

PRACTISING PLURALISM

REGULATING LAWYER CONDUCT IN PACIFIC ISLAND COUNTRIES: FIJI, KIRIBATI, AND VANUATU

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A handwritten signature in black ink, appearing to read 'D. Naylor', enclosed within a large, loopy, oval-shaped flourish.

.....
David Gordon Naylor
6 December 2023

DEDICATION

To the faces in the street.

*S'io credesse che mia risposta fosse
A persona che mai tornasse al mondo,
Questa fiamma staria senza piu scosse.
Ma perciocche giammai di questo fondo
Non torno vivo alcun, s'i'odo il vero,
Senza tema d'infamia ti rispondo.*

The Divine Comedy

(*Inf.* 27.61-66)

To my mother. For always requiring three good reasons.

To Alex; to Paul, Pete, Roz, Karen, Jen, Luke, and Fran; and to my two research assistants Lani and Evie (both miniature dachshunds), it was you who got me through. I promise I'll start baking again. I owe you all an immense debt of cakes.

ABSTRACT

This thesis presents the findings of the first comprehensive academic investigation of lawyer regulation and practice in Pacific Island Countries (PICs). Good lawyers are in high demand in PICs as facilitators of trade and economic activity and access to justice; champions for the rule of law; and technical experts in the ongoing projects of decolonisation and protection of indigenous cultures. However, in most Pacific jurisdictions, existing regulatory systems typically lack resources and capacity to regulate lawyers effectively, creating serious negative consequences for clients, the administration of justice and inevitably for trade and investment.

Utilising documentary analysis and ethnographically informed fieldwork conducted in three jurisdictions: Fiji, Kiribati, and Vanuatu, this thesis describes how state and non-state systems regulate lawyer conduct in practice and how lawyers in these PICs conceive of being a 'good lawyer.' It finds that lawyer conduct is influenced by a plurality of actants from both state and non-state sources, requiring lawyers to perform a complex 'dance' to navigate conflicting professional, customary and social norms. The empirical findings also demonstrate that reform of laws regulating lawyers is both technically and politically complicated, with challenges compounded by bureaucratic capacity constraints, embedded normative pluralities and other factors such as scale and geography.

These empirical findings lead to the theoretical argument that regulators who wish to intervene to strengthen lawyer competence and ethics in PICs need to go beyond strategic interventions in legal education, professional development, supporting professional associations of lawyers, and law reform (although all those are necessary). What is required are innovative regulatory approaches that are better adapted to local contexts and constraints than the existing and (mostly) outdated models. To aid in such a development, the thesis proposes a 'pluralist-relational approach to lawyer regulation,' which was developed abductively from the empirical data and draws from theories of pluralism, relationality and regulatory compliance.

There are three main advantages of a pluralist-relational approach. First it emphasises the need to understand lawyer regulation empirically, extending analytical depth beyond existing scholarship that primarily relies on comparative approaches with regulation in the Global North and involves a needs/deficit lens to evaluate existing regulatory frameworks. Second, it enables a regulator to develop a holistic understanding of the complex and relational factors that influence lawyer conduct in PICs, ensuring a deeper understanding of the compliance puzzle. Third, by applying a

pluralist-relational approach to lawyer regulation, a regulator can formulate adaptive and context-sensitive regulatory and enforcement strategies that work ‘with the grain’ of locally embedded systems.

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I wish also to acknowledge all of my current and former law students at the University of the South Pacific (USP) who now number in the thousands. You have taught me far more about law and legal education in the Pacific Region than I have taught you. In the time it has taken me to write this thesis some of you have travelled to the UN and back to make an historic and crucial request for an advisory opinion from the International Court of Justice on the Obligations of States in Respect of Climate Change. May your courage equal your desire as you hurl the little stones upon the great. There will be no Second Troy.

I additionally wish to thank my colleagues both former and present at the USP School of Law. In addition, I wish to thank the many Pacific scholars involved more broadly in law schools and Pacific research institutions around the world. Thank you for your research, patience and friendship over many years which have guided my questions, epistemic tools and my understanding of how to apply them.

I offer my deep gratitude to my Panel, chaired by my Supervisor Professor Miranda Forsyth. Simply put I could not have done this without your wisdom, networks and kindness, even as the landscape abductively came into focus. To Professor Veronica Taylor, thank you. Your feedback at critical junctures pushed me to consider different perspectives to see the overall pattern as it slowly coalesced. To Associate Professor Carolyn Penfold, your pioneering research on legal education in Vanuatu and Solomon Islands was daunting, yet it guided my research at seemingly every turn.

Last, but never least, to Professor Emeritus Eric Colvin. Eric. You set me on this path without quite knowing what it might involve, or where it might lead. I think one of the next places it leads will need to be your veranda for a slow dinner, quick conversation and a sensibly paced bottle of red. Or two.

David Gordon Naylor

Map of Pacific Region

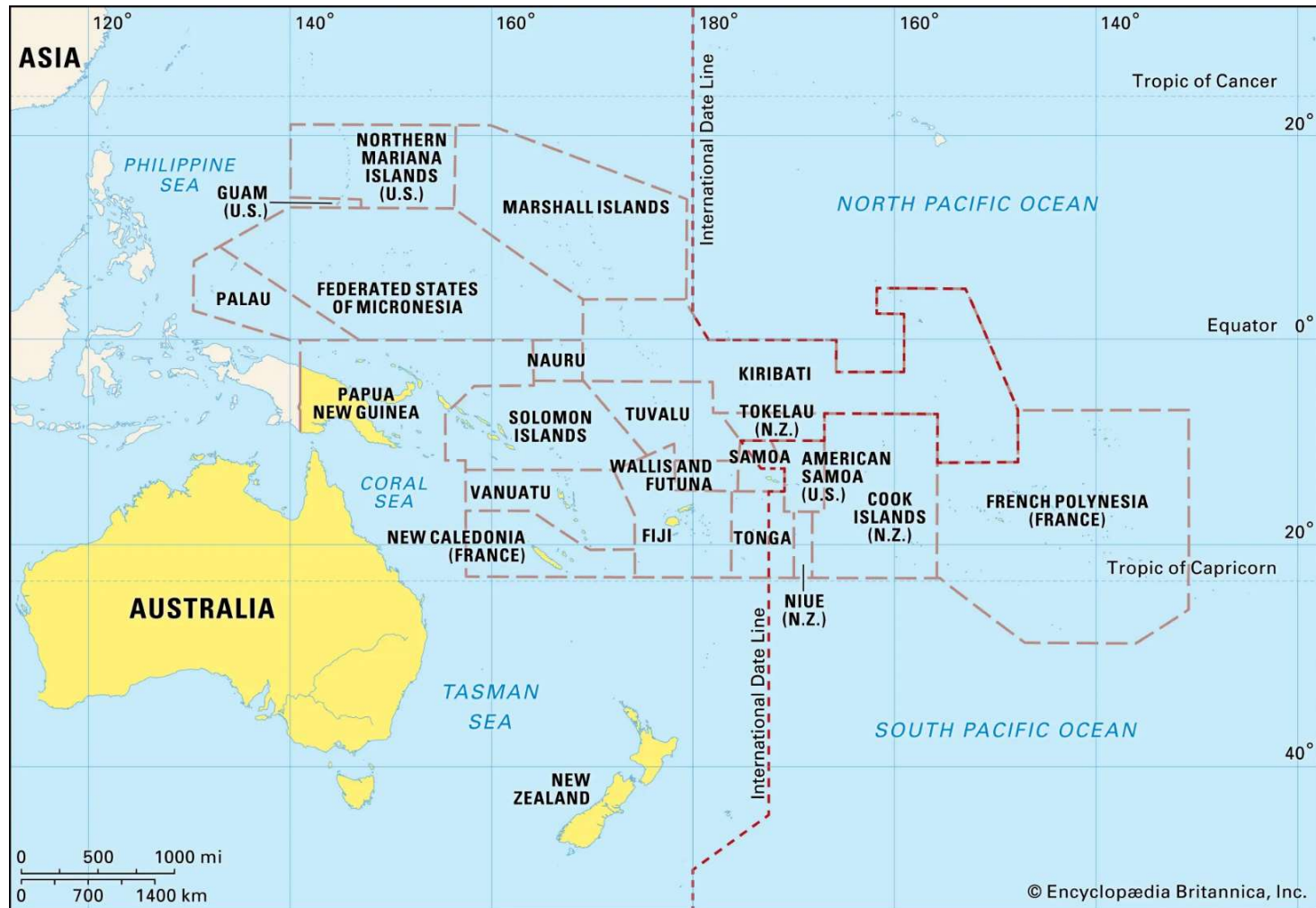


Image 1: Map of Pacific Region

Map of Republic of Fiji

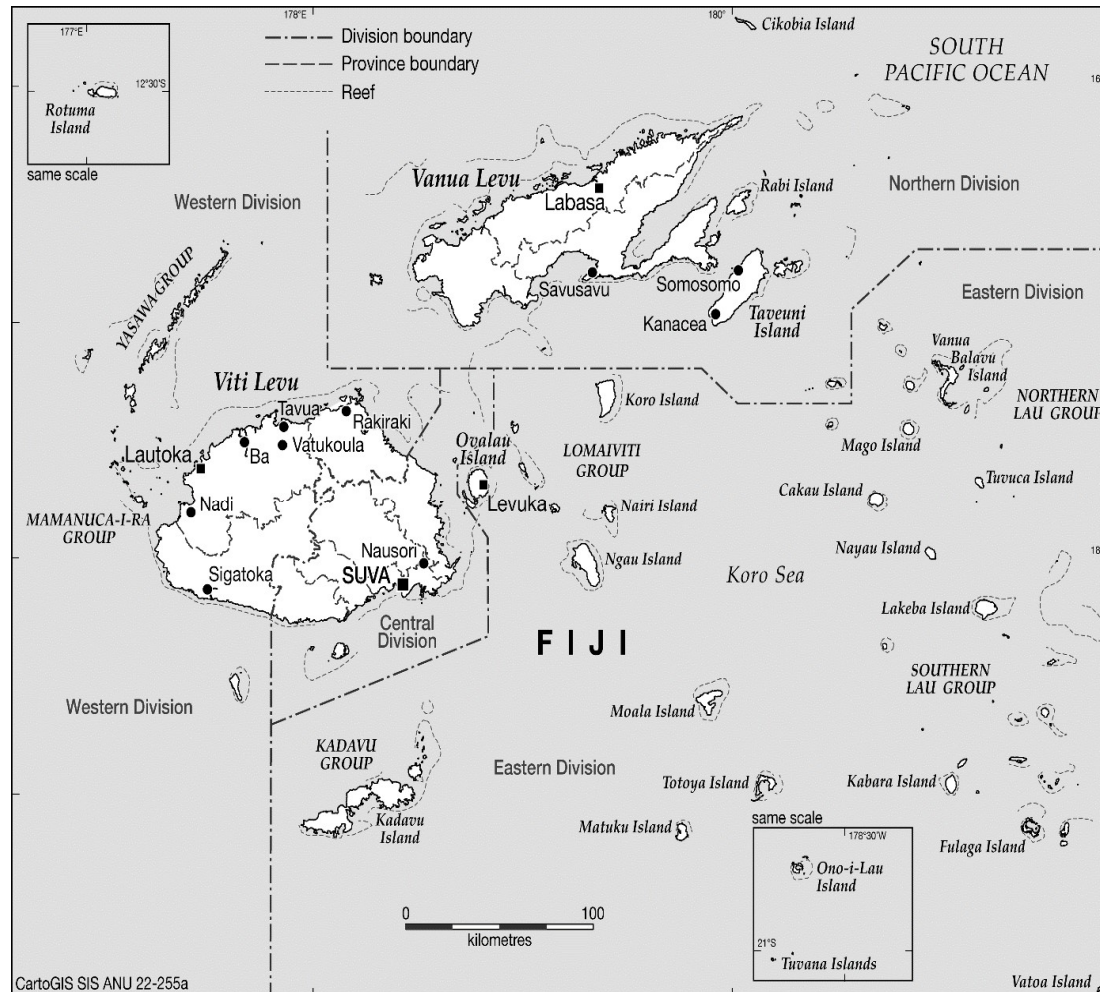


Image 2: Map of Republic of Fiji

Map of Republic of Kiribati

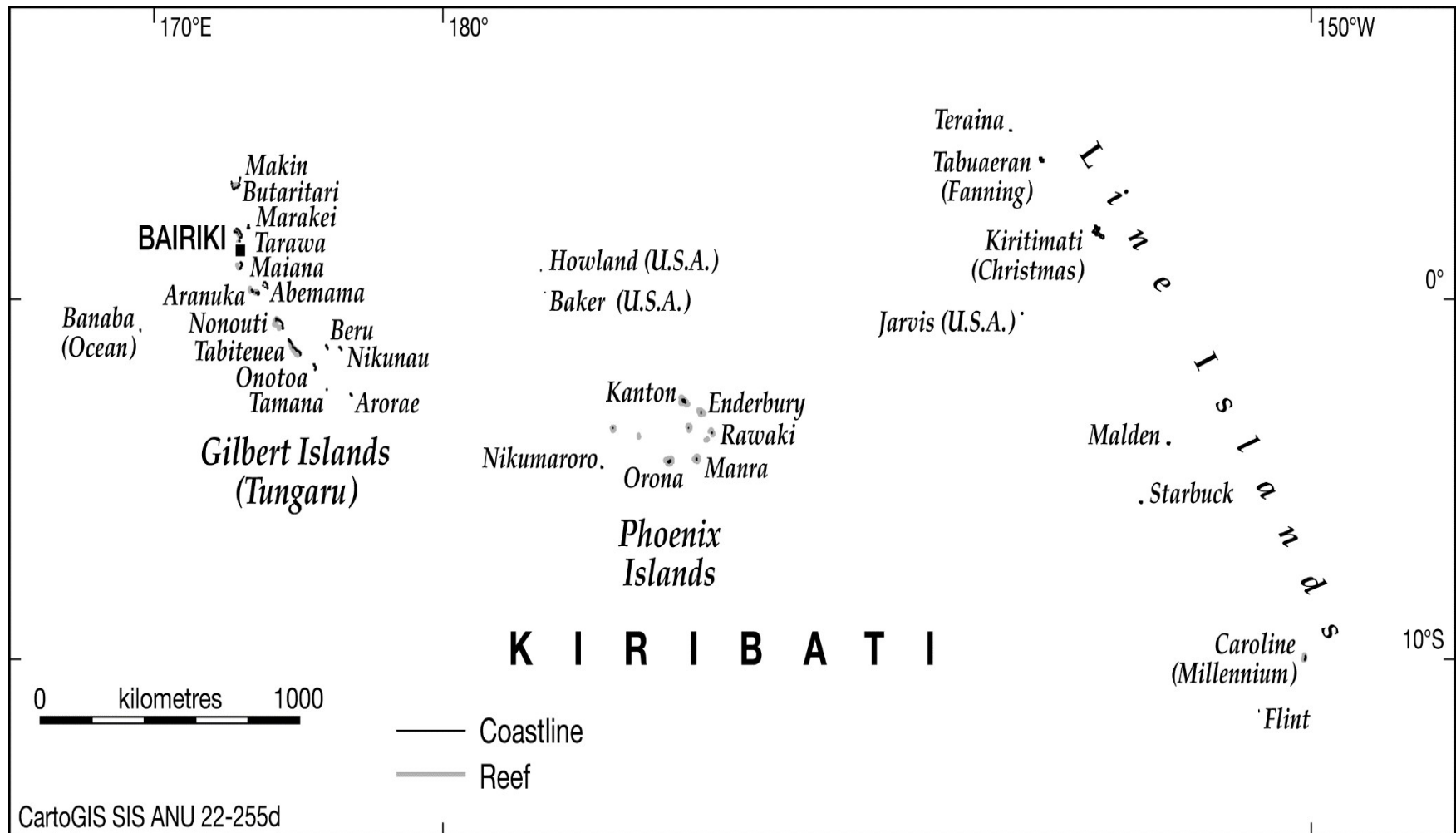


Image 3: Map Republic of Kiribati

Map of Republic of Vanuatu

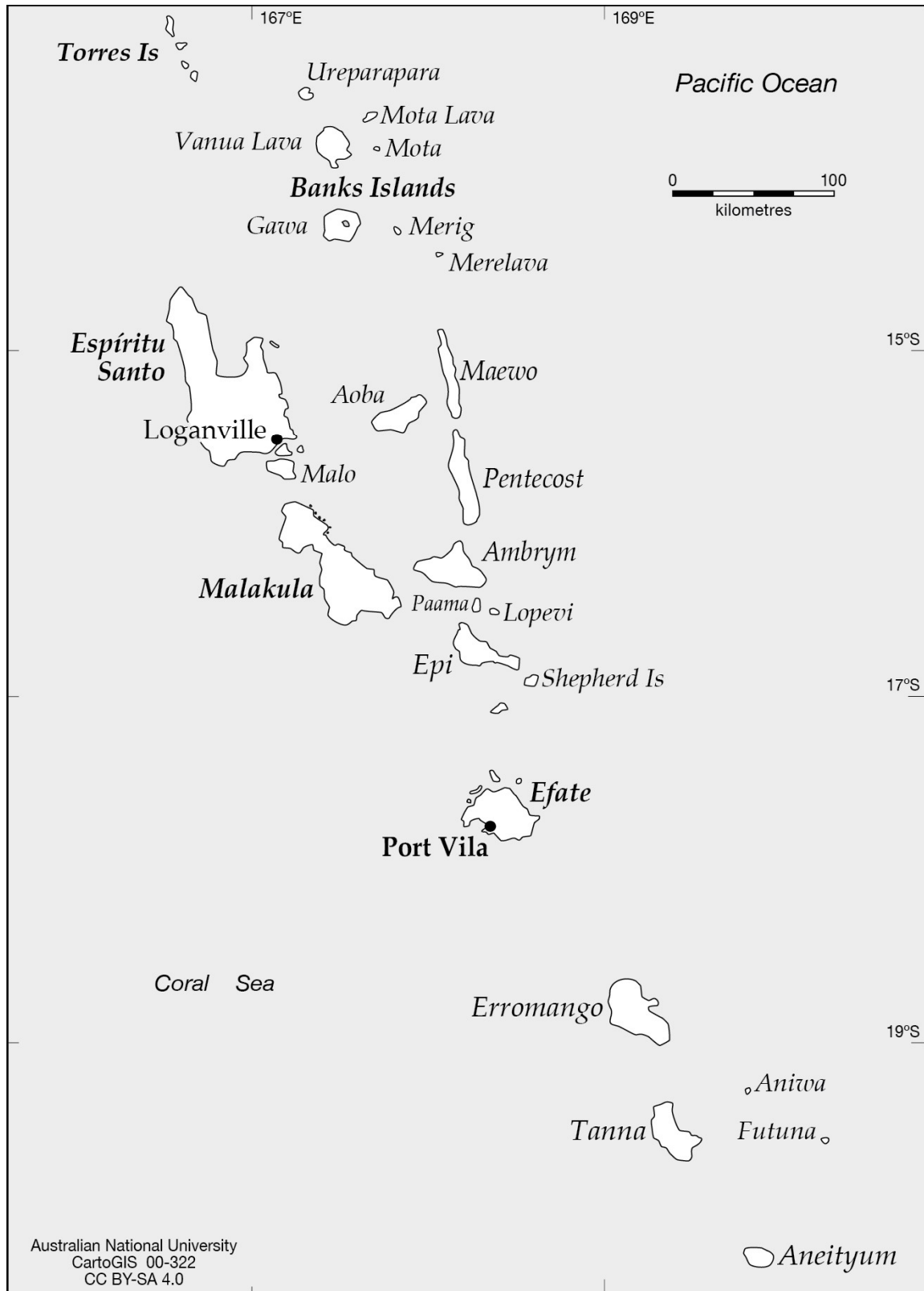


Image 4: Map of Vanuatu

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LIST OF ABBREVIATIONS

CPD	Continuing Professional Development or Continuing Legal Education
DPP	Director of Public Prosecutions
FELA	Fiji Environmental Law Association
FLS	Fiji Law Society
IBA	International Bar Association
KILN	Kingdom International Legal Network
KLS	Kiribati Law Society
LLB	Bachelor of Laws
LPU	Fiji Legal Practitioners' Unit
PacLII	Pacific Islands Legal Information Institute
PDLP	Professional Diploma in Legal Practice
PICs	Pacific Island Countries (see further glossary)
PIF	Pacific Islands Forum
PILON	Pacific Islands Law Officers' Network
PJSI	Pacific Judicial Strengthening Initiative
SPC	South Pacific Community
SPLA	South Pacific Lawyers' Association
UN	United Nations
USP	University of the South Pacific
VLC	Vanuatu Law Council
VLS	Vanuatu Law Society

GLOSSARY

Below are definitions for a number of specific terms used in this dissertation. For terms in Pacific languages both dictionaries and native speakers were consulted to ensure accurate translation of meaning.

Term	Definition
Legal Practice Environment	The physical and geographic locations in which lawyers provide legal services (e.g. courts and their surroundings, offices of law firms, at home and other settings).
Pacific Island Countries (PICs)	For the purposes of this project, PICs means common law Pacific Islands Forum member countries excluding Australia and New Zealand; specifically: the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. ¹
Professional Standards	The complete range of legal duties and obligations lawyers have with respect to their qualifications, competence and ethical practice of law.

1.1.1. Terms in Te-Kiribati

Te Kiribati	Translation to English
<i>Beretitenti</i>	President of the Republic of Kiribati
<i>I-Kiribati</i>	Indigenous person from Kiribati
<i>Kaainga</i>	the site of the <i>mwenga</i> of an <i>utu</i>
<i>Maneaba ni Maungatabu</i>	Parliament of Kiribati
<i>Mwenga</i>	Home, or household
<i>Rorobuaka</i>	Warriors (historically, now generally used as a term for a young man)
<i>te katei ni Kiribati</i>	The Kiribati way
<i>te mweaka</i>	Gifting
<i>Uea</i>	Chiefs
<i>Unaine</i>	Respected elder women
<i>Unimwane</i>	Respected elder men
<i>Utu</i>	Family and extended family

1.1.2. Terms in Na vosa vaka Viti

Na vosa vaka Viti	Translation to English
<i>Buli Vanua</i>	Environmental stewardship
<i>E va gauna na ka kece</i>	Fijian saying meaning 'there is a time and a place for everything'
<i>iTaukei</i>	Indigenous Fijian
<i>Mataqali</i>	Extended family
<i>Tabua</i>	Whales tooth
<i>Talanoa</i>	Storytelling
<i>va'ava'acebo</i>	Formal giving
<i>Vanua</i>	Land, people and custom
<i>Vakavinavinaka</i>	Showing gratitude
<i>Vakadidike</i>	Perseverance

¹ 'Who We Are Pacific Island Forum', *Forumsec* (Web Page, 1 November 2023) <<https://www.forumsec.org/who-we-arePacific-islands-forum/>>.

Na vosa vaka Viti	Translation to English
<i>VakaiTaukei</i>	Preservation of <i>iTaukei</i> culture
<i>Veiwekani</i>	Traditional systems for social and economic support of extended family
<i>Yaqona</i>	Kava (<i>piper methysticum</i>)
<i>Yavusa</i>	Village
1.1.3. Terms in <i>Bislama</i>	
<i>Kastom</i>	Traditional culture
<i>Malvatumauri</i>	A constitutionally recognised body, serves as an advisory body to the government on matters related to traditional customs and culture.
<i>Nakamal</i>	Meeting house
1.1.4. Terms in Samoan	
<i>Fa'a Samoa</i>	The Samoan way ²
<i>fa'alavelave</i>	Gift exchange

² Fritz Toeata Fa'apaoi Filisi, 'Fa'alavelave: Samoan Gift Exchange' (PhD Thesis, Auckland University of Technology, 2023).; Hal Levine, 'Some Reflections on Samoan Cultural Practice and Group Identity in Contemporary Wellington, New Zealand' (2003) 24(2) *Journal of Intercultural Studies* 175.

INTRODUCTION

1. MARY'S CHOICE

You are Mary, a state lawyer working primarily as a criminal law prosecutor in a small Pacific Island Country (PIC). You are an early-career lawyer with three years of post-admission experience. You are female, twenty-eight years old, married, with three children under the age of five. You go to church and are a member of the parish committee where you are valued for the advantages your legal skills bring your church and local community. Last week your mother called and asked you to send money and attend your cousin Rachel's wedding. Rachel is fourteen and, apparently, recently began sleeping with a seventeen-year-old boy, your second cousin Tomasi. Rachel may also be pregnant, although there are no pregnancy tests available. She is young, claims to be in love and wishes to get married. Their marriage is encouraged by the local Pastor because they are living in sin, which would be sanctified if they married. For your aunt, Rachel's mother, the marriage would mitigate the social shame of her daughter's premarital relationship. Under your traditional laws, your *Kastom*, such a marriage is permitted with parental consent.

However, as a lawyer, you are also well aware that under the official laws of your country, Rachel is a minor and cannot provide legal consent to sexual intercourse. Your second cousin Tomasi is (probably) guilty of statutory-rape of a minor – a serious criminal offence which if proven typically carries a sentence of 6-10 years in prison. As a lawyer, in your oath of admission, you swore on the Bible to uphold the laws of your country. Statutory rape is a serious indictable offence and failing to report your second cousin to the police would be a crime. Not only that, failing to report material facts of a serious crime could amount to professional misconduct and would also be a serious violation under the public service code of conduct – a striking off and sackable offence.

Sexual exploitation of minors and broader issues of gender-based-violence are significant social problems in your country. Since becoming a lawyer, you have become an advocate for the human rights and dignities of women and children. This role often puts you in conflict with the patriarchal values enshrined in your *Kastom* and your faith. You start to argue and your mother pleads with you to accept the decision and 'to not cause problems' for the family. If you report the crime, you may be ostracised from your family, treated with mistrust within your local community and at the most extreme threatened with physical harm. Do you report the (suspected) rapist?

What does it mean to be a good lawyer when what is right according to state law, your *Kastom*, and your faith diverge? What conditions and factors most strongly influence your decision-making? Does it matter that the chance of actually being charged with a crime is miniscule? Does it matter that the police would never divert their scant resources to investigate, let alone secure a conviction?

Lawyers in PICs face myriad permutations of Mary's choice on a regular basis, yet there are no resources they can refer to when faced with such questions. Indeed, existing literature on the regulation of lawyers in PICs offers few insights into legal practice, let alone the normative dynamics that operate within legal practice environments. The contribution of this thesis to filling this gap is to explore: how lawyers in PICs conceptualise being a good lawyer; the effects of state and non-state systems on lawyer conduct and compliance; and how a responsive regulator can interpret regulatory signals, such as lawyer conduct, to inform appropriate and effective regulatory action.

2. INTRODUCTION

The deep legal pluralism that exists in Pacific Island Countries (PICs) and the embeddedness of relational systems within the formal structures of the state create a complex environment for legal practice.¹ Mary's case illustrates the sort of ethical 'trolley dilemma'² lawyers in PICs often face as they navigate the intersection of constitutional, religious (predominantly Christian) and customary systems of norms in their day-to-day practice of law. Their ability to skilfully navigate this intersection when advising clients and in all aspects of professional practice is essential to being a 'good lawyer.'³ As Mary's case shows, ethical questions for lawyers in PICs are resolved within a pluralist paradigm, one where an individual's moral 'right' is often weighted against strict compliance with professional standards.⁴

Legal scholars from the Pacific and elsewhere have long questioned the capacity of traditional positivist approaches to explain or address complex policy and law reform issues within pluralist local paradigms.⁵ Unfortunately in PICs, formal regulatory systems for lawyers are styled upon traditional legal positivist approaches to lawyer regulation adopted and applied from former colonial powers.⁶ One important consequence of this legacy is that, with few exceptions, this leaves

¹ Jennifer Corrin, 'Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific' (2017) 48(2) *Victoria University of Wellington Law Review* 305.; Erika J Techera, 'Legal Pluralism, Indigenous People and Small Island Developing States: Achieving Good Environmental Governance in the South Pacific' (2010) 42(61) *The Journal of Legal Pluralism and Unofficial Law* 171.

² The 'Trolley problem' is the name given to a classic ethical thought experiment in which an onlooker has the choice to divert an out-of-control rail trolley from its current track, where it will certainly kill five people, onto a different track where it will certainly kill one person. It is commonly framed as an exemplar of utilitarian versus deontological ethics. Debate of the problem often contrasts the morality of passivity versus an active choice to kill. See Philippa Foot, 'The Problem of Abortion and the Doctrine of the Double Effect' (1967) 5 *Oxford Review*. and Judith Jarvis Thomson, 'Killing, Letting Die, and the Trolley Problem' (1976) 59(2) *The Monist* 204. Questions of lawyer ethics in PICs, such as Mary's, often involve far more complicated consequences of a choice to act or not act, but involve the same trade-off between what is 'good' and what sacrifice is 'acceptable', or 'not too much'. These concepts are explored further in Chapter Seven.

³ In Chapter Four an archetype of a good lawyer is constructed from empirical data. See Chapter Four, Figure 5: Archetype of the good lawyer, p. 128.

⁴ In this thesis, the term 'Professional Standards' is used to refer to the complete range of legal duties and obligations lawyers have with respect to their qualifications, competence, and ethical practice of law. These are typically written, e.g. in the form of statutes and codes of conduct and through principles arising under common law.

⁵ See for example Miranda Forsyth, 'Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea' (2022) 32(5) *Policing and Society* 1.; Carolyn Penfold, 'Developing Legal Communication Skills in the South Pacific Context' (2014) 24(1) *Legal Education Review* 117.; Jennifer Corrin, 'Crossing the Border from Custom to Contract: Legal Pluralism and Pacific Islands' Contract Laws' (2021) 21(1) *Oxford University Commonwealth Law Journal* 73.; Jennifer Corrin, 'Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 41(59) *The Journal of Legal Pluralism and Unofficial Law* 29.; Techera, 'Legal Pluralism, Indigenous People and Small Island Developing States: Achieving Good Environmental Governance in the South Pacific' (2010); Richard Grimes, 'Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific' (1995) 199 *Professional Legal Education* 199.; See also Martin de Bree and Martin Dees, 'How to Regulate in a Complex World' Ecpr Conference, June 21, 2021). See further discussion on legal pluralism in Chapter One, p. 27.

⁶ See further discussion in Chapter One. p. 34 and Chapter Three. p. 82 and discussion of state regulatory systems in Fiji, Kiribati, and Vanuatu in Chapter Five. On legal positivism see Jeremy Bentham, *Theory of Legislation*, tr R Hildreth (Trübner and Co, 1864).; HL Hart and John Austin, *The Province of Jurisprudence Determined and the Uses of the Study*

large gaps between how regulatory systems are designed and how they operate in practice in post-colonial societies. Lawyers are often required ‘to go “beyond” the letter of the [law] ... [or] to comply with the “spirit” or “purpose” of the law’⁷ in the pursuit and delivery of the justice of the state.⁸ Unfortunately, many lawyers, like Mary, upon entering legal practice feel poorly supported to navigate the complex local legal practice environments they face.⁹ The critical function of lawyers in small island states means that it is vital to ensure lawyers are better equipped to be good lawyers.¹⁰

Recent research on the legal profession in PICs has identified a range of ways lawyers in PICs might be better supported to be good lawyers, such as: reforming legal education;¹¹ strengthening professional associations;¹² and through law reform and related measures.¹³ Unfortunately, such strategies are complex, requiring the active engagement of many actors and substantial resources to execute effectively. Additionally, the question of how to ‘do’ legal pluralism in PICs is a compounding challenge for governments and regulators.¹⁴ New proposals for specific interventions and reforms risk over-reliance on the same positivist approaches, such as legal transplant, that have limited the development of law and governance in the region since the pre-independence era.¹⁵ To

of *Jurisprudence* (Weidenfeld and Nicholson, London, 1954). For legal theorists, legal positivism describes a deontological normative paradigm rooted in obedience to prescribed laws and rules. The position this thesis aligns itself with is that the dominant positivist regulatory approaches in PICs, in addition to struggling to establish strong regulatory institutions, also provide poor explanations of lawyer behaviour in practice. This is especially visible within pluralist post-colonial legal systems, such as exist in PICs, where the weakness of the bureaucratic state yields to the relative strength of embedded normative pluralities. On this see further Chapter Three. p. 96.

⁷ Samuel J Levine, ‘The Law and the Spirit of the Law in Legal Ethics’ (2015)(1) *Journal of the Professional Lawyer* 1. p. 2.

⁸ See further Chapters Six and Seven, and on the delivery of the bureaucratic state by the relational state in PICs see Forsyth, ‘Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea’ (2022).

⁹ In this thesis, the term legal practice environment refers to the physical and geographic locations in which lawyers provide legal services (e.g. courts and their surroundings, offices of law firms, at home and other settings). See Glossary. p. xix.

¹⁰ On the roles of lawyers, see Chapter One section 4. Lawyers and the Legal Profession in PICs, p. 34.

¹¹ Carolyn Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (PhD Thesis, Australian National University, 2017).

¹² South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (Report, South Pacific Lawyers’ Association, 2011).; Carolyn Graydon, ‘Situation Analysis of Pacific Lawyer Associations’ (Report, Pacific Judicial Strengthening Initiative, May 2021).

¹³ South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (Report, South Pacific Lawyers’ Association, 2017). 8-9. For example, the SPLA identify deficiencies in lawyer admission rules, complaints and discipline handling processes, auditing of lawyers’ accounts and continuing legal education. See further, Francesca Bartlett, ‘A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands’ Legal Profession’ (2018) 42(2) *Fordham International Law Journal* 231.; Pauline Mogish and David Lambu, ‘Rights and Procedures of Admission in South Pacific Countries’ (2013) 15 *Journal of South Pacific Law* CP-3.; Nilesh N Bilimoria, ‘Choices for the South Pacific Region’s Bar Associations and Law Societies?’ in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer, 2017) 245.; Peter MacFarlane, ‘The Importance of Ethics and the Application of Ethical Principles to the Legal Profession’ (2002) 6(2) *Journal of South Pacific Law* 1.

¹⁴ See for example Miranda Forsyth, ‘How to ‘Do’ Legal Pluralism’ (2007) *Available at SSRN 993617*.

¹⁵ On this, see further Chapter One, section 3.3, p. 30.

support the recognition of more locally-relevant ‘relational approaches’ to regulating lawyers in PICs, there is a need for empirical research to investigate and explain how lawyer conduct is influenced in practice by state and non-state institutions, phenomena and environments. This thesis aims to contribute to filling this knowledge gap.

3. MAPPING THIS THESIS

This thesis critically investigates the regulation of lawyers in three jurisdictions: Fiji, Kiribati, and Vanuatu. The empirical study used a mixed-methods approach that combined 67 qualitative interviews,¹⁶ case studies, and analysis of literature to advance understanding of lawyer regulation in Pacific Island contexts.¹⁷ Through an abductive analytical process, a ‘pluralist-relational approach to lawyer regulation’ was developed as a framework for understanding the complex interactions between state and non-state sources of regulation of lawyer conduct. Using this lens, this thesis seeks to fill existing gaps in literature by:

- Offering the first comprehensive academic study on lawyer regulation in practice in PICs;
- Challenging existing paradigms by proposing an innovative framework for understanding lawyer regulation in PICs that draws insights from theories of pluralism, relationality and regulatory compliance;
- Proposing actionable recommendations, grounded in empirical data, for regulators and policymakers.

3.1. Research Problem Statement

Existing systems regulating the conduct of lawyers in PICs face considerable barriers to ensuring professional standards of lawyers for a plethora of reasons linked to their histories, geographies and colonisation.¹⁸ This is problematic because lawyers perform a number of critical roles relevant to good governance in PICs including: the delivery of access to justice; facilitating trade and investment; and serving as legally qualified mediators and translators between state and customary

¹⁶ These included many ‘elite’ interviews with senior government officials, past and current judicial officers, law society presidents, academics and lawyers.

¹⁷ See further Chapter Three, p. 59.

¹⁸ The paradigm for law in PICs is explored in detail in Chapter One, p. 13.

norms.¹⁹ A legal profession that is better supported and regulated to be competent and ethical can deliver better legal services and perform their critical functions to support stable democracies.²⁰

The conventional policy approach by governments to laws that do not operate effectively is to undertake law reform.²¹ While locally-relevant and responsive law reform is important to ensuring long-term stability of legal institutions, law reform as a vehicle for achieving policy goals in least developed countries often yields mixed results.²² Within PICs, efforts to improve systems regulating lawyers through law reform have been infrequent and have a chequered history.²³ For example, in some PICs, previous attempts have resulted in: laws passed by Parliament, but never gazetted;²⁴ the languishing of a Bill, following a gruelling reform process lasting more than a decade;²⁵ and regulatory systems that do not operate in practice as they were designed.²⁶ In Fiji, sweeping reforms imposed by Decree in 2009 (without notice to the public or the profession) resulted in a tense relationship between lawyers and the regulator and questions regarding the independence of the regulatory system.²⁷ The difficulty of law reform to achieve regulatory objectives in PICs

¹⁹ On the role of lawyers as translators see Clark D Cunningham, 'Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse' (1991) 77 *Cornell Law Review* 1298.; Daniel Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 *Indiana Journal Global Legal Studies* 105.; Deborah Cao, *Translating Law* (Multilingual Matters, 2007).

²⁰ See Law Council of Australia, 'The Lawyer Project Report' (Report, Law Council of Australia, September 2021).; Okechukwu Oko, 'The Lawyer's Role in a Contemporary Democracy, Promoting the Rule of Law, Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience' (2009) 77(4) *Fordham Law Review* 1295.; Carrie Menkel-Meadow, 'The Lawyer's Role (S) in Deliberative Democracy' (2004) 5(2) *Nevada Law Journal* 347.; United Nations, *Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990).

²¹ See Lester M Salamon, *The Tools of Government: A Guide to the New Governance* (Oxford University Press, 2002).; Ronald J Daniels and Michael Trebilcock, 'The Political Economy of Rule of Law Reform in Developing Countries' (2004) 26 *Michigan Journal of International Law* 99.

²² Kevin Davis and Michael J Trebilcock, 'What Role Do Legal Institutions Play in Development?' (Conference Paper, Imf Conference on Second Generation Reforms, Washington Dc, 8-9 November 1999).; TK Poole, 'Law and Economic Development in South Africa: An Assessment through the General Theory of Law and Development' (2019) 12(2) *Law and Development Review* 377.

²³ On the chequered history of reform of legislation regulating lawyers in PICs see Chapter Three at 3.3, p. 99. See generally South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011); South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017).

²⁴ Such as the *Legal Profession Act 2005* (Vanuatu).

²⁵ As has been the case for the *Solomon Islands Legal Profession Bill 2007* (No. 3 of 2017). See Bartlett, 'A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands' Legal Profession' (2018). The reasons it has languished are complex, but ultimately reflect that not all parties involved in the regulation of lawyers agree on the final form for the Act. As noted by Carolyn Graydon 'The Parliamentary Committee which considered the draft law in 2017, recommended that the draft law be amended to require the Government to provide the "necessary resources, manpower and funding" to cover the functions of both the Legal Practice Authority and the Law Society, Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021) 18. See further Bills and Legislation Committee, 'Report on the *Legal Profession Bill 2007* (No. 3 of 2017)' (Committee Report, National Parliament of Solomon Islands 2017).

²⁶ See further Chapter Five, section 4. Lawyer Regulation in Kiribati, p. 198.

²⁷ A new reform process was announced in March 2023 with a draft Bill produced in August 2023 that was roundly criticised by the Fiji Law Society. It will be interesting to see how this process unfolds. See further Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170.

demonstrates the need for responsive regulators of lawyers to look beyond law reform alone and seek more relational, incremental and adaptive pathways to support lawyers to be competent and ethical.²⁸

But what are these pathways? What influences lawyers' decisions regarding compliance with professional norms in PICs? What regulatory signals do these send? And how can regulators support lawyers to make compliance easier? This thesis applies itself to these questions, calling for an empirical and multi-disciplinary analysis of the multivariate normative influences of lawyer behaviour within local legal practice environments.

3.2. Scope

This thesis focuses on the regulation of lawyer conduct in three PICs: Fiji, Kiribati, and Vanuatu, with a deep exploration of the unique socio-legal paradigms that shape legal practice environments in these jurisdictions. These countries were selected for their relative diversity in the size of their legal professions and the scale of their existing formal systems for lawyer regulation. The study extends to how lawyers conceptualise being a good lawyer; how existing state regulatory systems operate in practice; and the intersection of lawyers professional and individual identities and values.

Applying what I discuss in Chapter Three as a 'pluralist-relational approach to lawyer regulation', this study takes a multi-disciplinary approach that enables a holistic understanding of the multivariate normative influences on lawyer behaviour within local legal practice environments. This framework combines insights from theories of pluralism, relationality and regulatory compliance to develop an innovative lens through which to analyse lawyer conduct. It allows for an examination of lawyer regulation in PICs that transcends traditional regulatory paradigms, considering the intricate interplay between social, cultural, professional and statutory influences that shape lawyer conduct in Fiji, Kiribati, and Vanuatu. The prominent role of the judiciary as state-aligned regulators of lawyers is balanced by exploration of indirect regulatory mechanisms, including the plurality of actors and systems that regulate lawyer conduct beyond the state.

Because 'law is almost never the most important instrument of regulation', it follows that there are a variety of other variables in the 'feedback loops' that regulate lawyers.²⁹ According to Braithwaite

²⁸ See further Chapter Three, pp. 82-125.

²⁹ John Braithwaite and Christine Parker, 'Conclusion' in Braithwaite John et al (eds), *Regulating Law* (Oxford University Press, 2004) 269. 289.

and Parker, beginning with empirical research on the influences of ‘non-law’ variables that appear to matter most to affect a regulated phenomenon (i.e. lawyer conduct), makes for ‘an illuminating start’ for any such inquiry.³⁰ Through interviews with legal practitioners, judges, senior government officials and regulators, coupled with case studies and a detailed examination of the history of law and lawyers in PICs, this thesis offers a comprehensive account of the regulatory landscape for lawyers in Fiji, Kiribati, and Vanuatu. This methodological approach not only provides a grounded, empirical basis for the findings, but also ensures that the insights are rooted in the lived experiences and real-world dynamics of legal practice in Fiji, Kiribati, and Vanuatu.

3.3. Research Questions

The overarching question this thesis seeks to address is:

- How can regulatory systems for lawyers in PICs better support lawyers to be competent and ethical?

To answer this question, the following subsidiary research questions were generated:

- What is the paradigm for legal practice in Fiji, Kiribati, and Vanuatu?
- What theoretical perspectives and tools can support a holistic understanding of lawyer conduct in PICs?
- How do lawyers in Fiji, Kiribati, and Vanuatu conceptualise a good lawyer?
- How do state regulatory systems operate in practice in Fiji, Kiribati, and Vanuatu?
- How do non-state systems regulate lawyer conduct in Fiji, Kiribati, and Vanuatu?
- How can we understand compliance and non-compliance by lawyers in PICs?

Each chapter of the thesis focuses on answering one of these subsidiary questions.

³⁰ Braithwaite John et al (eds), *Regulating Law* (Oxford University Press, 2004).

3.4. Overall Argument

The determinants of any individual lawyer's conduct are plural, complex, and governed by relationships with and between diverse state and non-state actors, institutions and phenomena. In Chapter Three, I explain what I have termed 'a pluralist-relational approach' to lawyer regulation as a framework for understanding lawyer conduct in PICs.³¹ By viewing lawyer conduct through this pluralist-relational lens, a regulator can recognise opportunities to 'nudge' divergent lawyer conduct away from practices that undermine and delegitimise legal and regulatory authority.³² These nudges should seek to go 'with the grain' of local normative practices,³³ while also engaging lawyers in a regulatory 'dance' that strengthens the legitimacy of regulation and supports lawyers to be competent and ethical.³⁴ In order to recognise these opportunities, a regulator should be informed by an empirical understanding of: local contexts; histories and path dependencies; regulatory relationships; and by the regulatory signals communicated by lawyers through their conduct and existing professional practices.³⁵ In other words, regulators should identify and understand what currently influences lawyer conduct in practice in PICs, and use insights from this to inform responsive and adaptive regulatory action that better covers the weaknesses of formal regulatory systems with the strengths of existing and emerging informal regulatory systems.

³¹ See Chapter Three, section 4. A Pluralist-Relational Approach to Lawyer Regulation, p. 101.

³² See for example Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin, 2009).

³³ John Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford University Press, USA, 2005). 156. See also John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884. 885.

³⁴ On this framing of regulation as a complex dance, see Chapter Seven section 2. The Dance of Compliance, 250.

³⁵ See further discussion in Chapter Three, section 4. A Pluralist-Relational Approach to Lawyer Regulation, p. 101; and further discussion in Chapter Seven, p. 249.

4. CHAPTER OUTLINES

Chapter One explores the complex socio-legal paradigms of Fiji, Kiribati, and Vanuatu, laying the groundwork for understanding the environments for legal practice in PICs. It provides historical narratives that trace the growth, regulation and organisation of the legal profession in PICs from the Colonial Era to the present day, highlighting a trend towards ‘command and control’ approaches in statutory regulatory regimes. This historical and contextual analysis sets the stage for a nuanced discussion of lawyer conduct in PICs, and the insights and analyses presented in subsequent chapters.

Chapter Two outlines the research design and analytical approaches used in the primary study, offering a view of the complexities and nuances of researching lawyer regulation within the pluralist contexts of PICs. The chapter begins by considering my positionality, followed by a description of the research design, data collection, analysis, ethical considerations and limitations of the empirical study.

Chapter Three elucidates the theoretical foundations that underpin this study. It begins with an exploration of three dominant theoretical approaches to lawyer regulation: self-regulation; market/control; and contemporary models. It identifies several key limitations of these traditional approaches for explaining and understanding lawyer conduct in practice in PICs. To address these, the chapter introduces the ‘pluralist-relational approach to lawyer regulation.’ This conceptual framework, developed abductively from the empirical study, serves as a guiding structure for the thesis and provides a mechanism for a more nuanced understanding of the regulation of lawyer conduct in PICs.

Chapter Four focuses on how lawyers in Fiji, Kiribati, and Vanuatu conceptualise a good lawyer. Drawing from empirical data, the chapter explores the skills, knowledge and attitudes of good lawyers, and how lawyers learn to be good lawyers in PICs. The findings reveal a complex web of relationships that regulate lawyer conduct, transcending statutory frameworks and codes of ethics. Being a good lawyer emerges as a complex concept involving self-identity and the interaction of intricate social networks and phenomena over time. The chapter reveals the relative strengths and weaknesses of various sources of influence over lawyers’ conduct, providing valuable insights for regulators seeking to improve lawyer regulation in PICs. Critically, these insights are grounded in

an empirically informed and autochthonous understanding of what it means to be a good lawyer in Fiji, Kiribati, and Vanuatu.

Chapter Five presents empirical findings on the operation of state regulatory systems in Fiji, Kiribati, and Vanuatu through three case studies of lawyer regulation. These case studies uncover themes of legitimacy, compliance, resistance, and disengagement. They highlight common features of statutory systems for lawyer regulation in PICs, including: dependency on key individuals; the importance of autochthony for legitimacy of laws; and the prominent role of the judiciary as regulators of lawyer conduct. The case studies reveal the dynamics of state regulatory systems in these PICs and also their vulnerabilities. The chapter contributes to a pluralist-relational understanding of lawyer regulation and sheds light on the critical role of regulatory relationships in small and close-knit communities of lawyers, such as are found in PICs.

Chapter Six focuses on the plurality of influences of lawyer conduct in PICs from sources beyond the state. Through two case studies, it draws from empirical data to uncover the strong normative influences arising from a complex interplay of: personal identity; custom; religion; legal education; and professional communities. In particular, the chapter highlights the importance of legal education and professional communities in shaping lawyers' identities as good lawyers. The discussion supports recommendations for further research and action to bridge education gaps and strengthen local capacities to develop quality, locally-relevant, continuing professional development (CPD) opportunities. The chapter conceptualises lawyer regulation in PICs as a complex dance, contributing important insights into the dynamics of non-state regulators of lawyer conduct in PICs.

Chapter Seven builds upon the exploration of state and non-state regulators of lawyers by examining how lawyers in PICs navigate normative and legal pluralism in practice. Utilising a framework adapted from de Sardan's framing of practical norms, this chapter identifies practical norms of lawyers in Fiji, Kiribati, and Vanuatu and argues that these can serve as regulatory signals for responsive regulators. This chapter reveals how lawyers in PICs dance and weave through complex regulatory landscapes, adapting and responding to the changing norms and contexts that regulate their conduct. By recognising practical norms as signals, the chapter offers insights into lawyers' motivations and postures of compliance which can inform nuanced and context-sensitive regulatory action and strategies.

Chapter Eight, the conclusion, synthesises the findings of the thesis, arguing that within the pluralist contexts of PICs, responsive regulators can identify rich opportunities to support lawyers to be good lawyer both through law reform and particularly beyond law reform. This concluding chapter reflects on the key empirical findings and demonstrates how applying a pluralist-relational approach to lawyer regulation enables a responsive regulator to develop a holistic understanding of regulation within legal practice environments in PICs. This understanding is applied to make several recommendations on pathways forward for strengthening lawyer regulation in PICs. Finally, it underscores the major contributions of this thesis to existing literature and identifies promising avenues for future research.

CHAPTER ONE: E VA GAUNA NA KA KECE¹

1. INTRODUCTION

Social scientists of the most varying standpoints agree that human action can be rendered meaningful only by relating it to the contexts in which it takes place. The meaning and consequences of a behaviour pattern will vary with the contexts in which it occurs. This is commonly recognized (sic) in the saying that there is a “time and a place for everything.”²

The complex socio-legal paradigms of Pacific Island Countries (PICs), coupled with their geography and dispersed populations create unique legal practice environments and challenges for regulating lawyers. In PICs, the state faces formidable barriers to the delivery of public goods such as education, health and justice.³ Lawyers in PICs face many challenges in adapting and responding to constraints on and within legal practice environments. They do so with the added complexity that local customs and cultures are embedded within the state and its institutions, and the need for lawyers and other ‘street level bureaucrats’ to navigate cultural obligations and norms.⁴ At the same time, the work of lawyers is directed towards upholding state legal orders that represent both domination and emancipation.

This chapter situates this thesis within the complex socio-cultural, political and legal contexts that exist in Fiji, Kiribati, and Vanuatu. The first section discusses the unique histories and complex challenges faced by PICs generally today.⁵ The second section then considers the context of law in PICs, placing it within discourses of decolonisation and repatriation of laws.⁶ It also highlights the complexity arising from normative and legal pluralism for the practice of law in PICs. Finally, this chapter traces the histories of the legal profession in Fiji, Kiribati, and Vanuatu including their growth, regulation and organisation across several distinct eras. These histories aid understanding

¹ Fijian for ‘There is a time and a place for everything’.

² Alvin Ward Gouldner, *Wildcat Strike: A Study in Worker-Management Relationships* (Harper Torchbooks, 1965). 12.

³ See for example discussion in Te'o Fairbairn, *Island Economies: Studies from the South Pacific* (University of the South Pacific Institute of Pacific Studies, 1985). On public and social goods see: Joseph E Stiglitz, ‘The Theory of Local Public Goods’ in Martin S. Feldstein and Robert P. Inman (eds), *The Economics of Public Services* (Springer, 1977) 274.; William H Oakland, ‘Theory of Public Goods’ in Alan J Auerbach (ed), *Handbook of Public Economics* (Elsevier, 1987) vol 2, 485.; Amitai Etzioni, ‘The Good Society’ (2002) 1 *Seattle Journal of Social Justice* 83.

⁴ On Street Level Bureaucrats see Michael Lipsky, ‘Towards a Theory of Street-Level Bureaucracy’ (1969) *Institute for Research on Poverty: Discussion Papers* 48.; Michael Lipsky, ‘Street Level Bureaucrats and the Analysis of Urban Reform’ (1971) 6(4) *Urban Affairs Quarterly* 391.; Michael Lipsky and Richard Weatherley, ‘Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform’ (1977) 17 *Harvard Educational Review* 171.

⁵ These countries were selected for their dissimilarity across a range of metrics, including size of the profession; population; and my perceptions of the existing systems regulating lawyers. See further Chapter Three, section 3.2.1, p. 61.

⁶ Jennifer Corrin, ‘Discarding Relics of the Past: Patriation of Laws in the South Pacific’ (2008) 39 *Victoria University of Wellington Law Review* 635.

of the plurality of influences of lawyer conduct in PICs discussed in later chapters and help to contextualise the trajectories and path dependencies that influence regulatory reform and innovation.⁷

2. LARGE-OCEAN SMALL-ISLAND STATES

The history, culture and organisation of pre-colonial societies in the Pacific Region has been written about extensively by both indigenous and non-indigenous historians and anthropologists. It is a contested history. Much of what has been written about Pacific societies has been reimagined through an admixture of lenses borrowed and combined from a plethora of religious, colonial, and other non-indigenous ontologies and epistemologies.⁸ It has only been in the more recent past that indigenous accounts of places and people in the Pacific have risen to scholarly prominence. A deep exploration of the histories of PICs is beyond the scope of this thesis. Instead, what is offered in this section is a summary of the most relevant parts of this existing scholarship. Its core message, as articulated by pioneers of Pacific legal studies in Australia, Guy Powles and Mere Pulea, is simple: ‘Pacific societies, taken together are characterised by diversity – and individually by complexity.’⁹

This diversity of culture that exists within PICs is perhaps best indicated by the over 1,389 languages and thousands of dialects spoken within the region.¹⁰ Vanuatu, with its 105+ languages, almost half of which are spoken by fewer than 200 speakers, is one of the most linguistically diverse countries in the world.¹¹ By contrast, indigenous populations in Kiribati and Fiji are more ethnically and culturally homogenous with a common intelligible written language spoken by most people – although the Fijian language comprises around thirty to forty dialects and strong

⁷ On path dependence see Chapter Three, p. 105-106, Chapter Five at p. 186, and Chapter Eight at p. 286 and p. 305.

⁸ See for example AB Deacon and CH Wedgwood, *Malekula: A Vanishing People in the New Hebrides* (Routledge, 1934).; John E Terrell, *Prehistory in the Pacific Islands* (Cambridge University Press, 1988).; Michael A Ntumu (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993).; Jennifer Corrin and Anthony Angelo (eds), *Legal Systems of the Pacific: Introducing Sixteen Gems* (Intersentia, 2021).. For local accounts of histories see for example: Sister Alaima Talu, et al, *Kiribati: Aspects of History* (University of the South Pacific, and Tarawa, Ministry of Education, Training and Culture, Republic of Kiribati, 1979).; Hugh Laracy and Sam Alasia, *Ples Blong Iumi: Solomon Islands, the Past Four Thousand Years* (University of the South Pacific, 1989).; Subramani (ed), *The Indo-Fijian Experience / Edited and Introduced by Subramani* (University of Queensland Press, 1979).; Brij V Lal, *Broken Waves: A History of the Fiji Islands in the Twentieth Century* (University of Hawaii Press, 1992).; Kambati K Uriam, *In Their Own Words : History and Society in Gilbertese Oral Tradition* (The Journal of Pacific History, with the assistance of the Asian South Pacific Cultures Fund, 1995). Various compendiums draw together indigenous voices, such as Guy Powles and Mere Pulea, *Pacific Courts and Legal Systems* (University of the South Pacific, 1988).; Ntumu (ed), *South Pacific Islands Legal Systems* (1993); Howard Van Trease (ed), *Atoll Politics: The Republic of Kiribati* (Macmillan Brown Centre for Pacific Studies, University of Canterbury; Institute of Pacific Studies, University of the South Pacific, 1993).; and others.

⁹ Powles and Pulea, *Pacific Courts and Legal Systems* (1988). 8.

¹⁰ See John Lynch, *Pacific Languages: An Introduction* (University of Hawai'i Press, 2018). 28-9.

¹¹ Ibid. 34.

provincial identities exist.¹² This linguistic diversity coupled with low literacy rates¹³ create many challenges to the administration of, access to and delivery of justice.

For many centuries, in the South Pacific Region people tended to live in small communities with distinct languages and unwritten customs, with a variety of different traditional leadership systems being responsible for the maintenance of law and order.¹⁴ In pre-colonial Pacific societies, law was 'an integral part of the whole way in which people go about undertaking various tasks in the community.'¹⁵ However, beginning in the mid-19th century and due to early foreign and religious influences, paramount chiefs in Fiji, Niue, Samoa and Tonga began seeking foreign recognition of their dominion through the promulgation of written laws.¹⁶ These laws represent some of the first known written laws by Pacific societies.¹⁷

By the late 19th to early 20th century, PICs were all subject to some form of American, Australian, British, French, or German colonial control. Fiji¹⁸ and Kiribati¹⁹ became colonies of Great Britain while Vanuatu was ruled by a British/French condominium.²⁰ Law as recognised by colonial powers was a mixture of statutes enacted by foreign powers, laws made by colonial authorities, the English common law and equity, and limited formal recognition of customary laws.²¹ In these early days of the colonies, lawyers were exclusively foreign, and mostly responsible for resolving disputes within colonies between foreigners, although indigenous people could and did participate in the colonial justice systems.

¹² Ibid. 33.

¹³ Wendy Jarvie, 'Literacy in the Pacific: In Danger of Being Sidelined?', *Devpolicy* (Web Page, 14 February 2020) <<https://devpolicy.org/literacy-in-the-pacific-in-danger-of-being-sidelined-20200214/>>; Pacific Community, 'Pacific Islands Literacy & Numeracy Assessment 2021 Regional Report' (Report, Pacific Community Educational Quality and Assessment Programme, 2021) <<https://pilna.eqap.spc.int/2021/regional>>; Pacific Community, 'Pacific Islands Literacy & Numeracy Assessment 2018 Regional Report' (Report, Pacific Community Educational Quality and Assessment Programme, 2019) <https://research.acer.edu.au/ar_misc/31>.

¹⁴ Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (Insentia, 2017). 1-2.

¹⁵ Bernard Crocombe R. G. May John D'Arcy Roche Paul Narokobi, *Lo Bilong Yumi yet = Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service ; University of the South Pacific, 1989). 4.

¹⁶ Ibid. 2.

¹⁷ The first evidence of written Pacific language is in Rapa Nui see Steven R Fischer, *Rongorongo: The Easter Island Script: History, Traditions, Texts* (Oxford University Press on Demand, 1997).

¹⁸ *Deed of Cession of Fiji to Great Britain*, (signed and entered into force 10 October 1874) See further commentary Joeli Baledrokadroka, 'The Fijian Understanding of the Deed of Cession Treaty of 1874' (2003) *Indiana University Digital Library* 52.

¹⁹ From 1866 as a protectorate, from 1916 to 1978/9 as a colony – see Martin Tsamenyi, 'Kiribati' in Michael A Ntumu (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 75. 75.

²⁰ Formally established in 1906. Ntumu (ed), *South Pacific Islands Legal Systems* (1993) 365.

²¹ E.g. *Regulation of Native Affairs Ordinance 1876* (Fiji); *Native Court Regulations 1927* (Fiji); *Fijian Affairs (Criminal Offences Code) Regulations 1948* (Fiji); Gouldner, *Wildcat Strike: A Study in Worker-Management Relationships* (1965).

Following the Second World War, pressure from international organisations to grant colonial dominions self-determination grew strongly.²² This pressure was guided not simply by a sudden collective shift in morality, but also by strong local independence movements in Samoa, Fiji, Tonga, Papua New Guinea and Bougainville.²³ From the mid-1960s, the independence era began in earnest. Independence movements across the region were guided by local socio-political elites and typically involved extensive public consultations through Constitutional Conventions or variations of them.²⁴ Pacific constitutions established Westminster-style parliamentary systems, with some 'homegrown' stylings.²⁵ In most PICs, constitutions provided some form of formal recognition of legal pluralism by recognising customary law as a pre-existing parallel system of laws, or with certain restrictions and limitations as a distinct source of law deriving from outside the apparatus of the bureaucratic state.²⁶

Since independence, PICs have faced many threats to the maintenance and development of democratic institutions, security and justice. These challenges include: natural disasters and climate change;²⁷ political instability and rule of law fragility;²⁸ linguistic diversity – most

²² See Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press, 2007).; see further Graham Hassall et al, *Comparative Study on Local Government and Traditional Governance Systems Interaction in Pacific Island Countries* (University of the South Pacific, 2011).

²³ See for example the *Mau a Pule* movement leading to the 1929 Black Saturday massacre of 11 Samoans including Mau leader and one of the paramount chiefs of Samoa Tupua Tamasese Lealofi III. Michael Field, *Samoa Mo Samoa: Black Saturday 1929* (Bridget Williams Books, 2014). see also J. Connell, 'Independence, Dependence and Fragmentation in the South Pacific' (Pt Springer) (1981) 5(6) *Geojournal* 583.

²⁴ See Peter Sack, *Pacific Constitutions: Proceedings of the Canberra Law Workshop Vi* (Q: Dept. of Law, Research School of Social Sciences, 1982).; Connell, 'Independence, Dependence and Fragmentation in the South Pacific' (1981); Guy Powles, 'Changing Pacific Island Constitutions: Methods and Philosophies' (1992) 22 *Victoria University of Wellington Law Review* 63.; Peter Larmour, 'Westminster Constitutions in the South Pacific: A "Policy Transfer" Approach' (2002) 10(1) *Asian Journal of Political Science* 39.

²⁵ Sack, *Pacific Constitutions: Proceedings of the Canberra Law Workshop Vi* (1982).

²⁶ On recognition of customary law in constitutions see for example *Kiribati Independence Order 1979* (United Kingdom), preamble; *Laws of Kiribati Act 1989* (Kiribati), s 4(2); *Constitution of Nauru 1968* (Nauru), s8; *Constitution of Solomon Islands 1978* (Solomon Islands), s76 and sch. 3, para. 3; *Constitution of the Republic of Vanuatu 1980* (Vanuatu); and others. On Custom as a source of law see Morsen Mosses, 'Custom as a Source of Law in Vanuatu: A Critical Analysis' (2017) 19 *Journal of South Pacific Law* 37.; Nancy Vosa Tikoisuva, 'The Use of Collective Customary Rights to Protect, Preserve and Manage the Environment - Fiji Analysis' (2021) 22 *Journal of South Pacific Law* 56.

²⁷ See for example Hayrol Azril Mohamed Shaffril et al, 'Systematic Literature Review on Adaptation Towards Climate Change Impacts among Indigenous People in the Asia Pacific Regions' (2020) 258 *Journal of Cleaner Production* e120595.; John Campbell and Jon Barnett, *Climate Change and Small Island States: Power, Knowledge and the South Pacific* (Routledge, 2010).

²⁸ See generally Stewart Firth, 'Instability in the Pacific Islands: A Status Report' (Report, Lowy Institute, 4 June 2018).; on Fiji see Stewart Firth, Jon Fraenkel and Brij V Lal, *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU E-Press Canberra, 2009).; on Kiribati see for example WK Hastings, 'A Personal Journey through the Rule of Law in the South Pacific' (2021) *Judicature International* 1.; on Vanuatu see Wouter Veenendaal, 'How Instability Creates Stability: The Survival of Democracy in Vanuatu' (2021) 42(6) *Third World Quarterly* 1330.; on Solomon Islands see Clive Moore, 'The End of Regional Assistance Mission to Solomon Islands (2003–17)' (2018) 53(2) *The Journal of Pacific History* 164.; on Tonga's 2006 riots in Yvonne Takau, 'The Development of Planning Processes in Tonga and the Impact of the 2006 Riots' (PhD Thesis, University of Otago, 2020).; on Papua New Guinea see Louise Baker, 'Political Integrity in Papua New Guinea and the Search for Stability' (2005) *Pacific Economic Bulletin (1991-2010)* 98.; on Samoa see Iati

prominently in Melanesia;²⁹ geographically dispersed populations;³⁰ weak formal governance systems and weakening non-state legal systems (as urbanisation dilutes traditional power structures);³¹ high levels of poverty, poor literacy and subsistence living;³² weak health services and alarming rates of non-communicable and many communicable and insect borne diseases;³³ complex systems of land tenure affecting, amongst other things, financial market development and the attraction of foreign capital investment;³⁴ limited human capital resources to facilitate engagement in international forums and engage in robust domestic policy development and reform;³⁵ heavy reliance on aid and donor funding;³⁶ and exploitation by foreign powers – both government and private.³⁷ These many complex challenges interact to shape the environments in

Iati, 'Peace and Conflict in Samoa: The Role of Tradition and Traditional Institutions' in Carmela Lutmar and James Okey (eds), *Peacebuilding in the Asia-Pacific* (Springer, 2019) 161.

²⁹ See Lynch, *Pacific Languages: An Introduction* (2018); Lise M Dobrin, 'From Linguistic Elicitation to Eliciting the Linguist: Lessons in Community Empowerment from Melanesia' (2008) 84(2) *Language* 300.

³⁰ See Susan M Roberts, Sarah Wright and Phillip O'Neill, 'Good Governance in the Pacific? Ambivalence and Possibility' (2007) 38(5) *Geoforum* 967.; Gabriel Luke Kiddle et al, 'Unpacking the Pacific Urban Agenda: Resilience Challenges and Opportunities' (2017) 9(10) *Sustainability* 1878.

³¹ Chris Cocklin and Meg Keen, 'Urbanization in the Pacific: Environmental Change, Vulnerability and Human Security' (2000) 27(4) *Environmental Conservation* 392.; Paul Jones, 'Informal Urbanism as a Product of Socio-Cultural Expression: Insights from the Island Pacific' in Sahar Attia et al (eds), *Dynamics and Resilience of Informal Areas* (Springer, 2016) 165.

³² See for example Simon Feeny, Sasi Iamsiraroj and Mark McGillivray, 'Growth and Foreign Direct Investment in the Pacific Island Countries' (2014) 37 *Economic Modelling* 332.; Michelle Belisle et al, 'Pacific Islands Literacy and Numeracy Assessment: Collaboration and Innovation in Reporting and Dissemination' (Assessment, UNESCO, 2016).; Rebecca N Jesson and Rebecca Spratt, 'An Intervention in Literacy in Three Pacific Nations: Implications of a Context Specific Approach to Co-Design' (2017) 16(1) *International Education Journal: Comparative Perspectives* 36.; John Richard Campbell, 'Development, Global Change and Traditional Food Security in Pacific Island Countries' (2015) 15(7) *Regional Environmental Change* 1313.

³³ See for example Azmat Gani, 'Some Aspects of Communicable and Non-Communicable Diseases in Pacific Island Countries' (2009) 91(2) *Social Indicators Research* 171.; Dori Patay et al, 'How Do Interests, Ideas, and Institutions Affect Multisectoral Governance? The Case of Tobacco Governance in Two Pacific Small Island Developing States' (2023) 17(2) *Regulation and Governance* 313.

³⁴ See Sue Farran and Paterson Donald, *South Pacific Property Law* (Cavendish, 2004).; Satish Chand and Ron Duncan, 'Resolving Property Issues as a Precondition for Growth Access to Land in the Pacific Islands' in Peter Larmour (ed), *The Governance of Common Property in the Pacific Region* (ANU Press, 2013) 33.; Tiru Jayaraman and Baljeet Singh, 'Foreign Direct Investment and Employment Creation in Pacific Island Countries: An Empirical Study of Fiji' (Working Paper, ARTNet, May 2007).; Feeny, Iamsiraroj and McGillivray, 'Growth and Foreign Direct Investment in the Pacific Island Countries' (2014).

³⁵ See K E Charlton et al, 'Fish, Food Security and Health in Pacific Island Countries and Territories: A Systematic Literature Review' (2016) 16(1) *Bmc Public Health* 285.; Wilfred Golman, 'Is World Trade Organization (Wto) Dispute Settlement System Underutilized? An Assessment from the Wto Members of the South Pacific Region' (2018) 24(1) *Journal of South Pacific Law* 24.; Michel Beine, Frédéric Docquier and Hillel Rapoport, 'Brain Drain and Human Capital Formation in Developing Countries: Winners and Losers' (2008) 118(528) *The Economic Journal* 631.

³⁶ See for example Nic Maclellan, 'Nauru' (2020) 32(1) *The Contemporary Pacific* 213.; Alexandre Dayant, 'Chinese Debt in the Pacific: Information from the Lowy Institute Pacific Aid Map' (2021) No. 58-59(1) *Outre-Terre* 261.;

³⁷ For example: poaching of ocean resources within PIC territorial waters: substantial environmental impacts of resource extraction and logging; exploitation of unequal expertise and bargaining power in trade disputes, trade agreements and unilateral commitments made on accession to the WTO – see Oxfam, 'Proposed Wto Accession: Key Issues for Tonga' (Discussion Paper, Oxfam New Zealand, 7 November 2005).

which lawyers practise, the mechanisms by which their behaviour is influenced and the resources available for effecting positive change on systems that regulate lawyer conduct in practice.

These challenges have also resulted in a proliferation of local solutions to overcome the limitations of states to deliver public goods. For example, solutions to regional issues such as education, security and climate change have been championed through regional institutions such as the Pacific Islands Forum (PIF), the South Pacific Community (SPC) and the University of the South Pacific (USP).³⁸ The resilience and innovation of Pacific communities are widely discussed in literature on climate change adaptation;³⁹ food security;⁴⁰ health;⁴¹ and justice.⁴² A core element of this resilience in PICs is the relational networks that enable street level bureaucrats to 'bridge the gap' in the construction and delivery of the bureaucratic state.⁴³ In this regard, lawyers are a critical part of the delivery of law and justice systems in PICs and, as is considered in Chapter Seven, this requires them to practise 'relationally' – relying on their personal and relational networks to translate the laws and procedures of justice in adaptive and pragmatic ways to resolve a client's matter.

2.1. Fiji

Fiji is an archipelago of over 330 islands and 500 islets located in the Pacific Ocean, covering an area of about 18,300 square kilometres.⁴⁴ The two largest islands, Viti Levu and Vanua Levu, account for the vast majority of the total population of approximately 900,000 people.⁴⁵ Fiji's economy is driven by tourism, agriculture, fisheries, some mining and the sugar industry which has been in decline for many years.⁴⁶ Human settlement in Fiji dates back to around 1000BC.

³⁸ A detailed discussion of USP and its central role in legal education in PICs is provided at 4.1 below, p. 34.

³⁹ Jenny Bryant-Tokalau, *Indigenous Pacific Approaches to Climate Change: Pacific Island Countries* (Springer, 2018).

⁴⁰ Penny Farrell et al, 'Covid-19 and Pacific Food System Resilience: Opportunities to Build a Robust Response' (2020) 12(4) *Food Security* 783.; Campbell, 'Development, Global Change and Traditional Food Security in Pacific Island Countries' (2015).

⁴¹ Lachlan McIver et al, 'Health Impacts of Climate Change in Pacific Island Countries: A Regional Assessment of Vulnerabilities and Adaptation Priorities' (2016) 124(11) *Environmental Health Perspectives* 1707.

⁴² Miranda Forsyth et al, 'Hybridity in Peacebuilding and Development: A Critical Approach' (2017) 2(4) *Third World Thematics* 407.; Sinclair Dinnen and Matthew Allen, 'State Absence and State Formation in Solomon Islands: Reflections on Agency, Scale and Hybridity' (2016) 47(1) *Development and Change* 76.; Gabrielle Maxwell and Hennessey Hayes, 'Restorative Justice Developments in the Pacific Region: A Comprehensive Survey' (2006) 9(2) *Contemporary Justice Review* 127.

⁴³ Forsyth, 'Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea' (2022); Gordon Peake and Miranda Forsyth, 'Street-Level Bureaucrats in a Relational State: The Case of Bougainville' (2021) 42(1) *Public Administration and Development* 12.

⁴⁴ Geoffrey Clark and Atholl Anderson, 'Colonisation and Culture Change in the Early Prehistory of Fiji', *The Early Prehistory of Fiji Terra Australis* (ANU ePress, 2009) 407.

⁴⁵ Fiji Bureau of Statistics, 'Fiji Population and Housing Census' (Census Data, Fiji Bureau of Statistics, 2017).

⁴⁶ Janesh Sami, 'Time Series Dynamics of Sugar Export Earnings in Fiji with Multiple Endogenous Structural Breaks: Implications for Eu Sugar and Industry Reforms' (2020) 18 *Journal of Quantitative Economics* 169.; Moleen Monita

Through waves of migration, trade and wars the islands developed a unique culture that evolved into the complex hierarchical iTaukei system of chiefly rule, with parts of Fiji retaining distinctly Polynesian customs and practices.⁴⁷ Traditional Fijian society is communal, with obligations towards the extended family (*mataqali*) and the village (*yavusa*). Custom dominates many aspects of socio-political life in Fiji and remains deeply embedded within state system.⁴⁸

Fiji's first contact with Europeans occurred in the 17th century, with the arrival of Dutch explorers. However, it was not until the early 19th century that missionaries, traders, and settlers from England and Europe began to establish a more permanent presence. This led to significant cultural and political shifts, as traditional power structures were disrupted and Christian, especially Methodist religious beliefs were introduced.⁴⁹ In 1874, Fiji was ceded to the British Empire, becoming a Crown Colony.⁵⁰

During British Colonial rule, which ended in 1970, two key policies of the colonial administration have contributed to path dependencies that continue to affect the modern political landscape of Fiji.⁵¹ One key policy was the introduction of thousands of Indian indentured labourers (Girmitiya) to work on sugar plantations.⁵² The influx of Indian workers contributed to Fiji's rich cultural diversity and economic development, but their numbers also soon began to change the demographics of Fiji creating conflicts over leased indigenous land that continue today. Additionally, the growing wealth of Fiji was not equally shared between the mostly foreign and Indian populations of colonial towns and the rural and isolated *iTaukei* populations. This lopsided economic and social development was a consequence of Sir Arthur Gordon's policy of 'Native' or 'indirect rule'.⁵³ Under this policy Gordon sought to preserve traditional Fijian society by essentially

Nand, Douglas K Bardsley and Jungho Suh, 'Addressing Unavoidable Climate Change Loss and Damage: A Case Study from Fiji's Sugar Industry' (2023) 176(3) *Climatic Change* 21.

⁴⁷ For example the Lau Group; Laura Thompson, 'The Culture History of the Lau Islands Fiji' (1938) 40(2) *American Anthropologist* 181.; Steven Hooper, 'Who Are the Chiefs? Chiefship in Lau, Eastern Fiji' in R Feinberg and K. A. Watson-Gegeo (eds), *Leadership and Change in the Western Pacific* (Routledge, 2021) 239.

⁴⁸ Suliasi Vunibola, 'E Da Dravudravua E Na Dela Ni Noda Vutuni-I-Yau: Customary Land and Economic Development: Case Studies from Fiji' (PhD Thesis, Massey University, 2020).

⁴⁹ Lal, *Broken Waves: A History of the Fiji Islands in the Twentieth Century* (1992); Kim Gravelle, *Fiji's Times: A History of Fiji in Three Parts* (The Fiji Times and Herald, 1979).

⁵⁰ *Deed of Cession of Fiji to Great Britain, (signed and entered into force 10 October 1874)*

⁵¹ Path dependence in economics and social sciences posits that the current state of an idea, institution, or technology can be better understood by examining its historical development. It is discussed further in Chapter Three at p. 105 in the context of a pluralist-relational approach to lawyer regulation, Chapter Five at p. 186 in the context of Fiji's 2009 Decree reforming lawyer regulation, and in Chapter Eight at p. 286 and p. 305.

⁵² Sudesh Mishra, 'Time and Girmit' (2005) 23(1) *Social Text* 15.

⁵³ Sara H Sohmer, 'Sir Arthur Gordon's Native Rule Policy and the Introduction of Indian Contract Labor' (1984) 18 *Hawaiian Journal of History* 140. 143-154; Lal, *Broken Waves: A History of the Fiji Islands in the Twentieth Century* (1992).

segregating indigenous land, institutions and chiefly governance structures from colonial influence. At the time this was generally viewed as a progressive approach that communicated respect for indigenous traditions.⁵⁴ However, it critically limited opportunities for *iTaukei* to access health and other services, participate in education and develop indigenous land. This meant that by the time Fiji became independent, after over 90 years of indirect rule, the seeds of racial tension had well and truly begun to sprout.⁵⁵ The question of race has remained a complex and political issue with all of Fiji's four military coups having been linked to racial tensions and inequality.⁵⁶

Fiji gained independence from the United Kingdom on 10 October 1970.⁵⁷ Early political power sharing between indigenous Fijians and non-indigenous Fijians soon yielded to division fuelled by social and economic inequality.⁵⁸ In 1987 Fiji experienced its first two coups.⁵⁹ Since then, Fiji's political landscape has been defined by its 'coup culture' and marred by related tensions over land rights and resource allocation. In 2006, Fiji witnessed its most recent coup, led by Commodore Frank Bainimarama and the 'loyal' and 'politically-ambitious' attorney-general Aiyaz Sayed-Khaiyum.⁶⁰ This led to the abrogation of the Fiji's Constitution in April 2009 and the continuation of widespread abuses of human, civil and political rights.⁶¹ In 2013 a new Constitution was written and an election was held the following year, in 2014, that was easily won by the Fiji First Party, led by Commodore Bainimarama and Aiyaz Sayed-Khaiyum. While this was a critical step towards democracy, the tense political climate eased only slightly, with suppression of the media and civil liberties. A change of government in 2022 saw Sitiveni Rabuka become Prime Minister. Rabuka was the leader of Fiji's first two coups in 1987, and only time will tell if this time there will be lasting political peace.

2.2. Kiribati

Kiribati is located in the Central Pacific and comprises 32 atolls and one raised coral island, Banaba, which are dispersed across 3.5 million square kilometres of the Pacific Ocean in three archipelagic

⁵⁴ Sohmer, 'Sir Arthur Gordon's Native Rule Policy and the Introduction of Indian Contract Labor' (1984).

⁵⁵ Brij V Lal, 'Chiefs and Indians: Elections and Politics in Contemporary Fiji' (1993) *The Contemporary Pacific* 275.

⁵⁶ Firth, Fraenkel and Lal, *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (2009); Martha Kaplan, 'The Coups in Fiji: Colonial Contradictions and the Post-Colonial Crisis' (1988) 8(3) *Critique of Anthropology* 93.

⁵⁷ *Independence Order 1970* (Fiji)

⁵⁸ Jon Fraenkel, 'Power Sharing in Fiji and New Caledonia' in Stewart Firth (ed), *Globalisation and Governance in the Pacific Islands* (State, Society and Governance in Melanesia, 2006) vol 1, 317.

⁵⁹ Lal, 'Chiefs and Indians: Elections and Politics in Contemporary Fiji' (1993).

⁶⁰ See Brij V Lal, 'The Strange Career of Commodore Frank Bainimarama's 2006 Fiji Coup' (SSGM Discussion Paper No 8, Department of Pacific Affairs, 2013). 10. According to Brij Lal 'Convergence of mutual interest rather than conspiracy underpins the relationship between the prime minister and his attorney-general.'

⁶¹ Amnesty International, 'Beating Justice: How Fiji's Security Forces Get Away with Torture' (Report, Amnesty International, 2016).

groups known in English as the Gilbert Islands, the Phoenix Islands and the Line Islands. Kiribati's economy is highly vulnerable to external shocks due to its small size, limited resources and isolation. Economic activity is heavily dependent on income from fishing licenses, development assistance from donors in areas such as infrastructure development, climate change adaptation and capacity building, and remittances from i-Kiribati working overseas.⁶² The islands of Kiribati are particularly vulnerable to climate change, especially rising sea levels, shallow freshwater lenses and more frequent and severe weather events.

From around 1820, Kiribati began to be frequented by Western explorers, whalers and missionaries. Only the Gilberts group, known locally as *Tungaru*, was inhabited, and it is the traditions and culture of the people of *Tungaru*, heavily modified by religion and colonial domination, that persist in Kiribati today.⁶³ Traditional governance was clan based and gerontocratic (rule by elders) with customary norms enforced by *unimwane* (respected elder men) and *unaine* (respected elder women) within the *kaainga* (the site of the *mwenge* (home) of an *utu* (family/kin)).⁶⁴ Limited access to fresh water, poor soil, overpopulation and frequent droughts pose persistent threats to social harmony that to this day continues to be managed through complex customary systems that emphasise duties to *mwenga*, *utu* and *kaainga*.⁶⁵ These customary systems dominate both politics and the bureaucracy in Kiribati and create significant challenges for I-Kiribati lawyers who must often walk an 'ethical tightrope' between conflicting norms.

The Gilbert Islands were declared a British Protectorate in 1892⁶⁶ and subsequently became a Crown Colony in 1916.⁶⁷ The colonial government played a minimal role in the lives and welfare

⁶² Ministry of Finance and Economic Development, 'Kiribati National Assessment Report for the 5-Year Review of the Mauritius Strategy for Further Implementation of the Barbados Programme of Action for Sustainable Development of Small Islands Developing States (Msi+5)' (Report, Ministry of Finance and Economic Development, 2010) <<https://sustainabledevelopment.un.org/content/documents/1225Kiribati-MSI-NAR2009.pdf>>.

⁶³ Tsamenyi, 'Kiribati' 1993 76-7.

⁶⁴ Uriam, *In Their Own Words : History and Society in Gilbertese Oral Tradition* (1995). p 4. Waves of migration at different times by Melanesian and Polynesians resulted in differences between the northern islands, ruled by *uea* (chiefs), and the southern islands, which were more egalitarian. Barrie Macdonald, *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (Institute of Pacific Studies, University of the South Pacific, 2001). 3.

⁶⁵ Talu, *Kiribati: Aspects of History* (1979). 12.

⁶⁶ Ostensibly to protect the islands from rampant whaling, blackbirding and exploitation by merchants. Macdonald, *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (2001). 114. Although fear that Germany might declare their own Protectorate was likely influential, see William Parker Morrell, *Britain in the Pacific Islands* (Clarendon, 1960). cited in United Nations, 'Decolonization, No. 15' (Report, United Nations, July 1979). 7.

⁶⁷ Annexation of the Gilbert and Ellice Islands to His Majesty's Dominions: at the Court at Buckingham Palace, the 10th day of November, 1915. *Gilbert and Ellice Islands Order in Council 1915* (United Kingdom)

of indigenous people, especially on the outer islands.⁶⁸ Social services such as education were instituted and maintained through the church, while law and order was enforced by *unimwane* formally appointed as magistrates to adjudicate criminal and civil disputes amongst I-Kiribati.⁶⁹ Such disputes, particularly crimes, were generally seen as personal matters to be resolved between the parties and their *kaainga*, with traditional punishments generally involving either death, exile or the payment of compensation.⁷⁰ Over time, due to a combination of local perceptions and imperial policy, the magistrate emerged as the dominant figure in island government supplanting the hegemony of *uea* (chiefs) and their *rorobuaka* (warriors) in the North and the broad adjudicative authority of the *mwaneaba* in the South.⁷¹

Today the majority of Kiribati's 144+ magistrates have no formal training as lawyers, although many have recently completed a Certificate of Justice through the USP.⁷² Because of their historical place in society, lay magistrates continue to play a crucial role within communities in Kiribati and magistrate make decisions with due consideration to ensuring peace and harmony within the local community.⁷³

Kiribati achieved independence from the United Kingdom in July 1979 by the Kiribati Independence Order 1979,⁷⁴ adopting a unicameral Westminster-style democratic parliamentary system. Due to the state's limited fiscal and human resources, many governance functions are devolved to Island Councils, which comprise elected members of the local community and a few paid government employees. Police and magistrates are present on 20 of 21 inhabited islands.⁷⁵ Distance, high transportation and communication costs and the centralisation of all lawyers in the capital Tarawa are significant barriers to the enforcement of state law and the administration of

⁶⁸ In fact, colonial administrators likely viewed Kiribati's primary value as being the phosphate mine on Banaba (depleted by independence) and investment in health, social welfare and education was virtually non-existent. United Nations, 'Decolonisation: Issue on Kiribati (Gilbert Islands)' (1979) 15(UNST PCSA (OS) D3 No. 15 Eng). 8-9.

⁶⁹ Macdonald, *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (2001). 77.

⁷⁰ Today, compensation is the most common punishment, although exile may still be enforced in some *kaainga*. Punishment by death has fallen out of fashion. Talu, *Kiribati: Aspects of History* (1979). p 28.

⁷¹ Macdonald, *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (2001). 77-9. Even today, particularly on outer islands, the legitimacy of magistrates is said to rely more on their status within the community as respected elders than on their judicial appointment and grant of legal authority by the state.

⁷² Numbers correct at October 2019. Source: Registry, High Court of Kiribati. On the Certificate of Justice see High Court of Kiribati, 'Annual Report on the Judiciary of Kiribati 2018 & 2019' (Annual Report, Judiciary of Kiribati, 2019). 26-31.

⁷³ See section 35, *Magistrate's Court Ordinance [Cap 52] 1977* (Kiribati), note also Guideline 15 of the superseded 2002 Guidelines for Judicial Conduct, see Kiribati National Judicial Education Committee, *Magistrates' Court Bench Book* (High Court of Kiribati, 2004)., 28-9.

⁷⁴ *Kiribati Independence Order 1979* (United Kingdom)

⁷⁵ High Court of Kiribati, 'Annual Report on the Judiciary of Kiribati 2012-2014' (Annual Report, Judiciary of Kiribati, 2014) <http://www.paclii.org/ki/court_annual_reports/kiribati_annual_report_2012-2014.pdf>.

justice. Even though traditional punishments have mostly been supplanted by state laws, criminal and civil disputes, especially in outer islands, are often resolved by magistrates to in accordance with their mandate to promote reconciliation.⁷⁶ Successful lawyers adeptly utilise both customary and state dispute resolution mechanisms to influence the outcomes of cases. This in turn legitimises a fluid landscape for law and justice which reinforces Kiribati's legal and normative pluralities.

2.3. Vanuatu

Vanuatu is an archipelago of 83 islands, 65 of which are inhabited.⁷⁷ It is located in the Pacific Ocean, and covering an area of approximately 12,200 square kilometres. Vanuatu's population is ethnically diverse, with as many as 138 indigenous languages spoken.⁷⁸ Vanuatu's economy is primarily dependant on agriculture, tourism, logging and remittances from ni-Vanuatu working overseas. As with other small island states, it is vulnerable to sea level rise and increased natural disasters due to climate change.

The first inhabitants of Vanuatu are believed to have arrived around 1100 BC and developed a complex and diverse set of indigenous cultures and languages. Traditional societies in Vanuatu are organised around community and kinship, governed by a network of chiefs and elders who exercise power in *nakamals* (meeting house) to maintain peace and order through *Kastom*. *Kastom* remains a crucial part of everyday life in Vanuatu and is deeply embedded within its legal and political systems.

From the 17th century, European explorers charted Vanuatu, with James Cook naming the archipelago the New Hebrides, a name that persisted until independence.⁷⁹ Traders, missionaries and settlers arrived over the following centuries bringing the influence of Western culture and religion. This influence contributed to significant social and cultural change, particularly through the introduction of Christianity.⁸⁰ Today approximately 80% of the population are Christian and

⁷⁶ Section 35, *Magistrate's Court Ordinance [Cap 52] 1977* (Kiribati).

⁷⁷ Miranda Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (ANU Press, 2009).

⁷⁸ Alexandre François et al, *The Languages of Vanuatu: Unity and Diversity* (Asia Pacific Linguistics Open Access, 2015). 1.

⁷⁹ Donald E Paterson, 'Vanuatu' in Michael A Ntumu (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 365. 365.

⁸⁰ James L Flexner, *An Archaeology of Early Christianity in Vanuatu (Terra Australis 44): Kastom and Religious Change on Tanna and Erromango, 1839–1920* (ANU Press, 2016).

religion continues to play an important part in family and village life.⁸¹ Other colonial practices have had similarly lasting effects. During the 1860s plantation owners in Australia, Fiji, New Caledonia and Samoa commenced the now condemned practice of blackbirding which has left a lasting mark on the descendants of survivors.⁸²

In 1906 the British and the French established joint-rule through a Condominium – a unique form of shared colonial rule.⁸³ Under the Condominium, Vanuatu was governed by separate British and French administrations, which led to the development of a complex and often confusing legal and bureaucratic system. This dual governance structure persisted until Vanuatu gained independence in July 1980 following the passing of its Constitution.⁸⁴ Under its Constitution Vanuatu adopted a parliamentary democratic system with a president as the head of state and a prime minister as the head of government.⁸⁵ Of particular note is the recognition given by the Constitution to *Kastom* and to customary law.⁸⁶ Today, Vanuatu's political system is characterised by a blend of traditional and modern structures. The country's legal system is based on British and French law, as well as customary law, which continues to play a significant role in the resolution of disputes, particularly in rural areas. The National Council of Chiefs (*Malvatumauri*), a constitutionally recognised body, serves as an advisory body to the government on matters related to traditional customs and culture.⁸⁷

Due to the limited resources of the state, many governance functions in Vanuatu are devolved to local government councils, which consist of elected representatives from the community. The central government provides funding for local councils, but they are responsible for their own administration and the provision of basic services. In remote areas, access to formal legal institutions is often limited, with traditional chiefs and elders continuing to play a crucial role in maintaining social harmony and resolving disputes.⁸⁸ Vanuatu's legal and political landscape reflects its diverse and complex history, with indigenous customs and practices coexisting

⁸¹ United States Department of State, 'Vanuatu 2020 International Religious Freedom Report' (Report, Office of International Religious Freedom, 2020).; Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009).

