

Traditional Justice: Practitioners' Perspectives

WORKING PAPERS



Paper No. 3

Ensuring Access to Justice Through
Community Courts in Eritrea

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International Development Law Organization (IDLO)

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Published by:

International Development Law Organization in conjunction with the Van Vollenhoven Institute, Leiden University.

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DONOR SUPPORT

This publication is based on research funded by the Bill & Melinda Gates Foundation (<http://www.gatesfoundation.org>). The findings and conclusions contained within are those of the authors and do not necessarily reflect the positions or policies of the Bill & Melinda Gates Foundation.

Ensuring Access to Justice Through Community Courts in Eritrea

Senai W Andemariam¹

INTRODUCTION

The Eritrean communities have an age-long tradition of local dispute resolution in accordance with their respective customary laws, most of which are codified and date back to the 15th century. This tradition is considered part of the day-to-day life of the community and is a reflection of the desire to maintain peace among all of its members.

On 22 September 2003, the Government of Eritrea enacted Proclamation 132/2003² to establish community courts³ and thereby accomplish two objectives.⁴ The first objective is to enable greater participation of the community in the judicial process and make the judicial process accessible to the larger community, the poor in particular. This objective is achieved by allowing the community to elect the judges of the community courts, at least one of whom must be a woman, and by establishing hundreds of community courts. The second objective is to integrate customary dispute resolution mechanisms in the national legal system and thus alleviate the burden of higher courts. To achieve this two-tier objective, community court judges are allowed to reconcile disputants based on customary laws and practices. If the parties fail to reach a compromise, the community court judges then pass judgments based on national laws. Any disputant who does not agree with the judgment can appeal to higher courts. Settlement at the community courts of those disputes that would have been previously brought to the higher courts has alleviated the burden of such courts.

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² The Proclamation was issued in Tigrigna, the predominant literary language in Eritrea, and Arabic. The way languages are used for issuing legislations in Eritrea varies. The tradition involves a mix of legislations issued in Tigrigna only, in English only, in Tigrigna and Arabic, or in Tigrigna, Arabic and English. No legislation has thus far been issued in Arabic only. There is no official language in Eritrea, although Tigrigna and Arabic dominate official texts and government legislations. The Eritrean Constitution of 1997 states that all Eritrean languages are equal. For purposes of this article, all citations of the Tigrigna-issued Proclamations 132/2003 and 133/2003 are the author's own translations.

³ Literally translated, the title of the Proclamation would be "A Proclamation Issued to Establish Community Courts". Some documents of the Ministry of Justice, for example, those from the Office of Coordination of Community Courts, cite the Proclamation as the "Community Court Establishment Proclamation". For purpose of easiness, the author will refer to the legislation as "A Proclamation to Establish Community Courts" or "Proclamation 132/2003".

⁴ The Proclamation does not contain a statement of objectives or a preamble. The author continuously referred to these two objectives during his community court-related experiences (mentioned in above n 1), including his initial work in preparing the current draft legislation to revise the jurisdiction of Eritrean courts.

A report from the Community Courts Chief Coordination Office of the Ministry of Justice shows that from January 2004 to mid-2009, about two-thirds of cases brought to the community courts were settled by agreement (compromise) between the disputants. The steady success of community courts in ensuring peaceful settlement of disputes has inspired the wish to expand jurisdiction of community courts and attracted increasing assistance to strengthen them. Growing interest in customary laws has also revived national studies on them, which encouraged the incorporation of key principles of customary laws into Eritrea's basic laws.

This article will review the contribution and impact of community courts in creating access to justice, empowering the poor to participate in the judicial process, and in efficiently integrating customary dispute settlement in the national legal system. Accordingly, it will illustrate how the two objectives of the establishment of community courts are being progressively achieved.

1. Evolution of the establishment of community courts

The history of the establishment of community courts may be viewed from two perspectives. First, the present-day community courts are intended to be a partial reflection of the long history of the various communities of the Eritrean society in settling legal disputes based on customary laws. Accordingly, the nature of the customary laws within the Eritrean communities and their interaction with successive governments through the customary laws will be described.

Second, the history of efforts in various times to consolidate and use the basic notions of the Eritrean customary dispute resolution norms at the national levels will be described. Reference will be made to previous attempts to weaken or destroy the use of customary laws in dispute resolution in Eritrea.

1.1 The nature of Eritrean customary laws

Communities have always developed rules and procedures for settling disputes that arise among their members. As the socio-economic conditions of these communities grow and evolve — and hence the disputes become more complicated — it becomes more imperative that such rules and procedures adapt accordingly. Also, values and norms of these dynamic means of dispute settlement are part of the daily life of the community, and therefore they can be transmitted from one generation to the next. When the various communities living in a given country have developed indigenous settlement mechanisms that guarantee peaceful co-existence among its citizens, national laws should be developed in line with the inherent values of the society in question.

Eritreans are one of the people in sub-Saharan Africa — if not the only ones — to have had codified or written⁵ customary laws.⁶ The preambles of most of these customary laws claim that the laws were enacted as far back as the 15th century. For example:

⁵ M B Hagos, *Hgtat endaba bmentsr zemenawi hggi ntsotawi me'arnet* (Laws of the Forefathers in View of Modern Law for Gender Equality) (2009) 284-285. Hagos provides a list of 27 customary laws of Eritrea, 23 written and four non-documented, applied throughout the country.

⁶ The name commonly used to refer to customary laws in the various Eritrean communities, *Hggi endaba*, is translated to mean "laws (rules) of the forefathers".

- The preamble to the 1910 amendment to the Customary Law of *Loggo Chwa* (the name of a district in the Eritrean highlands) claims that the first version of the law was enacted in 1492 AD during the reign of Emperor Eskindir of Ethiopia; the second version in 1658 during the reign of Emperor Fasil of Ethiopia; the third version during the early days of the Italian occupation of Eritrea (1900); and the final version during the British Military Administration of Eritrea in 1943.
- Similarly, in a September 1991 interview, Reverend Haile Hadera, an Orthodox Christian priest, one of the elders involved in amending the customary law of *Adkeme-Mlga'e* (coined after the two alleged forefathers of the district in the Eritrean highlands within which this customary law applies), claimed that the *Adkeme-Mlga'e* law was over 800 years old (audio cassette copy of interview available). Another source suggests that the law of *Adkeme Mlga'e* evolved during the reign of Emperor B'edemariam (1467–1477) and it was modified in 1873 during the reign of Emperor Yohannes IV of Ethiopia. In 1940, the law underwent its final amendment: in 1944, Part I was published in the *Rassegna di Studi Etiopici* by Carlo Conti Rossini, and in 1953 Part II was published in the same journal. Both parts of Tigrigna version were published in single edition in 1944.
- Moreover, according to a tradition, the customary law of *Adgna-Tegeleba* (a name indicating the two villages of *Adgna* and *Tegeleba* in the Eritrean highlands, where this customary law applies), was first codified with the name *The Order of M'em Mhaza* (*M'em Mhaza* indicating a region in the southern highlands) during the reign of the Tigrayan ruler Ras Welde-Slassie (1750–1770). It was later amended in 1873, again in 1904, and finally published in its present form in 1946. This code combines the various previous codes known as *Mai Adghi*, *Serao*, *Enda Deko*, *Enda Fegrai* (Tigrigna families in the southern highlands), in addition to *The Order of M'em Mhaza*.⁷

It can be concluded that these customary laws cover almost all the notions embodied in conventional modern laws — substantive (civil, commercial and criminal) and procedural.

