

DISPUTE RESOLUTION: RESTORATIVE JUSTICE UNDER NATIVE CUSTOMARY JUSTICE IN MALAYSIA

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Utai besai gaga mit (Big matter make it small)
Utai mit gaga nadai (Small matter make it nothing)
—An Iban saying on dispute resolution

Introduction

Dispute resolution is an important aspect of Indigenous Peoples' legal traditions. Underpinning these traditions is the need to settle conflicts and controversies to ensure social cohesion and harmonious existence. These legal traditions are products of practice and deliberations over long periods of time. Through repetitious patterns of social interactions, they are accepted as binding by those who participate in them. In many Indigenous communities, customary laws constitute a very important source of Indigenous legal traditions² through which justice is meted.

This paper looks at the character and administration of dispute resolution mechanism under the native customary justice system as a “court of first resort”³ for native peoples in Malaysia.⁴ “Native” is a

1 I thank Professor Dimbab Ngidang and Jayl Langub, both of University Malaysia Sarawak, Kuching, Sarawak for reading through the draft of this paper and for their comments.

2 John Borrows discusses sources of Indigenous legal traditions which would apply to Indigenous Peoples in other parts of the world in Canada's Indigenous Constitution. (Toronto: University of Toronto Press, 2010).

3 Thomas James, Be Reconciled! Meaningful Steps for Mending Relationships. (Mississauga: McDougal & Associates, 2007) p. 175.

4 The term “native” is used in article 161A (clause 6) of the Malaysian Federal Constitution to refer to the Indigenous Peoples of Sabah and Sarawak. Other legislation that define them as “natives” include the Schedule to the Sarawak Interpretation Ordinance (1958) and the Sabah (Interpretation) Ordinance (1953). Determination of native identity is important because of the entitlement to rights accorded to natives. For a detailed discussion on who is a native, see Ramy Bulan, *Indigenous Identity and the Law: Who is a Native?*, (1998) 25 Journal of Malaysian and Comparative Law. pp127–167.

legal term used to refer to Indigenous Peoples in the Malaysian states of Sabah and Sarawak. While some references will be made to Sabah, the paper will focus on two native communities, the Iban and Kelabit, in Sarawak to illustrate how linking the customary dispute resolution mechanism with the courts established by the State, could assist in the overall function and implementation of customary justice. It highlights the importance of restorative justice within the native customary justice system and how the sanctions and remedies granted thereunder are shaped by the Indigenous communities' worldview,⁵ as they relate to their economic, physical and spiritual environment. In this discussion, the concept of justice refers not only to enforcement of rights, and imposition of judgment or punishment, but also the restoration of what was lost. This includes loss of peaceful co-existence and the need to restore relationships. In this context, restorative justice refers to an approach to justice that emphasizes repairing the harm done to people and relationships rather than mere retribution or punishment. It also takes into account the restoration of the state of balance with the economic, physical, and spiritual environment. The view is taken that the provision of better access to justice in the forums that they normally use is fundamental to the empowerment of Indigenous communities. This may be through formal legal institutions, but more often, the informal socio-cultural order and mechanisms for managing disputes and the administration of justice.

Justice and Law

According to the Merriam Webster's Dictionary, justice has to do with "the maintenance or administration of what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments." It is "the principle or ideal of

5 A working definition of world view is that "it is a cognitive trajectory, based on one's presupposition of reality from a particular point of belief system, that bears upon the meaning of existence and of the world we live in." Edmund Chan, A Certain Kind. (Singapore: Covenant Evangelical Free Church, 2013) p 188. Thus, an Indigenous world view is the view of reality which shapes the understanding of life and the world they live in.

just dealing or right action” and “quality of conforming to law.”⁶ Law and its meaning is often a subject of conflict and its meaning depends on whose perspective it is processing. Many a law student is first introduced to the concept of law and its institution, and courts of law, as the means to achieve social order and justice. For example, an introductory book on law by Kinyon defines law in this way:

The ‘law’ in the broad sense of our whole legal system with its institutions, rules, procedures, remedies etc., is society’s attempt, through government, to control human behavior and prevent anarchy, violence, oppression and injustice by providing and enforcing orderly, rational, fair and workable alternatives to the indiscriminate use of force by individuals or groups in advancing or protecting their interests and resolving their controversies. ‘Law’ seeks to achieve both social order and individual protection, freedom and justice.⁷

The “law” is defined here as an “attempt” by society to prevent anarchy and injustice,⁸ and it puts the government or the State at the core of all social discipline, protection and administration of law. The law aims to achieve social order, justice and protection of individual freedom. The definition speaks of orderly and “rational” alternatives to protecting and resolving controversies. However, in attempts to achieve justice, there are social realities and complexities as well as systems of normative rules that may be rational in one culture but may not necessarily be rational when seen through the lens of another, but they are norms that need to be understood and accommodated.

This writer takes as a starting point that law has both a formal and informal content. The view is taken of the concept of justice as something to be achieved not only through the work of lawyers, access to State legal institutions and enforcement agencies or judicial access, but justice through non-State institutions, rooted in Indigenous legal traditions. It is well known that there are informal dispute resolution

6 Merriam Webster Dictionary definition of Justice. <http://www.merriam-webster.com/dictionary/justice>, accessed on 22 January 2014.