⁸² Jeremy MacClancy, *To Kill a Bird with Two Stones: A Short History of Vanuatu* (Vanuatu Cultural Centre, 1981).

⁸³ Keith Woodward, *A Political Memoir of the Anglo-French Condominium of the New Hebrides* (ANU Press, 2014).

⁸⁴ *Constitution of the Republic of Vanuatu 1980* (Vanuatu)

⁸⁵ Ibid.

⁸⁶ See Article 47(1), 95(3), and Article 95(2). Ibid.

⁸⁷ Miranda Forsyth, 'Spinning a Conflict Management Web in Vanuatu: Creating and Strengthening Links between State and Non-State Legal Institutions' (2011) 43(63) *The Journal of Legal Pluralism and Unofficial Law* 179.

⁸⁸ See for example: Livingston Armytage AM, 'Access to Justice Enabling Rights & Unrepresented Litigants' (Report, Pacific Judicial Strengthening Initiative, 2019).; Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009);

alongside modern legal and political institutions. As Vanuatu continues to develop, balancing the competing demands of tradition and modernity remains an ongoing challenge. The legal profession has a critical role to play in navigating these demands.

3. THE CONTEXT OF LAW IN PICs

3.1. Normative Pluralism

Normative pluralism refers to the ‘social fact’⁸⁹ that within human social systems there exists multiple, often conflicting, values and norms which do not have a fixed hierarchy of importance within a given social field, but rather are sensitive to context.⁹⁰ For Corrin, recognising this social fact ‘allows reflection on all norms observed in a community and consideration of the legitimacy of an order, either within the community or by those outside it.’⁹¹ Legal scholars are typically concerned only with social norms that can be properly categorised as ‘legal’, with legal positivists favouring a state-centric view and legal pluralists recognising the possibility of multiple concurrent, or embedded legal orders.⁹² In literature about PICs concepts such as ‘the Pacific way’, ‘tradition’ and ‘Custom/*Kastom*’ are often used to refer to traditional sources of norms belonging to or arising from culture. In PICs, shared understandings of hierarchy, respect for elders, and duties to kin are embedded within social practices performed in every social domain from villages, to markets, to courts and within parliament. These practices shape the conduct of individuals and have, by and large, defied attempts to codify them as law.⁹³

As demonstrated through the histories explored earlier in this chapter, and in the case studies discussed throughout this thesis, there are a plurality of normative influences on lawyer conduct in PICs.⁹⁴ All of these influences are filtered through the unique lenses and ‘final vocabularies’ each lawyer cultivates over time.⁹⁵ Applied to the domain of legal practice normative pluralism can give

⁸⁹ William Twining, ‘Normative and Legal Pluralism: A Global Perspective’ (2009) 20 *Duke Journal of Comparative and International Law* 473, 476.

⁹⁰ See further Isaiah Berlin, *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958).; Brian Z Tamanaha, Caroline Sage and Michael Woolcock, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012).

⁹¹ Corrin, ‘Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific’ (2017) 306.

⁹² See further discussion on legal pluralism at 3.2 below.

⁹³ See Daniel F Robinson and Miranda Forsyth, ‘People, Plants, Place, and Rules: The Nagoya Protocol in Pacific Island Countries’ (2016) 54(3) *Geographical Research* 324.; Laura Grenfell, ‘The Relationship between Legal Pluralism and the Rule of Law in South Africa and Timor-Leste’ (PhD Thesis, Australian National University, 2009). 11. See also Sinclair Dinnen, ‘Community Law-Making and the Codification of Customary Laws-New Currents’ (In Brief No 18, Lowy Institute, 2018).

⁹⁴ See in particular the discussion in Chapters Six and Seven.

⁹⁵ I am referring here to Richard Rorty’s concept of ‘final vocabulary’ Richard Rorty and Rorty Richard, *Contingency, Irony, and Solidarity* (Cambridge University Press, 1989).; Mauro Santelli, ‘Redescribing Final Vocabularies. A Rortian Picture of Identity and Selfhood’ (2020) 12(1) *European Journal of Pragmatism and American Philosophy* 1. A ‘final vocabulary’ consists of the words that individuals use to justify their actions, beliefs, and lives. They are deeply personal and contingent upon one’s experiences, culture, and historical context. They are justified only in terms of their coherence and utility within an individual’s life or a specific community’s practices. While a deep study of Rorty’s notion of final vocabularies and the construction of moral identities is beyond the scope of this thesis I believe the concept is useful in understanding how language, law and culture interact to shape the understandings of individuals about the environments they navigate and the subjectivity in which they must be understood. See also Jean-Pierre Olivier de

rise to legal and ethical dilemmas for lawyers with no satisfying personal or professional resolutions, or provide pathways to justice that may be better adapted to local contexts than rigid state laws. Later chapters explore these ideas further.⁹⁶

3.2. Legal Pluralism

Numerous scholars have written about legal pluralism and the ways it complicates law in PICs.⁹⁷ Legal pluralism, although present in many societies and empires throughout history, has become an object of study in recent years by anthropologists and other social scientists, especially scholars of colonial and post-colonial situations.⁹⁸ As an interpretive phenomenon, legal pluralism is used as a lens by scholars of PICs as both a way of describing the observed operation of concurrent and interacting legal systems and as a methodology to study law and society in PICs. For example, Pacific scholars have used legal pluralism to: examine the boundaries of state and non-state law;⁹⁹ explore non-state protections for intellectual property rights;¹⁰⁰ and investigate issues regarding state legitimacy, constitutionalism and public ethics in the Pacific Region.¹⁰¹ 'Legal pluralism challenges 'the idea that the state has a monopoly over law.'¹⁰² But what precisely do I mean by legal pluralism?

Traditional definitions suggest that legal pluralism refers to 'the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal

Sardan, 'Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)' in Tom de Herdt and Jean-Pierre Olivier de Sardan (eds), *Real Governance and Practical Norms in Sub-Saharan Africa* (2015) 19. 7.

⁹⁶ See for example: Chapter Seven. p. 268.

⁹⁷ See for example: Sue Farran, 'Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific' (2006) 38(52) *The Journal of Legal Pluralism and Unofficial Law* 77.; Miranda Forsyth, 'Leadership Structures and Dispute Systems in Vanuatu from First Contact to Independence in Vanuatu' (2007) 30 *Journal of Pacific Studies* 63.; Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); See also Corrin, 'Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific' (2017); Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017); Corrin, 'Crossing the Border from Custom to Contract: Legal Pluralism and Pacific Islands' Contract Laws' (2021); Grenfell, 'The Relationship between Legal Pluralism and the Rule of Law in South Africa and Timor-Leste' (2009).

⁹⁸ Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) *Sydney Law Review* 375. 390. On an historic timescale, colonial and parliamentary laws have been a recent, albeit significant addition to the collection of legal pluralities in PICs.

⁹⁹ Jennifer Corrin, 'A Question of Identity: Complexities of State Law Pluralism in the South Pacific' (2010) 42(61) *The Journal of Legal Pluralism and Unofficial Law* 145.; Robert Hughes, 'Legal Pluralism and the Problem of Identity' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (ANU E-Press, 2010) 329.

¹⁰⁰ Miranda Forsyth, 'Making the Case for a Pluralistic Approach to Intellectual Property Regulation in Developing Countries' (2016) 6(1) *Queen Mary Journal of Intellectual Property* 3.

¹⁰¹ Graham Hassall, 'Governance, Legitimacy and the Rule of Law' in Anita Jowitt (ed), *Passage of Change: Law, Society and Governance in the Pacific* (2003) 51.

¹⁰² Grenfell, 'The Relationship between Legal Pluralism and the Rule of Law in South Africa and Timor-Leste' (2009). 9.

system'¹⁰³ which share features of legitimacy, obligation and coercive authority. While my study is bounded by the geographic borders of three PICs, contemporary socio-legal scholars reject the need to limit the definition of legal pluralism to nation states in favour of a less bounded definition. Waldron, borrowing from Falk Moore, suggests legal pluralism be described as:

*The presence of more than one legal system in a social field occupied or defined by one legal system ... which may or may not be identical with a state ... we call the situation pluralistic if and only if there is also at least one other legal system operating somewhere in that very field.*¹⁰⁴

Tamanaha takes this idea of an observed social field (which may or may not be an entire country) and suggests an interpretation of law as a 'folk concept', 'it is what people in social groups see and label as law' and therefore, 'Legal pluralism exists whenever social actors identify more than one source of 'law' within a social arena.'¹⁰⁵ For lawyers in PICs the weaknesses of State governance systems are balanced by the relative strengths of Customary systems and Christian normativity. This pluralism is a dynamic balance, one achieved by a constantly shifting network of relationships within legal practice environments that enable alternative and sometimes complementary pathways to resolving client disputes.

3.2.1. Implications of Normative and Legal Pluralism for Legal Practice in PICs

The presence of multiple, interacting legal systems in PICs complicates legal education and training by making the content and application of law conceptually and practically more difficult to teach and for students to learn. This affects both legal education and legal practice. For example, significant gaps exist in the legal education of Pacific lawyers on the application of customary law.¹⁰⁶ In the *2022 USP Handbook and Calendar* only four LLB courses specifically mention

¹⁰³ Margaret Davies, 'Legal Pluralism' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2012). 1.

¹⁰⁴ Jeremy Waldron, 'Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's' in Peter Cane (ed), *Colloquium: The Hart-Fuller Debate in the Twenty-First Century: 50 Years On* (Australian National University, 2010) Ch7. 7.

¹⁰⁵ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008). 396. Tamanaha's approach conveniently sidesteps the need for a researcher to engage in irreconcilable debate regarding the nature of law. Its principal advantage is that it enables the study of legal pluralism within a social arena, without the need to define when a normative authority becomes 'legal'. Griffiths prefers reference to normative pluralism, while Moore has never subscribed to the moniker "legal pluralism", distinguishing instead between governmental legal norms and 'non-governmental, semi-autonomous social fields which generate their own (non-legal) obligatory norms to which they can induce or coerce compliance.' See John Griffiths, 'The Idea of Sociology of Law and Its Relation to Law and to Sociology' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 49. 63-64; Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1972) 7 *Law and Society Review* 719.

¹⁰⁶ See further Carolyn Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012) 22(1) *Legal Education Review* 51.; Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017). See also internal USP School of Law Curriculum Map and Summary of Assessment Tasks 2020 – on file with author.

customary law in their description: LW201: Contract Law; LW308: Constitutional Law; LW340 Pacific Land Tenure; and LW341: Customary Law. Archived Handbooks show that LW341: Customary Law or an equivalent course, has not been offered since 2017 and ceased being taught face to face around 2010.¹⁰⁷ This means it is up to lawyers to fill the gaps in their knowledge on the job.¹⁰⁸ In a country such as Kiribati where disputes over customary land comprise a significant majority of cases, this gap is deeply problematic.

Within legal practice, dispute resolution is complicated by the existence of different mechanisms and opportunities for resolving conflicts. An example of such mechanisms includes separate customary law courts and hybridised or partially-institutionalised forms of justice such as are found in Vanuatu, Fiji, Kiribati and Solomon Islands.¹⁰⁹ Customary law and relationships are also woven through and deployed in the course of ordinary court proceedings around the region, for example in assessing liability for certain crimes and criminal sentencing, customary reconciliation; and in family and inheritance law.¹¹⁰ This context means that lawyers in PICs navigate a process of continuous renegotiation of norms being ‘inevitably part of both the state system and the local community, and required, always to straddle the two.’¹¹¹ Later chapters of this thesis further consider some of the key implications of legal pluralism on legal education and practice in PICs.¹¹²

¹⁰⁷ *Archived Publications* (Web Page, 28 November 2023) <<https://www.usp.ac.fj/publications/archived-publications/>>. On the challenges of teaching customary law in a Pacific jurisdiction, albeit not at USP, see: Brian Tom, ‘Customary Law and Legal Plurality in Papua New Guinea: The Challenges of Teaching and Learning Customary Law’ (2023) 16 *Journal of the Australasian Law Academics Association* 49. Tom recommends students be taught custom in their final year and that an anthropology course be compulsory for all students. 59.

¹⁰⁸ See further Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017). See also discussion in Chapter Four from p. 149.

¹⁰⁹ *Island Courts Act 1983 [Cap 167] 1983* (Vanuatu); Section 10 *Local Courts Act 1942* (Solomon Islands); *Village Fono Act 1990* (Samoa).

¹¹⁰ On the use of custom in sentencing see Jennifer Corrin, ‘The Impact of Custom on Criminal Proceedings in Pacific Island Countries’ (2023) 28 *Comparative Law Journal of the Pacific* 29.; Kim Weinert, ‘Mats and Restorative Justice in Vanuatu’ (2019)(1) *Journal of the Oxford Centre for Socio-Legal Studies* 45.; Donald E Paterson and Anita L Jowitt, ‘More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences’ (2008) 12(2) *Journal of South Pacific Law* 39.; and Tess Newton Cain, ‘Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region’ (2001) 2(1) *Melbourne Journal of International Law* 48. On custom in family law and child custody see Jennifer Corrin and Sue Farran, *The Plural Practice of Adoption in Pacific Island States* (Springer, 2019).; and Jennifer Corrin, ‘Is It Well with the Child: Custody of Children in Small South Pacific States’ in Frank Bates (ed), *International Survey of Family Law* (2009) 469. On balancing customary and state legal systems see further: Leigh T Toomey, ‘A Delicate Balance: Building Complementary Customary and State Legal Systems’ (2010) 3(1) *Law and Development Review* 156. See further generally: Anita L Jowitt and Tess Newton Cain, *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, 2003).; and Corrin and Paterson, *Introduction to South Pacific Law* (2017).

¹¹¹ Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017). 274. The implications of this on the norms of legal practice in PICs are considered in Chapter Seven.

¹¹² See in particular Chapters Six and Seven, but also the discussion in Chapter Four from p. 149.

3.3. Decolonisation and Patriation of Laws

A further issue relevant to the context of law in PICs is that state legal systems – and the institution of lawyers that sustains it – paradoxically perpetuate colonial domination in some respects, whilst also paving the road to cultural, psychological and economic emancipation.¹¹³ This paradox refers to the fact that legal systems and governance institutions in PICs continue to reflect colonial values and principles at the expense of indigenous epistemologies and ontologies, yet the same systems and institutions also provide tools for self-governance and empowerment of indigenous people. Decolonisation in PICs refers to the complex process of disentangling colonial political, cultural and economic influences from institutions of law and governance in PICs. A key component of this ‘project of decolonisation’ is the repatriation (localisation) of law.¹¹⁴

At independence, constitutions of PICs established local parliaments with autonomous law-making power, but by and large retained the sources of law that were in force at the time. This meant they retained colonial and foreign laws as sources of law; plus English common law and equity.¹¹⁵ This was only ever meant to be a transitional measure to allow time for colonial laws to be progressively patriated, but in many countries the patriation of laws has proceeded at a glacial pace.¹¹⁶ The problems of delayed patriation of laws and related issue of legal transplants from other

¹¹³ On the role of law in the protection of cultural and national heritage See Lucas Lixinski, ‘Heritage Law in Pacific Island States: The Legacies of Colonialism and the Elusive Possibilities of Cultural Emancipation’ in Margaretha Wewerinke-Singh and Evan Hamman (eds), *Environmental Law and Governance in the Pacific* (Routledge, 2020) 215. In Margaretha Wewerinke-Singh and Evan Hamman, *Environmental Law and Governance in the Pacific: Climate Change, Biodiversity and Communities* (Routledge, 2020).

¹¹⁴ See Corrin, ‘Discarding Relics of the Past: Patriation of Laws in the South Pacific’ (2008).

¹¹⁵ Ibid. 635-6. The terms ‘common law’ and ‘equity’ refer to sources of judge made law originally sourced from the United Kingdom, but with divergent branches – like a tree – developed and applied locally by judges in all former British colonies (and their colonies). Those familiar with common law and equity will understand the complexity this adds to legal practice and legal research in PICs.

¹¹⁶ Ibid.; See also Teleiai Lalatoa MRS Seumanutafa, *Law Reform in Plural Societies* (Springer, 2017).

jurisdictions, have been well documented in many substantive areas of law, including land tenure,¹¹⁷ jurisprudence,¹¹⁸ and contract law.¹¹⁹ Lawyer regulation has been no exception.¹²⁰

Others have written in detail about the intrinsic ‘foreignness’ of colonially derived systems of law and the pervasive impact this has in society on the perceived legitimacy of State law in PICs.¹²¹ Complete emancipation from domination requires decolonisation of state legal systems and the patriation of law and jurisprudence.¹²² While a detailed consideration of decolonisation and patriation of laws in PICs is beyond the scope of this thesis, the fact that in many PICs both foreign and colonial laws are still in force adds to the paradigmatic complexity of legal practice environment. Lawyers are important to this process, not only because of their qualifications as practising legal pluralists, but because lawyers are participants in creating local jurisprudence as an emergent property of the common law legal system which is important for the success of the project of decolonisation as a whole.¹²³

The delayed patriation of laws continues to create significant technical legal issues in some jurisdictions regarding what British (or foreign) legislation remains in force.¹²⁴ Philosophically, the continuing application of foreign law within Pacific States undermines State authority – the legitimacy of which ultimately resides in the autochthony of its laws and institutions. A striking

¹¹⁷ Rebecca Monson, ‘Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands’, *Justice for the Poor* (Briefing Note, 2010) <<http://hdl.handle.net/10986/10932>>; see also Sue Farran, ‘Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States’ (2011) 43(64) *The Journal of Legal Pluralism and Unofficial Law* 65., and Tuiatua Tupua Tamasese Efi, *Su’esu’e Manogi = in Search of Fragrance: Tui Atua Tupua Tamasese Ta’isi and the Samoan Indigenous Reference* (Centre for Samoan Studies, National University of Samoa, 2008). On transplant of legal patterns see: Edward M Wise, ‘The Transplant of Legal Patterns’ (1990) 38 *American Journal of Comparative Law Supplement* 1.; Efi, *Su’esu’e Manogi = in Search of Fragrance: Tui Atua Tupua Tamasese Ta’isi and the Samoan Indigenous Reference* (2008).

¹¹⁸ Kenneth Brown, *Reconciling Customary Law and Received Law in Melanesia: The Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, 2005).; see also Jennifer Corrin, ‘The Development of South Pacific Islands Jurisprudence: The Status of and the Relationship between Introduced Law and Customary Law in Small Island Countries of the South Pacific’ (PhD Thesis, Griffith University, 2002).; Anna Dziedzic, ‘Foreign Judges of the Pacific as Agents of Global Constitutionalism’ (2021) 10(2) *Global Constitutionalism* 351.; Jennifer Corrin, ‘Legal Scholarship and Pacific Islands’ Jurisprudence’ (2021) 26 *Comparative Law Journal of the Pacific* 139.

¹¹⁹ Corrin, ‘Crossing the Border from Custom to Contract: Legal Pluralism and Pacific Islands’ Contract Laws’ (2021).

¹²⁰ See South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017).

¹²¹ See Peter Larmour, ‘The Foreignness of the State in the South Pacific’ (2003) 2(1) *The New Pacific Review* 24.; Carolyn Penfold, ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’ (2013) 23(1) *Legal Education Review* 62.; and Miranda Forsyth, ‘Activating’ the Powers of Law in the South Pacific’ (2018)(80) *Development Bulletin (Australian National University)* 140.

¹²² Corrin, ‘Discarding Relics of the Past: Patriation of Laws in the South Pacific’ (2008); Tracey Banivanua Mar, *Decolonisation and the Pacific* (Cambridge University Press, 2016).

¹²³ See for example Corrin, ‘Legal Scholarship and Pacific Islands’ Jurisprudence’ (2021); Fuimaono Dylan Asafo, ‘“We Are Voyagers!” Building a Pacific Critical Legal Theory for a New Voyage to Freedom’ (2020) 27 *Canterbury Law Review* 99.

¹²⁴ Corrin, ‘Discarding Relics of the Past: Patriation of Laws in the South Pacific’ (2008).

example of this is that in Kiribati and Solomon Islands, the legal source of authority of the Constitution remains technically a schedule of United Kingdom legislation.¹²⁵ Such issues complicate both legal education and legal practice.

3.4. Pacific Regionalism

Pacific Regionalism has long been part of the political and economic agendas of PICs.¹²⁶ To some, it has long been viewed as an answer to the regulation of issues that are not limited to national borders such as: security; fisheries; prevention of transnational crime and regulating lawyers.¹²⁷ To others it is sometimes seen as a threat to individual sovereignty. Many local challenges in PICs raise issues that are also relevant at a regional level, or to similar challenges faced by other regional actors. These shared challenges include: developmental asymmetry; remote geographies; environmental vulnerability; and many others.¹²⁸

One of the ways PICs have sought to maintain regional stability is through the PIF, which was established in 1971 and today has 18 member countries. PIF seeks to maintain regional stability by mobilising dynamic elements of Pacific Regionalism as a political idea and practice. Through this PIF seeks to work collaboratively to address 'the region's vulnerabilities and dependencies, which will otherwise dog its social, economic and environmental well-being.'¹²⁹ Its operations have included many successful regional collective efforts in a wide range of areas including: tourism; environmental protection; law reform; law and justice sector development; aviation safety; and fisheries management.¹³⁰ Regional efforts have also led to disappointments and collaborative failures, each with important lessons for the future.

Over 90% of lawyers in PICs are educated at USP where law is taught comparatively with an emphasis on experiential learning and shared knowledge.¹³¹ Students study law with other students

¹²⁵ *Kiribati Independence Order 1979* (United Kingdom); *The Solomon Islands Independence Order 1978* (United Kingdom) This quirky, but symbolically profound fact has been corrected in other jurisdictions such as Tuvalu and Fiji through the passing of their own Constitutions – in Fiji's case, through the passing of several.

¹²⁶ See Pacific Islands Forum, 'Pacific Plan for Strengthening Regional Cooperation and Integration' (Report, Pacific Islands Forum Secretariat, 2005). See more recently Pacific Islands Forum, 'Pacific Plan Review: Report to Pacific Leaders' (Report, Pacific Islands Forum Secretariat, 2013).

¹²⁷ Sandra Tarte, 'Regionalism and Changing Regional Order in the Pacific Islands' (2014) 1(2) *Asia & the Pacific Policy Studies* 312. Farrell et al, 'Covid-19 and Pacific Food System Resilience: Opportunities to Build a Robust Response' (2020); Campbell, 'Development, Global Change and Traditional Food Security in Pacific Island Countries' (2015); Sandy Gordon, 'Regionalism and Cross-Border Cooperation against Crime and Terrorism in the Asia-Pacific' (2009) 5(4) *Security Challenges* 75.

¹²⁸ Pacific Islands Forum, 'State of Pacific Regionalism Report' (2017). 3.

¹²⁹ Pacific Islands Forum, 'Pacific Plan Review: Report to Pacific Leaders' (2013). 2-3.

¹³⁰ Ibid.

¹³¹ The Law School is now known as the 'Discipline of Law' and exists within a superstructure called 'SoLaSS'.

from around the region and, in many cases, live in shared residences for years while studying at the School of Law based at Emalus Campus, Port Vila, Vanuatu, or, since 2014, also at Laucala Campus, Suva, Fiji. An awareness of Pacific Regionalism and some of its challenges, opportunities and risks is instilled in all lawyers through their education and training at USP. Many USP law graduates have gone on to lead regional organisations, donors, forums and meetings.

4. LAWYERS AND THE LEGAL PROFESSION IN PICs

Weber argued that the very notion of a lawyer is a peculiar consequence of Roman law and jurisprudence and that the evolution of the State as a political structure is the product of rational juristic thought by university trained jurists.¹³² ‘Since the French Revolution, the modern lawyer and modern democracy absolutely belong together.’¹³³ Weber argued that the rise of the absolute state was not possible without juristic rationalism – in this sense, therefore, Weber’s position was that lawyers are not simply agents, but architects of the state.¹³⁴ Within modern states, lawyers are inextricably linked with activities to develop law and bureaucratic institutions in ways that legitimise the authority of the state and the rule of law.¹³⁵ This includes activities such as: facilitating access to justice and ensuring the rule of law as the ‘interface’ between citizens and state legal services, and ensuring the protection of human, civil and political rights. At a finer resolution the daily work of lawyers in PICs involves navigating legal and normative pluralism to achieve outcomes that balance the often-conflicting expectations of justice generated by clients, communities and courts.¹³⁶

4.1. A Brief History of Lawyers in PICs

The history of the legal profession in PICs is a modern history, albeit one with a profound historical connection. It is a necessarily modern history, not simply because no records exist of lawyers in pre-colonial Pacific societies, but because pre-colonial Pacific societies were not organised in a way that left room for a class of lawyers.¹³⁷ The legal professions of most PICs have developed over three

¹³² Max Weber, *Politics as a Vocation*, tr H.H. Gerth and Mills C. Wright (Fortress Press, 1965), [49-51]. In Hans Heinrich Gerth and C Wright Mills, *From Max Weber: Essays in Sociology* (Routledge, 2014), 77-128.

¹³³ Weber, *Politics as a Vocation* (1965), [51]. This quote starkly emphasises the colonial origin of the legal profession in PICs.

¹³⁴ This has a range of interesting consequences for sustainable development that are worth exploring. Where, other than the minds of their best legal scholars, can robust state institutions emerge from?

¹³⁵ The ‘rule of law’ describes a situation where laws apply equally to all actors and all actors are equally afforded its protection. Its precise scope, its measurement and how best to pursue it is much debated. For present purposes it is sufficient to say that the term ‘the rule of law’ describes an *ideal*, and as such is a value or principle that different actors within society actively pursue in many different ways. One actor may interpret their role in promoting this ideal as pursuing strict enforcement of black letter law to the detriment of social harmony, while another may view their role as being to vigorously defend the independence of the judiciary from egregious influence by the Executive, or military. As an ideal, actors weigh their pursuit of the rule of law against other meaningful concerns – such as conflicting norms, social justice, etc. The conduct of all actors directs and limits the ways in which the rule of law manifests in practice across different situations, environments and times. This position is well summarised by the Hon. Chief Justice Allsop, Federal Court of Australia: ‘the Rule of Law is a state of affairs and an attitude of mind, as much as, if not more than, it is an abstracted principle or body of rules.’ Chief Justice James Allsop, ‘The Rule of Law Is Not a Law of Rules’ (*Fca*) [2018] *Fedjschol* 22.

¹³⁶ This is considered in greater detail in Chapters Six and Seven.

¹³⁷ The closest social roles to lawyers would have likely been advisors to or spokespeople for Chiefs, or roles requiring deep knowledge of traditional norms. This is a far cry from the modern image of advisers, advocates and administrators.

to four distinct eras: the colonial era; the post-independence era; the post-USP School of Law era; and in some countries a distinct contemporary era following major reforms to laws providing for the regulation and organisation of lawyers. A high-level overview of these eras in PICs is provided below followed by more detailed accounts of the unique development of the legal profession in Fiji, Kiribati, and Vanuatu.

In all PICs, the first lawyers were citizens of colonial and other foreign powers who primarily provided legal services to colonists and plantation owners. By the time PICs became independent, most counted a small number of foreign qualified indigenous lawyers who were often associated with pro-independence political movements.¹³⁸ In most PICs, the Post-Independence Era for the legal profession is perhaps best understood in terms of its pragmatism, as a cadre of too few lawyers adapted to navigate the dynamic and considerable demands upon them in newly minted states. These demands followed not just the interests of bureaucratic institutions and state builders, but also commercial interests and for several lawyers, their own interests. New opportunities in expanding bureaucracies catapulted many young lawyers into senior roles, launching many notable legal careers in the region.¹³⁹

The USP School of Law opened to receive its first cohort of students in 1994 and produced the first graduates of its Bachelor of Laws (LLB) and Professional Diploma in Legal Practice (PDLP) legal programs in 1997 and 1998 respectively.¹⁴⁰ As shown in Table 1, below, in the years since, the number of lawyers across the region has increased dramatically to meet commercial, private and bureaucratic demand. The data shows that in Kiribati and Vanuatu the legal profession grew steadily from 2011-2020, while in Fiji the legal profession has grown more rapidly – fuelled by a glut of domestic students from Fiji’s three locally accredited law schools.¹⁴¹

¹³⁸ On demographics see Ntuny (ed), *South Pacific Islands Legal Systems* (1993), on lawyers, leaders and colonial independence movements see Anthony Haas, 'Independence Movements in the South Pacific' (1970) 11(1) *Pacific Viewpoint* 97.; Victor M Uribe, 'Kill All the Lawyers!: Lawyers and the Independence Movement in New Granada, 1809-1820' (1995) 52(2) *The Americas* 175.

¹³⁹ Examples include the late Michael Takabwe who became Attorney-General of Kiribati around 1-year after being admitted as the first I-Kiribati lawyer. He went on to become the longest serving Attorney-General in the Commonwealth. Other notable examples include Sir Gilbert John Baptist Muria, former Chief Justice of Solomon Islands and Kiribati, Chief Justice Lunabek, Vanuatu and many others.

¹⁴⁰ Anthony Angelo and Jack Goldring, 'The Study of Law at the University of the South Pacific' (1994) 24 *Victoria University of Wellington Law Review* 103. 103-7.; Richard Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998) 24 *Monash University Law Review* 38.; see also Jennifer Corrin, 'Vale Professor Emeritus Paterson: The End of an Era!' (2021) 23 *Journal of South Pacific Law* 1. 2.

¹⁴¹ The University of the South Pacific, the Fiji National University, and the University of Fiji. Table 1, 36.

Table 1: Composition of the legal profession in Kiribati, Fiji and Vanuatu¹⁴²

	Fiji ¹⁴³				Kiribati ¹⁴⁴				Vanuatu ¹⁴⁵			
	1986	2011	2020	2024	1986	1995	2011	2020	1986	1995	2011	2020
Total Lawyers	175	350	790	1,004	5	11	33(41)	40(56)	19	-	117	175*
Private or 'in house'	-	230	-	-	1	2	8	13	8	-	40	-
Government	~24	120	-	-	4	6	25	27	11	-	37	-
Female	-	142	-	-	0	2	17	21	-	-	25	-

Across the region rapid growth of the profession has created significant challenges for mentoring and supervision of new lawyers, due to the lack of capacity of senior lawyers to keep up with demand. Writing in 2011, Robert Cartledge observed:

*University of the South Pacific (USP) graduates are often thrust into positions of authority and responsibility beyond the level of their “training” without the support of an experienced mentor ... They are literally thrown in at the deep end.*¹⁴⁶

Puloka confirms this, saying:

*There is a great amount of work pressure on young lawyers who have been thrown into the deep end of their legal career ... climbing the career ladder has so far been rather quick.*¹⁴⁷

¹⁴² Data for this Table was compiled using the following sources: Powles and Pulea, *Pacific Courts and Legal Systems* (1988). 31; Ntummy (ed), *South Pacific Islands Legal Systems* (1993); South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011). 14; South Pacific Lawyers' Association, 'Women in Law in the South Pacific - Survey Report' (Report, South Pacific Lawyers' Association, 2014). 9. Any discrepancies from the data in these sources is explained in the references for the table.

¹⁴³ Data for Fiji taken from the 'List of Legal Practitioners with Practising Certificates'. Fiji judiciary website <https://judiciary.gov.fj>. 2020 data is shown as at 1 January 2020. 2024 data is shown as final at 9 August 2023.

¹⁴⁴ Figures in brackets include I-Kiribati lawyers admitted but not practising in Kiribati. For Kiribati, data for 1987 shows different figures than Guy Powles and Mere Pulea because my figures exclude two foreign lawyers who were not based in Kiribati and rarely appeared there. Data for 2020 provided by Registry of the High Court of Kiribati by email dated 13 April 2020. All numbers for Kiribati confirmed through personal correspondence with Justice David Lambourne, May 2020. At April 2020, 126 lawyers had been entered on the role of lawyers of the High Court of Kiribati. Three of the 'private and in-house lawyers shown in 2020 figures work in the NGO sector and only occasionally practice.

¹⁴⁵ 2020 data for Vanuatu provided by personal correspondence with Vanuatu Law Society. These figures reflect the number of members of the 'VanLawyers' Google Group used by lawyers in Vanuatu. As at May 2020 there were 58 paid members of the VLS which included an unknown mix of private and government lawyers. 'Vanuatu Law Society Directory', *Vanuatu Law Society* (Web Page, November 2020) <<https://www.vanuatalawsociety.org/directory>>. (accessed 29 November 2023).

¹⁴⁶ Robert Cartledge, 'In Depth; Thrown in at the Deep End' (2011) Issue 3 (October–December) *Newsplash Newsletter of the South Pacific Lawyers' Association* 9.

¹⁴⁷ South Pacific Lawyers' Association, 'Experiences as a Young Lawyer in the Pacific Discussions at the Pacific Young Lawyers' Forum' (2011) Issue 2 (July–September) *Newsplash Newsletter of the South Pacific Lawyers' Association* 7.

The Post USP Law School Era coincided with the emergence of internet media and social media, which provided new technologies for the organisation of informal and formal professional associations and networks of lawyers. Online platforms and social media have also provided places for the public, the bar, the bench and politicians to voice concerns regarding ‘bad lawyers’ involved in a wide range of subpar conduct ranging from mere incompetence to political corruption.¹⁴⁸ Most PICs in the region have responded to these concerns and the change in the scale and complexity of regulating lawyers, by seeking to develop new ‘modernised’ laws for the regulation of lawyers and the organisation of peak professional associations of lawyers. These law reform projects have met with a mixed fate across the region, and have heralded a new era of regulation and regulatory challenges.¹⁴⁹

Since independence it is possible to observe the following three trends affecting the legal profession in PICs. Demographically, legal professions in the region have increased substantially in number and have by and large overcome numerical ethnic and gender inequities.¹⁵⁰ Additionally, the growing need to reform and improve lawyer regulation has been acknowledged and responded to by the legal profession, judiciary, governments, legal educators and NGOs in various ways.¹⁵¹ Finally, there has been an increasing role played by professional associations of lawyers, both domestic and transnational, in the organisation, education and training of lawyers and the ‘projection’ of professional norms.¹⁵²

Today, throughout the Region, autochthonous and self-organising professional associations of lawyers have developed in Fiji, Papua New Guinea, Tonga and Samoa, with professional associations in other jurisdictions at different stages of development. In all cases in the Pacific,

¹⁴⁸ A substantial number of reports, cases, journals, newspapers, speeches and periodicals refer to concerns regarding lawyer competence and unethical lawyer conduct in PICs. See for examples: Radio Australia, ‘Interview with Sir Albert Palmer: Quantity, Quality Concern over Pacific Lawyers’, *Radio Australia* (Web Page, 28 January 2023) <<http://www.radioaustralia.net.au/international/2013-01-28/quantity-quality-concern-over-pacific-lawyers/1079622>>; Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017); Law Council of Australia, ‘Review of Legal Profession Regulations in Solomon Islands – Scoping Study Report’ (Report, Law Council of Australia, 2011).; James Leach, ‘Report to the Papua New Guinea Law Society and the Law Council of Australia Re Complaints Processing Difficulties Encountered by the Papua New Guinea Law Society’ (Report, Law Institute of Victoria, July 2010).; Cartledge, *In Depth; Thrown in at the Deep End* (2011). Reference is also made here to numerous personal communications with judicial officers, government law officers and bar leaders within the region since 2007.

¹⁴⁹ Bartlett, ‘A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands’ Legal Profession’ (2018).

¹⁵⁰ See South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (2011); South Pacific Lawyers’ Association, ‘Women in Law in the South Pacific - Survey Report’ (2014).

¹⁵¹ See for example Graydon, ‘Situation Analysis of Pacific Lawyer Associations’ (2021).

¹⁵² See for example the Case study on KILN in Chapter Six, section 3.2.2, p. 234. See also the recent activities of the SPLA, IBA, and FLS.

development of local lawyer associations owes much to the sustained efforts of local ‘key individuals’ and varying degrees of support from transnational associations of lawyers such as the International Bar Association (IBA) and the South Pacific Lawyers’ Association (SPLA) through institutional linkages. It is sufficient, but important to understand that foreign influences on the development of the legal profession and legal education in PICs ‘continue to determine the organisation of the legal professions ... throughout the South Pacific.’¹⁵³ The development of the legal professions of Fiji, Kiribati, and Vanuatu are considered in greater detail below.

4.2. The Vanuatu Legal Profession

4.2.1. Post-Independence Era 1979 – 1994

There are few written records of lawyers and legal practice in the early Independence era in Vanuatu.¹⁵⁴ Until not long after independence in 1980, the legal profession in Vanuatu comprised foreign educated lawyers (mostly British, Australian and French).¹⁵⁵ Prior to 1980, lawyers were admitted to practice in the High Court of the New Hebrides in accordance with the *Western Pacific (Courts) Order in Council*, 1961. This Order provided that the *Pacific Barristers and Solicitors Order in Council*, 1913 (‘1913 Orders’)¹⁵⁶ – and any rules made under them – would govern admission of lawyers until new rules were created by a Rules Committee established under section 22. The 1913 Orders provided that any lawyer admitted to practise as a barrister or solicitor in England, Scotland, Ireland, India, Canada, Australia, New Zealand or Fiji could be admitted to practise by the High Commissioner or the Supreme Court.¹⁵⁷ To be admitted they were required to be in good standing in their home jurisdiction, swear an oath or declaration of admission as an Officer of the Court, and be entered on a Roll held by the Court.¹⁵⁸ The Chief Justice held authority to suspend or strike-off a lawyer so admitted for good cause.¹⁵⁹

Since 1980, lawyers in Vanuatu have been regulated under the *Legal Practitioners Act* 1980 [CAP 119] (LPA 1980).¹⁶⁰ Prior to 1989, lawyers were registered by Order of the Law Council under section 15 of the LPA 1980. In 1989, the Act was amended to insert Part 1A which granted explicit

¹⁵³ Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017). 91.

¹⁵⁴ Records I have not had time to investigate due to time and COVID, include records of parliamentary debates; law reports; and local newspapers.

¹⁵⁵ Woodward, *A Political Memoir of the Anglo-French Condominium of the New Hebrides* (2014). Woodward refers to English and French lawyers and refers to unpublished memoirs of an English Lawyer Edward Jacomb.

¹⁵⁶ *Pacific Barristers and Solicitors Order in Council 1913* (United Kingdom)

¹⁵⁷ Section 4 *ibid*.

¹⁵⁸ Sections 4-7.

¹⁵⁹ Section 8 *Pacific Barristers and Solicitors Order in Council 1913 (United Kingdom)*.

¹⁶⁰ *Legal Practitioners’ Act 1980 [Cap 115] 1980* (Vanuatu).

power to the Chief Justice to admit barristers and solicitors and made provision for their admission; and Part 1B – which provided for the registration of legal practitioners. New provisions for temporary admission were put into place and the structure of the Law Council Disciplinary Committee was changed to reduce the number of legal practitioners on the Committee from two to one.¹⁶¹

During the early 1980s, the University of the South Pacific Law Unit was established at the USP Emalus Campus in Port Vila headed by the now legendary late Pacific Scholar Professor Emeritus Donald ‘Don’ Paterson. Under his guidance the offerings of the Law Unit expanded over time to include a 5-course certificate program and a 10-course diploma program in legal studies.¹⁶² These courses were directed to the education of bureaucrats, judicial staff and non-lawyer providers of legal services in the region such as pleaders.¹⁶³ The successes of the Law Unit and strong regional support led to the approval to establish a Law School based at the Emalus Campus in Suva with law degree program nominally designed to cater to the unique legal education and training needs of lawyers in PICs.¹⁶⁴

In terms of the growth of the profession over this era, Powles and Pulea report that in 1986, there were 19 lawyers, most of whom were non-indigenous, and whose legal training was typically either in the English common law system, or the French civil law system, rarely both. In 1993, Donald Paterson reported there were five government lawyers who were mostly ni-Vanuatu, while just one of five local law firms were operated by ni-Vanuatu lawyers.¹⁶⁵ There are no formal records of a law society existing until the mid-late 1990s.

4.2.2. Post-USP School of Law Era: 1994 – 2018

The opening of the USP School of Law in 1994 created many opportunities for ni-Vanuatu to study law. By 2011, the profession had grown substantially to 117.¹⁶⁶ The number of lawyers in Vanuatu

¹⁶¹ The Act was further amended in 2001 to permit the admission of USP lecturers – presumably related to the teaching of the USP School of Law’s Law Clinic program.

¹⁶² Interview with Professor Emeritus Don Paterson between 10 March and 21 April 2019), Port Vila, Vanuatu.

¹⁶³ See Ntumu (ed), *South Pacific Islands Legal Systems* (1993); and Powles and Pulea, *Pacific Courts and Legal Systems* (1988).

¹⁶⁴ Angelo and Goldring, ‘The Study of Law at the University of the South Pacific’ (1994); Grimes, ‘Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific’ (1995); Richard Grimes, ‘Vocational Legal Education in the South Pacific - Designing and Implementing a Programme for Progress’ [1996] (1996) 22(2) *Commonwealth Law Bulletin* 1193. Penfold gives a detailed account of legal education at USP in Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017). 114-133.

¹⁶⁵ Paterson, ‘Vanuatu’ 1993 393. It is unclear how these numbers reconcile with the figures provided by Powles and Pulea in 1988 Powles and Pulea, *Pacific Courts and Legal Systems* (1988).

¹⁶⁶ See Table 1 above, p. 36.

has continued to grow steadily since 2011, and as at 2018, there were approximately 150 lawyers. Demographically lawyers in Vanuatu today are predominantly Indigenous with a handful of law firms operated by foreign born and educated lawyers. Anecdotally, these foreign firms tend to dominate commercial and corporate and some government work.

In 2005, the Vanuatu Parliament debated and passed an updated and comprehensive act to reform regulation of lawyers in Vanuatu. The Act was developed as part of deliverables under the Asia Development Bank and Australian Aid supported Vanuatu Legal Sector Strengthening Program.¹⁶⁷ However, the Act was never gazetted for reasons that have never been disclosed publicly. Through personal correspondence, I understand these reasons include a lack of due consultation with the Chief Justice and the legal profession, and an absence of adequate consideration for funding and transitional arrangements.

Vanuatu does not have a history of strong legal professional associations or of a 'collegiate' legal profession. Academic scholarship confirms that an Australian admitted lawyer, Susan Bothmann was the President of a Vanuatu Law Society (VLS) in 1998.¹⁶⁸ I have been informed informally that a Vanuatu Law Society existed in some form in the late 1990s with local lawyer George Vasaris as President and Susan Bothmann as President from March 1998-1999. However, no records exist regarding its the formation and operations.¹⁶⁹ The entity today known as the VLS first existed as a Charitable Association¹⁷⁰ before being established as a statutory body in September 2010 under the *Vanuatu Law Society Act 2010* ('VLS Act').¹⁷¹ The newly established VLS faced and continues to face many challenges.¹⁷² The VLS received some funding from Australia to staff a Secretariat from 2011-2013 although ultimately a recommendation was made that funding be discontinued.¹⁷³ In 2013, the VLS co-hosted the 2013 South Pacific Lawyers' Conference in Port Vila, Vanuatu together with the SPLA, however, its activity languished subsequently.

¹⁶⁷ Colin Filer, 'Custom, Law and Ideology in Papua New Guinea' (2006) 7(1) *The Asia Pacific Journal of Anthropology* 65.

¹⁶⁸ See Jowitt and Newton Cain, *Passage of Change: Law, Society and Governance in the Pacific* (2003). xvii.

¹⁶⁹ Several participants acknowledged an 'informal' law society existed at some point prior to 2010 and that it functionally operated as a social club primarily for expatriate lawyers and foreign judges 'plus a few locals' until the Chief Justice requested judges cease attending their events due to the risk of negative public perceptions. Interviews conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁷⁰ Charitable Association Number 35759, incorporated 02/10/2009 (Vanuatu).

¹⁷¹ An extract from the Vanuatu Financial Services Commission shows this Charitable Association was deregistered with effect from 14 February 2017.

¹⁷² See further South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011).

¹⁷³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

4.2.3. Contemporary Era: 2018 – Present

It is debatable whether the regulation of the Vanuatu legal profession and the development of professional associations have progressed sufficiently to herald a new ‘era’ for the profession. The empirical research undertaken for this thesis indicates hopeful signs of positive change which are discussed further in Chapter Five.¹⁷⁴

¹⁷⁴ See further Chapter Five. p. 189.

4.3. The Fiji Legal Profession

Within the region, the history of lawyers in Fiji is unique because of Fiji's historical place as the administrative centre of the British Western Pacific Territories from 1877-1952 and the significant impact on the demographics of the legal profession resulting from the substantial influx of indentured labourers from the British Raj.¹⁷⁵ Lawyers based in Suva provided the majority of legal services to colonies in the region although 'many of the professed 'traditions' incorporated into local practice bore little relationship to their supposed antecedents ...'¹⁷⁶ Most historical accounts of lawyers in Fiji (and other British colonies) report a necessary pragmatism and tolerance for practical, adaptive, and 'palliative' solutions to constraints on colonial law and justice systems.¹⁷⁷ Solutions to these constraints and limited capacities of law and justice systems, such as centralisation of lawyers in capital cities, have serious drawbacks such as limitations on access to justice in remote and rural areas which remain key challenges in Fiji.

Prior to 1965, the legal profession in Fiji was regulated through a mix of British, colonial, common law and judge made rules.¹⁷⁸ Once a 'critical mass' of experienced lawyers and judges was reached 'colonial legal systems ... [became] more faithful replicas of [British legal traditions]'.¹⁷⁹ In 1965, with the passing of the *Legal Practitioners' Act* 1965 [CAP 254] (Fiji)¹⁸⁰ a faithful replica of British systems for regulating lawyers was indeed formalised in Fiji. The culmination of all of this was that by the time Fiji became independent in 1970, it had a comparatively large and experienced legal profession, with a working and appropriately scaled formal regulatory system for lawyers and an established peak professional association in the Fiji Law Society (FLS).

4.3.1. Post-Independence Era: 1970 – 1994

Following Fiji's independence, the Fiji legal profession was relatively well-positioned to meet the legal needs of both commercial interests and the newly-minted state. During this era, many lawyers

¹⁷⁵ See above at 2.1, p. 18. It is beyond the scope of this research to attempt to address the complex issue of race in Fijian politics and law. Notwithstanding it is an issue that adds additional complexity to the dynamics of legal practice. For some grounding in the issue see: Brij V Lal and Michael Pretes, *Coup: Reflections on the Political Crisis in Fiji* (ANU E Press, 2008).; Robert Norton, *Race and Politics in Fiji* (University of Queensland Press, 1990).; Sunil Kumar and Biman Prasad, 'Politics of Race and Poverty in Fiji: A Case of Indo-Fijian Community' (2004) 31(5/6) *International Journal of Social Economics* 469.; and Sir Timoci Uluiburotu Tuivaga, *A Memoir of Sir Timoci Uluiburotu Tuivaga Kt. Cf* (2014).

¹⁷⁶ Rob McQueen and WWesley Pue, 'Misplaced Traditions: British Lawyers, Colonial Peoples' (1998) 16(1) *Law in Context* 1. 2.

¹⁷⁷ As is considered in depth in Chapter Seven, adaptive and palliative practices remain a necessary and defining feature of legal practice in Fiji and elsewhere in the region.

¹⁷⁸ The *The Legal Practitioners Act [Cap 254] 1965* (Fiji) refers to 'Barristers and Solicitors (Practice Rules)' first made by the Chief Justice on 14 November 1938. See further McQueen and Pue, 'Misplaced Traditions: British Lawyers, Colonial Peoples' (1998).

¹⁷⁹ McQueen and Pue, 'Misplaced Traditions: British Lawyers, Colonial Peoples' (1998). 3.

¹⁸⁰ *Legal Practitioners' Act 1965 [CAP 254]*.

laid the foundations of law firms whose names continue to feature prominently in appellate court records and newspapers in equal measure – Munro Leys, Cromptons, Howards, Lateef and Lateef and others. Other prominent lawyers focused their efforts on state building and were inevitably drawn into the political tensions which have come to dominate the landscape for law and governance in Fiji ever since.¹⁸¹

Despite the profession's size and good reputation,¹⁸² it suffered from an important, but practically taboo demographical problem with deep social and political implications: by 1986 its 175 members were 'mostly Indians.'¹⁸³ Following the 1987 coup, the Fiji Government began discriminately supporting indigenous students to complete training as lawyers, primarily in Australia and New Zealand in a move directed to correcting the chronic under representation of indigenous Fijians in the demographics of the legal profession.¹⁸⁴ This under representation was a direct consequence of British colonial policies of separate colonial and indigenous administration.¹⁸⁵ It was not until well into the Post-USP era that more equitable representation in the ranks of the legal profession for both indigenous Fijians and women would begin to emerge.¹⁸⁶

An interesting and relevant occurrence during this era came in 1985 when the FLS promulgated a written Code of Ethics.¹⁸⁷ The FLS Code of Ethics was strongly endorsed by the Chief Justice of Fiji, Sir Timoci Tuivaga in an address given at its launch in Lautoka, Fiji in 1985.¹⁸⁸ This demonstrated, during an important era in Fiji's history, the active and multi-racial engagement of the profession and judiciary in Fiji on questions of professional ethics. This small example also provides some evidence of an active history of influence by transnational legal orders (TLOs) on lawyer ethics in PICs.¹⁸⁹ The FLS Code of Ethics incorporated a version of the IBA's, *International Code of Ethics 1985*.¹⁹⁰ In 2017, the SPLA recommended the use of the IBA's more modern *IBA International*

¹⁸¹ See for example Lal, *Broken Waves: A History of the Fiji Islands in the Twentieth Century* (1992); Brij V Lal and Hank Nelson, *Lines across the Sea: Colonial Inheritance in the Post Colonial Pacific* (Pacific History Association, 1995).; and Tuivaga, *A Memoir of Sir Timoci Uluiburotu Tuivaga Kt. Cf* (2014).

¹⁸² See Table 1, p. 36.

¹⁸³ Donald E Paterson and Stephen Zorn, 'Fiji' in Michael A Ntunye (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 26, 71.

¹⁸⁴ Interview conducted between 10 March and 21 April 2019 in Suva, Fiji.

¹⁸⁵ These policies which were at least partially well-intentioned, meant indigenous Fijians had limited access to education and training in the operation of the machinery of a bureaucratic state.

¹⁸⁶ See South Pacific Lawyers' Association, 'Women in Law in the South Pacific - Survey Report' (2014).

¹⁸⁷ Fiji *Law Society Code of Ethics* (as at 1 October 1984) see Powles and Pulea, *Pacific Courts and Legal Systems* (1988). 172-8.

¹⁸⁸ See *ibid.* 172-8.

¹⁸⁹ See Terence C Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge University Press, 2015).

¹⁹⁰ International Bar Association, *International Code of Ethics*, First Adopted 1956 (as amended in 1964).

*Principles on Conduct for the Legal Profession*¹⁹¹ as a basis for Codes of Ethics for lawyers in the region.¹⁹²

4.3.2. Post-USP School of Law Era: 1994 – 2009

In 1998, the School of Law's Professional Diploma in Legal Practice (PDLP) program was opened at the Laucala Campus in Suva. Subsequently, the vast majority of all lawyers in the Pacific Region have completed this program as a prerequisite for admission as a lawyer in their home jurisdiction.¹⁹³ Being based in Fiji, from the very beginning the program was more accessible and available to Fijian law graduates. This contributed to a rapid growth of the Fiji legal profession. This growth was anticipated by then Solicitor-General Nainendra Nand, who would later serve as coordinator of the PDLP program from 2008 until his passing in early 2022.¹⁹⁴ He commissioned a Fiji Law Reform Commission Report on lawyer regulation in Fiji which was published in May 1996, and led the subsequent enactment of a *Trust Accounting Act* 1996 (Fiji) and the *Legal Practitioners Act* 1997 (Fiji).¹⁹⁵ The reforms initiated by Mr Nand evidence broad recognition at the time of the need to ensure regulatory systems for lawyers in PICs operate at a locally relevant scale.

During the mid-2000s, the FLS became somewhat overwhelmed by a growing backlog of complaints and dealing with both internal and domestic politics. On several occasions from 2005-2009, the FLS sought support from Australia and New-Zealand legal regulators, but activities to mobilise support for complaints and backlog reduction were quickly overtaken by the military coup and political events of 2006 and 2009.¹⁹⁶ Unique to the experience of Fiji's legal profession has been accommodating a rapidly growing profession during an era in which the Constitutional State was being reimagined by military and political leaders through coups and demagoguery. Members of the FLS were arrested and injured on various occasions for opposing military coups and the abrogation of the rule of law. The FLS was further prohibited from meeting for extended periods of time.¹⁹⁷

¹⁹¹ International Bar Association, 'Iba International Principles on Conduct for the Legal Profession' (11 October 2018). See South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017). 7.

¹⁹² South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017).

¹⁹³ Excluding Papua New Guinea.

¹⁹⁴ Interview with Nainendra Nand conducted between 10 March and 21 April 2019 in Suva, Fiji.

¹⁹⁵ Interview Nainendra Nand (10 March and 21 April 2019). An independent regulator was considered but deemed unnecessary at that time due to the good standing of the FLS as regulator.

¹⁹⁶ Firth, Fraenkel and Lal, *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (2009).

¹⁹⁷ Personal communications with FLS President for much of this era Dorsami Naidu and other former FLS Executive members 2006-2023.

4.3.3. Contemporary Era: 2009 – present

This modern era in Fiji has developed in two stages, 2009-2014 and 2014 to the present. It began late in 2009 when the *Legal Practitioners Act 1997* (Fiji) was abrogated without notice by the *Legal Practitioners Decree 2009* (Fiji). The full account of how the Decree entered into force includes the coercive use of police and military power against civilians and a cavalier disregard for both the rule of law and due process. A more complete account is given in Chapter Five.¹⁹⁸

The 2009 Decree dramatically changed the organisation, education and regulation of lawyers in Fiji. Among other things the Decree removed regulatory powers from the FLS, stripped it of its primary sources of funding and generally hardened 'command and control' oriented approaches to regulating lawyers.¹⁹⁹ The disciplinary bodies the Decree established made excellent early progress in successfully prosecuting lawyers for serious misconduct.²⁰⁰ Although as discussed in Chapter Five the Fiji Legal Practitioner's Unit's disciplinary functions have regressed somewhat in recent years and allegations of political interference appear to be substantiated.²⁰¹

Image 5: Former Fiji Law Society office – destroyed by suspected arson in 2010



Source: Photo taken by author, November 2014

¹⁹⁸ See Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170.

¹⁹⁹ The operation of the system has been considered by others see Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017; Nainendra Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019) 20 *Journal of South Pacific Law* 40.

²⁰⁰ Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019).

²⁰¹ See Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170.

In 2014, Fiji returned to a semblance of democracy on the back of general elections and the entry into force of its somewhat controversial 2013 Constitution.²⁰² In the now more democratic Fiji, activities of professional associations of lawyers slowly flourished with the FLS reopening its office at new premises in 2018 - after the previous premises mysteriously burned down in 2010.²⁰³ The FLS has hosted successful annual education conferences since 2015 and other associations such as the Fiji Environmental Law Association (FELA) and the Kingdom International Legal Network (KILN) have flourished.²⁰⁴ At the same time, there has been strong and constant growth of the legal profession from approximately 350 in 2011 to around 1,000 in 2023.²⁰⁵

4.4. The Kiribati Legal Profession

During the Colonial Era in Kiribati ~1892-1979, lawyers based in Suva would travel to the Gilbert and Ellice Islands periodically to provide legal services. It is likely lawyers engaged by colonial administrators may have resided in Tarawa for extended periods of time, but there are no records of the existence of a locally based legal profession.²⁰⁶

4.4.1. Post-Independence Era 1979 – 1994

A unique Kiribati legal profession first began to emerge shortly after independence when, in 1981, Michael Takabwebwe became the first I-Kiribati to obtain a law degree and was subsequently admitted as a lawyer of the High Court. In 1983 he was appointed Attorney-General, an office he held until his appointment as a Judge of the High Court in 2002. The cohort of I-Kiribati lawyers grew slowly, with the admission of Tuarirake Teiwaki in 1982, Titabu Tabane in 1986, and both Natan Teewe Brechtefeld and Banuera Berina in 1989.²⁰⁷ Throughout the early post-Independence era, lawyers appearing in Kiribati courts were primarily locally-admitted foreigners. However, a controversial amendment to the *Lawyers Admission Rules* in 1986 resulted in the names of all foreign legal practitioners being removed from the roll. Challenges to the amendment failed both in the *Maneaba ni Maungatabu* (Parliament) and in the Court of Appeal.²⁰⁸ This shifted the

²⁰² Controversial for many reasons, including the seizure and burning of all copies of the draft 2012 Constitution prepared by Fiji's Constitution Commission and the arbitrary redrafting of what became the 2013 Constitution by Fiji's then interim Attorney-General and coup co-leader Aiyaz Sayad-Khaiyum. See Abrak Saati, 'Participatory Constitution-Building in Fiji: A Comparison of the 1993–1997 and the 2012–2013 Processes' (2020) 18(1) *International Journal of Constitutional Law* 260.; Brij V Lal, 'In Frank Bainimarama's Shadow: Fiji, Elections and the Future' (2014) 49(4) *The Journal of Pacific History* 457.

²⁰³ 'Fire destroys Fiji Law Society Office', *Radio New Zealand* (Online article, 13 October 2010) <<https://www.rnz.co.nz/international/pacific-news/193092/fire-destroys-fiji-law-society-office>>..

²⁰⁴ See case study on KILN in Chapter Six at 3.2.2, p. 234.

²⁰⁵ See Table 1. p. 36.

²⁰⁶ At this time, all lawyers in the region were regulated under the *Western Pacific (Courts) Order in Council* 1961.

²⁰⁷ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁰⁸ Howard Van Trease, *Melanesian Politics: Stael Blong Vanuatu* (University of the South Pacific, 1995).. Ibid.

majority of legal work to local lawyers. By the time the School of Law at the USP opened in 1994, eight I-Kiribati lawyers had been admitted to practice in Kiribati, but only five were working as private practitioners or in government in Kiribati.

4.4.2. Post-USP School of Law Era: 1994 – 2007

The Kiribati legal profession grew rapidly in the Post-USP School of Law Era, with the first couple of graduates admitted to practice in Kiribati in 1998 and the Kiribati legal profession almost quadrupling in size from 1995 to 2011.²⁰⁹ A long unmet demand for lawyers was met with a surge in supply and government law and justice agencies, rapidly expanded to employ them.²¹⁰ I-Kiribati lawyers returning fresh from study in Vanuatu, and PDLP training in Fiji faced many challenges adapting to local legal practice environments – which operated very differently to Fiji where they were taught professional skills. Inferior courts in Kiribati tend to be more informal and are usually presided over by a lay magistrate with minimal, or no formal education in law.²¹¹ Many I-Kiribati lawyers were propelled into senior legal roles, ‘stepping up’, in a pragmatic fashion to the law and justice needs of society and government.

During this era, several challenges emerged. The influx of new practitioners and the scarcity of opportunities for professional development fuelled a rising, but largely unmet, demand for mentoring and legal education. Additionally, concerns about unprofessional conduct by some lawyers and the provision of legal services by non-lawyers²¹² began to be publicly expressed yet were largely unaddressed. The lack of any formal mechanism to address public concerns, or meet the needs of the profession, combined with aspirations by some lawyers for a law society, ultimately led to the entry into force of the *Kiribati Law Society Act 2006* (KLS Act) on 26 January 2007.

4.4.3. Contemporary Era: 2007 to Present

The entry into force of the KLS Act heralded the present era for Kiribati lawyers. The initiative for reform was led by the recently retired judge Michael Takabwebwe who became the first President of the KLS at its inaugural General Meeting in March 2008. Under first Michael Takabwebwe and then Sister Bernadette Mee (kiri Eberi), the KLS began to engage regionally and locally to seek to represent the views and interest of Kiribati lawyers. Its activities have been supported by the government, regional organisations and the judiciary and it has engaged widely with other regional

²⁰⁹ See Table 1. p. 36.

²¹⁰ For example, the DPPs office, the Attorney-General’s Chambers and the Office of the People’s Lawyer (Legal Aid).

²¹¹ See further Chapter Five, p. 207.

²¹² This was often done through assertions of *locus standi* by taking advantage of close familial relationships in Kiribati.

peak lawyer associations.²¹³ A rather contentious issue for the legal profession during this period was the introduction of the KLS Code of Ethics.

Commentary in a decision by the Kiribati Court of Appeal, *Development Bank of Kiribati v Maitinnara* [2015] KICA 2 on the interpretation and applicability of the KLS Code of Ethics and the KLS Act led to local disagreement and debate by lawyers in Kiribati regarding the validity and or applicability of the Code of Ethics. This disagreement does not appear to have been properly resolved and as I have written elsewhere, there remains a need 'for the KLS to engage meaningfully with the entire legal profession regarding the Code of Ethics and more broadly on the regulation of lawyers in Kiribati under the KLS Act.'²¹⁴

There are some signs the legal profession may be entering into a new era of growth, with new laws expanding the minimum number of permanent judges sitting on the High Court to three;²¹⁵ the formal statutory recognition and autonomy of the Office of the People's Lawyer (OPL);²¹⁶ and strong progress towards upskilling the judiciary through a regionally backed initiative.²¹⁷ With that said, more recent crises, such as the sacking of the judiciary through seemingly clandestine abuses of Constitutional processes by President Maamau's Government may have lasting negative consequences for institutions of law and justice in Kiribati.²¹⁸

²¹³ Michael Takabwe sat on the inaugural Steering Committee of the SPLA from 2007-2011 and helped guide the establishment of the SPLA as a peak regional lawyer association through much engagement with bar leaders from around the region.

²¹⁴ David Naylor, 'Case Note: *Development Bank of Kiribati v Maitinnara* [2015] KICA 2; Civil Appeal 02 of 2015: Paterson, Blanchard and Handley Jja' (2019) 20 *Journal of South Pacific Law* 76. 78. See also further Chapter Five section 4. Lawyer Regulation in Kiribati, p. 203.

²¹⁵ including the Chief Justice.

²¹⁶ Since 2018 OPL is known as the Office of the Public Legal Service see <https://www.opl.org.ki/about-us/>.

²¹⁷ Pacific Judicial Strengthening Initiative, 'Fourth Six-Monthly Progress Report' (Progress Report, Pacific Judicial Strengthening Initiative, July-December 2019). Specifically, the support of nearly 100 magistrates and court staff to complete the USP Certificate of Justice and Diploma of Justice.

²¹⁸ See Anna Dziedzic, 'The President Vs the Judge: How Kiribati Came to a Constitutional Standoff', *Lowy Institute* (Web Page, 27 September 2022) <<https://www.lowyinstitute.org/the-interpreter/president-vs-judge-how-kiribati-came-constitutional-standoff>>.

5. CONCLUSION

The trajectories of lawyer regulation in Fiji, Kiribati, and Vanuatu, despite being rooted in distinct historical contexts, converge in many of their complexities and challenges. The presence of multiple, interacting legal systems in PICs makes the practice of law more complicated and increases the complexity of dispute resolution. All three jurisdictions have legal systems that were significantly influenced by British colonial rule, although Vanuatu also has a significant French influence. These shared histories mean each jurisdiction shares a common foundation for systems of governance and regulation, including lawyer regulation. Lawyers in each jurisdiction are presented with a challenging blend of customary laws, statutes passed by local parliaments, and foreign laws that apply locally. Lawyers in PICs face many challenges in adapting and responding to constraints on and within legal practice environments and do so with the added complexity that they are themselves embedded within strongly normative cultural systems.

Fiji, Kiribati, and Vanuatu also demonstrate a number of key differences that contribute to distinct regulatory landscapes and challenges. For example, the size and complexity of the legal profession vary widely among these jurisdictions, with Fiji having a more extensive and specialised profession partly attributable to its historical role as a colonial administrative centre, while Kiribati and Vanuatu have relatively smaller, less specialised professions. The impact of political instability affects all three jurisdictions, however Fiji's history of political turmoil has resulted in a unique suppressive influence on lawyer independence and freedom, whereas Kiribati and Vanuatu have experienced less oppressively instable governance, leading to less volatile regulatory conditions. These differences necessitate a nuanced understanding and application of regulatory strategies and a pluralist and relational understanding of the mechanisms of social influence and control. The next chapter, Chapter Two, provides a detailed explanation of the research design, conduct, data analysis and the emergence of the theoretical framework introduced in Chapter Three.

CHAPTER TWO: METHODS AND METHODOLOGY

1. INTRODUCTION

This chapter explains the research design and analytical approaches used in this study. It begins by briefly revisiting the research questions and then considers the question of my positionality and several key theoretical considerations, such as decolonisation in Pacific research, that are critically important to conducting the primary research in Fiji, Kiribati, and Vanuatu. This chapter discusses the research design and fieldwork which utilised a mixed methods approach to generate a wealth of data from interviews conducted in each jurisdiction. This chapter also explains the abductive methodological and analytical process which led to the development of the pluralist-relational approach to lawyer regulation, discussed in depth in Chapter Three. Finally, this chapter considers ethical and other potential limitations of the research.

1.1. Overview of Research Questions

The qualitative empirical study conducted for this thesis was anchored by the overarching question: **How can regulatory systems for lawyers in PICs better support lawyers to be competent and ethical?** The framing of ‘support’ used in the primary research question reflects a pluralist and relational approach to lawyer regulation that deemphasises a positivist ‘command and control’¹ regulatory approach in favour of a more responsive, inquisitorial and pluralist framing of compliance as something that is dynamic and relational.² This more open framing helped me avoid a ‘deficit lens’³ of lawyer regulation in PICs that has been noted by many Pacific scholars as a problematic and unhelpful way of both understanding and framing regulation and compliance in Pacific contexts.⁴ This overarching question invited a broad interpretation of the complex systems that regulate lawyers. For example, lawyer ‘competence’ may be affected by any socio-economic or cultural system associated with the acquisition of knowledge and skills by

¹¹ Christine Parker, ‘Justifying the New South Wales Legal Profession 1976 to 1997’ (1997) 2(2) *The Newcastle Law Review* 1. 13.

² See Chapter Three, section 4.2. p. 109.

³ See Kimberly Matheson, ‘Rebuilding Identities and Renewing Relationships: The Necessary Consolidation of Deficit- and Strength-Based Discourses’ (2017) 7(1) *Mediatropes* 75.

⁴ See for example Miranda Forsyth, ‘Policing Sorcery Accusation Related Violence in Papua New Guinea’ in S Amin, D Watson and C Girard (eds), *Mapping Security in the Pacific: A Focus on Context, Gender and Organisational Culture* (Taylor and Francis Group, 2020).; Cresantia F Koya, ‘Straight Talk| Crooked Thinking: Reflections on Transforming Pacific Learning and Teaching, Teachers and Teacher Education for the 21st Century’ in Ruth Toumu’a, Kabini Sanga and Seu’ula Johansson Fua (eds), *Weaving Education: Theory and Practice in Oceania* (Institute of Education, USP, 2016) 19.; Sinclair Dinnen and Gordon Peake, ‘Experimentation and Innovation in Police Reform: Timor-Leste, Solomon Islands and Bougainville’ (2015) 67(1) *Political Science* 21.; Shawn Malia Kana ‘iaupuni, ‘Ka ‘Akālai Kū Kanaka: A Call for Strengths-Based Approaches from a Native Hawaiian Perspective’ (2005) 34(5) *Educational Researcher* 32.

lawyers.⁵ Whereas, what it means to ‘be ethical’ is co-created by lawyers through performative signals that are exchanged in interactions with other regulatory actors.⁶ The empirical study was designed to ensure the collection of diverse and rich data that could support theorisation about lawyer regulation through a series of interrelated subsidiary research questions. Each chapter of the thesis is framed to address one of the following subsidiary research questions before being drawn together in Chapter Eight which addresses the overarching research question:

- What is the paradigm for legal practice in Fiji, Kiribati, and Vanuatu?
- What theoretical perspectives and tools can support a holistic understanding of lawyer conduct in PICs?
- How do lawyers in Fiji, Kiribati, and Vanuatu conceptualise a good lawyer?
- How do state regulatory systems operate in practice in Fiji, Kiribati, and Vanuatu?
- How do non-state systems regulate lawyer conduct in Fiji, Kiribati, and Vanuatu?
- How can we understand compliance and non-compliance by lawyers in PICs?

⁵ These include critical thinking, language ability, and writing, research, and advocacy skills. See further Chapter Four, section 2.1, p. 129.

⁶ See 4.2 Chapter Three, section 4.2.1. p. 110.

2. POSITIONALITY AND THEORETICAL CONSIDERATIONS

2.1. Positionality

Positionality in research is a critical consideration that encompasses the influences of a researcher's values, identities, and location in relation to the context of their research.⁷ It recognises that the researcher is embedded within a web of socio-cultural and personal dynamics that shape both the process and outcome of research. Acknowledging my positionality allows me to address my bias in conducting this research, something that is particularly important due to the colonial histories of PICs. It ensures that the research process is not only reflexive, but also respectful to the unique cultural landscapes and historical narratives of PICs.

As a white, male, Australian lawyer, my positionality in researching lawyers in PICs is influenced by both an outsider's perspective and an insider's understanding acquired through more than 15 years working in a variety of legal, research, and education roles across the Pacific Region.⁸ While not a 'true insider,' I am also not a 'true outsider'. Since completing the six and a half years of education and training required to qualify as an Australian lawyer, my career and higher legal education has substantially focused on the study and understanding of legal practice within pluralist contexts in the Indo-Pacific. My dual positionality, embracing a hybrid perspective, shapes the lens through which I have approached this research. This complex positioning does not necessarily advantage or disadvantage this research because 'What an insider 'sees' and 'understands' will be different from, but as valid as what an outsider sees.'⁹ However, my dual positionality influenced the selection of a multi-sited qualitative approach, enabling me to leverage insider familiarity and connections within different legal environments, while maintaining the critical distance of an outsider.¹⁰ This enabled a richer and more empathetic engagement with participants and the complex realities of legal practice in PICs.

⁷ Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', *Feminist Theory Reader* (Routledge, 2020) 303.; Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith, *Handbook of Critical and Indigenous Methodologies* (Sage, 2008).; Kim VL England, 'Getting Personal: Reflexivity, Positionality, and Feminist Research' (1994) 46(1) *The Professional Geographer* 80.

⁸ On insider/outsider distinctions see for example Justine Mercer, 'The Challenges of Insider Research in Educational Institutions: Wielding a Double-Edged Sword and Resolving Delicate Dilemmas' (2007) 33(1) *Oxford Review of Education* 1.

⁹ Sharan B Merriam et al, 'Power and Positionality: Negotiating Insider/Outsider Status within and across Cultures' (2001) 20(5) *International Journal of Lifelong Education* 405. 415.

¹⁰ Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' 2020; Katerina Teaiwa, 'Multi-Sited Methodologies"Homework" in Australia, Fiji, and Kiribati' in Lynne Hume and Jane Mulcock (eds), *Anthropologists in the Field* (Columbia University Press, 2004) 216.

My Australian legal education and oath of admission as a lawyer have shaped my perceptions, favouring concepts of constitutional states and adversarial legal systems. This bias, rooted in English legal traditions, requires careful consideration when researching law and legal practice in PICs. Most Pacific states, including Fiji, Kiribati, and Vanuatu, are modelled on a similar constitutional structure to Australia. Yet these structures often carry narratives of continued domination of indigenous people, reflecting the legacy of colonialism. By contrast with Australia, where the relationship between the state and minority indigenous populations is defined by tension and inequality, the majority of the population in PICs are indigenous and independence in most PICs – fought for, or imposed – carries a distinct meaning of self-determination and self-rule. This divergence underscored the need to approach this research with mindfulness towards my inherent biases and led me to employ triangulation in data generation, ensuring that I was exposed to multiple perspectives, helping to ensure my analysis was both rigorous and respectful of unique local contexts.¹¹

My journey as a researcher of law and lawyers in PICs has been marked by a growing awareness of cultural influences and biases, epitomised by my efforts to view law and society from different perspectives. In 2007, while working for the Law Council of Australia Secretariat, I became Administrator of what would eventually be launched as the South Pacific Lawyers' Association (SPLA).¹² From 2007-2015, this work involved extensive engagement with private and government lawyers from across the region. I left this role at the end of 2014 and moved to Suva, Fiji to pursue a new career as an academic teaching law at USP's Laucala Campus to a diverse multicultural body of law students. While based in Fiji, I travelled frequently, first to Samoa and then Kiribati – following my wife's movements as she pursued her own career. Since returning to Australia in 2018 to pursue my PhD, I have maintained many of my friendships with Pacific lawyers and scholars.

Through my experiences in the Pacific Region, I became aware of the socio-cultural and legal challenges inherited by PICs from colonialism and the complexities of post-independence governance. I tried many times to approach my work from different perspectives. My somewhat

¹¹ Both data and methodological triangulation were used to ensure the rigor, reliability, and validity of research data on triangulation see further Sally Engle Merry and Summer Wood, 'Quantification and the Paradox of Measurement: Translating Children's Rights in Tanzania' (2015) 56(2) *Current Anthropology* 205.; Alan Bryman, 'Encyclopedia of Social Science Research Methods' in M. Lewis-Beck, Alan Bryman and T. Futing Liao (eds), *Encyclopedia of Social Science Research Methods* (2004) 1144.

¹² The launch took place in 2011 in Sydney, Australia.

clumsy initial approach was through an application of the concept of ‘original position’¹³ to try to empathise with alternative understandings of law, society, and place.¹⁴ These efforts left me somewhat more aware of my own bias, ignorance and cultural influences and more eager to study and reflect on the deep pluralism of law in PICs and its influence in shaping the identity of lawyers and the practice of law.

My personal experiences have underscored the importance of framing questions sensitively and asking follow-up questions to clarify the meaning of responses. One example of this was at a conference in 2015 in Brisbane for Pacific Island lawyers. At a session I attended, an Australian facilitator asked: ‘how much pro bono work do lawyers in your country do?’ There were murmurs, averted gazes, and eventually general agreement that most lawyers in PICs did not do much or any pro bono work. However, before the facilitator could launch into a monologue about the importance of pro bono work, a quick-thinking Ross Ray QC, then Chair of the SPLA, interjected to reframe the question, asking: ‘how much work do you do that you receive no money for?’ To this question participants indicated they receive no fee for up to one-third of their work and a few participants indicated it was ‘more than half’ of their work. Many participants said they regularly accepted payment in goods or services due to the poverty of their clients, sometimes as little as a bunch of bananas, or some freshly caught fish. Experiences such as this informed the design of interviews, leading me to adopt a semi-structured approach to enable more open-ended and culturally responsive dialogue.

The exploration of positionality has been central to my PhD journey and has led me to a more nuanced understanding of the dynamics affecting compliance within legal practice environments in PICs. Drawing on the pluralist-relational approach discussed in Chapter Three, reflexive consideration of my positionality was an active and evolving practice throughout the research process. While I may never truly know what it is like to practice law as a Pacific Island lawyer in a PIC, conducting this research has helped me develop a richer understanding of what it means to be a Pacific scholar. For now, I am content with that.

¹³ John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001).

¹⁴ Ibid.; Tim Cresswell, ‘Place’ (2009) 8 *International Encyclopedia of Human Geography* 169.

2.2. Decolonisation and Pacific Research Methodologies

*Research methodologies that were designed to identify issues in a dominant culture and provide solutions are not necessarily suitable in searching for solutions for Pacific peoples, whose knowledge and ways of being have unique epistemologies, as well as lived realities...*¹⁵

Broadly speaking, decolonisation in research refers to the centring of indigenous epistemologies and ontologies in conducting research in post-colonial states.¹⁶ Much has been published on decolonisation in Fiji,¹⁷ Kiribati, and Vanuatu¹⁸ and throughout the Pacific.¹⁹ Decolonisation literature reminds us that for indigenous peoples, research has tended to be exploitative, and for a long time, primarily concerned with 'how a minority of white colonial conquerors were to rule over a majority of conquered black people.'²⁰ Papua New Guinean lawyer and academic Bernard Narokobi in particular has been scathing of the dominant western epistemology of research in the Pacific.²¹ Some decolonisation researchers have pointed out that post-colonialism itself is in need of decolonisation before it can engage with indigenous epistemologies.²² Tracey Banivanua Mar goes further, suggesting that any research framework that is bound to the emergence or continuity of the nation state is inadequate to account for indigenous experience.²³ This study however focuses

¹⁵ Timote M Vaoleti, 'Talanoa Research Methodology: A Developing Position on Pacific Research' (2006) 12(1) *Waikato Journal of Education* 21.

¹⁶ Adrian Muckle et al, 'Decolonisation and the Pacific' (2017) 51(4) *The Journal of Pacific History* 451. See further David Denoon (ed), *The United States, and the Future of Central Asia: Us-China Relations* (NYU Press, 2015).

¹⁷ Kaplan, 'The Coups in Fiji: Colonial Contradictions and the Post-Colonial Crisis' (1988); See also Brij V Lal, 'The Decolonisation of Fiji: Debate on Constitutional Change, 1943-1963' in Donald Denoon (ed), *Emerging from Empire? Decolonisation in the Pacific* (Research School of Pacific and Asian Studies, 1997).

¹⁸ See also the contributions of Ambrose, David and Morgan, Michael in Denoon (ed), *The United States, and the Future of Central Asia: Us-China Relations* (2015), at 47-59.

¹⁹ See for example *ibid.*; Lal and Nelson, *Lines across the Sea: Colonial Inheritance in the Post Colonial Pacific* (1995); Paul de Deckker, 'Decolonisation Processes in the South Pacific Islands: A Comparative Analysis between Metropolitan Powers' (1996) 26 *Victoria University of Wellington Law Review* 355.; Tamasailau Suaalii-Sauni and Saunimaa Ma Fulu-Aiolupotea, 'Decolonising Pacific Research, Building Pacific Research Communities and Developing Pacific Research Tools: The Case of the Talanoa and the Faafaletui in Samoa' (2014) 55(3) *Asia Pacific Viewpoint* 331.; Helen Gardner and Christopher Waters, 'Decolonisation in Melanesia' (2013) 48(2) *The Journal of Pacific History* 113.

²⁰ Sabelo J. Ndlovu-Gatsheni, 'Provisional Notes on Decolonizing Research Methodology and Undoing Its Dirty History' (2019) 35(4) *Journal of Developing Societies* 481.; Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Harvard University Press, 2012).; Mahmood Mamdani, *Citizen and Subject Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996).

²¹ See for example, Narokobi, *Lo Bilong Yumi yet = Law and Custom in Melanesia* (1989) at 8-9.

²² Haifa Alfaisal, 'Indigenous Epistemology and the Decolonisation of Postcolonialism' (2011) 19(Summer) *Studies in Social and Political Thought* 24. See also Otto Heim, 'Island Logic and the Decolonization of the Pacific' (2017) 19(7) *Interventions* 914. at 916; Ema Maria Bargh, 'Re-Colonisation and Indigenous Resistance: Neoliberalism in the Pacific' (PhD Thesis, 2002) <<https://openresearch-repository.anu.edu.au/bitstream/1885/7368/1/Bargh01front.pdf>>; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012).

²³ Mar, *Decolonisation and the Pacific* (2016).

on a subset of indigenous people in PICs – lawyers – who are regulated as a statutory profession and as officers of state courts and therefore necessarily assumes the continuity of the state.²⁴

Prior to commencing this research, I considered whether it was appropriate for me to pursue the research project at all, but decided to proceed for two primary reasons. First, I considered it unlikely that a rigorous study of the type contemplated by this research project would be done by someone else in the foreseeable future. This would leave unaddressed the significant lack of empirical data on lawyer regulation in PICs. Second, I genuinely do not believe the epistemologies and ontologies that I have been educated and habituated to are intrinsically any more valid than those I have not – I vehemently reject such dogmatism as a voluntary proclamation of ignorance.²⁵ Accordingly, as a researcher of the experiences of Pacific lawyers, I embraced decolonisation principles of respect, reciprocity, and reflexivity by ensuring the process of this research was inductive and abductive – drawing from my data and fieldwork to inform my analysis and develop my theoretical framework.²⁶

Having spent over eight years teaching law at USP, I am deeply aware that understanding local phenomena requires the application of local ways of knowing. In the interpretation of my findings, I was mindful of indigenous epistemologies, using perspectives drawn from my data to inform my choice and development of theoretical frameworks and analytical tools. In proposing practical pathways forward for lawyer regulation in Fiji, Kiribati, and Vanuatu, my purpose is not to prescribe a ‘solution’, but rather to contribute *something*, hopefully a foundation, upon which law makers and regulators in PICs might stand to encourage deeper engagement between Pacific lawyers and academics. Notwithstanding my efforts to be sensitive to local contexts, I acknowledge that this research is filtered through the view of a foreign academic – a *vulangi*; *I-matang*, a *waetmar*²⁷ – albeit one whose roots and connections are spread across my many island homes.

²⁴ The laws of which lawyers in PICs swear an oath to uphold through the swearing of the Lawyers’ Oaths of Admission in Fiji, Kiribati, and Vanuatu.

²⁵ This posed several challenges in writing up my thesis and in no small number of conversations with more traditionally minded ‘Western’ legal scholars on the topics covered by this research.

²⁶ See further Koya-Vaka’uta and Cresantia Frances, ‘Rethinking Research as Relational Space in the Pacific Pedagogy and Praxis’ in Upolu Lumā Vaai and Aisake Casimira (eds), *Relational Hermeneutics: Decolonising the Mindset and the Pacific Itulagi* (2017) 65.

²⁷ Fijian, te Kiribati, and Bislama words for ‘visitor’ or ‘foreigner’. Depending on context these terms are interchangeably derogatory, or respectful.

2.3. Emergence of the Theoretical Framework

The pluralist-relational approach to lawyer regulation, introduced in Chapter Three, forms the core of the theoretical framework for this study.²⁸ Developed specifically to facilitate a holistic understanding of the data generated by the empirical study, it both complements and transcends the limitations of traditional and contemporary theories of lawyer regulation.²⁹ The pluralist-relational approach to lawyer regulation recognises the intricate and temporal web of influences on lawyer conduct, encompassing social and customary norms, statutory obligations, legal education, and innate values and self-other relation. Unlike traditional and contemporary theories of lawyer regulation, it embraces legal and normative pluralism and emphasises the critical importance of understanding conduct within its socio-cultural and historic contexts.

Aligned with the inductive and abductive analytical approach used to interpret empirical data, the theoretical framework emerged organically.³⁰ This emergence was not a predetermined process, but evolved through continuous engagement with the data, reflecting a responsive and abductive approach to theory development.³¹ The framework represents an earnest attempt to move away from imposing external epistemologies, instead seeking to derive understanding from the lived realities and epistemological traditions of PICs.³² This alignment with decolonising principles underscored the sensitivity of the research to the cultural nuances and historical complexities of the region.

The iterative and data-driven evolution of the theoretical framework allowed for a richer engagement with the perspectives and understandings of Pacific lawyers regarding their conduct and regulation. By evolving the theoretical framework in tandem with the empirical findings, it not only became a reflection of the voices and experiences of Pacific lawyers, but also a model that is sensitive to the unique characteristics and histories of legal practice environments in PICs. The pluralist-relational approach thus serves as both an analytical tool for this study and a beacon for future scholarly exploration of professions in Pacific and other post-colonial contexts. Its

²⁸ Chapter Three, section 4. A Pluralist-Relational Approach to Lawyer Regulation, p. 101.

²⁹ Discussed in Chapter Three, section 2.5, from p. 89.

³⁰ This is discussed in greater detail below at section 4.3, p. 75.

³¹ See Stefan Timmermans and Iddo Tavory, 'Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis' (2012) 30(3) *Sociological Theory* 167.

³² See Koya-Vaka'uta and Frances, 'Rethinking Research as Relational Space in the Pacific Pedagogy and Praxis' 2017; Vivetha Thambinathan and Elizabeth Anne Kinsella, 'Decolonizing Methodologies in Qualitative Research: Creating Spaces for Transformative Praxis' (2021) 20 *International Journal of Qualitative Methods*.

development exemplifies the value of an abductive and context-sensitive approach to theory-building, especially in post-colonial contexts.³³

3. RESEARCH DESIGN AND FIELDWORK

3.1. Research Paradigm

Given the complex and relational nature of lawyer conduct in PICs, and in alignment with the principles of decolonisation, this research necessitated a paradigm that acknowledged the pluralistic and fluid nature of norms while ensuring respect for participants' subjective experiences. In conducting the empirical study, I therefore embraced both constructionist and interpretivist paradigms in recognition of their complementary strengths for understanding lawyers' subjective experiences of regulation.

*The key tenet of social constructionism is that our knowledge of the world, including our understanding of human beings, is a product of human thought rather than grounded in an observable, external reality.*³⁴

In the context of lawyer regulation, this perspective helped to guide my exploration of how social, cultural and professional norms are created and shaped within legal practice environments. The constructionist paradigm's focus on the fluid and pluralistic nature of norms also resonates with principles of decolonisation. It emphasises respect for local ways of knowing and rejects the idea of a singular, dominant perspective to explain observed phenomena. Complementing constructionism, the interpretivist paradigm focuses on the subjective interpretations and meanings that individuals attach to their experiences. Interpretivist epistemologies are described as 'anti-positivist' because they reject the pursuit of 'objective' truths. Instead, a researcher must 'elucidate the process of meaning construction and clarify what and how meanings are embodied in the language and actions of social actors.'³⁵ This approach guided the careful examination of how norms of lawyers were 'created, negotiated, sustained, and modified'³⁶ within the fieldwork

³³ Nayahamui Michelle Rooney et al, 'Thinking Incrementally About Policy Interventions on Intimate Partner Violence in Papua New Guinea: Understanding 'Popcorn' and 'Blanket' (2022) *Culture, Health & Sexuality* 1.; Miranda Forsyth et al, 'Sorcery Accusation-Related Violence in Png Part 7: The Harm of Sarv', *In Brief* (Web Page) <<http://dpa.bellschool.anu.edu.au/ssgm-research-communication/brief-series>>; Seu'ula Johansson-Fua et al, *Relationality and Learning in Oceania: Contextualizing Education for Development* (Brill, 2020).; Timmermans and Tavory, 'Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis' (2012); Anthea Roberts and Taylor St John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System' (2021) 116(1) *American Journal of International Law* 96. 7-9.

³⁴ Vivien Burr, *Social Constructionism* (Routledge, 2015). 222; see further *ibid*.

³⁵ Thomas A Schwandt, 'Constructivist, Interpretivist Approaches to Human Inquiry' in N. K. Denzin and Y. S. Lincoln (eds), *The Landscape of Qualitative Research: Theories and Issues* (Thousand Oaks, Sage Publications, 1998) 118. 222.

³⁶ *Ibid*. 225.

sites in Fiji, Kiribati, and Vanuatu and was instructive in exploring how lawyers perceive being a good lawyer.³⁷

Together, constructionist and interpretivist paradigms support the decolonising approach taken in the research. By emphasising qualitative research approaches that respect and reflect the experiences of lawyers in PICs, these paradigms reinforce the commitment to elevate local ways of knowing and contribute meaningfully to the discourse on lawyer regulation in PICs. Informed by these paradigms, the research utilised inductive and abductive analytical approaches to theory-creation. This allowed for a reflexive engagement with the data, fostering a robust and context-sensitive exploration of lawyer conduct in PICs.

3.2. Multi-sited Qualitative Approach

In regulatory and anthropological studies, multi-sited qualitative fieldwork refers to the methodological practice of conducting empirical research across multiple locations or sites, typically with a view to ‘glean insights’ into macro-level developments.³⁸ According to Henne, this methodology is especially suited to studying phenomena, such as regulation, that exist in many places, or are transnational in nature.³⁹ Through this research, I aimed to develop a holistic perspective of the compliance challenges faced by lawyers in PICs; the state and non-state influences of lawyer conduct; and the evolving discourse on lawyer regulation and compliance. My decision to adopt a multi-sited qualitative approach therefore emerged from the need to understand lawyer regulation as a dynamic and relational phenomenon. These sites were selected using maximum variation sampling to emphasise differences and reveal patterns and similarities in the data collected.⁴⁰ How these sites were selected is addressed in section 3.2.1 below.

My use of multi-sited fieldwork follows the work of many other scholars of phenomena occurring at local, national, and transnational scales in PICs.⁴¹ For example, Penfold’s studies on legal education in Vanuatu and Solomon Islands illustrate how a multi-sited approach can uncover the

³⁷ See further Chapter Four: Good Lawyers.

³⁸ George E Marcus, ‘Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography’ (1995) 24(1) *Annual Review of Anthropology* 95.; Kathryn Henne, ‘Multi-Sited Fieldwork in Regulatory Studies’ in Peter Drahoš (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 97.

³⁹ Henne, ‘Multi-Sited Fieldwork in Regulatory Studies’ 2017

⁴⁰ John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (Sage, 2016).