Notably, when customary law was recorded or amended, all the villages where it was applied were proportionally represented in the assembly of elders, who would deliberate on the law-making/amendment process.⁸ These elders would sit in a quiet, isolated place and debate the law in pious solemnity for weeks and often for months or years⁹ before they would return to their community and make all the contents of the law publicly known. The public was notified of any amendments to the law and thus their awareness was raised on individual rights and duties, and the legal procedures needed to implement them.

The striking similarities among Eritrean customary laws tend to show that there has been constant interaction between and among the various communities of Eritrean society.¹⁰

⁷ Z Estifanos, W Abraham and G Ghebre-Meskel (compilers), *Codes and Bylaws of Eritrean Regions and Counties* (1990) 207, 463. All citations from this compilation are translations of the Tigrigna version in which the compilation was prepared.

⁸ This is evidenced by long lists with names and villages of the legislators involved, presented at the beginning or end of the respective customary laws. See, for instance, *ibid* 14–18; 113–114; 217–219, 346–347 and 399–400.

⁹ For example, the final 1943 version of the customary law of *Loggo Chwa* took two years to amend. See Estifanos, Abraham and Ghebre-Meskel, above n 7, 219.

¹⁰ Hagos, above n 5, 21–279. Hagos describes in detail the similarities and differences in the rules applicable to various legal concepts (personality, betrothal and marriage, divorce, property, paternity and maternity, maintenance, successions, contracts, various types of crimes and compensation) as contained in 27 customary laws of Eritrea while simultaneously referring to corresponding provisions in national laws, particularly the Transitional Codes. For example, the introduction of the 1943 amendment to the customary law of *Loggo Chwa* contains an

Until the introduction of the Ethiopian Codes in the late 1950s and early 1960s, Eritrean communities used to settle their disputes on the basis of customary law. All litigation hearings were open to the public (hence judges were accountable) and were conducted in front of a village judge. The litigations followed procedures that reflected fairness, secured representation of women and guaranteed the presence of the parties and the swift execution of judgments. Litigants enjoyed the freedom of questioning the partiality of the judges and witnesses who testified under solemn oath. The village paid the so-called 'blood money' if one of its members had killed a person from outside the village, and inter-village marriages were conducted as a means of settling murder disputes.¹¹

1.2 View of customary law at the national level

The following is a brief history of how the various governments that ruled the country applied Eritrean customary laws at the national level.

Carlo Conti Rossini, an Italian scholar, notes that the Italians, who ruled Eritrea from 1890 until 1941, encountered diverse oral and written customary laws governing a law-abiding people. Hence, the Italians allowed the Eritrean society to be governed by its own customary laws except in matters concerning municipal administration and those concerning Italians living in Eritrea.¹²

The British, who administered Eritrea from 1941 to 1951, continued the Italian tradition and allowed legislators to amend their respective customary laws when necessary. These forefathers inked their amendments with the further expectation that their descendants would continue to broaden and amend these laws as needed.¹³

In late 1940s, the United Nations resolved that Eritrea would be federated with Ethiopia, and in 1952, the Federal Government of Eritrea was established. However, in November 1962, with the unilateral dissolution of the Federation and the Ethiopian annexation of Eritrea, the Emperor of Ethiopia, Haile Selassie I wanted to impose his new codes (introduced in the late 1950s and early 1960s) on the Eritrean society. Since Eritrean society had its own dynamic and comprehensive customary laws embedded in the cultural fabric of its various communities, he had to abolish pre-existing laws.

To this end, art 3347(1) of the *Civil Code of Ethiopia 1960* provided: "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

acknowledgment and gratitude to *The Honorable Azmatch* [title] *Tesfay Beraki*, originally from *Loggo Chwa*, who "despite being an official sent to *Meraguz* [a district where the customary law of *Adkeme-Mlga'e* prevails], assisted his heartiest friend, *The Honorable Blatta* [title] *Kahsay Malu* [one of the legislators of the customary law of *Loggo Chwa*], by giving his advice in writing and thus enabled the customary law of *Loggo Chwa* to rise high". Estifanos, Abraham and Ghebre-Meskel, above n 7, 219.

¹¹Estifanos, Abraham and Ghebre-Meskel, above n 7, 15–465. These conclusions can be drawn from the various procedural and substantive laws of Eritrean customary laws compiled for reference and study purposes.

¹²C C Rossini, *Principles of the Customary Law of Eritrea* (1916) 34-210.

¹³Referenced in Estifanos, Abraham and Ghebre-Meskel, above n 7, 112. The Preamble to the 1944 amendment to the customary law of *Adkeme-Mlga'e*, for example, contains this paragraph:

Now that the Most High God has allowed us to write and publish whatever is available [on the law of *Adkeme-Mlga'e*], we call upon our descendants coming after us to hone, update and expand this law over the foundation we have laid. It is easier to amend an existing law than to create a new one. First came the Old Testament and then were written the Gospels in perfect light; and so do we all bless our descendants who will come after us to renew and purify these laws in strict conformation to the manner of our laws.

However, customary laws are an integral part and a reflection of the tradition, lifestyle, belief system and civilization of the community where they are applied. Arguably, one cannot, by the stroke of a pen or by adding a paragraph in a new code, repeal these laws. Similarly, it can also be argued that new laws will only be adhered to in society when its people understand the concepts of the new law and find a way to harmonize the old with the new. This explains why Emperor Haile Selassie I failed when he tried to introduce new codes into Eritrean legal tradition. Despite this imposition, Eritrean society continued to follow the deep-rooted customary laws in resolving disputes.

The Dergue regime, which overthrew the Imperial Government of Ethiopia in September 1974 and ruled Ethiopia (inclusive of Eritrea) until May 1991, followed in the footsteps of the previous imperial government. In May 1991, the Eritrean People's Liberation Front (EPLF)¹⁴ liberated Eritrea. Eritrea gained its formal independence from Ethiopia in May 1993, following a referendum held in April 1993. Independence entitled the Eritrean people to assume full and free control of their destiny and thus the liberty to use their customary laws and search for means of harmonizing them with other national laws.

The EPLF had earlier started the consolidation and use of customary laws in dispute resolution. In the late 1970s, the EPLF initiated the establishment of communal assemblies of elders in liberated and semi-liberated areas to undertake amicable dispute resolution functions. Following Eritrea's liberation in 1991, the Transitional Government of Eritrea resolved to institutionalize traditional dispute settlement mechanisms and institutions by establishing village courts that were to function mostly in rural areas and to serve as the lowest benches of the judiciary for civil and criminal cases.

The law that established village courts was Proclamation Number 25/1992, which amended Proclamation Numbers 1/1991, 5/1991 and Legal Notice 3/1991. The following matters were placed under the jurisdiction of village courts for trial of first instance:

- In civil cases, disputes involving moveable properties for an amount not exceeding ERN2,501 (currently US\$1 = ERN15) and disputes involving immoveable properties for an amount not exceeding ERN5,001; and
- In criminal cases, disputes involving simple bodily injury (art 539(1) of the *Transitional Penal Code of Eritrea 1957* ['TPCE']), simple damage to property of another caused by herds or flocks (art 649(2) of the TPCE), disturbance of possession without use of force (art 650(1) of the TPCE), petty insult or violence (art 794 of the TPCE), simple insult or defamation (art 798 of the TPCE) and petty theft (arts 806-807 of the TPCE).