7 Stanley Kinyon, Law Study and Law Examination in a Nutshell. (St Paul: West Publishing Co, 1971) p. 9.

8 Sally Moore, Law as a Process, An Anthropological Approach. (London: Routledge & Kegan Paul Plc, 1978) p. 2.

mechanisms that include a wide array of traditional or customary justice systems, representing the very first access to justice for most Indigenous communities. As their “court of first resort” customary justice institutions are the major platform for obtaining remedies for their grievances. It is foundational to their legal empowerment that they get better access to justice in the forums such as their own customary justice systems that they normally use.⁹ Heppel, who wrote on the Iban noted that native judicial decisions need not result in what a westerner would regard as a just solution, but it does result in adversaries openly agreeing to the terms which extinguish a dispute and enable a modicum of harmony to be restored to the group.¹⁰ Understanding their communities’ traditional and customary systems can lead to a better appreciation of their contemporary potential, including how they might be enforced, implemented and how they might meet the needs of present and future Indigenous communities.¹¹

Customary Justice Systems

Customary justice systems have variously been described as informal, traditional or non-State justice systems. The International Council on Human Rights uses the term non-State legal order to indicate that

[T]hese are norms and institutions that tend to draw moral authority more from contemporary or traditional cultural, or customary or religious beliefs, ideas and practices, and less from the political authority of the state. They are law to the extent that people who are subject to them voluntarily or otherwise consider them to be the authority of the law.¹²

9 Eva Wojkowska & Johanna Cunningham, *Justice Reform’s New Frontier: Engaging with Customary Systems to Legally Empower the Poor*, in Stephen Golub, Thomas McInnerney eds., (2010) 2 Legal Empowerment: Practitioners’ Perspectives, Legal Reform and Governance Reform: Lessons Learned. p. 95.

10 Michael Heppel, Iban Social Control, The Infant and The Adult. (Unpublished Ph.D Dissertation, Australian National University, 1975).

11 John Borrows, Canada’s Indigenous Constitution. (Toronto: University of Toronto Press 2010) p. 23.

12 Ewa Wojkowska & Johanna Cunningham, Justice Reform’s New Frontier. (Rome: International Development Law Organization, 2010) p. 95.

Hoebel refers to the underlying cultural values of a particular society as the “basic social postulates” on which he contends the law of society is based.¹³ The reasoning is that, law is then the practical working out of the values of society. In the case of many Indigenous societies, while their traditions can be as historically and different from one another as other cultures and nations of the world, legal traditions and law to which they are subject, are often characterized by rules and regulations regarding economics, physical and religious sanctions governing social interactions and relationships.¹⁴ Indeed, spiritual principles often form part of most every culture’s legal inheritance. This is clearly evident within the native customary justice, where the concept and system of justice and fairness is underpinned by cultural, or customary or religious beliefs and ideas. These laws are generally referred to as customary laws.

In Sabah and Sarawak, multiple versions of customary laws exist. It is possible to identify codified customary law, judicial customary laws as declared by the courts, textbook customary laws as recorded by scholars and others.¹⁵ References to and recognition of customs are also made through statutes or administrative codes.¹⁶ Customary laws

13 E.A Hoebel, *The Law of Primitive Man*. (Cambridge, Mass.: Harvard University Press, 1954) cited in S F Moore, *supra* n 8, p. 11.

14 Masaru Miyamoto explored the presence of these characteristics in the native customary traditions of the Kadazan-Dusun, the Lotud and Rungus in Sabah in *Indigenous Law and Native Courts in Sabah: A Case Study of the Penampang Kadazan* (Masaru Miyamoto and Judeth John Baptist eds.) (2008) 11 Legal Culture in South-east Asia and East Africa, Sabah Museum Monograph. p. 21. The same principles apply to the Iban and Kelabit customary laws.

15 Among the more comprehensive records of native laws are the writings of M.B Hooker in Native Law in Sabah and Sarawak. (Singapore: Malayan Law Journal, Pte. Ltd, 1980).

16 A large part of the substantive content of native law in both Sabah and Sarawak is found in codes drawn up by administrative officials and published by the government printing press. For e.g., there are seven native law codes in Sabah known collectively as Woolley’s Code, named after the author, G.C. Woolley Esq, of the North Borneo Civil Service. The Codes were originally produced between 1932–37, with printed versions put out by the North Borneo Government Printing Office in 1953, and reprinted in 1962 as Native Affairs Bulletin. Nos.1–7. The codes deal with a variety of subjects which form the basis of native law as understood by the people concerned.

or *adat*¹⁷ govern the lives of native communities¹⁸ as living customary and legal traditions, which evolve through a period of time to address contemporary issues.

Established through long usage and common consent, the norms that govern relationships in those communities are accepted as correct and beneficial for generating harmonious interpersonal relations for a cohesive society. By repeated usage and common practice, they attain a degree of coercive authority that requires them to be observed on pain of sanction by the community or the traditional authority.¹⁹ This developed into a customary justice system through the making and reiterating of social order as an active process, not as something which, once achieved is fixed.²⁰ Customary justice is dynamic and fluid, and able to accommodate changes as the society evolves. They are susceptible to being made, remade, transformed and reproduced.²¹

Compared with established formal State systems, customary justice systems are generally much more accessible because those involved in their administration are often from within the community, and would settle disputes in a manner that is culturally acceptable to the parties. For the weak and the poor who would prefer to seek and obtain remedy for grievances in a “safe,” familiar, unthreatening and culturally acceptable manner, it may be the best option.²² Many Indigenous Peoples have found the formal court systems with their procedures and evidentiary rules, and harsh burdens of proof²³ to be alien and cold.

17 AJN Richards writing on Iban customary laws defines *adat* as “a way of life, basic values, culture, accepted code of conduct, manners and conventions”. AJN Richards, *Dayak (Iban Adat)*. (Kuching: Government Printing Press, 1963).

18 Commonly referred to as Dayaks,

19 Gerunsin Lemat, *The Dynamics of Customary Laws and Indigenous Identity: The Case of the Dayak of Sarawak*, Paper presented at the International Seminar on Indigenous Peoples, (Kuala Lumpur: ISIP, November 29–December 1, 1993), Kuala Lumpur; See also Ramy Bulan, *Resolution of Conflict and Dispute Resolution under Native Customary Law*, in Wan Zawawi (ed.), Representation, Identity and Multiculturalism in Sarawak. (Kuala Lumpur: Social Science Academy, 2008) p. 156.