⁴¹ Rooney et al, ‘Thinking Incrementally About Policy Interventions on Intimate Partner Violence in Papua New Guinea: Understanding ‘Popcorn’ and ‘Blanket’ (2022); Camilla Agnethe Borrevik, ‘“We Started Climate Change”: A Multi-Level Ethnography of Pacific Climate Leadership’ (PhD Thesis, 2019) <<https://hdl.handle.net/1956/19672>>; Jacqueline Ryle, *My God, My Land: Interwoven Paths of Christianity and Tradition in Fiji* (Routledge, 2016); Teaiwa, ‘Multi-Sited Methodologies’ ‘Homework’ in Australia, Fiji, and Kiribati’ 2004.

interplay between local traditions, colonial histories, and contemporary global influences between jurisdictions in PICs.⁴² Forsyth's research on legal pluralism and *Kastom* in Vanuatu, as well as on Sorcery Accusation Related Violence in Papua New Guinea, underscores the value of generating data from multi-sited fieldwork and using abductive analytical approaches to understand complex phenomena in Pacific contexts.⁴³ Generating data from a variety of sources in diverse socio-cultural contexts in Fiji, Kiribati, and Vanuatu provided a robust foundation for comparative analysis, unattainable through a study based on a single jurisdiction.

Within each fieldwork site I employed a mixed-methods approach, combining observation, semi-structured interviews, document analysis and data triangulation. This helped me more accurately represent the lived experiences, norms and practices shaping lawyer conduct in each jurisdiction. These methods, aligned with constructionist and interpretivist paradigms, facilitated the generation of data that, through careful analysis, provided insights into Pacific lawyers' perceptions of what it means to be a good lawyer; mechanisms of state and non-state regulation of lawyer conduct; and practical norms of lawyers in PICs. The adoption of a multi-sited qualitative approach thus facilitated a robust and nuanced understanding of lawyer regulation in PICs, while enabling me to prioritise the voices of research participants.

3.2.1. Selection of Field Sites

Field sites were selected with a view to ensuring that the data collected captured the inherent complexity of lawyer conduct across diverse legal practice environments in PICs. To achieve this, maximum variation sampling was used to ensure that field sites exhibited maximum variation across their legal landscapes, cultural norms and regulatory frameworks.⁴⁴ The criteria were as follows:

- **Small island developing states in the Pacific Region:** Australia and New Zealand were excluded based on this criterion.
- **Accessibility:** Many countries in the Pacific Region are difficult or expensive to travel to. My capacity to travel to and sustain my fieldwork was a relevant consideration in eliminating Niue, Nauru, Tonga, Samoa, the Cook Islands, Palau and Tuvalu.
- **Diversity of size of profession:** Given that many aspects of regulation vary with scale, field site selection sought the inclusion of one small, one medium, and one large state as

⁴² Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

⁴³ Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); Forsyth, 'Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea' (2022).

⁴⁴ Creswell and Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (2016).

measured by the size of legal profession, economic measures and global development rankings.

- **Diversity of scale and operation of regulatory systems:** This required the inclusion of Fiji which had the only well-resourced regulatory authority in the region.
- **No major current law reform proposed for lawyer regulation:** Major changes to the formal structure of lawyer regulation during the project would have impacted analysis and possibly the relevance of findings. This ruled out Solomon Islands, although these reforms have not ultimately eventuated.
- **Scholarly and professional connections:** I had scholarly and professional connections in all PICs considered, but due to my employment at USP, most notably in Fiji and Vanuatu.

Table 2: Field site selection criteria

Country	Accessibility	Lawyers ⁴⁵ / per capita		Population ⁴⁶	Land (km ²)	GDP (USD) ⁴⁷	Average income (USD) ⁴⁸	HDI 2017 Rank ⁴⁹	Proposed reform?
Fiji	High	733	1: 1,207	884,887	18,333	\$5.1B	12,769	91	No
Kiribati	High	44	1: 2,493	109,693	811	\$200M	3,835	137	No
Nauru	Low	7	1: 1,441	10,084	21	\$114M	11,851	n.a.	No
Palau	Low	58	1: 305	17,661	444	290M	11,184	60	No
PNG	Moderate	879	1: 8,031	7,059,653	462,840	\$21BN	6,854	154	No
Samoa	Moderate	103	1: 1,823	187,820	2,934	\$860M	11,277	104	No
Solomon Islands	High	100	1: 5,159	515,870	28,230	\$1.3B	3,847	156	Yes
Tonga	Moderate	52	1: 1,986	103,252	749	\$430M	10,237	101	No
Tuvalu	Low	13	1: 829	10,782	26	\$40M	3,341	n.a.	No
Vanuatu	High	117	1: 2,000	234,023	12,281	\$860M	5,479	134	No

Table 2 identifies key data used to compare potential field sites. The leading candidates for fieldwork were Fiji, Kiribati, Solomon Islands and Vanuatu. However, ultimately, Fiji, Kiribati, and Vanuatu were selected as fieldwork sites. Fiji, Kiribati, and Vanuatu exhibited maximum variation in a variety of ways. Fiji's legal profession is large and has a long history of regulation under a

⁴⁵ South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011). 14. 'Lawyers' here combines private, NGO and government lawyers. Fiji at 26 September 2018: Judiciary of Fiji, 'Legal Practitioners' Unit Homepage', *Legal Practitioners' Unit* (Web Page, June 2017) <<http://www.judiciary.gov.fj/index.php/judicial-department/legal-practitioners-unit>>; Kiribati at 25 September 2018, correspondence with High Court of Kiribati Court Registry, on file with author; *ibid.*; Palau Bar Association members list (only local active private, government and NGO lawyers included).

⁴⁶ Data as at last census prior to field site selection Cook Is. 2011, Fiji 2017, Kiribati 2015, Nauru 2011, Niue 2011, Palau 2015, PNG 2011, Samoa 2011; Solomon Islands 2009; Tonga 2011; Tuvalu 2012; Vanuatu 2009.

⁴⁷ Government of Niue, 'Statistics Niue', *Niue Statistics Office* (Web Page, June 2017) <<http://niue.prism.spc.int>>. *ibid.*; 'List of Legal Practitioners with Practising Certificates', *Judiciary of Fiji* (Web Page, 30 August 2023) <<https://judiciary.gov.fj>>.

⁴⁸ Source: 'World Inequality Database', *Wid* (Web Page, 1 June 2023) <<https://wid.world/>>.

⁴⁹ 'Human Development Report', *United Nations Development Programme* (Web Page, December 2017) <<http://hdr.undp.org/en/2017-report>>.

formal regulatory framework dating to the pre-independence era. By contrast, the legal profession in Kiribati is small and became formally regulated fairly recently, in 2007. Vanuatu falls somewhere between Fiji and Kiribati in both the size and scale of the profession, having been regulated by the Vanuatu Law Council since 1980. Since 2010, Fiji's formal system for lawyer regulation has been functionally operable, with action taken against many lawyers found in breach of professional ethics and conduct rules. By contrast, at the time of field site selection formal regulatory systems had not functionally operated in Kiribati and Vanuatu since they were created. The selected countries also exhibit wide variance in population, GDP, and income per capita.

3.3. Research Methods

3.3.1. Document Analysis

The initial phase of the project involved systematically examining existing literature and reports on: lawyer regulation; law and justice; and historical accounts of colonialism, law, and political economy in PICs. As the project progressed, newly published literature was reviewed and assessed, both aligned with and informed by the ongoing empirical data collection from observations and interviews. For example, various participants referred me to relevant documents such as case law, speeches given by Chief Justices at events, Hansard records, NGO reports, and news and social media reports. All of these documents helped me to develop a better understanding of the histories and socio-economic contexts of legal practice environments in PICs.

Despite this, data on lawyer regulation in PICs is limited, with the only comprehensive account of relevant statutory regimes having been published by the SPLA, and only a handful of empirical studies by scholars examining limited aspects of lawyer conduct linked to legal education, regional legal professional associations, and professional discipline in Fiji.⁵⁰ While the SPLA's 2017 Report, entitled *Legal Profession Regulation in the South Pacific* indicated a need for further research regarding 'Non-State mechanisms for enforcing legal professional standards'⁵¹ no existing data source focuses explicitly on cultivating a holistic understanding of lawyer conduct and regulation.

⁵⁰ Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021); Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019); Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017); Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017; South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017); South Pacific Lawyers' Association, 'Women in Law in the South Pacific - Survey Report' (2014); *ibid.*; Mogish and Lambu, 'Rights and Procedures of Admission in South Pacific Countries' (2013); South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011); *ibid.*; MacFarlane, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002); Peter Larmour, 'Corruption and Governance in the South Pacific' (1997) 20 *Pacific Studies* 17.; Powles and Pulea, *Pacific Courts and Legal Systems* (1988).

⁵¹ South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017). 9.

The closest source was Penfold's exploration of how legal education at USP can better equip undergraduate law students to be 'work-ready'. Her research greatly informed the design of this study.⁵²

The paucity of empirical data on the regulation of lawyer conduct in PICs made it clear that this research needed to generate primary data that was methodologically robust and aligned with the multi-sited approach. This also informed the development of my interview schedule, ensuring data collection relevant to the research questions spanning historical and paradigmatic questions; normative questions; and questions regarding lawyers' experiences and perceptions. No empirical research of perceptions about lawyers by court users emerged from the document analysis. Accordingly, in the early stages of designing this study a survey of court users was contemplated to provide additional data regarding public perceptions of lawyers. Instead, informal opportunities to discuss local perceptions of lawyers were pursued, reflecting the synergistic relationship between the research methods used.

3.3.2. Observation

Observation was an important method utilised throughout my fieldwork and allowed for an immersive and context-rich understanding of lawyer conduct and regulation in Fiji, Kiribati, and Vanuatu. Observation involves systematically watching, listening, reading or otherwise perceiving phenomena⁵³ and recording these in various ways. Grounded in interpretivist and constructionist paradigms, observation as a method aligns with the principles of decolonisation, emphasising respect for local ways of knowing and understanding and interpreting norms. This alignment guided the use of various forms of observation, each of which contributed to my understanding of local legal practice environments.

My primary fieldwork was conducted in Kiribati from 5 July to 10 September 2018; in Fiji from 10 March to 19 April 2019; and in Vanuatu from 18 July to 5 September 2019. Different forms of observation were used in each jurisdiction including ethnographic observation of local people, customs and practices at social gatherings and formal events;⁵⁴ naturalistic observation of physical

⁵² Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

⁵³ Karen O'Reilly, *Ethnographic Methods* (Routledge, 2nd ed, 2012).

⁵⁴ On ethnographic observation see Tony L Whitehead, 'Basic Classical Ethnographic Research Methods' (2005) 1 *Cultural Ecology of Health and Change* 1.; Paul Aktinson and M Hammersley, 'Ethnography and Participant Observation' in Norman. K. Denzin and Yvonna. S. Lincoln (eds), *Strategies of Qualitative Inquiry* (Sage, 1998) 248.

legal practice environments;⁵⁵ participant observation;⁵⁶ and opportunistic observations, through social interactions, including with taxi-drivers, business people, court staff „and court users.⁵⁷ These observational methods provided opportunities to triangulate data, and cultivate an understanding of social, cultural and environmental factors regulating lawyers that might have otherwise not been available.

I utilised multi-modal ethnographic documentation that included making field notes, audio recordings, visual materials (photographs and videos), and regular reflective dialogues with my supervisory panel.⁵⁸ My field notes included records of the physical environments of legal practice that provided the setting for most of my interviews such as courts, lawyers' offices, and government buildings; my evolving thoughts and perceptions relevant to the research questions; and records of informal private conversations with a wide range of people. These methods facilitated an immersive and multidimensional exploration of lawyers' conduct and their environmental influences in PICs. Ethical considerations were paramount and were addressed through respectful engagement, full disclosure of my presence as a researcher, respect for privacy and confidentiality and continuous reflexive practice.⁵⁹ Engaging with my supervisory panel throughout the research helped to ensure scholarly rigor and provided essential insights throughout the research process.

⁵⁵ On naturalistic observation see Michael V Angrosino, *Naturalistic Observation* (Routledge, 2016).

⁵⁶ On participant observation see Aktinson and Hammersley, 'Ethnography and Participant Observation' 1998.

⁵⁷ On opportunistic observation see Raymonde Guindon, 'Designing the Design Process: Exploiting Opportunistic Thoughts' (1990) 5(2-3) *Human-Computer Interaction* 305.

⁵⁸ Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data: Complementary Research Strategies* (Sage Publications Inc, 1996).; Steven J Taylor, Robert Bogdan and Marjorie DeVault, *Introduction to Qualitative Research Methods: A Guidebook and Resource* (John Wiley & Sons, 2015).

⁵⁹ See section 5. p. 76.

Image 6: Volleyball with Kiribati court staff



Source: Photo taken by author, August 2018, South Tarawa, Kiribati

3.3.3. Interviews

Semi-structured face-to-face individual interviews were chosen as the most suitable method for primary data collection due to their suitability for conducting research that aligns with key principles of Pacific research methodologies⁶⁰ and for examining ‘legal phenomena and perceptions of law and the legal profession.’⁶¹ The need to gather in-depth and historical insights necessitated a focus on ‘key informants’ – a term referring to individuals with significant knowledge or experience in a particular area.⁶² These included judges, government ministers, solicitors-general, directors of public prosecutions, departmental secretaries, law society presidents, and principals of law firms. I prepared extensively for interviews with key informants, by leaving them to the later stages of my fieldwork and asking specific questions tailored to their expertise. I also adopted an adaptive and flexible approach, allowing them to guide the conversation to some extent, while also asking probing and follow-up questions to delve deeper into specific areas of interest. The emphasis on key informants enabled me to collect detailed and historical information, such as the histories

⁶⁰ Sereana Naepi, ‘Pacific Research Methodologies’, *Oxford Research Encyclopedia of Education* (Oxford University Press, 2019).; Melani Anae, ‘Pacific Research Methodologies and Relational Ethics’, *Oxford Research Encyclopedia of Education* (Oxford University, 2019).; Unaisi Nabobo-Baba, ‘Decolonising Framings in Pacific Research: Indigenous Fijian Vanua Research Framework as an Organic Response’ (2008) 4(2) *Alternative: An International Journal of Indigenous Peoples* 140.

⁶¹ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926. 937.

⁶² See for example Neil Gunningham, Robert A Kagan and Dorothy Thornton, ‘Social License and Environmental Protection: Why Businesses Go Beyond Compliance’ (2004) 29(2) *Law & Social Inquiry* 307.

of law societies and lawyer regulation and facilitated the triangulation of data relevant to key regulatory roles within local legal practice environments.

As indicated in the interview schedule, interviews covered a wide range of topics linked to the research questions, but rarely took place in a linear and structured manner.⁶³ Most participants consented to audio recording of interviews, although extensive hand-written notes were also taken both as a backup record of interview and to record observations. In Fiji, interviews were conducted primarily in Suva and Nadi due to density of legal practitioners and logistical considerations. In addition to this, some interviews were conducted with Fiji participants residing in Australia. In addition, three participants from Fiji answered questions sent by email. The data collected from email interviews lacked the depth afforded by the flexibility of more fluid face-to-face interviews, but nevertheless yielded valuable data on the questions listed in the interview schedule. In Kiribati, interviews were conducted in South Tarawa, where the entire legal profession resides and primarily practices. Similarly, in Vanuatu, participants were all interviewed in Port Vila where most lawyers reside and practice. Travel to remote locations in Vanuatu to interview lawyers was considered desirable but was not feasible due to associated costs and logistical challenges.

3.3.4. Talanoa Research Methodology

In most interviews I adopted an unhurried and conversational approach that emphasised developing an authentic relationship with participants, akin to *Talanoa* research methodology.⁶⁴ Talanoa involves a ‘conversation, a talk, and an exchange of ideas, be it formal or informal’⁶⁵ but which emphasises the relationship between the researcher and the participant through non-linear and responsive approaches.⁶⁶ Talanoa requires mutually respectful communication and includes:

Many dimensions which when used skilfully, will initiate a sense of bonding, focus on a topic ... [and] contribute to maintaining the mālie (enjoyment, authenticity) of the interaction through ‘triangulations of information, testing the other participant’s mental agility and alertness, or [by] entertain[ing].’⁶⁷

⁶³ See sample Interview Schedule at Appendix Two.

⁶⁴ See Suaalii-Sauni and Fulu-Aiolupotea, ‘Decolonising Pacific Research, Building Pacific Research Communities and Developing Pacific Research Tools: The Case of the Talanoa and the Faafaletui in Samoa’ (2014); Trisia Farrelly and Unaisi Nabobo-Baba, ‘Talanoa as Empathic Research’ (Conference Paper, International Development Conference 2012, 3-5 December 2012); Timote Vaoleti, ‘Talanoa: Differentiating the Talanoa Research Methodology from Phenomenology, Narrative, Kaupapa Maori and Feminist Methodologies’ (2013) 56 *Reo, Te* 191.

⁶⁵ Vaoleti, ‘Talanoa Research Methodology: A Developing Position on Pacific Research’ (2006). 23.

⁶⁶ Vaoleti, ‘Talanoa: Differentiating the Talanoa Research Methodology from Phenomenology, Narrative, Kaupapa Maori and Feminist Methodologies’ (2013).

⁶⁷ Ibid. 204.

For example, most interviews began by discussing local events, our mutual backgrounds and acquaintances and throughout there was reciprocal sharing of personal stories and information. This helped to establish trust and mutual respect. This in turn helped to facilitate a nuanced exploration of local legal practice environments, lawyers' experiences of legal practice, social and customary norms, and personal and innate regulators of lawyer conduct, such as values and religion. Interviews typically lasted for 60-90 minutes, although at the request of, or with consent, several interviews extended beyond this or took place across two sessions.

3.3.5. Sampling

Participants were primarily recruited using snowballing sampling techniques⁶⁸ through a network of existing contacts, introductions through that network, and through direct contact with peak professional associations of lawyers in each country. In Kiribati for example, at the invitation of the Chief Registrar, I was fortunate to attend the swearing in of Judge David Lambourne on 16 July 2018, which was also attended by most of the Kiribati legal profession. At a catered morning tea following the ceremony, with permission from Judge Lambourne, I made a brief announcement to attendees to introduce myself and the research I was doing. This enabled me to 'break the ice' with many potential interview participants and arrange to contact them to schedule interviews. In addition to this, all participants interviewed were asked to recommend other people they thought I should speak with. Accordingly, as the research progressed, I was able seek targeted interviews with key recommended individuals and other participants to ensure a diverse range of participants in different participant classes.

As set out in Table 3, a total of 67 participants were interviewed representing the private legal profession, professional associations, regulators, judicial staff, government lawyers, academics, and NGOs. Many participants are counted in multiple categories due to holding concurrent or previous roles. This data has not been disaggregated by participant to respect participant choices regarding anonymity and confidentiality.

⁶⁸ Bruce L Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (Pearson Boston, 8th ed, 2012).

Table 3: Interview classes

Participant class	Fiji	Kiribati	Vanuatu
Private Legal Profession	15 private practitioners	5 private practitioners	10 private practitioners
Peak Legal Professional Association	President, FLS 2 Past Presidents, FLS	President, KLS Vice-President, KLS Secretary, KLS Past-President, KLS	President, VLS
Regulator	Former Commissioner, ILSC Manager, LPU Former Manager, LPU		Chair, VLC Secretary, VLC 2 Committee Members VLC
Judiciary	High Court Judge Former High Court Judge Former Magistrate	High Court Judge Chief Magistrate 3 Magistrates	2 Supreme Court Judges
Government	Solicitor-General Former Solicitor-General Director of Public Prosecutions	Secretary for Justice Member of Parliament 3 lawyers, Office of Attorney-General 3 lawyers, Office of the Peoples Lawyer	Director of Public Prosecutions Former Ombudsman
Other	1 lawyer, Ministry for iTaukei Affairs 1 NGO 1 Court Clerk 5 Academic	1 <i>Unimwane</i> 1 NGO 1 Advisor	Head of Law, USP 4 Academic 2 Police prosecutor 1 Legal secretary 1 Advisor
Total unique participants	25	20	22
	67		

3.3.6. Diversity

To ensure compatibility of my data with other studies of lawyers in the region, participants were counted as lawyers if they held an LLB degree.⁶⁹ In alignment with the objectives of this study to ensure diversity in participant responses, I sought to interview a mix of senior and junior lawyers. However, the need to gather in-depth and historical insights necessitated a focus on ‘key informants’ which, as depicted in Table 4, meant that out of 59 lawyers interviewed, 43 (73%) had more than 10 years of experience, eight (13%) had from 5-10 years of experience, and eight (13%) had fewer than five years of experience.

⁶⁹ Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017). 56-7.

Table 4: Post admission experience (PAE) of lawyer participants

	Fiji	Kiribati	Vanuatu	Total
<5 years PAE	2	2	4	8
5-10 years PAE	4	3	1	8
10+ years PAE	19	10	14	43
Total	25	15	19	59

Interestingly, the responsiveness to interview requests varied significantly between senior and junior practitioners. Senior lawyers were generally more accommodating in scheduling interviews upon initial contact. In contrast, junior lawyers exhibited a lower response rate, with many failing to respond to initial and follow up requests or promising to respond later but not following through.⁷⁰

10 participants were foreign lawyers, being either temporary or permanent residents originating from Australia, New Zealand, Canada, and the United Kingdom. Additionally, in Fiji and Vanuatu, participants included lawyers from other PICs. Contributions from these participants enriched the data by offering various points of comparison including their experiences of legal practice in each PIC and their reflections of local legal practice environments.

Table 5: Participants by gender

	Fiji	Kiribati	Vanuatu	Total
Male	14	10	14	38
Female	11	10	8	29
Total	25	20	22	67

To the extent that it was practicable a balanced sample of views was sought based on gender. However, due primarily to the limited number of women in senior government, legal and judicial roles, my emphasis on key informants meant that an unequal distribution was obtained. As shown in Table 5, a total of 38 males and 29 females were interviewed. In my sample, this inequality was most apparent in government roles (1 woman) and the Fijian judiciary (0 women). Notwithstanding this, participants of the study included women in senior leadership roles in each jurisdiction and with diverse practice experience, and the gender distribution does not undermine the validity or applicability of the data collected. While the emphasis on key informants led to a

⁷⁰ In keeping with my commitment to respectful engagement, I interpreted this as an unwillingness to participate and did not send repeated follow up requests. However, this distinction could just as easily have been due to other factors such as shyness, feeling they had nothing to contribute, relatively poorer time management skills, or the fact that senior lawyers were more likely to have their own legal secretary managing their diaries.

higher representation of males, insights provided by all participants were integral to understanding the complexities of lawyer regulation in PICs. Indeed, it was from interviews with female lawyers that the most striking examples of the normative complexities of legal practice in PICs were revealed.

By acknowledging and transparently reporting the distribution, this study demonstrates a commitment to drawing attention to these inequalities. The SPLA's 2014 Report entitled *Women in Law in the South Pacific*⁷¹ revealed there were just 26 female judges and magistrates across 11 respondent Pacific Island jurisdictions, with seven jurisdictions reporting one or no female judicial officers. At that time, across the region, women made up just 34% of the legal profession. It is perhaps time for a follow up study on this important issue. In this thesis, I sought to elevate the experiences and perspectives of female lawyers in PICs through two case studies. It is perhaps time for a follow up study and future research could specifically focus on the experiences and perspectives of women in the legal profession in PICs.

⁷¹ South Pacific Lawyers' Association, 'Women in Law in the South Pacific - Survey Report' (2014).

3.4. Reflexivity

Reflexivity is ‘thoughtful, conscious self-awareness’ by a researcher about their role in the co-creation of knowledge through their experiences and the process of data collection and analysis.⁷² It involves ‘a process of critical reflection both on the kind of knowledge produced from research and how that knowledge is generated.’⁷³ In addition to identifying and exploring my own positionality I engaged in self-reflexive practices throughout my fieldwork and data analysis to ensure the rigour and integrity of the research. During my fieldwork and the analysis of my data I engaged in self-reflexive practices including: keeping detailed field notes; regular debriefings with my supervisory panel; triangulation of data; and debriefings with peers. These practices enabled me to critically reflect on data collected from interviews and other sources and my interpretations and enabled me to adapt my data collection strategies to ensure saturation.

Additionally, self-reflexivity enabled me to reflect on my commitment to decolonising principles throughout my conduct of this research; my cultural sensitivity during interviews and observations; and my conduct during ‘ethically important moments’⁷⁴ and my responses to them. For example, there were several occasions where interviews were permitted to extend well-beyond the allocated time; two occasions where I was required to step out of my role as researcher to ensure the wellbeing of a participant who had become distressed; and two occasions where a participant wished to pause recording to elaborate on illicit conduct. By adopting a reflexive approach, I sought to mitigate biases introduced through my positionality and ensure that the research was calibrated to the context-sensitive and ethical generation of data in alignment with Pacific research methodologies.

⁷² Linda Finlay, ‘“Outing” the Researcher: The Provenance, Process, and Practice of Reflexivity’ (2002) 12(4) *Qualitative Health Research* 531. p 532. Reflexivity in socio-cultural research has deep roots, see for example George Herbert Mead, *Mind, Self, and Society* (University of Chicago press Chicago, 1934).

⁷³ Marilys Guillemin and Lynn Gillam, ‘Ethics, Reflexivity, and “Ethically Important Moments” in Research’ (2004) 10(2) *Qualitative Inquiry* 261. p 274.

⁷⁴ Ibid.

4. DATA ANALYSIS

4.1. Thematic and Abductive Analysis

Thematic analysis is a flexible method for identifying and interpreting patterns within qualitative data. In this study the primary data comprised transcriptions from over 80 hours of interviews which resulted in over 500,000 words of data. Braun and Clark describe Thematic Coding as occurring across six phases which take in: data familiarisation (e.g. from having conducted the interviews); iterative periods of coding; identifying and reviewing themes; defining themes; and finally weaving the themes together to answer the primary research questions.⁷⁵ Coded data was triangulated using data from other sources. Both my choice of thematic and abductive analysis was grounded in their compatibility with constructionist and interpretivist paradigms and fostered a reflexive engagement with analysis and theoretical frameworks.

Primary coding was done using NVIVO to identify key themes that emerged from the interview data.⁷⁶ This study sought to elicit data regarding the various themes expressed in the research questions, and accordingly my initial codes were created to cluster similar data together to make it easier to search for and review themes. My initial codes were: Actors; Case Studies; History of Profession; Personal Histories; Influences of Behaviour; Sources of Influence: Regulation; Good Lawyers; Complaints and Discipline; Managing Ethical Dilemmas; Breaches of Ethics; Pathways and Barriers to Beneficial Change. All of these initial codes were iteratively recoded into sub-codes which clustered data around key themes and narratives that emerged from the data.

The initial themes that emerged from my data were: legitimacy; resistance; legal education; normative pluralism; complexity; practical norms; and the role of key individuals.⁷⁷ These were analysed abductively to identify themes and develop case studies exploring and connecting different themes. Abductive analysis is an inferential process which enables a researcher to draw upon existing theories and observations to develop insights into the data.⁷⁸ A good description of the process is as one of ‘zooming in, and zooming out’⁷⁹ to examine data at different scales and in

⁷⁵ Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.

⁷⁶ <https://lumivero.com/products/nvivo/> NVIVO 12 Lumivero.

⁷⁷ And many others that were considered and set aside.

⁷⁸ Timmermans and Tavory, 'Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis' (2012).

⁷⁹ Davide Nicolini, 'Zooming in and Zooming Out: A Package of Method and Theory to Study Work Practices' in Sierk Ybema et al (eds), *Organizational Ethnography: Studying the Complexities of Everyday Life* (Sage Publications Ltd, 2009) 120.

novel ways. One of the key advantages of using abduction is its adaptability and reflexivity.⁸⁰ This enabled me to question my data to seek new insights such as identifying patterns connecting actors, themes and other phenomena. By comparing my data with existing literature and analysing it through different analytical lenses, I was able to generate fresh insights grounded in the perspectives of the participants.

4.2. Development of Case Studies

Case studies are a flexible analytical tool particularly well suited to socio-cultural research, within constructionist and interpretivist paradigms because they enable a researcher to delve deeply into complex social phenomena.⁸¹ Case studies of phenomena occurring at different scales were used analytically to identify similarities and patterns between jurisdictions and identify themes and narratives connecting related phenomena that emerged from the empirical data.⁸² At a macro scale, my study considered cases of legal practice environments in each of the three jurisdiction: Fiji, Kiribati, and Vanuatu. These were instrumental case studies through which the study aimed to explore state and non-state regulators of lawyers in the Pacific Region.⁸³ At the scale of individuals, case studies were used both descriptively and analytically. In keeping with decolonising methodologies, these case studies were used to relay the authentic narratives of participants and provide a contextually rich explanation of their experiences. These narratives were used to anchor discussion of key themes in each chapter.

⁸⁰ John B Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems-with Applications to Climate Change Adaptation' (2010) 89 *Nc Law Review* 1373.; Udo Kelle, 'Sociological Explanations between Micro and Macro and the Integration of Qualitative and Quantitative Methods' (2005) *Historical Social Research/Historische Sozialforschung* 95.

⁸¹ Robert K Yin, *Case Study Research: Design and Methods* (Sage, 4th ed, 2009).

⁸² Albert J Mills, Gabrielle Durepos and Elden Wiebe, *Encyclopedia of Case Study Research* (Sage Publications, 2009).

⁸³ Catherine Houghton et al, 'Rigour in Qualitative Case-Study Research' (2013) 20(4) *Nurse Researcher*.; Mills, Durepos and Wiebe, *Encyclopedia of Case Study Research* (2009).

4.3. Development of the Pluralist-Relational Approach to Lawyer Regulation

The pluralist-relational approach to lawyer regulation, explored in Chapter Three, emerged through a rigorous process of inductive and abductive analysis of the empirical data. It became evident that traditional and contemporary theories of lawyer regulation, being colonial in origin, could not offer a robust answer to the primary research question due to their epistemological limitations when deployed in the unique contexts of PICs.⁸⁴ This led to the development of the pluralist-relational approach to lawyer regulation through iterative engagement with various codes, themes and theories. This iterative approach embodied a responsive and abductive approach to theory development⁸⁵ that was calibrated to align with decolonising research principles of respect and reciprocity.⁸⁶ By developing the theoretical framework in tandem with analysis of the empirical findings, it became a reflection of the voices of Pacific lawyers, sensitive to their own experiences of regulation.

Methodologically, a pluralist-relational approach equips a researcher with both an analytical tool, and a framework for the study of professions in Pacific and other post-colonial contexts that looks beyond state norms and institutions. It does this by drawing a researcher's focus to the dynamic socio-cultural, innate, and temporal actants which constrain and influence the competence and capacities of regulatees to comply with state and customary norms in Pacific contexts.⁸⁷ Only by first understanding both contexts and concepts is it possible for a regulator to develop a holistic understanding of what regulates within a particular regulatory domain. This theoretical framework is validated in this thesis where it is applied throughout the substantive chapters to reveal insights about the plural actants on lawyer conduct in PICs and their connection with broader themes such as legitimacy, resistance, and normative pluralism. The development of the framework enriches current scholarly discourse on both lawyer regulation and regulatory studies in PICs and opens up pathways for application in future research.

⁸⁴ This was explored in Chapter One. These contexts include: decolonisation; normative pluralism; climate change; and the fragility of the bureaucratic state.

⁸⁵ See Iddo Tavory and Stefan Timmermans, *Abductive Analysis: Theorizing Qualitative Research* (University of Chicago Press, 2014).; Timmermans and Tavory, 'Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis' (2012).

⁸⁶ Thambinathan and Kinsella, 'Decolonizing Methodologies in Qualitative Research: Creating Spaces for Transformative Praxis' (2021); de Deckker, 'Decolonisation Processes in the South Pacific Islands: A Comparative Analysis between Metropolitan Powers' (1996). See discussion in Chapter Three at 2.2. Decolonisation and Pacific Research Methodologies, p. 56.

⁸⁷ See further Chapter Three. section 4. A Pluralist-Relational Approach to Lawyer Regulation, p. 101.

5. ETHICAL CONSIDERATIONS AND LIMITATIONS

5.1. Cultural and Other Ethical Considerations

My conduct throughout the research was informed by my awareness of the need to minimise risks to participants. The Australian National University's Human Research Ethics Committee considered and granted approval for the design and methodology of the study and noted its sensitivity to cultural and other ethical considerations.⁸⁸ All formal university ethics requirements were met including providing participants with information sheets; obtaining written consent for interviews and audio recording; respecting participant confidentiality; ensuring secure storage; and retention of data. In addition to this, before commencing research in each jurisdiction, I sought and received permission to undertake the research from the Governments of Fiji, Kiribati, and Vanuatu and complied with all requirements and protocols including relating to reciprocity and respect for local customs.

5.1.1. Language

The language in which interviews are conducted in PICs is an important consideration in terms of both cultural sensitivity and ensuring the accuracy and validity of data. While remaining sensitive to this, the language of tertiary education for lawyers in Fiji, Kiribati, and Vanuatu is English. All participants had tertiary qualifications obtained at English language institutions and accordingly, all participants spoke fluent English. In the conduct of interviews, to ensure clarity and comprehension, interviews were conducted at a pace led by participants, with ample pauses to allow for reflection and clarification. Additionally, where consent was given, audio recordings were made and transcripts of conversations were created. Participants were encouraged to express themselves in their preferred language, on the few occasions they had trouble expressing their thoughts in English. Whenever necessary, participants were asked to clarify the meaning of colloquial expressions and terms given in local languages. This approach prioritised participants' comfort and ensured sensitivity to cultural considerations while maintaining the accuracy and validity of data collected.

5.1.2. Managing Sensitive Information

Another key risk of the research was that participants might reveal conduct relating to crimes or regulatory breaches committed by themselves or others. To minimise risks associated with this, participants were firstly advised not to provide details such as names or identifying information

⁸⁸ Australian National University, Human Research Ethics Protocol: 2018/181.

regarding their or others' personal breaches of ethics rules, or involvement in criminal activity. Where identifying information was provided, this risk was managed by anonymising or deleting all personal and sensitive information during transcription and analysis. Any details that might lead to identification of individuals involved in unethical or criminal conduct were redacted or generalised, except where these related to publicly available information, such as published disciplinary findings.

5.1.3. Emotionally Distressing Topics

In several interviews, participants raised issues that were emotionally or psychologically distressing. These included instances of family violence; physical mistreatment by state authorities; feelings of persecution; feelings of inadequacy or incompetence; and accounts of distressing personal situations such as divorce, or loss of a family member. I provided support during interviews by ceasing any audio recordings and offering words of empathy and support. I prepared for such occurrences by participating in research training and ensuring I could provide details for local support services in each jurisdiction. In these situations, I emphasised my respect for the participant's autonomy and right to choose what information they shared with me and the confidentiality and privacy of information they had chosen to share.

5.1.4. Informal Observations

As part of observations in each jurisdiction, I engaged with local people in many informal or private settings. In some instances, these observations were recorded in field notes or used to assist the triangulation of data collected through formal interviews. This posed various risks, including potential breaches of privacy, misunderstanding or misinterpretation, and the potential for observations to be perceived as culturally insensitive or inappropriate. To manage these risks, I was transparent about my role as a researcher and the purpose of my questions or observations and wherever possible, I sought verbal consent. In addition to this, I maintained a reflexive approach, considering the impact of my presence and actions on those I engaged with or observed. Additionally, I ensured all recorded observations were anonymised and treated with the same degree of confidentiality and respect as data collected through formal interviews.

5.2. Limitations of the Research

While the research provides many valuable contributions, it is not without limitations. In addition to methodological limitations considered elsewhere,⁸⁹ the primary limitations of my study relate to the generalisability of my findings and that my empirical study was conducted in 2018-9. Addressing the question of generalisability first, I sought to ensure my findings were representative of PICs by ensuring each of the jurisdictions studied was diverse across a range of metrics. This approach generated a large amount of data, which was analysed abductively to enrich theoretical development. However, only PICs with common law legal systems were included in the study and thus my findings are of more limited value in non-common law jurisdictions. Additionally, the differences between jurisdictions means that further empirical research would be needed to validate my findings in jurisdictions not covered by the empirical study. Notwithstanding this issue, the empirical findings about lawyer regulation in each jurisdiction enables theorising about lawyer conduct in other jurisdictions and provides a solid foundation for future research.

While my empirical data was collected in 2018-19, making it now somewhat dated, it remains the only empirical study to consider the regulation of lawyers in practice in PICs. There were three primary reasons for delays. First, the substantial volume of data collected meant transcription of interviews and data analysis took longer than expected. Second, the COVID-19 pandemic prevented further fieldwork, which may have otherwise strengthened empirical rigour by adding additional empirical sources for data triangulation.⁹⁰ Thirdly, in addition to impacts from restrictions and lockdowns, in 2020, I became a full-time carer and guardian for my mother which significantly complicated completion of my thesis. She passed away in June 2023.

⁸⁹ These include my positionality, the difficulty of conducting multi-sited fieldwork, and the complexity of local legal practice environments.

⁹⁰ Hopefully future researchers will add these additional layers.

6. CONCLUSION

This study helps to fill the gap in research and theorisation of legal practice environments in PICs. Its design and methodological approach were aligned with decolonising principles, and constructionist and interpretivist paradigms. The study's reflexive and context sensitive approach generated rich data that supported the theorisation of the pluralist-relational approach to lawyer regulation and revealed many insights into the dance of compliance between lawyers and the plurality of regulators of lawyers in Fiji, Kiribati, and Vanuatu. This research speaks to discourses regarding lawyer regulation and ethics, and discourses of Pacific regulation and governance. I hope that my methodological approach can be of value to future researchers of professions in PICs as a model attuned to a rigorous, ethical, and culturally engaged consideration of social and other phenomena. In the next chapter, Chapter Three, I will consider theoretical understandings of lawyer regulation in the common law world and their limitations in explaining lawyer conduct in PICs. I then introduce the theoretical framework that emerged from analysis of my empirical data – 'a pluralist-relational approach to lawyer regulation.'

CHAPTER THREE: THEORY AND THEORETICAL FRAMEWORK

1. INTRODUCTION

As we saw in Chapter One, understanding the unique socio-cultural paradigms of PICs provides a necessary perspective for understanding the contexts and constraints of systems regulating lawyers.¹ Formalised statutory systems for regulating lawyers in PICs are based on systems that emerged in England and were transferred to the Pacific Region through processes of missionisation, colonisation, independence and development. The design of such systems throughout the common law world has been shaped by successive theoretical waves concerning the regulation of society and the legal profession. These waves draw from a wide range of literature including legal ethics, the sociology of the professions, moral philosophy, the philosophy of law and regulatory theory. The first section of this chapter identifies three primary theoretical approaches to lawyer regulation: the first two, self-regulation and market/control, are parsed in this thesis as ‘traditional approaches’, while more recent contemporary theories are parsed as ‘relational’ regulatory approaches because they embrace a more interconnected understanding of what regulates individual’s conduct in social systems.

The chapter then applies these lenses to theorise lawyer regulation in PICs. This analysis shows that existing theories and frameworks of lawyer regulation currently offer a limited explanation of lawyer conduct in practice in PICs. In order to address these limitations, the final section of this chapter introduces a novel framework I have termed a ‘pluralist-relational approach to lawyer regulation’. This framework was developed abductively based on analysis of the data collected in the empirical study and combines insights from theories of regulation and compliance, relationality and interactionist theories of norm creation.²

¹ The terms ‘systems regulating lawyers’ and ‘lawyer regulation’ are used interchangeably throughout this Thesis. It is used to mean the ‘regulation of lawyers’ not ‘regulation (of something) by lawyers’.

² See below, section 4. p. 101.

2. THREE WAVES OF LAWYER REGULATION

The evolution and development of lawyer regulation in common law countries since the mid-19th century can be understood in terms of three theoretical waves that have shaped dominant approaches to regulatory design. These waves have deposited formal regulatory strategies and tools, mostly in statutory forms, in what we can think of as ‘sedimentary layers’ that have accreted, eroded and resettled over the past 150-200 years. The first of these, beginning around the mid-1800s, were so-called ‘self-regulatory models’ which emerged in England and soon spread to British colonies and protectorates around the world, including the Pacific Region.³

From the 1960s, the rise of market and competition theories heralded regulatory reforms throughout common law countries that focused on protecting clients as ‘consumers’ of legal services. This second wave followed a general trend in regulation towards ‘tight’ formalised approaches, characterised by increasingly prescriptive, rules-based and punitive strategies. The main regulatory mechanisms for this second wave were increasing sanctions and enforcement through complaints and discipline systems as well as tightening entry and licensing requirements.⁴ Such ‘command and control’ mechanisms continue to provide the backbone of formal systems regulating lawyers throughout the common law world.

Since the mid-to-late 1990s a third wave has developed based on relational understandings of regulation which have emerged from cross-disciplinary theories of human sociology, psychology and systems theories. This approach has informed more holistic understandings of the temporal, environmental and socio-cultural influences on compliance behaviour within human systems. This has in turn led to a proliferation of new models and strategies for regulating lawyers, many of which have shown great promise in other common law countries such as Australia, England, and Canada, but have yet to be properly tested in PICs.⁵

³ See below at 2.3. Self-Regulation, p. 85.

⁴ See below at 2.4. Shift to Market/Consumer Ideologies, p. 87.

⁵ Russell G Pearce and Eli Wald, ‘Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles’ (2012) *Michigan State Law Review* 513.; Eli Wald and Russell G Pearce, ‘Being Good Lawyers: A Relational Approach to Law Practice’ (2016) 29 *Georgetown Journal of Legal Ethics* 601. ‘Self-regulatory models’ of lawyer regulation, in fact, appear to all include some degree of judicial control over admission, licensing and/or regulation of lawyers. The ‘wellness movement’ could perhaps be included here as a ‘fourth wave’ in lawyer regulation that has emerged over the past decade. This movement focuses on improving the mental and emotional health of lawyers, recognising the need for systemic change within the legal profession to address the high rates of depression, anxiety, and maladaptive coping strategies. In Chapter Eight I draw from this literature to discuss possible pathways forward for lawyer regulation in PICs. See Chapter Eight, 5.2.3. Mental Health of Lawyers, p. 315.

This section adopts a socio-historic approach to explain the development of these three theoretical waves. This approach ensures a contextually grounded explanation of the evolving dominant discourses of lawyer ethics, regulation and compliance. It is also helpful in situating current formal systems of lawyer regulation in PICs within the discourses of self-regulation and autonomous self-interest that existed at the time of their creation and persist in most PICs today. As is argued below, despite the many excellent insights of existing theories and models of lawyer regulation, the context of PICs requires looking beyond these existing approaches to effectively regulate lawyers in PICs.

2.1. The Unfused Profession

The structure and organisation of the legal profession in PICs closely follows the English legal tradition where forms of regulation of lawyers as a profession can be traced to the 11th century.⁶ Within the English legal tradition an historically relevant distinction existed – and persists – between the regulation of barristers and the regulation of solicitors.⁷ Such a distinction persists in the United Kingdom and many other common law jurisdictions.⁸ However, this was not the case in most British Colonies, which established what was called a ‘fused’ legal profession – in large part as a pragmatic response to the limitations of scale within colonial justice systems in British colonies throughout the 19th and 20th century.⁹ In a fused legal profession, all lawyers are admitted as ‘barristers and solicitors’ and are regulated by the same framework whether as advocates at the bar, or providing legal advice and representation.¹⁰ At independence, all PICs continued or established systems regulating lawyers as a fused profession and accordingly regulatory frameworks reflect this integration.¹¹

⁶ Herman Cohen, *A History of the English Bar and Attornatus to 1450* (The Lawbook Exchange Ltd., 2005).

⁷ See Alexander Morris Carr-Saunders and Paul Alexander Wilson, *The Professions* (Clarendon Press, Oxford, 1933). 7-64.

⁸ For example, Queensland and New South Wales in Australia; in other jurisdictions, such as Malaysia and Singapore no legal distinction exists, but lawyers typically practise as one or the other. The fusing of the profession in the UK has long been mooted – see *ibid.* 54-5.

⁹ In Queensland, Australia, for example, the profession was fused by the passing of the *Legal Practitioners Act* 1881 the preamble for which stated ‘the division of the profession is unsuited to the circumstances of the Colony’. A persistent challenge for both the legal profession and its regulators is the fact that in all modern societies legal services are provided by a much more diverse range of actors than otherwise indicated by this simple historic dichotomy. Pearce and Wald, ‘Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles’ (2012); Joshua Mandelstam, ‘A Case for The’fractal Self: The Scope of Moral Consideration as Influenced by Personal Identity’ (PhD Thesis, University of Hawai’i at Manoa, 2020). Those interested in reading more about this interesting and complex discourse should see Carr-Saunders and Wilson, *The Professions* (1933); Wilbert Ellis Moore, *The Professions: Roles and Rules* (Russell Sage Foundation, 1970).; Michael Eraut, *Developing Professional Knowledge and Competence* (Psychology Press, 1994).

¹⁰ See South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017). 17.

¹¹ See discussion in Jennifer Corrin Care, ‘Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific’ (2006) 4(2) *Journal of Commonwealth Law and Legal Education* 171. 182.

2.2. Lawyers' Self-Interest

Two dominant discourses regarding lawyers' self-interest have shaped the design and evolution of formal statutory systems for regulating lawyers, these are: relational self-interest and autonomous self-interest. The first discourse frames lawyers as relationally interested actors, 'civics teachers'¹² who serve as the 'glue' that holds together civil society: without law and order there is chaos; without the rule of law there is no justice only power.¹³ This discourse is heavily promoted by legal ethicists, judges and leaders of the profession.¹⁴ Of course, it also promotes an ideal that is elitist and paternalistic – ideals often viewed as inconsistent with modern values.¹⁵ However, adherents to this discourse would likely argue that it is not social or political elitism that is valued, but rather the diligence required for lawyers to be and remain elite. They may say the paternalism inherent in this discourse reflects the otherwise desirable ideal of protecting the vulnerable and disempowered from arbitrary abuse of power through the rule of law.¹⁶

The second discourse frames lawyers as autonomous self-interested actors who abuse their knowledge and power for their own benefit and their client's interest as 'guns for hire'. This discourse is supported by the evidence of many modern scandals and disciplinary decisions against lawyers for acting in their self-interest rather than the interests of their client, or justice. It is also evidenced by what Carr-Saunders refers to as the 'era of reform' which comprised over a hundred years of educational reforms in the United Kingdom as a reaction to so called 'bad apples' spoiling the barrel.¹⁷ The 20th century, certainly unfairly to the majority of lawyers, saw not just the barrel,

¹² Bruce A Green and Russell G Pearce, 'Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice' (2008) 50 *William and Mary Law Review* 1207.

¹³ Many might argue Thucydides' Melian dialogue remains (regrettably) the more accurate portrayal of justice in contemporary societies, Thucydides, *History of the Peloponnesian War*, tr Rex Warner (Penguin Classics, 1963). '[W]hen these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they must'. 360. Broadcasts of prominent trials in the United States do little to ameliorate such perceptions.

¹⁴ Wald and Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice' (2016).

¹⁵ See Pearce and Wald, 'Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles' (2012). 518.

¹⁶ See Zeynep Aycan, 'Paternalism: Towards Conceptual Refinement and Operationalization' in Uichol Kim, Kuo-Shu Yang and Kwang-Kuo Hwang (eds), *Indigenous and Cultural Psychology: Understanding People in Context* (Springer, 2006) 445. This might also be framed in terms of an ideological debate around law, ethics and morality juxtaposing a Rawlsian ethics of justice and Carol Gilligan's ethics of care. Regrettably space does not permit further exposition here. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1993).; Annatjie Botes, 'A Comparison between the Ethics of Justice and the Ethics of Care' (2000) 32(5) *Journal of Advanced Nursing* 1071.; Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press on Demand, 2006).

¹⁷ See Carr-Saunders and Wilson, *The Professions* (1933). 45-51. On the bad apples analogy see: Leslie C Levin, 'Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock' (2009) 22(4) *Georgetown Journal of Legal Ethics* 1549.; Ted Schneyer, 'Professional Discipline for Law Firms' (1991) 77 *Cornell Law Review* 1.

but the entire orchard of lawyers being viewed through this jaundiced eye of autonomous self-interest.

In common law jurisdictions, such as exist in most PICs, the traditional view of lawyers held by many legal ethicists aligns best with the discourse of relational self-interest. This view has shaped how the legal profession prefers to present itself to the public. Legal ethicists have viewed the role of lawyers as being to serve clients consistent with the public good, which lawyers, as professionals, were uniquely able to determine.¹⁸ From this traditional (and idealistic) perspective, compliance by the majority of lawyers is all but assured because professional success and reputation is inextricably tied to ethical conduct.¹⁹ As discussed below, when individual lawyers breach professional norms, ideally self-regulation through peak lawyer associations should be sufficient to prevent egregious abuse. After all, should lawyers fail to self-regulate for the public good, their monopoly on legal practice could (theoretically) be removed.²⁰ Nevertheless, self-regulation risks regulatory capture, especially in small jurisdictions where close relationships complicate disciplinary processes that cause shame and reputational harm.²¹

2.3. Self-Regulation

Self-regulation of the legal profession refers to a model whereby its peak professional associations are responsible for establishing and monitoring professional standards free from intervention by governments or courts. A common way of describing a self-regulating profession is taxonomic. The following functions are commonly performed: licensing; providing oversight of professional education; protecting monopolies over professional knowledge; offering a professional association for licensed members; formulating codes of ethics; and dealing with complaints and discipline of lawyers.²² Historically, the legal profession has substantially satisfied these criteria since at least

¹⁸ See discussion in Pearce and Wald, 'Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles' (2012). 516-519.

¹⁹ Ibid. 518.

²⁰ As indeed it was in Fiji in 2009, see further Chapter Five, p. 170. On the issue of lawyers' monopolies and self-regulation see further: Terence C Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (University of Chicago Press, 1987).; Alan Paterson, 'Legal Ethics: Its Nature and Place in the Curriculum' in Ross Cranston (ed), *Legal Ethics and Professional Responsibility* (Oxford Academic, 1995) 174. See also Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25(3) *University of New South Wales Law Journal* 676. For a critique of the social bargain approach see Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999). 140-73.

²¹ George J Stigler, 'The Theory of Economic Regulation' (1971) *The Bell Journal of Economics and Management Science* 3.; See further Noel Semple, Russell G Pearce and Renee Newman Knake, 'A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America' (2013) 16(2) *Legal Ethics* 258. 5.

²² Keith M Macdonald, *The Sociology of the Professions* (Sage, 1995).; see also Mike Saks, 'Defining a Profession: The Role of Knowledge and Expertise' (2012) 2(1) *Professions and Professionalism* 1.; Mike Saks, 'A Review of Theories of

the end of the 15th century.²³ By the late 19th century, models of self-regulation transitioned to a 'soft' bureaucratisation through statutory self-regulatory models. Over the course of the 20th century, statutory frameworks grew in technical complexity, with increasingly prescriptive admissions and qualifications frameworks and conduct rules for lawyers.²⁴ These models formally vested statutory powers to regulate and represent lawyers in peak professional associations such as law societies and bar associations.

Throughout the early-to-mid 20th century, social theorists such as Durkheim, Weber and later scholars, such as Parsons, Hughes and others, contributed to the development of a rich literature on the nature of professions and social roles.²⁵ To these theorists, professions such as law form part of a 'professional complex' that fulfil critical roles in society such as providing education, justice and health services, leading Parsons and much later Abbott to declare that professions 'dominate our world.'²⁶ Socio-legal scholars continued to strongly argue the case for self-regulation by lawyers, most prominently on the basis of their specialisation and relational-self-interest. However, around the world public concerns bolstered by high profile scandals involving lawyers heralded regulatory changes characterised by increasingly more formalised, statutory, and rules-based systems.

Professions, Organizations and Society: The Case for Neo-Weberianism, Neo-Institutionalism and Eclecticism: Table 1' (2016) 3(2) *Journal of Professions and Organization* 170.; Mike Saks and Tracey L. Adams, 'Neo-Weberianism, Professional Formation and the State: Inside the Black Box' (2019) 9(2) *Professions and Professionalism* e3190.

²³ A distinction exists between the regulatory histories of barristers through the Inns of Court which date back to the 15th century, and the regulation of solicitors and attorneys from the 19th century. Unfortunately, a detailed discussion is not possible here. Mark Neal and John Morgan, 'The Professionalization of Everyone? A Comparative Study of the Development of the Professions in the United Kingdom and Germany' (2000) 16(1) *European Sociological Review* 9. 14. See further: Parker, 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997)

²⁴ These early statutory approaches first emerged in Britain in response to negative public perceptions of lawyers in the mid-1800s. Amongst other criticisms, a committee appointed by the House of Commons to investigate the legal profession found that the 'moral and intellectual education' of lawyers was 'very inferior' Quoted in Carr-Saunders and Wilson, *The Professions* (1933). 48.

²⁵ See: Émile Durkheim, *De La Division Du Travail Social* (F. Alcan, 1922).; Weber, *Politics as a Vocation* (1965); David Trubeck, 'Max Weber on Law and the Rise of Capitalism' (1972) 3(3) *Wisconsin Law Review* 720.; Carr-Saunders and Wilson, *The Professions* (1933); Talcott Parsons, 'The Professions and Social Structure' in Talcott Parsons (ed), *Essays in Sociological Theory* (Free Press, 1954) 115.; Everett C Hughes, *Men and Their Work* (Free Press, 1958).; and Harold L Wilensky, 'The Professionalization of Everyone?' (1964) 70(2) *American Journal of Sociology* 137; *ibid.*; Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press, 1988). More recently see: Eliot Freidson, *Professionalism, the Third Logic: On the Practice of Knowledge* (University of Chicago Press, 2001).; Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988)

²⁶ Talcott Parsons, 'Professions' (1968) 12(1) *International Encyclopedia of the Social Sciences* 536.; Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988) 1. Although contemporary sociologists prefer to view professions as a 'transitory phenomenon' on the pathway to 'modern societies' which today are dominated by organisations that rule 'knowledge work.' Thomas Kurtz, 'The End of the Profession as a Sociological Category? Systems-Theoretical Remarks on the Relationship between Profession and Society' (2022) 53(2) *The American Sociologist* 265.; see also Rudolf Stichweh, 'Professions in Modern Society' (1997) 7(1) *International Review of Sociology* 95.

2.4. Shift to Market/Consumer Ideologies

By the early 1970s, despite the best efforts of professional associations to preserve the dignity of the profession, public opinion had shifted towards negative perceptions of lawyers as primarily self-interested actors. The popularisation of George Stigler's concept of 'regulatory capture' in 1971 was soon applied to professional self-regulation,²⁷ and as Christine Parker put it:

*By the 1970s professional self-regulation appeared to be an unjustifiably statist bargain that was undemocratic in its incapacity to countenance community concerns about access to justice, consumer service, controlling costs and gender bias.*²⁸

During this period, mass media facilitated increased reporting of unethical lawyers, and portrayals of self-serving sleazy lawyers met with critical acclaim.²⁹ Globally, the tide of negative public opinion of lawyers rose to somewhat of a peak following the Watergate scandal from 1972-4. The spate of investigations resulting from Watergate resulted in hundreds of convictions for corruption. It was frequently noted in media that this included 29 lawyers – amongst them two United States Attorneys-General – who were jailed or struck off the roll of lawyers for facilitating corruption and more egregiously hiding their actions from the public. The claim of lawyers to be trustworthy defenders of the public good was indelibly tarnished.³⁰ So significant was Watergate in focusing public criticism of lawyers, that even today Watergate remains extensively referenced in scholarship on lawyer regulation and ethics globally.³¹

By the early 1980s, the 'invisible hand of reputation' and ideas of lawyers as a self-regulating moral community was no longer viewed by governments as adequate to ensure the ethical and competent practice of law. Throughout the common law world, the dominant understanding of the

²⁷ Stigler, 'The Theory of Economic Regulation' (1971); See further Semple, Pearce and Knake, 'A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America' (2013). 5.

²⁸ Parker, 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997). 5.

²⁹ On lawyers in media see Michael Asimow, 'Bad Lawyers in the Movies' (1999) 24 *Nova Law Review* 533.

³⁰ Mark Curriden, 'The Lawyers of Watergate: How a Third-Rate Burglary Provoked New Standards for Lawyer Ethics' (2012) 98 *Aba Journal* 36.

³¹ See for example Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) *Human Rights* 1.; David AJ Richards, 'Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism' (1981) 31 *Journal of Legal Education* 359.; Erwin Chemerinsky, 'Pedagogy without Purpose: An Essay on Professional Responsibility Courses and Casebooks' (1985) 10(1) *American Bar Foundation Research Journal* 189.; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988). For recent scholarship see for example Kathleen Clark, 'The Legacy of Watergate for Legal Ethics Instruction' (1999) 51 *Hastings Law Journal* 673.; Carliss N Chatman, 'The Trump Administration Should Have Attorney Whistleblowers' (2020) 73 *Southern Methodist University Law Review Forum* 196.; Carolyn A Dubay, 'Public Confidence in the Courts in the Internet Age: The Ethical Landscape for Judges in the Post-Watergate Era' (2018) 40 *Campbell Law Review* 531.; Luz E Herrera et al, 'Evaluating Legal Needs' (2022) 36(1) *Notre Dame Journal of Law, Ethics & Public Policy* 22.

professional role of lawyers shifted firmly to autonomous self-interest reflecting that lawyers were no longer trusted as ‘guardians of the law’, but were ‘seeking to get away with what they could within the letter of the law’.³² In the United States, binding rules-based codes of ethics were introduced and used punitively to regulate lawyers.³³ At the same time, the American Bar Association (ABA) made a significant albeit slight change to the accreditation of legal education which affected the teaching of law throughout the United States by requiring law schools to teach a course in legal ethics as a requirement for prestigious ABA accreditation.³⁴ In Australia, new competition policies primarily viewed the practice of law as a business requiring regulation to protect ‘consumers of legal services’ and formal regulatory systems were revised to embrace strict command and control regulatory approaches.³⁵ Similar reforms took place in the United Kingdom and elsewhere.³⁶ A consequence of these competition/consumer focused reforms was that by the late 1980s in the United Kingdom, Australia, and the United States ‘the whole legal profession had started to move rapidly into a highly competitive, client-led, open market.’³⁷ This led some scholars to declare ‘that lawyers, their ethics, and their professionalism’ were ‘lost,’ ‘betrayed,’ in ‘decline,’ in ‘crisis,’ facing ‘demise,’ ‘near death,’ and in need of ‘redemption.’³⁸

2.4.1. Locating the Pacific

This shift to new market-based forms of regulation over lawyers coincided with the independence era in PICs.³⁹ During this era, comprehensive Acts to govern the legal profession were first created in most PICs – although for Kiribati such an Act came much later, in 2006.⁴⁰ In Fiji, the *Legal Practitioners Act* 1965 [CAP 254] (Fiji)⁴¹ established a comprehensive framework for lawyer

³² Pearce and Wald, ‘Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles’ (2012). 523.

³³ Ibid.; see also Stewart Macaulay, ‘Lawyers and Consumer Protection Laws’ (1979) 14 *Law & Society Review* 115.

³⁴ While hugely significant, the fact ethics and professional responsibility wasn’t made mandatory prior to this time is arguably a more interesting story.

³⁵ Stemming from the 1974 *Trade Practices Act* (Cth). See Parker, ‘Justifying the New South Wales Legal Profession 1976 to 1997’ (1997). 13.

³⁶ See Nuno Garoupa and Milan Markovic, ‘Deregulation and the Lawyers’ Cartel’ (2021) 43(4) *University of Pennsylvania Journal of International Law* 935. 970-6.

³⁷ Kim Economides, ‘The Country Lawyer: Iconography, Iconoclasm, and the Restoration of the Professional Image’ (1992) 19(1) *Journal of Law and Society* 115. 117.

³⁸ Russell G Pearce, ‘The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar’ (1995) 70 *Nyu Law Review* 1229. 1257.

³⁹ Specific dates for attaining independence vary. Western Samoa and Nauru in the 1960s, Tonga, Fiji, Papua New Guinea, Solomon Islands, Tuvalu, and Kiribati in the 1970s, and Vanuatu, Marshall Islands and Federated States of Micronesia in the 1980s, Palau in 1994.

⁴⁰ *The Legal Practitioners Act [Cap 254] 1965* (Fiji); *Legal Practitioners’ Act 1980 [Cap 115] 1980* (Vanuatu). In Kiribati nothing resembling these comprehensive acts came into force until the much later *Kiribati Law Society Act* 2006 (Kiribati).

⁴¹ *The Legal Practitioners Act [Cap 254] 1965* (Fiji).

regulation which included many of the primary mechanisms for regulating lawyers endorsed by the dominant market-control ideologies including: control of admissions and qualifications; empowerment of the FLS as regulator and representative of the profession; prescribed rules of practice which also covered the charging of fees; and rules regulating trust money.⁴² Many statutes in PICs have received only minor revisions since this time.⁴³ While regulatory systems have operated effectively to create a licensed profession of law with restricted entry – measurable by the considerable growth of the profession in the region⁴⁴ – outside of Fiji there have been few successful attempts at comprehensive locally-relevant reforms aimed at strengthening professional standards of lawyers. Over time, the entrenchment of a status quo of dysfunctional regulation of professional standards, and inertia, have made sustainable locally led reform more difficult to ignite and created a persistent barrier to reform. This is considered in greater detail below and in later chapters.

2.5. Contemporary Hybrid and Co-Regulatory Models

In the early 1990s, Ayres and Braithwaite released their seminal works on responsive regulation and tripartism which, from this time, began to shape discourses of regulation in Australia and elsewhere.⁴⁵ In 1994, the Australian jurisdiction of New South Wales (NSW), adopted what it called a ‘co-regulatory model’ for lawyer regulation under which responsibility for ensuring compliance with professional standards and addressing misconduct by lawyers is shared between an independent Legal Services Commission and peak professional associations of lawyers.⁴⁶ If a complainant is not happy, the outcome may be reviewed by the Legal Services Commissioner and may ultimately be brought before the Legal Services Tribunal.⁴⁷ This shift was revolutionary because it affirmed the end of lawyer self-regulation in a common law country for the first time, albeit in a model which retained a central regulatory role for peak professional associations.⁴⁸

⁴² Ibid.

⁴³ See South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017). 11-12.

⁴⁴ See for example South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011); and Table 1. 36.

⁴⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press on Demand, 1992).

⁴⁶ Specifically, the Law Society of New South Wales and the New South Wales Bar Association.

⁴⁷ The Office of the Legal Services Commissioner was established under the *Legal Profession Reform Act 1993* (NSW). See Parker, 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997). 178-9. See further Steven Mark and Tahlia Gordon, 'Innovations in Regulation-Responding to a Changing Legal Services Market' (2009) 22 *Georgetown Journal of Legal Ethics* 501.; Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 *Fordham Law Review* 2661. Appeals may be made from here to ordinary courts.

⁴⁸ A detailed discussion of the NSW model is beyond the scope of this thesis. However, see further Mark and Gordon, 'Innovations in Regulation-Responding to a Changing Legal Services Market' (2009); Terry, Mark and Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011).

Over the decades since, many common law jurisdictions including in the United Kingdom, Canada and other Australian jurisdictions have followed the regulatory trend led by NSW and developed their own co-regulatory models. From these jurisdictions have emerged a plethora of regulatory strategies and approaches, such as external independent regulation and tripartism;⁴⁹ regulation of ethical infrastructures of large law firms;⁵⁰ strategies for designing and testing indicators of ethical compliance;⁵¹ and cultivating ethical climates within law firms.⁵² These innovations in the design of formal regulatory systems for lawyers have been paralleled by innovations in legal education and training⁵³ and in legal practice.⁵⁴

⁴⁹ Mark and Gordon, 'Innovations in Regulation-Responding to a Changing Legal Services Market' (2009); Christine Parker and John Braithwaite, 'Regulation' in Cane P and Tushnet MV (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119.

⁵⁰ Schneyer, 'Professional Discipline for Law Firms' (1991). 4.; see further Christine Parker et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31 *Unsw Law Journal* 158.; Kim Economides and Julian Webb, 'The Impact of Ethical Climates on Changing Legal Landscapes' (2015) 10(2) *Legal Ethics* 115.

⁵¹ Victoria Hinchly et al, 'Designing Ethics Indicators for Legal Services Provision' (Working Paper No. 1, Legal Services Board of the United Kingdom, 2012).; Christine Parker and Vibeke Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing, 2011).; Christine Parker and Vibeke Lehman-Neilsen, 'Compliance: 14 Questions' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 217.

⁵² Stephen Tang, Tony Foley and Vivien Holmes, 'Ethical Misconduct by New Australian Lawyers: Prevalence and Prevention' [220] (2020) 27(3) *International Journal of the Legal Profession* 245.; Vivien Holmes et al, 'Australian Legal Practice: Ethical Climate and Ethical Climate Change' in Simon Rice et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 461. This scholarship draws on existing theories of organisations and ethical work climates based on Schneider's concept of 'work climate'. See Benjamin Schneider and Arnon E Reichers, 'On the Etiology of Climates' (1983) 36(1) *Personnel Psychology* 19.; and further Bart Victor and John B Cullen, 'The Organizational Bases of Ethical Work Climates' (1988) *Administrative Science Quarterly* 101. Interestingly Victor and Cullen give credit to the law for having long ago attributed corporations with legal 'personhood' emphasising the capacity of organisations to be theorised as social actors see 101.

⁵³ On legal education see Bryant Garth, *The Globalization of Legal Education: A Critical Perspective* (Oxford University Press, 2022).; Kim Economides and Joaquim Leonel de Rezende Alvim, 'Bar Exams, Legal Ethics and the Fight against Corruption: Lessons from Brazil' (2020) 23(1-2) *Legal Ethics* 31.; Holmes et al, 'Australian Legal Practice: Ethical Climate and Ethical Climate Change' 2017; Roger Burrridge and Julian Webb, 'The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School' (2015) 10(1) *Legal Ethics* 72. Powles and Pulea, *Pacific Courts and Legal Systems* (1988); Grimes, 'Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific' (1995); Grimes, 'Vocational Legal Education in the South Pacific - Designing and Implementing a Programme for Progress' (1996) Corrin and Paterson, *Introduction to South Pacific Law* (2017); Penfold, 'Teaching Legal Ethics and Professionalism in a South Pacific Context' (2013); Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

⁵⁴ On recent innovations in AI and legal services see Bart Custers and Eduard Fosch-Villaronga, *Law and Artificial Intelligence: Regulating Ai and Applying Ai in Legal Practice* (Springer Nature, 2022).; John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services' (2019) *Actual Problems of Economics and Law* 1230.; Dana Remus and Frank Levy, 'Can Robots Be Lawyers: Computers, Lawyers, and the Practice of Law' (2017) 30 *Georgetown Journal of Legal Ethics* 501. On technology in legal practice see G Patrick Flanagan and Michelle Hook Dewey, 'Where Do We Go from Here: Transformation and Acceleration of Legal Analytics in Practice' (2018) 35 *Georgia State University Law Review* 1245.; Raymond H Brescia et al, 'Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice' (2014) 78 *Alabama Law Review* 553.; Maura R Grossman and Gordon V Cormack, 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review' (2010) 17 *Richmond Journal of Law and Technology* 1.; On technology and judging see John Morison and Adam Harkens, 'Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making' (2019) 39(4) *Legal Studies* 618.; Dory

Much theoretical debate on lawyer regulation was stirred in the wake of the hugely influential 2004 Clementi Report in the United Kingdom and subsequent reforms to lawyer regulation.⁵⁵ While there is insufficient space here for a full discussion of the Clementi Report, its implications and its aftermath, it 'marked a fundamental change in the United Kingdom's legal profession regulation.'⁵⁶ This shift resulted in the inclusion of eight 'regulatory objectives' in the new *Legal Services Act* 2007 (UK). These objectives included a duty for lawyers to 'protect and promote the public interest' and ensure 'improved access to justice', but most significantly, included 'protecting and promoting the interests of consumers' and 'promoting competition.'⁵⁷ This shifted the emphasis for regulating lawyers from a general focus on protecting the public interest to a more specific obligation to protect the interests of clients as 'consumers of legal services'.⁵⁸ The premise for this reform was to strengthen protections for clients as vulnerable consumers of legal services – aligning it with market ideologies of regulation.⁵⁹ This regulatory objectives approach has subsequently been adopted in other common law jurisdictions in Australia, Canada, and elsewhere.⁶⁰

Ideologically this shift has continued the 'consumer rights revolution'⁶¹ and to some has affirmed an image of the profession as a cartel oriented towards self-interest that operates to secure its collective 'economic and social self-interest through the control of entry, competition and internal regulation.'⁶² To others, this shift towards co-regulatory approaches recognises the significant role

Reiling, *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden University Press, 2016).

⁵⁵ David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales* (Department for Constitutional Affairs, 2004).; Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17(3) *International Journal of the Legal Profession* 195.

⁵⁶ Laurel Terry, Steve Mark and Tahlia Gordon, 'Adopting Regulatory Objectives for the Legal Profession' (2012) 80(6) *Fordham Law Review* 2685, 2698.

⁵⁷ Boon, 'Professionalism under the Legal Services Act 2007' (2010), section 1.

⁵⁸ See excellent discussion by Terry, Mark and others Terry, Mark and Gordon, 'Adopting Regulatory Objectives for the Legal Profession' (2012). See further on clients of lawyers as consumers of legal services: Gillian K Hadfield and Deborah L Rhode, 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2015) 67 *Hastings Law Journal* 1191.; Ray Worthy Campbell, 'Rethinking Regulation and Innovation in the Us Legal Services Market' (2012) 9 *New York University Journal of Law and Business* 1.

⁵⁹ The UK Government's report was provocatively titled 'The Future of Legal Services: Putting Consumers First'. For an excellent discussion of regulatory objectives approaches see Terry, Mark and Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011).

⁶⁰ On the USA see for example Pearce and Wald, 'Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles' (2012); Parker et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008); Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37(3) *Journal of Law and Society* 466. See further Ted Schneyer, 'On Further Reflection: How Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firms Management' (2011) 53 *Arizona Law Review* 577.

⁶¹ Parker, 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997). 6.

⁶² Christine Parker, 'Lawyers' Justice, Lawyers' Domination: Regulating the Legal Profession for Access to Justice' (PhD Thesis, Australian National University, 1997). 188; see also Parker, *Just Lawyers: Regulation and Access to Justice* (1999); David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990).; Pat O'Malley, *Law, Capitalism and Democracy: A*

of peak professional associations and professional communities as relational actants capable of strengthening professional standards and projecting professional norms.⁶³ This pluralist shift has been necessary to strengthen lawyer regulation. As Haug explains, professional communities provide ‘informal social control’ of conduct because ‘people are socialised to accept norms of appropriate behaviour as so much a part of their definition of self that any violation of the norms provokes shame and guilt.’⁶⁴ Parker emphasises the importance of nurturing professional communities because:

*Failures in the effectiveness of informal social control occur where lawyers are not sufficiently integrated into professional community ... it is within such communities that they develop the self-identity that motivates them to stand up to clients and to employers when necessary to preserve justice ... serve ... clients well ... do voluntary work as a matter of public service ... and respect one another.*⁶⁵

In contemporary times, as Parker observes, the true challenge for the profession ‘is not to choose between strategies of self-regulation and trust and strategies of forcible reform and distrust but to reconcile them.’⁶⁶ According to Parker, lawyers, as gatekeepers of access to justice should be oriented towards access to justice ideals.⁶⁷ Parker proposes a framework for lawyer regulation which relies on a deliberative multi-pronged strategy to orient lawyers towards these ideals. Her framework relies on four pillars of: nurturing professional community; encouraging elements of self-regulation; embracing competition reform; and developing institutions of state and community accountability.⁶⁸ Parker suggests these four pillars are not standalone strategies, but are interconnected and should be implemented strategically and adaptively to achieve the best outcomes within local contexts. The key elements of Parker’s framework are captured in Table 6 below.

Sociology of Australian Legal Order (George Allen & Unwin, 1983); Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977); Richard L Abel, *The Legal Profession in England and Wales* (Blackwell, 1988).

⁶³ The term actant is taken from Actor-Network Theory where it refers to any entity that affects change or performs an action within a network or system, e.g. a regulatory system. See further Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2007); Algirdas Julien Greimas, *On meaning: Selected writings in semiotic theory*, tr Paul J Perron and Frank K Collons (University of Minnesota Press, 1987).

⁶⁴ Marie Haug, ‘The Sociological Approach to Self-Regulation’ in Roger D Blair and Stephen Rubin (eds), *Regulating the Professions: A Public-Policy Symposium* (Lexington Books, 1980) 61. 64; on shame and reintegration see further John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

⁶⁵ Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997). 208.

⁶⁶ Ibid. 182; See also Parker, *Just Lawyers: Regulation and Access to Justice* (1999). Vivien Holmes and Francesca Bartlett, *Parker and Evans’s inside Lawyers’ Ethics* (Cambridge, 4th ed, 2022).

⁶⁷ Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997). 144.

⁶⁸ Ibid. 207; See also Parker, *Just Lawyers: Regulation and Access to Justice* (1999).

Table 6: Christine Parker: Strengths of different regulatory strategies for the legal profession⁶⁹

Multiple regulatory strategies	Strengths in orienting profession towards access to justice ideals
1. Nurturing Professional Community	Sources of professional identity and socialisation into all four ethical ideals: • Advocacy ideal (but only if external pressure from market forces or competition reform); - Gatekeeper ideal (through identification with whole profession); • Public interest ideal (through identification with professional subcultures); • Ideal of collegiality (but needs to be turned inside out)⁷⁰
2. Encouraging Elements of Self-Regulation	Nurtures professional community, and professional responsibility for access to justice. Shares strengths and weaknesses of professional community.
3. Embracing Competition Reform	Strengthens advocacy ideal through: • De-regulation to make traditional legal services more consumer-oriented; and • Re-regulation to ensure competitive market by increasing market power of consumers. Helps prevent lawyer domination of justice market through: • De-regulation to allow proliferation of new forms of legal service delivery, and alternatives to law.
4. Developing Institutions of State and Community Accountability	Ensures regulatory strategies of professional community, self-regulation and competition are actually implemented and are oriented towards access to justice. Provides forums for deliberative processes of regulatory reform in which access to justice is the overarching goal.

Three observations about Parker's framework are important here. Firstly, Parker's framework is informed by and informs relational theories of regulation such as smart regulation and meta-regulation.⁷¹ For example, it combines multiple regulatory approaches enabling a regulator to leverage strengths, while compensating for weaknesses; it highlights the importance of context to designing a blend of locally-relevant regulatory strategies at both macro and micro levels; and it emphasises the importance of third-parties to effective regulatory design.⁷²

⁶⁹ Parker, 'Lawyers' Justice, Lawyers' Domination: Regulating the Legal Profession for Access to Justice' (1997). 213.

⁷⁰ Parker argues traditional collegiality of lawyers is inwardly focused and promotes elitism and professional solidarity and this needs to be turned 'inside out' so collegiality extends beyond internal relationships to the relationships between lawyers and the wider community. Additionally, this encourages lawyers to engage with norms external to the profession to help them calibrate their professional conduct with public interest and access to justice ideals. This strengthens responsibility and accountability of lawyers to their peers and communities.

⁷¹ Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 130.; Peter Grabosky, 'Meta-Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 149.; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory'world' (2001) 54(1) *Current Legal Problems* 103.; John et al (eds), *Regulating Law* (2004). It also draws from motivational posturing theory, discussed later in this chapter, but see: Valerie Braithwaite, 'Games of Engagement: Postures within the Regulatory Community' (1995) 17(3) *Law & Policy* 225.

⁷² See further: Gunningham and Sinclair, 'Smart Regulation' 2017.

Second, Parker acknowledges the fragmented nature of professional communities of lawyers and the importance of relationships within these communities as regulators of lawyers. Within the legal profession there are many subcultures, carrying different labels such as ‘young lawyers’; ‘women lawyers’; ‘environmental lawyers’; ‘Christian lawyers’ etc. Parker argues that ‘where lawyers accomplish both strong identity with the whole profession and with a subset of it ... then there is greater scope for face-to-face informal control to work to harness profession-wide ethics and values.’⁷³ Indeed, Litia’s case and the story of KILN in Chapter Six provide compelling support for this and for the importance of professional communities of lawyers in PICs as sources of regulation that strengthen professional norms.⁷⁴

Third, Parker views self-regulation as a critical element in her regulatory framework. Parker’s research on corporate self-regulation provides additional insight.⁷⁵ She argues that a responsive regulatory approach, where firms are encouraged and supported to self-regulate with the understanding that regulatory authorities will respond proportionately to non-compliance, can be effective in cultivating a culture of compliance. However, such an approach can only be effective when the regulator has adequate resources, is viewed as legitimate and has a demonstrated capacity to investigate and discipline lawyers. This poses somewhat of a challenge in PICs where, other than in Fiji, no self-regulatory authority for lawyers has any notable source of funding, many struggle with legitimacy and most have limited capacity to enforce professional standards through discipline and sanctions.

Indeed, it is difficult to apply contemporary theoretical approaches directly to the ‘problem’ of strengthening regulatory design in PICs. A key factor limiting the translation of contemporary hybrid and co-regulatory approaches to regulating lawyers is that they developed in wealthy industrialised countries to regulate lawyers operating in legal practice environments and socio-cultural paradigms that are vastly different to PICs. Substantial differences include: the size of legal professions; the normative roles played by custom and religion; lawyers’ access to ethical advice and support services; and the intrinsic capacities of law and justice systems. Meta-regulatory approaches, such as those described by Parker, are expensive to design – requiring comprehensive

⁷³ Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997). 210-11.

⁷⁴ Chapter Six at 3.2.1, from p. 233.

⁷⁵ Christine Parker, ‘The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement’ (2006) 40(3) *Law & Society Review* 591.; Parker, Gordon and Mark, ‘Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales’ (2010); See also Hinchly et al, ‘Designing Ethics Indicators for Legal Services Provision’ (2012).

and deliberative law reform processes – and resource intensive to operate, requiring highly trained regulatory staff and active monitoring and evaluation.⁷⁶ This makes them difficult to establish and implement in resource constrained development contexts as are found in most PICs. A compounding issue is that such approaches have been most heavily theorised in the context of large highly-specialised ‘corporate’ law firms, rather than the small 1-2 practitioner law firms which comprise the vast majority of firms in PICs. A further issue limiting their application is that these theories are also predicated on alternative law firm business structures which are presently not permitted in any PIC such as incorporated legal practices.⁷⁷ Fortunately, as is discussed in the next section, the non-generalisability of these theories of lawyer regulation to legal practice environments in PICs does not invalidate their use as part of a holistic approach to understanding regulatory relationships in PICs and the further theorisation of approaches to strengthening lawyer competence and ethics.

⁷⁶ See Parker et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008); Hinchly et al, 'Designing Ethics Indicators for Legal Services Provision' (2012).

⁷⁷ See Parker and Lehman-Neilsen, 'Compliance: 14 Questions' 2017; Hinchly et al, 'Designing Ethics Indicators for Legal Services Provision' (2012); Terry, Mark and Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011); Laurel S Terry, 'The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as Service Providers' (Pt HeinOnline) (2008) *Journal of the Professional Lawyer Symposium Issues* 189. There is scope for further research regarding how contemporary organisational approaches in particular can be adapted to large government employers of lawyers in PICs. However, this is beyond the scope of this study.

3. LAWYER REGULATION IN PICs

In Chapter One, I noted three important trends affecting the legal profession in PICs: its rapid growth since the late 1990s; recognition of a need and attempts to strengthen formal regulatory frameworks; and slow development of professional communities and peak professional associations. The previous section explains the dominant discourses that have shaped the development of lawyer regulation in the Global North and discusses the contexts they were developed to operate in. This section applies traditional and contemporary theories of lawyer regulation discussed above to theorise lawyer regulation in PICs with reference to three important concepts: legal transplant; professional communities; and emerging trends in regulation.

3.1. Legal Transplant

As explained in Chapter One, regulatory transplant approaches to law and governance have yielded mixed results in the context of post-colonial PICs.⁷⁸ Peter Lamour is critical of the multiple waves of institutional and legal transfers to the Pacific including ‘good governance’ initiatives ... ideologically driven by donors.’⁷⁹ Lamour cites Barrie Macdonald who criticises transplant approaches to law and governance because they ‘make insufficient allowance for cultural diversity, historical context, local economic circumstances, or the dynamics of political process.’⁸⁰ Laws establishing formal systems for lawyer regulation are no exception. In PICs, frameworks for lawyer regulation today model all of the typical problems associated with legal transplant approaches to law and governance reform in post-colonial states, including questions regarding legitimacy, marginalisation of pre-existing systems of law, and loss of culture/cultural appropriation.⁸¹

In 2017, a report by the South Pacific Lawyers’ Association (SPLA) on technical and structural weaknesses of existing formal statutory frameworks for lawyer regulation in the region led the SPLA to call for more research on how existing systems operate in practice and how non-state mechanisms influence professional standards of lawyers.⁸² These calls have been echoed by other

⁷⁸ See discussion in Chapter One from p. 26.

⁷⁹ Peter Lamour, *Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands* (University of Hawaii Press, 2005). 6.

⁸⁰ Barrie Macdonald, ‘Governance and Political Process in Kiribati’ in Barrie Macdonald (ed), *Economics Division Working Papers* (Research School of Pacific and Asian Studies, 1996) vol 2. iii.

⁸¹ On problems with legal transplant approaches see further: Sally Engle Merry, ‘Law, Culture, and Cultural Appropriation’ (1998) 10 *Yale Journal of Law and Humanities* 575.; Lamour, *Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands* (2005); Sue Farran, ‘Paddling a Canoe with an Oar Made of Oak’: The Enduring Legacy of British Law in Pacific Island States’ (2012) 63 *Northern Ireland Legal Quarterly* 323.; Corrin, ‘Crossing the Border from Custom to Contract: Legal Pluralism and Pacific Islands’ Contract Laws’ (2021).

⁸² South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017). 9-10.

regional bodies.⁸³ As noted in section 2.4.1 above, these formal systems draw heavily from dominant market/consumer regulatory ideologies draped over structural and self-regulatory models designed to regulate in non-Pacific contexts. The research undertaken for this thesis was specifically undertaken to contribute to filling this gap in empirical research on how state and non-state systems regulate lawyers in practice in PICs. Such research contributes to developing legitimised, decolonised and autochthonous systems for regulating lawyers in PICs.

3.2. Professional Communities

As discussed in section 2 of this chapter, in ‘most-developed’ post-industrial common law countries, the right of professional associations to regulate lawyers has been rigorously defended by demonstrating their capacity to ensure high professional standards through legal education; the policing of lawyer ethics; and contributing to social goods, such as organising pro bono legal services and participation in law reform. In exchange, the State has continued to permit lawyers to self-regulate, retain their monopoly over legal practice⁸⁴ and expand the activities of lawyers to new and emerging areas of legal practice. However, a system designed to be self-regulating requires an active professional community to participate in regulation. Where professional communities are insufficiently active and do not, or cannot, fulfil their obligation to self-regulate, a gap opens between regulatory capacity and regulatory need. This gap has existed in most PICs since independence and has been filled predominantly by the judiciary.

In all PICs except Fiji, at independence, institutions such as law societies that elsewhere organised to protect professional monopolies of lawyers and uphold professional standards, did not exist.⁸⁵ The primary factors for this include their colonial contexts – discussed in Chapter One – and the small size of the foreign educated and mostly foreign-born legal profession. After independence, the growth of the legal profession was slowed by access to local legal education, especially the lack of local universities offering law degrees.⁸⁶

Until 1994, when the USP School of Law was formed, lawyers in PICs were required to attain legal qualifications overseas which was expensive and uncommon.⁸⁷ Foreign education came with the

⁸³ Graydon, ‘Situation Analysis of Pacific Lawyer Associations’ (2021).

⁸⁴ Albeit with a growing list of exceptions and limitations – e.g. licenced conveyancers; legal will kits, etc.

⁸⁵ Fiji is an exception due to its history as the colonial metropole for British rule – see further Chapter One from p. 34.

⁸⁶ The first Pacific Island Law School was the University of PNG School of Law, which was established in 1965 with a cohort of 6 students and grew slowly. ‘University of Papua New Guinea’, *School of Law About Us* (Web Page, 1 November 2023) <<https://www.upng.ac.pg/index.php/sol-about-us>>.

⁸⁷ Corrin Care, ‘Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific’ (2006). p. 171-2.

problem that it lacked both substantive and contextual education in the Pacific law and legal systems to which graduates returned.⁸⁸ Additionally, education in foreign institutions reinforced the normativity of foreign regulatory models despite their evident limitations and constraints when applied locally. For example, local statutory schemes establish ethical obligations and duties that can be impossible to strictly adhere to in practice (e.g. avoidance of conflicts of interest) while providing no guidance as to how lawyers should reconcile conflicting norms.⁸⁹

Throughout the 1980s and 1990s, in most PICs, there was little impetus and few resources available to nurture robust peak professional associations. Early legislators apparently assumed that robust law societies and bar associations capable of regulating and representing lawyers would somehow emerge from a scarce handful of volunteer lawyers, operating without facilities or resources.⁹⁰ They were mistaken, or at least, overly optimistic and the subsequent development of peak professional associations as representatives and regulators of the profession has been slow.⁹¹ Indeed, I would argue that the slow development of legal professional communities has remained one of the greatest challenges for strengthening systems for regulating lawyers in PICs over the past 40 years.⁹² With that said, since independence, self-organising and active professional communities and professional associations of lawyers have emerged in Fiji, Papua New Guinea, Tonga, Solomon Islands and Samoa.⁹³ Despite this, many regulatory functions continue to operate sub-optimally including, but not limited to: systems for complaints and discipline; trust accounting and audit; and professional education.⁹⁴

⁸⁸ Angelo and Goldring, 'The Study of Law at the University of the South Pacific' (1994). 103-4.

⁸⁹ See discussion below at section 4.3. Normative Pluralism as a Source of Lawyer Regulation, p. 114. This issue is also discussed throughout this thesis, and in particular in Chapter Six.

⁹⁰ With the sole exception of Fiji, where the existence of the FLS preceded independence.

⁹¹ See further South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011) and Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021).

⁹² Indeed, other scholars and institutions support this position. See Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021).

⁹³ Professional associations in other jurisdictions, including Vanuatu and Kiribati, exist at varying stages of development and experience periodic fluctuations in activity.

⁹⁴ South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017).

3.3. A New Hybrid Wave?

In most PICs, formal systems regulating lawyers continue to be based on traditional self-regulatory models with admission and licensing governed by the judiciary. Formal shifts towards hybrid and co-regulatory approaches have occurred in a number of countries, most significantly in Fiji, but also in Samoa and elsewhere.⁹⁵ In Fiji, contemporary approaches to regulating lawyers feature in several parts of its regulatory framework such as: the orientation of its statutory objects towards consumer rights; a mandatory CPD system; and explicit recognition of the role of peak lawyer associations in strengthening professional standards.⁹⁶ In Vanuatu and Solomon Islands, efforts to reform regulatory systems for lawyers have stalled at different stages and for various reasons, although reform efforts have sought to incorporate more relational approaches to regulation and compliance such as the importance of continuing professional development and nurturing professional associations and communities.⁹⁷

My empirical study and the research of other Pacific scholars has shown that many of the salient institutions and actors that regulate conduct in PICs remain informal and dynamic.⁹⁸ As discussed throughout this thesis, the context of normative pluralism in PICs requires lawyers to navigate social, customary and even religious norms situationally within legal practice environments. Decisions regarding conduct are influenced by lawyers' relationships with other proximate actors.⁹⁹ These pluralities of normative systems have contributed to the emergence of practical norms of lawyers which, among other things, enable them to reconcile challenges such as conflicts of interest and the meagre resourcing of law and justice institutions.¹⁰⁰ This normative flexibility, that legal

⁹⁵ South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011).

⁹⁶ However, as is discussed elsewhere, in Fiji the role of professional associations no longer extends to discipline.

⁹⁷ On Vanuatu, see discussion in Chapter Five, p. 189. On Solomon Islands see Bartlett, 'A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands' Legal Profession' (2018).

⁹⁸ See for example Kenneth Ruddle, 'The Context of Policy Design for Existing Community-Based Fisheries Management Systems in the Pacific Islands' (1998) 40(2-3) *Ocean & Coastal Management* 105.; Jennifer Corrin Care and Jean G Zorn, 'Legislating Pluralism' (2001) 33(46) *The Journal of Legal Pluralism and Unofficial Law* 49.; Corrin, 'Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009); Patrick D Nunn et al, 'Beyond the Core: Community Governance for Climate-Change Adaptation in Peripheral Parts of Pacific Island Countries' (2014) 14(1) *Regional Environmental Change* 221.; Penfold, 'Developing Legal Communication Skills in the South Pacific Context' (2014); Melissa Bull, Nicole George and Jodie Curth-Bibb, 'The Virtues of Strangers? Policing Gender Violence in Pacific Island Countries' (2019) 29(2) *Policing and Society* 155.; Peake and Forsyth, 'Street-Level Bureaucrats in a Relational State: The Case of Bougainville' (2021); Forsyth, 'Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea' (2022).

⁹⁹ Braithwaite, *Crime, Shame and Reintegration* (1989); Olav Sorenson, Jan W Rivkin and Lee Fleming, 'Complexity, Networks and Knowledge Flow' (2006) 35(7) *Research Policy* 994.; Matteo Tubiana, Ernest Miguelez and Rosina Moreno, 'In Knowledge We Trust: Learning-by-Interacting and the Productivity of Inventors' (2022) 51(1) *Research Policy* e104388.