Village courts did not manage to produce the desired effect of enhancing access to state justice and reducing cases at higher levels of state courts. The institution of village courts was not formally abolished until the establishment of community courts. However, in practice, village courts faded out and their jurisdiction was later merged into the expanded jurisdiction of sub-regional courts. With the introduction of regional administrations in Eritrea through Proclamation 86/1996 (the Proclamation for the Establishment of Regional Administrations), the structure of the courts had to be aligned to the new administrative structure of the country. Thus, sub-regional courts were created as the lowest level of courts in Eritrea. Appeals from sub-regional courts led to regional courts, from regional courts to

¹⁴ The Eritrean People's Liberation Front (EPLF), the revolutionary front that liberated Eritrea in 1991, established the Provisional Government of Eritrea. In February 1994, the EPLF renamed itself the People's Front for Democracy and Justice (PFDJ) as part of its transformation into Eritrea's ruling political party.

the high courts, and from the high courts to the Court (Bench) of Final Appeal. With the enactment of the Proclamation to Establish Community Courts, sub-regional courts were dissolved, and appeals from community courts are now made to the regional courts.

The main reason for the limited success of village courts was that they were established to function as any other court. Although the intent was to enable them to help settle cases amicably, they were not given any clear mandate to do so. Village courts were established by Proclamation 25/1992 as the lowest echelon of the formal court structures. For each court, the Government appointed a village elder to serve as judge. A number of these new judges were either illiterate and/or lacked basic legal training, and the decisions of these single-judge village courts were neither traditional (i.e. dispute resolutions based on local customs and customary laws) nor formal (i.e. judgments based on national laws).

When the Government realized that the village courts were ineffective and that new community-based legal institutions needed a clearer mandate to apply customary laws and practices, it resorted to establishing "mediation elders" (*shmagle erqi*) in all communities with the aim of bringing disputants to settle their cases out of courts. These were neither formalized dispute resolution institutions established by law nor panels of previous customary community judges. Simply, they were panels of village elders selected by the community for their knowledge of customary dispute resolution who would try to mediate when disputes arose in their respective communities. Although constituted at the Government's initiative, these institutions were not integrated in the state legal system because they were not allowed to adjudicate and pass binding judgments when the parties failed to settle their dispute amicably. In addition, parties could not appeal to state courts when dissatisfied with the local settlement.

Responding to the strengths and weaknesses of village courts and *shmagle erqi*, the Government decided to establish a mechanism that would combine the character of both institutions. Like the village courts, it would issue binding judgments if parties failed to settle their disputes amicably. Like the *shmagle erqi*, the new mechanism would be allowed to make use of customary laws and practices familiar to the disputants to try to settle the dispute amicably. Community courts were created in 2003 to accomplish this dual task as well as to provide the communities with an opportunity to participate in the judicial process.

1.3 The development of community courts

The present community court system was created as a logical step to bring the state legal system closer to the people while integrating and formalizing traditional dispute resolution into its lowest tier. Before the introduction of community courts, due to the unequal distribution of formal courts throughout the nation, the rural people had to travel long distances and spend a great deal of money and time to make use of the state legal system. Some people in the southern Red Sea region, for example, had to travel over 300 km to the nearest state courts located in the port cities of Massawa and Asseb. This long distance, together with time and money involved, heavily restricted poor people's access to state justice. The complex procedures and the frequent misunderstandings caused by the differences in language and cultural background between the disputants and the judges, compounded these problems and made it difficult to reach an amicable settlement between the disputants.

2. Brief description of Proclamation 132/2003

Issued on 22 September 2003, Proclamation 132/2003 entered into force on 1 November 2003. In 13 Articles, the Proclamation covers a range of issues including: the establishment

and distribution of community courts; the qualification, election and term of office of community court judges; work procedures; civil and criminal jurisdiction of community courts; courtroom procedures and fees, budget, salary and other benefits of community court judges; and cooperation with, monitoring of, removal and/or disciplinary measures against community court judges. The following is a brief description of the Proclamation.

2.1 Distribution of community courts and election of judges

The Proclamation (art 3) requires the establishment throughout Eritrea of community courts at any convenient level such as a village or group of villages, districts or cities. Each community court is constituted by three judges elected by the people. Article 3 (1) and (2) of Proclamation 132/2003 distinguish the three members of the court as “one judge and two *nebaro*”, with the judge sitting as the presiding member. In Eritrean customary law, particularly in the highlands, the *nebaro* (singular *nebaray*, meaning “one who sits”) consist of an even number of elders called to constitute a majority when their votes are counted together with that of the judge. These elders, owing to their deep knowledge of customs and of the community, assist the judge at all steps during the proceedings, particularly in factual matters. The name *nebaro* seems to have been used in the Proclamation to follow traditional terminology. In the practice of community courts however, the three members of the community court bench are all named “judges”, even though Proclamation 132/2003 outlines some differences in the powers of a judge and a *nebaray*. For example, art 3(9) of Proclamation 132/2003 states that a community court cannot take the testimony of witnesses in the absence of the judge; whereas, in the absence of one *nebaray*, the judge and the other *nebaray* can take the testimony. Article 3(9) however, adds that judgments cannot be pronounced in the absence of any one of the three members of the court.

Judges of community courts are elected for two years and are eligible for re-elections. As required by art 4, to be elected to the community courts, a person must:

- be at least 25 years of age;
- be free from chronic mental problems;
- have fulfilled all national duties required from him/her;¹⁵ and
- not have been previously convicted of theft, embezzlement, corruption or perjury.

With respect to administration, the Ministry of Justice was given the responsibility to manage and oversee the election of community court judges, their budget and their overall functioning.¹⁶

2.2 Jurisdiction

In essence, the jurisdiction of community courts must fit within the purpose of their mandate. A fundamental principle in determining the jurisdiction of community courts is that only cases that are related to disputes arising from the “daily lives of communities” and ones that are “not complicated” should fall within the jurisdiction of such courts.

Accordingly, in civil cases, the jurisdiction of community courts extends to disputes involving:

- movable properties for an amount not exceeding ERN50,000;

¹⁵ This is a vague expression. In practice, however, it is interpreted to mean that the candidate for a community court position must have completed, or be exempted from, the compulsory national service.

¹⁶ Proclamation to Establish Community Courts, art 9.

- immovable properties for an amount not exceeding ERN100,000;
- land-related rights provided for in Proclamation 58/1994, the Land Proclamation, namely:
 - the right to fence the land;
 - the right to mark borders of land;
 - the right to require the cutting off of branches and roots at the point where they invade property of a neighbor; and
 - protecting an allotted plot of land.¹⁷

In criminal matters, community courts have original jurisdiction over the following offences:

- intimidation;
- minor damage to property caused by herds or flocks;
- disturbing the possession of another (but not where the disturbance has involved violence, threats or the assistance of a large number of persons, or has been committed by persons carrying arms or dangerous weapons, in which case the matter shall be taken to the regional courts);
- petty assault and minor acts of violence; and
- slight offences against honor.¹⁸

Since the establishment of community courts dissolved sub-regional courts, art 2(c) of Proclamation 133/2003, which amended the jurisdictions of Eritrean courts following the establishment of community courts, provides that all criminal matters that had previously been under the jurisdiction of sub-regional courts were to fall under the jurisdiction of regional courts.