20 *Supra* note 8, at p. 6.

21 *Ibid.*

22 *Supra* note 12, at p. 97.

23 John Borrowes, *Listening for a Change, The Courts and Oral Traditions* (2001)

39 Osgoode Hall Law Journal. p. 1.

When their testimony is subject to discrediting cross-examination, they can feel that they are not given the respectful space that they deserve. This has been the experience of native peoples, testifying in adversarial court systems.

Like other native communities, for the Iban and Kelabit communities, their *adat* is taken to be the “staff” to guide and to support them through life. *Adat* is a way of life, basic values and accepted conduct and conventions and it is about shared norms and values. This is embodied in the Iban saying:

*Bejalai betungkat ka adat,
Tinduk bepanggal ka pengingat*
Walk the path of life with the staff of custom,
Sleep upon the pillow of beliefs and traditions.

Gerunsin Lemat a prominent native leader wrote, “At the core of *adat* it is a system of justice.”²⁴

Despite being practiced since time immemorial, the administration of the customary justice system is not without problems. The applicable norms and customs can be complex, requiring identification of appropriate norms to a certain behavior or dispute. Customs are generally “local” requiring knowledge and understanding of applicable customs on the part of adjudicators of a conflict.

There may be instances where the administration of justice according to traditional conventions is characterized by violence and brute force and they would be considered inhumane. For instance, in many native communities, incest is considered an affront to the communities’ sensibilities and a very grave breach of the *adat*. In the past, among the Iban, penalty for incest was meted by driving bamboo poles through the bodies of the offenders. Adulterers could be killed by spouses, and unjustified homicide would be revenged through retaliatory killings.²⁵ Personal conflicts were settled through ordeals of diving contests or forced immersions, scalding with boiling oil, clubbing or public humiliation and even through cockfighting and

24 *Supra* note 19.

25 Empeni Lang, *Administration of Native Courts and Enforcement of native Customary Laws* (1998) 25 *Journal of Malaysian and Comparative Law*. p106

appropriation of property.²⁶ These were often in violation of human rights standards.

These ordeals and brutish systems were outlawed by the Brooke government²⁷ who introduced the concept of *bicara*, or “hearing in court” where the dispute between two parties would be heard by an arbiter. Along with the concept of *bicara* came the term *ukum*, or fine as penalty. However under the *adat*, many conflicts and breaches of customs were dealt with through the provision of ritual propitiation or restitution. As disputes continue to be dealt with under customary laws, elements of fines as penalty, might accompany ritual propitiation as forms of ‘remedies’ in settlement of disputes. These will be dealt with later.

The question is whether customary justice systems are effectively implemented as stand alone systems through traditional institutions, implemented through the hierarchy of the traditional leadership. In the contemporary period of rapid social and economic change and the advent of money economy, the social realities are such that in many Indigenous communities certain sections of the society may be more powerful and influential. Unequal power that often exists makes the system susceptible to elite capture. Such unequal power based on economic strength, or even a traditional social stratification and hierarchy may serve to reinforce existing unequal power at the expense of the poor and disadvantaged. In such situations, where the enforcement would mainly be at the lower courts, in the administrative offices and the villages, it is likely that customary obligations would be evaded. Based on her work on alternative dispute resolution in Africa, Nader states that “the ideal of equal justice is incompatible with the social realities of unequal power so that disputing without the force of law is doomed for failure.”²⁸ She argues that there must be a backup and the possibility of State law as a last resort.

²⁶ *Ibid.*

²⁷ Sarawak was ruled by the Brooke Rajahs (who themselves were British) for 105 years before it was ceded to Great Britain as a colony in 1946.

²⁸ Laura Nader, *The Underside of Conflict Management in Africa and Elsewhere* (2001) 32 *IDS Bulletin*. cited in Ubink & Benjamin Rooij. *Towards Customary Legal Empowerment: An Introduction*, in *Customary Justice: Perspective in Legal Empowerment*. Jannine Ubink & Thomas McInery Series ed. (Rome: IDLO Books, 2011) p. 9.

Following that line of argument, and considering Malaysia's own experience, it is suggested that the functioning and effectiveness of customary justices systems would be improved through institutional links between customary and State justice systems.²⁹ More effectual implementation and better acceptance of Indigenous legal traditions may be achieved when acknowledged and backed by official or State institutions.

Linking Customary and State Justice Systems

Three possible levels of linkages have been aptly suggested by Ubink and Van Roojr.³⁰ These are linkages (a) between State and customary norms; (b) between State and customary dispute resolution mechanisms, and (c) between State and customary administration. Such linkages would provide the possibility of some supervisory roles and the "potential to incorporate human rights into customary norms, dispute resolution and administration."³¹

The first institutional normative linkage takes the form of the State's recognition of customary norms. In Malaysia, article 160 of the Federal Constitution, defines law to "include written law, common law and custom and usage having the force of law." In the State of Sarawak, customary laws of the native communities have been codified through the work of the the *Majlis Adat Istiadat* (Council for the Preservation of Customs), the body set up for the purpose of preserving native customs.³² Through a process of consultation, with the elders and members of Indigenous communities, the customary laws of the various Indigenous communities are recorded in written form and codified. This necessarily involved the process of selecting the versions of customary laws that were the common practice in all

29 See Janine Ubink & Benjamin Rooij, *Towards Customary Legal Empowerment: An Introduction*, in *Customary Justice: Perspective in Legal Empowerment*, Jannine Ubink & Thomas McInerney Series ed. *Legal and Governance Reform: Lessons Learned*, No.3/2011, (Rome: IDLO Books, 2011) p. 7.