¹⁰⁰ See below 4.4 Practical Norms, p. 117. See also Chapter Seven.

ethicists often treat as a problem to solve, provides lawyers in PICs with flexibility in their performance of professional compliance behaviour while also enabling them to balance compliance with embedded social and customary norms.¹⁰¹ A central challenge for regulatory design in PICs is therefore: How can regulators better seek to cover the weaknesses of formal regulatory systems with the strengths of existing and emerging informal regulatory systems?

¹⁰¹ Indeed, it may well manifest as what Parker might term 'Relational Lawyering' or following an Ethics of Care approach to legal ethics, see Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics. Article First Presented as a Paper at the Australian Association for Professional and Applied Ethics. Conference (2003: Melbourne).' (2004) 30(1) *Monash University Law Review* 49.

4. A PLURALIST-RELATIONAL APPROACH TO LAWYER REGULATION

As shown in the previous two sections, regulatory systems for lawyers in PICs are based on theories of lawyer regulation developed in former colonising powers to suit legal practice environments in those jurisdictions. While these theories offer important insights into many aspects of systems regulating lawyers in PICs, they are limited in their ability to explain lawyer conduct in pluralist contexts. Accordingly, it was necessary to supplement these approaches with what I have termed a 'pluralist-relational approach' which was developed abductively and draws from three theoretical frameworks of relationality, pluralism, and compliance theories of regulation.¹⁰² A pluralist-relational approach recognises that in PICs regulation is sourced not only from state law, but also from diverse normative sources, particularly Custom and Christianity. This approach recognises that relationships between lawyers and other actants in PICs play a crucial role in regulation of conduct and thus a responsive regulator should foreground these relationships in formulating regulatory design or interventions.¹⁰³

Relational theorists 'posit that human beings are constituted in and through relationships at interpersonal, institutional and structural levels.'¹⁰⁴ In Pacific research, relational approaches are considered integral to social research.¹⁰⁵ They have been utilised in the Pacific Region by indigenous and non-indigenous scholars to study diverse issues including: law;¹⁰⁶ anthropology;¹⁰⁷

¹⁰² Each of these is discussed in this section below.

¹⁰³ On responsive regulation see below section 4.2, Relational Theories of Regulatee Compliance, p. 109.

¹⁰⁴ Jennifer Llewellyn, 'Transforming Restorative Justice' (2021) 4(3) *The International Journal of Restorative Justice* 374., 382. See further: Jennifer Llewellyn, 'Restorative Justice: Thinking Relationally About Justice', *Being Relational: Reflections on Relational Theory and Health Law* (UBC Press, 2011) 89.; Jocelyn Downie and Jennifer Llewellyn (eds), *Being Relational: Reflections on Relational Theory and Health Law* (UBC Press, 2011).

¹⁰⁵ Naepi, 'Pacific Research Methodologies' 2019, 5-6. See further: Koya-Vaka'uta and Frances, 'Rethinking Research as Relational Space in the Pacific Pedagogy and Praxis' 2017; Anae, 'Pacific Research Methodologies and Relational Ethics' 2019; Vaiotei, 'Talanoa Research Methodology: A Developing Position on Pacific Research' (2006).

¹⁰⁶ Peake and Forsyth, 'Street-Level Bureaucrats in a Relational State: The Case of Bougainville' (2021); Forsyth, 'Making the Case for a Pluralistic Approach to Intellectual Property Regulation in Developing Countries' (2016); Corrin, 'Crossing the Border from Custom to Contract: Legal Pluralism and Pacific Islands' Contract Laws' (2021); Corrin and Farran, *The Plural Practice of Adoption in Pacific Island States* (2019); Daniel B Evans et al, *The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu, and Local Courts of Solomon Islands* (Legal Vice Presidency, The World Bank, 2010).

¹⁰⁷ Epeli Hau'Ofa, 'Anthropology of Pacific Islanders' (1975) 45(4) *Oceania* 283.; 'Okustino Māhina, 'Theory and Practice in Anthropology: Pacific Anthropology and Pacific Islanders' (Pt Berghahn Books) (1999) 43(2) *Social Analysis: The International Journal of Social and Cultural Practice* 41.; Ton Otto, *Pacific Islands Trajectories: Five Personal Views* (Research School of Pacific Studies, 1993).

policing and community protection;¹⁰⁸ education;¹⁰⁹ climate change adaptation and disaster preparedness;¹¹⁰ and many other issues.¹¹¹ Relational approaches have also guided the study of social phenomena in post-colonial contexts in Africa which bear many similarities to post-colonial contexts in the Pacific Region. For example, Baker considers the non-state policing roles in sub-Saharan Africa of ‘customary leaders, religious organisations, ethnic associations, youth groups, work-based associations, community police forums, conflict resolution, non-governmental organisations ... informal levels of local government and entrepreneurs.’¹¹² Similarly, Bierschenk and de Sardan consider many examples of normative pluralism across Africa, the ways relationships ‘deliver the state’, and mechanisms for understanding norms compliance and deviance.¹¹³ Such non-state systems are prevalent in every society, but because state systems in PICs and many post-colonial African countries are relatively weak, the regulatory relationships of non-state systems are thrown into sharper relief.¹¹⁴

Figure 1 below, depicts a pluralist-relational approach to lawyer regulation. Figure 1 shows the individual lawyer at the centre of six overlapping domains of regulation of lawyer conduct. These six domains emerged from my empirical study as significant sources of influence on lawyers in PICs, although, of course, there are many alternative ways to classify them and conceptualise their interaction. This model theorises lawyer conduct in PICs as being strongly regulated by: social and customary norms underpinned by legal pluralism and embedded normative pluralities; statutory duties and obligations of lawyers; legal practice environments, such as courts or

¹⁰⁸ Considering pluralism and relationality in policing: Rooney et al, ‘Thinking Incrementally About Policy Interventions on Intimate Partner Violence in Papua New Guinea: Understanding ‘Popcorn’ and ‘Blanket’ (2022); Sinclair Dinnen, ‘Plural Policing in Papua New Guinea: More Than the Sum of Its Parts?’ (2022) 38(3) *Journal of Contemporary Criminal Justice* 280.; Forsyth, ‘Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea’ (2022).

¹⁰⁹ Considering education in Oceania Johansson-Fua et al, *Relationality and Learning in Oceania: Contextualizing Education for Development* (2020)

¹¹⁰ David Chandler and Jonathan Pugh, ‘Islands of Relationality and Resilience: The Shifting Stakes of the Anthropocene’ (2020) 52(1) *Area* 65-72.

¹¹¹ Stewart Firth and Vijay Naidu, *Understanding Oceania: Celebrating the University of the South Pacific and Its Collaboration with the Australian National University* (ANU Press, 2019).; Seumanutafa, *Law Reform in Plural Societies* (2017).

¹¹² Bruce Baker, ‘Linking State and Non-State Security and Justice’ (2010) 28(5) *Development Policy Review* 597. 10.

¹¹³ See Thomas Bierschenk and Jean-Pierre Olivier de Sardan, *States at Work* (Brill, 2014). 399. See further: Christian Lund, ‘Struggles for Land and Political Power: On the Politicization of Land Tenure and Disputes in Niger’ (1998) 30(40) *The Journal of Legal Pluralism and Unofficial Law* 1.; Giorgio Blundo et al, *Everyday Corruption and the State: Citizens and Public Officials in Africa* (Bloomsbury Publishing, 2008).

¹¹⁴ Forsyth, ‘Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea’ (2022).

firms/organisations; legal education, including tertiary and professional education; and innate factors such as values, motivations, and affects.¹¹⁵

Figure 1: A pluralist-relational approach to lawyer regulation in PICs



Figure 1 depicts each source of influence as an overlapping oval (or ‘sphere’) to illustrate their dynamic and embedded relationship with each other. How each of these sources influence lawyer conduct over time is complex, but careful observation of interactions at different scales¹¹⁶ can provide a regulator with enough understanding of the existing micro and macro regulatory system dynamics to inform effective theories of regulatory (or social) change. Within legal practice

¹¹⁵ Lisa Feldman Barrett, *How Emotions Are Made: The Secret Life of the Brain* (Pan Macmillan, 2017).; Valerie Braithwaite, 'Closing the Gap between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 25.; Valerie Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Taylor & Francis Group, 2003).; Shalom H Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' in Mark Zanna (ed), *Advances in Experimental Social Psychology* (Elsevier, 1992) 1.

¹¹⁶ Micro-macro: e.g. Individual; organisations; groups/networks; systems; local, national, transnational etc.

environments, each lawyer is one actant within a network, who co-creates the meaning of normative symbols through interactions with other actors.¹¹⁷ Examples of such symbols include what it means to ‘comply’ in a particular situation, or what it means to be a good lawyer.

One final element of a pluralist-relational approach to lawyer regulation is that it seeks to draw insight from considering the complex and adaptive nature of relational social systems. As Fiona Haines argues ‘the nature of the law, the way it was developed and the audiences it was designed to appease are ... important dimensions to consider in fully understanding the compliance challenge.’¹¹⁸ Many regulatory scholars have made similar observations about the way interactions between individual actors and groups of social actors at different scales regulate behaviour by shaping social values, regulatory institutions and resources over time.¹¹⁹ Holley and Shearing for example, describe the temporal dynamism of nodes within networks and argue that nodal governance is grounded in an understanding that the way things are is a product of ‘governing processes that have shaped events.’¹²⁰ Halliday refers to the worldwide struggles of transnational regulators and asserts:

*the historically contextualised struggles of British post colonies to institutionalise legal orders ... all turn on interplays of movements and events arrayed on temporal scales of varying length and speed.*¹²¹

¹¹⁷ On symbols see Kenneth Burke, *On Symbols and Society* (University of Chicago Press, 1989). On the study of meaning see further Stephen R Schiffer, *Remnants of Meaning* (MIT Press, 1987).; and Stephen C Levinson, *Pragmatics* (Cambridge University Press, 1983). On the term actant see further Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2007); Greimas, *On meaning: Selected writings in semiotic theory* (1987).

¹¹⁸ Parker and Nielsen, *Explaining Compliance: Business Responses to Regulation* (2011). 23-24.

¹¹⁹ See Georg Simmel, *On Individuality and Social Forms* (University of Chicago Press, 1971). On time and temporality and systemic changes over time see Terence C Halliday, ‘Time and Temporality in Global Governance’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 303.; see also Merry on understanding temporality of global legal orders: Sally Engle Merry, ‘Global Legal Pluralism and the Temporality of Soft Law’ [2014] (2014) 46(1) *The Journal of Legal Pluralism and Unofficial Law* 108.

¹²⁰ Cameron Holley and Clifford Shearing, ‘A Nodal Perspective of Governance: Advances in Nodal Governance Thinking’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU E-Press, 2017) 163.

¹²¹ Terence C. Halliday and Lucien Karpik, ‘Political Liberalism in the British Post-Colony: A Theme with Three Variations’ in Terence C. Halliday, Lucien Karpik and Malcolm M Feeley (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press, 2012) 3.; cited in Halliday, ‘Time and Temporality in Global Governance’ 2017. 308.

Halliday argues that by applying the lens of *longue durée*¹²² we can understand, for example, how ‘path dependence’¹²³ influences contemporary norm making and implementation within a particular regulatory domain, such as legal practice. In both Chapters One and Three, I have applied this by situating the contemporary paradigm for lawyer regulation and legal practice in PICs within the broader context of Pacific socio-legal histories; the evolution of theories of lawyer regulation; and the development of legal professions in Fiji, Kiribati, and Vanuatu over time.

In essence, a pluralist-relational approach to lawyer regulation posits that:

1. Lawyers *are* regulators and they both regulate and are regulated by other regulators.
2. These other regulators are diverse and include a range of state and non-state actants.
3. Regulation occurs through the communication of symbols between a lawyer and other actants about lawyer conduct (such as what it means to be a good lawyer or the tolerance of divergent conduct).
4. Within the regulatory system conduct is influenced in complex, non-linear, and temporal ways.

¹²² See Halliday, ‘Time and Temporality in Global Governance’ 2017. The idea of the *longue durée* is a French term popularised by the Annales School of historiography and refers to an approach in historical research that emphasises long-term social, economic, and cultural structures over a substantial period of time. This approach contrasts with more traditional historical studies that focus on short-term events or developments. See: Fernand Braudel, ‘History and the Social Sciences: The Longue Durée’ in Fernand Braudel (ed), *On History*, tr Sarah Matthews (University of Chicago Press, 1980).

¹²³ In the social sciences path dependence can be used to explain how a small difference in initial conditions – such as resources, an idea, or a short-term circumstance – can amplify over time to cause a later circumstance potentially leading to significant and often inefficient or undesirable outcomes. On path dependence see further: Paul A David, ‘Path Dependence, Its Critics, and the Quest For historical Economics’ in P Garrouste and S Ioannides (eds), *Evolution and Path Dependence in Economic Ideas: Past and Present* (Edward Elgar Publishing, 2001) 15.; Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’world’ (2001); James Mahoney, ‘Path Dependence in Historical Sociology’ (2000) 29(4) *Theory and Society* 507.; and N Gunningham, P Grabosky and R Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998). But see criticism that path dependence is overstated and too determinist Stan J Liebowitz and Stephen E Margolis, ‘Path Dependence, Lock-in, and History’ (1995) 11(1) *The Journal of Law, Economics, and Organization* 205.

4.1. Relationality: Relationships as Regulators

Rather than understanding the behaviour of an individual as the product of a 'liberal individualist vision of the self' relational theory 'compels us to take the fact of relationship, of connectedness, as our starting assumption.'¹²⁴ A relational approach to human behaviour posits that conduct is a product of relationships between social actors; the specific situation or circumstances of the conduct; and the broader socio-cultural paradigms. An understanding of each is paramount to understanding the signals communicated by that conduct. As Jennifer Llewellyn writes:

*One cannot ... focus on the relationships between and among parties in a situation without looking to the contexts, causes and circumstances at play that reveal the relevant systemic and structural relations involved.*¹²⁵

Despite the intuitive appeal of relational and connected explanations of the world, it was not until the Enlightenment that technology provided European philosophers the tools to contest the embedded monism that limited their world view – whether that be of a religious or a metaphysical kind. As Andrew Benjamin somewhat dryly put it: relational ontologies have always existed – but mainly as 'philosophy's other possibility'.¹²⁶ This paradigmatic shift in Western ontologies and epistemologies towards scientific and relational understandings of the world quickly expanded to discoveries about the complexity and inter-relatedness of other systems, such as biological systems, ecosystems and social systems.¹²⁷

As discussed earlier in this chapter, relational theory has been applied to lawyer regulation by contemporary scholars who recognise that 'community interests and concerns ... permeate the profession from the inside, through the dual identification of lawyers with their profession and with wider community concerns.'¹²⁸ This framing situates lawyers as actors that are inseparable from the normative and ethical contexts in which they exist. The embeddedness of individuals as relational subjects in the world and its ethical consequence is expressed eloquently by philosopher José Ortega y Gasset:

¹²⁴ Llewellyn, 'Restorative Justice: Thinking Relationally About Justice' 2011, 90.

¹²⁵ Llewellyn, 'Transforming Restorative Justice' (2021), 382.

¹²⁶ Andrew Benjamin, *Towards a Relational Ontology: Philosophy's Other Possibility* (Sunny Press, 2015), 2.

¹²⁷ On biology and ecology see for example Charles Darwin, *On the Origin of Species, 1859* (Routledge, 2004).; on social theory and social contract theory see Jean-Jacques Rousseau, *Discourse on the Origin of Inequality* (Oxford University Press, USA, 1999). On the consequence for human morality and ethics see Friedrich Nietzsche, *The Gay Science*, tr Walter Kaufmann (Vintage Books, 1974). On the history and philosophy of complex systems in fields as diverse as biology, climatology and public policy, see Dov M Gabbay et al, *Philosophy of Complex Systems* (Elsevier, 2011).

¹²⁸ Parker, 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997). 230. See above, section 2.5. Contemporary Hybrid and Co-Regulatory Models, 89.

*There can be no subject without objects. Things and I, others and I, are in a reciprocal relationship, each dependent on the other ... My subjectivity depends on the existence of things without any possible separation ... I am I **and** my circumstance, and if I do not save it, if I diminish it, I diminish myself.*¹²⁹

The observation that a key driver of lawyer behaviour emerges from an individual's perception of their role in relation to other proximate actors is particularly poignant within the context of PICs where the 'bareness of the bureaucratic state brings the relational state into more high relief than ... [elsewhere].'¹³⁰ This means that within PICs, relational influences of conduct may be more apparent than elsewhere. Chapters Six and Seven report many examples of these influences identified by participants of the empirical study.¹³¹

Globally, many theories of social action¹³² have converged around relational, networked and pluralist understandings of social fields.¹³³ Many empirical studies of regulatory networks, including by Braithwaite,¹³⁴ Martin,¹³⁵ and Kerr,¹³⁶ demonstrate how mapping of mentalities, technologies, resources and institutions¹³⁷ can reveal 'the complexity of governing processes while at the same time opening up new avenues for explanatory and normative thinking.'¹³⁸ The essence of these contributions is that in order to regulate effectively it is imperative to understand people in the context of their professional practice.

There are many examples of such approaches. One example is Liu's theorisation of the legal profession as a social process, the theoretical underpinnings of which resonate strongly with a pluralist-relational approach to regulating lawyers in PICs. The crux of Liu's theory is that

¹²⁹ Harold Raley, 'Reflections on Ortega Y Gasset's ¿Qué Es Filosofía?' (2015) 271(1) *Revue Internationale De Philosophie* 69. 92 (emphasis added). See also José Ortega y Gasset, *José Ortega Y Gasset Man and People*, tr Willard R Trask (W. W. Norton & Company, 1963).

¹³⁰ Forsyth, 'Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea' (2022). 2; see also Rick Muir and Imogen Parker, 'Many to Many: How the Relational State Will Transform Public Services' (Report, Institute for Public Policy Research, 2014).

¹³¹ See Chapter Six, section 3, Non-State Regulators of Lawyer Conduct in Fiji, Kiribati, and Vanuatu, 225; Chapter Seven, Table 11: A few practical norms of lawyers in PICs, 256.

¹³² Social action theory was first described by Max Weber see further: Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978).

¹³³ On social fields see: Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1972); On legal pluralism and social fields see Sally Engle Merry, 'Legal Pluralism' in Gerry Simpson (ed), *The Globalization of International Law* (Routledge, 2017) 29.1; Glenda H Eoyang and Royce J Holladay, *Adaptive Action* (Stanford University Press, 2020).

¹³⁴ John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar Publishing, 2008).

¹³⁵ James Martin, 'Informal Security Nodes and Force Capital' (2013) 23(2) *Policing and Society* 145.

¹³⁶ John Kerr, *The Securitization and Policing of Art Theft: The Case of London* (Routledge, 2016).

¹³⁷ Holley and Shearing, 'A Nodal Perspective of Governance: Advances in Nodal Governance Thinking' 2017. 168.

¹³⁸ Ibid. 170.

understanding the dynamic interactions between lawyers and other actants within legal practice environments, and their causal mechanisms, can inform holistic theories of regulatory intervention and action.¹³⁹ Liu's approach is rooted in Simmelian sociological theory which posits that social structures (or networks) are constituted by interactions between social actors.¹⁴⁰ However, Liu's processual theory of the legal profession is distinctive from simple interactional or structural approaches because it links and integrates ideas of 'micro-level social action of individual practitioners with the macro-level social structures of the profession'.¹⁴¹ In doing so, Liu's approach can be described as a material-semiotic approach which draws conceptually from network theories of social relations such as actor-network theory and nodal governance.¹⁴²

Similar to Liu's theoretical framework, a pluralist-relational approach to lawyer regulation draws from network theories of social relations to view lawyer regulation as processual, meaning the relationships that regulate lawyer conduct change dynamically over time within a complex and shifting web of relationships between lawyers, other actors, and phenomena.¹⁴³ Dynamics of power between the state, regulatory institutions and the profession play out over time affecting and affected by the various capacities of the state, regulators and regulatees. At the micro level, individual compliance conduct can be observed occurring spontaneously and situationally¹⁴⁴ within legal practice environments.¹⁴⁵ At the macro level, 'the legal profession is a changing social process that evolves across space and over time'.¹⁴⁶ This process of change within networks is

¹³⁹ Sida Liu, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' (2013) 38(3) *Law & Social Inquiry* 670. 687-8. These interactions involve 'the exchange of money, power, resources and interpersonal trust.' 687.

¹⁴⁰ Simmel, *On Individuality and Social Forms* (1971). Simmel is also credited with first conceptualising the phenomenon of 'the stranger' as specific form of interaction characterised by a simultaneous closeness and relational distance that is used dynamically in social relations. This concept is relevant to my role as a researcher, but also to case studies explored in later chapters which explore regulator-regulatee relationships. Georg Simmel, 'The Stranger' in Timothy Oakes and Patricia L. Price (eds), *The Cultural Geography Reader* (Routledge, 2008) 323.

¹⁴¹ Liu, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' (2013). 273. See further Sida Liu, 'Boundaries and Professions: Toward a Processual Theory of Action' (2018) 5(1) *Journal of Professions and Organization* 45.

¹⁴² Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2007); Bruno Latour, 'On Actor-Network Theory: A Few Clarifications' (1996) *Soziale Welt* 369.; Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30.

¹⁴³ Greimas, *On meaning: Selected writings in semiotic theory* (1987); Latour, 'On Actor-Network Theory: A Few Clarifications' (1996).

¹⁴⁴ On situations see further: Karl Popper, *The Poverty of Historicism* (Routledge, 2013).; Max Gluckman, 'Ethnographic Data in British Social Anthropology' (1961) 9(1) *The Sociological Review* 5. see also on 'situational influences' on decision making Michael Burgoon et al, 'Cultural and Situational Influences on the Process of Persuasive Strategy Selection' (1982) 6(1) *International Journal of Intercultural Relations* 85.

¹⁴⁵ Typically courts and law offices – both of which are important environments for ensuring strong professional norms). More inclusively 'legal practice environments' include any place that lawyers provide legal services.

¹⁴⁶ Liu, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' (2013). 688.

affected by individual, local, national and regional capacities and influenced by transnational legal orders.¹⁴⁷

4.2. Relational Theories of Regulatee Compliance

Regulatory scholars are interested in how and why regulation achieves compliance, or fails to do so, within a given regulatory domain.¹⁴⁸ This enables better theorising about regulatory strategies to improve compliance. Contemporary theories of regulatory compliance draw from interpretivist definitions of compliance which posit ‘compliance can refer to meanings and interpretations; social habits and practices and interactions; and communications between different actors in the implementation process.’¹⁴⁹ In other words, compliance is both an outcome and a process.¹⁵⁰ As an outcome it tends to be measurable as specific behaviours of regulatees which signal postures of compliance or resistance to regulation.¹⁵¹ As a process, compliance is negotiated and performed within a social (or regulatory) field, its meaning is socially constructed between regulators and regulatees¹⁵² and impacted by uncertainty due to complex relational dynamics operating at different scales.¹⁵³ For many contemporary regulatory scholars, ensuring compliance in the midst of this complexity requires smart and responsive regulation.¹⁵⁴

Ayres and Braithwaite’s 1992 book *Responsive Regulation: Transcending the Deregulation Debate* marked a paradigmatic shift in approaches to regulation and compliance governance in Australia and elsewhere.¹⁵⁵ Over the more than 30 years since, it has been adopted by many regulators in diverse fields and contexts and has inspired many scholars to develop and theorise its ideas

¹⁴⁷ Halliday and Shaffer, *Transnational Legal Orders* (2015); Halliday, ‘Time and Temporality in Global Governance’ 2017.

¹⁴⁸ Parker and Nielsen, *Explaining Compliance: Business Responses to Regulation* (2011).

¹⁴⁹ Parker and Lehman-Nielsen, ‘Compliance: 14 Questions’ 2017. 218.

¹⁵⁰ Braithwaite, ‘Closing the Gap between Regulation and the Community’ 2017. 28-9.

¹⁵¹ *Ibid.* 28-9.

¹⁵² Parker and Nielsen, *Explaining Compliance: Business Responses to Regulation* (2011). 37-8.

¹⁵³ See for example: Christine Parker and Vibeke Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (2009) 3(4) *Regulation and Governance* 376.; Robert A Kagan, Neil Gunningham and Dorothy Thornton, ‘Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing, 2011) 37.; Peter J May, ‘Compliance Motivations: Affirmative and Negative Bases’ (2004) 38(1) *Law & Society Review* 41.

¹⁵⁴ John Braithwaite, ‘Types of Responsiveness’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 117.; Gunningham and Sinclair, ‘Smart Regulation’ 2017.

¹⁵⁵ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

further,¹⁵⁶ including in the context of PICs.¹⁵⁷ Responsive regulation remains ‘the most sustained and influential account of how and why to combine deterrent and cooperative regulatory enforcement strategies’ to best ensure regulatory effectiveness, efficiency and legitimacy.¹⁵⁸ It embodies four key concepts: that different regulatory styles impact compliance; cooperation leads to capture and corruption; tripartism and enforced self-regulation; and promoting competition.¹⁵⁹

A detailed explanation of each of these is better given in the original work, but it is relevant to note that a responsive approach to regulation is intrinsically relational, emphasising the importance of time, context and regulatory cultures and relationships to regulatory design and operation. According to Ayres and Braithwaite, for regulators, ‘the best [regulatory] strategy is shown to depend on context, regulatory culture, and history.’¹⁶⁰ It thus not only welcomes, but requires an understanding of local actors, relationships, and institutions. This makes it – and many of the theories which draw from it – highly compatible with a pluralist-relational approach to lawyer regulation.

4.2.1. Motivational Posturing Theory

Over the past 30 years, responsive regulation has generated or inspired a vast number of theories and conceptual tools for understanding compliance within regulated social systems.¹⁶¹ In my analysis and discussion of empirical findings in later chapters, I draw from Valerie Braithwaite’s Motivational Posturing Theory.¹⁶² Motivational postures refer to the signals regulatees

¹⁵⁶ Fiona Haines, *Corporate Regulation : Beyond "Punish or Persuade"* (Clarendon Press, 1997). 218–229; Gunningham, Grabosky and Sinclair, *Smart Regulation: Designing Environmental Policy* (1998); Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford University Press, 1999).; Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ world’ (2001); Parker, ‘Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness’ (2002); Sally S Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press, 2002).; John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar Publishing, 2007)., 114–133; Neil Gunningham, *Mine Safety: Law Regulation Policy* (Federation Press, 2007)., 124–129; Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *The Modern Law Review* 59.; See also discussion in Parker and Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (2009).

¹⁵⁷ See John Braithwaite et al, *Pillars and Shadows: Statebuilding as Peacebuilding in Solomon Islands* (ANU Press, 2010).; Seumanutafa, *Law Reform in Plural Societies* (2017); Gina Zheng, ‘Re-Imagining Fiji’s Regulatory Reforms for Renewable Energy: The Potential of the Energy Co-Operative Model’ (2018) 11(5) *The Journal of World Energy Law & Business* 440.; Gregory Rawlings, *Responsive Regulation, Multilateralism, Bilateral Tax Treaties and the Continuing Appeal of Offshore Finance Centres* (Research School of Social Sciences, 2019).

¹⁵⁸ Parker and Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (2009). 376-7; Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

¹⁵⁹ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992). 5-7.

¹⁶⁰ *Ibid.* 5.

¹⁶¹ See for example Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017).; but see also Neil Gunningham and Darren Sinclair, ‘Designing Smart Regulation’ in Bridget M Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999) 305.; Gunningham and Sinclair, ‘Smart Regulation’ 2017.

¹⁶² Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003).

communicate to regulatory authorities about their control over them.¹⁶³ Arising out of a responsive regulatory approach, recognition of motivational postures by a regulator can provide opportunities for dialogue and resolution towards compliance. According to Valerie Braithwaite motivational postures are:

*conglomerates of beliefs, attitudes, preferences, interests, and feelings that together communicate the degree to which an individual accepts the agenda of the regulator, in principle, and endorses the way in which the regulator functions and carries out duties on a daily basis.*¹⁶⁴

Motivational postures may signal to the regulator that the regulatee is accommodating (commitment and capitulation) or defiant (resistance or disengagement and gameplaying) towards it, or some specific aspect of the regulatory system.¹⁶⁵ These signals communicate 'social distance' to the regulator.¹⁶⁶ Braithwaite explains that this distance is used strategically by regulatees to avoid regulatory scrutiny to mitigate the risks of non-compliance based on the relative threat of regulatory action and the individual's coping sensibilities.¹⁶⁷ Responses to regulatory threats may be emotion focused (feeling oppressed); problem-focused (taking control); or to reframe it (thinking morally as the regulatory system requires).¹⁶⁸ Braithwaite emphasises that the latter response should be strongly supported by regulators because it 'strengthens the motivational supra-posture of cooperation (as opposed to resistance) and weakens the motivational supra-posture of dismissiveness.'¹⁶⁹ Caution is nevertheless needed to ensure the moral code professed by the regulatory system is aligned to people and place.

The 'Enforcement Pyramid' shown in Figure 2 below shows motivational postures on the left hand signed aligned with different regulatory strategies on the right-hand side. Examples of different enforcement strategies (or regulatory interventions) are shown in the middle. In general, the goal of a regulator should be to drive regulatee conduct down the pyramid by interpreting their motivational postures and applying the corresponding enforcement strategy. A posture of

¹⁶³ Braithwaite, 'Closing the Gap between Regulation and the Community' 2017. 33.

¹⁶⁴ Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29(1) *Law & Policy* 137.

¹⁶⁵ Braithwaite, 'Closing the Gap between Regulation and the Community' 2017. 34; Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003). 3. See also Braithwaite, 'Games of Engagement: Postures within the Regulatory Community' (1995)

¹⁶⁶ The idea of social distance is explored in detail in Braithwaite, Murphy and Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007).

¹⁶⁷ Ibid. 138-41.

¹⁶⁸ Ibid. 141.

¹⁶⁹ Ibid. 141.

commitment or capitulation communicates support for the legitimacy of the regulator and acceptance of its role. Both of these are important for effective regulation and a regulator that is unable to attract recognition as a legitimate authority will find it difficult to carry out its regulatory functions. In Chapter Five this is considered in the context of Fiji, Vanuatu, and Kiribati.

Defiant postures include resistance, disengagement and game playing. Resistance according to Braithwaite is the most common and 'is a plea to authority to be fair and respectful' and it is managed successfully by introducing greater procedural fairness into regulatory design and operation.¹⁷⁰ Disengagement means a regulatee is maximising social distance from the regulator, neither engaging, nor responding. Game playing as a posture strongly undermines the authority's efficacy by using 'loopholes' or evading regulatory authority in delegitimising ways. The reasons for such behaviour are myriad and typically centre around moral authority, and questions of legal legitimacy.¹⁷¹

¹⁷⁰ Braithwaite, 'Closing the Gap between Regulation and the Community' 2017. 34.

¹⁷¹ Ibid. 35.

Figure 2: Enforcement pyramid¹⁷²

Motivational postures are shaped by the values and world views of individuals. They are therefore by their nature relational and affected by social, cultural, legal and practical norms. They are also shaped by the kind of interactions people have with authority.¹⁷³ Braithwaite explains three psychological selves that explain the ebb and flow of postures towards threat: the moral self; grievance self; and status-seeking self. She observes that where a regulator offends ‘any or all of these selves ... the task of regulating without constant surveillance and coercion [is] extremely difficult.’¹⁷⁴ A pluralist-relational approach to regulating lawyers in PICs recognises the importance of balancing relational dynamics between regulators and regulatees to ensure compliance. Motivational posturing theory is a helpful tool for understanding what occurs in legal practice in PICs. In Chapter Seven of this thesis, I draw from motivational posturing theory and de Sardan’s framing of practical norms, discussed below, to inform an understanding of how lawyers in PICs

¹⁷² Enforcement Pyramid in Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003). 3.

¹⁷³ Braithwaite, ‘Games of Engagement: Postures within the Regulatory Community’ (1995); *ibid*.

¹⁷⁴ Braithwaite, ‘Closing the Gap between Regulation and the Community’ 2017. 37.

understandings compliance and non-compliance.¹⁷⁵ Overlaying these theories enables a regulator to better visualise the diverse attitudes and motivations of lawyers towards compliance and interpret regulatory signals communicated by repeated or patterned lawyer behaviour such as practical norms.

4.3. Normative Pluralism as a Source of Lawyer Regulation

In PICs, a pluralist-relational approach to lawyer regulation is needed because, as Chapter One demonstrated, pluralism is a paradigmatic fact within legal practice environments in PICs. The role of Custom and Christianity as sources of norms in bureaucratic, professional and private life in PICs has been written about by many scholars, but rarely in relation to lawyer regulation.¹⁷⁶ In PICs, customary beliefs and practices, such as: gift giving; deference to authority; and avoidance of direct conflict, are embedded throughout the bureaucracy, law and justice sector, and civil society.¹⁷⁷ Similarly, religious practices such as ritualised prayer are embedded throughout government departments, NGOs and corporate environments in PICs, for example at staff meetings, ceremonies, and other events. The embeddedness and pervasiveness of normative pluralities create what are often conflicting expectations of compliance behaviour for lawyers in PICs, but which also create many aligned expectations – for example an expectation of honesty, or respect for hierarchy. A pluralist-relational approach to lawyer regulation recognises this symbiosis between professional and social norms and the regulatory utility of ‘working with the grain’ of locally embedded systems.¹⁷⁸

Legal formalist approaches, which have historically dominated legal study and education, train lawyers to view ‘right action’ as something discernible from legal rules and principles using deductive logic.¹⁷⁹ While this rules-based regulatory approach makes it possible to communicate professional norms and supports disciplinary authorities to identify technical breaches of those norms, it offers lawyers little by way of explanation of the praxis of applying those rules and performing their professional role within pluralistic normative environments. This sort of

¹⁷⁵ See, section 4.4. Practical Norms, p. 117.

¹⁷⁶ See for example Penfold, ‘Contextualising Program Outcomes for Pacific Island Law Graduates’ (2012); Penfold, ‘Developing Legal Communication Skills in the South Pacific Context’ (2014); on custom and judicial decision making see Forsyth, ‘Leadership Structures and Dispute Systems in Vanuatu from First Contact to Independence in Vanuatu’ (2007); For discussion of custom and lawyer ethics elsewhere see FD Mnyongani, ‘Duties of a Lawyer in a Multicultural Society: A Customary Law Perspective?’ (2012) 23(2) *Stellenbosch Law Review* 352.

¹⁷⁷ See Chapter Six, section 3.1. Custom as a Dynamic Regulator of Lawyer Conduct, p. 225.

¹⁷⁸ Braithwaite, *Markets in Vice, Markets in Virtue* (2005). 156. See also Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006). 885.

¹⁷⁹ See discussion in Richard A Posner, ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986) 37 *Case Western Reserve Law Review* 179. 181.

traditional rationalist logic was popularised by Adam Smith in terms of individuals making calculated rational choices based on their own best interests and 'utility'.¹⁸⁰ Technical proficiency in making rational legal arguments is something valued highly by lawyers, indeed in literature on professions, this forms part of the legal profession's claim to expertise, or what Parson's refers to as 'the superior "technical competence" of the professional man.'¹⁸¹ However, the way legal ethicists have theorised lawyer ethics has shifted over time, reflecting different trends in moral philosophy favouring more teleological or more deontological approaches to ethics.¹⁸² Scholarly debates continue around 'letter-of-the-law' versus 'spirit-of-the-law' approaches to applying legal rules;¹⁸³ rules-based ethics versus principles-based ethics;¹⁸⁴ and whether lawyers' ethics should centre around an 'ethics of justice,'¹⁸⁵ or around some other concept, such as an 'ethics of care.'¹⁸⁶

A key criticism of theories of behaviour based on rational actor models is that human decision-making does not follow these models, due to the immense variability of factors. Research has revealed layers of psychological and neurological complexity regarding moral decision making. Utility and logic can easily be bent based on an individual's affects,¹⁸⁷ values¹⁸⁸ and situations.¹⁸⁹ In any given situation, an individual actor might be rational, irrational, or virtuous.¹⁹⁰ Social identity

¹⁸⁰ James Samuel Coleman, James Smoot Coleman and Thomas J Farraro, *Rational Choice Theory: Advocacy and Critique* (Sage Publications, 1992).; see also Jeremy Bentham and John Stuart Mill, *Utilitarianism and Other Essays* (Penguin UK, 2004).

¹⁸¹ See Parsons, 'The Professions and Social Structure' 1954. 460.

¹⁸² See for example Donald Nicolson, Julian S Webb and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press on Demand, 1999).; Alessandro Ferrara, 'Moral Duties and Juridical Duties: The Ambiguity of Legal Ethics Considered through the Prism of Kant's Metaphysics of Morals' (2022) 23(1) *German Law Journal* 117. Edward A Dauer and Arthur Allen Leff, 'The Lawyer as Friend' (1977) 86(3) *The Yale Law Journal* 573.

¹⁸³ Derek J Harmon, Peter H Kim and Kyle J Mayer, 'Breaking the Letter Vs. Spirit of the Law: How the Interpretation of Contract Violations Affects Trust and the Management of Relationships' (2015) 36(4) *Strategic Management Journal* 497.

¹⁸⁴ Surendra Arjoon, 'Striking a Balance between Rules and Principles-Based Approaches for Effective Governance: A Risks-Based Approach' (2006) 68 *Journal of Business Ethics* 53.

¹⁸⁵ J Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1971).

¹⁸⁶ See: Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics. Article First Presented as a Paper at the Australian Association for Professional and Applied Ethics. Conference (2003: Melbourne).' (2004); Botes, 'A Comparison between the Ethics of Justice and the Ethics of Care' (2000); see also Paul Cilliers, 'Complexity, Ethics and Justice' in Rika Preiser (ed), *Critical Complexity* (De Gruyter, 2004) 181. On the ethics of care in sociology see: Carol Gilligan, 'In a Different Voice: Women's Conceptions of Self and of Morality' (1977) 47(4) *Harvard Educational Review* 481.; Held, *The Ethics of Care: Personal, Political, and Global* (2006); Camille A Carr and Melanie Hyams, Comp, 'An Ethic of Care in the Legal Profession: Not for Women Only' (Conference Paper, 35th Annual Adult Education Research Conference Proceedings 20-22 May 1994).

¹⁸⁷ Barrett, *How Emotions Are Made: The Secret Life of the Brain* (2017).

¹⁸⁸ Braithwaite, 'Closing the Gap between Regulation and the Community' 2017; Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' 1992.

¹⁸⁹ See Popper, *The Poverty of Historicism* (2013); Gluckman, 'Ethnographic Data in British Social Anthropology' (1961). On 'situational influences' on decision-making see Burgoon et al, 'Cultural and Situational Influences on the Process of Persuasive Strategy Selection' (1982).

¹⁹⁰ See further Braithwaite, 'Responsive Regulation and Developing Economies' (2006). 887.

is fractal¹⁹¹ and individuals perform normative rituals which strengthen relationships through patterns of interactions which communicate and create norms. A pluralist-relational approach, one that foregrounds understanding the relationships between people, institutions and their environments in a dynamic, co-created process,¹⁹² enables lawyer conduct to be conceptualised as a product of various relational processes and exchanges of normative power dynamics.

The mechanisms by which individuals navigate and reconcile conflicts of norms in practical situations has been an important area of research to many legal ethicists.¹⁹³ For lawyers in PICs, the ability to flexibly perform different ‘dances of compliance’ enables them to navigate normative pluralism within legal practice environments and to adapt to local paradigms and contexts. One way of understanding this process which I apply in Chapter Seven, is through Jean-Pierre Olivier de Sardan’s theoretical framework of practical norms which seeks to explain the processes and circumstances that contribute to professionally deviant conduct within professional and bureaucratic environments in Sub-Saharan Africa.¹⁹⁴

¹⁹¹ Marilyn Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (University of California Press, 1988).; Marilyn Strathern, *Partial Connections* (Rowman Altamira, 2005).; Roy Wagner, ‘The Fractal Person’ in Maurice Godelier and Marilyn Strathern (eds), *Big Men and Great Men: Personifications of Power in Melanesia* (Cambridge University Press, 1991) 59. See also: R Wagner and T Ingold, *The Invention of Culture* (University of Chicago Press, 2016).; Mandelstam, ‘A Case for The fractal Self: The Scope of Moral Consideration as Influenced by Personal Identity’ (2020); Carr-Saunders and Wilson, *The Professions* (1933); Moore, *The Professions: Roles and Rules* (1970); Eraut, *Developing Professional Knowledge and Competence* (1994).

¹⁹² Catriona Mackenzie, ‘Relational Autonomy, Normative Authority and Perfectionism’ (2008) 39(4) *Journal of Social Philosophy* 512.

¹⁹³ Hall and Holmes for example consider the power of rationalisation to influence lawyers’ decisions to choose to not comply with professional norms See Kath Hall and Vivien Holmes, ‘The Power of Rationalisation to Influence Lawyers’ Decisions to Act Unethically’ (2015) 11(2) *Legal Ethics* 137.; See also Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2018).; Erwin Chemerinsky, ‘Protecting Lawyers from Their Profession: Redefining the Lawyer’s Role’ (1980) 5 *Journal of the Legal Profession* 31.

¹⁹⁴ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015.

4.4. Practical Norms

De Sardan observes that in post-colonial states in Africa, new bureaucratic norms often ‘pile up without actually replacing the previous ones.’¹⁹⁵ He argues that in a development context, instead of simply making new bureaucratic norms that sit unperformed on top of all the previous versions, regulators should start by recognising and evaluating existing practical norms, rather than introducing new official norms that will gain no more respect than the previous ones. He suggests that the pragmatic objective of a reform strategy should be ‘to start with and from the practical norms, to make some of them ‘shift a bit’, or to change some of them sometimes, or to play certain practical norms against others ...’¹⁹⁶ Thus a pluralist-relational application of de Sardan’s ideas to lawyer regulation in PICs meshes well with regulatory strategies of responsive regulation.¹⁹⁷

During analysis of the empirical data, I searched widely for theories that could help me to interpret and explain participant responses regarding lawyer conduct that diverged from professional standards, but often seemed nevertheless to be widely tolerated. The overall focus of this study required a framework that could be applied as both an explanatory tool, and as a practical tool for regulators to theorise appropriate regulatory interventions. Ultimately, I found de Sardan’s framing of ‘practical norms’, with some minor adjustments, to work well within a pluralist-relational approach to lawyer regulation. Practical norms are repeated patterns of behaviour that diverge from bureaucratic or social norms. According to de Sardan:

*Practical norms may be defined as the various informal, de facto, tacit or latent norms that underlie the practises of actors which diverge from the official norms (or social norms) [In effect, official, social and practical norms are] ... superimposed, interwoven and entangled.*¹⁹⁸

From this definition we can discern that a practical norm must be:

- Divergent from but intertwined with official or social norms;
- Informal or implicit;
- *De facto* (meaning they exist as facts that can be observed and described);
- Norms (they regulate conduct and are regulated);
- repeated or patterned; and
- relational or entangled.

¹⁹⁵ Ibid. 31.

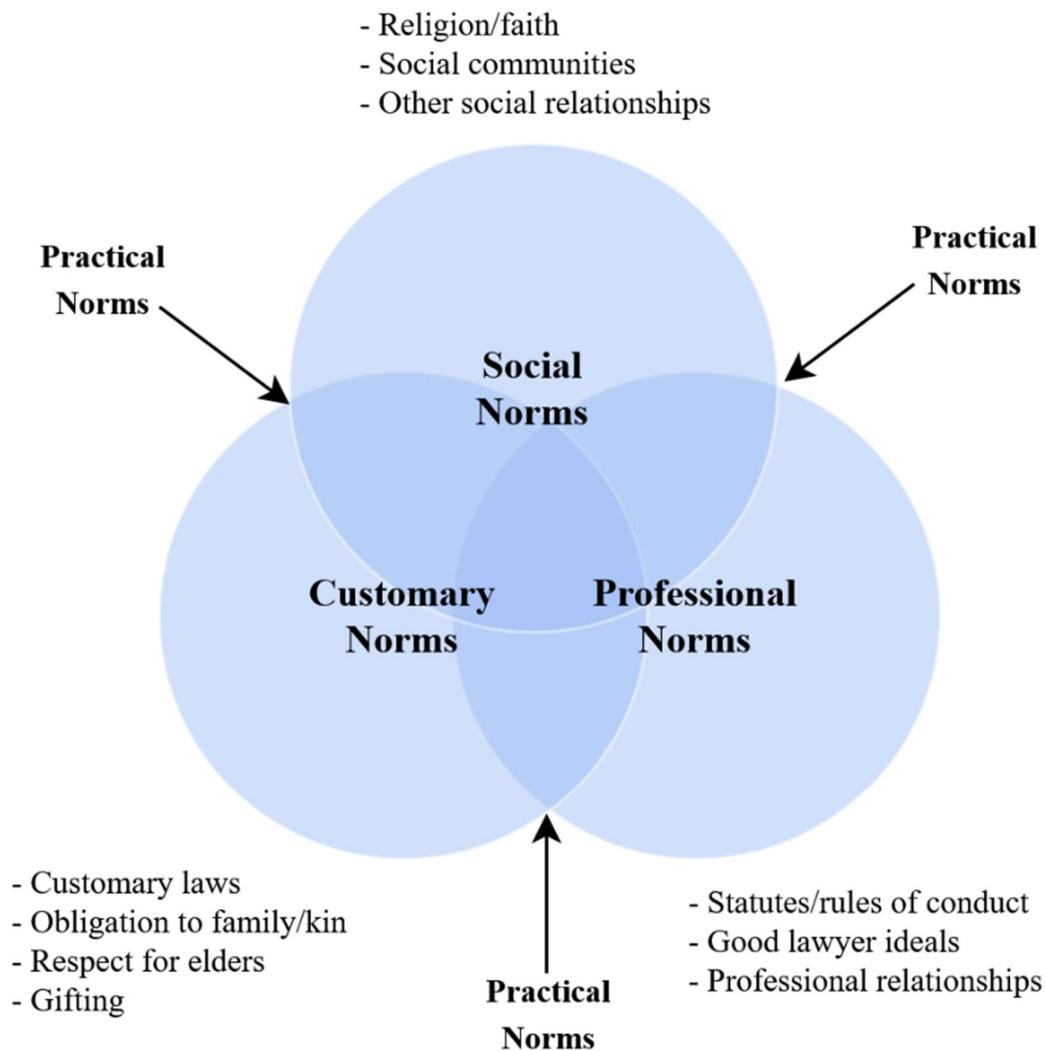
¹⁹⁶ Ibid. 32.

¹⁹⁷ See discussion below at 4.2. Relational Theories of Regulatee Compliance, p. 109.

¹⁹⁸ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 8.

Practical norms emerge from ‘shared expectations and margins of tolerance’ that result from the varying intensity of relationships between actors and norms within the regulatory domain.¹⁹⁹ Accordingly, they are likely to be more readily observed at the intersection of tensions between bureaucratic and social norms. These intersections are depicted in Figure 3 below by the darker bands between the three ‘bubbles’ of norms.

Figure 3: Typology of six norms



However, even knowing where to look for them, practical norms may be difficult to identify and understand because they are implicit and are often concealed, particularly from outsiders (such as researchers), and may resemble or be embedded within bureaucratic or social norms. An example

¹⁹⁹ Ibid. 24.

of this is social hierarchies within bureaucratic institutions. Practical norms are also typically local and may combine with other norms to constitute ‘local professional cultures’ which may be specific to a particular organisation (e.g. a law firm) where it can be difficult for a regulator to monitor norms and exert influence. Deviations from norms tend to be navigated situationally and may occur for many reasons, including:

*Local social pressure, a moral characterised by charity and pity, perhaps from religion or culture. A moral of shame, again, perhaps from religion or culture, a moral of non-avoidance of conflict, perhaps from religion or culture.*²⁰⁰

The reasons why lawyers in PICs deviate from professional norms are considered in depth in Chapter Seven. However, it is relevant to note here that, according to Durkheim, deviance is an essential component of a functional society.²⁰¹ As both Mary’s Choice in the Introduction and Litia’s case in Chapter Six reveal, deviant conduct can challenge dominant values and mores by pointing out existing flaws or gaps in existing systems.²⁰² Additionally, deviant conduct can act to strengthen professional norms by triggering punitive regulatory enforcement action which send signals of deterrence. Of particular significance to regulators is that the majority of deviant conduct by lawyers tends to strengthen professional norms by seeking to remain ‘in the spirit of’ the rules while transgressing them in some way. This is discussed below and with reference to the empirical data further in Chapter Seven.

4.4.1. Five Typologies of Practical Norms: A Pluralist-Relational Model

Practical norms can be identified by observation and context.²⁰³ De Sardan argues that if you go to any regulated space and conduct an ethnography to identify the scope and interconnectedness of official and socio-cultural norms, you will find many examples of behaviour that not only transgresses established norms, but does so in normative ways.

*Certain practical norms resemble routines; Others are similar to ‘know how’ or coordinative frames. Others are closer to their current strategies of actors ... Others express transversal social logics e.g. exchanging gifts, logics of debt. Shame, etc.*²⁰⁴

²⁰⁰ Ibid. 9.

²⁰¹ Thorolfur Thorlindsson and Jón Gunnar Bernburg, ‘Durkheim’s Theory of Social Order and Deviance: A Multi-Level Test’ (2004) 20(4) *European Sociological Review* 271. On deviance see further Robert K Merton, ‘Social Structure and Anomie’ (1938) 3(5) *American Sociological Review* 672.; Robert Agnew, ‘General Strain Theory: Current Status and Directions for Further Research’ (2006) 15 *Taking Stock: The Status of Criminological Theory* 101.

²⁰² See Introduction, Mary’s Choice, p. 1, and Chapter Six, section 3.2.1. Litia’s Case, p. 233.

²⁰³ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 13.

²⁰⁴ Ibid. 13.

All practical norms involve some degree of transgression or deviance from established norms and may be more or less tolerated by other regulatory actors.²⁰⁵ Practical norms may be legitimised by informal conventions or the opinions and actions (including perceived opinions and actions) of other actors.²⁰⁶ De Sardan proposes four empirical typologies of practical norms: adaptive, palliative, quasi-tolerated and transgressing. For reasons explained below, I have proposed a modified version of de Sardan's typologies with the following five typologies of practical norms:

- Adaptive practical norms;
- Palliative practical norms;
- Tolerated practical norms;
- Quasi-tolerated practical norms; and
- Rebellious practical norms.²⁰⁷

Using a pluralist relational approach to lawyer regulation, a regulator should be interested in practical norms because, as de Sardan observes 'in the professional world, both official and practical norms are part of any social situation.'²⁰⁸

Figure 4 shows these typologies of practical norms on a pyramid with scales of resistance and tolerance of relevant norms. Resistance here is resistance to the regulator or to the regulatory system. Tolerance refers to tolerance of practical norms by other proximate actors within legal practice environments. Figure 4 shows that adaptive and palliative norms tend to diverge less from the desired norms and generally operate 'in the spirit of' dominant professional norms. The more divergent and rebellious a norm is, the more likely it is to challenge the existing order. Practical norms which are viewed as quasi-tolerated or rebellious tend to weaken the legitimacy of bureaucratic norms, whereas practical norms which are palliative or adaptive tend to strengthen the legitimacy of bureaucratic norms. Rebellious and quasi-tolerated practical norms generally weaken the legitimacy of bureaucratic and social norms, are less broadly tolerated and evidence greater resistance to regulatory control than tolerated, palliative and adaptive practical norms.²⁰⁹ They tend to denote areas of resistance to regulation that require attention from the regulator.

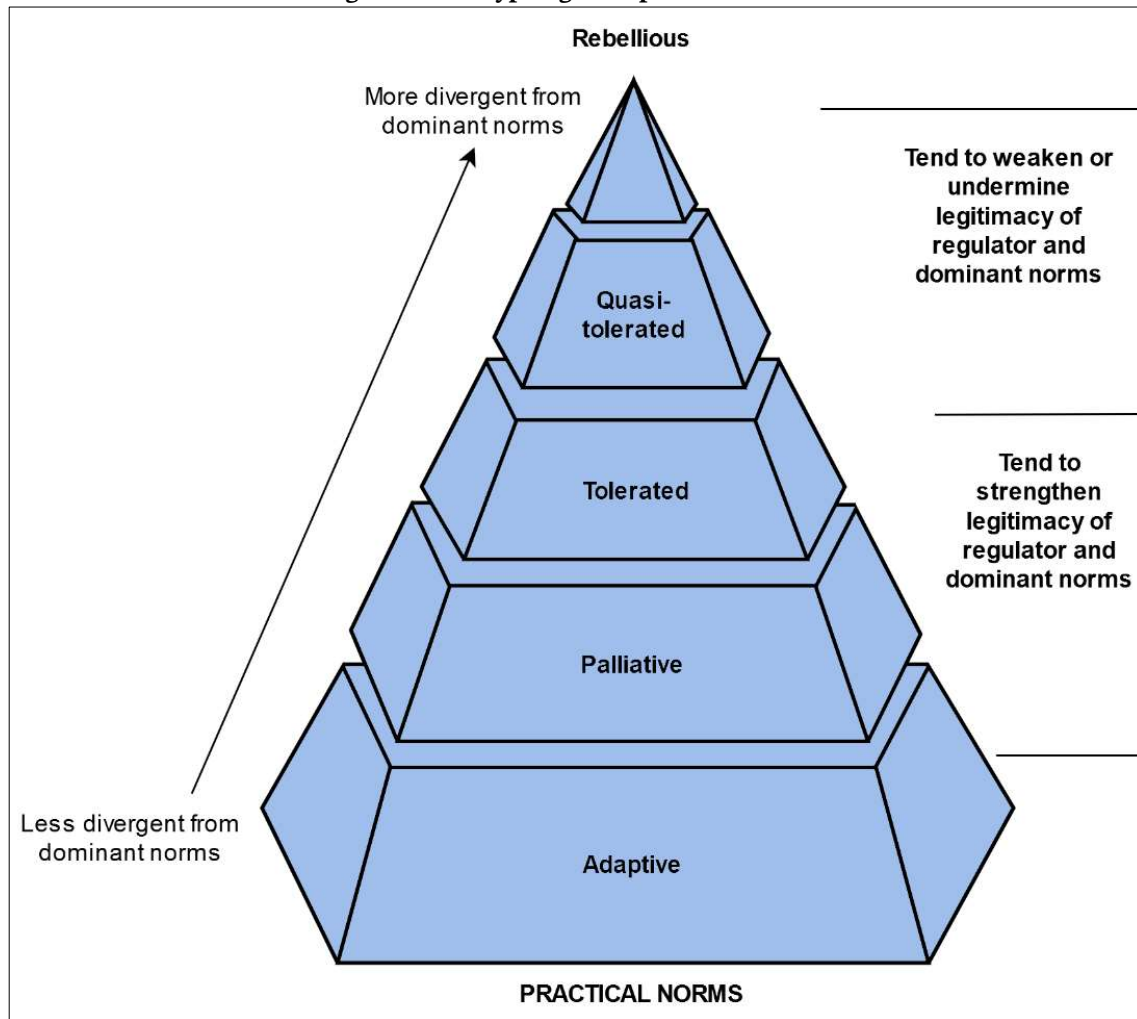
²⁰⁵ A regulatory actor can be an official regulator, or another normative actant, including other regulatees.

²⁰⁶ For example, other lawyers, the judiciary, clients, or statutory regulators.

²⁰⁷ See de Sardan, 'Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)' 2015. 27-9. c/f Figure 4, below, p. 121.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

Figure 4: Five typologies of practical norms

In Chapter Seven, I apply this model to identify and discuss practical norms of lawyers in legal practice environments in Fiji, Kiribati, and Vanuatu. Through analysing and coding my data, various themes and patterns emerged regarding the context in which practical norms develop in Fiji, Kiribati, and Vanuatu. These were identified as aligning with one or more of the following broad objectives:

- overcoming resource constraints within the legal practice environment;
- navigating familial, social or customary obligations;
- preserving relationships, both professional and social;
- permissibly attaining personal advantage; and
- resistance to the regulator.

4.4.2. Adaptive Practical Norms

Adaptive norms emerge from the need to perform official norms in resource constrained local contexts and environments, such as a variation in the operationalisation of official norms to improve efficiency or overcome contradictions or gaps in formal systems.²¹⁰ Adaptive practical norms can be thought of as variations in the performance of bureaucratic (or customary) norms that are explicitly tolerated. For example, in Kiribati, the resources constraints of the High Court Registry resulted in a discretionary institutional change – limiting the days of the week on which lawyers may request copies of land title records.²¹¹ This adaptation resulted in consequential adaptations to case management by lawyers.²¹²

4.4.3. Palliative Practical Norms

Palliative practical norms allow a bureaucratic service to survive on good intentions alone.²¹³ Palliative practical norms describe many day-to-day practices within legal and bureaucratic services in PICs which mitigate harmful or exclusionary impacts of formal systems. An example of this might be informal ‘pay what you can’ models for government services for low-income citizens; flexible work schedules for working parents; and providing accommodation for cultural practices and obligations within formal work contexts.

In *Policing in a Relational State: the case of sorcery accusation-related violence in Papua New Guinea* Forsyth describes how the relational interactions between actors in PICs gives rise to patterns of behaviour, practices and norms that deliver the bureaucratic state through ‘the state at work’ or what she calls a relational state.²¹⁴ Forsyth considers the operation of a palliative practical norm in the context of policing in Bougainville.²¹⁵ An example given was of a police officer requesting villagers provide fuel or money to purchase fuel for a police vehicle to facilitate police attendance at a crime scene.²¹⁶ Villagers were happy with the arrangement because it ensured they received the state service they desired, in this case security. Such palliative practical norms help

²¹⁰ Such as often arise in PICs due to their post-colonial and development contexts. See further Chapter One, p. 26.

²¹¹ A time-consuming task that draws court resources away from other matters, including criminal matters. Land matters account for approximately 70% of all cases before Kiribati courts and filing a case requires lawyers to first access all previous court decisions pertaining to the affected piece of land. With no electronic systems and a single matter requiring the registry clerks to locate potentially a dozen or more previous decisions (and copy them) the capacity of the registry to perform its other functions was suffering. Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²¹² See Chapter Seven at 4.4. Adaptations to Responsive Practices of Courts and Court Registries, p. 264.

²¹³ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 29.

²¹⁴ Forsyth, ‘Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea’ (2022); see also Bierschenk and de Sardan, *States at Work* (2014).

²¹⁵ Forsyth, ‘Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea’ (2022).

²¹⁶ Ibid.

ensure the delivery of vital community services such as policing and security in circumstances where the state otherwise cannot. This in turn can strengthen the authority and legitimacy of the state.

4.4.4. Tolerated Practical Norms

Tolerated and quasi-tolerated practical norms exist on a spectrum. The difference between them is primarily based on the degree to which they are accepted or resisted by other actors, including official regulators, within the formal or customary normative systems from which they deviate. Tolerated practical norms ‘deviate obviously from the rules of the game, while provoking neither warning nor real punishment.’²¹⁷ An example of these might be taking office stationery home ‘for work’ or utilising work hours for private purposes.

Such deviant norms enable regulatees to gain some sort of personal, social or practical advantage. Distinguishing them from adaptive norms, such norms tend to be non-explicit and may be characterised as being tolerated when the advantage or benefit gained by deviating from practical norms is ‘not too much.’²¹⁸ The characterisation of what is ‘sufficient’ and what is ‘too much’ is values-based, local, fluid and affected by many factors. Important factors include: who the actors are; their relative status; the environment; and the specific context for the performance of the norm.

4.4.5. Quasi-Tolerated Practical Norms

De Sardan uses the term ‘transgressing practical norms’ to describe norms that deviate even further from both the letter and the spirit of official norms than ‘tolerated’ practical norms.²¹⁹ These norms involve conduct that is ‘explicitly forbidden by law’ and is socially stigmatised,²²⁰ but which nevertheless are performed instead of bureaucratic or social norms. I have used the term ‘quasi-tolerated’ to indicate they represent conduct that might be ignored or allowed under specific circumstances, but is not generally accepted, and to distinguish such conduct from transgressing practices that are generally tolerated, such as shielding a colleague from regulatory action.²²¹

²¹⁷ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 28.

²¹⁸ See Chapter Seven, section 5.2, 270.

²¹⁹ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 28.

²²⁰ I.e. They transgress socio-cultural norms. Ibid.. 28.

²²¹ For example, by taking on a colleagues mismanaged case file to avert a complaint by their angry client, see Chapter Seven, section 5.3, p. 274.

4.4.6. Rebellious Practical Norms

De Sardan refers to a sub-type of transgressing practical norms which deliberately oppose established bureaucratic or cultural norms as ‘rebellious practical norms.’²²² Rebellious practical norms involve conduct that seeks to challenge the status quo or push for change, rather than simply adapting to or mitigating the effects of existing systems. Despite their subversiveness, rebellious practical norms may overall be beneficial to the regulatory system, such as challenging negative gender norms embedded within certain customary practices, or state law.²²³ Rebellious practical norms exhibit similarities to ‘defiant postures’ described by motivational posturing theory as a response of regulatees to regulatory threat.²²⁴ As with all practical norms, rebellious practical norms may self-legitimise, or source legitimacy from elsewhere (e.g. social norms or ‘*de facto* practice’).²²⁵

4.4.7. Changing Practical Norms

There may be many reasons why a particular divergent practice is tolerated. Common to all practical norms is that they provide some sort of benefit or advantage to those performing them. This benefit could be direct and personal, such as ‘moral superiority’ obtained from substantial compliance, or less direct and more communal, such as helping overcome capacity or resource constraints of local legal practice environments. Many lawyers in PICs, being educated in and bound by obligations under plural normative systems, identify as constantly shifting between the various sources of norms embedded within their legal practice environments.

Lawyers, even when moving within the private sphere, often feel compelled to manoeuvre in ways that enable them to concurrently accommodate normative pluralities in ways that are more or less tolerated, such as by bending ‘minor’ rules.²²⁶ For example, an I-Kiribati lawyer living in Kiribati has a simultaneous duty to uphold professional standards and customary obligations to family, land and tradition. When tensions arise between these duties a lawyer may breach professional norms, or conversely may breach customary norms in favour of adhering to their professional norms.²²⁷ Such deviant conduct may be a ‘one off’, or may be repeated, patterned and normative. Patterned breaches may give rise to observations of practical norms.²²⁸ De Sardan notes that norms inherited from colonisation (an example of which are lawyers’ codes of ethics in PICs) are

²²² de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015.

²²³ See further Chapter Seven, section 6, p. 279.

²²⁴ See above, section 4.2, p. 109.

²²⁵ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015, 28.

²²⁶ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²²⁷ Which norm is transgressed may well vary with each occurrence.

²²⁸ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015, 9.

‘frequently ill adapted to the local context’ and this ‘leaves more room for practical norms.’²²⁹ In a post-colonial context, such as exists in Fiji, Kiribati, or Vanuatu, this may mean that evidence of practical norms by lawyers may be more readily discernible because in some circumstances the conduct is ‘more or less tolerated and rarely acknowledged’ and carries ‘no sanction, nor social stigma.’²³⁰

5. CONCLUSION

This chapter has navigated a path through the theoretical complexity of problematising lawyer conduct in PICs. It has considered how successive waves of reforms to lawyer regulation in ‘most-developed’ former colonising countries shaped systems for lawyer regulation in PICs through legacies of colonisation. This chapter then applied existing frameworks of lawyer regulation to consider lawyer regulation in PICs which revealed limitations of traditional approaches to explaining conduct in pluralist contexts. It was argued this necessitated a theoretical framework that was relational, explanatory, and of use to regulators in practice. In the final section of the chapter, I described the theoretical framework that emerged abductively from analysis of my empirical data. The pluralist-relational approach to lawyer regulation draws from theories of relationality; pluralism; and compliance theories of regulation. This approach is used to discuss the empirical findings in Chapters Four to Seven. The next chapter, Chapter Four considers how lawyers in PICs conceptualise being a good lawyer and where lawyers learn to be good lawyers.

²²⁹ Bierschenk and de Sardan, *States at Work* (2014), 409.

²³⁰ *Ibid.*, 409-10.

CHAPTER FOUR: GOOD LAWYERS

*The thing is, in law school, you don't learn how to be a good lawyer because in law school you learn theory ... the practical side of it ... that's a different story altogether ... sometimes a client might rush in ... for any sorts of reasons. And for that, you don't learn in law school how to deal with that.*¹

1. INTRODUCTION

This chapter reports findings of the empirical study regarding how lawyers in three PICs: Fiji, Kiribati, and Vanuatu, conceptualise being a good lawyer and their perspectives on how and where lawyers in PICs learn to be good lawyers. Semi-structured interviews were conducted with 56 lawyers and judges which focused on two key questions: 'What does it mean to be a good lawyer?' and 'Where do lawyers learn to be good lawyers?'² Participant responses were wide-ranging and included observations about other lawyers as well as reflections on their own experiences and personal development. It further develops an archetype of the 'good lawyer' from the responses of participants. Archetypes, as grounded conceptual models depicting ideal qualities, serve a variety of roles in legal education and regulation as models and exemplars for individuals in the formation of professional and collective identities.³ This chapter, while focused on reporting the findings of my empirical study, also draws from prior scholarly research. To better understand how lawyers in PICs can be more effectively regulated, I was interested in learning how normative concepts of good versus bad conduct relate to lawyers' values and beliefs, particularly those arising from culture and predominantly Christian religious beliefs.⁴ Analysing how lawyers define and learn good lawyering can assist regulators of lawyers to understand motivations of regulatee behaviour such as social distancing from regulators.⁵ This understanding is crucial to understanding how lawyers reconcile conflicting norms and the capacities lawyers require to navigate compliance with professional norms in local contexts.

¹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

² Tables 3, 4 and 5 (pp. 69, 70, and 70) in Chapter Three provide a detailed breakdown of participant demographics. The full interview schedule is available at Appendix 1.

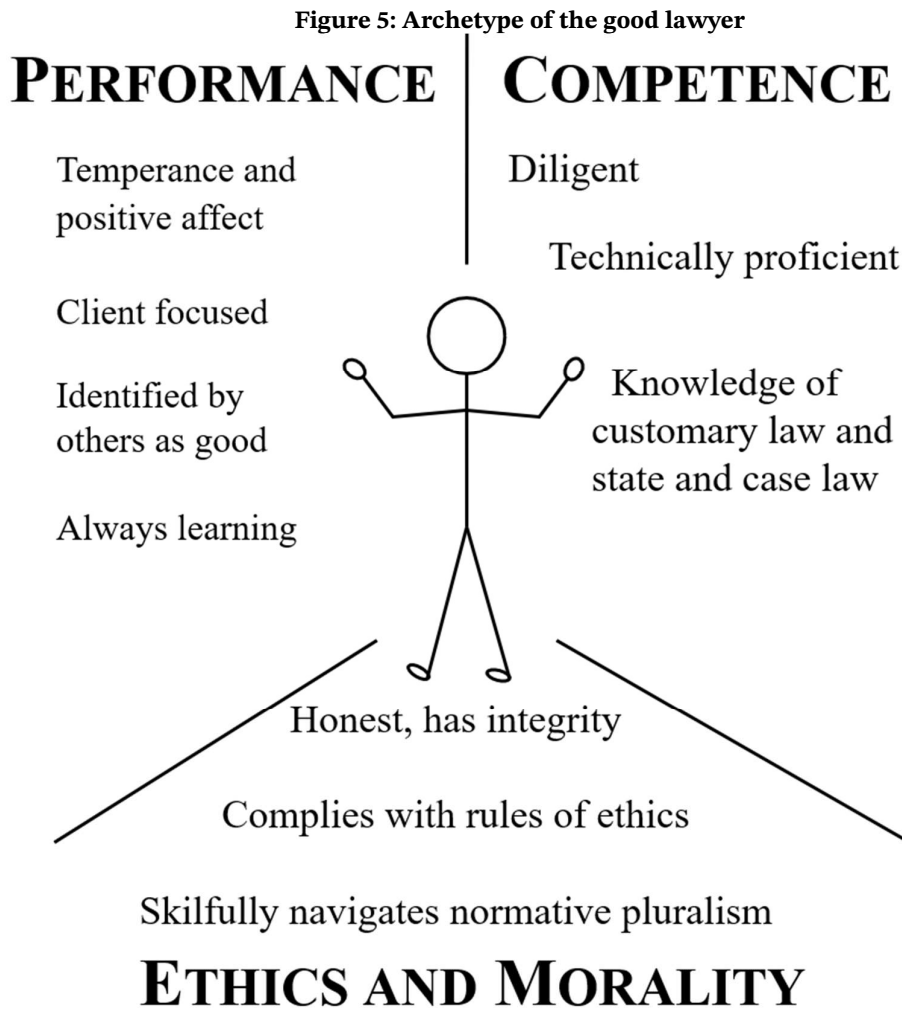
³ Carl Gustav Jung, *Four Archetypes* (Routledge, 2014).

⁴ see further Chapter Six, section 3.2. Religion, Identity and the Mission of Law, p. 232.

⁵ See Braithwaite, Murphy and Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007).

2. WHAT DOES IT MEAN TO BE A GOOD LAWYER IN PICS?

Figure 5 below draws from quotes by participants from Fiji, Kiribati, and Vanuatu to capture 10 essential qualities of good lawyers. These qualities were identified through iterative coding and analysis of interview data using the methods described in Chapter Two.⁶ Although inter-connected, each quality has been grouped under three discrete domains reflecting their relationship to lawyer competence, ethics and morality, and the way lawyers provide legal services – their performance. Each quality is considered in detail in the sections below.⁷



⁶ See Chapter Two, section 3. Research Design and Fieldwork, p. 59.

⁷ In addition to providing a baseline understanding of how lawyers in the Pacific Region conceptualise being a good lawyer, it is hoped that this archetype and the discussion in this chapter might provide generous fodder for constructive debate and scholarly discussion.

2.1. Competence

When talking about lawyer competence lawyers in PICs emphasised the need for diligence, technical proficiency (advocacy, research and writing), and knowledge of substantive laws. This is similar to general descriptions of the skills and qualities of good lawyers found in many introductory law textbooks and websites promoting legal education in Australia or elsewhere.⁸ However, one distinguishing feature of being a good lawyer in a PIC is the need to be knowledgeable about local customary law, especially land law. Participants revealed that currently this is mostly left to lawyers to learn ‘on the job’. As noted later in this chapter and in Chapter Eight, these responses revealed an opportunity for local legal educators and professional associations of lawyers to collaborate to better support students to bridge the gap from legal education to practice.⁹

2.1.1. A Good Lawyer is Diligent

A good lawyer ‘is diligent,’¹⁰ which among other things means ‘punctuality, time delivery and paying attention to detail.’¹¹ Being diligent means being ‘organised’;¹² ‘reliable and committed’;¹³ and ‘finding out exactly what the state of the law is, [and] how [to] apply the law to the particular facts of [a] client’s case.’¹⁴ Participants shared many examples describing lawyers who routinely failed to demonstrate diligence when appearing in court on behalf of a client or who failed to appear altogether.¹⁵ One senior lawyer in Fiji, only half-jokingly, lamented that:

*...everybody is bloody incompetent and it is very difficult to argue against them because they are on a different wavelength. Sometimes it is easy, but usually it is surprisingly difficult because you are playing soccer and they are playing netball and the judge is playing American football. It is not like it used to be.*¹⁶

⁸ See for example Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 2009).; David Luban, *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* (Rowman & Littlefield, 1984).; Wald and Pearce, ‘Being Good Lawyers: A Relational Approach to Law Practice’ (2016).

⁹ See below, section 3.2.1, p. 151. In Chapter Eight, legal education is identified as one possible area to improve regulation of lawyers in PICs ‘beyond law reform’, p. 303.

¹⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁴ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁵ Interviews conducted in Port Vila, Vanuatu (18 July – 5 September 2019); South Tarawa, Kiribati (5 July – 10 September 2018) and various locations Fiji (10 March – 21 April 2019).

¹⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. FI6.

By this, the lawyer was expressing their view that over the past 20-25 years, as the profession in Fiji has grown larger, they have encountered an increasing number of lawyers who they perceive to lack competence in the preparation and presentation of their arguments in court before judges who, in Fiji, are often foreign educated lawyers who lack familiarity with local law.¹⁷ ‘Preparation is key to being a good lawyer,’¹⁸ ‘you have to be prepared before going to Court ... whether it is a conference, a mention or a trial.’¹⁹ To one lawyer in Fiji, ‘90% of the battle is preparation. That has to come from you. You must burn the midnight oil to prepare your case.’²⁰

2.1.2. A Good Lawyer is Knowledgeable about (State) Law and Case Law

A lack of legal knowledge was often closely associated with a perceived lack of diligence. For example, a magistrate from Kiribati said:

Some lawyers always come prepared with research and case authority. However, some lawyers do not ... they bring the case and state what they are seeking and I ask if they have any case authority to assist me and they say ‘no I didn’t bring any’ and then I need to adjourn and ask them to come back with the authority. A good lawyer would do the work properly the first time.’²¹

Lawyers in all three countries emphasised the need to ‘be aware of changing laws to be able to provide accurate advice.’²² This meant being up to date with the latest ‘amendments to legislation [and] current case law.’²³ Underlying this is the paradigmatic challenge that in Fiji, Kiribati, and Vanuatu laws are not regularly consolidated to reflect amendments passed by parliament. This is a significant challenge in smaller jurisdictions such as Kiribati, where laws were last published in a consolidated form in 1980, and Vanuatu, where consolidated laws were last published by government in 2006.²⁴ Even in Fiji, where in 2016 the government joined with global legal publishing company LexisNexis to publish consolidated laws online, participants reported the consolidated laws available were sometimes dozens of gazetted amendments out of date.²⁵ Several

¹⁷ The role of foreign judges in PICs is considered in Chapter Five. p. 212.

¹⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

²⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²⁴ ‘PacLii Homepage’, *PacLii* (Web Page, 6 June 2023) <<http://www.pacLii.org/>>. See Sessional legislation.

²⁵ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. Verified by cross-checking amendments at <https://www.laws.gov.fj/>.

participants from Fiji reported keeping their own personally consolidated libraries of local legislation on file for the use of their firm.²⁶

Being knowledgeable about the law in PICs requires good lawyers to do more than just be up to date, it means also understanding how ‘to interpret laws from different angles’²⁷ and, especially for government lawyers, being a good lawyer means ‘knowing that existing laws should reflect current circumstances and old laws should be updated.’²⁸ Many examples of anachronistic laws were given by participants. For example, one participant from Kiribati noted that while the *Native Lands Ordinance* [CAP 61] regulates land matters it also regulates aspects of family law: ‘adoption is under the [Ordinance] ... I think because it relates to inheritance.’²⁹

2.1.3. A Good Lawyer is Knowledgeable about Customary Law

In Kiribati, Vanuatu and Fiji, knowledge of customary law, how it intersects with state law, and how to navigate both customary and state systems to effectively resolve legal disputes was viewed as particularly important to being a good lawyer. A lawyer from Vanuatu said:

*Because you have a lot of customary land law to practice here you need to have a good understanding of these whether it is to assist the custom owner themselves or any potential buyers. This is something that is very specific to Vanuatu.*³⁰

In Kiribati and Vanuatu, civil disputes involving land account for as much as 70% of all civil litigation. Given the small size of the legal professions in these countries knowledge of customary law was understandably viewed as important. A lawyer working in the Kiribati Office of the People’s Lawyer (OPL)³¹ said:

*Especially for Kiribati lawyers, it is important in private practice to understand land matters... land cases are one of the most common cases. So, if you work at OPL or private practice you need to understand land matters very well.*³²

Participants mostly discussed this quality in terms of entering into legal practice as newly admitted lawyers and feeling they lacked the knowledge to provide legal advice to clients in what is a

²⁶ This practice is not uncommon in the region and has been reported in other studies of lawyers in PICs see for example Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017).

²⁷ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati. The combination of native land and family law under a single ordinance is a legacy of colonial rule.

³⁰ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

³¹ OPL is Kiribati’s legal aid office. It provides civil and criminal legal services for I-Kiribati with few means.

³² Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

significant part of their practice. These findings have been confirmed by other scholars.³³ As noted in Chapter One, Customary Law or an equivalent course, has not been offered at USP since 2017 and ceased being taught face to face around 2010.³⁴ This means it is up to lawyers to fill the gaps in their knowledge on the job.³⁵ While both the breadth and depth of knowledge necessary to practise law varies based on a lawyer's practice area, no lawyers in Kiribati or Vanuatu and few lawyers in Fiji practice exclusively as subject area specialists and must accept clients with diverse issues connected with customary laws such as family law, or dealings with customary land. For the handful of law firms in Vanuatu and Fiji that specialise in commercial law and provide legal services primarily to corporate clients,³⁶ knowledge of customary law is required (at least) for any commercial dealing involving the lease or sale of customary land which comprises approximately 88% of all land in Fiji and 98% of all land in Vanuatu.³⁷ A good lawyer must learn to fill the 'customary law gap' in their knowledge.

2.1.4. A Good Lawyer is Technically Proficient

Technical proficiency as a lawyer means having good 'research skills, drafting skills and communication skills.'³⁸ Additionally, a good lawyer has 'got to be technologically savvy and open to change. Everything is changing fast, not just the technology, but as a result of the technology, client expectation, delivery times, performance expectations – all of that.'³⁹ In terms of research skills a participant from Kiribati observed that 'research skills are very important. You need to know where to look. Within the Government we have a server with lots of resources, but you aren't trained on it, so when you first start your job, you have to just ask around ...'⁴⁰ Legal drafting skills were seen as essential and require strong language skills, which, for reasons linked with colonisation, requires 'English proficiency'⁴¹ in addition to proficiency in indigenous and other official languages and dialects. Participants, including lawyers, judges and academics in all three

³³ See further Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012); Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017). See also internal USP School of Law Curriculum Map and Summary of Assessment Tasks 2020 – on file with author.

³⁴ See Chapter One, 3.2.1, p. 28.

³⁵ See further Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

³⁶ Such as Ridgeway Blake or Geoffrey Gee and Partners in Vanuatu, or Munro Leys, AP Legal or Siwatibau and Sloan in Fiji.

³⁷ Australian Agency for International Development, 'Making Land Work: Reconciling Customary Land and Development in the Pacific' (Report, Australian Agency for International Development, 2008). 4.

³⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

³⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁴⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁴¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

countries shared their perception that many lawyers struggle with English literacy and that this affected both written and oral communication skills.

A former judge in Fiji recalled that he presided daily over matters brought by lawyers who demonstrated a lack of competence. When asked to recall any particular areas the lawyers were deficient the judge said:

*Just basics, absolute basics: A very poor knowledge of the rules of evidence and their application; inadequate advocacy skills; and woeful drafting. I mean, it's not much more you can add to that list, is there?*⁴²

The same judge also observed that there were many lawyers they considered to be competent and named a number of lawyers they considered to be good lawyers who '[D]id prepare. They did come well-armed. And I think that was their training and those people were probably employing the better graduates as well.'⁴³

For other participants, technical proficiency meant something more than having sound research and drafting skills – indeed, several participants dismissed these as qualities every lawyer should have 'as a minimum.'⁴⁴ To be a good lawyer requires understanding something 'even lawyers who are 4-5 years out often still don't seem to grasp'.⁴⁵ That is that all legal disputes involve relationships which are made more complex and dynamic by the pluralist contexts of PICs:

*When you are dealing with litigation there's a big long game which ends with the judgment. Every communication, every directions hearing, mention, etc is all about winning that. Everything you do has got to focus on the result and you have got to take into account all of the human beings: the opposing lawyers; the judge; the clients; your witnesses. It is multi-dimensional. It is like a soccer game. So, in a soccer game you don't just concentrate on the kick off, you have to know where everybody is in a dynamic process.*⁴⁶

⁴² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. This participant also noted that standards today.

⁴³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. This participant also noted that standards today.

⁴⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. This participant also noted that standards today.

⁴⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji.

⁴⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji.

Technical proficiency, for a good lawyer, therefore includes both tangible and intangible skills connected with the acquisition of legal knowledge and its application to solve legal disputes within pluralist contexts.

2.2. Ethics and Morality

Participants discussed the ethics and morality of good lawyers in terms of three concepts: honesty and integrity; technical compliance with laws and professional rules; and the ability to navigate normative pluralism within legal practice environments. Participants spoke about being ethical or moral as both something an individual chooses and as something ‘innate’ to each individual. However, it was also evident that within local contexts the meaning of concepts such as ‘integrity’ and ‘compliance’, far from being dogmatic and inflexible, were often fluid and socially constructed, reflecting a complex ‘dance of compliance’ performed by lawyers in the course of legal practice. This dance of compliance by lawyers is considered further in Chapter Seven.⁴⁷

2.2.1. A Good Lawyer is Honest and has Integrity

Lawyers in PICs viewed that ‘being honest’⁴⁸ and having ‘integrity ... [and a] good character’⁴⁹ as critical qualities of good lawyers. Being honest means ‘being reliable and not lying to clients.’⁵⁰ Participants shared many examples of dishonesty by other lawyers. These included a wide range of conduct including: misleading the court; accepting a retainer and failing to complete relevant legal work; misleading clients as to the relative merits of their claim and accepting payments for hopeless cases; and an array of financial dishonesty offences including tax fraud; trust account theft, and billing clients for Personal Costs Orders.⁵¹

Having integrity means being trustworthy and being able to resist temptation and making ‘the right, ethically correct decision.’⁵² ‘Here in Vanuatu, “good lawyer” means to have a good

⁴⁷ See Chapter Seven, p. 249.

⁴⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁴⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁵¹ Various interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; and between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁵² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

character.⁵³ A participant from Fiji gave a clear personal example demonstrating the integrity of a good lawyer:

I am not currently working as a private lawyer right now ... [however] former clients will call me and ask to see me. They come to my office and offer me money to do work for them, but I have to tell them no, sorry I can't. What I do, is what a good lawyer does. A bad lawyer would say ok, give me the money, I will do some work on the side. A regulator can't really regulate this, so it comes down to personal integrity. The legal profession calls for integrity. But if you don't have that personal characteristic of integrity yourself then forget about everything else.⁵⁴

Another participant from Fiji provided a personal example of maintaining integrity by choosing to 'step out' and extricate themselves from an ethically risky situation:

As a prosecutor and a private lawyer, it is so easy to use your position to influence people in the wrong direction or give information that can mislead people. Simply because people in Fiji have reverence for your knowledge as a lawyer. Whatever you say they will accept or do. So, you can influence them. At the same time, you can be put in a situation that you have to decide whether or not to do something. I have been through those situations to the point where I decide I need to step out. A good lawyer needs to make these kinds of decisions. There is so much temptation to step out of line.⁵⁵

Participants also explained that a good lawyer must be trusted by the court. A participant from Vanuatu explained this in terms of being part of a lawyer's obligations as an officer of the court:

You are also an officer of the court and the court is where problems, if it comes to it, have to be solved. The chief function of a lawyer for the court is to act as someone that the litigants who come before the court can trust implicitly and will give legal advice so the court can feel quite confident that the lawyer who is appearing is standing in the shoes of the client. The duty to the court to do this is absolute.⁵⁶

Another participant from Fiji reflected simply: 'you need to be a good person to be a good lawyer.'⁵⁷

The notion that being a good lawyer requires 'being a moral person' is considered further below.⁵⁸

⁵³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁵⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁵⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁸ See section 3.6. Being a Good Lawyer is Innate, p. 163.

2.2.2. A Good Lawyer Complies with Rules of Ethics

Being a good lawyer means ‘being ethical’.⁵⁹ This requires a lawyer to know, understand and ‘be able to comply with’⁶⁰ relevant ‘professional conduct and [court issued] practice rules.’⁶¹ Compliance with these rules requires a lawyer to ‘act to the standard that the law requires [of them].’⁶² For example, ‘being competent;’⁶³ declaring conflicts of interest;⁶⁴ and ‘uphold[ing] the rule of law.’⁶⁵ Rules compliance was mostly discussed in strict terms, with participants explaining compliance primarily using examples of noncompliance. The most common examples of misconduct reported by participants involved: a lack of diligence and preparation; problematic financial and business management practices such as overcharging or poor client communications; and a lack of professionalism or professional discourtesy. Alleged misconduct ranged from minor breaches such as failing ‘to keep clients timely informed of the progress on their cases’⁶⁶ to major breaches such as: ‘asking their client for in kind contributions in addition to their payment. For example, asking clients to provide a pig for a function knowing that the client wouldn’t refuse them;’⁶⁷ ‘switching sides’ during an ongoing civil dispute;⁶⁸ or official corruption.⁶⁹ A participant from Kiribati said:

*[S]ome lawyers with close links to people in business sometimes, maybe use their role as [government lawyers] to assist relatives in business in whatever way they can. For me that is an unethical thing to do.*⁷⁰

It became clear from interviews that many participants themselves, not just anonymous ‘other lawyers,’ routinely engaged in conduct that deviated from rules of ethics, but which appeared to be widespread and accepted. Participants identified regular conflicts between duties and obligations

⁵⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati. see also Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁶⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁶² Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁶³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁶⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁷ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁶⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁶⁹ Various interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; and between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁷⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

arising under law and those arising under custom or as a consequence of the circumstances and constraints of local legal practice environments.⁷¹ Some participants gave examples where technical breaches of rules of ethics were unavoidable, such as legal aid resources in Vanuatu being insufficient to enable provision of independent legal advice to multiple co-accused;⁷² situations where lawyers are required to give customary gifts; and situations where clients offer gifts to a lawyer in circumstances where refusal would cause undue offence or shame.⁷³ Within the pluralist context of legal practice environments in PICs, compliance with some rules of ethics appeared to be a socially negotiated and somewhat fluid concept.⁷⁴ Thus, while rules compliance is important to being a good lawyer in PICs, understanding what constitutes compliance within local contexts and the ability to navigate this in different situations appeared to be a more nuanced way of understanding this quality of a good lawyer.

2.2.3. A Good Lawyer Skilfully Navigates Normative Pluralism

Participants expressed the quality of good lawyers as being able to skilfully navigate normative pluralism in terms of two main challenges: the first challenge is ‘walking an ethical tightrope’ between professional norms and customary/social norms; the second challenge is navigating and utilising normative systems to resolve complex legal disputes. For a good lawyer, the first challenge involves being careful when navigating professional practice situations to ensure their conduct complies with professional conduct and practice rules, while simultaneously navigating compliance with embedded customary and social norms. Examples of such embedded norms include respect for elders, duty to family/kin and giving and receiving gifts.⁷⁵

For example, customary norms regarding respect for elders may mean a junior lawyer might not question (even in private) an inaccurate legal opinion of a more senior lawyer to avoid causing shame for both parties.⁷⁶ Customary norms regarding obligations to kin may strongly compel a lawyer to accept a brief to act for kin in a land claim that has no merit because the landowners wish to proceed regardless and they only trust the lawyer, as their kin, to represent them.⁷⁷ Participants from all three jurisdictions discussed numerous situations in which a lawyer may be obligated by

⁷¹ See Chapter Seven. See also Chapter Six, section 2.2. Banuera’s Case. p. 221.

⁷² Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁷³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁷⁴ This is explored in detail in Chapter Seven, through the framing of practical norms.

⁷⁵ On these see further Chapter Six, section 3.1. Custom as a Dynamic Regulator of Lawyer Conduct, p. 225.

⁷⁶ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁷⁷ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu. Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

law or custom to give or receive gifts in the course of legal practice.⁷⁸ Participants described widely tolerated norms regarding lawyers accepting gifts from clients that were ‘appropriate in custom’ or ‘not too much’.⁷⁹ However, accepting gifts that were more than ‘just cultural’ or ‘too much’ was viewed negatively because ‘those gifts are not really gifts,’⁸⁰ they come with acceptance of an additional obligation to the client that other lawyers recognise as a threshold for unacceptable professional conduct. How lawyers navigate normative pluralism is considered in depth in Chapter Seven, however, the above examples help to illustrate the normative complexity that lawyers in PICs must navigate consistently to be good lawyers.

A participant described the internal and social conflict of being both a lawyer and an advocate for women and children when legal and customary norms conflict:

So, with the life of a lawyer, say for example myself, I know it is illegal to force a girl to marry a boy, but because that is my culture and I am bound to respect my elders because they are my aunties and uncles, I can't say anything against it. And this is me standing there confused, like, just let it happen. I know it is illegal, it is moral according to my tradition, but it is immoral. It is immoral, but we make it moral. And with the church, because the couple has already slept together, they see their union as consummated so they must marry so they can be seen as 'clean' Christians. This is always my issue when an issue like domestic violence comes up, one half of me hates it and wants to report it, my other half says 'it's none of your business, don't frustrate your custom, your neighbours, those couples,' and often I guess it is better to remain silent. Yet it is so crucial to speak up because the clients are not educated, but the lawyers are educated, they know the law and have an advantage.⁸¹

The capacity of a lawyer to navigate normative pluralism within legal practice environments also affects the options and strategies available to them in service to clients. One way of thinking of this is in terms of relational webs of influence connecting different actors to a dispute. All disputes in PICs are wrapped in these webs, some more intricately or firmly than others. Some legal disputes can be resolved informally by a phone call at the right time to the right person.⁸² Other disputes might require a lawyer with the right networks, undertaking customary rituals and additional formal legal steps. In other words, to be a successful lawyer in PICs, a good lawyer needs to

⁷⁸ Chapter Seven explores these norms in greater detail. In some situations, such as where visiting a village is necessary in the course of representing a client, expenses such as giving *Sevusevu* to the village headman, see Chapter Seven, section 5.2. Lawyers Accepting Gifts from Clients, p. 270.