In the first three or four years after the establishment of community courts, there was a tendency in Eritrea not to consider community courts as part of the court hierarchy in the country, which was reflected in the use of the term “regular” courts to identify courts other than community courts. This notion probably came from the misguided belief that community courts were established to settle disputes by mediation or conciliation of the parties. It should be noted however that:

- Since the establishment of community courts, there have been four levels of courts in Eritrea: community courts, regional courts, high courts and the Court (Bench) of Final Appeal. By law, therefore, community courts are the lowest level of the courts in Eritrea, as were previously the village courts, the district courts and the sub-regional courts;
- Although art 3(10) of Proclamation 132/2003 provides that community court judges must give parties adequate opportunity to settle their dispute by conciliation or negotiation, this article also authorizes them to issue a judgment if the parties fail to reach an amicable settlement;
- Judgments of community courts are appealable to regional courts by the losing party (arts 5 (6) and 8(5) of Proclamation 132/2003);¹⁹ and

¹⁷ Proclamation 58/1994, the Land Proclamation, as also later reflected in the *Constitution of Eritrea 1997*, declared the principle that all land in Eritrea belongs to the State and that a person may only have usufructuary rights on land allotted to him or her by the Government of Eritrea. The legislation also states that the Government of Eritrea will allocate land for industrial and agricultural purposes. A person to whom a plot of land has been allotted has the right to fence and mark the borders of such land, to require the cutting of branches and roots from an adjoining land and to protect such land.

¹⁸These are contained in arts 552, 649(2), 650(1), 794 and 798 of the TPCE respectively. All of these offences, except intimidation (art 552) were previously under the jurisdiction of the village courts. See s 1.2.

- The police, security officers and other government institutions are obliged, as with the other courts, to assist community courts in their functions (art 13 of Proclamation 132/2003).

These and related provisions of Proclamation 132/2003 show that community courts are part of the state legal system. Due to the increase in the number of disputes being settled out of court by community courts and the growing expertise of community court judges in national laws as a result of lessons learned from judgments of regional courts to which community court judgments are appealed, there is increased trust in the capacity of community courts. This can be evidenced from the current plans to expand their jurisdiction.

2.3 Procedure of community courts

Most of the basic procedures in civil and criminal matters applicable in other courts, as contained in the *Transitional Civil Procedure Code of Eritrea 1965* ('TCPCE') and *Transitional Criminal Procedure Code of Eritrea 1961* ('TCRPCE') respectively,²⁰ have been maintained for use in the community courts, although in a much simpler form. The main reason to introduce substance of the TCPCE and TCRPCE procedures into the community courts is to enable the regional and other higher courts to review properly all of the cases appealed from the community courts. These procedures include, in civil cases:

- dismissing a case when the plaintiff does not appear on the appointed date of trial;
- reopening trial if the plaintiff submits sufficient evidence for his or her absence on the appointed date of trial;
- proceeding with trial in absentia if the defendant fails to appear on the appointed date of trial;
- starting a new trial if the defendant submits sufficient evidence for his or her absence on the appointed date of trial;
- hearing witnesses either called by the parties or by the court's own motion; and
- fixing court fees and deciding if court fees can be waived in special circumstances.²¹

In criminal matters, the basic adversarial nature of the Eritrean trial proceedings has been maintained for community court hearings. If convicted, the accused is punishable with a maximum of ERN300. If the convicted person does not pay the fine, the court can substitute the fine with an imprisonment not exceeding 15 days.²²

Although not specifically provided for in Proclamation 132/2003, in practice the parties in civil and criminal cases tried by community courts are not represented by lawyers. The principal justification given for the avoidance of lawyers in community courts is that there is

¹⁹ If the regional court confirms the judgment of the community court, then the case is closed. If the regional court reverses the judgment of the community court, then the party that had won at the community court level can make an appeal to the High Court. The decision of the High Court is final for all parties.

²⁰ In September 1991, the then Provisional Government of Eritrea issued Eritrean Gazette Volume 1, which contained eight transitional proclamations. Except for Proclamation 1/1991 (the Proclamation to Establish Transitional Institutions for the Administration of Justice in Eritrea), these Proclamations (Transitional Civil, Penal, Civil Procedure, Criminal Procedure, Commercial, Maritime Codes of Eritrea and the Transitional Labour Law of Eritrea) were issued by including essential amendments to the same laws previously in force by the Ethiopian Government. With the exception the Transitional Labour Law of Eritrea, which was replaced by Labour Proclamation No. 118/2001, they have been in force up until today. Drafting of the new Civil, Penal, Civil Procedure, Criminal Procedure, Commercial and Maritime Codes of Eritrea as well as a new Evidence Code of Eritrea (drafted by the author of this chapter) has been completed and their official enactment is expected.

²¹ Proclamation to Establish Community Courts, arts 5(2)–(7) and 6.

²² *Ibid* art 8(5).

a need to maintain a balance in the parties' knowledge and power of argument. Another justification is the need to protect the low level of legal knowledge of the community court judges by allowing them to lead the parties to closure of the cases by conciliation, because in the majority of the disputes brought to them, they consider their office as de facto conciliator of the parties.

3. A review of the work of community courts in Eritrea

3.1 A community court in action

A community court can be found in or near the district administration in any big city in Eritrea, or even in a popular spot, or under the shade of the largest tree in a very remote village. There would be three judges, often well over 45 years of age, dressed in original attire, at least one of whom would be a woman. These places are routinely visited by residents of the jurisdiction of the court, and passers-by may stop for a few minutes to see what is going on since they may know the arguing parties, who may be their relatives or neighbors. They may also know the three judges and probably even attended the meeting in which they were voted into office. It is not considered a breach of courtroom decorum for the passer-by to greet the judges and the arguing parties. If interested in the case, passers-by can wait and see if they can be of help in settling the dispute. Occasionally, the judges press the parties to resolve the dispute amicably. Passers-by can be asked to voluntarily intervene in the conciliation together with some other volunteer mediators. The judges can also be, and usually are, part of the mediating (conciliating) team. The settlement process does not consist in hard-and-fast mediation or conciliation. Community court judges and other persons who participate in the dispute settlement process may take on the role of mediators, conciliators or negotiators, as fits the circumstances. It must be noted that, in this article, the terms "conciliation", "mediation", "compromise", "peaceful settlement" are used interchangeably, without reference to their conceptual difference, generally to refer to the means by which the parties to a dispute peacefully settle their matters outside of the court's formal process.

The judges may ask the disputants to select — or the judges may appoint — elders and/or relatives of the disputants to settle the case peacefully out of court. Whether it is the judges of the community court or other individuals requested to mediate or conciliate the disputants, the judges, given that they live close to the parties, are available at any moment for discussion. The complainant may finally be persuaded to receive some form of compensation from the defending party, which would be acceptable to the customary law and tradition prevailing in that district or village. These include covering costs of medication of an injured plaintiff, compensation in the form of money, cattle, cereals, a determined size of traditionally woven cloth, honey, butter, salt, stew spices or other commodities, and a public apology to the victim and his or her family, often in front of village elders, religious leaders or the mediators/conciliators. Of the cases brought to community court judges in January 2004 to mid-2009, over 57 percent were settled in this manner.