30 *Ibid.*

31 *Ibid.*, at p. 13.

32 This body was established within the Sarawak Chief Minister's Department through the *Majlis Adat Istiadat Ordinance 1977* for the preservation of customs and traditions.

the communities to ensure credibility and acceptability. In Sabah, customary laws have not been systematically codified in the same way but there have been some recordings by G.C Woolley of the customary practices. An equivalent body, the *Majlis Hal Ehwal Anak Negri* has also been established in Sabah. Breaches of customs and their remedies are also listed in the Sabah (Native Customary Laws) Rules 1995 which is a convenient manual for use by the staff and judges of Native Courts.

Codification and writing of customary laws made a complex system, in some cases, accessible and understood by the younger generation and the general public.³³ It has been suggested that even if successfully accomplished, codification would render customary law less customary, and more artificial, far removed from the experience and comprehension of the people. While introducing a degree of certainty in the rules, it also meant crystallization of the rules, affecting the fluid, informal and accessible nature of the original and living customary laws for once codified, the process of legislative amendment is slow. Furthermore, it is suggested that to subject customary law to premature crystalization in a time of rapid social and economic change would be a disservice to the cause of customary law and to the people who live under it.³⁴ In the process of production of codes or the incorporation of some of the customary fines list in subsidiary legislation, some alien concepts and legal terms were introduced to describe the existing norms. Be that as it may, “to make the concepts suitable for administrative and legislative purposes”³⁵ a certain common framework had to be agreed upon for the compilation of the *adat*.³⁶

33 Sarawak has codified the customary laws of the various communities into “Adat Orders” starting with the Adat Iban Order 1993. The general contents are standardized, subject to variations to accommodate the peculiarities of each community.

34 T.O Elias, *The Problem of Reducing Customary Laws to Writing*, Reprinted from British Legal Papers. Presented to the Fifth International Congress of Comparative Law, Palace of Justice, Brussels, 4th-9th August 1958 (London: Stevens & Sons, 1958) pp 57–69.

35 Introduction to the Kelabit Adet Order 2008. (Kuching: Government Printing Department, 2008) p. 1.

36 Jayl Langub, *Compiling the Adat of the Adat of the Dayak of Sarawak*, Paper presented at the Third Bicentennial Conference of the Borneo Research Council, (Pontianak, Indonesia: BRC, 1994).

Codification of customary laws facilitated the linking of State justice system and customary administration for implementation of the *adat*. This is bolstered through reporting and compilation of previous decisions of the court, which could act as a guide and precedents for the judges.³⁷ Customary laws are administered through a system of Native Courts, which is a hybrid of customary law court structure, combining the traditional leadership structure with State administrative personnel as well as the judicial officers. Although they are established through State legislation,³⁸ these courts administer a system of laws entirely different from the laws administered in the High Court and the Subordinate Courts in Sarawak.³⁹ They combine the traditional leadership and the State's administrative structure and hierarchy. The Native Court's ascending hierarchy in Sarawak is shown below:

The Court

Native Court of Appeal—



The Resident's Court



The Personnel

A judge from the High Court
two native assessors

Resident (the highest government official in a division) with two native assessors as experts on native customs. two native assessors

37 The most important compilation of native customary law cases were done by a former Chief Judge of Sabah and Sarawak, in Lee Hun Hoe, Native Customary Law Cases in Sabah, (Kuching: Government Printing Department, 1973) and Lee Hun Hoe, Native Customary Law Cases in Sarawak, (Kuching: Government Printing Department, 1973). Former Federal Court judge, Syed Ahmad Idid bin Syed Abdullah Idid, compiled other materials in Native Court and Customary Law of Sabah (With Cases and Decisions), (Sabah: Government Printing Press, 1993). The Sabah Law Association published a compilation of cases in Native Court of Appeal Law Report, 1989–2009 (Kuala Lumpur: Sabah Law Association Native Law, Culture, Customs and Rights Committee, 2010). Decisions of the Federal courts (High Court, Court of Appeal and the Federal Court) on customary land rights and related issues are published in the Malayan Law Journal, Current Law Journal, and All Malaysia Reports.

38 Sarawak Native Courts Ordinance 1992 and Rules of the Native Court, repealing the Native Courts Ordinance Cap 43, 1958; Sabah Native Courts Enactments 1993 and Native Courts (Native Customary Laws) Rules 1995.

39 Ongkong ak Salleh v David Panggau ak Sandin and Anor 1983 (1) Malayan Law Journal, 419. (Per Seah J).

District Native Court	District Officer (head of a District) with two native assessors
↑	
The Superior Chief's Court	<i>Temenggong</i> (Paramount Chief over multiple native groups) assisted by two assessors)
↑	
The Chief's Court	Pemanca (Chief of one native group)
↑	
The Penghulu's Court	<i>Penghulu</i> (Regional leader with jurisdiction over few longhouses.
↑	
The Tua Kampung's Court	<i>Tua Kampung</i> /Headman of one longhouse.

At the lowest tier, the traditional hierarchy of community leaders, namely the *Ketua Kampung* (Village Headman) and the *Penghulu* (the Chief and the *Temenggong* (Superior Chief) have only original jurisdiction to hear cases on breach of native laws and customs. Any appeals from their decision goes to the District Native Court and the Resident's Court whose personnel are drawn from the State administration. At the highest appellate level, a High Court judge from the Civil Courts sits in the Native Court of Appeal, in an appellate as well as supervisory capacity where the appellate courts may call for the records of proceedings in the lower courts.⁴⁰

Since the personnel at the appellate levels of the Native Courts may not always be an Indigenous person, or a person from the same native community as a claimant, the judge would depend on the codified customary laws, and native "assessors" to act as experts who would assist the court with regard to the applicable customs. Proceedings in these courts are inquisitorial and not adversarial and generally, no lawyers are allowed in the lower courts. Even in the courts at the appellate level, a lawyer has to apply to the court for permission to represent a client.