⁷⁹ Tolerated gifts included a small sum of cash for ‘lunch money’, or ‘bus fare’, or services such as sweeping or cleaning. See further Chapter Seven, section 5.2. Lawyers Accepting Gifts from Clients, p. 270.

⁸⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁸¹ Interview with a participant.

⁸² Interview with a participant.

understand local norms and practices. One lawyer in Vanuatu explained this in terms of ‘social awareness’:

To go to the Magistrate’s Court your social awareness is more important than your knowledge of the law. Not to say that you don’t get a good result, the courts here can still achieve a good result, but your social awareness and your relationship with the other lawyers is in the room, the magistrate, the clerk who you deal with and has coffee with magistrate and talked about you. All of those things that social awareness and relationship are more important than your legal knowledge so long you have knowledge of some process procedure and that sort of thing.⁸³

A lawyer in Kiribati explained the importance of understanding and following social and customary norms in terms of trust, saying: ‘if a lawyer is to work in Kiribati they must know our customs, the norms and beliefs of people. This will help them to gain people’s trust.’⁸⁴ Participants from Fiji spoke in similar terms.⁸⁵

For lawyers working in PICs, normative pluralism impacts conduct in other ways. Several participants told stories of customary obligations overwhelming a lawyer to the detriment of their client:

I know of other lawyers who have been raised in the iTaukei custom and tradition. There can be situations where custom can interfere...for example a funeral. A lawyer may only be connected to the deceased in terms of their village. Just because they are from the next village, a custom of that family unit is such that each village has to contribute something for the funeral events. And this lawyer is the only one who can provide it, they need to go - so their cases are dropped like a sack of potatoes. This may then flow on to a default judgement against them, the other side may seek costs, etc. It can create many problems.⁸⁶

A participant from Vanuatu explained the plight of a colleague who had spent nearly a decade litigating a land matter with no prospect of success on behalf of their kin. Their kin refused to trust any other lawyer because the colleague is the first lawyer in the family, something that, in addition to being the eldest male in his family, elevated both his status and his feeling of obligation to represent his kin when asked. However, this elevated status and expectation also tend to increase the consequence of failure. The participant said their colleague was troubled and ‘weighed down’

⁸³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁸⁴ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁸⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁸⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

by the case.⁸⁷ In Kiribati, participants described a now less common practice of lawyers accepting similarly legally ‘hopeless’ land cases because the client would otherwise seek another lawyer and pay them instead.⁸⁸ A lawyer who is a good lawyer has learned to walk the ethical tightrope and how to draw from the strengths of both state and non-state systems to navigate local legal practice environments.

Non-indigenous lawyers reported that they are not exempt from the need to understand and navigate normative pluralism because their clients, peers and the law and justice sector all exist within the context of normative pluralism which must be navigated by them on behalf of clients. Further to this, while non-indigenous lawyers, naturally, are not bound by their own indigeneity they typically have customary obligations which arise through marriage, children or through their own embeddedness within local communities.⁸⁹

2.3. Performance

Lawyers in PICs identified that being a good lawyer meant being client focused; having temperance or self-control; having positive affect; seeking opportunities to learn; and cultivating a reputation as a lawyer who is both successful and moral. Such statements would not be out of place in any contemporary text directed to young lawyers or law students. However, a key distinction between the way lawyers in PICs and lawyers in other common law countries conceptualise the performance of good lawyers is encountered when considering examples of conduct that is tolerated locally in PICs but may not exemplify tolerated conduct elsewhere, such as in Australia. Examples of these are considered in detail in Chapter Seven and include practices such as accepting gifts from clients and norms regarding ‘relational legal practice’.⁹⁰

2.3.1. A Good Lawyer is Client-Focused

Participants explained that being client-focused meant a number of different, but related things. For some participants being client-focused meant something akin to good customer service, requiring good communication with clients, managing their expectations and ‘being able to

⁸⁷ Ultimately the lawyer lost on appeal in the highest appellate court in Vanuatu and the family blamed the outcome on ‘black magic’. This had the fortunate side effect of absolving the beleaguered lawyer from his ‘failure.’ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁸⁸ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁸⁹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; and between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁹⁰ See Chapter Seven, section 5.1. Relational Legal Practice, p. 267.

identify when clients need to be updated and doing it.’⁹¹ After all, ‘lawyers are professionals and our clients come to us for service, and so a good lawyer does not forget that.’⁹² For others, being client focused meant delivering a good product, ‘whatever role that lawyer is performing it is a product that somebody buys and pays money for. So, in terms of fairness to the consumer you should be competent and proficient in the delivery of the product, or legal services.’⁹³

Several participants saw being client-focused as meaning a lawyer ensures clients are satisfied. For example, a participant from Fiji explained: ‘Delivering to your clients and bringing client satisfaction. That is what being a good lawyer means to me. They come to us with instructions, I complete the work, I see a smile on their face when the work is done, that is good enough for me.’⁹⁴ Unfortunately, not every client is left with a smile on their face, even when a lawyer has done everything, they possibly can to help their cause. Accordingly, other participants viewed being client-focused as acting ‘for the best interest of [their] client without thinking of how much you will charge [them].’⁹⁵ For one participant from Vanuatu, rather than seeking client satisfaction as evidence of a good job, being a good lawyer means:

*Getting the best result that I can in a court action for my client. It doesn't mean winning the case, it means either winning the case in a way that solves my client's problem with the other side as well as can be done, Or, if they are going to lose, getting the least possible damage in the loss ... hopefully, being worth the fees [the client] has to pay in order to get the result ...*⁹⁶

Understanding the ‘bigger picture’ of a client’s interests and acting in their best interests was identified by a number of participants as important to being a good lawyer. Another participant from Vanuatu said:

*The best private lawyers are the ones who solve the problem; there's no doubt about that. The best lawyers are not the ones who go to court and win the cases because half of those cases that go to court could be resolved much more economically for their client and without all the stress in the early stage if the lawyer had it in mind [its] resolution.*⁹⁷

⁹¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁹² Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁹³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁹⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁹⁵ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁹⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁹⁷ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

Participants gave many examples of lawyers making decisions that were not in the best interests of clients. A participant from Kiribati observed that:

Most lawyers allow adjournments in cases instead of arguing to proceed. For example, when the opposing side's counsel isn't present and an adjournment is sought by their paralegal or client, the lawyer should argue to proceed rather than allow the adjournment. If they adjourn, they will get paid, then when they show up again, they get paid for appearance fees, so he believes there is a personal commercial interest in accepting adjournments.⁹⁸

In Fiji, several participants echoed similar views, but rather than financial gain, the personal advantage obtained by the lawyer is the capacity to comply with social and customary obligations and expectations, one said:

For a lawyer, if it is a choice between attending to a trial, or attending a funeral and related obligations of a close uncle, then family will come first. This is an area in which lawyers often breach ethics rules, but not in a way the LPU has been able to regulate effectively.⁹⁹

Participants in all three countries reported being aware of lawyers who regularly bill clients for court appearances even where the lawyer attends having pre-arranged with the opposing counsel to agree to an adjournment.¹⁰⁰ While liaising with other lawyers and the courts to manage complex schedules is a feature of legal practice in most countries, there is scope for such conduct to diverge significantly from professional norms where it involves billing clients improperly, or providing a magistrate with a false, but perhaps convincing reasons for an adjournment.¹⁰¹ As is considered further in Chapter Seven, such divergent practices communicate signals to regulators. For example, they may reflect adaptations by lawyers to the conditions of local legal practice environments such as high caseloads.¹⁰²

It should be noted that lawyers engaged in legal work such as policy or law reform do not provide legal services to 'clients' in the same sense as lawyers engaged in private practice. For such lawyers a broader conception of the term 'client' might reasonably include those impacted by policies or law reforms. This broader definition of client could encompass a wide range of stakeholders

⁹⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁹⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁰⁰ Interviews conducted in Port Vila, Vanuatu (18 July – 5 September 2019); South Tarawa, Kiribati (5 July – 10 September 2018) and various locations Fiji (10 March – 21 April 2019).

¹⁰¹ An example given was 'the unavailability of a witness'. Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁰² See Chapter Seven. 4.2. Relying on Adjournments as a Case Management Strategy, p. 260.

including government bodies, non-government organisations and communities affected by proposed changes. As legal professionals operating outside traditional client-lawyer relationships, these lawyers are entrusted with a unique role in shaping legal frameworks that contribute to the public good.

2.3.2. A Good Lawyer has Temperance and Positive Affect

I have used the term temperance here to represent a number of related virtues participants in all three countries said were important to being a good lawyer. I have used the following definition of temperance: ‘moderation or self-restraint in action, statement, etc.; self-control.’¹⁰³ One way a good lawyer demonstrates temperance is they ‘don’t violate the law and avoid perception that [they] breach the law.’¹⁰⁴ Having temperance means you have ‘patience and perseverance’¹⁰⁵ in all dealings with clients, courts, colleagues and others. Having temperance means being humble and a good lawyer should ‘discipline his or her ego with the rod of humility;’¹⁰⁶ although good lawyers also ‘need confidence.’¹⁰⁷ A participant from Fiji shared that they felt a tension between temperance and self-confidence:

You could say I’m a good lawyer and not have to worry about a thing, drink all night and still be in a bubble and say ‘I’m a good lawyer’. Or you could be the kind of person who says, I’m never going to get this right, even though you come off as a great lawyer and it’s just that you are sceptical about yourself.’¹⁰⁸

In addition to temperance, participants said personality and disposition are important to being a good lawyer. ‘A good lawyer must have the right personality – they must conduct themselves properly in public as well as privately.’¹⁰⁹ For good lawyers in PICs, it includes things such as ‘courtesy to other lawyers;’¹¹⁰ ‘good manners’¹¹¹ and being ‘friendly.’¹¹² Some participants also put this in terms of professionalism, for example ‘a good lawyer has to do his or her job

¹⁰³ Macquarie Dictionary Online, ‘Macquarie Dictionary Online’, *Macquarie Dictionary* (Web Page, 1 June 2023) <www.macquariedictionary.com.au>.

¹⁰⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁰⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁰⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁰⁷ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁰⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁰⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹¹⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹¹¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹¹² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

professionally.¹¹³ Other participants emphasised the need to be ‘energetic’; ‘positive’; and possess skills to ‘cope with stress’; and ‘stay positive’.

Participants descriptions aligned with the concept of ‘positive affect’. Positive affect is a term commonly used in psychology to refer to ‘the extent to which a person feels enthusiastic, active, and alert. High positive affect is a state of high energy, full concentration, and pleasurable engagement, whereas low positive affect is characterized [sic] by sadness and lethargy’.¹¹⁴ Positive affectivity has been closely linked with pro-social individual behaviour¹¹⁵ and wellbeing.¹¹⁶

Participants provided many examples of lawyers who lacked these qualities. For example, lawyers who are routinely ‘rude’; ‘negative’; ‘disorganised’; or who are sexist or bigoted.¹¹⁷ One participant from Fiji shared a story told by a former judge at a recent workshop they had attended. The judge had granted a break for a lawyer and his client to confer. ‘During the break he [the judge] could hear clearly ... the lawyer and his client madly fighting, arguing and swearing at each other in the Courtroom ... As the Judge heard everything ... the Judge decided to recuse himself in the interest of Justice, as he did not want to prejudice the case.’¹¹⁸ Here an absence of temperance harmed the interests of both the lawyer and the client.

2.3.3. A Good Lawyer is Always Learning

To be a good lawyer ‘you have to be committed to constant learning,’¹¹⁹ because ‘learning is a continuous process and skills and knowledge will grow with experience.’¹²⁰ Becoming a good lawyer means ‘learning from mistakes’¹²¹ and making incremental improvements through repetition ‘always going back to the books, the principals, the precedents, checking stuff - that

¹¹³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹¹⁴ David Watson, Lee Anna Clark and Auke Tellegen, ‘Development and Validation of Brief Measures of Positive and Negative Affect: The Panas Scales’ (1988) 54(6) *Journal of Personality and Social Psychology* 1063. 1065. See further: Braithwaite, ‘Games of Engagement: Postures within the Regulatory Community’ (1995); Evelien Snippe et al, ‘The Reciprocity of Prosocial Behavior and Positive Affect in Daily Life’ (2018) 86(2) *Journal of Personality* 139. Patty Van Cappellen et al, ‘Positive Affective Processes Underlie Positive Health Behaviour Change’ (2018) 33(1) *Psychology & Health* 77.

¹¹⁵ Snippe et al, ‘The Reciprocity of Prosocial Behavior and Positive Affect in Daily Life’ (2018)

¹¹⁶ Van Cappellen et al, ‘Positive Affective Processes Underlie Positive Health Behaviour Change’ (2018).

¹¹⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹¹⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹¹⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

diligence - and then applying it on a case-by-case basis.’¹²² ‘You learn by researching for every case.’¹²³ Participants explained that cultivating this attitude of openness to learning was important because law school does not teach a lawyer everything they need to know to be successful in legal practice. Education and practice experience as means to becoming a good lawyer are considered further below.¹²⁴

2.3.4. A Good Lawyer is Identified by Others as Good

All participants either said they believed themselves to be good lawyers, or were humbler, saying instead that they ‘try’ to be a good lawyer, ‘[do not] believe they are a bad lawyer’, or that they ‘hoped others thought they were a good lawyer’.¹²⁵ While a lawyer can subjectively identify as a good lawyer, it was clear that many participants thought being recognised by others as being a good lawyer was important. A participant from Fiji said: ‘Other people have to say you are a good lawyer. You can’t define yourself as one.’¹²⁶ Others related this to the tangible benefit a lawyer derives from having a reputation for being good. For example, participants noted that law firms with good reputations typically attract the majority of corporate and government work in Kiribati, Vanuatu and Fiji. A lawyer from Kiribati said simply, ‘reputation helps in getting work, especially in private practice.’¹²⁷ A lawyer from Fiji tried to explain why having a good reputation was important to being a good lawyer: ‘I can probably get a better deal for my client because of my reputation and because the court trusts me.’¹²⁸ But what does having a good reputation mean?

For one participant having a reputation for ‘billing fairly’¹²⁹ was important to being a good lawyer because overcharging is such a common complaint against lawyers. One participant from Vanuatu became energised as he described that having a good reputation meant:

¹²² Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹²³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹²⁴ See section 3. How Do Lawyers Learn to be Good Lawyers?, p. 147.

¹²⁵ Various interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; and between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹²⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²⁷ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹²⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

*You deliver on time, you meet at the deadline, you produced a piece of work of quality. Everybody is talking about you being a good lawyer and your name is floating around in town.*¹³⁰

For some participants a good reputation was about winning cases, ‘if you lose cases your integrity will drop ... reputation is the paramount thing here. You have to do everything possible to win every case you take.’¹³¹ One lawyer implored a colleague and friend to stop accepting cases with no merit because 90% of the colleague’s applications were being struck out and ‘because of the impact of bringing these cases on his reputation and on the reputation of lawyers.’¹³² Another participant was strategic about cultivating a winning reputation by carefully choosing their clients, pointing out that ‘as a lawyer your reputation is important, so why would you take on losing cases?’¹³³

Lawyers typically develop a reputation as a bad lawyer from negative interactions with peers, judges, clients and other actants within legal practice environments which are then discussed or shared as stories. Participants gave examples of numerous lawyers whose good reputations were ruined by a finding of professional misconduct, or by personal circumstances such as drug addiction or declining mental health.

¹³⁰ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹³¹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹³² Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹³³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

3. HOW DO LAWYERS LEARN TO BE GOOD LAWYERS?

Participants identified key experiences such as legal education, mentoring and key environments such as law school, courts and law firms as places where lawyers learn to become good lawyers. In addition to learning from state regulatory sources, such as findings by disciplinary committees, participants identified that being a good lawyer is linked with an internal desire to be good which lawyers learn from a multitude of sources and experiences throughout their lives. Lawyers in PICs are first introduced to depictions of good lawyers as children through film, news and other media. These depictions vary wildly in their portrayal of competent and ethical legal practice. It is typically not until they attend ‘Law School, the University of the South Pacific ... ‘that most lawyers begin to develop an awareness of the qualities of good lawyers ‘But that is not where it ends ...’¹³⁴ To be a good lawyer, experience in legal practice is needed because ‘learning is a continuous process and skills and knowledge will grow with experience.’¹³⁵ As one participant put it:

*The more court experience you gain, the better you become. There is no substitute for hard work and experience ... I learned from my senior. I used to sit with him in court and observe. Sometimes I would assist ... It took me a couple of years of being an assistant and then after that I would go out on my own.*¹³⁶

Mentoring and supervision, especially in their early years of legal practice, was perceived in Fiji, Kiribati, and Vanuatu as being critically important to supporting lawyers to develop as good lawyers. Participants also noted that lawyers learn extensively from their peers and from professional communities. Peers and professional communities are often positive sources of influence on lawyer conduct, but equally participants cautioned that lawyers needed to be careful about who they socialise with and look to as peers.

Penfold’s study of legal education in Vanuatu and Solomon Islands also identified ‘the gap’ or transition to legal practice as a significant period of time for the development of lawyers’ identities, ethical practices, and skills.¹³⁷ This identity, ‘lawyer’, is just one of many ‘fractal identities’ an

¹³⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. As of November 2023, the University of the South Pacific continues to train the majority of lawyers in PICs. However, popular course offerings from the Fiji National University and the University of Fiji now provide alternative pathways to legal practice. This competition might reasonably be expected to catalyse innovation and development in legal education and training in PICs over the coming years.

¹³⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹³⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹³⁷ Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017).

individual lawyer has, together with their existing identities derived from things such as *wantok*, ethnicity, religion, gender, political beliefs, experiences, etc.¹³⁸ Being ‘good’ or ‘being a good person’ is an identity most participants attributed to a good lawyer. Participants observed that while being good is innate, one learns how to ‘do what is right’ mostly from external sources of social norms such as their parents, elders, peers, cultural practices and religion. For most lawyers, their peers and the professional relationships they cultivate typically involve multiple shared identities. For example, for some participants, their strong Christian faith and peer networks have led them to cultivate a shared hybrid identity as ‘Christian-lawyers’ and to view law as their ‘mission field’. In this way, a strong morally normative identity as a practising Christian serves as a lens, magnifying shared normative expectations about being a good lawyer.¹³⁹ Such identities are innate to an individual and yet they are constantly in conversation with normative pressure broadcast by other proximate actors, environments and situations.¹⁴⁰

Understanding how lawyers in PICs learn to be good lawyers is important for the design and implementation of regulatory strategies to better support them. It reveals the multiple institutions, networks and phenomena that influence the conduct of lawyers within local legal practice environments. The section that follows sets out responses by participants to questions about how lawyers learn to be good lawyers. The roles of state and non-state sources of regulation in influencing lawyers to be good lawyers are considered in greater detail in Chapters Five-Seven.

3.1. State Regulatory Systems

Participants did not specifically identify state regulatory systems as a key mechanism by which lawyers learn to be good lawyers. Nevertheless, being a good lawyer means becoming qualified and practising in accordance with statutory and judge made laws. In the course of interviews, participants discussed four mechanisms by which state regulatory systems influence lawyers to be good lawyers. The first is the written statutory frameworks which prescribe the technical standards and codes of ethics for lawyers – good lawyers learn and comply with these. The second mechanism

¹³⁸ Strathern, *Partial Connections* (2005); Wagner, ‘The Fractal Person’ 1991; see also Wagner and Ingold, *The Invention of Culture* (2016); Mandelstam, ‘A Case for The’fractal Self: The Scope of Moral Consideration as Influenced by Personal Identity’ (2020); Carr-Saunders and Wilson, *The Professions* (1933); Moore, *The Professions: Roles and Rules* (1970); Eraut, *Developing Professional Knowledge and Competence* (1994). See discussion in Chapter Six at 0.

Relational Perspectives on Non-State Influences of Lawyer Conduct, p. 218.

¹³⁹ See further case study on KILN in Chapter Six at 3.2.2, p. 234.

¹⁴⁰ On identity and self-other positioning see Eleni Andreouli, ‘Identity, Positioning and Self-Other Relations’ (2010) 19(1) *Papers on Social Representations* 14.1.; see further Braithwaite, *Crime, Shame and Reintegration* (1989); Sorenson, Rivkin and Fleming, ‘Complexity, Networks and Knowledge Flow’ (2006) Tubiana, Miguelez and Moreno, ‘In Knowledge We Trust: Learning-by-Interacting and the Productivity of Inventors’ (2022).

is formal systems for complaints against and discipline of lawyers – sanctions produce deterrent effects that good lawyers learn from and strongly signal professional norms to lawyers which good lawyers do not ignore. The third mechanism comprises the activities of formal regulators and their relationships with regulatees. The fourth mechanism is through the judiciary which influences lawyers in three main ways: promulgating rules of procedure and practice for lawyers;¹⁴¹ rebuking lawyers for poor conduct in open court, including, where appropriate, exercising judicial authority to sanction lawyers;¹⁴² and informally through guidance or advice given privately, e.g. in chambers.¹⁴³ These are all considered in greater detail in Chapter Five.

3.2. Learning to be a Good Lawyer Begins at ‘Law School, USP ... But That is Not Where it Ends’¹⁴⁴

For the majority of lawyers in PICs, starting university at USP marked a critical milestone along their personal journey to becoming a lawyer. The small size of the legal profession in most PICs means that cohorts of students become peers and friends and form the genesis of professional communities of lawyers. Image 7 on page 150 shows the first 37 law graduates from USP’s Professional Diploma in Legal Practice (PDLP). It was taken in 1998 at the Laucala Campus in Suva. Student experiences at university have long been studied as part of efforts to support positive outcomes for student development.¹⁴⁵ As is considered further in Chapter Six, the environment of legal education can be a significant incubator for future regulatory networks. Friendships formed competing in a mooted competition, or attending other extra-curricular activities such as Christian Fellowship meetings, may grow into future business partnerships, or even into a global network of Christian lawyers such as the Kingdom International Legal Network (KILN).¹⁴⁶

At university, law students ‘learn the principles’.¹⁴⁷ However, the overwhelming response from participants was that their formal legal education at university did not equip them with some of the knowledge and skills they most needed in legal practice. As a participant from Vanuatu noted:

¹⁴¹ To those not familiar with such rules, these range from the width of document margins accepted by the Registry, to what a lawyer is permitted to wear in court.

¹⁴² An example of this being personal costs orders.

¹⁴³ The idiom ‘a good lawyer knows the law; a great lawyer knows the judge’ somewhat loses its cutting edge when we think of judges as supportive mentors of all lawyers in service to the wider interests of justice.

¹⁴⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁴⁵ See Vicki Trowler, ‘Student Engagement Literature Review’ (2010) 11(1) *The Higher Education Academy* 1.

¹⁴⁶ See case study on KILN in Chapter Six, section 3.2.2, on p. 234.

¹⁴⁷ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

*Ultimately law school is 3-4 years and only the last 2 are where you're actually kind of trying to get the methodology and starting to apply it, but I do think you only really get that in legal practice.*¹⁴⁸

While most participants acknowledged university as the beginning of their education and that individuals bore personal responsibility to round out gaps in their own knowledge, many participants also felt their education was lacking in the areas of substantive customary law and how law is practiced locally. In PICs, knowledge of customary law and practices is essential to competent legal practice because custom is deeply embedded within all state systems – including the legal system – and this enables a practitioner to navigate alternative pathways to resolve client's legal problems. However, it takes lawyers many years to learn to navigate the complexities of legal practice, even with good mentors and supervision. This means that learning to be good is a dynamic and ongoing process because:

*Adults learn from application. So, on the job training is a really large part of it. So, one part of the answer is your education. But, the other part of it, and totally as vital as the education is learning from others [in practice].*¹⁴⁹

Image 7: First graduating cohort PDLP, University of the South Pacific



Source: USP School of Law (taken in 1998, Laucala Campus, Suva, Fiji)

3.2.1. The Gap from Legal Education to Legal Practice

Globally, law schools face pressure to produce 'practice ready' graduates.¹⁵⁰ In many countries this has led to various efforts over the years to better equip law graduates with desirable skills and

¹⁴⁸ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁴⁹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁵⁰ See for example discussion of this in Robert J Condlin, 'Practice Ready Graduates: A Millennialist Fantasy' (2014) 31 *Touro Law Review* 75.; see also Margaret Martin Barry, 'Practice Ready: Are We There Yet' (2012) 32 *Boston College Journal of Law & Social Justice* 247.

knowledge and to ‘bridge the gap’ between legal education and legal practice.¹⁵¹ At the time of the research, Professor Emeritus Eric Colvin was Head of the USP School of Law. He explained that unlike most law schools the USP School of Law¹⁵² was ‘established to train people to enter the legal profession in the Pacific.’ However he cautioned that this did not equate to an expectation that the USP School of Law could ‘turn out fully formed lawyers.’ The objective was to instead ‘give people a skillset and a body of basic knowledge that will enable them to grow and develop subsequently when they get out there and practice.’¹⁵³ As Professor Tony Angelo, one of two academic consultants engaged in 1991 to assist in developing the curriculum explains, the USP School of Law specifically sought to ensure that lawyers engaged in practice in the Pacific ‘have a training which is sensitive to the cultural environment in which the Pacific laws work’ and to meet the ‘need to generate local legal materials ... available in an accurate form’.¹⁵⁴

Professor Colvin advised that the key priority of the USP School of Law today was to develop law graduate’s technical competence – this is done through the LLB and PDLP program. However, he noted, technical competence and capacities are further developed through mentoring and legal practice experience. Responsibility for narrowing knowledge and skills gaps when moving from education to legal practice is shared between legal profession regulators, educators and employers. Indeed, statutory frameworks in most PICs recognise that new lawyers require supervision and mentoring through mandatory restrictions imposed on their right to practice law which are usually complied with.¹⁵⁵ Such restrictions apply in Fiji, Vanuatu, and Kiribati, although many participants explained that in most small private firms, young lawyers often, if not always, perform work unsupervised. However, as noted by one participant:

*I think they really need to rethink the whole PDLP program, because in the last four or five years, these young lawyers have been appalling. That’s just my experience.*¹⁵⁶

Professor Colvin expressed awareness of the challenges faced by new lawyers in learning how to cope with the demands of being a legal practitioner in a PIC and their desire for better support. He

¹⁵¹ See Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017); see also Penfold, ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’ (2013). See generally William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (John Wiley & Sons, 2007).; historically see E Gordon Gee and Donald W Jackson, ‘Bridging the Gap: Legal Education and Lawyer Competency’ (1977)(4) *Buy Law Review* 695.

¹⁵² Since 2022 it is officially known as the ‘Discipline of Law’ within the Faculty of Arts and Social Sciences.

¹⁵³ Professor Emeritus Eric Colvin, Head of Law, School of Law (now Discipline of Law), University of the South Pacific. Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁵⁴ Angelo and Goldring, ‘The Study of Law at the University of the South Pacific’ (1994). 104.

¹⁵⁵ South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017).

¹⁵⁶ Interview conducted between 10 March and 21 April 2019, Fiji.

lamented the limited capacity and engagement by professional associations in the region to assist new lawyers to bridge the gap.

Pacific scholars have written about the challenges of legal education and bridging the gap to legal practice in PICs for many years.¹⁵⁷ According to Robert Cartledge:

*University of the South Pacific graduates are often thrust into positions of authority and responsibility beyond the level of their “training” without the support of an experienced mentor ... They are literally thrown in at the deep end.*¹⁵⁸

Viliame Puloa confirms this, saying:

*there is a great amount of work pressure on young lawyers who have been thrown into the deep end of their legal career ... climbing the career ladder has so far been rather quick.*¹⁵⁹

Participant responses revealed that most felt underprepared by legal education to navigate normative pluralism in legal practice. Australian legal ethicist Adrian Evans argues that good lawyers can learn how to act ethically and morally by cultivating an understanding of general morality. Evans defines understanding general morality as being capable of applying three main ethical frameworks to ethical problems: Kantian; consequentialist; and virtue ethics.¹⁶⁰ He focuses on the distinction between ethical obligations of lawyers that arise as a duty (e.g. from rules) rather than consequences, and ethical obligations that arise from an individual's character or values –

¹⁵⁷ Guy Powles, 'Legal Education and Information in Higher Education in the Pacific' (1983) 12(1) *Pacific Perspective* 17.; Angelo and Goldring, 'The Study of Law at the University of the South Pacific' (1994); Grimes, 'Vocational Legal Education in the South Pacific - Designing and Implementing a Programme for Progress' (1996); Jennifer Corrin Care and Sue Farran, 'Law in the Pacific: Implications of Jurisdictional, Cultural and Ethnic Diversity for the Teaching of Law' (1997) 31(3) *Law Teacher* 283.; Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998); Corrin Care, 'Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific' (2006); Penfold, 'Teaching Legal Ethics and Professionalism in a South Pacific Context' (2013); Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017); Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017; Bartlett, 'A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands' Legal Profession' (2018). On the challenge of higher education for Pacific governments see more generally Michael Crossley and Pearlette Louisy, 'The Changing Role of the Small State in Higher Education: A Comparison of National and Regional Initiatives in the Caribbean and the South Pacific' (1994) 24(2) *Compare* 109.

¹⁵⁸ Cartledge, *In Depth; Thrown in at the Deep End* (2011).

¹⁵⁹ South Pacific Lawyers' Association, *Experiences as a Young Lawyer in the Pacific Discussions at the Pacific Young Lawyers' Forum* (2011). Due to the lack of lawyers in the Pacific, young lawyers are forced to fill in the gaps of senior posts in the legal fraternity.

¹⁶⁰ Adrian Evans, *The Good Lawyer* (Cambridge University Press, 2014). See in particular the discussion in Chapter Three pp. 62-80. On Kant and legal ethics see further: Ferrara, 'Moral Duties and Juridical Duties: The Ambiguity of Legal Ethics Considered through the Prism of Kant's Metaphysics of Morals' (2022).

virtue ethics – which he argues ‘offers the best fit with what the community want to see in new lawyers and what the profession wants to encourage through its professional conduct rules.’¹⁶¹

Evans makes a strong case that ‘general morality can align good legal education with good legal practice, so that from cradle to grave, good and not-so-good lawyers are strengthened.’¹⁶² Penfold makes a similar argument calling for improvements to the contextual teaching of legal ethics in PICs together with improving supervision and support of lawyers in practice and the cultivation of stronger ethical environments.¹⁶³ This need for lawyers in PICs to cultivate an innate understanding of legal ethics through a holistic and contextualised approach was evident from participant responses. It would be desirable for further research to be conducted to investigate the substance and form of legal ethics education for law students and lawyers in PICs and seek to measure its effects on strengthening professional ethics of lawyers in practice.¹⁶⁴

In 2013, Penfold published a paper entitled *Teaching Legal Ethics and Professionalism in a South Pacific Context*.¹⁶⁵ This paper identifies a number of nascent issues for improving legal professionalism and ethical practice in PICs and ‘closing the gap’ from education to legal practice. Among notable issues, Penfold observes that no textbook or collection of materials on ethics and professionalism in the South Pacific has been published.¹⁶⁶ None have been published in the decade since Penfold’s observation.¹⁶⁷

A significant part of the challenge of closing the gap from education to legal practice in PICs is that many barriers are systemic. For example, poor student language skills originate in declining literacy standards within primary and secondary education systems in PICs which in turn

¹⁶¹ Evans, *The Good Lawyer* (2014). 80.

¹⁶² Ibid. xiv. A deeper exploration of this is a rich area for future research.

¹⁶³ Penfold, ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’ (2013). 23. See also Eli Wald, ‘The Contextual Problem of Law Schools’ (2018) 32 *Notre Dame Journal of Law, Ethics & Public Policy* 281.; Burridge and Webb, ‘The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School’ (2015); Bruce Green, ‘Less Is More: Teaching Legal Ethics in Context’ (1998) 39(2) *William and Mary Law Review*; Allan C Hutchinson, ‘Legal Ethics for a Fragmented Society: Between Professional and Personal’ (1998) 5(2-3) *International Journal of the Legal Profession* 175.

¹⁶⁴ On related research in Australia see Vivien Holmes et al, ‘Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers’ (2012) 15(1) *Legal Ethics*; on legal ethics education in PICs see Penfold, ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’ (2013); Penfold, ‘Developing Legal Communication Skills in the South Pacific Context’ (2014); Penfold, ‘Contextualising Legal Education: The Case of Solomon Islands and Vanuatu’ (2017).

¹⁶⁵ Penfold, ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’ (2013).

¹⁶⁶ Ibid. 23.

¹⁶⁷ I sincerely hope the person who writes about this topic in 2033 will be able to report a more positive story.

negatively affect the capacity of students to participate in tertiary legal education.¹⁶⁸ USP has made various efforts since 2015 to address the literacy problem through benchmarking language skills on entry to university and academic English language courses designed to scaffold students to strengthen language and literacy skills to support them throughout their degree.¹⁶⁹ In addition to this, attempts have been made to integrate language teaching into the LLB program. Having taught law at USP for eight years, I am deeply sceptical that these efforts are sufficient, let alone appropriate and adapted to the needs of law students.

Research by Penfold also confirms many additional challenges for USP in ensuring its staff and curriculum meet the needs of students on their pathway to legal practice.¹⁷⁰ These challenges range from reliance on foreign staff unfamiliar with the region, to considerable changes in both the structure and content of the LLB over time. These changes include the removal of practical and clinical assessment components from some courses, while relegating teaching on customary land tenure from 'the core Property II course, before being removed from that into an elective course'¹⁷¹ that has not run since 2012.¹⁷² Penfold presents an excellent analysis that shows that 'outcomes-based educational approaches, and pursuit of program learning outcomes ... could provide a useful framework and direction for educators.'¹⁷³ Critically, addressing institutional challenges for the delivery of LLB teaching and assessment, will support lawyers in PICs to be good lawyers.

3.2.2. Continuing Professional Development (CPD)

CPD has been considered vitally important for ensuring minimum professional standards of lawyers, whether in private practice or government in common law jurisdictions for 50 years or more,¹⁷⁴ and in the South Pacific Region since at least 1995.¹⁷⁵ However, despite most participants

¹⁶⁸ See for example UNESCO, 'Pacific Education for All 2015 Review' (Report, UNESCO, 2015). For more historical accounts see Charles David Throsby and Ken Gannicott, 'The Quality of Education in the South Pacific Islands/Australia' (Working Paper No 9, Research School of Pacific Studies, National Centre for Development Studies, 1990).

¹⁶⁹ Fiona Willans et al, 'Supporting the Transition to Tertiary Level: How Students Engage with Academic Literacy Materials Embedded into a Mainstream Course' in Som Naidu and Sharishna Narayan (eds), *Teaching and Learning with Technology: Pushing Boundaries and Breaking Down Walls* (University of the South Pacific Press, 2020) 137.; Fiona Willans et al, 'Fostering and Evaluating Learner Engagement with Academic Literacy Support: Making the Most of Moodle' (2019) 16(4) *Journal of University Teaching & Learning Practice* 5.; Fiona Willans, 'Carving out Institutional Space for Multilingualism in the World's Most Multilingual Region: The Role of Linguistics at the University of the South Pacific' in Anthony J. Liddicoat (ed), *Language Policy and Planning in Universities* (Routledge, 2018) 132.

¹⁷⁰ Penfold, 'Teaching Legal Ethics and Professionalism in a South Pacific Context' (2013); see further Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

¹⁷¹ Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017). 290.

¹⁷² , *Archived Publications* (28 November 2023) .

¹⁷³ Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017). 332.

¹⁷⁴ Mary Frances Edwards, 'Mandatory Cle: Shield or Sham' (1985) 27 *Professional Legal Education* 27. 28.

¹⁷⁵ Grimes, 'Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific' (1995). 204.

from Fiji, Kiribati, and Vanuatu expressing a strong desire for more CPD opportunities few lawyers identified CPD as specifically important to being a good lawyer, despite many also identifying it as ‘necessary’, ‘important’ and part of ‘the attitude of being open to continuous learning and accepting that we’re not computers and we do not carry, all of that wisdom around in ourselves.’¹⁷⁶ In Kiribati’s Country Report to the 2017 Pacific Islands Law Officers’ Network (PILON) Conference, the Attorney-General of Kiribati noted the need for ongoing CPD to develop the capacity of I-Kiribati lawyers.¹⁷⁷ Indeed, senior government law officers in PICs have long been aware of a need to grow offering of CPD in the region. It is notable that a sub-committee of PILON first reported on CPD at its meeting in Vanuatu on 11-13 October 1995.¹⁷⁸ Regrettably, the urgent need for locally-relevant CPD in almost all PICs, despite sporadic and well-intentioned efforts, has been largely unmet for more than 25 years due to issues of scale and capacity and the slow progress of needed law reform.

Over the past 30 years, most common law countries have switched from voluntary to mandatory CPD for lawyers.¹⁷⁹ At the time of the research, CPD was not mandatory in Vanuatu or Kiribati. In both Kiribati and Vanuatu, the law society is responsible for upholding standards for CPD.¹⁸⁰ However, since each was formed (the KLS in 2006 and VLS in 2010) each has only managed to coordinate a handful of isolated, but memorable CPD events, the most significant of which were coordinated with the regional support from the SPLA.¹⁸¹ In their contributions to the SPLA’s 2011 Report on ‘Needs of South Pacific Lawyers’ Associations, both the VLS and the KLS noted they lacked resources, capacity and trainers to deliver a CPD program.¹⁸² This problem is both historic and regional, with similar comments about barriers to CPD made by Richard Grimes in 1995.¹⁸³ As

¹⁷⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁷⁷ Attorney-General of Kiribati, ‘Kiribati Country Report, 36th Pilon Meeting, Republic of the Marshall Islands’ (Report, Kiribati, 18-20 October 2017)., 3.

¹⁷⁸ Grimes, ‘Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific’ (1995). 205.

¹⁷⁹ This has occurred for a range of reasons, including to improve the culture of learning within the legal profession. See for example Rima Sirota, ‘Making Cle Voluntary and Pro Bono Mandatory: A Law Faculty Test Case’ (2017) 78 *Louisiana Law Review* 547.; Barrie Brennan, ‘Mandatory Continuing Professional Education—Its Origin and Acceptance’ in Barrie Brennan (ed), *Continuing Professional Education in Australia: A Tale of Missed Opportunities* (2016) 63.; Colleen G Segall, ‘Ethics in Mandatory Cle: An Overlooked Means for Improving the Standard of the Profession’ (1988) 6(1) *Journal of Professional Legal Education* 22.; Edwards, ‘Mandatory Cle: Shield or Sham’ (1985); Stanley A Samad, ‘Reappraising American Legal Education through a Comparative Study’ (1964) 13 *Cleveland-Marshall Law Review* 375.;

¹⁸⁰ *Kiribati Law Society Act 2006* (Kiribati); *Vanuatu Law Society Act 2010* (Vanuatu).

¹⁸¹ One such occasion was coordinated with the SPLA and the Centre for Asia Pacific Pro Bono (CAPPB), in 2013-4, which had recently been established within the Law Council of Australia Secretariat. See further Chapter One, section 4.2.2, p. 39.

¹⁸² South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (2011).

¹⁸³ Per Grimes: ‘This is much the same fate as efforts by other Law Societies in the South Pacific Region to establish CPD programs.’ Grimes, ‘Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific’ (1995). 209.

considered further in Chapter Five, in Vanuatu at least, since 2018, efforts led by the judiciary have begun to stimulate local supply of CPD. The judiciary's objective has, at least in part, been based on the premise that 'supply and demand of CPD are inter-dependent ... hopefully supply can lead demand.'¹⁸⁴ Further follow up in offering additional CPD in each jurisdiction was regrettably prevented by COVID-19.

In Kiribati, some optimistic lawyers and judges indicated cautious support for the introduction of mandatory CPD, but view this as unlikely to happen in the short to medium term.¹⁸⁵ In Samoa, Solomon Islands and Vanuatu existing or proposed legislation makes it possible for the regulator or the law society to make CPD mandatory but the relevant authorities have not yet chosen to do so. By contrast, Fiji has operated a strict mandatory CPD scheme since 2009.

Fiji's legal profession is substantially larger than that of Vanuatu or Kiribati¹⁸⁶ and regulation therefore operates at a different scale. Fiji's model for mandatory CPD has, since 2009, resulted in a system with a diverse range of legal education opportunities for lawyers provided by a range of accredited providers locally and internationally. In 2009, Fiji moved to a system of mandatory CPD for all lawyers under the *Legal Practitioners Decree 2009* (Decree 2009). The move was controversial for many reasons, not the least of which was that, initially, the only way to meet the annual minimum CPD requirement (10 hours) was to attend the Annual Legal Education Conference hosted by the joint leader of Fiji's 2006 Coup Aiyaz Sayed-Khaiyum.¹⁸⁷ Failure to attend and obtain points resulted in a lawyer being denied renewal of their practising certificate. After several years, growth began in the number of CPD accredited seminars, conferences and events in Fiji coordinated by different providers, including: the Fiji Law Society (FLS); the Legal Practitioner's Unit (LPU) – the regulator; the Legal Aid Commission; the Director of Public Prosecutions Office; local universities; and other government agencies. Fijian lawyers are today also able to meet mandatory requirements by participating in foreign accredited CPD activities online or overseas. CPD is considered further in Chapter Six.¹⁸⁸

¹⁸⁴ Interviews conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁸⁵ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati. Interviews conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁸⁶ There are over 1,000 lawyers who hold practising certificates in Fiji compared with fewer than 50 in Kiribati. See Table 1, p. 36.

¹⁸⁷ Controversial because, among other reasons, the Attorney-General Aiyaz Sayad-Khaiyum was willing party to Fiji's 2006 *Coup D'etat*.

¹⁸⁸ See Chapter Six, 3.3.2. Continuing Professional Development (CPD), p. 242.

3.3. Mentoring and Supervision

To be a good lawyer ‘it is important to have very good mentors’,¹⁸⁹ and many participants credited being a good lawyer to the mentoring they received from more senior lawyers. Mentoring for lawyers is often informal, but can also be part of a formal process supported by a law society, law firm or government law office.¹⁹⁰ In both Fiji and Vanuatu, there is precedent for supervision of a lawyer being ordered by a disciplinary authority following adverse findings of misconduct against a legal practitioner.¹⁹¹

In Kiribati, there is no existing culture of existing lawyers ‘inducting’ new lawyers into the legal profession, and no mentoring programs operated by the KLS.

*There is nobody here in Kiribati to teach us, apart from judges who give lawyers a bollocking so we learn as we go along. The more you appear in court the more you learn how to be a professional.*¹⁹²

By contrast with Kiribati, in Vanuatu and Fiji most participants reported receiving good supervision and mentoring whether they were employed in private practice or by government (e.g. DPP or legal aid). although the experiences of individual lawyers were reported to vary considerably in all three jurisdictions. For example, a participant from Fiji credited their supervisors – more senior lawyers in government – with helping them to cultivate the technical competencies to be a good lawyer: ‘I learned to be a good lawyer was through my supervisors. It all depended on the supervisors that I had. I would pay tribute and credit to three of my supervisors.’¹⁹³ Another participant from Fiji credited their mentors with helping them navigate ethical issues:

*I was mentored by the greats of the profession in this country ... They were the ones who took charge of me and guided me. Any ethical issue. Any time I get caught up in a conflict situation I would ring my mentor and then my own legal senior partners.*¹⁹⁴

¹⁸⁹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁹⁰ The Victorian Bar for example operates a system whereby if a new barrister is unable to find a willing mentor to read under, the Bar Association will appoint a barrister as a mentor who is then more or less obliged to accept the mentee. Query whether a similar model might add value for young lawyers in PICs?

¹⁹¹ In Fiji see, *Chief Registrar v Koro* [2012] FJILSC 7; see also *Chief Registrar v Vosarongo* [2016] FJILSC 6; *Chief Registrar v Vakaloloma* [2017] FJILSC 19. For Vanuatu see: *Bal, Re* [2019] VULCDC 2 (8 May 2019).

¹⁹² Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁹³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁹⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

One participant in Vanuatu observed that mentoring and supervision of new lawyers by more senior lawyers is ‘inbuilt into our system as an inherent assumption that there will be supervision of the ones coming straight out of university, and that is an assumption in our legislative framework.’¹⁹⁵ Another participant from Vanuatu credited their mentors with helping them to develop a deeper understanding of how to better manage relationships with clients:

*Through working with more senior lawyers who showed/demonstrated to me that our job is to understand what our client needs to get out of the case, and sometimes what they really need to get out of the case is not something that they will say to you directly.*¹⁹⁶

In PICs, the relative scale and resourcing of government law offices typically means lawyers employed by government receive vastly more opportunities for both supervision and professional development than private practitioners.¹⁹⁷ For example, in Kiribati, where there were no multi-practitioner firms, the Office of the People’s Lawyer (OPL) and government legal services were the only workplaces where lawyers worked with other lawyers and any form of supervision and mentoring took place. All current private practitioners in Kiribati have previously been employed in government legal roles. However, within government legal services, relationships with senior lawyers appeared to be impacted by embedded customary norms, such as deference to seniority and elders. Several participants from Kiribati reported they never voice opposition to the legal opinions of their seniors even if they think they are wrong ‘I just agree with the changes, partly out of respect, but it can also be because of fear (of disagreeing with a change).’¹⁹⁸

Most participants from all three countries felt they were fortunate to receive good mentoring and that the reality for many new lawyers is that good mentoring and careful supervision is the exception, not the norm and its absence contributes to lowering professional standards. New lawyers in PICs are often required to ‘sink or swim’ which directly impacts their capacities and competencies. A lawyer from Kiribati noted: ‘When you work at OPL you swim or you die. If someone had guided me, I would have had more confidence ... there is a need for lawyers to be

¹⁹⁵ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁹⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁹⁷ Many participants in all three countries referred to this. Particularly with reference to opportunities for training overseas – much of which is organised government-to-government.

¹⁹⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati. K13.

mentored and supervised during [their early years of practice].¹⁹⁹ However, one senior I-Kiribati lawyer considered this to be a good thing:

*...when [young students] arrive back from their studies in the office we treat them like they are trained and competent lawyers. This sink-or-swim approach is good, because it forces lawyers to get up to speed quickly, but also there is a need for lawyers to be mentored and supervised during this time.*²⁰⁰

This sink or swim approach was also noted in Vanuatu and Fiji:

*Top firms in Suva ... pride themselves on international standards of practice. Young lawyers see the name and the reputation, but the reality is you sink or swim. If you can't swim, you sink.*²⁰¹

3.3.1. Being a Good Mentee

Some participants explained that a good lawyer should be a 'good mentee' and identified important qualities of good mentees, for example a good mentee 'must have a teachable spirit.'²⁰² A good mentee should carefully observe how senior lawyers practice law and seek to understand and model their preparation and approaches to providing legal services. However, they should always seek to develop a comparative and critical perspective when learning from the conduct of others. As a lawyer from Vanuatu shared:

*I have three seniors in here, so I compare the seniors. They have different ways of conducting cases so I get different perspectives from three different people. But when it's from a smaller law firm with only one senior, then whatever the senior is doing, it just seems there's only one way of doing it and you can't see the other way of doing it. But when you've got larger firms, you've got more than one lawyer to see how they behave compared to the small firms.*²⁰³

¹⁹⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁰⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁰¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²⁰² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²⁰³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

3.4. Legal Practice Experience

While mentoring and supervision were important to cultivating good lawyers, many participants emphasised that learning as a legal professional comes from a broad range of experiences in legal practice: ‘it’s not just mentoring, it’s sort of, it’s every interaction that you have as a professional and what you take away from that.’²⁰⁴ A lawyer’s competence, performance of their work and their capacity to comply with rules of ethics and navigate normative pluralism are all developed by applying their existing competencies and capacities to addressing the problems of real clients or employers and learning from those experiences. Over time, unfamiliar challenges become familiar and a lawyer’s ‘toolbox’ for facing new challenges grows. A lawyer from Kiribati explained:

*When we start work it is different to what we learn in law school. So, a lawyer learns knowledge on the job. When I started [working as a lawyer] I found the PDLP and knowledge from LLB were different, but really useful, they gave me a head start on some of the issues I dealt with, especially in, for example, contracts. However, for new areas of law that are not really part of what we learned, such as land law ... you learn on the job.*²⁰⁵

Learning to comply with legal ethics was singled out by many participants as something that can only truly be learned experientially – as opposed to being taught at university. On this Professor Emeritus Colvin observed:

*We have ethics in the LLB, [and] we have a compulsory course on ethics in the PDLP. But you learn [ethics] by living them in real life. Otherwise, it’s all theory.*²⁰⁶

As Penfold would likely agree, it is also ‘all theory’ taught from an overseas textbook written for lawyers practising in a foreign jurisdiction.²⁰⁷

Learning how to interact with clients is an additional critical skill that lawyers learn primarily from experience, which as a participant in Vanuatu observed: ‘you don’t learn in law school how to deal with that.’²⁰⁸ Lawyers in PICs identified clients as a significant source of influence on lawyer

²⁰⁴ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu. See also Cartledge, *In Depth; Thrown in at the Deep End* (2011).

²⁰⁵ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁰⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu with Professor Emeritus Eric Colvin, Head of Law, School of Law, University of the South Pacific.

²⁰⁷ See discussion above in section 3.2.1. at p. 153.

²⁰⁸ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

conduct, something that is compounded by the context of normative pluralism. In Kiribati for example:

There is a view in the community that providing gifts to lawyers beyond their legal fees will assist them in getting favourable attention from their lawyer. People do this because they are required by custom and because gifting can create a social obligation to favour a person. In some sense if you accept gifts, you might be required to consider more the client's case. We advise clients not to give 'gifts', but clients are tricky and it is important to make good records of interactions. For example, clients will visit you at home, or outside of office hours, hide money in your office, etc. This can create a social obligation to accept gifts.²⁰⁹

Beyond obligations regarding receiving gifts, accepting a retainer to represent a client can have significant personal costs for lawyers:

Sometimes it is very hard to stand for a client when it is [your] relative who is on the other side. So, when that case comes, it may not be culturally acceptable to take that case against your relative, even if it is professionally acceptable. [However], the lawyer ... is bound to assist that person ... [culturally] if there is a relationship with the client it is more important [than the family connection] because you have agreed to help that person.²¹⁰

Learning how to effectively navigate (or avoid) such situations is a function of experience, albeit that the acquisition of experience for many lawyers is paved with bad examples and overcommitment.

²⁰⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²¹⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

3.5. Peers and Professional Communities

Participant responses revealed that peers and professional communities and networks of lawyers had varied and significant influence on the habits, motivations and affect of individual lawyers.²¹¹ As a participant from Kiribati observed: 'Lawyers learn from more senior counsel, especially from observing and following their practices. Also, from colleagues.'²¹² A participant from Fiji stressed the importance of learning from others to becoming a good lawyer:

*Adults learn from application. So totally as vital as education [at university] is learning from others. Once you come out of Uni with the LLB, then what do you do with it and who do you get to interact with? Those are all massively important in learning to be a good lawyer.*²¹³

Another put the influence of peers on lawyer conduct in more normative terms:

*it is the mindset, the friends you keep, and your surrounding environment that you are in. And so, my answer is really 'peer pressure.'*²¹⁴

It was evident from many participants that a great deal of regulation of lawyers in PICs occurs through social, non-state, mechanisms and professional communities. For example, one participant from Fiji said:

*There are ways the profession is self-regulating... When I came out of law school, if I made a mistake, the practitioners then would call me aside and say come here let's have a cup of coffee or have grog.*²¹⁵

Professional communities have long been identified as important sources of norms generation and projection by scholars of professions.²¹⁶ Professional communities of lawyers exist at different scales. At the broadest scale we might think of them as comprising the entire legal profession of a country – especially a small jurisdiction such as Kiribati. At a narrow scale, a professional community might involve only a single law firm. Professional communities of lawyers might also form around common practice interests, such as the Fiji Environmental Lawyers Association, or

²¹¹ On affect see discussion above section 2.3.2. p. 143 and note 114 p. 144.

²¹² Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²¹³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

²¹⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²¹⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²¹⁶ W Bradley Wendel, 'Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities' (2001) 54 *Vanderbilt Law Review* 1953.; Deborah Hartstein and Justine Rogers, 'Professional Associations as Regulators: An Interview Study of the Law Society of New South Wales' [2019] (2019) 22(1-2) *Legal Ethics* 49.

shared beliefs, such as religious beliefs, for example KILN.²¹⁷ Professional communities notionally include peak lawyer associations such as law societies, although at the time of the research it might be argued that both the Vanuatu Law Society and the Kiribati Law Society could be strictly defined as a professional community due to the infrequent interaction of their members. Professional associations serve as central nodes, or hubs, connecting many smaller networks of lawyers each with their own interconnections and relationships. Professional communities of lawyers in PICs may also be networked with transnational associations of lawyers such as the SPLA or the IBA, or with professional communities of lawyers in other countries such as the Pacific Lawyers Association in New Zealand. Chapter Six further explores the influences of professional communities and other non-state sources of regulation on lawyer conduct.²¹⁸

3.6. Being a Good Lawyer is Innate

As noted above, many participants identified the personal drive to be a good lawyer was something that came from within and referred to things like faith and internalised values and moral impulses. ‘Lawyers learn their attitudes from personal things, like family, community, church and their faith.’²¹⁹

*What makes you a good lawyer? It's you. It's you as a person ... it's in your character ... you can't learn how to be a good lawyer. You can learn the law, how well you learn it, is entirely on you.*²²⁰

As a participant from Fiji explained, being a good lawyer ‘has to come from you. Do you want to be a good lawyer? Do you want to be competent? Do you want others to say that you are?’²²¹ This idea that being a good lawyer involves something innate to an individual and how they perceive their role in relation to not only their client, but to society echoes one of the key messages of legal ethicist David Luban in his edited book entitled *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* that being a good lawyer means being a ‘good person’.²²² Luban’s argument connects with

²¹⁷ See further Chapter Six, section 3.2.2, p. 234.

²¹⁸ Chapter Six, section 3.4. Professional Communities as Regulators of Lawyer Conduct, p. 244.

²¹⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²²⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²²¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²²² Luban, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1984). 83.122; see also discussion in Stephen Gillers, ‘Can a Good Lawyer Be a Bad Person?’ (Pt The Michigan Law Review Association) (1986) 84(4/5) *Michigan Law Review* 1011. 1014.

contemporary discourse regarding the 'role morality' of lawyers.²²³ In essence this discourse provides that: 'contrary to over 100 years of orthodoxy in the thought, writing and institutionalisation of professional ethics;²²⁴ '...lawyers cannot get away from wider moral obligations that impact on the rest of society.'²²⁵

In PICs, an individual's notions of 'good' and 'bad' are values that are strongly influenced by their personal experiences and external sources of norms such as religious beliefs, cultural mores and bureaucratic rules which become internalised. For example, for many participants, the innate desire to learn to be 'good' appeared to be strongly linked with personal belief in Christianity and in particular Christian morality and contemporary social mores in PICs that equate 'good' as desirable and anything not good as 'bad', subversive or at best undesirable. This is captured by the following quote from a participant from Fiji:

*For myself, as a Christian and a lawyer, ultimately, I draw guidance from Biblical principles and standards of behaviour summarised in the greatest commandment - Matthew 22:36-40 New International Version (NIV) 'Teacher, which is the greatest commandment in the Law?' Jesus replied: 'Love the Lord your God with all your heart and with all your soul and with all your mind.'*²²⁶

*I went to Gospel High School and scripture was my daily bread, every morning and this shaped who I am today. The scriptures were my buffer, my refuge 5 days a week from the difficulties at home. When I came to Law School this continued through the Christian Fellowship at University.'*²²⁷

The influence of religious networks and beliefs on lawyer conduct is explored in greater detail in Chapter Six.²²⁸

²²³ On questions of lawyer roles and role morality see further Rob Atkinson, 'Beyond the New Role Morality for Lawyers' (1992) 51(4) *Maryland Law Review* 853.; Judith Andre, 'Role Morality as a Complex Instance of Ordinary Morality' (1991) 28(1) *American Philosophical Quarterly* 73.; Luban, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1984).

²²⁴ Joseph P Tomain, 'The Legal Heresiarchs: Luban's the Good Lawyer' (1984) 9(3) *American Bar Foundation Research Journal* 693. 694.

²²⁵ Evans, *The Good Lawyer* (2014). 4.

²²⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²²⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

²²⁸ See Chapter Six, section 3.2. Religion, Identity and the Mission of Law, p. 232.

4. CONCLUSION

My primary research question focuses on understanding how regulators of lawyers can better seek to cover the weaknesses of formal systems with the strengths of existing and emerging informal regulatory systems to support lawyers to be good lawyers. This chapter sought to explain how lawyers in three PICs conceptualise being a good lawyer and the mechanisms by which lawyers in these PICs learn to be good lawyers. The introduction of the archetype of a good lawyer, as presented in this chapter, is a unique and important contribution to discourses on lawyer regulation in PICs. While archetypes are inherently somewhat arbitrary and abstracted ideals, they serve important functions in education and regulation. Used as a pedagogical tool, they offer a referential framework for the communication of knowledge, values, and norms. Additionally, they provide legal educators and regulators with a framework for evaluating lawyer conduct against empirically established ideals, enabling better alignment with broader socio-legal paradigms.

This chapter has revealed that lawyers' conduct and capacities are shaped and influenced through regulatory relationships with a variety of state and non-state actants that change over time. Participant responses also revealed that the strength of different sources of regulation varied based on an individual's characteristics, affects and relationships with those regulators. In the next chapter, Chapter Five, I will explore how state systems regulating lawyers operate in practice in Fiji, Kiribati, and Vanuatu through three case studies. Developing an understanding of how these systems currently regulate lawyer conduct is critical to answering the primary research question regarding how these systems can be improved. In Chapter Six, I will delve deeper into the non-state sources of regulation of 'good lawyers' to reveal the complex relational systems that regulate lawyer conduct in PICs.

CHAPTER FIVE – RELATIONSHIPS WITH STATE REGULATORS

1. INTRODUCTION

This chapter addresses my subsidiary research question on how state regulatory systems operate in practice through three case studies of lawyer regulation in Fiji, Kiribati, and Vanuatu. These case studies reveal themes of legitimacy, compliance, resistance and disengagement which speak to theories of responsive regulation and regulatory compliance.¹ The case studies also demonstrate the importance of regulatory relationships between regulatees and regulators to questions of compliance, especially in small and close-knit regulatory communities – such as are those found in PICs. The case studies highlight three features of state regulatory systems common to Fiji, Kiribati, and Vanuatu: dependency on ‘key individuals’; the importance of autochthony as a source of legitimacy for state institutions; and the prominent role of the judiciary as regulators of lawyers in PICs. Overall, this chapter helps to answer the primary research question by revealing important insights into the dynamics of state regulatory systems in Fiji, Kiribati, and Vanuatu. In Chapter Eight, I will consider how these insights can contribute to theories of change to improve the regulation of lawyers in PICs.

1.1. Understanding State Regulatory Systems in PICs

Participants of the primary study identified four main mechanisms through which state regulatory systems influence lawyer conduct in PICs: statutory licensing and qualifications requirements; systems for complaints and discipline; signals communicated between state regulatory actors and regulatees; and direct and indirect conduct of the judiciary.² Figure 6 below represents these four mechanisms. The four inner circles represent these main influences and the outer circles show examples of specific mechanisms of influence. The double lines indicate the strong interrelationship between each source of regulation and lawyer conduct.

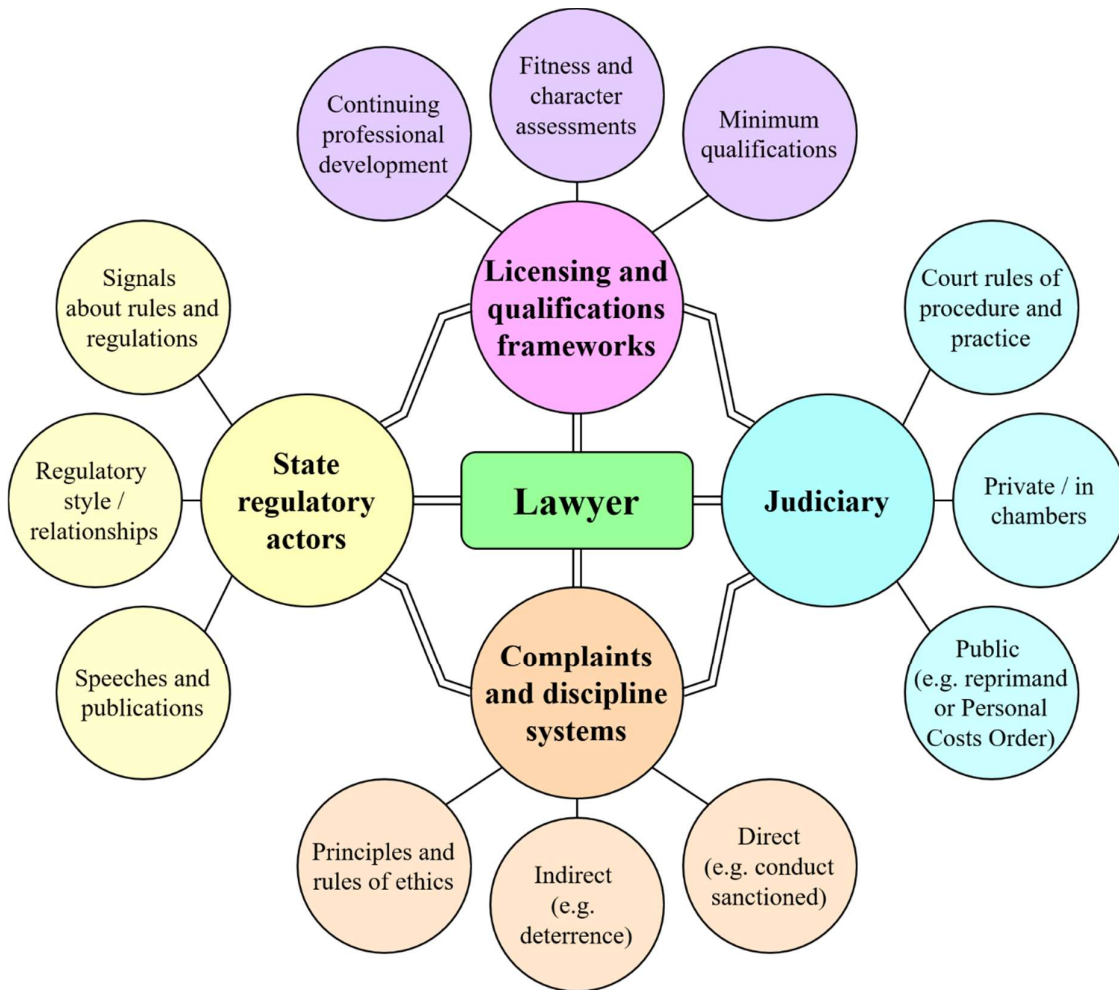
For simplicity, not all interconnections are shown and there are many more mechanisms of influence not represented. For example, legal education institutions such as law schools could reasonably be included as an additional inner circle because in the Pacific Region all law schools are based at state-owned universities. I have excluded legal education from this diagram because the focus of this chapter is primarily the operation of frameworks, regulations, and actors which

¹ See discussion in Chapter Three, section 4.2. p. 109.

² See Chapter Four, section 3.1. State Regulatory Systems, p. 148. Chapter One provides a socio-historic account of the development of existing state systems regulating lawyers in PICs, see pp. 34-47.

overtly regulate lawyer conduct in practice. While legal education institutions play a vital role in developing the knowledge and capacities of future lawyers and introducing them to professional norms regarding the conduct of ‘good lawyers’, this influence is temporally disconnected from legal practice.³

Figure 6: State regulators of lawyer conduct



The three case studies in this chapter provide glimpses into the operation of state systems in Fiji, Kiribati, and Vanuatu. With reference to Figure 6, in all three countries there was strong support by lawyers for the legitimacy of existing licensing and qualifications frameworks.⁴ State regulatory actors play an important regulatory role. State regulatory actors are the individuals and institutions

³ Legal education is considered in Chapter Four in the context of good lawyers, from p. 149; in Chapter Six in the context of non-state sources of regulation of lawyer conduct, from p. 240; and in Chapter Eight, section 3. A Way Forward: Supporting Good Lawyers in PICs, p. 296.

⁴ Many lawyers in Fiji disputed the legitimacy of the *Legal Practitioners' Decree* 2009 as a valid legal instrument, without necessarily disputing the legitimacy of a statutory framework for licensing of lawyers – after all without an Act, they could not be a Fijian lawyer.

empowered by statute to regulate lawyers; these vary from country to country. For example, in Vanuatu they include the Vanuatu Law Council (VLC) and its members; in Fiji, the Chief Registrar and the Independent Legal Services Commission (ILSC), while in Kiribati, the Kiribati Law Society (KLS) and its officers are the primary state regulatory actors.

State regulatory actors in PICs communicate with lawyers about compliance through a range of mediums including consultations on proposed changes to regulatory rules; speeches, annual reports and other publications; and through relationships with individual lawyers.⁵ In terms of systems for complaints and discipline, data from Vanuatu and Fiji, discussed below, indicates that publishing disciplinary sanctions both produces deterrent effects and generally improve lawyers' postures of compliance and capacities to comply.⁶ In Kiribati, no lawyers have been sanctioned for misconduct although it seems likely that the effect on deterrence and postures of compliance by lawyers would be similar to Vanuatu and Fiji.

Finally, the case studies show the central importance of the judiciary as a regulator of lawyers in PICs through a range of formal and informal mechanisms including: the promulgation and enforcement of court rules and directions;⁷ reproaching lawyers for poor conduct in open court, including, where appropriate, exercising judicial authority to sanction lawyers (e.g. by issuing Personal Costs Orders); and through guidance given privately, e.g. in chambers.

⁵ See further Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003); Braithwaite, Murphy and Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007); Braithwaite, 'Closing the Gap between Regulation and the Community' 2017.

⁶ Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review* 209.; Parker and Evans, *Inside Lawyers' Ethics* (2018).

⁷ Examples include the *High Court Rules 1988* (Fiji); *Chief Registrars Directive to Legal Practitioners Nos 1-3 Of 2014* (Fiji); *Chief Registrar's Practice Direction 1 Of 2017* (Fiji); *Chief Registrar's Practice Direction 1 of 2017* (Fiji); *Civil Procedure Rules 2002* (Vanuatu)

2. LAWYER REGULATION IN FIJI

This case study investigates Fiji's current system for regulating lawyers from its inception in 2010. Divided into three sections, the study first examines the events leading up to the commencement of the new regulatory system in 2010. Next, it delves into the establishment and operations of the LPU and the ILSC. Finally, it explores themes of legitimacy and resistance emerging from the empirical study, which relate to broader regulatory and compliance theories, including motivational posturing theory.⁸

Data for this case study is derived from interviews conducted in Fiji and Australia, as well as documentary records. The 25 participants interviewed about lawyer regulation in Fiji were asked to discuss the new regulatory system introduced in 2010. Key participants include prominent government law officers, judges and senior Fijian lawyers, past LPU employees and lawyers who have appeared before the ILSC.

Leading into this research, I believed the reforms to lawyer regulation in Fiji resulting from the *Legal Practitioners' Decree 2009*⁹ ('2009 Decree') had created a more locally-suited regulatory system in Fiji with the potential to serve as a model for other regional jurisdictions. This view has been supported by some Pacific scholars.¹⁰ The new system addressed several issues of the previous one, such as funding for regulation; encouraging mediation of complaints; re-enlivening moribund complaints and discipline processes; and various accountability measures. However, the research also exposed signs of tension, including a growing backlog of complaints and a strained relationship between the LPU and the legal profession.

2.1. Transition from Self-Regulation

Understanding the modern context of Fiji is crucial for interpreting this case study. As mentioned in Chapter One, The military coup in 2006 resulted in over seven years of military dictatorship in Fiji marked by numerous economic and legal changes, as well as significant human, civil and political rights abuses.¹¹ Between 2009 and 2014, 328 Decrees were issued, often repealing and

⁸ Braithwaite, 'Games of Engagement: Postures within the Regulatory Community' (1995)

⁹ *Legal Practitioners' Decree 2009* (Fiji)

¹⁰ Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017; see also Tauvasa Tanuvasa Chou-Lee in Cartledge, *In Depth; Thrown in at the Deep End* (2011).

¹¹ Amnesty International, 'Beating Justice: How Fiji's Security Forces Get Away with Torture' (2016); Sue Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009).; One of the most comprehensive works on this period in Fiji is Firth, Fraenkel and Lal, *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (2009), but see also Lal and Pretes, *Coup: Reflections on the Political Crisis in Fiji* (2008).

replacing existing statutes.¹² Political opposition was suppressed, the entire judiciary was purged, with all judicial appointments revoked by way of the *Revocation of Appointment of Judicial Officers Decree* 2009 (Fiji),¹³ and rights such as free speech and peaceful assembly were routinely denied.¹⁴ Led by the Fiji Law Society (FLS), lawyers were vocal opponents of the unlawful military regime and consequently became targets of intimidation and violence.¹⁵

Fiji's transition from lawyer self-regulation to a new model characterised by complete control by the judiciary was sudden and unexpected. Late in the afternoon, on or shortly after Friday 22 May 2009, the Secretary of the FLS was walking along the sea wall in Suva. She was met by a group of police officers and the then Chief Magistrate, Major Ana Rokomokoti. A hard copy of the 2009 Decree repealing the *Legal Practitioners' Act* 1997 (Fiji) was presented, signed and already in effect.¹⁶ Under the 2009 Decree, the FLS's regulatory powers had been stripped and its membership changed from mandatory to voluntary – a serious blow to both its relevance and finances. This *fait accompli* was the first notice given to the FLS that reforms to the structure and organisation of lawyer regulation in Fiji were being drafted, although there had been public calls for reform from the Consumer Council of Fiji.¹⁷ The keys to the Law Society's premises were demanded from the Secretary, its records seized and throughout the whole process members of the FLS Council faced a variety of precarious circumstances involving military officers. The fear and distrust generated by this sequence of events created a paradigm of fear and distrust between the profession and its new regulatory masters, especially because they occurred in the wake of the abrogation of Fiji's 1997 Constitution on 10 April 2009. Many lawyers viewed it as a move to further suppress the

¹² See 'Decrees by Year', 'Paclii Homepage', *Paclii* (6 June 2023) .

¹³ *Revocation of Appointment of Judicial Officers Decree* 2009 (Fiji).

¹⁴ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; Firth, Fraenkel and Lal, *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (2009); Jon Fraenkel, 'Silence after Abrogation of Fiji's 1997 Constitution', *East Asia Forum* (Web Page, 28 April 2009) <<https://www.eastasiaforum.org/2009/04/28/silence-after-abrogation-of-fijis-2007-constitution/>>.

¹⁵ Eight interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. See also Reports by the International Bar Association: Roslyn Atkinson et al, 'Dire Straits: A Report on the Rule of Law in Fiji' (Report, International Bar Association's Human Rights Institute, 2009). On coups and targeting lawyers see further Michael Ignatieff, 'Human Rights as Politics and Idolatry' in Amy Gutman (ed), *Human Rights as Politics and Idolatry* (Princeton University Press, 2011).; 'Zimbabwe: Between a Rock and a Hard Place - Women Human Rights Defenders at Risk', *Amnesty International* (Web Page, 25 July 2007) <<https://www.amnesty.org/en/documents/afr46/017/2007/en/>>.

¹⁶ Various interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁷ Consumer Council of Fiji, "No lawyer is above the law", Press Releases, 8 December 2008 cited in Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019).

outspoken Law Society, although even the strongest critics of the introduced system acknowledged that the system it replaced was far from perfect.¹⁸

2.1.1. A Justification for Change – but not how it Occurred

*Professional ethics before 2009 was definitely less ethical.*¹⁹

Prior to the 2009 Decree, a self-regulatory model existed in Fiji whereby the FLS was responsible for complaints and discipline of lawyers. The core justification by Fiji's Interim-Government for stripping the FLS of its authority to regulate lawyers was that it had lost confidence in the capacity of the FLS to independently and effectively manage complaints against lawyers in the public interest.²⁰ the FLS had become 'essentially a mates club'.²¹ One example given by a government source included the lack of transparency and accountability within the existing system, especially the paucity of written disciplinary decisions. In addition, it was believed by senior members of the Interim-Government that FLS had become 'captured' by members of its Council allowing them to influence the complaints process and effectively practice with impunity, despite serious allegations of misconduct against them. One participant reflected:

Before 2009 the small-town lawyers were notorious because they had a different relationship with their clients. Theirs was that sort of Victorian hierarchical thing, where they were educated, their clients were ignorant and they abused it. It is that almost feudal relationship and they worked it. Everyone knew it was happening and the judges knew it was happening, but nobody was able to do anything. That is why in 2009 if you look at the first prosecutions, everybody went straight for them. They were very powerful. They were smart. They were the big mouths within the Law Society.

So, the same set of skills they used to con the client were used to con the profession, they were demagogues, they were articulate and charismatic and had the motivation to take the leadership positions within the FLS.

There were serious disciplinary matters that weren't being prosecuted in an expeditious or transparent way and it was revealed the FLS had a backlog of as many as 350 outstanding complaints. Additionally, the interim-Government had also come to the view that the FLS was not

¹⁸ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁹ Interview conducted between 10 March and 21 April 2019 in Suva, Fiji.

²⁰ Interview with Solicitor-General of Fiji conducted between 10 March and 21 April 2019 in Suva, Fiji.

²¹ Interview with Solicitor-General of Fiji conducted between 10 March and 21 April 2019 in Suva, Fiji.

ensuring lawyers were complying properly with practising certificate renewal requirements, for example, compliance with CPD requirements.²²

Former FLS President's reported it was true that FLS' Disciplinary Committee processes often proceeded at a glacial pace affected by the busy schedules of Committee members. The FLS was well aware of its growing problem complaints and discipline problem. As well as its own efforts to reduce its backlog of complaints, the FLS sought international support between 2006 and 2009 for assistance to process this backlog. However, the prevailing circumstances under the military regime made provision of international support difficult.²³ All participants of the empirical study, including several past-presidents and the current President of the FLS agreed the complaints system under the FLS had become untenable.²⁴ Nevertheless, no explicit justification was given by the Solicitor-General – or any participant – for why the entire legal profession was kept in the dark and afforded no opportunity to comment prior to promulgation of the 2009 Decree. Perhaps, it was, as some participants suggested, to ensure the 'element of surprise'.²⁵

²² Interview with Solicitor-General of Fiji conducted between 10 March and 21 April 2019 in Suva, Fiji.

²³ Requests were made by the FLS to the Law Council of Australia (LCA) and to the International Bar Association (IBA) for support. It was hoped the support could be modelled in the format of the assistance given by James Leach additionally for financial assistance to prosecute serious complaints. I was an employee of the LCA's International Policy Division at this time, with remit for implementing the Law Council's International Strategy.

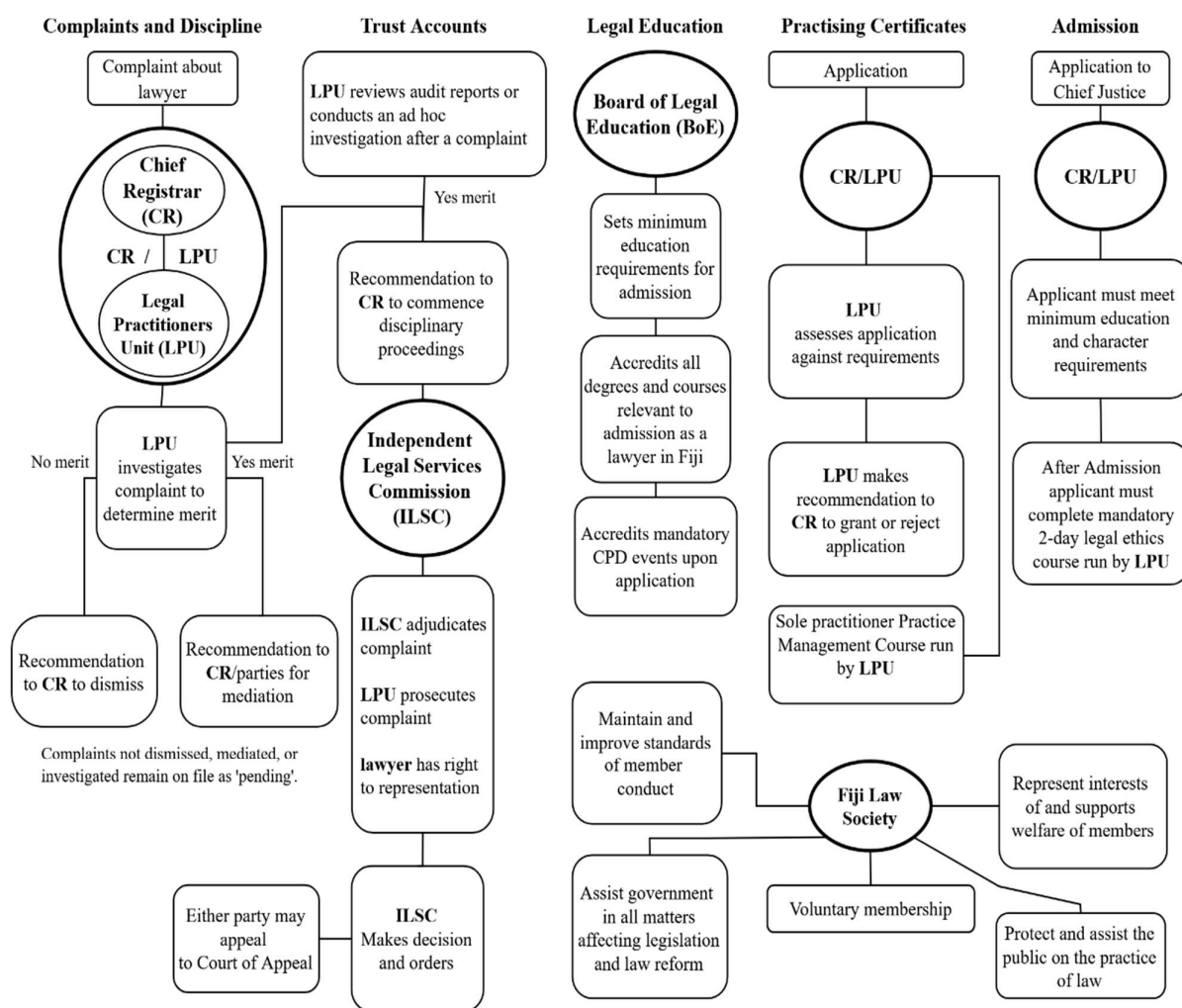
²⁴ Interviews with President, Fiji Law Society conducted between 10 March and 21 April 2019 in Suva, Fiji and other interviews.

²⁵ Interviews conducted between 10 March and 21 April 2019 in Suva, Fiji and at other times with participants residing in Australia.

2.2. The New (Current) Regulatory System: An Overview

As shown in Figure 7 below, which was created for this study, the current regulatory system in Fiji is complex and broadly reflects the structure of a 'modern' regulatory system for lawyers, albeit one dominated by the judiciary.²⁶ Figure 7 maps the key institutions, responsibilities and processes under the 2009 Decree across five important regulatory domains. Key regulatory institutions are shown in ellipses, while information and processes are shown in rectangles.

Figure 7: Overview of lawyer regulation in Fiji



As Figure 7 shows, under the 2009 Decree, responsibility for complaints and discipline and the issuance of practising certificates were transferred from the FLS to the Chief Registrar. An external

²⁶ See comparative discussion in South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017).

adjudicator (the ILSC) became responsible for determining complaints.²⁷ A ‘Cabinet decision’ in 2009 established a new judicial department (the LPU) to support the Chief Registrar who is not personally involved in the day-to-day operations of the LPU, but is the delegated decision-maker for all LPU activity.²⁸ Complaints investigated by the LPU are prosecuted – also by the LPU – before the ILSC. The Commissioner adjudicating is required to be a Judge of the High Court.²⁹ Appeals from the ILSC may be made to the Court of Appeal. Problematically, this makes the judiciary responsible for: licensing and admission of lawyers; receiving and investigating complaints against lawyers; prosecuting complaints against lawyers; and adjudicating those complaints. This is problematic because it centralises regulatory power in a single entity, the judiciary, and gives rise to perceived or actual bias that undermines common law principles of due process. Without suggesting that there has been any impropriety, I can only agree with the President of the FLS, Mr Wylie Clarke, that the 2009 Decree does not provide for the independent regulation of lawyers in Fiji.³⁰

There are two key features that set Fiji’s regulatory framework under the 2009 Decree apart from other models in the Pacific Region. The first, as shown in Figure 7, is the isolation of the FLS from any formal role in regulating lawyer conduct. The second (not pictured) is its innovative funding model which successfully addressed a problem long faced within the region regarding how governments in PICs can sustainably resource lawyer regulation. These features are discussed below.

2.2.1. Exclusion of Professional Associations from Regulation

Fiji’s regulatory model is unique in the common law world, as it excludes professional associations from statutory administrative and disciplinary functions.³¹ Instead, a judge of the High Court

²⁷ The 2009 Decree makes no mention of the LPU and no records are available specifying the manner of its creation, although I was advised a Cabinet decision was responsible for its creation, but that I could not view a copy.

²⁸ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. Cabinet decision appears in inverted commas here because Fiji was at the time governed by a military regime which had seized power in the 2006 Coup and the term ‘Cabinet decision’ implies both an elected government and due process, both of which were absent.

²⁹ By operation of s85 (2), *Fiji Legal Practitioners’ Decree* 2009 and s105 (2) of the *Constitution of the Republic of Fiji* 2013 (Fiji)

³⁰ Anish Chand, ‘Registrar Should Not Regulate Lawyers’, *The Fiji Times* (Web Page, 20 June 2023) <<https://www.pressreader.com/fiji/the-fiji-times/20230620/281663964428844>>.

³¹ As discussed in Chapter Three, at pp. 82-96, the history of lawyer regulation has followed a trend from self-regulation towards hybrid private/state models. However, until Fiji in 2009, as far as I have been able to ascertain, no peak legal professional association has been stripped of its regulatory authority in a common law jurisdiction. Although in the 1980s, New South Wales, Australia came close. See Semple, Pearce and Knake, ‘A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America’ (2013).

appointed as a Commissioner to the ILSC adjudicates complaints, which are investigated and prosecuted by judicial employees in the LPU under the authority of the Chief Registrar – a judicial officer.³² While the judiciary has traditionally been an important regulator of lawyers in common law countries,³³ it is also officially a branch of government. Accordingly, in Fiji, regulatory control of lawyers resides fully in the state, affecting the independence of the legal profession. This has led some, including former Solicitor-General of Fiji Nainendra Nand, to call for further reforms towards a fully independent authority for complaints and discipline of lawyers. Nand argues that such an authority should be independent from the FLS and ‘independent from the executive and the judiciary’, which he argues would lend ‘greater credibility’ to the system.³⁴

2.2.2. Unique Funding Model

The initial funding of around \$300,000 FJD was deemed ‘very generous’ by the incoming Commissioner, the Hon. John Connors, and was used to establish the ILSC.³⁵ The ILSC is allocated a small percentage of revenue collected from lawyers’ trust account deposits, which has proven to be more than sufficient for the ILSC’s workload to date.³⁶ Conversely, the LPU was initially given a ‘small and unrealistic’ budget that hampered its early work.³⁷ However, by 2012, additional funding was secured to hire an investigator and additional staff, including lawyers, after intense lobbying by LPU staff and the then Chief Magistrate Irani Ganga Wakishta-Arachichi.³⁸ The LPU has office facilities within the government buildings near the main court complex in Suva. As of April 2019, the LPU employed five lawyers, five paralegals and two investigators.³⁹ Being the best-funded model for lawyer regulation in the Pacific Region by a substantial margin, the funding

³² At the time of the research all judicial appointments to Fiji’s High Court and to the ILSC were contract based and may be rescinded at the will of the Attorney-General.

³³ See Richard L Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press on Demand, 2003).

³⁴ See Nand, ‘Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji’ (2019). p 74. In Fiji, this could likely be achieved by fairly minimal statutory changes.

³⁵ Interview with The Hon. John Connors, Independent Legal Services Commissioner Fiji 2010-2012, conducted between 10 March and 21 April 2019. I have been unable to verify this figure from other sources or official sources.

³⁶ Interview the Hon. John Connors (10 March – 21 April 2019). Substantial funds are also allocated in this way to Legal Aid. These funds have enabled it to grow substantially between 2009 and 2020 and more than replaced the funding provided by Australian Aid which was lost as a result of the 2006 Military Coup.

³⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

³⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. Recruitment of experienced and competent prosecutorial staff was (and remains) a challenge for the LPU because ‘not many people are willing to do this work.’

³⁹ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji. A request for updated information was unfortunately unanswered.

model of Fiji's system shows significant potential as a mechanism for funding lawyer regulation in other PICs.

2.3. Legitimacy and Resistance

Themes of legitimacy and resistance towards state regulatory systems emerged from my empirical study, and were observed in the context of accusations of political interference, tense relationships, a range of problems with complaints and discipline systems, and the overall satisfaction of lawyers with the system. The LPU's early operations were conducted under the direction of the Chief Registrar with informal support provided by an external government consultant, Madam Nazhat Shameem.⁴⁰ The LPU initially faced challenges in its management due to a lack of continuity in the position of Chief Registrar. The employment contract of the first Chief Registrar responsible for overseeing the new system was terminated in 2010 under controversial circumstances,⁴¹ followed by her replacement, Sri Lankan lawyer Irani Ganga Wakishta-Arachichi, whose contract was terminated in 2012.⁴² Deputy-Registrar Mohammed Saneem acted in the position until Yohan Liyanage's appointment as Chief Registrar in 2013, until his appointment as a judge in 2019.⁴³ A permanent replacement, Tomasi Bainivalu, was appointed in 2023.⁴⁴

The LPU faced questions regarding its legitimacy from the legal profession due to its association with the Bainimarama government, which resulted in some lawyers refusing to assist LPU prosecutions as expert witnesses.⁴⁵ Additionally, the appointment of lawyers from Sri Lanka to the Bench in Fiji struck a discordant note with many lawyers for several reasons. Firstly, the vacancies they filled on the bench were previously held by local judges and magistrates purged by the *Revocation of Appointment of Judicial Officers Decree 2009*.⁴⁶ Secondly, the foreign judges were appointed on short-term contracts and routinely dismissed often in circumstances of rumoured

⁴⁰ Now Permanent Representative of the Republic of Fiji to the United Nations in Geneva. Nazhat Shameem is the Aunt of Fiji's Attorney-General Aiyaz Sayed-Khaiyum.

⁴¹ See Coup four and a half, 'Ana Rokomiti Sacked as Chief Registrar', *Coup Four and a Half* (Web Page, September 2010) <<http://www.coupfourandahalf.com/2010/09/ana-rokomiti-sacked-as-chief-registrar.html>>.

⁴² On or around 8 September 2012. No official reason was given for her departure, but see Elenoa Turagaiviu, 'Chief Registrar Leaves', *Fbc News* (Web Page, 10 September 2012) <<https://www.fbcnews.com.fj/news/chief-registrar-leaves/>>; Speculation exists, see: Coup four and a half, 'Sacked Sri Lankan Chief Registrar', *Coup Four and a Half* (Web Page, September 2012) <<http://www.coupfourandahalf.com/2012/09/sacked-sri-lankan-chief-registrar.html?m=0>>.

⁴³ Kate Talebula, 'Liyanage Sworn-in as Puisne Judge', *Fiji Times* (Web Page, 5 April 2019) <<https://web.archive.org/web/20200927164018/https://www.fijitimes.com/liyanage-sworn-in-as-puisne-judge/>>.

⁴⁴ Reginald Chandar, 'Five New Judicial Officers Sworn In', *Fiji Live* (Web Page, 24 March 2023) <<https://fijilive.com/5-new-judicial-officers-sworn-in/>>.

⁴⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁴⁶ *Revocation of Appointment of Judicial Officers Decree 2009* (Fiji).

disagreement with the Attorney-General.⁴⁷ The LPU faced regular postures of resistance and defiance from lawyers who would respond to notices of complaint from the LPU with a barrage of requests for further and better particulars, straining its resources.⁴⁸

Notwithstanding its early challenges, the LPU successfully brought serious charges against a number of senior lawyers involving allegations of serious professional misconduct dating as far back as 1997.⁴⁹ Accountability of the complaints process improved, with disciplinary decisions being promptly published on the websites of the ILSC and the Pacific Islands Legal Information Institute (PACLII), and, notionally, through the publication of Annual Reports by the ILSC.⁵⁰ The LPU also increased the use of mediation to resolve complaints involving 'non-conduct issues' such as 'a disagreement on fees.'⁵¹ Between 2009 and 2015, 583 complaints were resolved through mediation.⁵²

For reasons that were not revealed in my research, one of the most widely used mechanisms for resolving fee disputes between lawyers and clients – taxation of costs – has not been used at all by the Chief Registrar/LPU. Former Solicitor-General Nainendra Nand observed that while s109(2) of the 2009 Decree explicitly empowers the Chief Registrar to seek to resolve fee disputes by way of a referral to a Master or Judge of the High Court, this has never been done. Furthermore, he noted that no Costs Review Committee has been established under s75 to prepare a schedule of fees against which a lawyers' fees might be assessed.⁵³

A success of the introduced regulatory system has been the improvement of the availability and quality of Continuing Professional Development (CPD) for lawyers in Fiji since 2009, which introduced a mandatory 10 hours of CPD per annum for all lawyers. Initially, there were few accredited CPD offerings other than the Annual Attorney-General's Conference. The majority of the legal profession participated in this conference to earn the required CPD points but many felt coerced to attend at what was for most a significant cost. However, additional CPD options

⁴⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁴⁸ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji.