If the parties fail to settle their dispute amicably, the community court judges, given their adjudicative powers under Proclamation 132/2003, will proceed with the trial process and issue a judgment based on the relevant provisions of substantive laws such as the *Transitional Civil Code of Eritrea 1991* (TCCE), the *Transitional Penal Code of Eritrea 1957* (TPCE) or the Land Proclamation. After a formal judgment has been pronounced, a party aggrieved with such judgment can make an appeal to the appropriate regional court.

3.2 Level of restoration of customary laws for use in community courts

The Eritrean Government has taken an ambiguous position towards the restoration of customary law. On the one hand, by Proclamation Number 2 of 1991, the Government has not repealed Article 3347 of the *Civil Code of Ethiopia 1960*, which provides that customary laws are not to be used as substantive laws in resolving disputes.²³ On the other hand, with the creation of community courts, customary laws are tolerated for reaching compromises between litigants, although not explicitly allowed by Proclamation 132/2003. It may be concluded that the Government of Eritrea has not officially revived the use of customary laws in resolving legal disputes brought to any court, but seemingly, the government does not oppose the use of customary laws in the amicable resolution of disputes undertaken by the community courts.

3.3 Standards for evaluating community courts

Over the past six-and-a-half years, community courts have played a positive role in Eritrea as shown by statistical reports, the government's decision to further expand their jurisdiction and the increase in interest of the international community to support them. It emerged that they have served as an essential tool in furthering peaceful, out-of-court dispute settlements, in preserving customary dispute resolution mechanisms and in easing the burden of higher courts. The institutional set-up and functions of community courts in Eritrea are evaluated below, according to the following four standards:

- enhancement of popular participation;
- guarantee of the representation of women and protection of their rights;
- tackling of barriers to justice; and
- achievement of out-of-court settlements.

3.3.1 Popular participation in the establishment of community courts

A key method employed in the establishment of community courts to enhance the participation of Eritrean communities in the judicial process is the direct election of community court judges by the people.²⁴

Under Article 53 of the *Eritrean Constitution 1997*, a Judicial Service Commission will be established by law to advise the President of Eritrea on the appointment of judges, supervise their working conditions and give its opinion on these matters. The President shall appoint judges who hold offices after confirmation of their appointment by the National Assembly. The Judicial Service Commission has not yet been established, however. To date, the prevailing legislation on the appointment of judges (Proclamation 1/1991 to Establish Transitional Institutions for the Administration of Justice in Eritrea), provides that judges of the various levels of courts shall, depending on the level of the court, be appointed by the Government of Eritrea (interpreted to mean the President of Eritrea) or by the President of the High Court (now President of the Court [Bench] of Final Appeal). The process of electing community court judges into office by the people may therefore undergo a constitutional test under the Constitution's general principles for the appointment of judges.

Nevertheless, election is one of the most effective instruments in controlling the accountability of officials in the various branches of the government. While the wisdom of

²³ The *Ethiopian Civil Code 1960* was amended by Proclamation Number 2 of 1991.

²⁴ An interesting critique of the wisdom of appointing judges and the ensuing disadvantages can be found in K Malleson and P H Russell (eds), *Appointing Judges in An Age of Judicial Power: Critical Perspectives From Around the World* (2006).

appointing judges into office may be questioned if viewed from the perspective of countries where judges are appointed by the executive and confirmed by the legislative body,²⁵ the advantages of a direct election of judges to enhance popular involvement and a sense of local ownership in the state legal system are self-evident.

There are no specific rules in Proclamation 132/2003 applicable to the election of community court members. Although the lack of uniform election rules has its disadvantages,²⁶ this was intended to allow each community to resort to its customary process of electing community leaders and judges. The Eritrean communities have always observed their respective norms and rituals for electing customary law judges, called *chQa Addi* or *dagna Addi*,²⁷ and Proclamation 132/2003 merely requires that judges of the community courts be elected by the respective community. Such practice has brought proximity between the people and the judicial process.

The participation of the people at the beginning of the establishment of the community courts by the election process is also ensured throughout the term of office of the judges, since the latter involve members of the community in the numerous mediation/conciliation processes that dominate the functions of community courts.

3.3.2 The representation of women in the community courts

A notable achievement of the establishment of community courts from a gender perspective is the representation of women on the bench. Although not specifically required by Proclamation 132/2003, in practice it is expected that at least one of the judges of the community courts be a woman. In a country where women were not elected as village

²⁵ Recall, however, that in some countries with the most advanced and powerful judiciaries, certain judges are elected by the people. With respect to the election of U.S. state judges:

Unlike federal judges, who are appointed by the president with the Senate's approval, state judges come to the bench in a variety of ways. Some judges are appointed by state governors and, after a period of time, stand for elections. Other judges are elected from the beginning. Sometimes these elections are contested and partisan; often they are not. In recent years states have tried to improve the quality of state and local judges by creating panels of qualified lawyers from which state governors choose the judges they appoint.

– Microsoft Corporation, *United States Government*, Encarta 2009.

²⁶ A notable disadvantage is that the election process may select judges that do not fairly represent the communities that have elected them. Although, unlike the legislative body, community court judges are not expected to be elected to represent fairly the various communities in which they serve, the legitimacy and acceptability of these judges is undeniably bolstered if the communities that have elected them feel that the three judges represent fairly the composition of the community. Even in systems where judges are appointed by the executive and confirmed by the legislature, the appointment of judges is carefully undertaken to reflect the political, social, economic, racial and religious composition of the respective countries. See the following for an analysis of the U.S. experience in appointment of U.S. Supreme Court judges: A Liptak, 'Stevens, the Only Protestant on the Supreme Court', *The New York Times*, (New York) 10 April 2010 <<http://www.nytimes.com/2010/04/11/weekinreview/11liptak.html>> at 7 January 2011. Another disadvantage is that there are no uniformly explicit rules regulating the lodging of electorate complaints against the fairness of the election process. However, resorting to an election process traditionally familiar to each Eritrean community has greatly ameliorated any such grievances.

²⁷ Literally translated, the Tigrigna phrases *chQa Addi* or *dagna Addi* mean, respectively, "mud of a village" or "judge of a village". The origin of the phrase *chQa Addi* is interesting because the office of the judge is equated to mud, a substance that is treaded equally by everyone, weak or strong. By this expression, the community wants the village judge to think that he has been appointed to treat everybody in the community without distinction. In fact, when the village elders plead a person to be their village judge, they tell him (village judges have always been men) that they want him to be like the *goduf* (dumping ground) of the village. This is a figurative expression used to ask the judge to be patient to patiently hear and settle the wrongs of the community as one would dump all his wastes to a dumping ground.

judges, this is a groundbreaking step in securing women’s interests. Tables 1 and 2 show the male-female distribution of community court judges in the 2003 and 2008 elections.²⁸

Table 1. Male-female distribution of community court judges during the first election (2003)

| Region | Total number of judges | Gender | | Percentage of women judges |
|------------------|------------------------|--------------|------------|----------------------------|
| | | Men | Women | |
| Center | 165 | 118 | 47 | 28.5 |
| South | 639 | 452 | 187 | 29.3 |
| Anseba | 327 | 274 | 53 | 16.2 |
| Gash Barka | 531 | 465 | 66 | 12.4 |
| Northern Red Sea | 294 | 260 | 34 | 11.6 |
| Southern Red Sea | 90 | 67 | 23 | 25.6 |
| Total | 2,046 | 1,636 | 410 | 20.0 |

As a result of the policy of women’s participation in community courts, from 2003 to 2008, the number of women community court judges increased by 8.4 percent.