One advantage proffered for the linking of the customary and State administration, is that the customary dispute resolution mechanism,

40 *Supra* note 25. p. 89. See also Wan Arfah Hamzah & Ramy Bulan, Introduction to Malaysian Legal System. (Shah Alam, Malaysia: Oxford Bakti, 2002) ch. 10.

is required to adhere to certain administrative procedures. This will ensure that both substantive and procedural justice is served. Human rights standards may be maintained through the system of appeal⁴¹ or supervisory jurisdiction of the appellate courts as expressed in *Haji Laugan Tarki v Mahkamah Anak Negeri Penampang*.⁴² It may well be that this linkage would affect the accessible and informal character of the customary justice system, but that has to be balanced against the better implementation and functioning of the law. As the bulk of the work in the community is at the lower courts, there is a need to increase the jurisdiction and power at the level of the Chiefs (*Penghulu*) and Chief Superior (*Pemanca*) to hear minor offences to prevent paralysis in implementation of justice. The real impact and benefit of customary justice system is seen in its restorative justice character, which operates at the first tier of the legal system.

Customary Dispute Resolution Mechanism and Restorative Justice

With its emphasis on restoration of relationships, and social harmony, one of the most distinctive characteristics of the customary dispute mechanism is its restorative justice approach.⁴³ In conflicts between individual or family members in the community, the preferred customary approach is mediation, arbitration or conciliation. And in cases where injury is inflicted or a crime is committed, a restorative justice approach emphasizes repairing the harm done to people and relationships rather than mere punishment of the offenders.⁴⁴ With a

41 *Supra* note 29 at, p. 12.

42 *Haji Laugan Tarki v Mahkamah Anak Negeri Penampang* (1988) 2 Malayan Law Journal p. 85. The then Supreme Court (which has co-ordinate jurisdiction with the present Federal Court) ruled that Native courts are creatures of statute and the High Court can exercise control over Native Courts through prerogative orders. The Supreme Court also held that Native courts had no power to impose custodial sentences. With the passing of the Native Courts Ordinance 1993, a custodial sentence may now be imposed upon a person's refusal to pay the fines imposed by the court.

43 This paper does not pretend to explore the whole field of restorative justice. Rather it is an effort to show how there are elements of restorative justice in the native customary justice system.

44 Howard Zehr, Changing Lenses: A New Focus for Crime and Justice. (Scottsdale, PA: Herald Press, 1990).

restorative approach, crime is regarded as “violation of people and relationship,” giving rise to an “obligation to make things right.”⁴⁵ As Thomas James succinctly puts it, “an injury takes away from the personhood, the personal integrity and worth of the one injured. The one who injures another is the foremost person to restore and heal the victim by giving them back their wholeness and value.”⁴⁶

It is significant that these elements are echoed in many indigenous practices employed in cultures all over the world from Native American and First Nations in Canada to African and Asian, Hebrew and Arabic and many other cultures. Indigenous customary justice has contributed much to the practice and acceptance of restorative justice in demonstrating justice practices that reflect an intention to repair harm, to promote reconciliation and reassurance rather than simply to get retribution or to inflict equivalent harm.⁴⁷

Writing about restorative justice in relation to crimes, Galaway & Hudson identified three fundamental elements that should be present:

First the crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict.⁴⁸

In the modern context, restorative justice has been used as mediation and reconciliation processes between victims and offenders under victim-offender mediation and victim-offender dialogues,⁴⁹ or they take the form of family group conferences,⁵⁰ or healing or sentencing

45 *Ibid*, at pp. 1–49.

46 *Supra* note 3, at p. 37.

47 *Supra* note 44, at p. 40.

48 B. Galaway & J Hudson (eds) Abstract, Restorative Justice: International Perspectives, National Criminal Justice Reference Service. 1996.

49 Ted Watchel, Defining Restorative. (Bethlehem Penn.: International Institute for Restorative Practices, 2012), www.iirp.edu.

50 Originated from the Maori practice of family group conferencing.

or community circles.⁵¹ All of these promote shared responsibility, with offender participation in some cases, and a focus beyond blame. It has also been called a relational justice or community justice system,⁵² reflecting the objectives of the justice system.

The following looks at contemporary examples of restorative justice as practiced by the Iban and Kelabit in Sarawak, Malaysia.

Restorative Justice and the Iban and Kelabit Customary Justice Systems

The Iban are the largest native community in Sarawak, comprising at least 30 per cent of the State population, occupying lowland areas all over Sarawak, whereas the Kelabit are a minority but a thriving community, living in the highlands of Central Borneo. Both groups generally live in longhouses, where many families live together in one longhouse with each family having its own apartment. Social cohesion and peaceful community living is vital. Like other native communities in Sarawak, the administration of their *adat* is linked with the State through Native Courts and to some extent, codification of customary laws.

Iban *adat* was the first to be codified as Adat Iban Order 1993 whereas Kelabit *adat* was codified as Kelabit Adat Order 2008. As with all codified *adat* of other native communities, the structure of the code follows the Iban, with adaptations, to accommodate specific cultural differences. The Adat Orders are codification of customs and remedies as well as ritual fines for breaches of customs. These cover areas such as construction of longhouses, rules of social behavior of the longhouse occupants, as well as their visitors, customs relating to farming, matrimonial and sexual matters, property, deaths and burials, adoption and other customs. At the core, restorative justice is the most important aspect, which is “embedded in their code of life.”⁵³

51 Drawn from First Nations practice in Canada.

52 *Supra* note 50.