⁴⁹ See for example discussion in Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017 and Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019),

⁵⁰ Annual reports covering 2010 and 2011-2016 are available on the ILSC website 'Independent Legal Services Commission', *Annual Reports* (Web Page, June 2023) <<https://ilsc.com.fj/publications/annual-report/>>.

⁵¹ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji.

⁵² Table 7 below, p. 182.

⁵³ Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019). 74.

gradually became available and there has been a clear trend towards the development of more CPD offerings for lawyers in Fiji by local and international legal education providers. Since 2015, the FLS has provided regular accredited CPD events including its Annual Convention,⁵⁴ and other transnational networks of lawyers have hosted many locally accredited CPD conferences in Fiji, including the International Bar Association, LAWASIA, the SPLA, and the Law Council of Australia.

2.3.1. Accusations of Political Interference

*Nobody, within the judiciary, or amongst senior government law officers is prepared to risk putting the AG off-side.*⁵⁵

Criticism that some of LPU's prosecutions are politically influenced have persisted since it was established.⁵⁶ When put to current and former LPU staff in interviews, these accusations were rigorously denied:

*[There exists] a lot of views that the work of the LPU was not independent and that is entirely not true. We were independent in who we charged and why we charged them.*⁵⁷

These defences contradicted the dominant view of Fijian legal practitioners interviewed. For example:

*This current system the problem is that it has been used to pressure lawyers ... They [the LPU and ILSC] haven't really prosecuted too many anti-government people for serious things. They have disciplined a few for minor things, but it is the deterrent effect that you can't see. It is scary.*⁵⁸

A review of the cause lists for the ILSC published on its website during my fieldwork did not indicate a coherent prioritisation of cases by age or substantive significance, but rather a somewhat ad hoc approach. When I queried this, I was advised by the LPU that it will sometimes prioritise cases if they became a 'squeaky wheel' such as attracting significant media attention, or if they

⁵⁴ which was suspended from 2009 to 2014 due to the coup and FLS' suppression.

⁵⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁶ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. See further: Fiji Leaks, 'Lying or Covering up for Renee Lal', *Fiji Leaks* (Web Page, 10 February 2016) <<https://shorturl.at/bcfJ2>>.

⁵⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

received a call from the Prime Ministers' Office that a complainant had complained about their case directly to them – which does not speak well of transparency or due process.⁵⁹

How does LPU choose who to prosecute? Well, complainants who are persistent, who might go to the media, who have gone to the media, who go to the PMs Office, who constantly call and demand progress, receive priority. In a way LPU feels compelled to prioritise in this way because these complaints are most likely to threaten the public image of the LPU and the complaints system. It is paramount there be public confidence in the system ... We agree it is not the best system for prioritising complaints, but there are a lack of resources and there is only so much time LPU can spend dealing with each matter.⁶⁰

This inconsistency further supports criticism over transparency and accountability which have strained relationships between the regulator and the profession.

2.3.2. Strained Relationships

The tense relationship between the LPU and the legal profession in Fiji further raises questions about the perceived legitimacy of the regulator. There is a mutual mistrust between the LPU and legal practitioners, with the former perceiving lawyers as uncooperative and the latter viewing the LPU as biased and ineffective. This tension has likely contributed to slow disposal rates and the large backlog of complaints. The Manager, LPU advised:

There are maybe 10% of lawyers that are forthcoming and cooperative with LPU, but most lawyers treat complaints personally. They take the fact they have received a complaint personally and react to a notice of complaint as if a prosecution has commenced against them, rather than trying to mutually work together to resolve what happened, they might respond to LPU and say 'deny, deny, deny' and provide no additional information to LPU to assist them in their investigation.

An additional challenge for LPU is that lawyers are often vague in responding to complaints. LPU may request a lawyer to respond in relation to five points. The lawyer may write a 10-page response regarding two of the points and ignore the other three points. So LPU must write back to the lawyer to seek particulars on the other three, but only after they have read the 10-page letter and relevant attachments. So, all of this causes delay and takes time.⁶¹

⁵⁹ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji.

⁶⁰ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji.

⁶¹ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji.

The perception that lawyers actively seek to create work for the LPU was supported by at least one participant who shared his delight in ‘creating work for the LPU.’⁶² Other lawyers stated bluntly that they would never hire a lawyer who had worked for LPU because ‘they chose to be the enemy.’⁶³ However, this was not the only example of resistance, nor the most public, with a prominent Fijian Human Rights lawyer, Mr Aman Ravindra-Singh leading a multi-year media campaign criticising regulatory authorities over the suspension of his practising certificate in March 2019.⁶⁴ Indeed, his case signalled a worrying trend by the LPU of prosecuting ‘low hanging fruit’ – less serious complaints – and brought to light the LPU’s questionable prioritisation of cases and capacity issues. Instead of focusing on more severe cases of professional misconduct, the LPU chose to focus on prosecuting a lawyer for an administrative breach – failure to respond to a letter. This approach does not address the more serious and pressing issues within the legal profession and undermines the legitimacy of the regulator.

2.3.3. Three Problems with the Complaints and Discipline System

The complaints and discipline system established under the 2009 Decree suffers from three main issues: a significant backlog of complaints; slow complaint disposal rates; and a propensity by the LPU to prosecute less serious offenses, or ‘low hanging fruit.’ First, it was apparent that the LPU was overwhelmed by a large backlog of complaints. The LPU does not consistently disclose complaint statistics. The most recent available data is from August 2015 which shows over 1,400 outstanding complaints – see Table 7 below. More up to date figures are unavailable, but based on estimated numbers provided by the LPU, as at 2020, there are likely more than 2,000 outstanding complaints today.⁶⁵

⁶² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁴ See *Chief Registrar V Aman Ravindra Singh* [2018] Fjilsc 06. See also related media Ashna Kumar, ‘Aman Ravindra Singh’s Practising Certificate Suspended’, *Fiji Sun* (Web Page, 29 March 2019) <<https://fijisun.com.fj/2019/03/29/aman-ravindra-singhs-practising-certificate-suspended/>>.

⁶⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. Requests for updated data by academics at the University of the South Pacific and by the President of the Fiji Law Society have been repeatedly refused over the past several years. As was my own request.

Table 7: Legal Practitioners Unit complaints received and disposed

Year	Complaints received	Mediated	Prosecuted (ILSC)	Total disposed	Outstanding
2009	411 (~300 from FLS)	3	9	12	399
2010	332	53	23	76	655
2011	300	57	5	62	893
2012	307	120	10	130	1,070
2013	333	119	39	158	1,245
2014	271	140	17	157	1,359
2015 (31 Aug)	159	91	3	94	1,424

Source: Chief Registrar Fiji.⁶⁶

Regrettably no response has been received to several polite letters to both the LPU and the Chief Registrar requesting updated data for LPU complaints handling sent as recently as September 2023. The LPU's unwillingness to share updated figures appeared to fuel criticism by some lawyers regarding the LPU's lack of transparency. Numerous participants reported having complaints filed against them, which had been pending for more than eight years despite them being properly characterised as minor in nature, and or having been resolved directly with the client long ago. This tends to indicate that the current system is not adequately addressing the volume and variety of complaints and discipline, and the situation seems to be deteriorating progressively.

Disposal of complaints by both the LPU and the ILSC is slow, with the ILSC disposing of only 59% of complaints between 2009 and 2015, a figure that is low when compared to jurisdictions like Australia and New Zealand.⁶⁷ Data compiled by Nand and shown in Table 8, demonstrates that from 2009 to 2015, 108 applications were filed in the ILSC, 56 judgments made and thirteen applications were withdrawn. Data beyond 2015 is not available at present.

⁶⁶ Data for table in Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017. 254. The rightmost column was created for this thesis.

⁶⁷ See Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019).

Table 8: ILSC applications filed

Year	Applications filed	Judgments Delivered
2009	9	9
2010	21	3
2011	7	6
2012	12	11
2013	29	20
2014	14	3
2015	16	4
Subtotal	108	56
2016	Not available	6
2017	Not available	10
2018	Not available	2
2019	Not available	4
2020	Not available	9
TOTAL		87

Source:⁶⁸

The ILSC's first Commissioner, the Hon. John Connors acknowledged this problem, attributing the slow disposal rates to the LPU's backlog and challenges mounting successful prosecutions.

*I had trouble driving the LPU to have matters ready for trial because there were so many in the backlog ... I couldn't get hearings, I couldn't get sittings, there was nothing ready ... I was constantly pushing [LPU] ... to get matters on.*⁶⁹

I was referred by several participants to a judgment by the ILSC critical of the LPU which was also reported widely in local media.⁷⁰ An excerpt reads:

While this Commission has not seen nor heard any evidence that would go to even suggest that the allegations of misconduct against the practitioner and his firm are founded on malice and vindictiveness, there is much force in their submissions that they have been unfairly treated since the initial complaint of their client was made. The conduct of the [LPU] in investigating the complaint appears unfortunately to have been lackadaisical, to have been very one sided

⁶⁸ Data to 2015 sourced from *ibid.* 66. Data of judgments delivered 2016-2020 sourced from 'Ilsc Homepage', *Ilsc* (Web Page, June 2023) <www.ilsc.com.fj>. Accessed 27/7/2022. I have not had the opportunity to analyse data beyond 2020.

⁶⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁷⁰ Farisha Ahmed, 'Chief Registrar Lawyers Warned', *Fiji Sun* (Web Page, December 2012) <<https://fijisun.com.fj/2014/11/16/chief-registrar-lawyers-warned/>>.

*and biased and there appears to have been an attitude of ensuring that the allegation to be proved at any cost.*⁷¹

Referring to complaints received by the LPU, one lawyer said:

*The problem with the new regulatory system is that things go in and don't come out. We have a number of pending complaints against us that we need to declare on our PC renewal every year. But they go back to 2006, 2009 and nothing has come out the other side, but you don't know if something might. We received a letter; we respond to the letter and then nothing. We don't write to them to follow up because we don't want them to dig the file up. We don't want to prompt them!*⁷²

The Manager, LPU also recognised these issues, suggesting that granting the LPU extraordinary search and seizure powers 'similar to Fiji's Independent Commission Against Corruption' could improve investigation efficiency.⁷³ I discussed this idea with several participants, including former ILSC Commissioner John Conners, who suggested LPU might be better served by pursuing other options instead, such as: applying to the ILSC for a seizure order 'which it has always been able to do'; revising LPU's operational procedures; or reviewing the composition and training of its staff in prosecuting disciplinary offences.⁷⁴

Over time, the LPU has demonstrated a tendency to prosecute 'low hanging fruit' rather than prioritising serious complaints of wilful professional misconduct. As shown in Table 9 below, figures reported by Nand show that 'since inception ILSC has dealt with approximately 40% of offences in Fiji which are either for not replying to [the LPU] or for other administrative issues relating to practicing certificates.'⁷⁵

⁷¹ *Chief Registrar V Aman Ravindra Singh [2018] Fjilsc 06; Chief Registrar V Devanesh Prakash Sharma and R Patel Lawyers [2014] Fjilsc 7.* per Madigan J, [7].

⁷² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁷³ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji. FICAC is Fiji's Independent Commission Against Corruption.

⁷⁴ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁷⁵ Nand, 'Protecting the Public, Maintaining Professional and Ethical Standards in the Legal Profession-a Study of Recent Reforms in New Zealand, Australia (New South Wales) and Fiji' (2019). 73.

Table 9: Major areas of complaint to LPU at 2017

Major Areas of Complaint		
1	21%	Failure to respond to the Chief Registrar
2	16%	Practicing Certificate issues
3	13%	Trust account issues
4	14%	Disrespectful behaviour
5	10%	Failure to obtain instructions
6	26%	Unspecified
Total	100%	

Source:⁷⁶

The LPU acknowledges this problem, attributing it to capacity constraints including a shortage of qualified investigators and the burden of the complaints backlog.⁷⁷ If the backlog were cleared and capacity increased, the LPU believes it could prioritise more serious complaints. However, this approach may not resolve other issues such as resistance from lawyers or limitations in the legislative framework governing complaint disposal and adjudication. For the LPU, tackling these issues will likely necessitate increased transparency, procedural enhancements, capacity building, and potentially, revisions to the legislative framework.

2.4. Conclusion

In conclusion, the case study on lawyer regulation in Fiji reveals the importance of regulatory relationships between regulatees and regulators for compliance with professional standards. Fiji's transition from a self-regulatory model to judiciary-controlled model was characterised by a lack of transparency and consultation which generated fear and mistrust between the legal profession and the new regulatory authorities. Accordingly, despite being well-resourced, Fiji's regulatory system for lawyers has been hindered by strained regulatory relationships which undermine compliance and contribute to administrative burdens, such as its untenable backlog of complaints.

The case study illuminates the connection between postures of compliance and resistance and enforcement of professional standards. These problems are particularly visible in the context of the strained regulatory relationships and questions regarding the legitimacy of regulators. Accordingly, fostering more collaborative and transparent regulatory relationships could improve the enforcement of professional standards and help to expedite the resolution of complaints.

⁷⁶ Arieta Vakasukawqa, "Hickie to Lawyers: Address Mistakes", *Fiji Sun* (Web Page, 3 September 2017) <<https://fijisun.com.fj/2017/09/03/hickie-to-lawyers-address-mistakes/>>.

⁷⁷ Interview with Manager, LPU conducted between 10 March and 21 April 2019 in Suva, Fiji.

The prominent role of the judiciary as regulators of lawyers in PICs is exemplified by Fiji's regulatory model which fully places regulatory control of lawyers within the scope of the state. While this model has addressed some of the key challenges of the previous self-regulatory system – such as regulatory capture, and its lack of funding – concerns about the lack of independence of regulation of the legal profession remain.

Finally, the case study illustrates the difficulties associated with path dependence,⁷⁸ by revealing how the starting conditions of a system can have long-lasting effects on the evolution and development of the system and the outcomes it produces. The way the 2009 Decree was introduced contributed to resistance by lawyers underpinned by both feelings of disrespect at having been sidelined and a (legitimate) fear of the unknown. A lingering consequence of path dependencies arising from initial starting conditions of a system is that once in place, even if its design is sub-optimal, it may be difficult to change.⁷⁹ Indeed, this appears to be supported by the current trajectory for a review of the 2009 Decree announced by the Fiji Government in 2023 which is considered below.

2.4.1. Proposed Reform of the 2009 Decree

In early 2023, the newly elected Fiji government announced that it would conduct a review of the 2009 Decree.⁸⁰ In response the FLS called for repeal of the current act and a return to the former Act, and reinstatement of the FLS as sole regulator of the legal profession.⁸¹ A draft *Legal Profession and Practice Bill 2023* ('2023 Bill') was endorsed by Fiji's Cabinet on 29 August 2023, but has not been released for public consultation.⁸² I was fortunate to view a copy of the draft Bill which, as drafted, proposes no changes to the substantive structure of the current system, while introducing a raft of new and amended provisions – many of which raise questions of policy or create the potential for negative consequences which may not have been considered by the drafters. Some of the problems are relatively minor (e.g. syntax, grammar and lack of definitions for many terms),

⁷⁸ See discussion in Chapter Three, p. 104.

⁷⁹ There may be many reasons for this, including 'sunk cost fallacies' and the tendency of institutions to operate to ensure their own survival ahead of broader concerns. On path dependence see further Chapter Three at p. 105-101 in the context of a pluralist-relational approach to lawyer regulation, and in Chapter Eight at p. 286 and p. 305.

⁸⁰ Naveel Krishant, 'Legal Practitioners Act 2009 to Be Reviewed', *Fijivillage* (Web Page, 29/03/2023) <<https://www.fijivillage.com/news/Legal-Practitioners-Act-2009-to-be-reviewed-458fxr>>.

⁸¹ Anish Chand, 'Society Wants Act Reinstated', *The Fiji Times* (Web Page, 20 June 2023) <<https://web.archive.org/web/20230621213533/https://www.fijitimes.com/society-wants-act-reinstated/>>.

⁸² The *Legal Profession and Practice Bill 2023* (Fiji) was endorsed by Fiji's Cabinet on 29 August 2023 for tabling in Parliament. 'Decisions Made at the Cabinet Meeting Held on 29th August, 2023', *Office of the Prime Minister* (Web Page, 29 August 2023) <<http://www.pmooffice.gov.fj/decisions-made-at-the-cabinet-meeting-held-on-29th-august-2023-29-08-2023/>>.

while some are more substantial. Below I have outlined some of these key issues which ultimately point to a need for the Fiji Government to conduct a more comprehensive consultation process on the 2023 Bill.

There are many terms throughout the 2023 Bill that are not defined, or introduce ambiguity. For example:

- ‘Legal practitioner’ is not defined, yet used throughout the 2023 Bill.
- ‘Public officer(s)’ used throughout the 2023 Bill.
- ‘Points of practice’ (s13(f)).
- ‘Malpractice’ and ‘unprofessional practice or conduct’ (s83(2)).
- ‘Entitled to practice’ (s18).
- ‘Members of the insurance industry’ (s75(1)(c)).

The provisions concerning the Fiji Board of Legal Education are problematic. As drafted, the Attorney-General’s delegate could call a meeting of the Board of Legal Education without notice to other members, in the middle of the night and attended only by the delegate, the Solicitor-General and any one other member. A decision by just two (of eight) members of the Board could at this meeting remove the accreditation of any previously accredited course/institution, or grant accreditation to any new course or institution. While members of the Board may be liable if they fail to act in good faith (see section 9), any decisions of the Board made in bad faith would remain in force and unappealable by operation of section 8. Additionally, precisely what liability arises and how such liability is to be determined is unclear.

Section 13(o) creates a right of audience for a person appointed by the FLS to any court or tribunal in any matter the Society is concerned about or interested in. This is an objectively extraordinary power. Not even the Chief Justice or President has such a right of audience. As drafted, this object has potential for abuse as it grants the Society a right of audience in any matter without restriction which includes:

- Domestic violence, Juvenile and Family Court matters where privacy is otherwise a right of parties;
- Agricultural; Anti-Corruption; Cooperative; Employment; Environment; LTA; Public Service Disciplinary; Small Claims; Statutory and Tax Tribunals.

Section 100(4) requires the ILSC to act in accordance with ‘any guidelines’ given by the Attorney-General regarding ‘general policy, administrative and financial guidelines’. This creates a substantial risk of undue influence over the ILSC by the Executive especially as the Commissioner

is already on a short-term contract that can be terminated with no more than 4 weeks' notice, or 4 weeks' pay in lieu of notice in accordance with s99(8).

Section 122 concerns costs payable for applications and disciplinary proceedings brought under the proposed Act. Section 122(2) provides the ILSC 'shall not make any order for payment of costs and expenses against the Registrar or Attorney-General', while s122(3) permits such an order against a legal practitioner. This is unjust and means the Registrar or Attorney-General are exempt from paying costs even in circumstances where the ordering of costs is appropriate and fair, such as where the prosecution is deemed to be for an improper purpose, or to have been a waste of the ILSC's time and resources.

The direction Fiji's Government takes will be closely watched by the entire region and by the global legal community.

3. IGNITING LAWYER REGULATION IN VANUATU

This case study investigates the revitalisation of the VLC's Disciplinary and Education Committees, particularly highlighting the role of a key individual, the Hon. Judge Andree Gustav ('Gus') Wiltens in driving positive change and strengthening regulatory relationships. Appointed Chair of both committees in 2017, Judge Wiltens' leadership and mentoring approach were well-received by the legal community, leading to positive perceptions about the regulatory system and increased postures of compliance by lawyers in Vanuatu.⁸³ Despite limited resources, the Disciplinary Committee has eliminated its backlog of complaints. At the same time, the Legal Education Committee has organised semi-regular legal education events utilising senior lawyers, academics from the locally based USP Law School, and visiting lawyers and judges. The case study highlights the importance of autochthony in fostering legitimacy and sustainability of state regulatory systems, with the appointment of local judges like the Hon. Viran Molisa Trief to the Supreme Court likely to play a crucial role in the future.

Data for this case study was collected through a series of interviews with key stakeholders conducted in Vanuatu from 18 July to 5 September 2019 in Port Vila, Vanuatu and review of documentary records. The 22 participants provided insights into various aspects of lawyer regulation in Vanuatu. Key participants included academics, judges, senior government law officers, and lawyers in Vanuatu – including several who had recently faced disciplinary sanction.

Contrary to my initial expectations of a dysfunctional state regulatory system in Vanuatu based on previous research and conversations with lawyers in Vanuatu, the empirical study revealed a system that was not only functioning, but was robust in two key areas, legal education and professional discipline. With the support of Chief Justice Vincent Lunabek, Judge Wiltens spearheaded locally-driven changes in legal education and professional discipline, demonstrating the importance of the judiciary to professional regulation and the significance of key individuals as regulators in small professional communities. In recognition of his outstanding contributions to the judiciary, Judge Wiltens was awarded a National Badge of Distinction in June 2022 by Vanuatu's then President, Tallis Obed Moses.⁸⁴

⁸³ On legitimacy and trustworthiness in regulatory style, see Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375.

⁸⁴ Glenda Willie, 'Justice Wiltens Decorated with Badge of Distinction', *Vanuatu Daily Post* (Web Page, 25 June 2022) <https://www.dailypost.vu/news/justice-wiltens-decorated-with-badge-of-distinction/article_0e4a6737-0b9a-5750-8768-d3f4eb9bdefb.html>.

3.1. Overview of Vanuatu's State Regulatory System for Lawyers

As noted in Chapter One, despite a comprehensive revised act to reform regulation of lawyers being passed by Parliament in 2005, it was never gazetted for reasons that have not been disclosed publicly.⁸⁵ Lawyers in Vanuatu are regulated under the *Legal Practitioners Act 1980 [CAP 119]* (Vanuatu) ('LPA 1980'), the *Legal Practitioners (Qualifications) Regulations (No. 22 of 1996)* (Vanuatu), and the *Vanuatu Law Society Act 2010* (Vanuatu) ('VLS Act')⁸⁶ which established the VLS as a peak professional body for the legal profession with responsibilities in relation to representation of the legal profession and continuing legal education.

Figure 8 below depicts the current structure of Vanuatu's regulatory system. Under the VLS Act, the VLS is responsible for establishing a program for continuing legal education (CPD) and ensuring all voluntary members complete a minimum of 10 hours of CPD each year. However, since its establishment in 2010 the VLS has struggled to fulfil this role.⁸⁷ As with other jurisdictions in the region, Law degrees accredited by the Fiji Board of Legal Education are recognised for the purpose of admission in Vanuatu.⁸⁸

The primary body responsible for regulation of lawyers in Vanuatu is the VLC. The members of the VLC comprise the Chief Justice, the Attorney-General and a lawyer appointed by the Minister responsible for justice.⁸⁹ The VLC is responsible generally for the 'control and supervision of legal practitioners' and is specifically responsible for issuing a 'Certificate of Registered Legal Practitioner' which is required for application for admission, dealing with complaints and discipline, lawyers' etiquette and continuing legal education of lawyers.⁹⁰ For reasons which never became clear during the research, I learned that sometime during the mid-2000s many of the regulatory activities of the VLC became increasingly intermittent. One function that deteriorated significantly was ensuring lawyers were duly admitted and their names entered on the Register of Legal Practitioners. By 2017, this had resulted in unknown numbers of lawyers regularly appearing

⁸⁵ See further Filer, 'Custom, Law and Ideology in Papua New Guinea' (2006).

⁸⁶ *Vanuatu Law Society Act 2010* (Vanuatu).

⁸⁷ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu. These requirements are not linked to renewal of practising certificates, and there are therefore few incentives for the legal profession to ensure a mandatory CPD system is established.

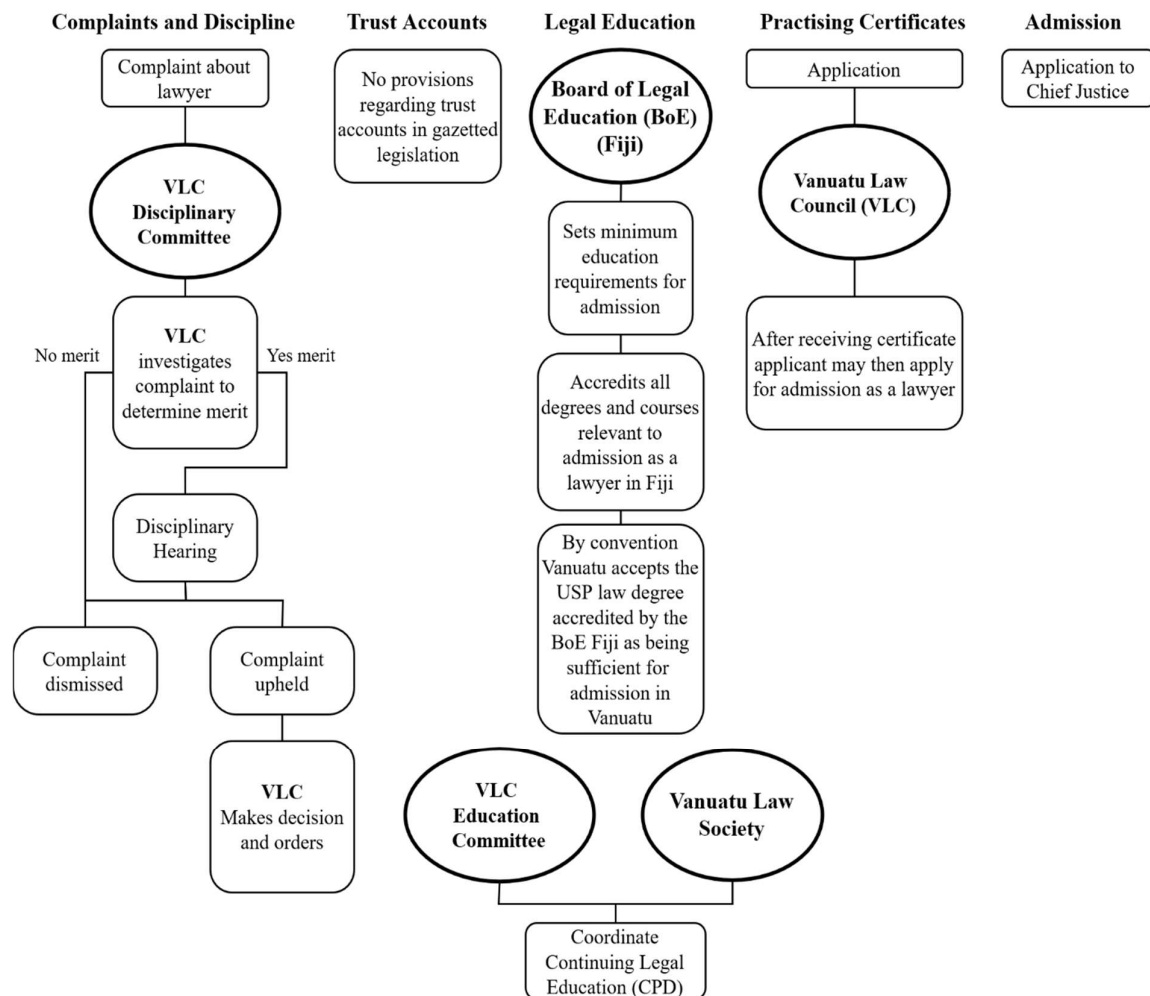
⁸⁸ On the origins of this rule, see further Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998), p. 40-1. In recent years the Fiji Board of Legal Education has accredited two Fijian universities, the Fiji National University (FNU) and the University of Fiji (Uni Fiji) for the purposes of admission. Technically degrees from these universities now qualify lawyers for admission in Vanuatu, although I am not aware if this has been tested.

⁸⁹ Section 2, LPA 1980.

⁹⁰ Section 5 LPA 1980. On the admission of lawyers in Vanuatu see further Morsen Mosses, 'A Note on Vanuatu's Cases on the Right to Equality in Vanuatu' (2017) 23 *Comparative Law Journal of the Pacific* 81, 89-93.

in court in Vanuatu without having been admitted. In addition to this, the VLC's disciplinary and legal education committees had not met for 'many years.'⁹¹ This rather dreary situation for professional standards of lawyers in Vanuatu would soon change following the arrival of a new Supreme Court Judge – formerly of the New Zealand District Court – the Hon. Judge Wiltens.

Figure 8: Overview of lawyer regulation in Vanuatu



⁹¹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

3.2. Reignition of Functions of the VLC

All participants interviewed in Vanuatu identified the Hon. Judge Wiltens, with the backing of Chief Justice Lunabek, as the driving force behind the surge of support for enhancing professional standards for lawyers in Vanuatu from 2018-2022. Leveraging his ‘inability to say no to the Chief Justice,’⁹² his skill in balancing both command-and-control and more relational regulatory styles,⁹³ and his amiable demeanour, he has effectively engaged the broader legal community in Vanuatu to better understand and adhere to professional standards. He attributed any success he may have had to his belief that a combination of ‘teaching, education and some sanctions is an effective way to motivate lawyers to comply and to improve.’⁹⁴

Image 8: The Hon. Judge Wiltens



**Source: Photo taken by author
August 2019, Port Vila, Vanuatu**

3.3. Direct Judicial Engagement – Mentoring and Sanctions

Judge Wiltens expressed empathy towards the complex challenges lawyers face in local legal practice environments. He observed that one ‘challenge that lawyers face is the lack of mentoring, even for relatively experienced lawyers ... ‘due to the small scale of the profession and absence of effective professional associations. He has sought to mentor lawyers directly both inside and outside chambers:

I have a practice of speaking with lawyers after cases. I talk to prosecutors and respondents and ask them ‘how do you think that went?’ what do you think went well? What do you think didn’t go well? They will say things and even raise things I might not have thought of myself and I’ll tell them, ‘It would have been good if you had said that! ... If they are waiting for court in the morning, I will seek to take an interest in what they are doing. I feel this is well received and I believe my attitude to be beneficial for lawyers.’⁹⁵

⁹² Interview with Judge Wiltens conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁹³ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Valerie Braithwaite, ‘Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions’ in Valerie Braithwaite (ed), *Taxing Democracy* (Routledge, 2003) 15.; Cary Coglianese and Robert A Kagan, *Regulation and Regulatory Processes* (Ashgate, 2007).

⁹⁴ Interview with Judge Wiltens (18 July – 5 September 2019).

⁹⁵ Interview with Judge Wiltens (18 July – 5 September 2019).

Despite his collegiate and approachable manner, he is also strict with lawyers who waste the court's time:

*I make costs orders against lawyers. To try to ensure the lawyer does not simply pass the costs onto the client, I direct that a copy of the order be given to the client so they are clear it is their lawyer personally and not them who must pay costs.*⁹⁶

One local practitioner discussed receiving a personal costs order against her by Judge Wiltens:

*I got slapped with a twenty-five thousand vatu fine last time for my client just not providing instructions. It was by Wiltens' as well. I won't hold it against him ... I think when higher fines are levied against lawyers and their clients, there is a more serious approach to the law and more respect for the judiciary in that you don't just go and file cases left, right and centre. ...indemnity costs, wasted costs, all that stuff, I think, could invigorate change in the quality of practise and in the way that lawyers handle their cases and think twice about what sort of advice to give and how to guide their clients instead of them being the ones steered.*⁹⁷

The same participant also reported that on a separate occasion Judge Wiltens had personally helped her to locate her client's passport after she mentioned to him that the registry had been unable to locate it for several months.⁹⁸ Judge Wiltens was identified by seven participants who were private practitioners – representing approximately 15% of the members of the VLS as having personally influenced them to strive to be a better legal-practitioner.⁹⁹ All participants spoke of him with praise and respect.¹⁰⁰

3.3.1. The VLC and Its Two Committees

In February 2017, Judge Wiltens was appointed Chair of the VLC's Education Committee and a newly established Disciplinary Committee pursuant to section 7 of the LPA 1980,¹⁰¹ to hear complaints about legal practitioners and their employees. That Committee was appointed for 12 months. During the life of that committee a number of complaints were received which, for a variety of reasons, were not able to be dealt with.¹⁰² In January 2018, local media reported that the

⁹⁶ Interview with Judge Wiltens (18 July – 5 September 2019).

⁹⁷ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁹⁸ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁹⁹ Reference here is made to the list of 58 lawyers in private practice see Vanuatu Law Society 'Vanuatu Law Society Directory', *Vanuatu Law Society* (November 2020).

¹⁰⁰ All 20 of them, including Judge Wiltens himself, albeit humbly.

¹⁰¹ *Legal Practitioners' Act 1980 [Cap 115] 1980* (Vanuatu).

¹⁰² A sensitive matter affecting the Committee's operation involved a lawyer who was complained against acting in various ways to intimidate members of a Disciplinary Committee. Interview with Judge Wiltens (18 July – 5 September 2019).

Disciplinary Committee was ‘a little-known and little-used mechanism’ and that ‘no one has ever been disciplined by the Law Council before’.¹⁰³ In June 2018, Judge Wiltens was appointed to Chair a new Disciplinary Committee which, as discussed below, began to operate for the first time. At the time of Judge Wiltens appointment the Disciplinary Committee had a backlog of complaints and poor record keeping, while the Legal Education Committee had not taken an active role in coordinating CPD events for many years. Judge Wiltens considered that:

*The primary role of the regulator in Vanuatu is to improve professional standards. In doing that, education is the most important function ... Why one would do that is to make things better for the public ... Here in Vanuatu some lawyers are ripping clients off. Some lawyers are badly representing client's cases and cases are getting thrown out of court because of problems with their legal representation.*¹⁰⁴

Judge Wiltens’ objective was for the Disciplinary Committee to dispose of one case per month and for the Legal Education Committee to run semi-regular CPD events for lawyers delivered by a judge or senior lawyer.¹⁰⁵ During my fieldwork in August 2019, both of these committees were achieving these objectives despite neither committee having any funding or resources other than the use of court facilities for meetings and the time of its members, predominantly Judge Wiltens. The Legal Education Committee has drawn from senior local lawyers, academics from the locally based USP Law School and visiting lawyers and judges to deliver CPD on a regular (monthly) schedule.¹⁰⁶ At the time of my fieldwork, lawyers seemed open to reflecting on legal ethics and professional standards. Judge Wiltens had ignited genuine change, perhaps not because he had secret access to resources not already present in the system, but because in acquiring him, the regulatory system acquired a reliable source of ignition for change.

From June 2018 to March 2020, the Committee made 12 decisions on outstanding complaints, including a very serious matter involving an Australian lawyer Mr Dane Thornburgh against whom seven different complaints were made, including relating to criminal charges of extortion.¹⁰⁷ The sanctions and decisions of the Disciplinary Committee was remarkably well-received. Two

¹⁰³ Dan McGarry, ‘Disciplinary Committee Progress - Slow but Sure’, *Vanuatu Daily Post* (Web Page, 27 January 2018) <https://www.dailypost.vu/news/disciplinary-committee-progress---slow-but-sure/article_b5fadec3-d459-5edb-8e62-77ff8a1d4df2.html>.

¹⁰⁴ Interview with Judge Wiltens (18 July – 5 September 2019).

¹⁰⁵ Interview with Judge Wiltens (18 July – 5 September 2019). In Vanuatu there is currently no mandatory obligation on lawyers to do CLE.

¹⁰⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁰⁷ See ‘Lawyer Ceases Practise in Vanuatu’, *Vanuatu Daily Post* (Web Page, 9 December 2019) <https://www.dailypost.vu/news/lawyer-ceases-practise-in-vanuatu/article_37bdf760-1a02-11ea-883a-0f51e6a76b23.html>. see further *Thornburgh, Re* [2019] Vulcdc 6.

participants who had been sanctioned with fines¹⁰⁸ expressed their satisfaction with the fairness of the process – one even expressed his gratitude for the opportunity to be disciplined so that he could improve his professional knowledge and skills:¹⁰⁹

*It was a turning point for me. I suddenly appear before them [the Disciplinary Committee]. Oh my God, I was wrong. So now I am trying to pull up the socks, I 'am trying to correct my weaknesses.' So then other lawyers hear about those disciplined lawyers (like me), and they are pulling up their socks as well.*¹¹⁰

One senior lawyer felt that by sanctioning him, other lawyers would perceive the disciplinary system as impartial and fair, lending it greater legitimacy.¹¹¹ Data collected in other interviews suggested this may well have been the case:

*When I heard that there were some lawyers being disciplined, automatically, I just thought I need to be on the safe side and see how the seniors act and act in the way they acted.*¹¹²

*When there's discipline, I learn from that. Like, this lawyer has been disciplined by the Law Council, or this lawyer has been suspended, so I was asking why. And then my seniors told me "Just because he got his client's money from the trust account". So normally, you can't touch trust accounts because it's the client's money. So that's when I learned.*¹¹³

One participant, Arthur Faerua, then President of the Vanuatu Law Society (VLS), observed:

*What is key in my view is I think the lawyers themselves, when they see this recent wave of discipline, it's waking some of them up ... [the disciplinary issues arising] are typical practice dilemmas and I think the fact that it's been reported in the media makes lawyers think maybe, it can happen to me?*¹¹⁴

In conclusion, the positive response from sanctioned lawyers highlights the value of a disciplinary system that fosters professional growth and improvement. Additionally, prompt publication of decisions helped to increase awareness of disciplinary actions among lawyers, leading to a greater sense of caution and adherence to professional standards. Judge Wiltens' regulatory style has been

¹⁰⁸ Interviews conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁰⁹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹¹⁰ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹¹¹ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹¹² Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹¹³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹¹⁴ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

instrumental in fostering a sense of trust and respect in the VLC and the disciplinary process among lawyers. His critical role in the system raises a natural question, what happens when he leaves?

3.3.2. Succession Planning

As is discussed in section 5 below, dependency on one key individual makes Vanuatu's reinvigorated VLC vulnerable, particularly in the wake of Judge Wiltens departure. Judge Wiltens demonstrated awareness of the need to plan ahead for his eventual departure by actively seeking to mentor a successor, local Judge Viran Molisa Trief. It is too early yet to tell how the regulatory system in Vanuatu will adjust to change.

3.4. Why was He Successful?

The success of Judge Wiltens in revitalising the VLC Disciplinary and Education Committees can be attributed to several factors. First, his statutory authority as a judge, with support by the Chief Justice, lent both legal authority to his actions, allowing him to drive change and positively influence others. Second, he demonstrated a sound ability to balance different regulatory styles to motivate lawyer compliance.¹¹⁵ For example, his collaborative and supportive leadership style emphasised the need for locally-driven change in legal education and professional discipline. His personalised charismatic approach made a significant impact on lawyers, with several participants crediting his advice and guidance as being central to their professional development. The notable lack of criticism of the judiciary's regulatory role by lawyers in Vanuatu (e.g. compared with lawyers in Fiji) appeared to be linked to Judge Wiltens' regulatory style, which reflected important elements of a pluralist-relational approach to lawyer regulation based on a grounded understanding of local paradigms and relationships. This case study therefore also underscores the significant impact of the regulatory styles of individual regulators on compliance

Finally, with a deep understanding of the challenges facing the profession in Vanuatu, such as the lack of mentoring, Judge Wiltens took it upon himself to provide guidance to lawyers both inside and outside the courtroom while also encouraging and supporting other senior lawyers to do more. By fostering a sense of ownership and pride within the legal community, he was able to shift postures of resistance and disengagement by regulatees towards regulation into postures of compliance and capitulation, strengthening regulatory legitimacy and efficacy. His open and supportive regulatory style cultivated trust in the VLC by lawyers, and generated enthusiasm from

¹¹⁵ On regulatory styles see further Valerie Braithwaite, 'Responsive Regulation and Taxation: Introduction' (2007) 29(1) *Law & Policy* 3.

a number of lawyers for professional development which manifested as increased postures of compliance in Vanuatu and support for the VLC and its initiatives. This shows the importance of autochthony and trust as a source of legitimacy and the effects of positive regulatory relationships on postures of compliance.

3.5. Conclusion

In Vanuatu, the judiciary plays a critical part in maintaining the integrity of the legal profession and ensuring lawyer compliance with professional standards. Judge Wiltens' tenure as Chair of both the Disciplinary and Education Committees illuminates the important role of both the judiciary and key individuals in PICs in the regulators of lawyers. Through his work in revitalising the VLC Disciplinary and Education Committees Judge Wiltens demonstrated the judiciary's commitment to supporting and improving the legal profession in Vanuatu. His work to strengthen these institutions while seeking to mentor a successor in local Judge Viran Molisa Trief demonstrated his awareness of the need to ensure continuity of the VLC and its work after his eventual departure.¹¹⁶

Image 9: Judge Wiltens receiving the National Badge of Honour, First-Class Badge of Distinction (Vanuatu) June 24 2022



Source: Vanuatu Daily Post¹¹⁷

¹¹⁶ Issues such as the dependency on key individuals, the role of the judiciary and autochthony as a source of legitimacy are considered below in section 5. Three Features of State Regulatory Systems in PICs, p. 210.

¹¹⁷ Willie, 'Justice Wiltens Decorated with Badge of Distinction', (2022)

4. LAWYER REGULATION IN KIRIBATI

4.1. Introduction

This case study investigates the operation of state systems regulating lawyers in Kiribati focusing on the dynamics between the KLS as regulator and the legal profession. The study is structured into three sections: an overview of the current system, emphasising the importance of key individuals as regulators; an analysis of the system's operation, highlighting themes of legitimacy and disengagement related to the KLS' *Professional Conduct and Practice (Kiribati Lawyers) Rules 2011*¹¹⁸ ('Code of Ethics'); and an exploration of the role of the judiciary as regulators of lawyer conduct in practice. Data for this case study was collected through 20 formal interviews and informal conversations with a diverse range of stakeholders during a research visit to Tarawa, Kiribati, between 5 July and 10 September 2018.¹¹⁹

The primary research revealed that the KLS has adapted to operational constraints by developing a responsive approach to resolving complaints against lawyers. However, the judiciary emerged as having perhaps a more significant influence on lawyer conduct, emphasising their importance as regulators of lawyers in PICs. This case study underscores the challenges faced by small-scale regulatory systems, the importance of key individuals as agents of regulatory change and the pivotal role of the judiciary as regulators of lawyers in PICs.

4.2. Overview of the System

Lawyers in Kiribati are governed by the following legislation and rules:

- *Lawyers Admission (Amendment) Rules (No2) 1992* (Admission Rules);¹²⁰
- *Kiribati Law Society Act 2006* (KLS Act);¹²¹
- *Professional Conduct and Practice (Kiribati Lawyers) Rules 2011* (Code of Ethics).¹²²

¹¹⁸ *Professional Conduct & Practice (Kiribati Lawyers) Rules 2011* (Kiribati)

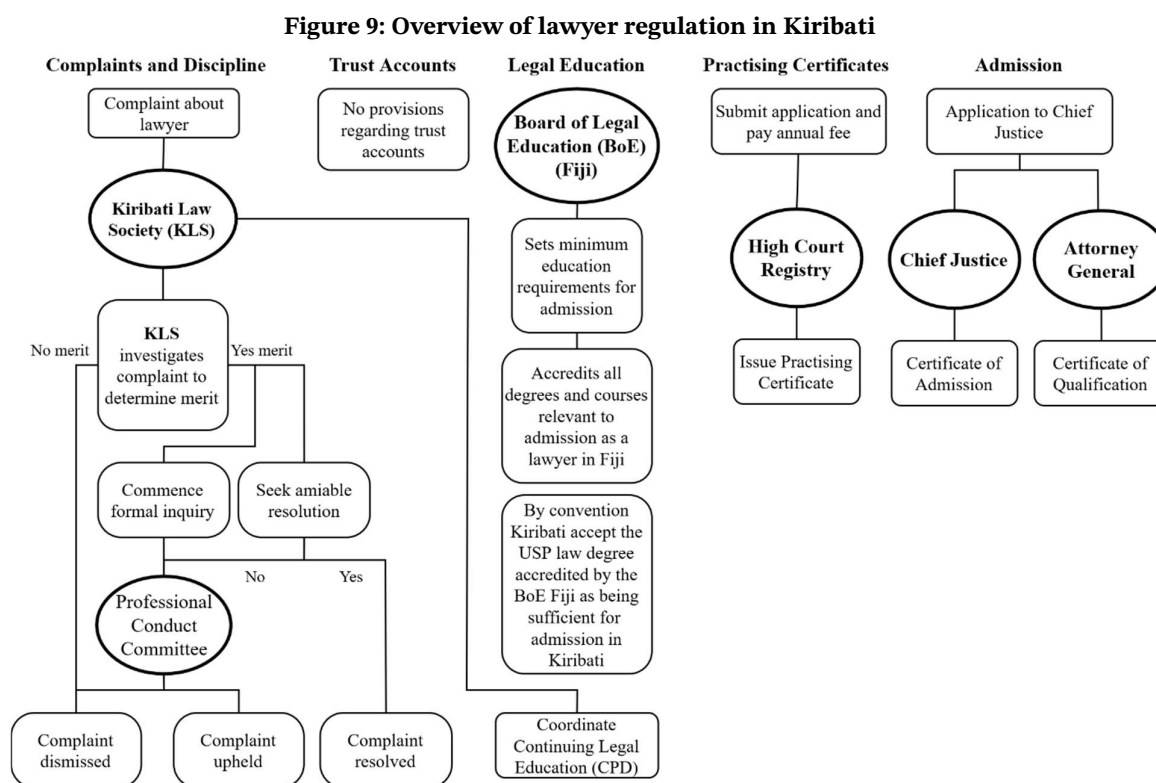
¹¹⁹ These included judicial officers, government lawyers and private practitioners. In addition to formal interviews, informal conversations were conducted with local business owners, judges, court staff, and court users to enrich and triangulate data.

¹²⁰ In accordance with section 97 of the Constitution of Kiribati, the Admission Rules were made by the Rules Committee, which comprised the Chief Justice, President of the Court of Appeal and the Attorney-General (quorum) and up to two other people appointed by the *Beretitenti* (President). *Kiribati Independence Order 1979* (United Kingdom) As of December 2023, Kiribati has no constitutionally appointed Court of Appeal judges. Accordingly, the committee currently comprises the Attorney-General and any appointees by the *Beretitenti*. See Dziedzic, 'The President Vs the Judge: How Kiribati Came to a Constitutional Standoff', (2022)

¹²¹ *Kiribati Law Society Act 2006* (Kiribati)

¹²² *Professional Conduct and Practice (Kiribati Lawyers) Rules 2011* (Kiribati) These Rules were created by the KLS and most likely entered into force on 1 April 2011. See further Naylor, 'Case Note: *Development Bank of Kiribati V Maitinnara* [2015] Kica 2; Civil Appeal 02 of 2015: Paterson, Blanchard and Handley Jja' (2019). See discussion below 4.3. Questions of Legitimacy: The Code of Ethics, p. 202.

Figure 9 illustrates an overview of lawyer regulation in Kiribati developed for this thesis.



The Chief Justice and Attorney-General are jointly responsible for admission and licensing while the KLS is primarily responsible for complaints and discipline and legal education. The term 'lawyer' is defined under the KLS Act to refer to 'a person admitted to practise as a lawyer of the High Court under the Admission Rules'.¹²³ There is no distinction between barristers and solicitors in Kiribati. Despite this lack of distinction, section 22 of the KLS Act empowers the *Beretitenti* (President) to confer the title 'Senior Counsel' upon a lawyer.¹²⁴

Neither the Admission Rules nor the KLS Act specify the minimum academic or practical qualifications for lawyers, although the Admission Rules provide that completion of a law degree in any common law country qualifies a person for admission to practise via the unused 'Student at Law' pathway.¹²⁵ By convention, member countries of the USP,¹²⁶ including Kiribati, accept the

¹²³ KLS Act 2006, section 2.

¹²⁴ Per section 22 of the KLS Act, the *Beretitenti* must act in 'accordance with the advice of the Chief Justice and the Council [of the KLS], tendered after consultation with the judges of the Court of Appeal, Attorney-General and the Council'.

¹²⁵ Admission Rules, Rule 10.

¹²⁶ Member countries of the USP are: Cook Islands; Fiji; Kiribati; Republic of the Marshall Islands; Nauru; Niue; Samoa; Solomon Islands; Tokelau; Tonga; Tuvalu; and Vanuatu.

accreditation granted by the Fiji Board of Legal Education as being sufficient for the purposes of local admission.¹²⁷ Past practice indicates the Attorney-General of Kiribati will determine that a person is qualified to practise in Kiribati if they have completed a law degree in a common law country and a post-graduate diploma in legal practice.¹²⁸

The control of admissions through the determination of fitness by the Attorney-General is unique in the South Pacific Region, as shown in the table at Appendix 2. In all other jurisdictions in the region the determination of a person's fitness to practise is made by either the court, or a designated independent body such as a law society council. The role of the Attorney-General in determining the adequacy of lawyers' qualifications and fitness to practise appears to blur the separation of the powers of the Executive and Judiciary.¹²⁹

4.2.1. The KLS Act

Image 10: Michael Takabwebwe



Source: Photo taken by author 2011

The entry into force of the KLS Act in 2007 heralded a new era for professional regulation in Kiribati.¹³⁰ Initiative for reform was led by the recently retired judge and longest serving Attorney-General in the Commonwealth, the Hon. Michael Takabwebwe. One participant explained his passion and drive:

Michael Takabwebwe in retirement was basically the only lawyer who wanted it [the KLS]. He led, in his style, top down, drafted an Act and kept going. Taking the view that if somebody would do something he would do

¹²⁷ The Fiji Board of Legal Education is established under the *Legal Practitioners Act* 2009 (Fiji). The Fiji Board of Legal Education has accredited the law degrees offered by the USP, Fiji National University (FNU) and the University of Fiji (Uni Fiji) for the purposes of admission in Fiji. The sufficiency of degrees from FNU or Uni Fiji have, to date, not been tested for the purpose of admission in Kiribati. On the origins of this rule, see further Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998). p. 40-1.

¹²⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹²⁹ Although improbable, the Attorney-General could, hypothetically, deny all applications for a Certificate of Qualification for any arbitrary reason. In such a situation, judicial review by the High Court could only determine whether such denials were improper, unfair or unreasonable and could not compel a reversal of the decision.

¹³⁰ See further Chapter One, p. 46.

*it, and if nobody was going to do anything, then he would do it ...*¹³¹

This quote summarises a much longer story of how a retired career public servant leveraged his experience and deep networks to drive an immense law reform project from around 2004-2006 in a local context of limited government law-making capacity. It is unlikely any other I-Kiribati lawyer could have achieved what he did. Takabwebwe then became the first President of the KLS at its inaugural General Meeting in March 2008, a position he held until his passing in 2013.¹³² Several participants confirmed that Takabwebwe's central role in establishing a statutory framework for the regulation of lawyers to better protect clients and support lawyers.¹³³

Takabwebwe was succeeded by Sister Bernadette. (Having had many conversations with Michael and 'Sister B' it is difficult to write impartially about them, they are titans).¹³⁴ Participants spoke of Sister Bernadette with admiration and respect, one said: 'Sister B is a formidable advocate. Few I-Kiribati lawyers could face her.'¹³⁵ Sister Bernadette was called to the Bench in 2013 and left her position as President of KLS in 2015, leaving somewhat of a vacuum in the senior leadership of the KLS. At the same time, as discussed below, issues regarding the legitimacy of the Code of Ethics and disengagement by lawyers from KLS had begun to raise many challenges for the KLS as regulator.

Image 11: Sister Bernadette



Source: Photo taken by author 2014

¹³¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹³² I had the pleasure of knowing Michael through his work on the inaugural Steering Committee of the SPLA from 2007-2011. He helped guide the establishment of the SPLA as a peak regional lawyer association through much engagement with bar leaders from around the region.

¹³³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹³⁴ In Greek mythology, the term 'Titan' is used to describe a group of powerful and immortal gods who preceded the Olympians. A reference to this can be found in Hesiod's 'Theogony', a classical Greek poem that details the origins and genealogies of the gods. The Titans are portrayed as influential figures with immense power, and the term itself has come to signify greatness and strength. This use of the term 'titan' in a contemporary context conveys respect and admiration for a person's accomplishments and legacy. It is in this sense I mean the term here.

¹³⁵ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

4.3. Questions of Legitimacy: The Code of Ethics

The Code of Ethics is a set of guidelines adopted by the KLS to regulate the professional conduct of lawyers in Kiribati. It was created at the KLS Annual General Meeting in 2011 and came into effect on April 1, 2011.¹³⁶ Three narratives regarding the Code of Ethics emerged during my fieldwork: some parts of the profession did not feel consulted in their development; the Code of Ethics is too complex and not relevant to practice in Kiribati; and that the Code of Ethics does not apply to government lawyers – which comprise more than 80% of the legal profession.

Some participants said they did not agree with the Code of Ethics primarily because they felt they were not adequately consulted. One participant said:

When Michael Takawebwe was meeting lawyers to discuss the Conduct Rules, I attended one of the consultation sessions. We (lawyers) all kept quiet when we discussed things like who would be members of the KLS Council, and sit in punishment or make decisions against lawyers.¹³⁷

When this was put to other participants, I was told this was probably associated with both customary norms of deference to seniority and Takawebwe's 'top-down regulatory style'.¹³⁸ The feeling of not having been consulted appeared to connect with more general attitudes of disengagement and distancing from the KLS as regulator. One participant said 'I left the KLS because I felt that it was not going anywhere and not moving forward to fulfil its functions under the KLS Act.'¹³⁹

Several lawyers contended that the Code of Ethics is too complex and not relevant to the local context, although the vast majority of lawyers I interviewed admitted they were not very familiar with its content. It was therefore difficult to accurately gauge perceptions of the relevance of the Code of Ethics to local legal practice environments.¹⁴⁰ One possible explanation for lawyers' lack of familiarity with the Code of Ethics was that its introduction was not widely promoted. The Code of Ethics is not available online, or in hard copy.¹⁴¹ When interviewed, three magistrates said they were unaware the Code of Ethics existed, let alone that it had existed for seven years.¹⁴²

¹³⁶ Attorney-General of Kiribati, 'Kiribati Country Report, 30th Pilon Meeting Auckland, New Zealand' (Report, Kiribati, 4-6 December 2011).

¹³⁷ Interview conducted in South Tarawa, Kiribati, between 5 July and 10 September 2018.

¹³⁸ Interviews conducted in South Tarawa, Kiribati, between 5 July and 10 September 2018.

¹³⁹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁴⁰ Interviews conducted between 5 July and 10 September 2018, South Tarawa Kiribati.

¹⁴¹ I received my copy by email from the KLS in 2011.

¹⁴² Interviews conducted between 5 July and 10 September 2018, South Tarawa Kiribati. Two magistrates subsequently requested a copy from me.

Additionally, the introduction of the Code of Ethics was not linked with any training or instructions for lawyers regarding how to comply with it, nor support for lawyers to identify compliance issues and develop better systems for compliance.

Concerns regarding the complexity of the Code of Ethics have some merit. The Code of Ethics draws heavily from the *Rules of Professional Conduct and Practice* 2003 of the Law Society of South Australia – rules designed to operate in a very different context.¹⁴³ The Code of Ethics provide five extended statements of principle, which underpin 44 specific rules of conduct, regarding: client relationships; advocacy and litigation; relations with other lawyers; relations with third parties; and general practice rules.¹⁴⁴ By any measure the rules are fairly complex, but this alone does not mean they are not relevant to the local practice of law.

In interviews, several government lawyers expressed the view that they did not believe the KLS regulated them and that the Code of Ethics only applies to members of the KLS (rather than all lawyers). This was despite the fact that the KLS Act explicitly obliges the KLS to control and regulate all lawyers admitted under the Admission Rules.¹⁴⁵ The reason for this view that the KLS does not regulate government lawyers appeared to be linked with *obiter* on the interpretation and applicability of the KLS Code of Ethics and the KLS Act in a decision by the Kiribati Court of Appeal in the case *Development Bank of Kiribati v Maitinnara* [2015] KICA 2.¹⁴⁶ I have written about this elsewhere,¹⁴⁷ but, in brief, an apparent error by the Court of Appeal as to how the Code of Ethics were created and by what statutory mechanism resulted in some unfortunate phrasing in their learned judgment which has in turn led to government lawyers questioning both the legality of the Code of Ethics and its applicability to them.¹⁴⁸ This disagreement has not been properly resolved and has resulted in disengagement and distancing from the KLS as a regulator of government

¹⁴³ The Law Society of South Australia's *Rules of Professional Conduct and Practice* 2003 were based on the Law Council of Australia's *Model Rules of Professional Conduct and Practice* 1997. In July 2011, the Law Society of South Australia revoked its 2003 Rules and adopted the *Australian Solicitor's Conduct Rules*, which had been developed by the Law Council of Australia and promulgated in June 2011. See further history at: Law Council of Australia, 'Australian Solicitor's Conduct Rules', *Law Council* (Web Page) <<https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>>.

¹⁴⁴ *Professional Conduct & Practice (Kiribati Lawyers) Rules 2011* (Kiribati)

¹⁴⁵ Section 5(d) *Kiribati Law Society Act 2006* (Kiribati) The Code of Ethics applies to every admitted lawyer engaged in the provision of legal services, including government lawyers and lawyers employed by the OPL. See detailed discussion in Naylor, 'Case Note: *Development Bank of Kiribati v Maitinnara* [2015] Kica 2; Civil Appeal 02 of 2015: Paterson, Blanchard and Handley Jja' (2019).

¹⁴⁶ *Development Bank of Kiribati v Maitinnara* (Kiribati Court of Appeal, Paterson, Blanchard and Handley JJA, No 2, 19 August 2015).

¹⁴⁷ Naylor, 'Case Note: *Development Bank of Kiribati v Maitinnara* [2015] Kica 2; Civil Appeal 02 of 2015: Paterson, Blanchard and Handley Jja' (2019).

¹⁴⁸ See discussion *ibid.* 81-2.

lawyers – which is problematic given that they comprise more than 80% of the legal profession in Kiribati. This distancing erodes the legitimacy of the KLS and trust by the public and profession in the KLS’ ability to effectively regulate lawyers.

4.4. Questions of Legitimacy: Complaints and Discipline

The KLS is responsible for control and regulation of lawyers in Kiribati and for enforcing the Code of Ethics through the operation of the complaints and discipline system.¹⁴⁹ This system does not currently function as designed, and despite reports of serious misconduct by some lawyers, no Professional Conduct Committee (PCC) has been formed and no disciplinary action has ever been taken against a lawyer in Kiribati.¹⁵⁰ The research indicated several factors contributing to this, including the KLS’ lack of resources and an apparent lack of interest by the Attorney-General in establishing a PCC to investigate serious complaints. The KLS appeared to have nevertheless adapted to barriers to its operation in a flexible way,¹⁵¹ albeit one which does not prioritise transparency or strict compliance with professional standards. A figure created for this research which shows the statutory complaints process in Kiribati is provided at Appendix 3.¹⁵²

4.4.1. The Complaints Process in Practice

As noted, KLS’ lack of funding or in-kind support severely impacts its operation. It is difficult for complainants to know how to make a complaint because KLS has no permanent office, phone number, mailing address, website or email address, and no employed staff.¹⁵³ Several participants identified the lack of a permanent office as a key problem for reporting complaints.¹⁵⁴ This is compounded by the fact that many people with grievances against lawyers are discouraged from filing a complaint at all. For example, several participants advised that people with *prima facie* complaints against lawyers are often discouraged from making a formal complaint by other lawyers, magistrates and government employees in whom they confided.¹⁵⁵ Reasons given for discouraging people from making formal complaints included: ‘the risk of negative consequences

¹⁴⁹ Section 5(d), *Kiribati Law Society Act 2006* (Kiribati) See further Part III of the KLS Act 2006.

¹⁵⁰ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁵¹ The KLS’ regulatory approach is perhaps better described as ‘palliative’ rather than ‘adaptive’. See further discussion regarding Adaptive and Palliative Practical Norms in Chapter Three, section 4.4. Practical Norms, p. 117, and Chapter Seven, section 4. Adaptive and Palliative Practical Norms, p. 258.

¹⁵² See Appendix 3 Statutory Complaints Process in Kiribati. I have explained the theoretical operation of this system elsewhere, see David Naylor, ‘Lawyer Regulation in Kiribati’ (Report, PhD Thesis Working Paper, 31 July 2020) <<https://ssrn.com/abstract=4417590>>. Here I have omitted a detailed description of the diagram at Appendix 3 in lieu of more robust explanation of how the system actually operates.

¹⁵³ South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (2011). This remains the case today.

¹⁵⁴ Interviews conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁵⁵ Interviews conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

for the lawyer complained about’; the ‘unlikelihood of successful remedy’ through the complaints process; and social/cultural practices such as the avoidance of conflict and causing public shame.¹⁵⁶ Discouraging complaints in this way prevents the regulator from receiving important information on possible lawyer offending which restricts its ability to effectively argue for financial resources and facilities.¹⁵⁷

Despite its lack of resources and the practice of discouraging complainants, the KLS Council received and evaluated more than 50 written complaints against lawyers between 2011 and September 2018.¹⁵⁸ This process of evaluation involved meeting as a Council to discuss the complaint and if deemed necessary notifying the lawyer of the complaint in writing. Some KLS Council members may have also provided informal advice to lawyers regarding how they might best resolve a complaint directly with their client. Unfortunately, records such as annual reports, which might provide data on the number and nature of complaints received and whether and how they were resolved, are not available.¹⁵⁹ Notwithstanding this, participants reported a wide range of divergent conduct by lawyers ranging from poor communication to financial misconduct.¹⁶⁰

Some complaints received by the KLS concern allegations of serious professional misconduct, such as improper dealings with client money or intentionally misleading the court, and these ought to have been referred to a PCC for formal investigation.¹⁶¹ However, no PCC has ever been formed. The primary reason given for this by the KLS was that the Attorney-General has not responded to repeated requests from the KLS to appoint a lawyer to chair a PCC.¹⁶² Such a request has been made in writing several times, including as recently as 2019, but as at 7 September 2019 no response has been received.¹⁶³ No explanation has been given by the Attorney-General for this.¹⁶⁴ Accordingly as

¹⁵⁶ Interviews conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁵⁷ Interviews with past and present KLS Council members conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁵⁸ Interviews with past and present KLS Council members conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁵⁹ Given the lack of published annual reports, or any public records of KLS regarding the number and nature of complaints against lawyers, it would be desirable for the KLS Council to conduct an audit of records held by current and former Council members. Such an audit should record key details such as the date a complaint was made, relevant action taken and any outcomes.

¹⁶⁰ The broad scope of lawyer conduct that diverges from professional standards reported in PICs is considered in greater detail in Chapter Four.

¹⁶¹ Interview with current KLS Council member conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁶² Interviews with past and present KLS Council members conducted between 5 July-10 September 2018 in South Tarawa, Kiribati. The Acting President of the KLS has raised the issue in her formal remarks at the Opening of the Legal Year in both 2019 and 2020.

¹⁶³ Conversation with current member of KLS Council, 7 September 2019.

¹⁶⁴ Interview with current KLS Council member conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

one KLS Council member sombrely observed, ‘the current system won’t get an outcome [against a lawyer accused of serious misconduct].’¹⁶⁵

KLS’ inability to effectively enforce professional standards was linked with disengagement and impunity by some lawyers. One lawyer said: ‘[Lawyers who do the wrong thing] believe there won’t be any punishment, or that other lawyers may not raise that issue against him or her.’¹⁶⁶ Another said: ‘In Kiribati, is there really a risk from non-compliance with obligations? Is client going to complain? Is the regulator going to do anything? ... [The KLS Act] has no teeth.’¹⁶⁷ By this she meant that the current system was not able to ensure professional discipline. However, despite lacking teeth, the KLS Act empowers the KLS Council to attempt to facilitate the amicable resolution of disputes which it has sought to do via letters and personal interactions characteristic of more responsive regulatory styles. This perhaps underscores the importance of flexibility in regulatory design for pluralist contexts.

4.4.2. Encouraging Amicable Resolution

Section 13(3) empowers the KLS to seek to resolve complaints received about lawyers in writing by ‘first attempting to bring about an amicable resolution’¹⁶⁸ prior to referring them to a disciplinary committee. Because the KLS Council is unable to establish a PCC, it has relied on s13(3) to encourage lawyers to resolve complaints with clients amicably and informally. Participants who expressed knowledge of complaints against lawyers suggested that it was likely that some complaints are resolved by the lawyer reaching an agreement with the complainant – usually involving paying back some sum of money in dispute.¹⁶⁹ One former KLS Council member advised that if they knew the lawyer complained about as a friend, sometimes a KLS Council member might speak privately with the lawyer and offer them advice on their situation to resolve the complaint amicably.¹⁷⁰ Some lawyers will reply by letter, but others choose not to reply. Without ‘teeth’ the KLS cannot take further action and as one participant put it: ‘The current system leaves doubts in the mind of the public as to the transparency and fairness of the process.’¹⁷¹

¹⁶⁵ Interview with current KLS Council member conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁶⁶ Interview with current KLS Council member conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁶⁷ Interview conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁶⁸ Kiribati Law Society Act 2006, section 13(3).

¹⁶⁹ Interview conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁷⁰ Interview conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

¹⁷¹ Interview conducted between 5 July-10 September 2018 in South Tarawa, Kiribati.

4.5. Role of the Judiciary

Because most I-Kiribati lawyers are based in the capital Tarawa, the environments of courts in Tarawa have a particularly significant impact on the minimum standards of competence, professionalism and ethics of practising government and private lawyers. However, Table 10 below shows that the vast majority of cases in Kiribati take place in the Magistrates' Courts – where lawyers' professionalism can be difficult to maintain due to relaxed rules of procedure, lay magistrates and the limitations of court facilities.

Table 10: Total cases filed in Kiribati 2012-2014 combined

Magistrates' Courts ¹⁷²			High Court ¹⁷³			Court of Appeal ¹⁷⁴		
Filed	Disposed	Pending	Filed	Disposed	Pending	Filed	Disposed	Pending
34,034	26,185	7,749	1,280	799	481	43	42	1

Kiribati has 22 Magistrates' Courts spread across 20 magisterial districts. Each court outside the urban areas has a pool comprising up to 10 lay magistrates, who sit as a panel of three or five (depending on the matter) and receive a sitting fee for each day they sit. There are 130 of these lay magistrates and in addition, there are 14 full-time 'single magistrates' (three of whom hold a law degree) who are empowered to hear cases alone.¹⁷⁵ Most lay magistrates have received little legal training, outside of judiciary workshops and conferences.¹⁷⁶ Compared with the lawyers who regularly appear in their courts, most magistrates are less knowledgeable about Kiribati criminal and civil law and procedure which creates somewhat of a power imbalance.¹⁷⁷ My empirical data showed that while most lawyers show respect and deference towards magistrates, some lawyers routinely take advantage of their superior training to achieve outcomes for their clients that may not necessarily coincide with the interests of justice.¹⁷⁸ One participant noted:

*In courts you often hear the comment that some lawyers don't have any manners, they are unprofessional. They think "they are lawyers and the magistrate is just a lay magistrate" so they don't show deference or respect to the magistrate.*¹⁷⁹

¹⁷² High Court of Kiribati, 'Annual Report on the Judiciary of Kiribati 2012-2014' (2014). See Figure C1 and Annexure C 12 of Report.

¹⁷³ Ibid. 111-113.

¹⁷⁴ Ibid. 104-106.

¹⁷⁵ Numbers correct at October 2019. Source: Registry, High Court of Kiribati.

¹⁷⁶ Pacific Judicial Strengthening Initiative, 'Fourth Six-Monthly Progress Report' (2019).

¹⁷⁷ According to two senior judicial sources who requested anonymity. Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁷⁸ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁷⁹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

My limited empirical data suggested that lay magistrates may be more tolerant and permissive of unprofessional conduct by lawyers. One lay magistrate reported failing to admonish or discipline lawyers who had lied to them; who were drunk in court; or who had made false submissions.¹⁸⁰

Two magistrates with law degrees reported taking a firmer approach with lawyers:

*Sometimes lawyers aren't doing their job. For example, I had a case where the defendant was deceased, but the lawyers didn't tell me ... I asked them to explain why the name of the deceased was on the filing and why they appeared with a relative, also why summons a dead person? They did not give me any good response. I ended the matter.*¹⁸¹

*Some lawyers always come prepared with research and case authority. However, some lawyers do not prepare out of habit, only if they are asked to do the research. So, they bring the case and state what they are seeking and I ask if they have any case authority to assist me and they say, 'No I didn't bring any,' and then I need to adjourn and ask them to come back with the authority. A good lawyer would do the work properly the first time.*¹⁸²

One magistrate noted that members of the judiciary are not immune to the influence of customary practices of avoiding shame and non-intervention:

*The court is very shy to prosecute lawyers who would otherwise be charged (face consequences for professional discipline). It is not the proper way for court officers to punish lawyers. It should be referred to KLS. But also, in reality, if a lawyer is charged for general civil offences the court will feel shy, I would feel shy to look at the face of the lawyer. Even though what he has done is serious, but you feel reluctant.*¹⁸³

A fairly recent practice of issuing Personal Costs Orders against lawyers for vexatious actions or repeated delays has been adopted by Magistrates' Courts. Although no data exists to indicate whether this has an effect on reducing the incidence of these kinds of issues, this has been shown to be effective in other places, for example Vanuatu.

By contrast with the Magistrate's Courts, the environments of the Kiribati High Court and Court of Appeal (when it sits) are much more formal and the way they usually operate typically engender a sense of professionalism. Within the context of superior courts, lawyers in Kiribati are generally supportive of efforts by the judiciary to guide or train them and believe the judiciary should play a

¹⁸⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁸¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁸² Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁸³ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

greater role in training and educating lawyers through forms of interventionism.¹⁸⁴ One lawyer said, ‘Since [Judge Lambourne] started as a judge he has been rather inquisitorial and the younger lawyers seem more receptive to constructive feedback. The young lawyers seem to understand there is plenty they can learn because they do not think that they ‘know it all’ already.’¹⁸⁵ This sentiment was supported by other lawyers, for example: ‘There is nobody here in Kiribati to teach us, apart from judges who give lawyers a bollocking so we learn as we go along.’¹⁸⁶ It is clear that the judiciary currently plays a key role in setting or failing to set standards of behaviour and advocacy expected from lawyers in Kiribati and that the social and normative dynamics within different court environments impact lawyer conduct in Kiribati.

4.6. Conclusion

This case study has unveiled themes of resistance, legitimacy and disengagement, reflecting the challenges faced by the KLS in effectively regulating the legal profession in Kiribati. While the KLS has sought to adapt its processes to local contexts and constraints, it continues to struggle with negative perceptions regarding its legitimacy and capacity to fulfill its statutory functions. The case study has also highlighted the pivotal role of the judiciary as regulators of lawyers in Kiribati, demonstrating their influence through both direct and indirect means.

¹⁸⁴ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁸⁵ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁸⁶ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

5. THREE FEATURES OF STATE REGULATORY SYSTEMS IN PICs

5.1. Dependency on 'Key Individuals'

The case studies reveal that state systems regulating lawyers in PICs are highly dependent on 'key individuals' to activate change and empower other regulatory actors or nodes.¹⁸⁷ The case studies also demonstrate that regulatory systems for lawyers in PICs are prone to periods of expansion and contraction in line with the emergence and recession of 'key individuals.' According to Ayres and Braithwaite, reliance on key individuals in regulation poses many risks for strong regulatory institutions.¹⁸⁸ However, such dependencies can have positive outcomes for improving regulation, such as beneficial law reform as discussed in the Kiribati case study or the reinvigoration of moribund regulatory systems, as discussed in the Vanuatu case study. This dependency can also have negative outcomes on regulatory compliance, such as when regulatory relationships become toxic as exemplified in the case study on lawyer regulation in Fiji. In small jurisdictions, such as exist in most PICs, this problem is largely unavoidable and points to a need, where possible, to ensure strong institutions that can withstand cycles of expansion and contraction from periodic ignition.

Entering into my fieldwork I considered it likely that Fiji's 'modern' regulatory design would reveal a system that was highly functional and supported lawyer compliance with professional norms. Data from Fiji confirmed almost unanimous local support for the new regulatory system compared with the previous system, yet also revealed that many lawyers were disengaged from or resistant to the regulator. I anticipated that I would find the regulatory system in Vanuatu moribund but instead I found it flourishing. Both the Fiji and Vanuatu case studies demonstrate that the way an individual regulator interacts with the legal community and how they are perceived can have a significant impact on compliance.

¹⁸⁷ On ideas of regulatory 'nodes' and nodal governance, see Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' world' (2001); see further Holley and Shearing, 'A Nodal Perspective of Governance: Advances in Nodal Governance Thinking' 2017; Burris, Drahos and Shearing, 'Nodal Governance' (2005).

¹⁸⁸ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

5.2. Reliance on the Judiciary to Regulate Lawyers

*Lawyers learn from their own country. Magistrates and judges should help lawyers to learn how to act and appear in court.*¹⁸⁹

The case studies from Fiji, Kiribati, and Vanuatu reveal the significant role that the judiciary plays in regulating lawyers in PICs. The judiciary serves as a central figure in the regulatory landscape through both direct and indirect forms of regulation. Its influence is felt through various means such as enforcement of court rules, sanctions for misconduct and guidance provided to legal practitioners. The case studies demonstrate the importance of the judiciary as a source of legitimacy and a key driver of both stability and change in regulatory systems for lawyers in all three PICs.

In Fiji, Kiribati, and Vanuatu, the judiciary has been instrumental in promoting compliance with professional norms and shaping the conduct of lawyers, consistent with the tenets of responsive regulation.¹⁹⁰ Judges in all three countries have effectively deterred misconduct and encouraged ‘good’ lawyer conduct by, for example, reproaching lawyers in open court and through the use of Personal Costs Orders against lawyers personally where costs have been incurred due to the lawyer’s neglect or incompetence. Additionally, in all three countries, direct guidance provided by the judiciary, such as mentorship and advice given in private settings, has helped strengthen perceptions of expertise and trustworthiness. Indirectly, the adjudication of disciplinary committees by judges is widely perceived by lawyers in both Fiji and Vanuatu as resulting in procedurally fair processes which legitimises the regulatory system. These factors of expertise, trustworthiness and procedural fairness speak to theories of regulatory legitimacy.¹⁹¹

This reliance on the judiciary as a primary regulator of lawyers also poses potential challenges and risks. For example, the regulatory capacity of the judiciary may fluctuate due to resource constraints, institutional barriers, individual appointments and systemic factors. As a result, it is essential to strike a balance between the judiciary’s role as a regulator and the need for independent and robust regulatory institutions.

¹⁸⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁹⁰ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

¹⁹¹ Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2(2) *Regulation and Governance* 137.

5.2.1. A Comment on Foreign Judges

In PICs, mandates for social and political change are often deeply couched in terms of decolonisation, the excise of ‘foreign influence’ and negative assessments of existing circumstances.¹⁹² In recent years, academic critique has been made of foreign judges sitting in superior courts in PICs.¹⁹³ These concerns build on questions long raised amongst Pacific legal scholars regarding the slow evolution of Pacific jurisprudence, which some attribute at least in part to the common law ‘baggage’ of foreign judges.¹⁹⁴

Foreign judges have long been used as a solution to shortages of suitable judicial candidates in developing countries.¹⁹⁵ Such shortages are likely to continue for some time. During my fieldwork in Vanuatu, a graduating law student from USP was appointed directly to the bench as a Magistrate despite not having any of the minimum seven years of practice experience required. I learned from a judicial source this was due to a dearth of other suitable and willing candidates. At the time of the research in Kiribati, only three Magistrates held legal qualifications – although around 60 Magistrates have since completed a Certificate in Legal Practice through USP.¹⁹⁶

In Vanuatu, most participants of the primary study attributed Judge Wiltens’ foreignness as a potentially important factor that enabled him to reignite what had been until his arrival an inert system. Perhaps it was his position as an outsider that allowed him to ignite the fires of change? Perhaps the combination of respect for his judicial role and his character contributed to his ability to ‘face’ other lawyers as a regulator without the added complexity of deep connections with local custom? The reasons are almost certainly multi-faceted and nuanced. For the legal community of Vanuatu at least, what has been most meaningful has not been the source of ignition, but the fact of it.

¹⁹² See Mar, *Decolonisation and the Pacific* (2016); Nations, *Decolonisation: Issue on Kiribati (Gilbert Islands)* (1979)

¹⁹³ Anna Dziedzic and Simon NM Young, *The Cambridge Handbook of Foreign Judges on Domestic Courts* (Cambridge University Press, 2023).; Anna Dziedzic, *Foreign Judges in the Pacific* (Bloomsbury Publishing, 2021).; Dziedzic, ‘Foreign Judges of the Pacific as Agents of Global Constitutionalism’ (2021); Natalie Baird, ‘Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific’ (2013) 19 *Canterbury Law Review* 80.

¹⁹⁴ Dziedzic, ‘Foreign Judges of the Pacific as Agents of Global Constitutionalism’ (2021); Corrin, ‘Legal Scholarship and Pacific Islands’ Jurisprudence’ (2021); Baird, ‘Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific’ (2013); Stephen Eliot Smith, ‘The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?’ (2013) 13(2) *Oxford University Commonwealth Law Journal* 331.; Anita L Jowitt, ‘The Future of Law in the South Pacific’ (2008) 12(1) *Journal of South Pacific Law* 43.

¹⁹⁵ See for example Jonathan Aleck, ‘Beyond Recognition: Contemporary Jurisprudence in the Pacific Islands and the Common Law Tradition’ (1991) 7 *Queensland University of Technology Law Journal* 137.

¹⁹⁶ Personal communication with USP staff, 2020. See further Pacific Judicial Strengthening Initiative, ‘Fourth Six-Monthly Progress Report’ (2019).

5.3. Autochthony as a Source of Legitimacy and Compliance

The case studies in this chapter underscore the importance of autochthony in legitimising state regulatory institutions and fostering regulatory compliance in PICs. Autochthony refers to the grounding of laws, institutions and practices in local cultural and historical contexts.¹⁹⁷ It emphasises the importance of connecting regulations to the communities they serve, making them more effective, legitimate, and adaptable. This concept is closely related to John Braithwaite's idea of deliberative democratic participation which stresses the importance of local context, inclusive dialogue and responsiveness to the needs of the regulated communities.¹⁹⁸ For lawyer regulation in PICs, autochthony contributes to legitimacy and compliance by ensuring the design and operation of regulatory systems is inclusive, culturally sensitive and grounded in a deep knowledge of local regulatory contexts.

In Fiji, the lack of autochthony in the regulatory system is evident, as the legal profession was excluded from involvement in regulatory reform. This exclusion contributed to perceptions of illegitimacy of the regulator and disengagement by many lawyers. In contrast, the regulatory system in Kiribati was initially grounded in autochthony, as the legal profession led its own progress towards self-regulation, but over time postures of disengagement have increased and the regulator has become widely perceived as lacking enforcement capacity. In Vanuatu, the revitalisation of the existing system was driven by the decisions of Chief Justice Lunabek in response to growing need. Judge Wiltens' legal authority as a judge, combined with his charismatic approach to enforcement, education, and engagement with lawyers have helped him to strengthen the legitimacy of the state regulatory system. This shows that autochthony does not necessarily always have to be catalysed from endemic, or indigenous sources, but rather can spread from an external or foreign source provided it is sufficiently legitimised by local sources of authority.

¹⁹⁷ Elise Huffer and Ropate Qalo, 'Have We Been Thinking Upside-Down? The Contemporary Emergence of Pacific Theoretical Thought' (2004) 15 *The Contemporary Pacific* 87.; Farran, 'Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States' (2011); Anita L Jowitt, 'The Guy Powles Minimum Standards Framework' (2016) 18(1) *Journal of South Pacific Law* 132.

¹⁹⁸ John Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford University Press on Demand, 2002).; Braithwaite, 'Responsive Regulation and Developing Economies' (2006).

6. CONCLUSION

In conclusion, this chapter has answered a key subsidiary research question by revealing the dynamics of state systems regulating lawyers in Fiji, Kiribati, and Vanuatu. In different ways, each case study revealed the critical role of legitimacy and lawyers' regulatory relationships with regulatory authorities to strengthening professional standards and compliance. The case studies also show that state regulatory systems in PICs are vulnerable, being highly dependent on key individuals and the judiciary. The next chapter, Chapter Six, seeks to expand understanding of lawyer regulation in PICs by exploring the multivariate regulators of lawyer conduct that extend beyond the state.

CHAPTER SIX: NON-STATE REGULATION OF LAWYERS IN PICs

1. INTRODUCTION

*Whatever it is we think state law is or does, legal pluralist scholarship points out that state law is not the only thing that does it.*¹

The previous chapter revealed that state regulatory systems in PICs regulate lawyers through a complex interplay of normative relationships. Such relationships exist between bureaucratic actants and individual judges and lawyers in addition to structural regulatory mechanisms such as licensing and qualifications frameworks. This chapter presents empirical findings on the operation of non-state regulators of lawyers in Fiji, Kiribati, and Vanuatu using two case studies and interview data collected in the primary study. These data reveal that lawyer conduct in PICs is regulated by strong normative influences arising from: custom; religion – especially Christianity; professional communities; and legal education – especially the University of the South Pacific (USP). The data revealed similar non-state sources of influence across Fiji, Kiribati, and Vanuatu, although the normative strength and velocity of any single source on the conduct of an individual is highly specific to their personal circumstances.² These sources of influence can both strengthen or undermine compliance with professional norms – an aspect that will be considered in greater detail in Chapter Seven. Overall, this chapter helps to answer the primary research question by revealing important insights into the dynamics of non-state regulators of lawyer conduct in Fiji, Vanuatu and Fiji. In Chapter Eight, I will consider how these insights can contribute to theories of change to strengthen professional norms for lawyers in PICs.

¹ Christine Parker, 'The Pluralization of Regulation' (2008) 9(2) *Theoretical Inquiries in Law* 349. 325.

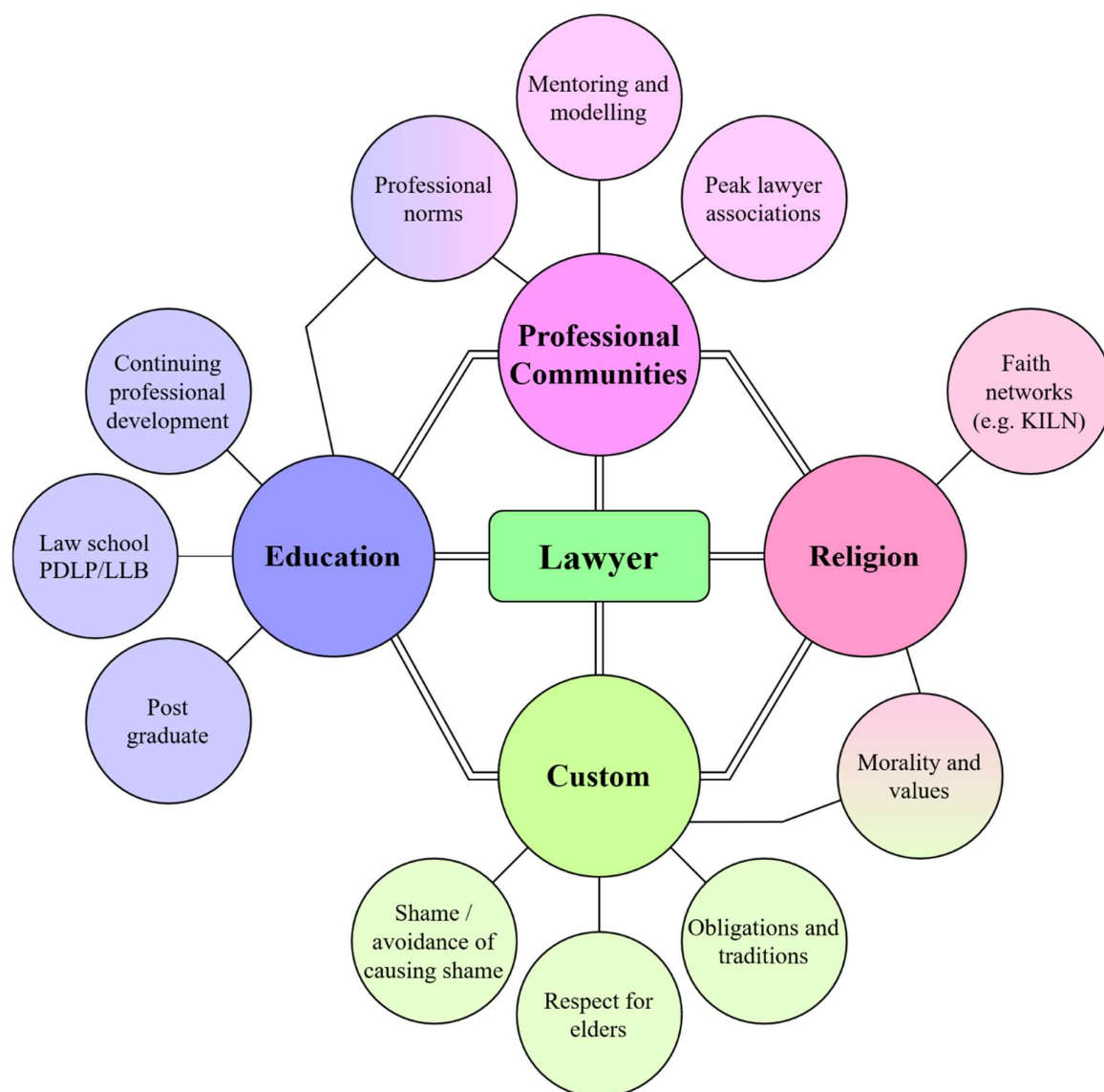
² The term velocity comes from physics and refers to both speed and direction of movement. Metaphorically applied to social relations it encapsulates not just the magnitude of influence (strength), but also the rate and direction of influence. The term 'strength' alone fails to encapsulate the dynamic and directional nature of relational influence.

1.1. Mapping Non-State Regulators of Lawyer Conduct in PICs

In Chapter Four, participant responses revealed perceptions of a diverse range of non-state actants that influence – regulate – whether a lawyer is a good lawyer. Figure 10, below, uses double lines to illustrate the strong connections between four primary sources of non-state regulation: religion; custom; legal education; and professional communities. The outer circles show exemplar actants linked to each of these four regulators of lawyer conduct. The figure is simplified, not shown are the relational webs connecting these four regulators of lawyer. Also not shown in Figure 10 are other important non-state regulators of conduct. For example: intrinsic motivators tied to personal accomplishment, and extrinsic motivators of behaviour such as greed or financial gain; stress; or poor mental health. These are well-researched as drivers of professional conduct, but are beyond the scope of the primary research.³ Each of the four non-state sources of regulation of lawyer conduct identified in Figure 10 is considered in detail in section 3 of this chapter.⁴ However, it is important to first (briefly) expand on the theoretical discussion in Chapter Three to consider how theories of pluralism, relationality and regulatory compliance can contribute to a nuanced perspective of relational regulation of lawyer conduct in PICs.

³ See for example Richard M Ryan and Edward L Deci, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' (2000) 25(1) *Contemporary Educational Psychology* 54.; Parker and Evans, *Inside Lawyers' Ethics* (2018); Braithwaite, Murphy and Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007); Nicholas D Lawson, 'To Be a Good Lawyer, One Has to Be a Healthy Lawyer: Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline' (2021) 34 *Georgetown Journal of Legal Ethics* 65.; Jarrod F Reich, 'Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being' (2020) 65 *Villanova Law Review* 361. Innate sources of regulation are represented in Figure 13: Mapping regulators of lawyer conduct in PIC, p. 284.

⁴ See below, section 3. Non-State Regulators of Lawyer Conduct in Fiji, Kiribati, and Vanuatu, p. 225.

Figure 10: Non-state regulators of lawyers in PICs

2. RELATIONAL PERSPECTIVES ON NON-STATE INFLUENCES OF LAWYER CONDUCT

*It is well to remember that the entire universe, with one trifling exception, is
composed of others.
– John Andrew Holmes⁵*

As explored in Chapter Three, theories of pluralism and relationality have been applied to a broad range of social fields to describe regulatory relationships between different actants.⁶ In PICs, the weakness of the bureaucratic state functions to bring the influence of non-state actants into ‘high relief’.⁷ Over the past 30 years, regulatory scholars have increasingly recognised that ‘regulation is not the exclusive domain of the state.’⁸ Increasingly, contemporary legal scholars have applied theories of pluralism and relationality to lawyer regulation in recognition that law is practiced within the broader contexts of community and society.⁹ This is relevant to a responsive regulator of lawyers that acknowledges the importance of local knowledge and cultural contexts to understanding the dynamics of professional identities in PICs.¹⁰

Lawyers in PICs are influenced by their associations within many different social fields. For example: the legal profession; custom and culture; kinship; and church/faith networks. The normative pressure to identify with such groups often guides an individual's loyalty and commitment through adoption of the group's symbols, rituals and beliefs. In this chapter I draw from Marilyn Strathern and Roy Wagner's conceptions of the ‘dividual’ and ‘fractal person’ to

⁵ John Andrew Holmes, *Wisdom in Small Doses* (University Publishing Company, 1927).