Table 2. Male-female distribution of community court judges during the second election (2008)

| Region | Total number of judges | Gender | | Percentage of women judges |
|------------------|------------------------|------------|------------|----------------------------|
| | | Men | Women | |
| Center | 108 | 72 | 36 | 33.3 |
| South | 350 | 227 | 123 | 35.1 |
| Anseba | 135 | 115 | 20 | 14.8 |
| Gash Barka | 282 | 186 | 96 | 34.0 |
| Northern Red Sea | 171 | 150 | 21 | 12.3 |
| Southern Red Sea | 15 | 10 | 5 | 33.3 |
| Total | 1,061 | 760 | 301 | 28.4 |

The presence of women in community courts is of paramount importance both to women litigants and to women living in various communities. First, it strengthens the Government’s policy to ensure access to all offices and occupations on a gender-equal basis. Second, arguably the presence of a woman in a community court gives a woman litigant an advantage because the woman judge may be more understanding to women-specific issues, such as child maintenance, than her male colleagues. Finally, the presence of a woman judge in the community court may encourage women litigants to bring their cases before the court, especially in a society where women have been traditionally barred from accessing justice directly.

3.3.3 Tackling barriers to justice

The Commission on Legal Empowerment of the Poor asserted that “at least [four] billion people [in the world] are excluded from the rule of law.”²⁹ Carothers states that the current “rule-of-law orthodoxy” that focuses on nationally applicable formal laws and procedures, usually not understood by the wider public, could not effectively create efficient access to

²⁸ Although by law the election of community court judges had to be conducted every two years, logistic and other challenges led the Ministry of Justice to suspend the second election, due in 2005, until 2008, when the second round of elections were conducted.

²⁹ Commission on Legal Empowerment of the Poor and UNDP, *Making the Law Work for Everyone*, Report Volume 1 (2008) 3; See also M De Langen and M Barendrecht, ‘Legal Empowerment of the Poor: Innovating Access to Justice’ in G Rizvi and J de Jong (eds), *The State of Access: Success and Failure of Democracies to Create Equal Opportunities* (2009), 262 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1355446> at 7 January 2011.

justice for the people, especially the poor.³⁰ Golub writes that this top-down approach needs to be replaced by what he and other scholars dub the “bottom-up approach” to create better access to justice and empower the poor.³¹ Access to justice and legal empowerment³² of the poor have become the core standards for measuring the newly emerging bottom-up approaches to legal services, especially after the common barriers to justice have started to be identified.³³ These barriers are geographical distance, financial obstacles, language, cultural norms, delays, and the complexity of laws and procedures.³⁴ The establishment and functioning of community courts will be discussed below in light of their contribution to tackling the above-mentioned barriers to justice.

Distance

The dearth of legal professionals both in and outside the judiciary has become a serious impediment to the Ministry of Justice’s desire to expand its outreach by extending its services to remote towns and villages in Eritrea. Today, there are only 36 regional courts in Eritrea. Previously there was only one High Court, in the capital Asmara; however, after years of efforts, the Ministry of Justice established four new High Courts – one in Anseba Region, two in Debub Region and one in Gash Barka Region.³⁵ Prior to the establishment of community courts, litigants had to travel long distances, often for two or three days, to reach the nearest sub-regional or regional court.³⁶

During the first round of elections, 683 community courts were opened, covering the entire nation.³⁷ The first three to four years of community court practice have shown that, in some regions, the number of community courts was excessive or some communities continued to resort to more indigenous forms of dispute settlement, such as in the case of the Afar tribe of the southern Red Sea region. Hence, the number of community courts has been drastically reduced to 368 as of 15 April 2010, still a sizable number compared with that of regional and high courts in Eritrea. This has allowed rural people to have easier access to

³⁰ Ibid 260. Carothers challenges the three types of reforms intended to create access and empower the poor: “Revising laws or whole codes to weed out antiquated provisions [...] ... the strengthening of law-related institutions, usually to make them more competent, efficient, and accountable [...] and] reforms aimed at the deeper goal of increasing government’s compliance with law. A key step is achieving genuine judicial independence.”

³¹ B van Rooij, ‘Bringing Justice to the Poor: Bottom-up Legal Development Cooperation’ (2009), 8, SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368185> at 7 January 2011.

³² The World Bank uses the term “justice for the poor” and has developed a program to this end. The World Bank explains the program as:

an attempt by the World Bank to grapple with some of the theoretical and practical challenges of promoting justice sector reform in a number of countries in Africa and East Asia. Justice for the Poor reflects an understanding of the need for demand oriented, community driven approach to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized as women, youth and ethnic minorities.

Ibid 7-8.

³³ The Eritrean Ministry of Justice holds that one of the goals of the community courts is to enhance access to justice by the poor and their participation in legal proceedings. E A Elobaid and S W Andemariam, *Evaluation Report: UNDP Eritrea, Capacity Building in the Justice Sector Project No. 00035786* (2007) 13–14 <<http://erc.undp.org/evaluationadmin/reports/viewreport.html?jsessionid=3E3C7E107171C88DC7ABB29DCE5B8DF6?docid=1314>> at 7 January 2011.

³⁴ Langen and Barendrecht, above n 29, 254–256.

³⁵ The High Court in Asmara has two benches presiding over civil matters, one over commercial matters and one over criminal matters, both of which sit as courts of first instance and as appellate courts for cases appealed from regional courts in the central region of Eritrea. Moreover, there is a panel of five judges in the Asmara High Court building constituting the Court (Bench) of Final Appeal, which is the highest court of the land.

³⁶ The author of this article is witness to this situation. When serving as judge at the courts in the cities of Massawa and Ghinda’e in 2001, there were litigants who would come from the cities of Gele’alo and Af’abet after travelling for two to three days, some on camels.

³⁷ Ibid 13.

state justice by approaching the community courts near them for the settlement of “daily life” disputes.

Financial barriers

Linked to the issue of distance is the financial difficulty that the poor face in bringing their cases to court, specifically the costs of travel to the courts and lodging. There would be substantial savings in litigation-related expenses for the poor if they were allowed to litigate in courts near their homes, without having to pay for an attorney and by making simple applications.³⁸ Statistics show the success of community courts in amicable dispute settlement and this has in turn greatly reduced the expenses that the litigants would otherwise incur if they were to make appeals to regional courts and high courts.

Language

Language is the third barrier in securing access to justice. Eritrea is a nation of nearly five million people divided into nine major ethnic groups,³⁹ each speaking its own language.⁴⁰ Although the judicial service is crucial to the daily lives of a given nation's people, appointing a judge to serve in a community who is unfamiliar with its traditions, language or way of life is a difficult barrier to his or her efficiency. Judges and prosecutors appointed to work in regional and high courts in Eritrea very often meet parties who have a different tradition and language.⁴¹

Since community court judges are elected from the community in which they live and work, and whose language they speak, this indubitably reduces the estrangement often felt between courts and litigants in Eritrea. The proximity between community court judges and litigants is one of the factors contributing to the high number of quick and peaceful dispute settlements in these courts.

