are recognized by the private and public actors as legitimate veto players in their ancestral lands, meaning they must have the right to oppose development projects.

While assessing the implementation of the rights of IPs remains a challenge, especially in the Global South, this paper has shown that focusing on the legal or administrative dimension is extremely useful, although probably insufficient. Therefore, we must ensure that the concepts, theoretical constructs, and measurements employed for research purposes incorporate the standards of the IPs involved.

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¹ For decades, within the international community, there was debate over the concept of IPs. For example, UN Special Rapporteurs on the rights of IPs and ethnic minorities from different regions of the world have expressed different positions on the topic. Originally, and from an North and Latin American perspective, the international community defined IPs as the original peoples who have historically and continually inhabited a territory prior to the colonization by distant settler states (Martínez Cobo, 1986; Stavenhagen, 1989). As a result, the concept has been deeply contested, both in Africa (Inman, 2014) and Asia (Erni, 2008). In fact, indigenous advocates from Asia put the emphasis on self-determination as IPs as the main defining feature of indigenous nations, communities, or individuals (Daes, 2008; Tauli-Corpuz, 2008). This latter perspective was the one finally adopted for the UNDRIP.

² It specifically states: “IP have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UN General Assembly, 2007). Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

³ I adhere to the definition put forward by Alcantara et al. of multi-level governance as “an instance of policy-making in which government(s) engage with a variety of non-governmental actors, organized at different territorial scales, in a process of decision-making that aims to collaboratively produce some sort of public good” (2016, p. 40).

⁴ In English: Department of Orang Asli Development.

⁵ Organizations include but are not limited to the IP Network of Malaysia (JOAS; the nationwide indigenous organization), the Center for Orang Concerns (COAC; the organization most prominent for all Orang Asli in West Malaysia), and the Sarawak Dayak Iban Association (SADIA), which encompasses several IPs from Sarawak. Unless otherwise suggested by the interviewee, no further details were provided regarding their identity due to confidentiality, since some of their members had faced persecution from current state governments.

⁶ The research project (including overall project design, questionnaires, information sheets for participants, consent sheets for participant) had been approved by the ethics committee of the researcher’s university.

⁷ See Section A of the Online Appendix for more details on the interviews.

⁸ Interview with Colin Nicholas, in Peninsular Malaysia (Kuala Lumpur, 11/19/2019).

⁹ Interview with a Sarawakan activist in Kuching, 11/15/2019.

¹⁰ Interview with an indigenous activist in Sabah and technical advisor to JOAS (Kota Kinabalu, 11/16/2019).

¹¹ Interview with Colin Nicholas, in Peninsular Malaysia (Kuala Lumpur, 11/19/2019)

¹² Government of Malaysia (*Aboriginal Peoples Act 1954 (Revised 1974)*, 1954).

¹³ Interview with a well-known lawyer and academic (Kuala Lumpur, 11/20/2019).

¹⁴ Interview with a senior activist from SADIA (Kuching, 11/15/2019)

¹⁵ Interview with an indigenous technical advisor to JOAS (Kota Kinabalu, 11/16/2019)

¹⁶ Interview with Colin Nicholas, in Peninsular Malaysia (Kuala Lumpur, 11/19/2019)

¹⁷ Interview with Colin Nicholas, in Peninsular Malaysia (Kuala Lumpur, 11/19/2019) when talking about the responsiveness of state and federal government in Peninsular Malaysia.

¹⁸ Interview with lawyer and scholar (Kuala Lumpur, 11/20/2019).

¹⁹ Interview with an indigenous activist in Sabah and technical advisor to JOAS (Kota Kinabalu, 11/16/2019).

²⁰ Interview with an indigenous activist from SADIA (Kuching, 11/15/2019).

²¹ Interview with lawyer and scholar (Kuala Lumpur, 11/20/2019).

²² Interview with Colin Nicholas, in Peninsular Malaysia (Kuala Lumpur, 11/19/2019).

²³ Interview with an indigenous activist from Sabah (Kota Kinabalu, 11/16/2019).

²⁴ Interview with an indigenous activist from SADIA, 11/15/2019, and with a Sarawak lawyer and politician (Kuching, 11/14/2019).

²⁵ Interview with an indigenous activist from Sabah (Kota Kinabalu, 11/16/2019).

²⁶ Interview with an indigenous activist from SADIA (Kuching 11/15/2019).

²⁷ Interview with Colin Nicholas, in Peninsular Malaysia (Kuala Lumpur, 11/19/2019).