⁶ See for example Mead, *Mind, Self, and Society* (1934); Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (University of California Press, 1986); Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1987); Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, 1990). For applications of these concepts in PICs, see for example Margaret Jolly, ‘Woman Ikat Raet Long Human Raet O No? Women's Rights, Human Rights and Domestic Violence in Vanuatu’ (1996) 52(1) *Feminist Review* 169; Marshall Sahlins, *Apologies to Thucydides: Understanding History as Culture and Vice Versa* (University of Chicago Press, 2004); Konai Helu Thaman, ‘Decolonizing Pacific Studies: Indigenous Perspectives, Knowledge, and Wisdom in Higher Education’ (2003) 15(1) *The Contemporary Pacific* 1; Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009).

⁷ Forsyth, ‘Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea’ (2022). De Sardan and Biershenk describe a similar phenomenon in Africa, see Bierschenk and de Sardan, *States at Work* (2014); while Muir and Parker describe this underlying phenomenon of relationality in terms of the actions of a ‘relational state’, see Muir and Parker, ‘Many to Many: How the Relational State Will Transform Public Services’ (2014).

⁸ Bridget M Hutter, ‘The Role of Non-State Actors in Regulation’ (Discussion Paper No 37, Centre for Analysis of Risk and Regulation, London School of Economics, 2006). 1.

⁹ Parker, ‘Justifying the New South Wales Legal Profession 1976 to 1997’ (1997); Parker, *Just Lawyers: Regulation and Access to Justice* (1999); Liu, ‘Boundaries and Professions: Toward a Processual Theory of Action’ (2018); Wald and Pearce, ‘Being Good Lawyers: A Relational Approach to Law Practice’ (2016).

¹⁰ See further Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press, 1999). On the importance of context in Pacific studies see further Chapter One, 13.

explore the relational ways these non-state actants regulate lawyer conduct.¹¹ Strathern's concept of the 'dividual' or 'partible person' comes from her work in Melanesia where people are seen as being composed of many different social relationships and aspects.¹² Wagner's concept of the fractal person illuminates how an individual can embody and express broader social structures and relationships, similar to how each part of a fractal contains the pattern of the whole.¹³

To illustrate, consider indigenous practices of gift exchange in PICs arising under customary systems such as *Kastom*, *te katei ni Kiribati*, *Vanua*, or *Fa'a Samoa*.¹⁴ For example *fa'alavelave* (gift exchange), *te mweaka* (offering or gift), or *va'ava'acebo* (formal giving), where valued objects such as: pigs; mats; *tabua* (whales tooth); food; and *yaqona* (kava) are gifted and regifted, circulating within the community, contributing to the creation and re-creation of social bonds.¹⁵ Both the giver and receiver are transformed in this process and the gift itself can be seen as a 'part' that contains the 'whole' social relationship.¹⁶ Similarly, Wagner's fractal person can be seen in Melanesian kinship systems where a kinship term like 'father' is not singular nor plural but carries an integral relationship, reflecting the fractal nature of personhood.¹⁷ Strathern and Wagner's ideas find rich support in the works of other Pacific scholars. For example, Rotuman Professor Vilsoni Hereniko refers to his 'many selves' in his seminal work *Woven Gods: Female clowns and power in Rotuma*.¹⁸

¹¹ Strathern, *Partial Connections* (2005); Wagner, 'The Fractal Person' 1991; see also Wagner and Ingold, *The Invention of Culture* (2016); Mandelstam, 'A Case for The'fractal Self': The Scope of Moral Consideration as Influenced by Personal Identity' (2020); Carr-Saunders and Wilson, *The Professions* (1933); Moore, *The Professions: Roles and Rules* (1970); Eraut, *Developing Professional Knowledge and Competence* (1994).

¹² Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1988). Strathern's 'dividuals' are constantly being made and remade through their relationships, with the relations being more fundamental than the 'relata' (the things in relation). This is similar to Jennifer Nedelsky's emphasis on the role of 'the other' in the construction of the individual self which she states is 'constituted in an ongoing, dynamic way by the relationships through which each person interacts with others.' Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011), 1.

¹³ Wagner, 'The Fractal Person' 1991. Wagner's concept of the 'fractal person', informed by his fieldwork in Papua New Guinea, posits that personhood can be understood as a complex, self-similar entity embodying different aspects of social structures at different scales.

¹⁴ These terms refer to customary systems in Vanuatu, Kiribati, Fiji and Samoa respectively. See Glossary, p. xix.

¹⁵ Pacific languages have many different terms for gifting which vary depending on context, those listed are provided as limited examples only.

¹⁶ Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1988). This insight underscores the fluidity and dynamism of personhood in Pacific cultures. For an explanation of these terms see the Glossary, p. xix.

¹⁷ Wagner, 'The Fractal Person' 1991, 163. This is similar to the ideas of Simone de Beauvoir, who argues that individuals create meaning in their lives through their actions and choices within social fields, see: Simone de Beauvoir, *The Ethics of Ambiguity*, tr Bernard Frechtman (Citadel Press, 1949); Simone de Beauvoir, *The Second Sex*, tr Constance Borde and Sheila Malovany-Chevallier (Knopf, 2010).

¹⁸ Vilsoni Hereniko, *Woven Gods: Female Clowns and Power in Rotuma* (University of Hawaii Press, 1995). 8. See also Roger M Keesing, 'Creating the Past: Custom and Identity in the Contemporary Pacific' (1989) 1 *The Contemporary Pacific* 19.; Marianne I Franklin, 'I Define My Own Identity: Pacific Articulations of 'Race' and 'Culture' on the Internet' (2003) 3(4) *Ethnicities* 465.; Sina Va'ai, 'Pacific Utopias and National Identities in the Twenty-First Century' (2005) 2(2)

A pluralist-relational approach to lawyer regulation in PICs acknowledges the complexity, relationality and fluidity of interactions that shape understandings of the individual self. It emphasises the rich tapestry of normative influences of lawyer conduct and the interconnectedness of social systems in understanding and influencing the conduct of lawyers.

2.1. Relational Regulation

Relational regulation describes mechanisms of influencing conduct that emphasise the centrality of relationships and connections among individuals, institutions and broader social systems. Unlike traditional regulatory frameworks for lawyers that focus primarily on rules and formal structures, relational regulation explores how interactions, relationships and social norms influence behaviour and compliance. It recognises that effective regulation requires understanding the diverse normative sources of regulation (i.e. legal and normative pluralism), the central role of relationships and interactions (i.e. relationality), and the dynamic nature of regulatory compliance.¹⁹ This framing recognises that regulation of lawyers is not solely a top-down process, but a dynamic exchange within a network of actants, such as lawyers, clients, communities and formal regulatory authorities. Through this lens the behaviour of a regulated individual is seen as a product of their relationships with other actors and the contexts in which they operate. This perspective acknowledges that compliance and regulatory effectiveness are shaped by the complex interplay of cultural, social and professional norms. Further, it underscores the idea that effective regulation requires an adaptive approach that considers these relational dynamics, leading to regulatory strategies that are more responsive to local contexts and which are more likely to foster cooperation and compliance.

The first case study in this chapter, ‘Banuera’s Case’ demonstrates how relational dynamics operate in practice in Kiribati. It provides a concrete example of how non-state regulatory mechanisms and cultural influences play a crucial role in regulating lawyer conduct in Kiribati to align with professional norms without any engagement by the state regulatory system discussed in Chapter Five.

Portal: Journal of Multidisciplinary International Studies 1.; Katerina Teaiwa, 'Postcolonial Cultural Identities in the Pacific' in Anne Cullen and Stuart Murray (eds), *The Globalization of World Politics: Case Studies from Australia, New Zealand and the Asia Pacific* (Oxford University Press, 3rd ed, 2014).

¹⁹ See further discussion in Chapter Three, section 4. A Pluralist-Relational Approach to Lawyer Regulation, p. 101.

2.2. Banuera's Case

Born in 1962 on the remote atoll of Beru, Kiribati, the Hon. Banuera Berina is a lawyer whose journey illuminates the unique regulatory environment of PICs. He is friendly and down-to-earth, soft spoken, but chatty; his ever-present smile and his quick wit conjure the spirit of the animal namesake of his home island: the gecko. Banuera's early career began with a diploma in law from Otago University in New Zealand in 1988. He was admitted in Kiribati the following year, becoming one of just five lawyers admitted to practice in Kiribati at that time and one of only

Image 12: The Hon. Banuera Berina



**Source: Photo taken by author, August 2018
South Tarawa, Kiribati**

two private practitioners. Banuera's reputation as a persuasive advocate has made him a feared opponent in court and a popular choice for both foreign and local clients.²⁰ A review of superior court decisions in Kiribati shows that from 1997-2022, while also frequently appearing before both the High Court and Magistrate's Courts and in Parliament, Banuera has appeared as counsel in a staggering 30% of Kiribati Court of Appeal cases.²¹

2.2.1. Entry Into Politics and the Influence of Customary Norms

In May 2003, Banuera made the leap into politics successfully securing a seat in Parliament as a member for South Tarawa. In Kiribati, the intertwining of the political and the personal is deeply rooted in customary norms and Kiribati's version of 'big man' politics.²² *Te katei ni Kiribati* (the Kiribati way) creates obligations for those who lead in socio-political spheres, whether as a political representative, a legal professional or an *unimwane*. The practice of *temweaka* (gift-giving), personal favours and customary fines are an expensive and unavoidable part of political campaigning in Kiribati, reflecting a relationality deeply rooted in cultural practices of duty and obligation and an ethics of care that are central to most Pacific cultures.²³ As Banuera himself put

²⁰ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²¹ 101 of 336 cases, Kiribati Court of Appeal of Kiribati. 'Paclii Homepage', *Paclii* (6 June 2023),

²² On this see further Macdonald, 'Governance and Political Process in Kiribati' 1996; Van Trease (ed), *Atoll Politics: The Republic of Kiribati* (1993); Barrie Macdonald, 'Elections in Kiribati' (1983) 35(1) *Political Science* 58.

²³ To explain the difference between an ethics of justice and an ethics of care, Virginia Held contrasts them: 'an ethic of justice focuses on questions of fairness, equality, individual rights, abstract principles, and the consistent application of them. An ethic of care focuses on attentiveness, trust, responsiveness to need, narrative nuance, and cultivating caring relations' Held, *The Ethics of Care: Personal, Political, and Global* (2006). 15. See further: John Whitehead, 'Restorative

it 'as a member of parliament, [constituents] expect you to assist them with all kinds of things ... even financial things ... It can be very expensive to be a Member of Parliament.'²⁴

2.2.2. Constituents and Conflicts of Interest

Banuera found balancing his dual roles as a lawyer and politician increasingly challenging. He said he was frequently approached in the street by constituents as both lawyer and politician, a testament to the overlapping social fields that shape the conduct of lawyers in PICs. Banuera would sometimes joke that he could not distinguish between clients and constituents when people would approach him in the street for advice.²⁵ This presented many challenges, such as conflicts of interest, which he initially attempted to manage by drawing boundaries between his parliamentary office hours and his practice hours and through careful scheduling of court and parliamentary commitments. When approached by people seeking legal advice when he was acting in a Parliamentary capacity, he would typically tell them 'If you have a legal problem, come and see me at my firm and we can consult, or if you need to speak to somebody now you should go and find another lawyer.'²⁶

Banuera was keenly aware that his decision to continue to practice while serving as a Member of Parliament could affect him politically or socially 'I accepted as a fact that I would lose some votes. I knew people would be unhappy, especially if they lost a case and their friends might be unhappy with me, and I accepted that. In Kiribati people attach lawyers to their client's causes.'²⁷ However, for Banuera, giving up legal practice entirely was never an option. 'My profession is what I take pride in ... I couldn't refuse a client after studying the client's case and finding it has merit simply because I was going to appear against another constituent ... '²⁸ To contextualise this choice, consider that when Banuera entered legal practice in 1989 he became only the fifth I-Kiribati admitted as a lawyer and one of only three lawyers in private practice. As at 2023, there are fewer than 10 lawyers in private practice out of around 40 total lawyers in the country.²⁹

Justice in the South Pacific: Responding to Sexual Violence in Fiji' (PhD Thesis, Monash University, 2018).; Botes, 'A Comparison between the Ethics of Justice and the Ethics of Care' (2000); Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1993); Gilligan, 'In a Different Voice: Women's Conceptions of Self and of Morality' (1977).

²⁴ Interview with the Hon. Banuera Berina, conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁵ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁶ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

²⁷ Interview with the Hon. Banuera Berina (5 July – 10 September 2018).

²⁸ Interview the Hon. Banuera Berina (5 July – 10 September 2018).

²⁹ See Table 1. p. 36.

2.2.3. The 2011 Election and its Aftermath

The 2011 election marked a turning point for Banuera. He narrowly lost his re-election bid by a margin of just 26 votes. Most Kiribati lawyers, including Banuera himself, agree that his loss was closely linked to the perceived conflicts of interest stemming from his dual roles. Not long before the 2011 election Banuera was involved in a controversial dispute between factions within an *unimwane* (elder man) association in South Tarawa.³⁰ 'I studied their case and I thought their case had merit and I couldn't let the other side to simply take over the *unimwane* association, so I had to appear against them.'³¹ Banuera's client was successful in court, but his happiness at his client's success was blunted when he was met outside the courthouse by a relative of one of the losing parties. The relative told him 'We will meet you Banuera during the election. There are more than 1,000 members of this association.'³² Associated with this group was an opposing candidate who was a preacher in a voting ward in which Banuera's share of the vote plummeted from first in 2009, to last in 2011.³³ By being voted out of office the flow of events was such that one source of Banuera's conflict of interest (being a politician) was eliminated.³⁴ According to Banuera:

*The problem I was having is that I was appearing against people that I ought to be representing in Parliament. I was very much aware of the risk that those against whom I appeared would be upset. I was aware that they would be speaking to their relatives and to their friends and they wouldn't be saying nice things about me. In the end it was a combination of factors.*³⁵

A Kiribati lawyer explained:

The reason he lost the election was to do with his role as a lawyer and his role as an MP at South Tarawa. You know, representing one party and on the other side it is like, going against another party, so the opposing party becomes his enemy. Banuera would represent mainly families in their land matters. This creates issues because the opposing side were constituents. You can easily tell (predict) that whoever Banuera would go against would become his enemy. Because he represented only a few families, whoever he was against in court, those families would become his enemy because they don't understand the concept of a lawyer representing one side...Him losing the election had nothing

³⁰ *Unimwane* associations play a role in local government and community life as decision makers within *mwaneaba* around which community and social life is focused. See further Tony Whincup, 'Te Mwaneaba Ni Kiribati: The Traditional Meeting House of Kiribati: 'A Tale of Two Islands'' (2010) 4(1) *Shima* 113.; Talu, *Kiribati: Aspects of History* (1979).

³¹ Interview the Hon. Banuera Berina (5 July – 10 September 2018).

³² Interview the Hon. Banuera Berina (5 July – 10 September 2018).

³³ Interview the Hon. Banuera Berina (5 July – 10 September 2018).

³⁴ Regulation is 'influencing the flow of events.' Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

³⁵ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

*to do with whether he is a good man, or bad man, or whether he gave good or bad services to clients, he just made too many aiam (enemies).*³⁶

Following the 2011 election, Banuera returned to legal practice full time and prepared for his next election bid. He returned to contest the 2015 elections having reflected on his experiences and considered how he could self-regulate to better align with community expectations. However, this time he stood for election as a representative of the sparsely populated outer-island of Kuria instead of seeking election as a representative for the densely populated island of South Tarawa. His successful re-election signified not only his political comeback, but also an evolved approach to managing conflicts of interest. Banuera changed his approach to managing conflicts of interest, telling me that he now never accepts cases against his constituents from Kuria. One participant confirmed this saying: ‘I think he learned from his mistakes because now he is member for Kuria he never acts against his constituents. He always withdraws if he knows the case involves people from his island.’³⁷

2.2.4. Relational Regulation

Banuera’s case exemplifies how relationships and community expectations can play a central role in regulating the conduct of lawyers in PICs. It demonstrates the complex interplay between professional duties and customary obligations for lawyers in Kiribati and serves as a cautionary tale for other lawyers on the effective management of conflicts of interest. His experiences underscore how non-state regulatory mechanisms can directly shape professional conduct of lawyers even when state regulatory systems do not, or cannot. The adjustments Banuera made to his professional conduct – particularly the avoidance of conflicts of interest between clients and constituents – reflect a sophisticated understanding of the relational dynamics at play. These adjustments not only safeguarded his career but also underscored his commitment to serving his community as an *unimwane*, a lawyer, and a politician. By representing Kuria politically and withdrawing from matters against constituents, Banuera is able to maintain his law practice in South Tarawa with little risk of encountering conflicts of interest between clients and constituents. His approach demonstrates the importance of navigating professional conduct within the context of local customs and expectations. The impact of customary norms as a regulator of lawyers is considered further in the next section.

³⁶ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

³⁷ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

3. NON-STATE REGULATORS OF LAWYER CONDUCT IN FIJI, KIRIBATI, AND VANUATU

This section considers the four non-state regulators of lawyer conduct in PICs depicted in Figure 10: Non-state regulators of lawyers in PICs above.³⁸ The dynamic role of custom as a regulator of lawyer conduct is considered in relation to Banuera's case and data collected from interviews with participants of the empirical study. The profound role of religion, particularly Christianity in shaping social morality and lawyer conduct is considered in the context of two case studies, Litia's Case and the Kingdom International Legal Network (KILN). These case studies illustrate some of the complex ways lawyers in PICs develop their fractal identities through exchanging symbols, rituals and beliefs within various semi-autonomous social fields.³⁹ This section also shows the critical importance of legal education and professional communities as incubators for the development of lawyers' professional identity and their understanding of how to be a good lawyer.

3.1. Custom as a Dynamic Regulator of Lawyer Conduct

This section discusses four examples that illustrate the dynamic range of influences of custom on lawyer conduct in legal practice in PICs. Chapter Seven discusses further examples of customary influences which demonstrate the complex 'dance of compliance' performed by lawyers and signal postures of compliance or resistance to regulators.⁴⁰ Many scholars have written on custom – or *Kastom* – and customary law and its diverse impacts on law and society in PICs.⁴¹ While custom may be 'a broad assertion of indigeneity or simply used to signal autochthony of practice', it can also be 'a measure of the correct or appropriate way of being a critical tool in determinations of the propriety and legitimacy of behaviour, personality, relationship and intent.'⁴² These sentiments mirror de Beauvoir's ideas about individuals as co-creators of meaning through their actions and choices within societal constructs and reflect Nedelsky's emphasis on the role of 'the other' in shaping individual identity.⁴³ Legal practice environments in PICs are interwoven with systems of

³⁸ Figure 10, above, p. 217.

³⁹ On the use of the term semi-autonomous social fields see Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1972).

⁴⁰ See Chapter Seven, Table 11: A few practical norms of lawyers in PICs, p. 256.

⁴¹ See for example Keesing, 'Creating the Past: Custom and Identity in the Contemporary Pacific' (1989); Filer, 'Custom, Law and Ideology in Papua New Guinea' (2006); Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); Tamanaha, Sage and Woolcock, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (2012); and Bronislaw Malinowski, *Crime and Custom in Savage Society* (Transaction Publishers, 2013).

⁴² Benedicta Rousseau, "'This Is a Court of Law, Not a Court of Morality': Kastom and Custom in Vanuatu State Courts' (2008) 12(2) *Journal of South Pacific Law* 15. 16.

⁴³ Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011); 'As humans, we exist only as 'an individual in the collectivity on which [we] depend ...'. de Beauvoir, *The Ethics of Ambiguity* (1949). 1.

customary norms, often binding lawyers to responsibilities that are more fundamental to their quiddity than their professional identity. Lawyers assimilate customary norms and expectations into their fractal identities and this in turn shapes their performance of their professional roles.

As discussed in Chapter Three,⁴⁴ the outcome for those who act without due consideration for the broader contexts and consequences of their conduct is, in the words of philosopher José Ortega y Gasset the diminishment of both ‘themselves’ and the ‘circumstances’ of their life comprising their identity, culture, history and environment.⁴⁵ To put this in the context of Banuera’s case,⁴⁶ *te katei ni Kiribati* is part of *who* Banuera is as a person. As I-Kiribati and an *unimwane* he *must* help others when asked, regardless of the potential for conflicts of interest. To do so *is I-Kiribati*. To fail to do so is *mama* (shameful). To practice law as an I-Kiribati-lawyer is to relate to clients and others as *I-Kiribati*. Not doing so would be to deny his own identity. The consequence of denying legal services to those he is obliged to serve would be to diminish both his identity as I-Kiribati and more broadly devalue the social and ideological construct of what it means to be I-Kiribati.

3.1.1. The Impact of Customary Norms on Lawyer Conduct

In PICs, customary practices and norms often give rise to situations that impact a person’s options or strategies. For example, Pacific scholar Marie M’Balla-Ndi reported a complex customary norm affecting the conduct of journalists in Vanuatu:

*It is prohibited in Kastom to speak directly to either your brother-in-law or sister-in-law. In some Kastom societies it is also prohibited to ask for information from your father-in-law or cousins of your father-in-law. If we do go ahead and ask them, they would consider us to be disrespectful to the Kastom way and will not respect us in return.*⁴⁷

Most participants of my study did not specifically raise specific cultural or customary practices such as these, although it is possible that such obligations could affect both lawyers and their clients depending on the type of matter. One participant from Fiji spoke of a customary practice he was bound by which meant that, as a mark of respect, he could not speak directly to his sister.⁴⁸ His sister is also a lawyer, and a practical consequence of this rule of custom is that they cannot work

⁴⁴ Above 4.1 Relationality: Relationships as Regulators, p. 106.

⁴⁵ See Raley, ‘Reflections on Ortega Y Gasset’s ¿Qué Es Filosofía?’ (2015). 92.

⁴⁶ See Banuera’s Case above, p. 221.

⁴⁷ Marie M’Balla-Ndi, ‘On Being a Contemporary Taasila: Navigating Kastom and Ol Ting Blong Waet Man’ (2015) 23(4) *Perspectives* 599. 2.

⁴⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

together and must avoid situations where they might otherwise be required to speak directly. However, they may appear as opposing counsel. In his view this enhances justice because it strengthens the mutual bond of respect between opposing counsel and enhancing the adversarial process by ensuring parties are focused on achieving a ‘...just outcome, rather than just being adversarial’.⁴⁹

A ni-Vanuatu participant explained how another customary practice, deference to elders, can operate in detrimental ways within a private or government law office: ‘do not question the elders, what they decide. So, do not question your boss, the boss is always right.’⁵⁰ A participant from Kiribati explained ‘as an I-Kiribati we have a tradition to obey elders no matter what. If they are wrong, you still have to obey that is your obligation.’⁵¹

Lawyers’ professional judgement can be affected by pressure to uphold family expectations. For example, one participant from Vanuatu provided an example of a lawyer who accepted a brief to litigate a family land case which had no reasonable prospect of success due to:

*Family pressure ... because he's a lawyer and the first lawyer in in the family ... [after many years and great expense] he ended up [getting] slammed in the Court of Appeal ... Now [he] feels like he's failed the entire family.*⁵²

The need to mitigate pressure from family has led some firms to innovate solutions to support lawyers. The principal of one law firm in Vanuatu explained one way the firm supports its lawyers to navigate obligations to family:

*Lawyers are often asked to represent family members. Because the firm has six lawyers if a family member comes in, the firm can allocate that person's case to another lawyer in the firm. So, they will help staff family members, but the individual staff member is assisted to keep professional and family obligations separate.*⁵³

⁴⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; and follow up correspondence.

⁵⁰ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁵¹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁵² Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁵³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu. Such practices are ideologically aligned with research on ethical infrastructures within law firms. See further: Parker et al, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour’ (2008)

Unfortunately, the majority of private lawyers in PICs operate as sole practitioners and support from colleagues within a firm is not widely available.⁵⁴ At the same time, state regulatory systems currently provide little guidance to lawyers faced with conflicting obligations arising under the legal pluralities in which they operate.⁵⁵

The case studies discussed in this chapter highlight the tangible influence of cultural and customary practices and norms on lawyer conduct in PICs. For instance, as will be discussed in Litia's Case below,⁵⁶ Litia, an indigenous Fijian lawyer, demonstrates the impact her evolving identities as a woman, lawyer, Christian and *iTaukei* have on her professional conduct and perceptions of her role in relation to her social, customary, religious and professional communities. Banuera's case, discussed above, reveals the delicate equilibrium lawyers in PICs must maintain when navigating the space between local customs, state law and professional obligations. It also highlights the consequences that can arise when this equilibrium is disrupted.

Another example of the potential for customary practices to impact lawyer conduct that emerged from the empirical study concerned obligations arising under custom (and religion) in relation to funerals. In PICs, funerary rites and practices are deeply significant cultural events that typically require lawyers to set aside any 'conflicting' professional responsibilities.

*There can be situations where custom can interfere. For example, a funeral. A lawyer may have some connection in terms of their village. Just because they are from the next village, a custom of that family unit is such that each village has to contribute something for the funeral events [often money]. And this lawyer is the only one who can provide it, they need to go - so their cases are dropped like a sack of potatoes.*⁵⁷

Another participant from Fiji said: 'For a lawyer, if it is a choice between attending to a trial, or attending a funeral and related obligations of a close uncle, then family will come first.'⁵⁸

⁵⁴ See for example Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021) 23. At the time of my fieldwork in 2018 in Kiribati, there was one partnership, all other private lawyers were sole practitioners.

⁵⁵ There is no explicit reason for why this is the case today beyond the complexity of the task and the historic and contextual reasons noted in Chapter One.

⁵⁶ Section 3.2.1. p. 233.

⁵⁷ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁵⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

3.1.2. Custom and Gender

Female participants in all three countries typically spoke strongly about gender inequality and discrimination arising from tradition and customary norms which continue to operate to censor and dominate women in social, political and professional settings.⁵⁹ A participant from Kiribati explained that within the legal profession, and even within government law offices:

*There is always an atmosphere where there is an issue about your gender and your age ... as a woman it is a double burden ... it is something that is embedded in us [from culture] ... in practice there is something that women need to do that is extra.*⁶⁰

Many female participants shared personal experiences of being subjected to 'rude', 'dismissive' and 'inappropriate' conduct from male lawyers including, in some cases, from supervisors or mentors.⁶¹ Participant's attitudes and strategies for dealing with this sort of conduct varied considerably across jurisdictions. A focused study would be highly desirable to enable a deeper consideration of the professional experiences of female lawyers in PICs. From a regulatory perspective, recognising the tangible impact of traditional gender hierarchies and power dynamics on social dynamics within legal practice environments is critical to cultivating a holistic understanding of lawyer conduct in PICs. Gender equality within the legal profession in PICs is considered further elsewhere in this thesis.⁶²

⁵⁹ For a powerful perspective on this topic see Grace Mera Molisa, 'Vanuatu Women's Development since Independence' (1985) *Women in Development in the South Pacific* 215.

⁶⁰ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati. Gender inequality arising through customary norms remains a significant issue in Pacific societies and for women within the legal profession in PICs. It is noted here as one of several mechanisms by which customary norms influence behaviour, but is deserving of far more focused and comprehensive future research. Some consideration is given to the issue in Chapter Three at p. 70, Chapter Seven at p. 279, and Chapter Eight at p. 315. See generally Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1988); Margaret Jolly, 'Woman Ikat Raet Long Human Raet O No?: Women's Rights, Human Rights and Domestic Violence in Vanuatu' in Anne-Marie Hilsdon et al (eds), *Human Rights and Gender Politics: Asia-Pacific Perspectives* (Routledge Vanuatu, 2012) 124.; Diane Zetlin, 'Women in Parliaments in the Pacific Region' (2014) 49(2) *Australian Journal of Political Science* 252.

⁶¹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji.

⁶² Chapter Three, section 3.3.6. p. 69; Chapter Eight at 5.2.2. p. 315; and in the context of two case studies, Mary's Choice, discussed in the Introduction and Chapter Eight of this thesis, and Litia's case discussed Litia's Case at 3.2.1. p. 233.

3.1.3. Custom and Kin

Customary norms regarding obligations to kin create strong obligations on lawyers to provide pro bono legal advice when asked, especially by family, close friends and community members.⁶³

*In the community and importantly in the family it is highly regarded and the family comes to the house with whatever problems they have, legal or otherwise. To them you are the solution to all of their problems.*⁶⁴

*I am asked for certain advice in areas such as creating a company for the village, or if somebody in the village violates criminal law, drafting wills, advising on disposition of properties ... This is on a pro bono basis. I see it as my contribution to my family nuclear and extended.*⁶⁵

A participant from Vanuatu explained it in the following way:

*When you're born into this type of society, you become linked to a community group, and that link is your social safety net ... you cannot deny [your community] because that's the social safety net that raised you, that gave you a sense of identity, gave you a sense of belonging ... got you through university ... when you become a professional ... you come into situations where because of the role you have as a lawyer, you have to take a side, you have to represent interests of parties, you have to be impartial, you have to be objective, but all of that is in the face of the overarching community ties and customary links that you have, which can, in some ways, either cause you to be twisted in some of your decision-making or cause you to be limited in the way you are going to perform your role.*⁶⁶

This obligation is magnified for many lawyers by an obligation to kin arising from their specialised knowledge, and the support they often receive – financial and otherwise – from extended family to complete education as a lawyer.⁶⁷ Awareness of the privilege of their education as a lawyer and of the status and respect afforded to them by becoming a lawyer serves only to magnify this sense of duty for many lawyers.⁶⁸ For many lawyers this obligation manifests in the form of fee-free or pro

⁶³ For explanations of these terms see the Glossary at p. xix. On gifting practices in Kiribati see further Chapter Seven, section 5.2.1 'Gifts? I like them!' – Tolerated Practical Norms Regarding Gifts in Kiribati, p. 271.

⁶⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁶⁷ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁶⁸ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

bono work – which for some lawyers can account as much as 30-40% of their practice.⁶⁹ For example, a participant from Fiji shared her experience of finding herself in serious financial difficulty because of her financial management:

*Custom does significantly affect [indigenous lawyers'] business and financial management practices. We don't know how to bill our friends, our relatives, our cousin's friend, etc.*⁷⁰

A negative consequence of this is often financial stress which can limit a lawyer's capacity to meet the expenses of maintaining business premises and meeting tax and other mandatory expenses.

3.1.4. Financial Obligations

Despite the contrary reality, lawyers in PICs are often perceived publicly as being wealthy and are often obligated to provide financially for extended family. For example, a lawyer from Fiji shared 'after securing stable employment, I am obliged to financially support my [extended] family.'⁷¹ A judicial officer from Kiribati revealed the depth of financial obligation simply by virtue of drawing a salary: '...money means I can assist more families, brothers and sisters who aren't working.'⁷² Other participants from Kiribati confirmed that a single government salary in Kiribati typically funded the basic necessities such as food, water and shelter for several families, a problem linked with both customary practices and Kiribati's chronically low employment rate.⁷³ Financial obligations are often compounded for lawyers because they extend beyond familial ties to other communities to which a lawyer belongs, such as church communities:

*In terms of obligations in the church community, there are collections where I (mainly because of my income) am expected to buy things, for example flour, so that others in the community can bake cakes, pies, etc which the church sells, or for church community events.*⁷⁴

A participant from Vanuatu referred to such pressure as 'a fundamental problem' which is amplified by the fact that:

⁶⁹ Conference Proceedings, SPLA Second Pacific Lawyers' Conference, Brisbane 2016.

⁷⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁷¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁷² Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁷³ Kiribati National Statistics Office, 'Labour in Kiribati Based on Analysis of the 2019/20 Household Income and Expenditure Survey' (Report, Pacific Community, September 2022).

⁷⁴ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

*... lawyers are handling a lot of money and if the family sees and knows they are handling a lot of money and says I want some of that, then it is very hard for them to say no.*⁷⁵

A participant from Fiji revealed how such pressures can quickly trap a lawyer within a cycle of unethical conduct:

*... because of some financial pressures, some lawyers use the money from the clients to pay their bills and then they get new clients and that pays for their first debt with the first clients.*⁷⁶

Other customary norms, such as the avoidance of shame or causing shame may result in lawyers failing to seek support: ‘Rather than ask for help, because appearing incompetent could be shameful, you do nothing.’⁷⁷ Ironically, as one lawyer in Fiji explained, this can mean the lawyer ends up not only appearing incompetent, but also impedes their opportunity to learn better practices:

*[many] Fijian lawyers struggle to run a business of law, but they don’t admit they have any problems ... They will suffer through, humiliating themselves, meanwhile an expert is sitting next to [them] and they don’t ask for help. It is cultural.*⁷⁸

Unfortunately, such cultural practices can limit a lawyer’s capacity to be a good lawyer.

3.2. Religion, Identity and the Mission of Law

The two case studies discussed in this section reveal how religious principles and community expectations are interlaced with professional ethics and shape the practice and identity of lawyers in PICs, particularly those who identify as Christians. The case studies are closely related and tell the story of a Fijian lawyer, Litia. The first case study shows how Litia’s intertwined Christian, cultural, and professional identities shape her legal practice and community advocacy. The second case study focuses on a network of Christian lawyers to which Litia belongs, the Kingdom International Legal Network (KILN), and illustrates how a faith-based professional network supports lawyers to integrate Christian values with their professional responsibilities to be good

⁷⁵ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁷⁶ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

⁷⁷ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁷⁸ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

lawyers. Together, these cases reveal the significant role of religious beliefs as regulators of lawyers in PICs.

3.2.1. Litia's Case

*For us as lawyers we are in a key position to share knowledge in different aspects. If I can influence communities to break down one issue, which is the cycle of violence, and build up a generation that is free from those pressures then maybe in the next generation we will have a sea of change. But I am just one person doing these things.*⁷⁹

Litia is a 40-year-old lawyer in Suva, Fiji. She is an *iTaukei* Fijian from a respected but not wealthy, chiefly family. Litia identifies as a mother, a lawyer, a Christian and as an *iTaukei* woman. These identities are not fixed but continually evolving, reflecting the fluidity and dynamism of identity in Pacific cultures. According to Litia, these identities have shaped her character and values. Navigating these identities and seeking to serve as a role model for others has defined much of her professional life.⁸⁰ In the early 2000s, Litia became the first woman to graduate from her village with a degree. For her, as for most lawyers in PICs, becoming a lawyer came with an elevated status and respect within her community, but also a strong feeling of obligation, or responsibility to use her education and privilege for the betterment of her community and society. In the semi-autonomous social field of her family, Litia is expected to uphold traditional *iTaukei* customs and values. In her professional community, she is expected to adhere to the norms and standards of the legal profession. Within her religious networks, she is expected to live by Christian principles. Each of these social fields has its own norms and expectations which Litia strives to reconcile.

Litia is candid about the power she has to influence others through her status, words and actions. Litia is a vocal advocate for *VakaiTaukei* (preservation of *iTaukei* culture) and customary practices such as: *Buli Vanua* (environmental stewardship); *Veiwekani* (traditional systems for social and economic support of extended family); *Vakavinavinaka* (showing gratitude); *Vakadidike* (perseverance); and *Talanoa* (storytelling). However, she is also fearless in challenging traditional values she views as being problematic, such as the culture of silence around child abuse and

⁷⁹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁸⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

gender-based violence.⁸¹ Her experiences as a prosecutor led her to become an impassioned advocate for child protection and the elimination of gender-based violence in Fiji.

*In our culture in the community if something happens, the response is to keep the family reputation, don't talk about it, let's hide it. But I am not like this because of my experience as a lawyer.*⁸²

She has leveraged her privileged identities to challenge customs and protocol in both her own and her husband's villages and used her influence to raise awareness on important, but taboo topics such as child protection and gender-based violence. Litia shared a story of arranging for guest speakers on several important topics, including Fiji's then new domestic violence laws, at a community meeting in her husband's village. Such a format had never been tried before, nor would discussion of taboo topics ever occur so publicly. However, following the meeting 'five people from the village said "thank you so much for having that. Let's have this every year." So, we broke the norm in my husband's village.'⁸³

Litia's case shows that the normative force of custom is not always dominant, nor is it immutable and unchanging. In PICs there is much contestation over which customs should be upheld and which should be challenged, especially those regarding gender norms and domestic violence. Lawyers in PICs hold a deeper knowledge of both the content and application of state law, such as criminal laws, than lay people in their village, or local community. Combined with their typically elevated social status, lawyers, such as Litia, play an important role as advocates for both cultural protection and progress.

3.2.2. The Kingdom International Legal Network (KILN)

*All of Mount Sinai was covered with smoke because Yahweh had come down on it in fire. Smoke rose from the mountain like the smoke from a kiln, and the whole mountain shook violently. Exodus 19:18.*⁸⁴

⁸¹ Ulamila Monica Cagivanua, 'Reclaiming Loloma: (Re) Focusing Itaukei Indigeneity as an Action Based Framework against Gendered Violence' (Masters Thesis, University of Hawai'i at Manoa, 2023) <<https://tinyurl.com/56hm2zd2>>; Kreetika Kumar, 'Culture of Silence and Violence Needs to Be Broken: Akbar', *Fbc News* (Web Page, 9 August 2019) <<https://www.fbcnews.com.fj/news/parliament/culture-of-silence-and-violence-needs-to-be-broken-akbar/>>; Shamima Ali, 'Preventing Commercial Sexual Exploitation of Pacific Children', *Fiji Women's Crisis Centre* (Web Page, 1998) <<https://www.fijiwomen.com/flare/child-abuse/preventing-commercial-sexual-exploitation-of-Pacific-children/>>.

⁸² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁸³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁸⁴ *The Holy Bible: New International Version*, (Biblica, 2011). Quote taken from 'About Kiln', *About* (Web Page, 1 November 2022) <<https://kiln.online/about/>>.

Litia strongly identifies as a Christian-lawyer and this identity exerts a constant normative force on her conduct as a legal practitioner.

*I believe that [Christian-legal practitioners] have a higher calling than non-practising or non-religious lawyers. We have a higher calling in the sense that we have duties religiously and professionally and exemplify those in our lives through the work that we do, by living with integrity and honesty which are biblical principles anyway.*⁸⁵

Litia is part of a network of self-identifying Christian-lawyers – primarily based in Fiji – known as KILN who provide support to each other to overcome the many struggles and challenges of practising law and being a Christian in Fiji. This network developed from informal social connections made through religious schooling and friendships made through participation in activities of the Christian Fellowship at USP in the mid-2000s. Over time KILN has expanded and formalised into a transnational professional association of lawyers. The biblical quote from Exodus – above – is taken from the website of KILN. One of KILN’s founders told me ‘the name KILN is intentional, it is a biblical term, to us the metaphor of fire and ignition was important.’⁸⁶

Litia views her legal and community work as her ‘mission field’ and she serves as both a mentor and mentee to other Christian legal-practitioners facing the challenges of navigating faith, customary obligations and legal practice in Fiji. To Litia, being a Christian-lawyer magnifies the duty and obligation she feels to live her life by principles of personal integrity and honesty. Religious institutions and communities, like KILN, function as actants that amplify and broadcast norms regarding morality, financial devotion, worship practices and parish activities. For example, Tomlinson has extensively discussed the role of Christian identity in shaping Fijian Methodism and customary practices, asserting that the ritualistic aspects of Christianity are intricately woven into the fabric of Fijian society, shaping collective and individual identities.⁸⁷ The complex association between customary and religious identities in PICs has also been noted by many Pacific scholars, although experiences of religion in PICs are naturally deeply individuated.⁸⁸

⁸⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁸⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁸⁷ Matt Tomlinson, *Ritual Textuality: Pattern and Motion in Performance* (Oxford Ritual Studies, 2014); Matthew Akim Tomlinson, *In God's Image: The Metaculture of Fijian Christianity* (Univ of California Press, 2009).

⁸⁸ See generally: Fraser Macdonald and Christiane Falck, 'Positioning Culture within Pacific Christianities' (2020) 31(2) *Australian Journal of Anthropology* 123.; Phyllis Herda, Michael Reilly and David Hilliard, *Vision and Reality in Pacific Religion: Essays in Honour of Niel Gunson* (Canberra, ACT: Pandanus Books, 2017); Charles W Forman, *The Island Churches of the South Pacific: Emergence in the Twentieth Century* (Wipf and Stock, 1982). On Fiji see: Ryle, *My God*,

KILN was initially formed during a meeting held in Suva, Fiji in January 2016 between Laurel Vaurasi, then President of the Fiji Law Society, and Romulo Nayacalevu, both of Shekinah Law, Fiji; and Andrew Lind, Alistair McPherson and Heilala Tabete of Corney & Lind Lawyers, Brisbane, Australia. The purpose of KILN is to ‘inspire Christians in the legal community to see and conduct their work as a calling to Kingdom Ministry.’⁸⁹ Since 2016, KILN has established a secondment program which has resulted in lawyer exchanged between firms in Brisbane, Australia; Suva, Fiji; and Honiara, Solomon Islands.⁹⁰ KILN has also organised three highly successful Legal Education Conferences, two in Fiji, in 2018 and 2020, and the third hosted in Naivasha, Kenya in August 2023.

KILN’s first Conference was held in Nadi, Fiji on 26-27 January 2018 and was attended by 107 delegates from five countries. The conference theme was ‘Law as Mission; Being Called & Sent’ and sessions covered a wide range of areas touching upon legal ethics, faith and substantive areas of practice.⁹¹ To Litia, KILN is about heeding the call to share knowledge with all and develop friendships and relationships with other professionals. To her the outcome of the inaugural KILN Conference were two convictions she carries with her in both her personal and professional life: ‘your lifework is reflective of who you are and secondly love prevails over everything.’⁹²

Outside of conferences and exchange programs, members of KILN are encouraged to form their own local networks to support each other to ‘practice what they preach’ by embodying Christian virtues of honesty, integrity, diligence and compassion in their approach to legal practice. This may be as informal as ‘child minding’, or ‘bringing over a pot (of food)’ when a colleague has a punishing

My Land: Interwoven Paths of Christianity and Tradition in Fiji (2016). On Kiribati see: Talu, *Kiribati: Aspects of History* (1979); Baranite Kirata, ‘Spiritual Beliefs’ in Batiri T. Bataua (ed), *Kiribati: A Changing Atoll Culture* (1985) 75.; Kambati K Uriam and Gary Bouma, ‘Kiribati: Religious Practices’ in Thomas Riggs (ed), *Worldmark Encyclopedia of Religious Practices* (Gale, Cengage Learning, 2nd ed, 2014) vol 3, 228. On Vanuatu see, Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); Annelin Eriksen, *Gender, Christianity and Change in Vanuatu: An Analysis of Social Movements in North Ambrym* (Routledge, 2016).

⁸⁹ See ‘About Kiln’, *About* (1 November 2022)

⁹⁰ Advancing desires for mentoring expressed by a number of respondents to the SPLA 2011 Needs Evaluation Survey Report South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (2011).

⁹¹ The second, well-attended, conference was themed ‘Re-imagining legal culture: pursuing trust & truth’ and the third conference was themed ‘Restoring pathways to justice; refining words.’

⁹² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

workload;⁹³ or more solemn, such as joining in prayer for a client, for justice, or for a favourable judge.⁹⁴ KILN encourages lawyers to be advocates and educators within their own communities.

*In KILN, we are all involved in other community activities. It is about taking our knowledge from the legal profession and sharing it with our social and religious communities.*⁹⁵

To most modern regulators of lawyers in the Global North, the possibility that a lawyer might harbor a biblical feeling of love towards the performance of their duties might have never occurred to them. Indeed, when presented with the idea over coffee, several Australian legal ethicists visibly recoiled at the idea that faith networks might play a significant role in delivering the individual morality that contributes to solving the ‘compliance puzzle’.⁹⁶ One conceded that professional communities of Christian-lawyers could positively influence professional norms, but immediately stated a strong preference that lawyers draw strength of character from secular or humanist traditions.⁹⁷

In common law countries, legal scholars typically regard the legal profession as a secular institution. This secular perception arises because lawyers operate under the regulation of secular laws, rather than religious or divine mandates. However, it is important to note that the development of numerous legal principles – many of which guide lawyer conduct like justice, morality, and ethics – have long been influenced, at least in part, by religious traditions. The Constitution of many PICs clearly express the important role of Christianity in society. For example, in 2017, Samoa amended the preamble of its constitution to include Clause 3 in Part 1 which reads ‘Samoa is a Christian nation founded of God the Father, the Son and the Holy Spirit’.⁹⁸

⁹³ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁹⁴ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁹⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

⁹⁶ The compliance puzzle is a concept in regulatory theory that seeks to understand why regulatees choose to comply with regulations, even when it might be in their short-term interest to ignore them. See for example Nichita Ramona-Anca and Bătrâncea Larissa-Margareta, ‘The Implications of Tax Morale on Tax Compliance Behaviour’ (2013) 1(1) *Annals of Faculty of Economics* 739.; Tom R Tyler, *Why People Obey the Law* (Princeton university press, 2006). In the area of tax compliance, some scholars argue individual morality and ethical considerations help explain the puzzle of why people comply, see Benno Torgler, *Tax Compliance and Tax Morale: A Theoretical and Empirical Analysis* (Edward Elgar Publishing, 2007).; James Alm, ‘What Motivates Tax Compliance?’ (2019) 33(2) *Journal of Economic Surveys* 353.; JT Manhire, ‘There Is No Spoon: Reconsidering the Tax Compliance Puzzle’ (2015) 17 *Florida Tax Review* 623.; Fiona Balla, ‘Implications of Tax Morale in Tax Compliance Behavior: Albania’s Case’ (2017) *Available at Ssrn: <https://ssrn.com/abstract=3297478>*.

⁹⁷ Discussion held 3 March 2022, Canberra.

⁹⁸ See *Constitution of the Independent State of Samoa 1960* (Samoa) See discussion in Matt Tomlinson, *God Is Samoan: Dialogues between Culture and Theology in the Pacific* (University of Hawaii Press, 2020).; Brian Alofaituli, ‘Religion

Today, despite changing demographics of religious identity in PICs,⁹⁹ estimates of the total percentage of people who identify as Christian range from 60% to over 99%.¹⁰⁰

Litia's case and the story of KILN shows that personal beliefs and values, including those derived from faith, do influence and can magnify the normativity of good lawyer norms. In this light, KILN conferences serve as a platform for exploring these intersections of faith, love and law. Through delivery of substantive legal education, encouraging humility and service, and providing an environment for lawyers to reflect on ethical and moral legal practice, KILN functions to strengthen both professional competence and ethics.

The intertwined nature of religion and culture in PICs blur the lines between lawyers' cultural and religious identities, as one Indigenous Fijian participant put it: 'iTaukei lawyers are all Christians, their values are Christian values, regardless of whether or not their actions demonstrate them ...

¹⁰¹ Another participant from Fiji explained:

*For myself, as a Christian and a lawyer, ultimately, I draw guidance from Biblical principles and standards of behaviour summarised in the greatest commandment - Matthew 22:36-40 New International Version (NIV) "Teacher, which is the greatest commandment in the Law?" Jesus replied "Love the Lord your God with all your heart and with all your soul and with all your mind." This is the first and greatest commandment. And the second is like it "Love your neighbour as yourself." All the Law and the Prophets hang on these two commandments.*¹⁰²

The above statement underscores the prevailing influence of religious doctrines on ethical decision-making among lawyers in PICs. Most participants, with only a few exceptions (all born outside the region), identified as Christian and when discussing the ethics and morality of good lawyers many specifically mentioned religious schooling, upbringing, and regular attendance at church. A participant from Vanuatu emphasised the role of family and faith in shaping lawyer morality and ethics from a young age:

and Development in Samoa: Time to Draw on the Strength of Local Culture?' (2023) 41(Suppl. 2) *Development Policy Review* e12746.

⁹⁹ See Manfred Ernst, 'Changing Christianity in Oceania: A Regional Overview' (2012) 157 *Archives De Sciences Sociales Des Religions* 29.

¹⁰⁰ See Pew Research Centre, 'Global Religious Landscape' (Report, Pew Research Centre, 18 December 2012). 45-50.

¹⁰¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹⁰² Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

If a lawyer [is from] a family where ... they usually encourage him, they teach him to have manners, they take him to church and [discipline] him if [he does something] wrong ... that teaching will lead him to be a good person in the future. As a saying goes, a young tree you can bend it, but a big tree you cannot bend it. So, you have to teach or bend the tree when it is young ... If he ... goes to university and [his] background is not proper he cannot perform to the standard that society expects.¹⁰³

Empirical data presented in Chapter Four on how lawyers in PICs conceptualise being a good lawyer revealed a close connection between the identity of ‘being good’ and values associated with Christian morality such as honesty, temperance, humility and fellowship. The case study further demonstrated that individual identities, while rooted in personal experiences and beliefs, are dynamic. They can change over time and in response to normative pressure from other proximate actors, environments and situations. The emergence and growth of KILN attests to this dynamism.

KILN offers a platform for Christian lawyers to engage in dialogue, nurturing professional norms of honesty, diligence, trustworthiness and respect for others within professional practice. This case study has highlighted the power of religious beliefs, communities and institutions to support lawyers to be good lawyers in PICs and elsewhere. KILN’s rapid growth and growing international support exemplifies how Christian faith shaped by an approach to law as mission can be a powerful ally for weak bureaucratic regulators seeking to strengthen systems for regulating lawyers. Of particular relevance to regulators is that where a lawyer identifies strongly with both the whole profession (e.g. as a good lawyer) and a subset of it (e.g. Christian lawyers) ‘then there is greater scope for face-to-face informal control to work in harness with profession-wide ethics and values.’¹⁰⁴

¹⁰³ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

¹⁰⁴ Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997). 210-11.

3.3. Legal Education and Education Environments: Shaping Professional Values and Conduct

While other tertiary institutions have emerged in the region over the past decade, USP's School of Law remains the epicentre of education for lawyers in the Pacific Region. It is therefore not surprising that the majority of participants of the primary study attributed USP as the genesis of their journey to becoming a good lawyer.¹⁰⁵ Law at USP is primarily undertaken as an undergraduate degree with most students enrolling following graduation from high school – year 12/13.¹⁰⁶ Professional norms of good lawyers in PICs, such as diligence; honesty; temperance; and professionalism, are woven throughout teaching and assessment of most law courses from their first to their final year. Accordingly, by the time they graduate from USP – typically after 4-6 years – most new lawyers in PICs will have spent the vast majority of their adult life in an environment calibrated towards training them to be competent and ethical.¹⁰⁷ This makes the legal education environment at USP critical to the regulation of competent and ethical – good lawyers – in PICs.¹⁰⁸

3.3.1. Tertiary Legal Education Environments: Influences on Lawyer Conduct

The focus of legal education at USP is the teaching of foundational skills and knowledge essential for success in legal practice. For example, students are introduced to a mindset often referred to as 'thinking like a lawyer'.¹⁰⁹ This mindset promotes problem-solving, analytical thinking and understanding the legal implications of acts and omissions.¹¹⁰ As confirmed by many participants, students also begin to develop core legal practice skills such as how to conduct legal research; legal

¹⁰⁵ See discussion in Chapter Four. p. 149.

¹⁰⁶ In PICs, students receive a form of High School or School Leaving Certificate upon completion of year 12 and proceed to Form 7. See for example <https://www.usp.ac.fj/handbookandcalendar2023/university-requirement-and-regulations/bridging-requirements-regulations/>. See also the South Pacific Form Seven Certificate: <https://eqap.spc.int/spfsc>.

¹⁰⁷ On professional norms of good lawyers see Chapter Four, section 2. What Does it Mean to be a Good Lawyer in PICs?, p. 128. On legal education at USP, see further: Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012); Joseph Foukona et al, 'Curriculum Alignment: A Legal Experience' (Report, University of the South Pacific, Port Vila, Vanuatu, 2021).

¹⁰⁸ On good lawyers and ethics education see further: Andrew Boon, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2003) 5(1) *Legal Ethics*; Eli Wald and Russell G Pearce, 'Making Good Lawyers' (2011) 9 *University of St. Thomas Law Journal* 403; Anneka Ferguson, 'Creating Practice Ready, Well and Professional Law Graduates' (2015) 7(2) *Journal of Learning Design* 26; Parker and Evans, *Inside Lawyers' Ethics* (2018); Margaret Thornton, 'The Challenge for Law Schools of Satisfying Multiple Masters' (2020) 62(2) *The Australian Universities' Review* 5.

¹⁰⁹ Interview conducted with Professor Emeritus Eric Colvin between 18 July and 5 September 2019, Port Vila, Vanuatu; see further Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

¹¹⁰ On program outcomes of USP's Bachelor of Laws see Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012).

drafting; advocacy; and negotiation skills.¹¹¹ These base skills and knowledge set the foundations for competent legal practice. However, as noted by participants, education gaps exist in important areas such as the teaching of customary law and learning to navigate the use of customary networks and law in practice to solve client's problems and avoid breaching professional standards.¹¹² Deeper research into education gaps within USP's LLB is beyond the scope of this study. However, as previous research by Penfold and other Pacific scholars indicates, such gaps directly impact the capacities and competencies of lawyers in PICs.¹¹³

While accredited tertiary institutions and curriculums of law are broadly speaking institutions of the bureaucratic state, the environments of law students at law school are highly relational and impacted by a plethora of experiences that extend beyond formal classroom settings. For example, law students will have many positive and negative experiences throughout their studies in a variety of contexts, including tutoring and study-groups; extra-curricular activities, such as legal competitions; and work placements. These experiences occur both individually and collectively with others and influence their identities and future behaviour in complex ways.¹¹⁴

As illustrated by the KILN case study,¹¹⁵ another significant aspect of the tertiary environment at USP is the opportunity it presents for law students to 'self-organise' around shared interests, values and social networks. As was the case for KILN, the relationships formed through shared beliefs, interests and experiences at USP sowed the seeds for the cultivation of a professional community which operates to regulate the conduct of its members in a variety of ways. An additional recent

¹¹¹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹¹² Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia. See further Chapter Four. p. 147.

¹¹³ See Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017); Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012); Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998); MacFarlane, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002); Corrin, 'Legal Scholarship and Pacific Islands' Jurisprudence' (2021).

¹¹⁴ A plethora of research exists on tertiary education experiences and the role of student engagement. An account of this literature is beyond the scope of this research, but a worthy subject for future research. See generally: Johansson-Fua et al, *Relationality and Learning in Oceania: Contextualizing Education for Development* (2020); Trowler, 'Student Engagement Literature Review' (2010). On law student experiences in the Pacific and elsewhere see further: Grimes, 'Vocational Legal Education in the South Pacific - Designing and Implementing a Programme for Progress' (1996); Boon, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2003); James Douglas, Luke R Nottage and M Tellier, 'The Role of Practice in Legal Education: National Report for Australia' (2012) 12(28) *Sydney Law School Research Paper* 1.; Michael Robertson, 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective' [2015] (2015) 8(2) *Legal Ethics* 222.; Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017).

¹¹⁵ See above, section 3.2.2. p. 234.

example from USP can be found in the environmental law and justice community formed by USP law students arising from a ‘learning by doing’ exercise in an elective course on International Environmental Law taught in Vanuatu in 2019. Through guidance from teaching staff spanning 5 years – reaching well beyond the classroom – a core group of students, most of whom are now lawyers, have led successful advocacy on climate justice at national, regional and global level. The most recent success of this advocacy was the March 29, 2023, UN General Assembly Resolution requesting the International Court of Justice to issue an advisory opinion on the obligations of States under international law with respect to climate change, human rights and intergenerational equity.¹¹⁶

3.3.2. Continuing Professional Development (CPD)

Evidence for CPD as a regulator of lawyer conduct and ethics in the region was mixed. In all jurisdictions, CPD was not specifically identified as a key regulator of lawyer conduct, such as by helping them to be good lawyers. Despite this, most participants lamented the lack of locally available CPD and expressed a desire for more and ‘better’ CPD and professional development opportunities and there exists considerable evidence of the regional demand for quality CPD.¹¹⁷ In all three jurisdictions ‘better’ generally meant opportunities to travel overseas to learn or to learn from visiting foreign lawyers and judges, rather than from senior colleagues and peers.¹¹⁸ Participants gave a range of reasons for this, including: the attractive daily allowances paid for attending overseas training; lack of financial reward for providing training locally; and a negative perception of the capacity of local lawyers to teach higher order legal skills.¹¹⁹

One participant from Kiribati said:

*...external trainers are required because their quality is higher. If we want lawyers to improve and move to a higher standard, then we need to shape young lawyers and old lawyers with quality external training.*¹²⁰

¹¹⁶ United Nations General Assembly, ‘Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change: Resolution / Adopted by the General Assembly’ (2023) A/RES/77/276. See further ‘Usp Students Succeed in Campaign Taking Climate Change to the World’s Highest Court’, (Web Page, 29 March 2023) <<https://www.usp.ac.fj/news/usp-students-succeed-in-campaign-taking-climate-change-to-the-worlds-highest-court/>>.

¹¹⁷ See discussion in Chapter Four. 3.2.2. Continuing Professional Development (CPD), p. 154.

¹¹⁸ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹¹⁹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²⁰ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

However, participants from all three jurisdictions also said that when opportunities to learn from foreigners are available, they rarely focus on developments in law or overcoming practical challenges within the local legal practice environment.¹²¹ While there are sound arguments for better utilising the expertise of visiting foreign lawyers, an over-dependence on foreign lawyers to improve local practice skills may be a barrier to the long-term development of local professional communities and self-sustaining systems for CPD in Kiribati and Vanuatu. As Richard Grimes observed in 1995 speaking about the Pacific Region's dependency on foreigners for CPD:

*If this state of over-dependency [on foreign lawyers to provide CPD] is to be avoided it is essential that ownership of continuing legal education vests in the individual countries of the region and does not remain long-term in the hands of aiders.*¹²²

Participants generally did not identify fact that CPD events organised by local professional communities and networks of lawyers occur in physical and virtual spaces where lawyers can *talanoa* or *toktok* about shared challenges and create opportunities to strengthen professional networks.¹²³

A possible explanation for this paradox – where lawyers value education by foreigners which may be less locally relevant, but overlook the value of education by locals – may be the historic unavailability of consistent, locally coordinated CPD workshops and seminars focusing on local needs. As noted in Chapter Four, within the region CPD is mandatory only in Fiji where, today, accredited CPD opportunities are readily available from a wide variety of providers in a range of formats, including seminars, intensive workshops and whole day or multi-day conferences. According to participants from Fiji, the CPD on offer is of variable quality, with some referring to CPD as ‘rubbish’; ‘a load of crap’; or ‘for the purpose of being able to tick the box’.¹²⁴ Other Fijian lawyers and judges however, spoke glowingly of conferences and events organised the Fiji Law Society and especially by KILN.¹²⁵

¹²¹ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²² Grimes, 'Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific' (1995). 202.

¹²³ See Glossary, p. xix.

¹²⁴ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²⁵ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

For many lawyers this has meant the primary source of professional development – outside of practice experience – has been overseas education, such as participation in regional training opportunities funded by government or government donors. These opportunities tend to only be available to government employees, who accordingly receive many more opportunities than private lawyers for professional development. This was widely noted as a point of tension and division between professional communities of private and government lawyers, especially in Kiribati.¹²⁶

3.4. Professional Communities as Regulators of Lawyer Conduct

As noted by Holmes and others, ‘there is extensive research to support the view that the practice norms and habits of lawyers are formed in large part through interaction with the legal community in which they practise.’¹²⁷ Professional communities act as central nodes providing physical and virtual spaces where individuals bound by shared identities based in culture, faith, values, experiences and professional interests convene for shared purposes such as legal education. Drawing from Falk Moore’s conception of social fields, we can understand these professional communities generate their own norms and rules while remaining embedded within broader societal and professional frameworks of norms and rules.¹²⁸

As discussed in Chapter Three, professional associations of lawyers, such as law societies and bar associations have long served as a bridge linking the regulatory objectives of the bureaucratic state and the forms of informal social regulation attributed to professional communities.¹²⁹ In PICs, professional associations and communities of lawyers exist at different scales, connecting at transnational, national and local scales and form around shared personal and professional interests and identities.¹³⁰ Empirical studies by Australian legal ethicists suggest participation in these

¹²⁶ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati; between 18 July and 5 September 2019, Port Vila, Vanuatu; and between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹²⁷ Holmes et al, ‘Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers’ (2012). 10.

¹²⁸ Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1972); Clifford Geertz, *After the Fact* (Harvard University Press, 1995). See further Émile Durkheim, *The Division of Labor in Society* (Simon and Schuster, 2014); Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster, 2000); Michèle Lamont and Virág Molnár, ‘The Study of Boundaries in the Social Sciences’ (2002) 28(1) *Annual Review of Sociology* 167.

¹²⁹ See Chapter Three, p. 92. See also Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997); Parker, *Just Lawyers: Regulation and Access to Justice* (1999).

¹³⁰ For example: The South Pacific Lawyers’ Association and KILN are transnational, the Fiji Law Society is national and individual firms often enculture a form a local professional community. Other examples include Women lawyers’ associations, environmental lawyers’ associations, etc.

professional communities, especially in the early years of legal practice, are important to the development of lawyers' professional identities – such as being a good lawyer.¹³¹

KILN's precept of 'law as mission' exemplifies one powerful example of this. As Parker emphasises, subcultures within the legal profession do not merely provide a sense of identity for lawyers; they also help in creating stronger connections between workplace commitments and broader notions of legal justice and public interest.¹³² For a regulator, understanding that professional communities like KILN often operate to reinforce professional norms is relevant and important to designing effective strategies to improve lawyer regulation in PICs.

¹³¹ Holmes et al, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012). On the role of professional communities in shaping the identities and values of their members, including in response to norms imposed by 'others' see: Lisa Abbott et al, *Australian Law Dictionary* (Oxford University Press, 2010).; Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011).

¹³² See Parker, 'Lawyers' Justice, Lawyers' Domination: Regulating the Legal Profession for Access to Justice' (1997); Parker, *Just Lawyers: Regulation and Access to Justice* (1999). See further discussion in Chapter Three, p. 94.

4. CONCLUSION

This chapter has explored the multi-dimensional nature of lawyer regulation beyond the state in PICs, providing a detailed answer to one of the key research questions: 'How do non-state systems influence lawyer conduct in Fiji, Kiribati, and Vanuatu'. The investigation unfolded through the personal journeys of Banuera and Litia, which situated the complex interplay of personal identity; cultural norms; and professional ethics in the real-world context of legal practice in two PICs. Litia's case study challenged the traditional image of 'legal missionaries' as agents of domination in post-colonial states and offers a less frequently voiced perspective on regulating law and development in the Pacific.¹³³ Banuera's case revealed the fluid nature of lawyers' 'fractal identities' and underscored the relational dynamics at play in legal practice environments in PICs.¹³⁴

The profound influence of custom as a regulator of lawyers' professional conduct emerged as a significant theme. As illustrated in Banuera's narrative, lawyers in PICs such as Kiribati, must navigate a complex landscape of state and non-state regulatory mechanisms. His experience underscored the strong influence of customary norms and local community expectations, and demonstrated the embeddedness of lawyers in cultural and customary systems. Banuera's journey underlines the need for lawyers in PICs to be flexible and adaptable to accommodate their fluid identities and the overlapping semi-autonomous social fields that characterise local legal practice environments.

The case studies show that regulation of lawyers is not just about imposing state law and statutory rules on lawyers, but also driven through non-state regulators of conduct arising from lawyers' engagement within local cultures, customs and values, including religious ideologies. They also underscore the importance of recognising and engaging with cultural and customary practices, as well as the profound role of religion and religious networks, in shaping norms regarding lawyer conduct in PICs. This has important implications for efforts to strengthen professional norms for lawyers beyond the state which are considered further in Chapter Eight.

This chapter has also demonstrated that legal education and professional communities play pivotal roles in moulding lawyers' professional identities, capacities and ethics. Within legal education

¹³³ On the notion of legal missionaries in development see: John et al (eds), *Regulating Law* (2004). 269. See further Lawrence M Friedman, 'On Legal Development' (1969) 24 *Rutgers Law Review* 11.; Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 *Cornell International Law Journal* 209.

¹³⁴ Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1988); Wagner, 'The Fractal Person' 1991.

environments are many challenges and opportunities for regulating future lawyers. There is a clear need for more detailed research on education gaps within USP's curriculum and action to ease the transition of graduates into legal practice environments in PICs. The findings also point towards the need for regulators in PICs to renew their focus on developing more CPD opportunities and cultivate opportunities for strengthening professional communities and networks within local legal practice environments. While the development of locally sustainable systems for CPD likely remains tantalisingly out of reach in small jurisdictions such as Kiribati, Fiji's experience demonstrates the potential for such systems to emerge in larger jurisdictions, demonstrating the importance of locally sustainable CPD systems, even if some CPD events are 'rubbish'.¹³⁵

Finally, this chapter has shown that through their actions and interactions within professional communities, lawyers create meanings and identities, such as 'being a good lawyer', through their actions and choices – aligning their conduct with the adopted norms and values of other proximate actors. Thus, professional communities offer vital spaces for lawyers to connect, learn from, and influence each other, reinforcing the potential for mutual regulation. Litia's case provided a practical demonstration of the power of professional communities as regulators of lawyer conduct.

This chapter therefore reveals that the regulation of lawyer conduct in PICs is a complex 'dance' involving not only formal rules but also diverse socio-cultural norms and practices. The next chapter will build on this metaphor to explain how lawyers communicate regulatory signals to regulators through their patterns of behaviours.

¹³⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

CHAPTER SEVEN: THE DANCE OF COMPLIANCE: PRACTICAL NORMS OF LAWYERS AS REGULATORY SIGNALS

1. INTRODUCTION

The previous chapter demonstrated that in addition to being regulated by state regulators, lawyers in PICs are regulated by a variety of non-state regulators. These state and non-state regulators exert normative influences over lawyers which compel their compliance with, or deviance from, different sources of norms. In this chapter, I apply de Sardan's framing of practical norms¹ to identify practical norms of lawyers in Fiji, Kiribati, and Vanuatu. The chapter draws from both de Sardan's research and Valerie Braithwaite's motivational posturing theory to consider how a responsive regulator of lawyers can interpret practical norms of lawyers in PICs as signals to inform beneficial regulatory interventions and enforcement strategies.² Using the analogy of 'dance', discussed in the next section, this chapter seeks to illuminate the complex process by which lawyers and regulators in PICs navigate and negotiate compliance.³ The chapter begins by exploring the analogy of lawyers' dance of compliance and by introducing a heuristic tool for interpreting signals about lawyers' postures of compliance communicated by practical norms. It then considers de Sardan's criteria for identifying practical norms which were applied to identify practical norms of lawyers in PICs based on the data collected in the empirical study. These practical norms are summarised in Table 11 in section 3, below and are discussed in detail in sections 4 to 6.⁴

¹ See: de Sardan, 'Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)' 2015. See further Chapter Three, p. 117.

² Braithwaite, 'Closing the Gap between Regulation and the Community' 2017.

³ State regulators of lawyers are primarily concerned with ensuring lawyer conduct complies with statutory or judge made rules of conduct; ethics; procedure; competence; etc. These State sources are parsed in this chapter as 'professional standards.'

⁴ See Table 11, p. 256.

2. THE DANCE OF COMPLIANCE

Consider the regulatory process as a street carnival, where regulatees are the dancers and a regulator the musician. The regulatory domain (the site of the carnival) is limited by various constraints both intrinsic to the domain (e.g. its starting state, local resources and facilities, etc) and extrinsic (e.g. socio-cultural trends, or public health orders). Every regulatee performs their own unique dance of compliance within the regulatory domain, often improvising moves reactively in response to other proximate dancers, their physical environment, their interpretation of the music, and their own postures.⁵ To increase commitment to the norms being broadcast by the musician, the musician continuously observes and monitors the dancers and adjusts the music (feedback loops) to subtly guide both the engagement of dancers (social distance), and the moves and postures of dancers (performance of compliance). For example, the musician may change the beat or subtly alter the tempo (regulatory actions) to encourage dancers to move in line with a certain dance style (norms crafted by the regulator). After all of this interplay the dancers are still expressing themselves, still responding to the music, but are now more in harmony (postures of commitment and capitulation) with the rhythm of the music.

2.1. Regulatory Responses to Practical Norms

As discussed in Chapter Three, responsive regulatory strategies should be nuanced, context-sensitive and adaptive.⁶ This involves building relationships characterised by dialogue and cooperation between regulators and those they regulate, while also being responsive to the context in which regulatory compliance or non-compliance occurs.⁷ Responsive regulators of lawyers in PICs can best achieve regulatory goals by prioritising regulatory action to disrupt practical norms that undermine the legitimacy of the regulator or professional standards (e.g. norms involving conduct that is harmful to clients or the interests of justice) while seeking to engage positively towards practical norms that strengthen the regulatory system (e.g. most adaptive norms). If the regulatory system effectively supports postures of commitment, for example, by making it easy to comply with professional standards, the overall cost to the regulator of ensuring compliance will be reduced due to low enforcement costs and regulatory effectiveness is likely to increase.

⁵ The double entendre of postures (physical and motivational) is intended.

⁶ See discussion in Chapter Three, p. 110.

⁷ Braithwaite, 'Closing the Gap between Regulation and the Community' 2017; Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011); Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); Baldwin and Black, 'Really Responsive Regulation' (2008); Christine Parker, 'Lawyer Deregulation Via Business Deregulation: Compliance Professionalism and Legal Professionalism' (1999) 6(2) *International Journal of the Legal Profession* 175.; Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

Conversely if the regulatory system is unable to effectively regulate practical norms that signal postures of disengagement and game-playing, its legitimacy and efficacy will tend to be undermined. This hybrid regulatory approach strives to balance an understanding and respect for local contexts, traditions and customs with the necessity to uphold broader legal principles and maintain professional standards.

In Chapter Three, I introduced what I termed a ‘pluralist-relational model of practical norms’ which is encapsulated in Figure 4: Five typologies of practical norms.⁸ Figure 11, below, shows a modified version of Figure 4 which incorporates elements from Valerie Braithwaite’s motivational posturing theory.⁹

Figure 11: Motivational postures and practical norms¹⁰

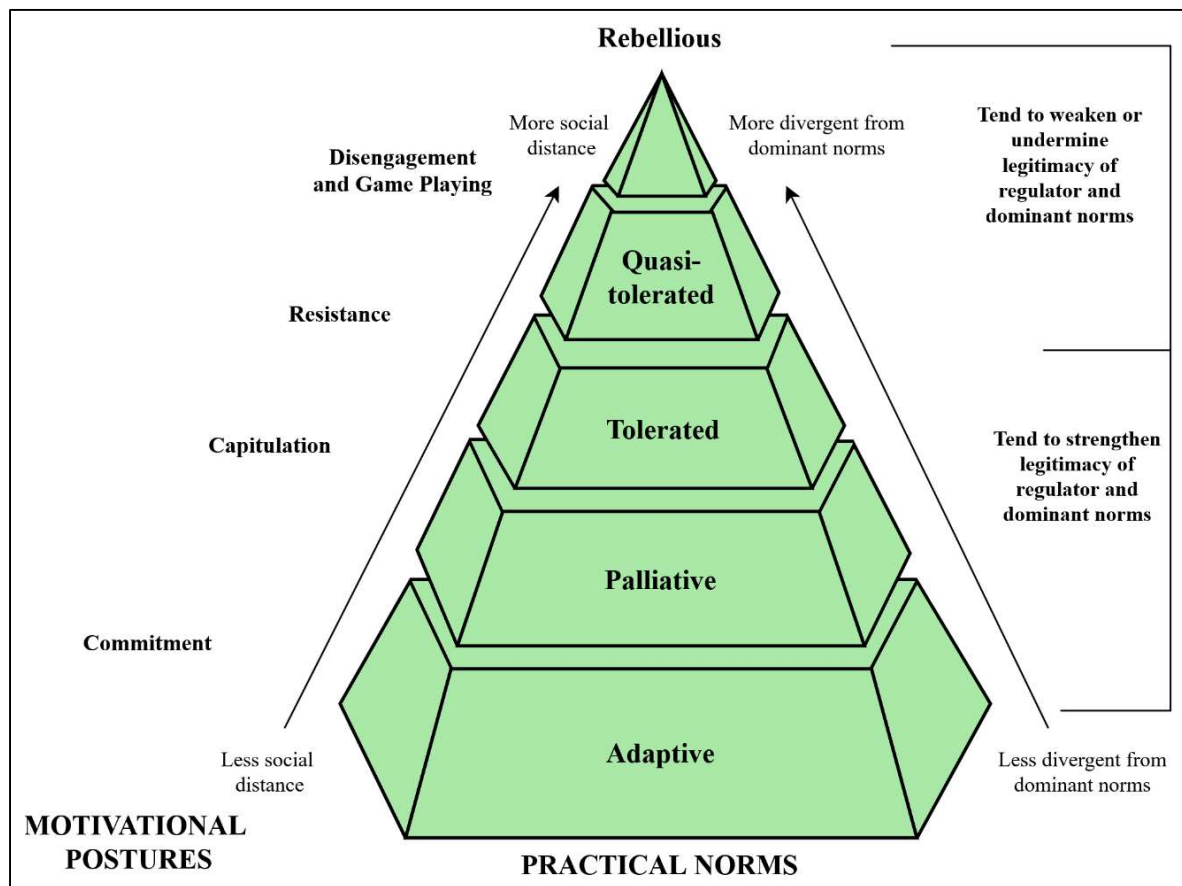


Figure 11 was created as a heuristic tool to assist regulators to interpret regulatory signals about lawyers’ postures of compliance communicated by practical norms. Motivational postures of

⁸ See Chapter Three, Figure 4: Five typologies of practical norms, p. 121.

⁹ See Figure 4: Five typologies of practical norms, p. 121; and Figure 2: Enforcement pyramid, p. 113.

¹⁰ Figure 11 was created by the author for this thesis.

regulatees are shown on the left-hand side of the pyramid and broadly correspond to the degrees of tolerance and divergence of the type of practical norm shown in the pyramid. Rebellious norms are typically characterised by more social distance and divergence from dominant norms, while adaptive norms are typically characterised by less social distance and divergence. The more rebellious and disengaged norms of lawyers are, the more likely their conduct will tend to undermine the legitimacy of the regulator. Conversely, conduct that signals a posture of commitment and capitulation tend to strengthen the legitimacy of the regulator.

As a heuristic, Figure 11 does not provide a definitive model for interpreting signals communicated to regulators by practical norms. It is therefore incumbent on the regulator to interpret practical norms in the context of local paradigms before deciding on appropriate regulatory action, or inaction. For example, the practical norms discussed in this chapter exemplify more than mere deviations from formal legal norms, they provide insights into the motivations, challenges and contextual dynamics that influence lawyers' conduct. Norms that are strongly deviant might emerge to help lawyers uphold the 'spirit of the law' despite constraints of local systems, or enable them to negotiate tolerated ways to navigate tension between conflicting norms. For example, each of the practical norms of lawyers identified in Table 11: A few practical norms of lawyers in PICs,¹¹ is connected with the achievement of one or several of the following broad goals of lawyers:

- Overcoming resource constraints within the legal practice environment.
- Navigating familial, social or customary obligations.
- Preserving relationships, both professional and social.
- Permissibly attaining personal advantage.
- Achieving social change.

The overall objective of regulators remains to encourage and support regulatees' commitment to professional standards, while ensuring the availability of flexible options that enable it to escalate threat and to intervene to promote less divergent and more tolerated conduct by lawyers. By recognising and responding to signals communicated by practical norms, regulators can seek to establish feedback loops where regulatory action (or inaction) lead to shifts in practical norms, which, in turn, inform future regulatory action.¹² Over time, this iterative cycle can culminate in

¹¹ See Table 11, p. 256.

¹² See for example Rooney et al, 'Thinking Incrementally About Policy Interventions on Intimate Partner Violence in Papua New Guinea: Understanding 'Popcorn' and 'Blanket' (2022); Roberts and St John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System' (2021); John B Ruhl and Daniel Martin Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 *Iowa Law Review* 191.; John B Ruhl, 'Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State' (Pt Duke University School of Law) (1996) 45(5) *Duke Law Journal* 849.

the institutionalisation of new norms that are both professionally robust and sensitive to the legal practice context in which they operate.¹³

De Sardan cautions against regulators responding to regulatory signals with additional layers of rules, especially in development contexts such as exist in PICs. As he observes from his work in post-colonial states in Africa, new bureaucratic norms often ‘pile up without actually replacing the previous ones.’¹⁴ He argues that in a development context, instead of simply making new bureaucratic norms that sit unperformed on top of all the previous versions,¹⁵ regulators should start with evaluating how to shift existing practical norms, rather than introducing new official norms that will gain no more respect than the previous ones. A useful goal for a responsive regulator is to seek to intervene at key leverage points to steer the trajectory of the system through positive feedback loops.¹⁶ De Sardan suggests that the pragmatic objective of a reform strategy should be ‘to start with and from the practical norms, to make some of them ‘shift a bit’, or to change some of them sometimes, or to play certain practical norms against others ...’¹⁷ The goal of the regulator is to make ‘the illicit become licit’ through the provision of resources and the imposition of constraints.¹⁸

In this light, the process of regulation begins to resemble a complex dance. In this dance, practical norms function as signals of different motivational postures – and reveal how regulatees interpret rules, as well as their motivations and coping strategies. Woven into this dance is ‘social distance’, the perceived relational space between regulator and regulatee. Regulatees (lawyers) may vary this social distance as a mechanism to respond to conflicting norms and mitigate risks associated with deviant conduct. Regulators also have a crucial role to play in this dance. By cultivating legal practice environments that encourage and support cooperation, regulators can influence social distance to make positive shifts towards regulatory goals. This, in turn, leads to regulatory enforcement strategies that are more likely to resonate with regulatees and support positive

¹³ Eoyang and Holladay, *Adaptive Action* (2020); Glenda H Eoyang, ‘Human Systems Dynamics: Complexity-Based Approach to a Complex Evaluation’ in B Williams and I Imam (eds), *Systems Approaches to Evaluation: An Expert Anthology* (2007) 123.; Robert E Goodin, *The Theory of Institutional Design* (Cambridge University Press, 1998); Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977).

¹⁴ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 31.

¹⁵ This is reminiscent of attempts to reform lawyer regulation in Solomon Islands and Vanuatu.

¹⁶ Roberts and St John, ‘Complex Designers and Emergent Design: Reforming the Investment Treaty System’ (2021).

¹⁷ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 32.

¹⁸ Ibid. 32. This approach is reminiscent of Baldwin and Black’s concept of ‘risk based regulation’ Robert Baldwin and Julia Black, ‘Driving Priorities in Risk-Based Regulation: What’s the Problem?’ (2016) 43(4) *Journal of Law and Society* 565.

feedback loops where regulatory adaptations inform shifts in practical norms, which then inform future regulation.¹⁹

Bailey refers to the effects of regulatory actions as ‘adaptive change’ by regulatees which ‘occurs ... through the transformation of existing pragmatic rules, ... tailored to the new constraints or new resources.’²⁰ Regulators can therefore instigate the formation of new (more tolerable) practical norms that legitimise bureaucratic norms, or support postures of compliance through regulatory actions (and inactions). Adaptive changes often lag behind regulatory action and the effects of regulatory action can be unpredictable. Therefore, a responsive regulator needs to ensure regulatees are supported to adapt to change,²¹ and ensure that feedback loops provide effective monitoring and evaluation, and support for potential further regulatory ‘nudges.’²²

¹⁹ Roberts and St John, ‘Complex Designers and Emergent Design: Reforming the Investment Treaty System’ (2021); Braithwaite, ‘Closing the Gap between Regulation and the Community’ 2017; Braithwaite, ‘Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions’ 2003.

²⁰ Frederick G Bailey, ‘Leaders and Teams’ in Frederick G. Bailey (ed), *Stratagems and Spoils: A Social Anthropology of Politics* (Basil Blackwell, 1969) Ch4. cited in, de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 24.

²¹ On this see generally Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Routledge, 2017).; Baldwin and Black, ‘Really Responsive Regulation’ (2008); Julia Black and Robert Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32(2) *Law & Policy* 181.

²² See generally Gunningham and Sinclair, ‘Smart Regulation’ 2017; Thaler and Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009); Gunningham and Sinclair, ‘Designing Smart Regulation’ 1999.

3. IDENTIFYING PRACTICAL NORMS OF LAWYERS IN PICs

As was discussed in depth in Chapter Three, practical norms ‘underlie the practises [sic] of actors’ and diverge from state and non-state sources of norms in patterned ways.²³ Lawyers in PICs face constant pressure to comply with different norms projected from a plurality of sources including state laws, Custom and Christianity. Practical norms develop where these sources of norms intersect, resulting from the reconciliation of plural normative pressures on lawyers in situations where contemporaneous compliance with disparate sources of norms is not possible or not desired.²⁴

De Sardan argues that a regulator can identify practical norms by asking: ‘What are these divergences from the official norm and in what context do they arise? What impacts do they have? How are they regulated? [and] What patterns do they follow?’²⁵ The empirical data identified many examples of conduct by lawyers that diverged from professional norms, or which *prima facie* involved conduct that breached professional standards. Many of these are discussed in previous chapters and include: financial dishonesty; incompetence; fraud; and improper dealings with clients.²⁶ While these examples all indicate divergent conduct by lawyers, to meet the definition of a practical norm they must be:

- Divergent from, but intertwined with official or social norms;
- Informal or implicit;
- *De facto* (meaning they exist as facts that can be observed and described);
- Norms (they regulate conduct and are regulated);
- Repeated or patterned; and
- Relational or entangled.²⁷

Interview data was assessed against these criteria to identify the examples of practical norms that are shown in Table 11.

²³ See de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 8. See further Chapter Three, section 4.4. p. 117.

²⁴ See Chapter Three, Figure 3: Typology of six norms, p. 118.

²⁵ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015. 2.

²⁶ See Chapter Four, section 2. p. 128.

²⁷ See discussion in Chapter Three, section 4.4. p. 117.

Table 11: A few practical norms of lawyers in PICs

Type of Practical Norm	Practical Norm	Effect on legitimacy of regulator / system	Criteria used to assess evidence of practical norm					
			Degree of divergence from Professional or Social norm	Informal / hidden	<i>De facto</i> ⁺	They are norms*	Patterned	relational
Adaptive	Adjournment agreement norm: Lawyers commonly collude to seeking adjournments for personal, cultural or family reasons.	Neutral to Positive	Slightly divergent	Y	Y	Y	Y	Y
	Adaptive compliance norms: Some firms develop adaptative practices to manage conflicts of interest.	Positive	Not divergent to slightly divergent	Y	Y	Y	Y	Y
	Client selectivity norms: In Banuera's Case, a norm is observed whereby potential conflicts of interest are avoided by being selective about clients.	Positive	Not divergent	Y	Y	Y	Y	Y
	Moderate gifting norm: Giving customary gifts that are 'not too much' is a norm in some professional contexts.	Neutral to Positive	Not divergent to moderately divergent	Y and N	Y	Y	Y	Y
	Social harmony norm: divergent conduct done to maintain social harmony, like Mary's choice.	Neutral	Moderately divergent	Y	Y	Y	Y	Y
Palliative	Relaxed formality of court proceedings: It is common for magistrates to relax certain formal rules such as the language of proceedings and court procedures.	Neutral to Positive	Slightly divergent	Y and N	Y	Y	Y	Y
	Case postponement norm: Lawyers with high case-loads frequently seek to postpone cases as a case management strategy.	Neutral to Positive	Slightly divergent	Y	Y	Y	Y	Y
Tolerated	Customary gift acceptance norm: Receiving customary gifts of money or in kind is accepted where the value is 'not too much'.	Neutral to Negative	Not divergent to moderately divergent	Y	Y	Y	Y	Y

Type of Practical Norm	Practical Norm	Effect on legitimacy of regulator / system	Criteria used to assess evidence of practical norm					
			Degree of divergence from Professional or Social norm	Informal / hidden	De facto ⁺	They are norms*	Patterned	relational
	Tolerance for subpar practice norm: subpar performance of colleagues is often tolerated in a variety of professional contexts.	Neutral to Negative	Slightly divergent	Y	Y	Y	Y	Y
	Relational legal practice norm: Lawyers often utilise customary systems and practices to augment legal dispute resolution for clients.	Neutral to Positive	Slightly divergent to Extremely divergent	Y	Y	Y	Y	Y
Quasi-Tolerated	Excessive gifting norm: Receiving gifts from clients that are 'too much' is usually frowned upon, but still often occurs.	Neutral to Negative	Moderately divergent to Extremely divergent	Y	Y	Y	Y	Y
	Lack of cost agreement norm: Lawyers frequently do not provide costs agreements to clients in circumstances they ought to.	Negative	Slightly divergent	Y	Y	Y	Y	Y
	Conditional misconduct tolerance norm: Some forms of 'serious misconduct' Such as theft or misleading the court are semi-tolerated in specific contexts.	Negative	Moderately divergent to Extremely divergent	Y	Y	Y	Y	Y
	Magistrate exploitation norm: Lawyers in Kiribati, Vanuatu and Fiji improperly exploit inexperienced magistrates for their client.	Negative	Extremely divergent	Y	Y	Y	Y	Y
Rebellious	Gender inequality resistance norm: Many women lawyers participate in practical norms directed to challenging dominant customary norms that entrench inequality of women.	Neutral to Positive	Slightly to Extremely divergent	Y and N	Y	Y	Y	Y

⁺ I.e. They exist as facts that can be observed and described ^{*} I.e. They regulate conduct and are regulated.

4. ADAPTIVE AND PALLIATIVE PRACTICAL NORMS

Adaptive practical norms represent localised solutions to professional challenges and emerge as adaptive strategies to local contexts and constraints. These adaptations are often pragmatic responses designed to overcome, for example: conflicts of interest; manage heavy caseloads; or maintain social harmony. Adaptive practical norms typically signal commitment by lawyers to professional norms. For example, a law firm might develop internal systems to effectively manage inevitable conflicts of interest which arise for their employees.¹ Palliative practical norms are adaptive practical norms, but are distinguished by the characteristic that they also serve as an essential support for sustaining the delivery of legal services amidst potential system failures. They often emerge from a desire to ensure the survival and functionality of both the legal system and socio-cultural systems. Palliative practical norms signal postures of capitulation to regulation, as lawyers strategically modify their behaviour to accommodate and bridge systemic constraints. For example, the practice of magistrates relaxing formal rules shows a willingness for lawyers and the judiciary to bend formal rules to ensure the effective administration of justice.² While this chapter discusses just two palliative practical norms it is likely a deeper and more focused empirical study would yield richer data.³

4.1. Seeking Adjournments to meet Familial or Customary Obligations

In Fiji, several participants spoke freely about a common practice whereby before an appearance or hearing, a lawyer will engage with opposing counsel to agree on a reason to justify a request for an adjournment. Most typically this was reported to be done in order to enable one of them to attend important family events – especially funerals – for cultural reasons.⁴ A participant explained how the process typically works:

[T]hey first contact the opposing counsel and see if they would consent to an adjournment and then together, they provide a plausible explanation to the judge as to why the matter needs to be adjourned. It is more likely at the earlier stages of a trial when there are many more plausible reasons to seek an adjournment – e.g. issues of discovery, securing witness statements, etc.⁵

¹ See below section 4.3.2. p. 262.

² See below section 4.4.1. p. 264.

³ See below section 4.2. p. 260 and section 4.5. p. 265.

⁴ Interviews FI14; FI19; FI24 (10 March – 21 April 2019); KI2; KI16; KI19 (5 July – 10 September 2018); VI6 (18 July – 5 September 2019).

⁵ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

Several participants admitted that they readily agreed to such requests because they anticipated that one day, they would require the same flexibility.⁶

This implicit, repeated and relationally-driven practice diverges somewhat from professional norms, yet paradoxically, it also reinforces them. By justifying adjournments on (manufactured) legal grounds they give the appearance of preserving the integrity of the legal system. Moreover, such conduct often does not significantly affect client interests or the administration of justice, especially when it occurs during the earlier stages of a trial.

A more harmful practice was reported by a participant from Fiji, who shared their knowledge of some lawyers who, when faced with a situation involving a strong cultural obligation requiring their presence elsewhere, drop their cases ‘like a sack of potatoes’ and simply fail to respond to courts or clients.⁷ Similar practices were also reported in Kiribati and Vanuatu.⁸ Judicial officers in each country expressed frustration with lawyers who fail to appear altogether, yet also expressed understanding of the conflicting legal and cultural obligations lawyers often face.⁹

The judiciary has responded adaptively to these practical norms. For example, I was advised in Kiribati that the judiciary had changed the rules of procedure to eliminate the practice of mentions and preliminary hearings for every case due to the large number of adjournments sought by lawyers and the rising cost to clients who paid lawyers for their appearances.¹⁰ I also learned that the High Court Registry in Suva maintains a list of reserve matters which can be called at short-notice to fill unexpected gaps on scheduled hearing dates – seemingly a responsive adaptive practical norm of the judiciary.¹¹ These counter-adaptations demonstrate a regulatory system operating in a fluid state, responding to the practical realities of legal practice in PICs and illustrating how adaptive norms can shape and be shaped by regulatory actions.

⁶ Interviews conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia; Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

⁷ Interview FI19 (10 March – 21 April 2019). See also discussion in Chapter Four, p. 131.

⁸ Interviews KI1; KI2 (5 July – 10 September 2018).