Complexity of laws and procedures

Community courts were required to follow the most basic procedures contained in the TCPCE and TCRPCE.⁴² The wholesale application of the procedures contained in these codes to the community court litigations would have created proceedings not easily understood by the common citizen. As noted throughout this article, the emphasis of community court procedures is to immediately resort to out-of-court settlement. The fear of losing a case due to lack of knowledge of the substantive and procedural laws is greatly reduced in community courts, which encourage such settlements as part of their way of operating.

³⁸ It should be noted, however, that the court fees payable for opening a civil case continue to apply to files opened before the community courts, another indication that community courts are part of the formal judicial structure. Court fees are governed by the Legal Notice No. 177 of 1952, otherwise known as Court (Fees) Rules of 1952, which were issued as part of the various Rules of Court enacted to further implement Proclamation No. 2 of 1942, the Administration of Justice Proclamation. In 1991, the Provisional Government of Eritrea proclaimed that the Court (Fees) Rules of 1952 should continue to be in force.

³⁹ These are Tigrigna, Tigre, Saho, Afar, Blin, Kunama, Nara, Hdarb and Rashaida.

⁴⁰ These are Tigrigna, Tigre, Saho, Afar, Blin, Kunama, Nara, Bdawiyet and Arabic for the Tigrigna, Tigre, Saho, Afar, Blin, Kunama, Nara, Hdarb and Rashaida ethnic groups, respectively. For a more detailed profile of the country, see <<https://www.cia.gov/library/publications/the-world-factbook/geos/er.html>> at 7 January 2011.

⁴¹ In his practice as a judge in a predominantly Tigre-speaking region, the author of this article, coming from a Tigrigna background, encountered language problems in communicating with Tigre-speaking litigants. The use of interpreters often made the proceedings tiring and complex.

⁴² Instead of stating the obvious that community courts must follow the TCPCE and TCRPCE, Proclamation 132/2003, Issued to Establish Community Courts included the most fundamental elements of these procedural codes in the text of the legislation allowing each community court judge to easily preside over the cases brought to his or her bench.

Cultural norms

Barriers to justice based on cultural norms include the tradition common to some societies where taking a case to the court or seeking remedies from courts is considered dishonorable, an embarrassment to community elders, or a sign that the community is unable to handle its problems.⁴³ In remote Eritrean villages, there is still the tendency — arising from the belief that community courts are like the other courts in all aspects — to resolve disputes, including murder cases, by the village elders. However, people have increasingly been encouraged to approach community courts because in the majority of cases people who are knowledgeable of customary laws are elected into the community courts, hence the high probability that cases that go to the community courts will be settled under customary practices.

3.3.4 Achieving out-of-court settlements

As previously noted, community courts place great emphasis on out-of-court dispute settlements. Table 3 shows that from January 2004 to mid-2009, a total of 117,586 cases were brought to the community courts, out of which approximately 57 percent were settled by a compromise between the parties and 31 percent decided by judgment of the community courts, with 11 percent pending.

Table 3. Preliminary report of all cases (civil and criminal) brought to community courts from 2004 to mid-2009.

| Year | Total no. of cases | Decided (%) | Settled without trial total (%) | Pending by the end of the year (%) ⁴⁴ |
|--------------|--------------------|-----------------------|---------------------------------|--|
| 2004–2006 | 60 333 | 20,246 (33.5) | 37,326 (61.9) | 2,761 (4.6) |
| 2007 | 23 845 | 6,787 (28.46) | 12,316 (51.65) | 4,742 (19.89) |
| 2008 | 22 673 | 7,078 (31.22) | 11,972 (52.80) | 3,623 (15.98) |
| Mid-2009 | 10 735 | 2,611 (24.32) | 5,845 (54.45) | 2,279 (21.23) |
| Total | 117 586 | 36,722 (31.22) | 67,459 (57.36) | 13,405 (11.40) |

Sources: E A Elobaid and S W Andemariam, Evaluation Report: UNDP Eritrea, Capacity Building in the Justice Sector, 41; Community Courts Chief Coordination Office of the Ministry of Justice.

A key element in the high percentage of cases being resolved out of court by community courts is that the community court judges, being part of the community of the litigants, know the parties well and are well known to them. There is a higher probability that relatives and community elders are involved and also that the litigants live in the same village or district. Hence, there are more chances of personal interaction.

An interesting question arising from the high number of disputes settled out of court by community courts is whether the plaintiffs or complainants, especially women, are being excessively pressured not to pursue their claims for judgments under national laws. Or in the extreme of cases, could some community courts be putting too much emphasis on out-of-court settlement due to the fear of a reversal of their judgments by the higher courts

⁴³ Langen and Barendrecht, above n 29, 255.

⁴⁴ Hence, to give a clear picture of the statistics, cases that have not been decided by the end of 2007, for example, might be added to the cases decided or settled out of court in 2008, or possibly transferred to 2009 if not decided in 2008. However, in all tables indicating the number of cases brought to community courts, the total number indicated as heard in a given year includes the ones transferred from the previous year. For example, the reported total of 22,673 cases brought to community courts in 2008 include the 4,742 cases identified as pending by the end of 2007. However, statistics do not show how many of these cases were decided by the end of 2008. Therefore, it is not clear if some of them were still pending by the end of 2008 and therefore to be indicated as transferred to 2009.

which are more knowledgeable of national laws? A useful approach to respond to these and related questions would be that community court judges be further trained in courtroom procedure,⁴⁵ including voluntary reactions of litigants to out-of-court settlements. A comprehensive statistical report on the quality of such settlements could then be conducted.

Non-community courts also frequently push for a compromise between the litigants and thus a withdrawal of the dispute.⁴⁶ Community court judges however, are expected to serve the litigants and they see themselves as facilitators of a compromise between the litigants. The first action that community courts take is to guide the parties towards a compromise. In a system like the Eritrean community courts however, the mediators (the community court judges in this case) can also refer to national law to pass executable judgments, which may convince both parties to resort to compromise. Thus, the community court system arguably strengthens the state legal system by allowing speedy case resolution through mediation and by simultaneously extending the jurisdiction of national law, which applies when parties fail to mediate.

4. Further strengthening of community courts

Seven years of experience of community courts show that the community court system tends to ensure access of the wider population to basic judicial service and peaceful settlement of disputes. An April 2007 evaluation of the community courts recommended further support to and strengthening of the community courts.⁴⁷ The plan to strengthen community courts required financial assistance. The United Nations Development Programme (UNDP) had assisted the community court plan as part of its Capacity Building in the Justice Sector project. On 2 September 2009, the European Commission and the Government of Eritrea signed a Country Strategy Paper and National Indicative Programme for 2009-2013, whereby the former agreed to provide the latter with a financial assistance of €122 million.⁴⁸ Part of the amount, €9.7 million, will be earmarked for strengthening the community courts. The following is an analysis of some of the activities in progress to strengthen community courts and other steps that need to be taken to achieve this.