53 Howard Zher & Ali Gohar, The Little Book of Restorative Justice.

(Intercourse, Penn.: Good Books Publisher, 2003) p. 9., <http://www.unicef.org/tdad/littlebookrjpakaf.pdf>

The Iban are more egalitarian compared to the Kelabit where the traditional leadership system is intact. Although the Iban use mediation to settle their disputes, it is the Kelabit that have a very well developed system of mediation and conciliatory methods for settlement of individual conflicts.⁵⁴ The hallmark of Kelabit interpersonal dealings and conflict resolution is through intermediaries. Culturally, open confrontation is considered rude. Mediation is normally undertaken by respected persons in the community. Depending on the nature of the conflict, dispute settlements incorporate elements of mediation, facilitation, negotiation, counseling and conciliation and in some instances, arbitration.

When a conflict arises, a wrong is perceived or committed, the conflict resolution process begins with *mekitang*, where a mediator is approached to act as a “go between”. A good mediator must *ngubuk*, that is, to speak gently, to persuade and positively discourage the continuance of an act or omission and counsel the parties to avert any problems or outburst of anger or any destructive behavior. Having met with both parties in turn, the mediator brings them to *petutup*, meaning, face to face meeting where he or she would exhort the parties to reconcile. If one or both parties refuse to settle the dispute, it becomes a matter for *pamung*, or public hearing before appointed elders or the village headman. There is no set procedure, although there will always be a presiding elder or village head who controls the proceedings. The meeting is open to any interested party and the public.

At each level of hearing, the facts are recounted, and both parties are given ample opportunities to be heard. The elders exhort, entreat and admonish. Alliterations and metaphors are used to drive the message and in extreme cases where parties are obstinate or obtuse, sarcasm would also be employed. It is only when these efforts fail, that the case will go to the formal court in a *besara* or *bicara*, a court hearing, where the Headman takes on the role of a judge of the Native Court. It is then a judicial proceeding conducted according to the Native Court Rules 1993.

An appeal to a *Penghulu* (Chief’s court) and further appeal to a higher court is possible. However, procedurally, appeals must be lodged at the District Office at the nearest town. As the high cost of

⁵⁴ *Supra* note 19, at p. 156.

travel is to be borne by the appellant, this discourages parties from appealing, and encourage them to settle the dispute at this local level.

Fines, Restitution and Compensatory Payment

The primary function of *adat* in all native communities in Sarawak is reconciliation and restoration of relationships. The view is taken that a breach of the *adat* threatens not only individual relationships, but also the spiritual well-being and health, as well as material prosperity of the community. To restore the “state of balance” or “equilibrium in the environment,” the wronged must be given redress and the offender must provide some form of ritual propitiation or restitution. This is called *tunggu* (Iban) or *pengebpo* (Kelabit).

A distinction is made between payment of *ukum*, or a fine that is paid to the State, and the payment of a *tunggu*, or *pengebpo* or “customary fine” or “ritual fine”,⁵⁵ the purpose of which is to restore relationship and peace in the community. Breach of customs, matrimonial or sexual offences may be dealt with by imposition of *ukum* or fine that is payable to the State. But if the case involves any injury to property, the remedy would involve restoration of the property. While the law deals only with offences against norms of social behavior and rights of individuals through payment of *ukum* or fines, the *adat* deals with offences against norms of social behavior and breaches of customs, as well as taboos or the Indigenous community’s faith and beliefs.⁵⁶ Richards, an English writer tried to capture the essence and purpose of the *tunggu* thus:

The “offence” against custom is therefore a disturbance of the balance within the community, and encroachment on its property whether tangible or not, and the significance of “payment” of a fine lies in its magical power or ritual effect of restoration and not in causing the offender to suffer punishment and loss. For this reason the western concepts

55 Writers including Richards, Heppel and Hooker had a problem finding the correct term for this form of “fine”. Richards called it a “fine”, Heppel used “ritual fine” and Hooker used “customary fine.”

56 *Supra* note 19.

of civil damages or the distinctions between degrees of criminal intent do not belong to the customs.⁵⁷

The fine or *ukum* is specified in *kati* or *pikul* where 1 *kati* is equivalent to MYR 1.00 and 1 *pikul* is equivalent to MYR100.00. When the *adat* was codified, the English term that bears the closest meaning and purpose as the *tunggu* or *pengebpo* is restitution. Befitting their purpose, all the codified *adat* in Sarawak use the term “restitution” to refer to these payments.

The payment of restitution has two parts to it. The first is the payment provided by an offender to an injured party; the second is the payment of a ritual propitiation through the slaughtering of a pig, or chicken, or provision of a piece of iron (or ceremonial sword) or a jar or other valuable. The second element had its roots in ancient customary belief systems where ritual propitiation payment had to be made to “cool” or cleanse the environment, to appease the spirits, to strengthen or to protect the souls of the injured party as well as other affected parties. This is partly grounded in the native worldview of their symbiotic relationship to the environment. This is similar to what Judith Baptist describes of the Lotud relationship to their environment and the need to keep balance and harmony. It is summed up thus:

Their belief and ritual system which is orally transmitted also prescribes a code of conduct and ethics to regulate behavior. Contravening this code or *adat* through irregular human actions inadvertently or intentionally, would disrupt this symbiosis and fracture man’s relationship with his environment including the spirits that govern it. These contraventions are considered serious offences as they upset the balance and defile the universe. Appropriate actions must therefore be taken to restore the balance as prescribed in various forms of atonement through fines, penalties and associated rituals according to the rural tradition.⁵⁸

57 *Supra* note 17.

58 Masaru Miyamoto & Judith John Baptist, *Editorial Notes Legal Culture in South East Asia and East Africa*, (2008) 11 Sabah Museum Monograph. (Kota Kinabalu: Department of Sabah Museum, 2008) p.4. See also Judith John Baptist, *Causes and Consequences: Dealing with the Unseen for Secular Restitution among the Dusun Lotud of Tuaran District*, in Miyamoto & Baptist (eds.) *ibid* at p. 1.

The fact that there is injury demands some form of redress and restitution. When there is damage or destruction of property through the action of an individual, it must be repaired or replaced. Indeed, the equitable maxim that “no wrong should go without redress or remedy” applies as *adat*.

Adat and Conciliation

The administration of *adat* is to be understood in the context of jurisdiction of the native courts under the Native Courts Ordinance 1992.⁵⁹ Under section 28 (b), the Native Courts do not have jurisdiction to try any offence that falls under the Penal Code. However, whenever a physical injury or death occurs whether by accident or otherwise, the offence requires a ritual propitiation and restitution to be provided, irrespective of whether the offender is convicted or acquitted by the criminal court. This is especially so when grievous harm is suffered and blood has been spilt. In addition to the fine and restitution payment, an additional ritual propitiation payment called *genselan*⁶⁰ (in Iban) or *Tue'd* (in Kelabit) is required.

Just like the payment of restitution in the form of *tunggu* or *pengepbo*, this is not deemed a punishment, but a form of accountability, providing an incentive to restore relationships, and to maintain peace in the community. Thus the payment of the *genselan*, or *tue'd* is not an admission of guilt but a gesture of goodwill between families and to stall any adverse effect on the community. The main forms of restitution payments as encapsulated under *Kelabit Adat Order* are as follows:

- *Pengbpo* (to pacify)
- *Pengedame* (to cool the atmosphere, to restore peace and tranquility)
- *Tu'ed* (compensation paid to the family for injury or death of a person whether by accident, negligence or otherwise)
- *Pememug iguq* (to remove disgrace and shame)

59 In Sabah, the corresponding statute is the Native Court Enactment (1993).

60 *Genselan* is an Iban term for a ritual propitiation provided for by the offender for a breach or an infringement of a custom or taboo through the slaughter of a chicken or a pig. The blood of the animals is to appease the spirits and “cool” the environment and restore a harmonious relationship that had been disturbed.

Pengbpo is the first restitution payment by an offender to an aggrieved party for a minor offence, to pacify the aggrieved party. But when there is an injury to the person, an additional payment of *pengedame* is to be paid, to restore peace and tranquility in the community. In some cases where the offence has affected the community, *pengedame* is paid to the Headman as a representative of the community. Where death or grievous injury occurs, a *tue'd* has to be paid to the affected person and his or her family. This is one of the highest payments, usually consisting of five *kerubau temadak* (five male buffaloes). Incest or rape, which are also crimes under the Penal Code are an affront to the community. An offender would have to pay *pememug iguq* (Kelabit) or *pemalu* (Iban), a compensation for disgrace to restore self-respect and to remove the shame and embarrassment from the victim or affected party and his or her family.⁶¹ The parties must settle these restitutionary payments immediately although in exceptional circumstances, payments may be deferred for up to a year.⁶²

There is a slight difference with regards to the forms of restitutionary payments between the Iban and Kelabit. The ritual propitiation takes greater significance for the Iban. The provision of a *kering semangat*, in the form of a piece of iron, symbolizes strength, and is important. In addition, animal sacrifices may be made to atone for the wrong. The Kelabit, on the other hand have embraced the Christian faith, and no longer practice any form of blood or animal sacrifices. Rather, the monetary value of the animal will be ascertained and paid as additional monetary compensation.

The importance and centrality of these restitutionary payments underscores the inability of modern laws to deal with breaches of the *adat* at the fundamental level of community relationships. Payment of *ukum* to the State satisfies the law but does not “heal” the relationship or effect conciliation. The restitution and propitiation, makes it

⁶¹ In comparison, among the Kadazan in Penampang, the Rungus of Pitas, Lotud of Tuaran (all in Sabah), Miyamoto records that an offence is basically settled if the offending party makes a compensation for disgrace (*komolu'an*) through a conciliation gift (*babas*), and or reimbursement (*kolugi'an*), to the offending party for causing either mental loss or a material /economic loss.

⁶² Interview of Maran Ayu', also known as Mada' Karuh, a respected mediator in the Kelabit community (January 2013).

possible for the parties to continue living in the community without the risk of revenge or reprisal from the family members of the aggrieved party. The Iban saying captures the spirit of reconciliation thus:

<i>Manuk udah disayat</i>	(The chicken has been slaughtered.)
<i>Besi udah didilat</i>	(The piece of iron has been bitten.)
<i>Nadai tau naruh dengki</i>	(No grudge should be harbored.)
<i>Naruh dendam enggau pangan agi</i>	(No more revenge to be contemplated.)

To complete the restoration of relationships, beyond the payment of *pengebpo* or other “ritual fines” the Kelabit put an emphasis on bringing the parties and their families together to settle the matter, and to be reconciled in a meeting brokered by a mediator or the headman. At these meetings the families would be advised further on how to deal with the aftermath of the offence. In times past, reconciliation was sealed over drinking of *burak* rice wine, and with shaking of hands. Today, as the Kelabit are almost all Christians, the church plays a major role in ministering forgiveness and reconciliation.

When all matters have been settled through mediation, church elders would be invited to witness and to seal their reconciliation through prayers of release and forgiveness. These church leaders are generally, also respected community leaders. The Biblical injunction to “Take heed to yourselves. If your brother trespass against you, rebuke him; and if he repent, forgive him,”⁶³ carries the same intent as the *adat*, and it is taken seriously.