4.1 Expanding jurisdiction of community courts

During a national meeting of the Ministry of Justice and its stakeholders in May 2007, a review of the 2004-2006 activities of the community courts was presented and discussed. Among the various recommendations was that, given the achievements of the community courts, the jurisdiction of community courts should be expanded to include more cases. If community court judges can be further trained on national laws, there is a general

⁴⁵ In his joint evaluation of the 2004–2006 functions of community courts, the author of this article visited a number of community courts and had access to their court records. Compared with records kept by the other courts, community court records lack depth, arguably owing to the judges' inadequate training in national laws and court procedures. Further, it is difficult to obtain complete information of the entire process solely from their records.

⁴⁶ Article 275(1) of the TCPCE states that "A compromise agreement may at any time be made by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them."

⁴⁷ Elobaid and Andemariam, above n 33, 30.

⁴⁸ Eritrea-European Community: *Country Strategy Paper and National Indicative Programme for the Period 2009–2013* (2009) Social Science Research Network <http://www.deleri.ec.europa.eu/whatsnew/CSP-NIP_2009-2013.PDF> at 7 January 2011; PE/2009/8686 C (2009) 9149: *Commission Decision of 25 November 2009 on the Annual Action Programme 2009 in favour of Eritrea to be financed from the 10th European Development Fund* (2009) Europe Aid <http://www.ec.europa.eu/europeaid/documents/aap/2009/aap_2009_eri_en.pdf> at 7 January 2011; *New EU support programmes to foster poverty alleviation in Eritrea* (2009) Europe Aid <http://www.ec.europa.eu/europeaid/documents/aap/2009/pr_aap_2009_eri.pdf> at 7 January 2011.

agreement that adding more cases to their jurisdiction can serve the greater goals of access to justice and peaceful settlement of disputes.

An overall plan has been in progress at the Ministry of Justice to review the jurisdiction of the three levels of courts with original jurisdiction — community courts, regional courts and high courts. A pyramidal structuring of jurisdiction whereby the majority of cases would begin at the lower level courts and the few, complex cases would be brought to higher level courts can relieve congestion of cases in the higher courts, allowing judges more time to study cases and carry out research in order to deliver refined judgments. The standard that must apply for adding more cases to the original jurisdiction of community courts is to select cases related to the day-to-day lives of communities and those that are socially relevant.

Draft legislation on the adjustment of jurisdiction of Eritrean courts is now completed. If the legislation passes, the community courts' jurisdiction will be expanded to comprise a number of civil causes including: family disputes, abuse of ownership leading to nuisance, right of way, publication of succession rights, repair of a wall or a building, lost objects or stray animals, abuse of ownership, and the use of rainwater and its flow to lands on low levels. Criminal disputes including defamation and insult, failure to provide financial support to family members, infringement of the right to privacy, damage to property caused by herds or flocks, and disturbance of possession of private or public property will be under the original jurisdiction of community courts.

The current legislative proposal to add more cases to the primary jurisdiction of community courts should be implemented under the condition that community court judges receive more training in national law. It is also important that judges of the community courts be literate.

4.2 Term of office and literacy

A number of reviews of the activities of community courts have indicated that the two-year term of office of community courts can thwart the progress of the courts if the judges have to sit for election every two years.⁴⁹ This problem is further highlighted by the concern that the huge expenses involved in training community court judges can be futile if the trained judges work for two years and fail to be re-elected. However, the Ministry of Justice responds that the failure to be re-elected can be an asset because regular installation of new judges leads to more people with legal training in the localities, which can be an essential tool in disseminating knowledge of the law to families and neighbors in the community. The draft legislation proposes to balance these two legitimate arguments by extending the term of office of community court judges to four years.

Officers at the Community Courts Chief Coordination Office of the Ministry of Justice state that in a few community courts, none of the judges are literate and must receive assistance by students in the communities for writing functions. The Ministry of Justice has started to place graduates of a one-year, college-level law training as assistants to community courts. The trainees will assist the community court judges not only in writing court decisions and keeping court files, but also in helping the judges understand relevant national laws that need to be referred to in delivering judgments. Moreover, the draft legislation on the

⁴⁹ These reviews include comments given by judges and public prosecutors during the presentation in April 2010 of the draft legislation to amend Proclamation 132/2003. Expansion of the term of office of community court judges from two to four years is also a precondition for the EU assistance program mentioned at the beginning of this article.

adjustment of jurisdiction of courts provides that at least one of the three judges in each community court must be able to read and write.

4.3 Clarity in the use of customary laws

The extent to which customary law can be used in deciding on a given issue must also be clearly spelled out in the future. A notable uncertainty in the operations of community courts is the status of the customary laws of Eritrea. Currently, the use of customary law as a source of law for delivering judgments is prohibited by the national laws, specifically art 3347(1) of the TCCE. Proclamation 132/2003 does not contain an explicit provision allowing community courts to refer to local traditions or customary laws for any purposes. However, perhaps owing to their background, in a short time, judges of community courts have developed the tradition of referring to customary laws in reaching a compromise between disputants. To this end, any subsequent legislation on community courts needs to be specific on how, if, when and to what extent community courts can refer to local traditions or customary laws in deciding on a case.

4.4 Issues for further research

The increased rate of out-of-court dispute settlements, close to 60 percent, may also be a cause of concern. Documents at the Community Courts Chief Coordination Office of the Ministry of Justice do not reveal if the wronged parties, especially women, under the pretext of peace-making with the wrongdoer and respect to the community, were put under pressure not to proceed with court action. The proposal to add more cases to the primary jurisdiction of community courts can lead to more cases being settled without resort to national laws, something that could lead to inadequate redress for the wronged party. Research should therefore be conducted on this issue.

Moreover, a more complete review of the achievements of community courts needs to be supported by advanced statistical data. At present, for example, there is no data regarding the percentage of cases appealed to regional courts against the judgments of community courts and how many of the appealed cases were upheld, modified or reversed. The assessments of the higher courts on the soundness of the judgments of community courts need to be collected in order to further integrate both court systems. Furthermore, perspectives of community court users, especially in the rural areas, need to be studied.

5. Conclusions

Community courts, as opposed to the previous post-independence institutions of village courts and *shmagle erqi*, have recorded positive achievements in ensuring the administration of justice at the village and district levels. The democratic means of establishing each community court through election has brought the Eritrean communities closer to the judicial service and allowed them to monitor the courts' transparency. Electing women in each community court is another asset of the community courts because it contributes to national efforts to ensure greater emancipation of women and their involvement in the judicial process.

The mixed nature of community courts, i.e. their application of national laws in delivering judgments while simultaneously referring to local customs and indigenous laws in settling disputes out of court, enables them to act as a conduit between customary and national laws. Therefore, they may be used as effective tools for preserving the nation's rich pool of customary laws as its heritage and for disseminating knowledge of national laws to the local arena. The high level of participation of community members in peaceful dispute settlements

led by the community courts in their vicinity brings societies, rich and poor alike, closer to the judicial service.

Community courts have also played their role in the legal empowerment of the poor. The concept of legal empowerment of the poor includes *inter alia*, encouraging them to resort to informal justice systems by involving religious authorities, local authorities and other local procedures.⁵⁰ In this sense, community courts have involved a variety of intermediaries and conciliators in their efforts towards out-of-court dispute settlement.

⁵⁰ Langen and Barendrecht, above n 29, 264.