Restorative Justice and Restitution as a Growing Practice

It is significant to note that the concept of restitution is reflected in other justice systems. For example, under Hebrew law, restitution

63 King James Bible. Authorized 1611 Cambridge Edition, Luke 17:3.

formed an essential part of the justice process for the reestablishment of community peace. With restitution, came the notion of vindication of the victim and the law. The justice process was through vindication and reparation to restore a community affected by crime.⁶⁴

Restitution offers an approach to punishment that is ethically, conceptually and practically superior to contemporary criminal justice.⁶⁵ Increasingly, restorative justice is being considered by courts or legislatures and the United Nations as a new approach to criminal justice. In 2002, the United Nations Economic and Social Council adopted a resolution containing a set of Basic Principles on the Use of Restorative Programs in Criminal Matters as a guide to policy makers and community organizations. This is a demonstration of the growing emphasis on restorative justice approaches.⁶⁶ The use of restorative practices is spreading worldwide in education, criminal justice, social work, counseling youth services and faith community applications.⁶⁷

Van Ness points out that customary justice systems of many Indigenous and aboriginal communities reflect some restorative values that have been part of Indigenous cultures for thousands of years and have continued to be practiced.⁶⁸ He suggests that attempts to introduce restorative approaches in schools would do well to consider the cultures of the Indigenous and aboriginal Peoples who have inspired several well-known restorative practices, and initiate cultural change

64 Daniel Van Ness & Karen Heetderks, Strong, Restoring Justice: An Introduction to Restorative Justice. 4th ed. (Philadelphia: Elsevier Reference, 2010).

65 Charles Abel & Frank Marsh, Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal. (Westport, CT: Greenwood Press, 1984).

66 See United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes. (New York: UNODC, 2006) annex II, http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf. Note also the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century which encouraged the “development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties”. ECOSOC, 10th United Nations Congress on the Prevention of Crime and Treatment of Offenders, Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, UN doc. A/CONF.184/4/Rev.3 (2000) para. 29.

67 *Supra* note 50.

68 Daniel Van Ness, Restorative Justice as a World View. Retrieved on 22 January 2014. “<http://www.educ.cam.ac.uk/research/projects/restorativeapproaches/DanielWVanNess.pdf>, at p 4.

as they [schools] inaugurate restorative approaches to discipline.”⁶⁹ He states that introduction of restorative approaches must include the three conceptions of restorative justice: repair of harm, encounter of affected parties and transformation of relationships and culture.⁷⁰

Given that most customary justice systems have elements of restorative justice, what does this global development hold for Indigenous communities, themselves? Can their systems stand alone as an alternative to the State based justice system? This paper has attempted to answer that question.

Concluding Remarks

The case of the Iban and Kelabit are examples of customary justice systems that have clear elements of restorative justice to meet the needs of the native communities. They illustrate how the overall implementation of the justice system is strengthened through linking the customary and State justice systems such that the two justice systems may operate together, without diminishing the indigenous legal traditions and customary laws. Certain elements of punishment are attained through the State system whereas the restitution payments through the *adat* restores and helps the process of healing of relationships. This is augmented by the role of the church in its ministry of forgiveness and reconciliation.

One concern that has been expressed in the implementation of restitutionary payments, be they *tunggu* or *pengedame* or *tu'ed* is that, when imposed, they are often well above the jurisdictional powers conferred by the Native Courts Ordinance. For example, the *Tua Kampung* (Headman's) jurisdiction to impose fines for breach of native law and customs in the Native Courts is MYR 300 (approximately USD 90), but the imposition of a ritual fine of *pengebpo* or *tu'ed* consisting of a pig or up to five buffaloes whose value would be approximately MYR 1000 and MYR 10,000 respectively. This far exceeds the jurisdiction specified under the ordinance. Nonetheless, this is still legitimate because a Native Court

⁶⁹ *Ibid*, p1.

⁷⁰ *Ibid*, at p. 8.

is empowered to award full compensation prescribed by the various native customary laws. It is arguable that the value associated with restitution payments under *adat* are in themselves punitive. Objections have also been raised against resitutionary payments on grounds of double jeopardy—punishing the offender twice for the same offence. That argument fails to appreciate the rationale underlying the restitution payment and the *adat*.

The native customary justice system that is described here is still largely practiced at the lower levels of native courts, mainly in the interior where kinship ties as well as the traditional leadership remain strong. *Adat* continues to be their “staff,” and a source of vitality, survival and continuity. The functionality and effectiveness of this justice system depends on continued social cohesion of the community. Although many young people have moved to towns for education and employment, in the last decade, retirees from the civil service as well as the public sector have begun to return to their ancestral lands in the villages. Many of these people have now begun to take up the leadership in their villages.

There remains the need to empower and to build the capacity of the communities for them to gain better access to justice through their own informal dispute resolution mechanisms. The Native Courts system is an integral part of that and it is important that the institution be strengthened. As Simpson wrote, “A customary system of law can function only if it can preserve a considerable measure of continuity and cohesion and it can do this only if mechanisms exist for the transmission of traditional ideas...”⁷¹ However, it must be clear that the governments and the courts are supplementary and not at the center of the determination of Indigenous customs and legal traditions. It would be well to ensure that those appointed to sit as adjudicators have a knowledge or receptivity to native legal traditions so that justice is meted fairly, taking into account the Indigenous perspective. Finally, it is the communities and their leaders who should be making the judgment about how their customary justice systems

71 AWB, Simpson, *The Common Law and Legal Theory in Oxford Essays in Jurisprudence*, edited by A W B. Simpson, Second Series.(Oxford: Oxford Univ. Press, 1973) 134.

should continue to be administered. In this way, there would there be a participatory process which will be a bulwark against inflexible laws,⁷² and the positive aspects of the customary justice systems would be promoted while simultaneously addressing the shortcomings, to ensure consistency with human rights values.

⁷² *Supra* note 11, at p. 36.