⁹ Interviews KI1; KI2; KI7; KI18 (5 July – 10 September 2018).

¹⁰ Interviews KI7 (5 July – 10 September 2018).

¹¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji.

4.2. Relying on Adjournments as a Case Management Strategy

Many lawyers in Kiribati reported examples of conduct that wilfully transgresses professional norms but which were often justified as an adaptive or palliative strategy. Strategies such as delaying responses to communications or regularly seeking adjournment are used as adaptive measures to manage high case-loads and common problems such as witnesses not appearing for court.¹² In Kiribati, several participants said it was common for lawyers to agree outside court about the matters for which they would seek an adjournment that day as a way of managing caseloads, included cases for which they were appearing but had not prepared.¹³ Despite deviating from professional norms, these strategies are widely practiced and seldom publicly discussed and in turn can become a tolerated ‘core feature [of]... professional culture.’¹⁴ One lawyer discussed her anger at a colleague who after having agreed to an adjournment outside of court, then in court advised the magistrate they were ready to proceed (i.e., this breached the expected practical norm).¹⁵

Lawyers from all three jurisdictions reflected that a common reason why other lawyers may breach professional standards is simply because they become overwhelmed. For one participant from Vanuatu being overwhelmed was a consequence of an initial lack of technical competence which subsequently develops into a time management issue:

*Why do people behave unethically... very often, it's because people are struggling... and that starts off with lack of technical competence. They don't really understand the things that they need to do. And then it becomes a sort of management issue – they end up juggling dozens of matters they are struggling with – then that leads into the ethical problems...*¹⁶

While conduct relying on adjournments inevitably delays justice for clients, its overall effect on the justice system is palliative, reflecting a pragmatic response to an operational constraint that ultimately enables lawyers to focus on resolving other active cases. Such conduct sends signals to regulators regarding the need for improved support systems for lawyers and pressures faced by lawyers. For a responsive regulator, encouraging more open discussions about these practical norms can lead to a shared understanding of the pressures faced by lawyers, foster empathy and potentially generate collective solutions.

¹² Interview KI3 (5 July – 10 September 2018); Interview FI18 (10 March – 21 April 2019, Fiji).

¹³ Interview KI17 (5 July – 10 September 2018).

¹⁴ See de Sardan, 'Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)' 2015. 415.

¹⁵ Interview KI17 (5 July – 10 September 2018).

¹⁶ Interview with Professor Emeritus Eric Colvin (18 July and 5 September 2019).

4.3. Adaptive Practical Norms Guiding the Management of Conflicts of Interest

Data collected from interviews revealed adaptive practical norms related to lawyers' management of conflicts of interest operating at three scales: (institutional) government law offices; (local) norms within law firms; and (personal) socio-cultural norms followed by individuals. These are each discussed below.

4.3.1. Institutional: Within Government and In-House Legal Practice

Participants from all three countries provided many examples of conflicts of interest that occur in the course of legal practice due to a familial connection.¹⁷ These may arise from a direct request for legal advice by kin but are often inadvertent, for example arising from local practices of using several different names and spelling variations which may appear on official documents. Depending on the nature of the matter the conflict may only be discovered very late – at the first mention or hearing date.¹⁸ A participant from Kiribati explained:

in the course of a civil case. I was interviewing the client, and discovered that the other party is my spouse's uncle. It wasn't immediately apparent because the case name was different to his common name...

*I gave the case away. The process was, I spoke with the Attorney-General to disclose my interest. The case was reallocated to another lawyer... This is a very common problem in Kiribati. It is very common for people to use different names.*¹⁹

Because of this risk, institutional practices for reallocating a file upon discovering a familial connection are well-established within government legal services in PICs.²⁰

Such practices are less well-established in the context of corporate/in-house legal practice where there may not be any alternative lawyer to allocate a file to. For example, a participant working as an in-house lawyer for state-owned corporation in Kiribati discussed being directed to pursue legal action against relatives or have their employment terminated. This had negative effects on her personal relationships and has consequently led to her changing her approach to legal practice:

¹⁷ Interview FI1 (18 July – 5 September 2019); KI3; KI5; KI6; KI8 (5 July – 10 September 2018); VI1 (18 July – 5 September 2019).

¹⁸ Interview KI3 (5 July – 10 September 2018). This has several deleterious effects on the administration of justice, including delays and increased costs.

¹⁹ Interview KI3 (5 July – 10 September 2018).

²⁰ Interview FI1 (18 July – 5 September 2019); KI5 (5 July – 10 September 2018); VI8 (18 July – 5 September 2019).

In the past I have had to ask a colleague to take over a case because I was in conflict. [However], the former CEO of the [organisation] would [then] say to me 'you are an officer of the [organisation], if you are honest, you should take them to court and just apologise to them that you are just doing your job'. This is what I have done mostly. But the consequence is I don't want to face my relatives or friends to apologise (I was forced to take the case or it could cost me my job). After about 2 years my relationship with relatives/friends are back to normal. One thing this has meant is that now I try hard to seek a settlement with people. I meet with the relative to talk through the settlement directly.²¹

For this lawyer the severe personal consequences they faced arising from not avoiding a conflict of interest, combined with the lack of an acceptable alternative to them, has resulted in them prioritising seeking settlements in matters where, were they not conflicted, they might otherwise seek remedy through the courts. This adaptive practice enables the lawyer to preserve their relationships with family and friends while also mitigating the costs and delays associated with litigation that their employer would otherwise incur. On the other hand, litigation might result in a better outcome for the employer than a settlement negotiated by a conflicted lawyer incentivised to avoid litigation. Were the state-owned corporation to embrace institutional practices and procedures that enable legal staff to better manage conflicts of interest it is possible that it could not only improve the well-being of their legal staff but also enhance the integrity and outcomes of their legal proceedings.

4.3.2. Local: Within Private Law Practices

Many larger firms of lawyers across the Pacific Region have developed operational practices to ensure they identify and appropriately manage conflicts of interest. A participant in Vanuatu discussed how their private law firm has adopted its own approach to assist individual lawyers to manage familial conflicts of interest.²² Recognising that individual lawyers will be asked to represent family members, the firm has a policy that it will accept cases on behalf of a staff member's family and allocate it to another lawyer in the firm.²³ In this way the individual lawyer is able to satisfy their duty to help family/kin while keeping their professional and family obligations separate.

²¹ Interview KI6 (5 July – 10 September 2018).

²² Interview VI1 (18 July – 5 September 2019).

²³ Interview VI1 (18 July – 5 September 2019).

4.3.3. Individuals: Banuera's Case

Banuera's case, which was introduced in Chapter Six, illustrated an example of a tolerated or quasi-tolerated practical norm by one lawyer who did not manage conflicts of interest properly.²⁴ His conduct diverged from legal and professional norms regarding the avoidance of conflicts of interest. Banuera received no formal censure from any regulator and his conduct was tolerated for many years by other lawyers, by judges and by clients.²⁵ However, when a sufficiently significant conflict eventually arose it resulted in a form of sanction by losing his seat in an election. After this Banuera adopted a new informal practice that is broadly consistent with professional norms regarding avoiding conflicts of interest – not accepting cases against his constituents. For him, this has become a norm which controls his choice of clients. It is repeated conduct and it is relational, resulting from Banuera's relationships with multiple other actors. His new approach can consequently be viewed as an adaptive practical norm.

4.3.4. Analysis of Three Adaptive Practical Norms Regarding Conflicts of Interest

Each of the examples above exemplify practices developed by lawyers in PICs to help them to comply with legal and professional norms based on the actual practices and realities of local legal practice environments. The practices described support lawyers to comply with legal norms regarding the avoidance of conflicts of interest as soon as they are identified, albeit in different ways. These practices are repeated and are relational in that discovery of a potential conflict of interest creates a relationship-based challenge that needs to be navigated. Each of these practical norms signals postures of commitment to regulators, manifesting as different strategies that enable lawyers to navigate conflicts of interest.

²⁴ See Chapter Six, section 2.2. Banuera's Case. p. 221.

²⁵ Interview KI6, KI17, KI19 (5 July – 10 September 2018).

4.4. Adaptations to Responsive Practices of Courts and Court Registries

4.4.1. Relaxed Rules of Procedure and Language Requirements in Magistrate's Courts

In Kiribati, law and justice resources are often constrained. The vast majority of magistrates in Kiribati are lay magistrates with very little formal training.²⁶ Petitioners before courts often understand little of the law.²⁷ One adaptation courts have made is to relax formal rules of procedure and requirements for proceedings to be in English in a variety of situations in Magistrate's Courts in Kiribati. For example, magistrates often communicate directly with clients, adopting inquisitorial, as opposed to adversarial judicial styles.²⁸ Lawyers are active participants in these adaptive practices.²⁹ They are adaptive practical norms because they deviate from formal standards, are largely informal, but are recognised and followed in practice. They regulate the conduct of court proceedings and are patterned, being consistently applied across a range of proceedings in the Magistrate's Courts. Such practices are relational and represent a form of adaptive resilience in response to constraints of the legal practice environment, allowing the system to function in a more efficient and accessible manner. This in turn tends to lend legitimacy to state legal systems because despite evidencing problems for their operation as designed, it demonstrates a commitment to the spirit of the law and the legitimate authority of the judiciary.³⁰

4.4.2. Adjusting to Changes in Court Registry Practices

In the course of interviews in Kiribati, I learned that changes implemented by the High Court Registry to its operating practices had given rise to adaptive practical norms within the legal profession. The court's changes to its operating practices itself reflects an adaptative practical norm. In Kiribati, land matters account for as much as 70% of all cases before Kiribati courts and filing a case requires lawyers to first access all previous court decisions pertaining to the affected piece of land.³¹ A single matter may require the Registry clerks to locate paper copies of potentially dozens of past decisions spanning decades (and copy them). This severely impacted the capacity of the Registry to perform its other access to justice and rule of law functions.

To cope, the Registry notified lawyers that it would limit the days of the week on which lawyers may request copies of land title records.³² Importantly, the practice resulted in adaptations by

²⁶ See Chapter One, 2.2. Kiribati, p. 20.

²⁷ Interviews KI1; KI2; KI12; KI18 (5 July – 10 September 2018).

²⁸ Interviews KI1; KI2; KI12; KI18 (5 July – 10 September 2018).

²⁹ Interviews KI1; KI2; KI12; KI18 (5 July – 10 September 2018).

³⁰ On the spirit of the law see Levine, 'The Law and the Spirit of the Law in Legal Ethics' (2015) at 2.

³¹ Interview KI17 (5 July – 10 September 2018).

³² Interview KI17 (5 July – 10 September 2018).

lawyers to the ways they manage clients and cases, not just for land matters but other civil and criminal matters. While one lawyer expressed dissatisfaction with the limitation due to its impact on their practice management,³³ I understood from conversations with judicial staff and court officers that despite the dissatisfaction of some lawyers, the change has helped the court to better manage its workload.³⁴

Such practices reflect the emergence of adaptive practical norm because they diverge from established legal and professional norms regarding the delivery of services critical to access to justice by the High Court Registry. The policy is an informal institutional rule of the Registry, yet they are tacitly endorsed in the sense that they are at the discretion of the Chief Registrar; they are *de facto*; they regulate lawyer conduct; the adaptive conduct of lawyers is patterned; and the adaptations are relational – having a ripple effect on the broader law and justice system.³⁵

4.5. Tolerance of Divergent Conduct by Others Performed to Maintain Social Harmony

Mary's case in the Introduction to this thesis provided a vignette of the lived experience of a Pacific woman compelled to remain silent about sexual exploitation of a teenage girl to preserve social harmony and 'not cause trouble for family'.³⁶ Mary chose to diverge from professional norms by not reporting her cousin for statutory rape despite a legal obligation to do so. Mary's family lives on a remote outer island of her country, accessible only by infrequent small planes, or a sometimes-perilous multi-day trip by ferry. In this place, customary approaches to solving local problems strongly prevail and the influence of state is weak. Mary's choice not to report her cousin was a 'workaround' that enabled her to navigate the tension between conflicting professional and customary norms.

Mary's case sheds light on an intrinsic complexity of the legal profession in PICs – the juggling of professional norms with deeply rooted socio-cultural norms. When I discussed Mary's case with participants from Kiribati, Fiji and Vanuatu they expressed empathy and support for Mary's

³³ Interview KI17 (5 July – 10 September 2018).

³⁴ Interviews KI12; KI17; KI18 (5 July – 10 September 2018).

³⁵ The way practical norms emerge from a confluence of relational factors is reminiscent of applications of complexity theory to conceptualising dynamic human systems. See for example Eoyang and Holladay, *Adaptive Action* (2020); Julian Webb, 'Regulating the Practice of Practice' in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2018).; Jamie Murray, Thomas Webb and Steven Wheatley, *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2018).; Eoyang, 'Human Systems Dynamics: Complexity-Based Approach to a Complex Evaluation' 2007.

³⁶ Introduction, Mary's Choice. p. 1.

position. Most agreed that even had she reported her cousin the police would have lacked the capacity and resources to investigate and prosecute without local community cooperation which would not have been forthcoming. This empathy and understanding suggested a general recognition by lawyers across the region that it is sometimes necessary to breach professional norms to maintain social harmony demonstrating tolerance, and in some cases tacit support, for divergent conduct in such situations. This adaptive practical norm is not just a workaround for lawyers; it is a potent signal to regulators about the relevance and enforceability of legal norms in areas where the influence of the state is weak and customary norms strongly prevail.

5. TOLERATED AND QUASI-TOLERATED PRACTICAL NORMS

As discussed in Chapter Three, tolerated and quasi-tolerated practical norms exist on a continuum. They are primarily distinguished by the degree to which they are accepted or resisted by other actors within the normative systems from which they deviate.³⁷ Tolerated practical norms tend to reflect a posture of capitulation to regulation. Lawyers tacitly agree to the presence and function of professional norms, while also tolerating a degree of leeway in the dances of compliance lawyers perform. One example, discussed below, is tolerance for relational legal practice whereby lawyers rely on relational networks in the course of legal practice to aid in the resolution of a dispute. Quasi-tolerated practical norms can represent both postures of resistance and disengagement towards the regulator. For example, a posture of resistance is signalled by lawyers who participate in norms involving taking advantage of the inexperience of lay and junior magistrates, a practice frowned upon but which commonly occurs nonetheless.³⁸ Lawyers who adopt quasi-tolerated practices distance themselves from the regulator, creating a disconnect between these lawyers' conduct and the objectives of the regulator. This distancing may occur for many reasons specific to a given context.

5.1. Relational Legal Practice

Relational legal practice is a widely tolerated practical norm of lawyers in PICs. It involves a wide range of conduct that diverge from legal norms that are typically tolerated to varying different degrees. In relational legal practice lawyers are not just advocates but also mediators, negotiators and connectors. Lawyers activate relational systems to support both criminal and civil disputes at multiple levels ranging from individuals to institutions. When practised relationally, law is not seen as a standalone bureaucratic structure but as a complex, interconnected web of relationships and norms that are integral to dispute resolution within civil society. Lawyers are themselves embedded within local relational networks and leverage their connections and cultural knowledge to negotiate, advocate and work towards dispute resolution to achieve a form of justice that is recognised and accepted by the community.

While lawyers can be reasonably expected to rely on both professional and personal networks in the course of legal practice, the circumstances in which they do so can be at odds with a range of

³⁷ While my primary focus in this chapter is discussing deviations from professional norms, practical norms also exist as deviations from customary and other sources of norms. See Chapter Three. from p. 117.

³⁸ See section 5.4. p. 277.

professional norms. For example, duties related to: the avoidance of conflicts of interest; client confidentiality; independence; impartiality; professionalism; and ensuring their conduct upholds the integrity of the legal system rather than, for example, manipulating or side-stepping legal processes through the use of personal connections. There were many examples of relational legal practice reported by participants including: relying on kin and family networks to access bureaucratic services preferentially; drawing on family connections to guide resolution of disputes involving customary lands, child custody, and inheritance. Such behaviours and practices are informal although they may include formal customary processes, gifts and ceremonies.³⁹

Practising relationally means that for certain types of legal issues the relationships between the parties can open up alternatives to courts such as opportunities for resolving the dispute through customary processes.⁴⁰ What distinguishes relational legal practice from 'black-letter practice' is its process-focused orientation, seeking a culturally acceptable and respectful outcome that is also legally sound for clients. Relational legal practice calls for lawyers to adopt a broader, more holistic perspective to understand and navigate the web of norms, relationships and values that underpin ethical and competent legal practice. One particularly interesting example of this is in relation to the use of customary reconciliation in dispute resolution in legal practice in PICs.

5.1.1. Customary Reconciliation in Dispute Resolution

Lawyers in PICs often seek to mediate disputes for clients using customary systems and relational networks, especially when relying on dispute resolution options of the state may not serve the best interests of the client. For instance, in Kiribati I was advised of a tragic case concerning the death of a pedestrian involving a motor vehicle, where the police discontinued the investigation following a hastily organised *butaki* (a traditional ceremony).⁴¹ The families of both the accused and the victim were involved and adequate customary reparations were given.⁴² On one hand, leaving a

³⁹ Interviews KI8; KI9; KI11; KI12 (5 July – 10 September 2018); Interviews VI3; VI9 (18 July – 5 September 2019). Interviews FI3; FI19 (18 July – 5 September 2019).

⁴⁰ There are many different reconciliation and dispute resolution practices arising under Custom in Fiji, Kiribati, and Vanuatu. Several of these are considered in Chapter Six. For more detailed accounts see: Whitehead, 'Restorative Justice in the South Pacific: Responding to Sexual Violence in Fiji' (2018); Mosses, 'Custom as a Source of Law in Vanuatu: A Critical Analysis' (2017); Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); Miranda Forsyth, 'Leadership Structures and Dispute Systems in Vanuatu from First Contact to Independence' in' (2007) 30 *Journal of Pacific Studies* 63.; Talu, *Kiribati: Aspects of History* (1979).

⁴¹ Ernest Sabatier and Sister Oliva, *Gilbertese-English Dictionary: Te Tekitinari N Taetae Ni Kiribati Ma Ingiriti*, tr Sister Oliva (South Pacific Commission Publications Bureau, 1971), 94. The word *butaki* has a range of different meanings in te Kiribati depending on context. *Butaki nako* is an expression that means to be separated or detached from the group. In relation to this matter other customary ceremonies took place involving practices such as sharing food and gifts.

⁴² In this case, part of the reparations was that the accused was 'adopted' by the family of the victim and was required to sever all ties with their own family and children. Private Communication, conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

serious crime⁴³ with multiple witnesses un-investigated and un-prosecuted may weaken the normative force of the state's criminal laws and the authority of the police force – especially if such practices are common.⁴⁴ On the other hand, the payment of customary reparations which are accepted as 'just' by the community promotes a rules-based order, albeit a pluralistic one. As Corrin observes both 'customary and State processes share common goals of maintaining social order, deterrence and rehabilitation.'⁴⁵ This practice by lawyers is *de facto*, patterned and by its nature deeply relational, indicating a tolerance for alternative dispute resolution strategies grounded in local customs and traditions.

Reliance on customary and relational systems to resolve legal disputes, while often pragmatically effective, can also undermine the legitimacy of state systems and foster impunity for serious criminal offences. For example, many Pacific scholars have written about social and legal issues resulting from the use of customary reconciliation for crimes involving sexual offences and in criminal sentencing.⁴⁶ Corrin notes in particular the need for courts to ensure that substantive justice is achieved for survivors of sexual crimes and that any discount in a head sentence due to the payment of customary reparations be appropriate.⁴⁷ On the other hand, the application of customary processes involving paying reparations, and community acceptance of this method, reflects a restorative and adaptive pathway to dispute resolution albeit a pathway perhaps more suited to resolving civil disputes and petty criminal matters.

The nuanced engagement of lawyers in relational legal practices underscores their strategic navigation of complex socio-cultural landscapes where customary and state norms intersect. These practices, deeply embedded in community relationships and traditional mechanisms, often fulfil crucial societal functions that formal legal systems can sometimes overlook. However, their integration into the formal legal system requires careful consideration to ensure they do not

⁴³ Possible manslaughter, see ss 192 and 207 *Penal Code [Cap 67] 1977* (Kiribati).

⁴⁴ I was informed the practice of police informally discontinuing an investigation is common in Kiribati, although it is rare for serious or violent crimes: KI18 (5 July – 10 September 2018). From private communications with lawyers in all three countries, I understand it remains common for police to informally discontinue criminal investigations where a matter has been subject to customary reconciliation. See further Cain, 'Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region' (2001).

⁴⁵ Corrin, 'The Impact of Custom on Criminal Proceedings in Pacific Island Countries' (2023) 44.

⁴⁶ *Ibid.*; Cain, 'Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region' (2001); Paterson and Jowitt, 'More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences' (2008); Sofia Shanaz Shah, 'Sexual Offences in Vanuatu under the Light of Custom and Law: "An Avenue for Restorative Justice"' (2013) 8(4) *Asian Journal of Criminology* 257.; Whitehead, 'Restorative Justice in the South Pacific: Responding to Sexual Violence in Fiji' (2018); Bull, George and Curth-Bibb, 'The Virtues of Strangers? Policing Gender Violence in Pacific Island Countries' (2019).

⁴⁷ Corrin, 'The Impact of Custom on Criminal Proceedings in Pacific Island Countries' (2023) 8-41.

compromise the principles of fairness, accountability and transparency that underpin the rule of law. Ultimately, the challenge for governments and regulators lies in harnessing these practices in a way that complements the state legal frameworks, ensuring they contribute positively to the broader goals of justice and reconciliation without undermining the authority and effectiveness of formal legal processes. This balancing act calls for a contextual understanding and careful judicial discretion to discern when and how customary practices can be appropriately recognised and utilised within the formal legal system, ensuring that both systems work collaboratively to enhance rather than diminish the overall justice system in PICs.⁴⁸

5.2. Lawyers Accepting Gifts from Clients

In PICs, norms regarding giving and accepting gifts are often complicated and vary not only from country to country but across different islands, provinces and villages. In PICs, lawyers may have an obligation to give or receive gifts in many common situations that arise in legal practice. For example, in Fiji, a lawyer who visits their client in a village will be required to give *Sevusevu* to the *Turaga ni koro* (village headman).⁴⁹ In Kiribati, custom gives rise to a similar obligation to give gifts to a *Maneaba* (meeting house) through customary practices of *Mweaka*, *Moanei* or *Ririwete* (forms of gifting), which have been upheld as law by both the Kiribati High Court and by Parliament through legislation.⁵⁰ A participant from Kiribati explained: ‘It is part of culture... we are obligated to give them money ... and they are expected to receive it.’⁵¹ Similar obligations exist under *Kastom* in Vanuatu.⁵² In many of these cases, the conduct is not divergent from legal professional norms

⁴⁸ For lawyers stuck pondering their role in such processes I can only suggest a possible refuge in following the principle that a lawyer’s actions should be taken in the honest pursuit of justice. Whether justice is the best possible outcome, whose justice and what sort of justice are rich topics of scholarly debate. See: Jerold S Auerbach, *Justice without Law?* (Oxford University Press, USA, 1984); Luban, *Lawyers and Justice: An Ethical Study* (1988); Parker, *Just Lawyers: Regulation and Access to Justice* (1999); Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Harvard University Press, 2009); Erica Harper, *Customary Justice: From Program Design to Impact Evaluation*. (Rome: International Development Law Organization, 2011).

⁴⁹ *Sevusevu* is defined in the Glossary. p. xix. See further Nabobo-Baba, ‘Decolonising Framings in Pacific Research: Indigenous Fijian Vanua Research Framework as an Organic Response’ (2008).

⁵⁰ per Williams CJ in *Patrick Tatireta and Others V Anote Tong* [2003] 5 Lrc 665; [2003] KHC 1., [42]. See further *Elections Act 2019* (Kiribati), section 32, which provides that such gifts are not bribery where given ‘with the sole intention of showing for the customs and traditions of Kiribati’. For definitions of these terms see the Glossary. p. xix. In a complex way, in Kiribati, such gifts form the basis for social welfare safety nets across the outer islands, coordinated through Local Councils which are centred around local *Maneaba*.

⁵¹ Interview KI11; see also KI12; see further Macdonald, ‘Governance and Political Process in Kiribati’ 1996; Peter Larmour, ‘Culture and Corruption in the Pacific Islands: Some Conceptual Issues and Findings from Studies of National Integrity Systems’ (Discussion Paper, Asia Pacific School of Economics and Government, 2006).

⁵² Lissant Bolton, *Unfolding the Moon: Enacting Women’s Kastom in Vanuatu* (University of Hawaii Press, 2003); Siobhan McDonnell, Matthew Allen and Collin Filer, *Kastom, Property and Ideology: Land Transformations in Melanesia* (ANU Press, 2017).

because it is formally sanctioned by law.⁵³ Instead, the predominance of gift-giving in professional contexts exemplifies the deep embeddedness of certain customary norms within state legal norms in PICs.

While no evidence of divergent conduct concerning lawyers *giving* gifts was reported, participants provided ample evidence of both tolerated and quasi-tolerated practical norms concerning lawyers *receiving* gifts from clients. Across Fiji, Kiribati, and Vanuatu the question of whether accepting a gift from a client was tolerated or quasi-tolerated appeared to be linked to the maxim that the offered gift should be ‘not too much’ otherwise the gift could be viewed as transgressive of both law and/or custom.⁵⁴ In Kiribati for example, a gift that is ‘not too much’ could be said to be offered ‘just in thanks’, whereas accepting a gift that offered too much ‘wasn’t proper in custom.’⁵⁵ For a lawyer to accept a gift that was ‘too much’ was viewed as transgressive because ‘to a lawyer there is extra obligations attaching from the client, it is not just in thanks.’⁵⁶ Conversely, refusing a gift offered by a client, that is ‘small’ and ‘appropriate’ was considered *mama* (shameful).⁵⁷ This concept of ‘not too much’ is explored further in the two sections below.

5.2.1. ‘Gifts? I like them!’⁵⁸ – Tolerated Practical Norms Regarding Gifts in Kiribati

Participants in Kiribati spoke at length about practices of accepting gifts offered by clients to lawyers at the Office of the People’s Lawyer (OPL).⁵⁹ Until the case of *Republic v Maitinnara*⁶⁰ the ethics of OPL lawyers receiving gifts from clients on top of their government salaries was considered a grey area. Being offered gifts was common for lawyers employed by OPL, but

⁵³ *Kiribati Independence Order 1979* (United Kingdom); *Constitution of the Republic of Vanuatu 1980* (Vanuatu); *Constitution of the Republic of Fiji 2013* (Fiji); Katrina Cuskelly, ‘Customs and Constitutions: State Recognition of Customary Law around the World’ (Report, IUCN, 2011).; and various statutes.

⁵⁴ This may (or may not) have any consequence for the individual. In Kiribati for example, it would cause shame to point out another’s transgressions. Interview KI12; KI18; KI20 (5 July – 10 September 2018). See also: Talu, *Kiribati: Aspects of History* (1979).

⁵⁵ Interview KI11 (5 July – 10 September 2018).

⁵⁶ Interview KI11 (5 July – 10 September 2018). On distinctions between gifts and bribes see further Larmour, ‘Corruption and Governance in the South Pacific’ (1997); Cain, ‘Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region’ (2001); Peter Larmour, ‘Corruption and the Concept of Culture: Evidence from the Pacific Islands’ in Manuhua Barcham, Barry Hindess and Peter Lamour (eds), *Corruption: Expanding the Focus* (ANU Press, 2012) 155.; Peter Larmour, *Interpreting Corruption: Culture and Politics in the Pacific Islands* (University of Hawaii Press, 2012).

⁵⁷ Interview KI12; KI20 (5 July – 10 September 2018).

⁵⁸ Interview KI12 (5 July – 10 September 2018).

⁵⁹ and also by ‘private lawyers on top of their charges’, interview KI12. (5 July – 10 September 2018).

⁶⁰ *Republic v Maitinnara* (High Court of Kiribati, Millhouse CJ, 5 March 2010).

perceptions about whether accepting gifts was licit or illicit varied within the profession. Some felt it was okay if within limits set by custom, others felt it was properly a criminal offence.⁶¹

Maitinnara's case was a prosecution against a lawyer, Nei Botika Maitinnara, that was decided by the late Chief Justice Robin Milhouse in 2010.⁶² This case involved seven counts of extortion totalling \$300AUD against Ms Maitinnara who was at that time employed by the OPL. It was alleged that she had accepted the gifts from clients in the course of her employment and that doing so was a breach of section 86 of the *Penal Code [CAP 67]* (Kiribati) which prohibits persons 'employed in the public service' from accepting any reward for performance of their duties beyond their pay. The lawyer was acquitted by Chief Justice Milhouse without consideration of the merits of the case on the basis that the prosecution had not tendered evidence the accused was employed in the public service.⁶³ The decision was not appealed by the prosecution.

Following Maitinnara's acquittal, many lawyers in Kiribati interpreted the decision to mean that lawyers at OPL were not considered to be public servants and it was therefore permissible to accept gifts from clients.⁶⁴ In interviews, several participants referred to *Maitinnara's case* when explaining their understanding that it was permitted for a lawyer at OPL to accept gifts. A former OPL employee, when asked 'When you were practising at OPL, how did you feel about receiving gifts?' enthusiastically responded 'I liked it!'⁶⁵ This participant was one of several who emphasised that a lawyer is only permitted to accept a gift that was offered because of custom – as opposed to a bribe, and which was 'appropriate' or 'not too much'. Participants speculated that this meant less than \$20,⁶⁶ could include paying for lunch,⁶⁷ or might include personal services like 'sweeping your compound.'⁶⁸

I was advised by the Manager of OPL that sometime after *Maitinnara's case* a policy was introduced against accepting gifts, although he conceded the practice still occurred: '[At OPL we] strictly require staff not to accept [gifts] now... we advise client's not to give 'gifts'... but it happens ... '⁶⁹ A

⁶¹ Interview KI11; KI12; KI16; KI18 (5 July – 10 September 2018).

⁶² *Republic v Maitinnara* (High Court of Kiribati, Millhouse CJ, 5 March 2010).

⁶³ Despite this fact, she had been admitted by and appeared before CJ Milhouse in her professional capacity as a People's Lawyer.

⁶⁴ Even though the court in *Maitinnara* made no formal determination on the legality of lawyers accepting gifts from clients.

⁶⁵ Interview KI12 (5 July – 10 September 2018).

⁶⁶ Interview KI11 (5 July – 10 September 2018). \$20 is the value given to *mweaka* in the *Elections Act 2019* (Kiribati) See also *Patrick Tatireta and Others V Anote Tong [2003] 5 Lrc 665; [2003] KIHIC 1*.

⁶⁷ Interview KI16 (5 July – 10 September 2018).

⁶⁸ Interview KI12 (5 July – 10 September 2018).

⁶⁹ Interview KI13 (5 July – 10 September 2018).

participant from Kiribati who previously worked for OPL explained that lawyers would often accept a small (i.e. appropriate) gift because the person giving the gift could make it challenging to refuse. Small meant something like ‘A\$2, or A\$5’, ‘[clients] say it is for your bus fare’.⁷⁰ Another former OPL lawyer said ‘Sometimes they [clients] also do things like hide the money in your diary on your desk, then you find it later and don’t even know who left it!’⁷¹ Another participant confirmed this saying:

*Clients [of OPL] are tricky... For example, clients will visit you at home, or outside of office hours, hide money in your office, etc. This can create a social obligation to accept gifts.*⁷²

Several participants felt cash was not appropriate to accept and said they felt ‘it is more appropriate for lawyers to be given goods, or services as gifts.’⁷³ Most participants said they had not personally witnessed other lawyers accepting gifts, but even if they did, they would not do anything about it, justifying this on grounds that it would be *mama* (shameful) to ‘cause trouble’ or otherwise intervene in another lawyer accepting a gift.⁷⁴ Accepting gifts from clients by OPL lawyers is (or was) therefore a practical norm. Such conduct diverges from official norms, yet persists; it occurs in private – usually in a lawyer’s office or at their home; it is a norm in that it influences and shapes behaviour; it is patterned; and it is relational in the sense that it requires mutual understanding between the lawyer and the client. Unfortunately, in PICs, no resources exist for lawyers that provides explicit guidance regarding the giving and receiving of gifts, nor especially whether a particular gift is ‘too much’ or ‘not too much’.

5.2.2. Quasi-Tolerated Practical Norms Regarding Lawyers Soliciting Gifts

Many participants from Kiribati, Fiji and Vanuatu discussed situations involving lawyers receiving gifts from clients that was much less tolerated than the examples given in the previous section and in some instances likely indicating a pattern of unethical conduct by one or several lawyers. For example, in Fiji several participants referred to transgressive conduct by some lawyers who ask clients for money or in-kind contributions beyond the scope of their retainer. This could include

⁷⁰ Interviews KI11; KI12; KI13 (5 July – 10 September 2018).

⁷¹ Interview KI12 (5 July – 10 September 2018).

⁷² Interview KI13 (5 July – 10 September 2018).

⁷³ Interview KI16 (5 July – 10 September 2018).

⁷⁴ The dynamics of *mama* are such that an intervening party brings *mama* by intervening and causing negative consequences for the other lawyer (i.e. because this breaches dominant customary norms of non-intervention and not causing shame for others). The second is by causing offence or possible harm to the interests of the person who gave the gift, and their family. Conflicts can escalate quickly in Kiribati and are sensibly avoided.

asking clients to cover the cost of ‘taxi fares’; ‘conference fees’; or even ‘practising certificate fees.’⁷⁵ Another example given was of a lawyer who called a client at 11pm to say ‘I need \$50 for beer and also, you pay for my taxi, I’ll pay you back.’⁷⁶ Their client felt obligated to assist, although later lodged a complaint – which languished due to a lack of proof.⁷⁷ In a similar vein, a participant from Kiribati referred to a lawyer ‘...asking [a] client to provide a pig for a function knowing that the client wouldn’t refuse them.’⁷⁸

In the above examples, the conduct diverges from established professional standards in Fiji, Kiribati, and Vanuatu, yet remains intertwined with both them and customary norms. The conduct is secret, occurring almost exclusively in private situations involving the client and lawyer. In respect of each example, the conduct was said by participants to fit a pattern of behaviour performed by one or several individuals and is deeply relational, relying on interpersonal, cultural, social and contextual factors. The fact that examples such as these were widely reported, albeit isolated to particular individuals, should raise concerns for regulators. Indeed, the Manager of the LPU in Fiji indicated his knowledge of many similar instances, but lamented the LPU’s limited capacity to obtain proof sufficient to enable prosecution of a lawyer for misconduct:

*The problem for LPU is how do you prove this? The lawyer will deny it. It is word against word and the lawyer has been very careful in minimising the potential for corroboration. Where is the proof?*⁷⁹

By adopting a more responsive regulatory approach, strategies other than prosecution might be open to the LPU and may enable them to act to intervene or disrupt such disruptive practices, even if it does not result in any particular individual lawyer being punished.

5.3. Subpar Professional Conduct by Other Lawyers

In Chapter Four, participant responses were analysed to reveal 10 attributes of a good lawyer. These attributes related to a lawyer’s competence; ethics and morality; and the performance of their work.⁸⁰ To lawyers in PICs, being a good lawyer meant more than just feeling like one, it meant demonstrating the attributes of a good lawyer most of the time. These attributes included complying with rules of ethics.⁸¹ In distinguishing good lawyering from bad, participants identified

⁷⁵ Interview FI15 (10 March – 21 April 2019).

⁷⁶ Interview FI14 (10 March – 21 April 2019).

⁷⁷ Interview FI14 (10 March – 21 April 2019).

⁷⁸ Interview KI4 (5 July – 10 September 2018).

⁷⁹ Interview FI14 (10 March – 21 April 2019).

⁸⁰ Chapter Four, p. 128.

⁸¹ Chapter Four, section 2.2.2, p. 136.

many examples of conduct that transgressed or fell below legal or professional norms. It was apparent that poor professional conduct by other lawyers was something most lawyers tried to ignore and avoid causing shame over. This was explained by several participants as something that was both cultural (not causing shame) and related to the small size of and close relationships between members of the legal profession, especially in Kiribati and Vanuatu.⁸²

In many instances tolerance of the alleged transgressive conduct of other lawyers satisfied the criteria for being a practical norm. These included relatively well tolerated transgressive conduct such as ‘poor time management’;⁸³ routinely ‘not showing up in court’;⁸⁴ or appearing in court ‘unprepared’;⁸⁵ routinely making basic technical mistakes such as ‘citing amendment acts as the offence provisions for ... (civil and criminal offences)’;⁸⁶ unprofessional communication with or behaviour towards colleagues, the bench or others;⁸⁷ poor client service, such as ‘not keeping a client informed of progress of their case’;⁸⁸ not providing ‘receipts’ or a ‘proper bill of costs’;⁸⁹ and many other transgressive practices.

Participants from Fiji, Kiribati, and Vanuatu also discussed longstanding tolerance of subpar practice by government lawyers. For instance, Professor Emeritus Colvin gave the following example:

*it wasn't so long ago that prosecutors in Vanuatu were notoriously not turning up in court because they were having cases they couldn't handle, they were just too difficult. So how did they deal with that? They just ditched them; they just didn't go to court.*⁹⁰

This clearly breaches professional standards that require diligence but went without repercussions, showing that the regulator would not (or could not) enforce professional standards. Lawyers in Vanuatu also spoke of the issue of negligence in pursuing legal costs within the State Law Office:

⁸² Interview KI3; KI5 (5 July – 10 September 2018).

⁸³ Interviews VI6; VI11; VI16 (5 July – 10 September 2018).

⁸⁴ Interviews KI3; KI6; KI7; KI9; KI3; KI2; KI18. (5 July – 10 September 2018).

⁸⁵ Interviews KI2; KI3; KI13; KI16; KI7; KI19 (5 July – 10 September 2018).

⁸⁶ Interview KI18 (5 July – 10 September 2018).

⁸⁷ Interviews FI4 (10 March – 21 April 2019); KI14; KI2; KI3; KI18 (5 July – 10 September 2018); VI21; (18 July – 5 September 2019).

⁸⁸ Interviews FI4; FI1; FI16; FI22 (10 March – 21 April 2019).

⁸⁹ Interviews FI3; FI9; FI13; FI14; FI15; FI20; FI24 (10 March – 21 April 2019); KI20 (5 July – 10 September 2018). VI11 (18 July – 5 September 2019).

⁹⁰ Interview conducted with Professor Emeritus Eric Colvin between 18 July and 5 September 2019, Port Vila, Vanuatu. The Director of Public Prosecutions, Vanuatu discussed with me some of the many initiatives to strengthen prosecutorial practice in recent years including the development of a Code of Conduct, education and training. Interview (18 July – 5 September 2019).

[When I worked at the State Law Office], [there were] close to 2,000 files sitting, and about 800 of them [were] sleeping files, and maybe about 500 of them [were] just files which have already been closed but you just need to go after the costs. That's the problem because the government is a bit slack in terms of legal costs or making payments.⁹¹

The reason for this, as speculated by the participant, was that unlike lawyers in private practice who must pursue costs so that 'you get paid, you can run your office, keep the lights on ...'⁹² government lawyers are not incentivised to promptly pursue costs especially when more serious matters than costs demand constant attention.

Participants also identified examples of conduct which occurred often but were viewed as more transgressive, relatively less tolerated, and might generally be characterised as serious misconduct such as: 'grossly overcharging clients';⁹³ various financial and 'trust account' irregularities;⁹⁴ and swapping sides during litigation '... if the other party's case has more merit.'⁹⁵ Most serious misconduct by lawyers is illicit and therefore hidden, making it difficult to observe – especially by regulators. Even on the rare occasions where seriously transgressive conduct is reported and complained about to a regulator, it can be difficult to properly prove.⁹⁶ Coupled with embedded dominant customary norms of 'not causing trouble for others'⁹⁷ serious misconduct can become even less 'visible', affording bad actors a wide margin for manoeuvre.

It was evident that lawyers in Kiribati, Fiji and Vanuatu tolerate a wide variety of ongoing transgressive practices by other lawyers that breach legal norms across a variety of professional contexts. This transgressive conduct is often ignored or hidden and can be normative, regulating lawyer conduct in patterned ways, such as acceptance of a colleague being routinely unprepared for court. Acceptance of subpar performance of others is a norm that is relationally entangled with lawyer's education and training, environment, and other proximate actors. This tolerance

⁹¹ Interview VI11 (18 July – 5 September 2019).

⁹² Interview VI11 (18 July – 5 September 2019).

⁹³ Interviews FI3; FI4; FI16; FI13; FI14 (10 March – 21 April 2019). KI4; KI5; KI6 (5 July – 10 September 2018).

⁹⁴ Interviews KI6 (5 July – 10 September 2018); VI10; VI21 (18 July – 5 September 2019). FI1; FI2; FI22 (10 March – 21 April 2019).

⁹⁵ Interviews KI4; KI6; KI20 (5 July – 10 September 2018). Participants also provided insights that this 'would be seen as (doing the wrong thing culturally)' Interview KI4 (5 July – 10 September 2018); and that 'that relationship culturally, especially to a person you are not related to is like a good connection and you can't get away from that one actually.' Interview KI6 (5 July – 10 September 2018).

⁹⁶ Interview FI14 (10 March – 21 April 2019).

⁹⁷ Interviews KI8; KI18; KI20 (5 July – 10 September 2018).

undermines professional standards of lawyers and also potentially affects the delivery of justice, client trust and the reputation of the legal profession.

5.4. Improperly Taking Advantage of Inexperienced Magistrates

One quasi-tolerated practical norm that emerged across all three countries involved a subset of lawyers who improperly exploited the inexperience or lack of knowledge of magistrates for their own purposes. A participant from Kiribati discussed unprofessional behaviour by some lawyers, saying ‘they are unprofessional. They think “they are lawyers and the magistrate is just a lay magistrate” so they don’t show deference or respect to the magistrate.’⁹⁸ This behaviour was also reported in respect of junior magistrates – with legal qualifications – in Vanuatu.⁹⁹ The sorts of behaviour reported included: failing to advise a magistrate of a lesser included offence, which resulted in an acquittal and perverted the course of justice; intellectual bullying; and coercive behaviour, such as pressuring the magistrate to make a rushed judgment. For example, a participant in Vanuatu shared: ‘you can have lawyers who are bullies show up and push the magistrate into agreeing with them. You have quite ridiculous orders that can come out of the Magistrate’s Court.’¹⁰⁰

Behaviours of the sort described are informal, often implicit, and demonstrate a patterned and manipulative use of legal knowledge and authority that strongly diverges from professional norms – especially regarding lawyers’ duties to the court. Such improper practices by lawyers signal the need for appropriate regulatory action to protect the legitimacy of law and justice systems as well as the integrity of the profession. These practices may also offer insights into the pressures faced by lawyers and the systemic factors contributing to these behaviours, creating opportunities for constructive reform. An example of such a systemic pressure faced by lawyers in Kiribati is that most magistrates are lay magistrates who possess limited legal education and training.¹⁰¹ This can cause frustration for lawyers, especially when arguing technical points of law.¹⁰² In Vanuatu, magistrates are not required to have any legal practice experience and are often appointed with little or no legal practice experience. This practice reflects other systemic problems, such as

⁹⁸ Interviews KI14; KI7 (5 July – 10 September 2018).

⁹⁹ Interview VI9 (18 July – 5 September 2019).

¹⁰⁰ Interview VI9 (18 July – 5 September 2019).

¹⁰¹ See further Chapter One, section 2.2, p. 20.

¹⁰² Interview KI17 (5 July – 10 September 2018).

experienced lawyers not wishing to take judicial appointments and limited opportunities for newly qualified lawyers.¹⁰³

¹⁰³ These issues were discussed by both senior and junior lawyers interviewed in Vanuatu, but is a broader regional issue. See for example Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021). 17.

6. REBELLIOUS PRACTICAL NORMS

Rebellious practical norms emerge when regulatees challenge or resist established bureaucratic or customary norms and can become powerful tools for both beneficial and detrimental regulatory and social change.¹⁰⁴ Lawyers are likely to adopt these norms in the pursuit of broader social and ethical changes, signalling postures of defiance towards entrenched or dominant norms and wilfully attacking the legitimacy of regulation. Participants in Fiji, Kiribati, and Vanuatu provided isolated examples of rebellious conduct which directly challenged regulatory legitimacy. However, it was difficult to categorise these examples of rebellious conduct as rebellious norms due to both insufficient data points (lack of established pattern). Additionally, while some rebellious conduct occurs openly,¹⁰⁵ most deeply transgressive norms involve conduct that is illegal and therefore hidden and difficult to observe.¹⁰⁶

However, a rebellious practical norm discussed by many participants involved conduct by women lawyers in Fiji, Kiribati, and Vanuatu that actively challenged and systematically sought to change customary norms and practices that entrench the unequal status of women. Lawyers who participant in rebellious practical norms do so to express their disagreement with both traditional norms and the legal systems that fail to adequately address these disparities, signalling a clear intention to redefine and change dominant norms. This conduct signals defiance which while not in line with established customary norms, reflects a commitment to a higher ethical cause, raising challenging questions regarding regulatory support for lawyers who practice such norms.

6.1. Rebellious Practical Norms Against Dominant Customary Norms

In Vanuatu, Kiribati and Fiji dominant patriarchal customary hierarchies enforce norms of the subordination of women to men.¹⁰⁷ Despite constitutional and statutory declarations proclaiming a legal norm of gender equality, the lived experience of most women in Vanuatu, Kiribati and Fiji is of inequality. Throughout the modern history of PICs, many programs and initiatives have

¹⁰⁴ See further discussion in Chapter Three, p. 124.

¹⁰⁵ See for example Mackenzie Smith, 'Fijian Lawyer Aman Ravindra Singh Flees Country to Avoid Hail Time as a Result of Facebook Posts', *Pacific Beat* (Web Page, 22 August 2022) <<http://abc.net.au/pacific/programs/pacificbeat/Fijian-lawyer-Aman-Ravindra-Singh-flees-country/14027744>>.

¹⁰⁶ Identifying and reporting on patterned evidence of strongly non-compliant conduct may require different research methods.

¹⁰⁷ See Molisa, 'Vanuatu Women's Development since Independence' (1985); Grace Mera Molisa, '18 Colonised People' in Robert Borofsky (ed), *Remembrance of Pacific Pasts* (University of Hawaii Press, 2020) 333.; See further Margaret Jolly, 'Braed Praes in Vanuatu: Both Gifts and Commodities?' (2015) 85(1) *Oceania* 63. See also Pacific Community, 'Kiribati Family Health and Support Study: A Study on Violence against Women and Children' (Report, Secretariat of the Pacific Community, 2010).

sought to disrupt some of the more devastating consequences of these dominant customary and social norms, which include: high rates of family violence;¹⁰⁸ high rates of sexual violence by men;¹⁰⁹ sorcery accusations and related violence (SARV);¹¹⁰ and low rates of women in leadership.¹¹¹ Such initiatives operate in partnership with a complex web of stakeholders across regional,¹¹² domestic,¹¹³ and local levels¹¹⁴ throughout the Pacific Region.

In all three countries, I encountered women lawyers, such as Mary and Litia, who worked passionately to challenge customary norms regarding women.¹¹⁵ Both Mary and Litia participate regularly in rebellious practical norms through their advocacy and activities promoting the equal treatment of women and men under custom in their countries. Both referred to lawyer colleagues who also championed such work. Their persistent advocacy was self-reported to have changed customary norms in various ways while also serving to strengthen and legitimise legal norms regarding gender equality and human rights.

¹⁰⁸ Loïs Bastide and Denis Regnier, *Family Violence and Social Change in the Pacific Islands* (Taylor & Francis, 2022).

¹⁰⁹ Michiko Nagashima-Hayashi et al, 'Gender-Based Violence in the Asia-Pacific Region During Covid-19: A Hidden Pandemic Behind Closed Doors' (2022) 19(4) *International Journal of Environmental Research and Public Health* 2239.

¹¹⁰ Miranda Forsyth, 'The Challenges Belief in Witchcraft and Sorcery Pose for National and International Justice Systems' in P Birh, C Murray and A McInnes (eds), *Crime, Criminal Justice and Religion: A Critical Appraisal* (Routledge, 2022) 222.; Forsyth et al, 'Sorcery Accusation-Related Violence in Png Part 7: The Harm of Sarv', (2021).

¹¹¹ Elise Howard, 'Effective Support for Women's Leadership in the Pacific: Lessons from the Evidence' (Report, Department of Pacific Affairs, 2019). But see promising research on Pacific women's leadership by: Kabini Sanga et al, 'Getting beneath the Skin': A Tok Stori Approach to Reviewing the Literature of Leadership in Solomon Islands, Tonga and Marshall Islands' (2021) 20(2) *International Education Journal: Comparative Perspectives* 52.; Rachel Clissold, Ross Westoby and Karen E McNamara, 'Women as Recovery Enablers in the Face of Disasters in Vanuatu' (2020) 113 *Geoforum* 101.; Mema Motusaga, 'Women in Decision Making in Samoa' (PhD Thesis, Victoria University, 2017).; Buriata Eti-Tofinga, Heather Douglas and Gurmeet Singh, 'Female Leadership Styles in Fijian Social Enterprises' (Conference Paper, Proceedings of the Massey University Social Innovation and Entrepreneurship Conference: Collaborating for Impact, 10-12 February 2016).; Sophia Kagan, 'On the Ship, You Can Do Anything': The Impact of International Cruiseship Employment for I-Kiribati Women' (2016) 36(1) *Pacific Studies* 35.; Kerryn Baker, Roannie Ng Shiu and Jack Corbett, 'Women Mps in Samoa and Kiribati' (In Brief, ANU Department of Pacific Affairs, 11 January 2013) <https://openresearch-repository.anu.edu.au/bitstream/1885/143498/1/SSGM_IB_2013_11_0.pdf>; Forsyth, 'Leadership Structures and Dispute Systems in Vanuatu from First Contact to Independence' in (2007); Bolton, *Unfolding the Moon: Enacting Women's Kastom in Vanuatu* (2003).

¹¹² Australian Department of Foreign Affairs and Trade, 'Pacific Women: Shaping Pacific Development Six-Year Evaluation Report' (Report, Australian Department of Foreign Affairs and Trade, 2020).; Pacific Islands Forum, 'Pacific Leaders Gender Equality Declaration, 30 August 2012, Rarotonga, Cook Islands' (2012).; Pacific Community, 'Pacific Platform for Action on Gender Equality and Women's Human Rights 2018-2030' (Report, Secretariat of the Pacific Community, 2018).

¹¹³ For example, Community and Social Development Ministry of Women, 'Samoa: National Policy on Gender Equality and Rights of Women and Girls 2021-2031' (Policy, Government of Samoa, 2021).; Department of Women's Affairs of the Ministry of Justice and Community Services, 'Vanuatu: National Gender Equality Policy 2015-2019' (Policy, Government of Vanuatu, 2015).

¹¹⁴ For example, The Fiji Women's Crisis Centre; the Vanuatu Women's Centre; and in Kiribati see both the Kiribati Women and Children's Legal Advice Centre and the saintly mission of the Sisters of Our Lady of the Sacred Heart.

¹¹⁵ See Introduction, Mary's Choice, p. 1, and Chapter Six, section 3.2.1. Litia's Case, p. 233. See also interviews FI3; FI7; FI8; FI10 (10 March – 21 April 2019); VI9; VI13; VI20; VI21 (18 July – 5 September 2019); KI12; KI17 (5 July – 10 September 2018).

7. CONCLUSION

As this chapter has explored, practical norms serve as beacons in the regulatory landscape that cast light on professional motivations and the contextual dynamics of legal practice in PICs. They reveal lawyers' patterned choices and dissonances regarding their conduct and 'tolerated' deviations from professional norms regarding, for example: their diligence; accepting and receiving gifts; and how they reconcile conflicts of interest. How do lawyers navigate compliance by lawyers in Fiji, Kiribati, and Vanuatu? They dance. Lawyers in PICs master this dance by being deeply embedded within customary systems from birth, observing, learning from others, and fluidly adapting to tolerated practices as they shift and change in response to regulation. The rich understanding of practical norms of lawyers in PICs offered in this chapter provides regulators of lawyers not just an in-depth and empirical account of the complexities of legal practice in PICs, but also a tool for adaptive regulation.

Recognising practical norms as regulatory signals opens avenues for nuanced, context-sensitive regulatory strategies. It also assists regulators in performing an appropriate regulatory 'dance' between divergence and convergence, harmonising the asynchronous rhythms of universal legal principles, professional standards and local traditions. Accounting for the goals and motivational postures of regulatees, this chapter demonstrated that the dance of regulation is complex, the steps are not uniformly followed, nor are they necessarily all required. This complexity necessitates a layered approach towards effective and culturally sensitive regulation. By strategically influencing practical norms and guiding lawyers' postures towards compliance, regulators can incrementally achieve this.

In the next chapter, this thesis will weave together the various insights from the preceding chapters to address the primary research question and make specific recommendations for regulators of lawyers in PICs. Additionally, it will outline the major contributions of this thesis to existing discourses on lawyer regulation, both within and beyond the Pacific Region, and identify areas for future research.

CHAPTER EIGHT: DISCUSSION AND CONCLUSIONS

1. INTRODUCTION

The previous chapters have answered the subsidiary research questions set out in the introduction to this thesis.¹ This final chapter draws together the findings from these chapters to address the primary research question: ‘How can regulatory systems for lawyers in PICs better support lawyers to be competent and ethical?’ This chapter begins by synthesising the key findings of the previous chapters and reflecting on how a pluralist-relational approach to lawyer regulation moulds to the contours of Pacific legal landscapes. It next addresses the primary research question and makes recommendations on how regulators can support lawyers in PICs through both law reform and beyond law reform. My answer, put simply, is that covering the weaknesses of formal regulatory systems requires responsive regulators to work ‘with the grain of naturally occurring systems.’² Finally, this chapter articulates the contributions of this thesis to existing literature and identifies areas for future research. It concludes with a reflection on the question framed on the first page of this thesis as ‘Mary’s Choice’.

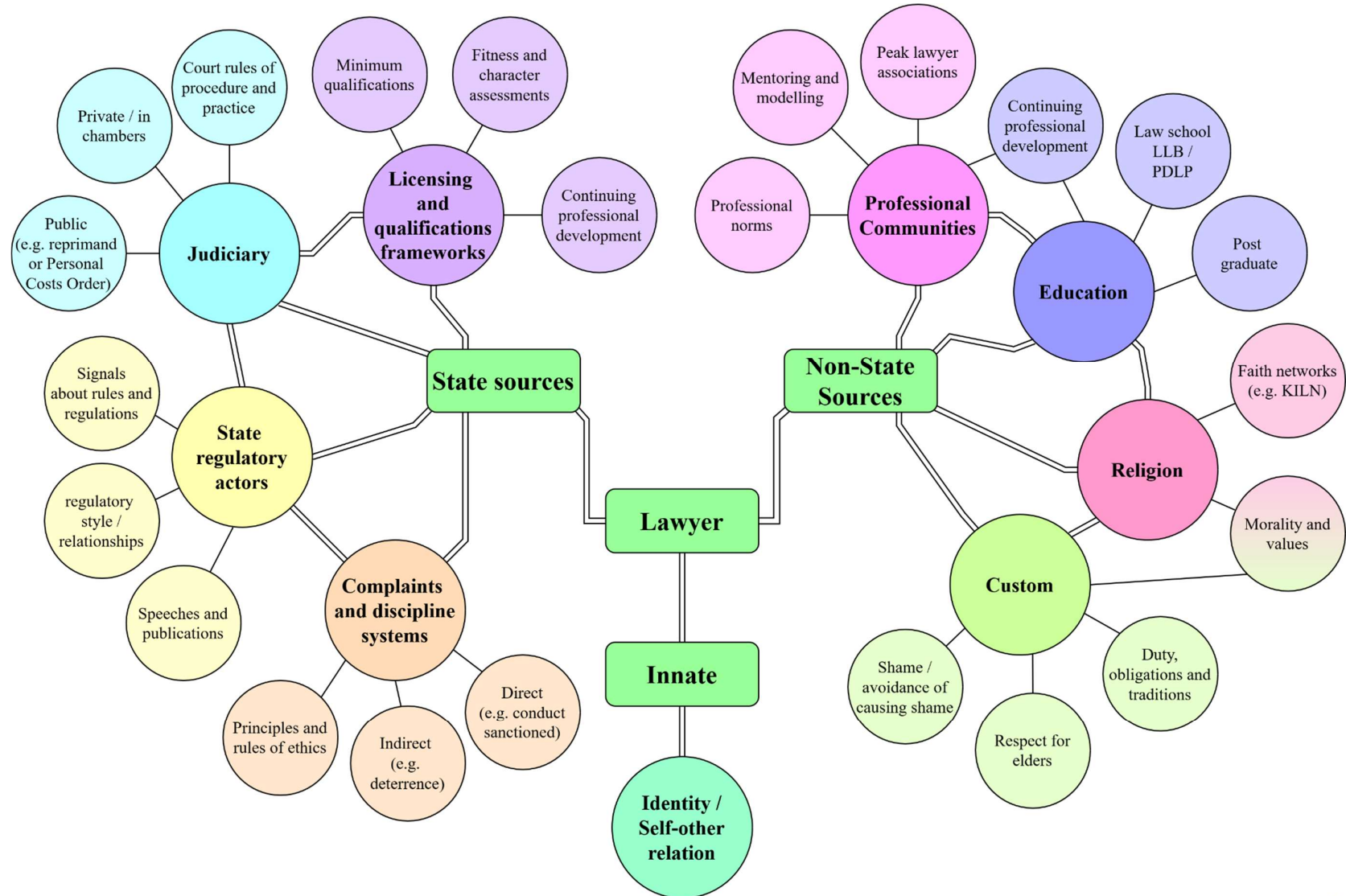
The previous chapters have considered the many dynamic influences of lawyer conduct in Fiji, Kiribati, and Vanuatu. An important insight from this research is that all individuals are relational actants within a complex web of other interconnected actants. Figure 12, below, illustrates the complex and diverse regulators of lawyer conduct identified by participants of the primary study. At the centre is the lawyer, whose conduct within legal practice environments, is regulated by diverse actants linked with diverse state, non-state, and innate sources.³ Through their interactions, lawyers co-create normative meaning such as what it means to comply in a particular situation and what it means to be a good lawyer. On the outer edge of the figure are associated regulatory mechanisms. To a responsive and adaptive regulator, this holistic representation of lawyer regulation reveals diverse complementary systems and mechanisms of regulation of lawyers and consequently reveals opportunities to engage in diverse and strategic ways to support lawyers to be good lawyers.

¹ Chapter One, section 3.3, Research Questions, p. 8.

² ‘A law that goes against the grain of business culture risks irrelevance; a law that crushes normative systems that naturally emerge in business can destroy virtue; a law that lets business norms take it over can destroy its own virtues. I am at one with Teubner in seeing it as essential to regulate by working with the grain of naturally occurring systems in business.’ Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006). 885.

³ Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2007).

Figure 12: Mapping regulators of lawyer conduct in PICs



1.1. A Pluralist-Relational Approach to lawyer regulation

This thesis has argued that supporting lawyers to be competent and ethical requires a regulatory approach that transcends traditional positivist and command-and-control focused approaches. Such an approach may be found in a pluralist-relational approach to lawyer regulation which adopts relational, adaptive, and contextually sensitive pathways for regulators to support lawyers in pluralist Pacific contexts. As discussed in Chapter Three, a pluralist-relational approach to lawyer regulation in PICs recognises that regulation does not only come from state law, but also from a diverse range of other normative sources, particularly Custom and Christianity. Unlike traditional and contemporary theories of lawyer regulation, a pluralist-relational approach embraces theories of both legal and normative pluralism and emphasises the critical importance of understanding lawyer conduct within its socio-cultural and historic contexts – especially where that conduct diverges from professional norms.¹ In addition, it recognises and activates the regulatory potential of individuals, institutions, and networks ‘beyond the state’ recognising that relationships play a crucial regulatory role and as such need to be foregrounded in regulatory design.

As stated in Chapter Three, a pluralist-relational approach to lawyer regulation posits that:

1. Lawyers *are* regulators and they both regulate and are regulated by other regulators.
2. These other regulators are diverse and include a range of state and non-state actants.
3. Regulation occurs through the communication of symbols between a lawyer and other actants about lawyer conduct (such as what it means to be a good lawyer or the tolerance of divergent conduct).
4. Within the regulatory system, conduct is influenced in complex, non-linear, and temporal ways.

So how does this apply to the Pacific legal landscape?

¹ See full discussion in Chapter Three, section 4. A Pluralist-Relational Approach to Lawyer Regulation, p. 101.

2. SYNTHESIS: THE CONTOURS OF REGULATORY LANDSCAPES

This section synthesises the insights from the preceding chapters, drawing them together to illuminate the contours of regulatory landscapes in PICs. These chapters revealed the histories and the complex interplay of state and non-state regulators. By integrating these findings, this section demonstrates the importance of a pluralist-relational approach to understanding regulation within the pluralist contexts of Pacific legal practice environments. This synthesis paves the way for the next section where the utility of Parker's framework for lawyer regulation is explored as a practical and adaptive framework for regulators, and several possible ways for regulators to support lawyers in PICs are considered.

2.1. The Paradigm for Legal Practice in PICs

In Chapter One, this thesis explored the paradigm for legal practice in PICs, noting how each jurisdiction's legal practice environment is not only a product of its unique cultural and historical contexts, but also an example of path dependence.² The historical development of PICs has produced legal systems that today are both pluralist in nature and intricately woven with the threads of colonial pasts, local customs and regional dynamics. Present legal systems demonstrate the enduring influence of initial conditions – such as colonial paternalism, missionisation, and semi-autonomous customary governance – that have evolved but continue to impact contemporary legal practice, education and governance.

Each jurisdiction in the Pacific Region is connected through shared histories of pluralism, colonisation, development and regionalism. The context of decolonisation means state law faces inevitable questions of legitimacy, as a historical source of domination, which regulators must navigate. The context of legal pluralism means that legitimate sources of law derive from both state and non-state sources. The context of normative pluralism both complicates and creates opportunities for dispute resolution, while also binding lawyers to embedded cultural normative systems which create ethical dilemmas for lawyers. The context of development affects the capacities of state and non-state institutions to support, educate and discipline lawyers. In addition to these shared dimensions, the legal practice environments of each jurisdiction are also shaped by

² See Chapter One, p. 14. See further discussion in Chapter Three, p. 105-106; and Chapter Five p. 186. In particular, Halliday's call to apply the lens of the *longue durée* to comprehend path dependence in British post-colonies assists in understanding the significant impact of historical contexts on the resources and institutionalisation of legal orders in PICs. See discussion in Chapter Three at p. 109. Halliday specifically considers how the entrenchment Halliday, 'Time and Temporality in Global Governance' 2017, 304.

their own unique histories, cultures, politics, and stories, including stories of law reform and attempted reform.³ By understanding the histories and path dependencies that shape legal practice environments in Fiji, Kiribati, and Vanuatu, regulatory action can be better attuned to the complexities of local formal and informal regulatory systems.

2.2. Being a Good Lawyer in Fiji, Kiribati, and Vanuatu

Outside the Pacific Region, being a good lawyer has been heavily theorised by legal scholars and sociologists. The past century has produced countless monographs, studies and speeches on the skills, knowledge and characteristics of good lawyers.⁴ However, from the perspective of lawyers in PICs, almost all of the narratives about good lawyers they encounter are foreign, originating from foreign scholarship centred on foreign places and based on foreign ontologies and epistemologies.⁵ One of the primary purposes for compiling the data in Chapter Four was to locate an autochthonous depiction of a good lawyer, one that gives voice to professional communities of lawyers in PICs and aims to be at least *less* foreign than existing scholarship. The archetype of the good Pacific lawyer was developed from responses by lawyers in Fiji, Kiribati, and Vanuatu to interview questions regarding their conceptualisation of being a good lawyer and where lawyers learn to be good lawyers and is depicted in Figure 5 in Chapter Four.⁶ Figure 5 is important because it depicts the findings of the first academic study on how lawyers in PICs perceive being a good lawyer.

The 10 qualities of good lawyers depicted in Figure 5 related to three interconnected domains of lawyer competence, ethics, and performance. Many of the qualities are, understandably, similar to the qualities attributed to good lawyers in other jurisdictions such as honesty, technical proficiency and knowledge of substantive law.⁷ However, some qualities have unique local characteristics, such as knowledge of customary law, especially land law, learning how to skilfully navigate normative pluralism to walk the ‘ethical tightrope’ between professional and customary norms, and the ability to engage in ‘relational legal practice’ which prioritises seeking a culturally

³ See Chapter One, section 4. Lawyers and the Legal Profession in PICs, p. 34.

⁴ See Chapter Four, section 3.6. Being a Good Lawyer is Innate, p. 163.

⁵ Indeed, outside of a fairly narrow slice of recent history, in PICs, both the idea of state law and a legal profession gatekeeping access to it were also irrelevant concepts, becoming relevant only when self-determination for indigenous people was interpreted to mean ‘constitutional Westminster-style self-governance integrated with the global economic system.’

⁶ See Figure 5: Archetype of the good lawyer, p. 128.

⁷ See for example Cook et al, *Laying Down the Law* (2009); Luban, *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* (1984); Wald and Pearce, ‘Being Good Lawyers: A Relational Approach to Law Practice’ (2016).

acceptable and respectful outcome for clients that is also legally sound.⁸ While an archetype of a good lawyer can only be an abstract representation of the ideals of being a good lawyer, it has many potential uses. For example, it can be a reference tool for educators, regulators, and professional communities of lawyers to communicate mutual expectations regarding lawyer conduct and compliance and encourage critical reflection by lawyers on how they identify with and demonstrate the qualities of being a good lawyer to others.

Lawyers learn to be good lawyers in different ways. Lawyers in all jurisdictions reported a connection between being a good lawyer and being ‘a good person’, embodying values that come from ‘personal things like family, community, church and their faith.’⁹ Learning the skills and technical knowledge begins at ‘Law School ... But that is not where it ends ...’¹⁰ because ‘skills and knowledge ... grow with experience.’¹¹ Lawyers reported that mentoring and supervision, especially in their early years of legal practice, were critically important to the development of good lawyers, although this requires ‘a teachable spirit.’¹² This revealed lawyers’ perceptions of the important connection between their experiences during formative periods of education and practice and their motivations and capacities to comply with professional standards. The transition from education to legal practice in PICs is a particular area in which both this study and previous research by other scholars has identified the need to fill a gap in support for lawyers.¹³

2.3. Operation of State Regulatory Systems in PICs

To support the answer to the primary research question, the thesis explored how state regulatory systems for lawyers operate in practice in Fiji, Kiribati, and Vanuatu. Participants discussed four mechanisms by which state regulatory systems regulate lawyer conduct: written frameworks prescribing technical standards and ethical codes; formal systems for complaints against, and discipline of, lawyers; lawyers’ relationships with regulators and formal regulatory activities; and lawyers’ engagement with courts and the judiciary – both directly and indirectly. These mechanisms were considered in greater detail in Chapter Five.¹⁴ Chapter Five, drew from three case studies which depicted unique contexts and experiences of lawyer regulation in each

⁸ See Chapter Seven, section 5.1. Relational Legal Practice, p. 267.

⁹ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati.

¹⁰ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹¹ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

¹² Interview FI22 (10 March and 21 April 2019).

¹³ Penfold, ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’ (2013).

¹⁴ See discussion throughout Chapter Five, p. 167.

jurisdiction. The case studies revealed shared themes regarding: the legitimacy and resourcing of state regulatory systems; the prominent role of the judiciary as a regulator of lawyers; and the substantial impact key individuals have on the success and efficacy of state regulatory institutions in PICs. These are each considered under separate headings below.

The empirical data indicated that in PICs, lawyers' postures of compliance and their support for state regulatory authorities are strongly impacted by the nature of their relationship with state regulatory institutions and actors. Strained relationships, mistrust and lack of resources can hinder cooperation and impede the resolution of complaints, as seen in the case studies of Fiji and Kiribati.¹⁵ On the other hand, collaborative, respectful, and inclusive relationships can lead to greater compliance and support for regulatory initiatives, as was seen in the case study of lawyer regulation in Vanuatu.¹⁶ Such an approach aligns with a pluralist-relational approach to lawyer regulation by emphasising the inter-dependence of regulators and practitioners in establishing state regulatory institutions that are perceived as legitimate and effective. In light of this, a pluralist-relational approach to lawyer regulation underscores the importance of mutual respect and regular engagement between regulatory authorities and lawyers to foster more effective regulatory relationships.

2.3.1. Legitimacy of the Regulator and Regulatory Relationships

The empirical data strongly indicated that perceptions by lawyers in PICs regarding the illegitimacy of the regulator were associated with resistant and disengaged behaviour by lawyers that ultimately impeded effective regulation. This was particularly the case in Fiji where participants reported that the introduction of the new regulatory system by way of a 'surprise Decree' resulted in a relationship of mistrust between the regulator and most lawyers.¹⁷ Participants in Fiji reported active game-playing and rebellious conduct since the establishment of the new system that has undermined the regulator's legitimacy. At the time of my fieldwork in 2019, this had fuelled a further shift by the regulator towards stricter command-and-control regulatory styles and strategies, such as imposing new reporting obligations on lawyers and seeking extraordinary 'search and seizure' powers.¹⁸

¹⁵ Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170; on Kiribati, p. 198.

¹⁶ Chapter Five, section 3. Igniting Lawyer Regulation in Vanuatu, p. 189.

¹⁷ 'Surprise' here means by Decree without notice to the profession, stripping the Fiji Law Society of its Regulatory authority and seizing its documents in the midst of a Military Coup. See fuller discussion of this in Chapter Five, from p. 170.

¹⁸ Interview Manager, LPU (10 March and 21 April 2019).

By contrast, Judge Wiltens in Vanuatu, by engaging transparently and facilitatively with lawyers, had effectively shifted lawyers' previously dominant postures of disengagement and resistance to dominant postures of compliance and capitulation, strengthening regulatory legitimacy.¹⁹ He did this despite having access to very limited resources.²⁰ This approach speaks to theories of motivational posturing and responsive regulation.²¹ Drawing from these theories, the empirical data indicates that regulators of lawyers in PICs should be sensitive to signals sent by lawyers about regulation, especially when they communicate disengagement and resistance to the regulator. As the Vanuatu case study showed, the legitimacy and effectiveness of regulation can be enhanced when regulators engage responsively and adaptively with individual regulatees and cultivate positive relationships with regulatees that engender mutual support for regulatory objectives.

2.3.2. Key Individuals

The three case studies demonstrated that systems regulating lawyers in PICs share a dependency on key individuals to ignite transformative change in the design and operation of systems regulating lawyers in PICs.²² However, as Ayres and Braithwaite observe, such a dependency on key individuals can be a double-edged sword.²³ For example, it makes state regulatory systems in PICs vulnerable to periods of growth and decline corresponding to the emergence of key individuals and their fluctuating capacities. This dependency presents an almost unavoidable risk, especially in small Pacific jurisdictions, although it can be somewhat mitigated by strengthening regulatory institutions and effective succession planning for key regulatory roles.²⁴ Additionally, as was seen in Fiji, individuals may wield their transformative power in ways that marginalise and disregard regulatees, sowing the seeds of resistance and disengagement. On the other hand, key individuals can make use of facilitative regulatory styles that can be crucial to cultivating the

¹⁹ On the empirical connection between regulatory styles and postures of resistance and compliance see: Valerie Braithwaite et al, 'Regulatory Styles, Motivational Postures and Nursing Home Compliance' (1994) 16(4) *Law & Policy* 363.; see further Braithwaite, *Restorative Justice & Responsive Regulation* (2002); see also Gunningham and Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (2017).

²⁰ One can only speculate how much more Judge Wiltens might have achieved if Vanuatu's system for regulating lawyers was as comparatively well-funded as Fiji.

²¹ Braithwaite, 'Games of Engagement: Postures within the Regulatory Community' (1995); Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory'world' (2001); Baldwin and Black, 'Really Responsive Regulation' (2008).

²² For example, Judge Wiltens in Vanuatu, Michael Takabwebwe in Kiribati, and former coup leaders in Fiji. See case studies and discussion in Chapter Five.

²³ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

²⁴ As noted in Chapter Five, Judge Wiltens demonstrated awareness of this critical issue by actively seeking to mentor a successor, local Judge Viran Molisa Trief. p. 189.

mutual respect and trust required for effective regulation within pluralist contexts in PICs, as we saw in the case study on regulation in Vanuatu.²⁵

2.3.3. Prominent Role of the Judiciary as Regulators

The regulatory relationship between lawyers and members of the judiciary emerged as an important mechanism for regulating lawyers in PICs. Going to court remains a common part of a lawyer's work in PICs,²⁶ and participants from all three jurisdictions identified judicial officers as a strong source of both direct and indirect regulatory influence. The judiciary directly regulates lawyer conduct in various ways, such as providing mentorship and advice in private settings, enforcing court rules and Personal Costs Orders, and sometimes delivering a deserving lawyer 'a good bollocking'.²⁷ Indirectly, the judiciary regulates lawyers through rules of court procedure, the deterrence effect of sanctions, and strengthening legitimacy of disciplinary processes as adjudicators of complaints. The strength of these existing regulatory relationships makes the interaction between lawyers and the judiciary an ideal place to look for new opportunities to support lawyers in PICs to augment existing regulatory activities.

As discussed in Chapter Five, the prominent regulatory role of judges in PICs is not without complications. For example, in both Fiji and Vanuatu, the judiciary is responsible for: licensing and registration of lawyers and the investigation, prosecution and adjudication of complaints. This raises valid questions regarding the independence of the regulatory system.²⁸ Additional sensitivities arise around the role of foreign judges in systems regulating lawyers in PICs, raising questions regarding the sufficiency of their local knowledge and vulnerability to termination of their contracts.²⁹ In navigating these complexities, a pluralist-relational approach provides a valuable framework based on ensuring the design of culturally sensitive, adaptive and ultimately more effective regulatory systems.

2.4. Regulation of Lawyers by Non-State Systems

The preceding section discussed state regulation of lawyers, but the thesis also showed that there were multivariate non-state regulators of lawyer conduct. While the influences of an individual lawyer's conduct are highly specific to their personal circumstances, Chapter Six showed how the

²⁵ Chapter Five, section 3. Igniting Lawyer Regulation in Vanuatu, p. 189.

²⁶ Compared with jurisdictions such as Australia and New Zealand where many lawyers never or rarely attend court.

²⁷ See full quote Chapter Four, section 3.3. p. 157.

²⁸ See Chapter Five, section 5.2. Reliance on the Judiciary to Regulate Lawyers, p. 211.

²⁹ The question of foreign judges is considered in Chapter Five at 5.2.1. A Comment on Foreign Judges, p. 212. See further Dziedzic, *Foreign Judges in the Pacific* (2021).

vast majority of lawyers in Fiji, Kiribati, and Vanuatu shared four important non-state sources of regulation: custom; religion; professional communities; and legal education.³⁰ These are critical regulators of lawyer conduct because through repeated exchanges of symbols, rituals and beliefs, a lawyer develops ‘many selves’³¹ or ‘fractal identities’³² such as *iTaukei*, Christian, and lawyer. These identities, and the obligations they carry, can have profound implications for a lawyer’s professional conduct, community engagement, and personal choices.³³ Theories of relationality and social network theories provided useful conceptual tools for understanding the interconnectedness of non-state influencers of lawyer conduct in terms of ‘relational webs’ and ‘nodal governance.’³⁴

2.4.1. Custom and Tradition

Customary norms and traditions are embedded within legal practice environments in PICs and affect lawyer conduct in a multitude of ways. Various customary practices, like honouring customary funeral obligations, can conflict with professional duties.³⁵ As explained by a participant from Fiji ‘for a lawyer, if it is a choice between attending to a trial, or attending a funeral and related obligations of a close uncle, then family will come first.’³⁶ Other customary norms, such as avoiding shame, and deferring to elders, can impact lawyers’ willingness to seek help, admit mistakes or question decisions. A ni-Vanuatu participant explained ‘do not question the elders, what they decide. So, do not question your boss, the boss is always right.’³⁷ While a participant from Kiribati shared that ‘rather than ask for help, because appearing incompetent could be shameful, you do nothing.’³⁸ These findings underscore the need for a context-sensitive and adaptive regulatory

³⁰ See further Chapter Six, section 1.1. Mapping Non-State Regulators of Lawyer Conduct in PICs, p. 216.

³¹ See discussion in Chapter Six, section 2.

Relational Perspectives on Non-State Influences of Lawyer Conduct, p. 218.

³² See Chapter Six, section 2.

Relational Perspectives on Non-State Influences of Lawyer Conduct, p. 218.

³³ See Chapter Six, Litia’s case at section 3.2.1, p. 233.

³⁴ See Chapter Three, section 4. A Pluralist-Relational Approach to Lawyer Regulation, from p. 101; Chapter Six, section 2.

Relational Perspectives on Non-State Influences of Lawyer Conduct, from p. 218.

³⁵ See Chapter Six 3.1 Custom as a Dynamic Regulator of Lawyer Conduct, p. 225.

³⁶ Interview conducted between 10 March and 21 April 2019, various locations, Fiji; and at other times with participants residing in Australia.

³⁷ Interview conducted between 18 July and 5 September 2019, Port Vila, Vanuatu.

³⁸ Interview conducted between 5 July and 10 September 2018, South Tarawa, Kiribati, see further Chapter Six, section 3.1.4. Financial Obligations, p. 231.

approach that supports lawyers to navigate normative pluralism without compromising their professional or customary obligations.

2.4.2. Professional Networks and Communities

Professional associations and communities of lawyers in PICs exist at different scales and operate as central nodes around which lawyers, bound by shared identities, convene.³⁹ As illustrated by the example of KILN with its precept of ‘law as mission’, professional communities can provide critical spaces for lawyers to congregate to discuss shared questions of faith and legal practice. Extensive research by Australian scholars indicates that participation in professional communities, especially in the early years of practice, is critical in the formation of lawyers’ habits and practice norms.⁴⁰ It is within the overlapping social fields of these professional communities that lawyers co-create the meaning of important shared concepts such as ‘being a good lawyer’ and ‘compliance’ through their actions and choices. Using a pluralist-relational approach, a regulator of lawyers should seek to identify and support active and emerging professional communities of lawyers with an understanding of the vital role they play in lawyer development, mentoring and education.

2.4.3. Education and Environments of Legal Education

The USP School of Law and the broader environment of USP’s Campuses in Port Vila and Suva remain the epicentres for legal education in the Pacific Region. It is at USP that the vast majority of Pacific Island lawyers are first introduced to the attributes and values of being a good lawyer. This occurs through both the substantive curriculum and formative student experiences beyond the classroom, such as extracurricular legal competitions, work placements and student clubs and societies. However, the findings revealed a number of gaps and a need for more detailed research on the design and delivery of USP’s LLB and PDLP curricula, especially regarding the teaching of customary law and legal practice skills.⁴¹ Additionally, there remains a strong need for regulators of lawyers to more effectively support the transition of graduates into legal practice.⁴²

Beyond environments of tertiary legal education, most participants lamented the lack of available locally-relevant Continuing Professional Development (CPD) and professional development

³⁹ Shared identities such as culture, faith, values, experiences, political affiliation, or professional interests, etc.

⁴⁰ Holmes et al, ‘Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers’ (2012). See Chapter Six, section 3.4. Professional Communities as Regulators of Lawyer Conduct, p. 244.

⁴¹ See further Chapter Four, section 3.2.1. The Gap from Legal Education to Legal Practice, p. 151; Chapter Six, section 3.3. Legal Education and Education Environments: Shaping Professional Values and Conduct, p. 240.

⁴² Here the term ‘regulators of lawyers’ is used broadly denoting this is a responsibility shared between the plurality of regulators of lawyers, state, non-state, and by individual lawyers.

opportunities – especially for lawyers working outside government. Around the Pacific Region, CPD is only mandatory in Fiji, where its introduction was initially supported by government-funded CPD offerings.⁴³ In Fiji, the government’s investment and focus over the past decade – and the profession’s desire for more diverse offerings – have resulted in a robust CPD system with many local and international providers offering a mix of locally relevant professional development opportunities. In Vanuatu, the case study of Judge Wiltens discussed in Chapter Five, demonstrated the significant impact an individual regulator can have on professional development and nurturing professional communities by activating and enabling other local actors.⁴⁴

2.5. Understanding Compliance and Non-Compliance

Chapter Seven explored how lawyers navigate normative pluralism within the fluid and shifting regulatory landscape of legal practice environments in PICs. Lawyers navigate compliance by performing a complex dance, co-creating practical norms and adapting to the intricate, and sometimes discordant, performances of regulatory ‘musicians.’⁴⁵ Participant responses discussed in Chapter Seven revealed that practical norms arise at the intersections of conflicting sources of norms (e.g. professional, social, and customary norms) when contemporaneous compliance is not possible, or desired.⁴⁶ Chapter Seven also demonstrated that adaptive and palliative practical norms involve divergent conduct by lawyers performed primarily to adapt to constraints of local legal practice environments or sustain local law and justice systems.⁴⁷ Examples of these include: seeking adjournments as a case management strategy or to meet familial or customary obligations, and the relaxation of rules and procedures in magistrate’s courts. These divergent practices signal underlying postures of accommodation towards regulation by lawyers seeking to act ‘in the spirit’ of professional norms. By contrast, quasi-tolerated and rebellious practical norms tend to signal postures of regulatee resistance, disengagement and game-playing and involved conduct that was more divergent from professional norms such as exploiting inexperienced magistrates or accepting excessive gifts from clients.⁴⁸

⁴³ See further Chapter Five, section 2.3. Legitimacy and Resistance, p. 177.

⁴⁴ See further Chapter Five, section 3. Igniting Lawyer Regulation in Vanuatu, p. 189.

⁴⁵ See Chapter Seven section 2. The Dance of Compliance, p. 250.

⁴⁶ See Chapter Five, Figure 3, p. 118.

⁴⁷ See further Chapter Seven, section. 4. Adaptive Practical Norms Guiding the Management of Conflicts of Interest, p. 258.

⁴⁸ See further Chapter Seven, section 5. Tolerated and Quasi-Tolerated Practical Norms, p. 267; Chapter Seven, section 6. Rebellious Practical Norms, p. 279.

The empirical data revealed a wide range of practical norms of lawyers in PICs that diverged from professional norms, sometimes considerably, but were nevertheless mostly tolerated within the regulatory domain.⁴⁹ Tolerated practical norms were reported to be connected with a variety of benefits including: overcoming constraints within legal practice environments; preserving relationships, both professional and social; and permissibly attaining personal advantage. The extent to which a divergent norm appeared to be tolerated by other lawyers was reported to relate to its effect on the legitimacy of regulation, its manner and degree of divergence, and its apparent intention. For example, conduct performed ‘in the spirit’ of rules (such as adaptive or palliative practical norms) was likely to be more tolerated, whereas conduct that was more self-serving or tends to delegitimise regulatory authority was less tolerated.

⁴⁹ See Chapter Seven, Table 11: A few practical norms of lawyers in PICs, p. 256. These included norms regarding giving and receiving gifts, managing conflicts of interest, and tolerating subpar legal practice by other lawyers.

3. A WAY FORWARD: SUPPORTING GOOD LAWYERS IN PICs

*Like the architectural design of a building which must use principles of aesthetics together with laws of physics and engineering, the design of social institutions must marry normative and empirical considerations.*⁵⁰

This thesis has argued that regulators can better cover the weaknesses of formal regulatory systems by leveraging the strengths of existing and emerging informal regulatory systems through a pluralist-relational approach to lawyer regulation. This requires responsive regulators to work ‘with the grain of naturally occurring systems’⁵¹ in PICs. This section discusses several pathways forward for supporting lawyers to be good lawyers, anchored by this study’s empirical findings of the contours of Pacific legal landscapes, and a commitment to responsive, incremental, and adaptive regulation. In discussing pathways forward, I revisit Parker’s framework for lawyer regulation to demonstrate its utility as an adaptive strategic framework for guiding regulation of lawyers in PICs.⁵² This section shows how Parker’s framework can be adapted to apply in the legally pluralistic environments that characterise PICs.⁵³ It also shows how insights from this study of lawyer regulation in the Pacific Region, such as the regulatory mechanisms of practical norms, can add nuance to Parker’s framework.⁵⁴ Finally, because statutory review is an inevitable component of regulatory reform, I offer some reflections on reform of laws regulating lawyers in PICs and doing law reform better. In the deep blue waters of regulatory design in PICs, there are many coastlines left to be charted and many lines yet to be inked on future ‘regulatory maps.’

To briefly recap, Parker proposes a framework for lawyer regulation which seeks to orient lawyers towards access to justice ideals⁵⁵ and is founded on four strategic pillars of: nurturing professional community; encouraging elements of self-regulation; embracing competition reform; and developing institutions of state and community accountability.⁵⁶ As noted in Chapter Three, Parker’s framework has three important strengths as a guide for lawyer regulation in PICs: it is relational; it recognises the critical role of professional communities in regulating conduct; and it emphasises the importance of self-regulation.⁵⁷ Additionally, it is hoped the discussion in this

⁵⁰ Parker, *Just Lawyers: Regulation and Access to Justice* (1999). 263-4.

⁵¹ Braithwaite, *Markets in Vice, Markets in Virtue* (2005). 156.

⁵² This was foreshadowed in Chapter Three, section 2.5. Contemporary Hybrid and Co-Regulatory Models, p. 89.

⁵³ This discussion of pathways forward is approached with sensitivity to my position as an outsider which was discussed in detail in Chapter Two, section 2.1. Positionality, p. 53.

⁵⁴ See generally Chapter Seven and above section 2.5. p. 294.

⁵⁵ Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997) 144.

⁵⁶ Ibid. 207; See also Parker, *Just Lawyers: Regulation and Access to Justice* (1999); and discussion in Chapter Three, section 2.5. Contemporary Hybrid and Co-Regulatory Models, p. 89.

⁵⁷ See discussion in Chapter Three, section 2.5. Contemporary Hybrid and Co-Regulatory Models, pp. 89-95.

section will contribute to future scholarly and policy discourses on lawyer regulation in PICs. It is further acknowledged that alternative interpretations, theories, and proposals for supporting lawyers to be good lawyers in PICs based on my data are not just possible, but probable.⁵⁸

3.1. Nurturing Professional Community

In support of Parker's strategy of nurturing professional communities to strengthen lawyers' commitment to regulatory ideals, the empirical findings of this study have shown that professional communities are strong regulators of lawyer conduct in PICs. The findings of this thesis also extend Parker's framework by demonstrating that, in addition to professional communities, there are myriad other normative systems that regulate lawyers in PICs including practical norms.⁵⁹ How regulators can engage strategically with these other systems to support lawyers to be competent and ethical is discussed further below in sections 3.2 and 3.4.⁶⁰

Peak lawyer associations emerged as an important focal point for professional communities of lawyers in Fiji, Kiribati, and Vanuatu. These professional communities are fragmented and often form around other shared identities and sub-cultures.⁶¹ In particular, the FLS has a long history as a hub for professional communities in Fiji and, as an institution, it has weathered many political storms and threats to the rule of law. As much younger institutions with fewer resources, the KLS and VLS exist in much more nascent states and have developed institutional legitimacy slowly. The case study of KILN showed how rapidly a professional community of lawyers can grow in PICs when its members are oriented towards similar ideals.⁶² In particular, KILN's members share ideals of serving the public interest – 'law as mission' – and collegiality 'turned inside out' – promoting inclusivity and community engagement.⁶³ This appears to have provided a strong foundation for

⁵⁸ See below, section 5.1. p. 314.

⁵⁹ Examples include custom, religion and practical norms, see above, section 2. p. 286.

⁶⁰ See below, section 3.4. p. 298; section 3.4. p. 302.

⁶¹ See discussion above, section 2.4. p. 291. see further Chapter Six, section 2.

Relational Perspectives on Non-State Influences of Lawyer Conduct. p. 224. See further section 3.2, Religion, Identity and the Mission of Law, p. 232.

⁶² See Chapter Six, section 3.2.2, The Kingdom International Legal Network (KILN), p. 234. Another excellent, albeit more focused community is the coalition of Pacific law students and lawyers who have come together with a shared purpose to advocate for climate justice. See 'Usp Students Succeed in Campaign Taking Climate Change to the World's Highest Court', (29 March 2023)

⁶³ See discussion in Chapter Six, section 3.2.2. The Kingdom International Legal Network (KILN), p. 234; and Chapter Three, section 2.5. Contemporary Hybrid and Co-Regulatory Models, p. 95; and Parker, 'Lawyers' Justice, Lawyers' Domination: Regulating the Legal Profession for Access to Justice' (1997) 153-4. See also Parker, *Just Lawyers: Regulation and Access to Justice* (1999).

the emergence of a professional community of Christian-lawyers in Fiji oriented towards supporting lawyers to be competent and act ethically and morally.

Nurturing professional communities of lawyers by supporting the growth and development of professional associations of lawyers in PICs should be a key strategic focus for regulators, as these associations play central roles in regulatory networks. However, as noted by Carolyn Graydon in a review of Pacific lawyer associations for the Pacific Judicial Strengthening Initiative (PJSI) ‘lawyer associations remain the most neglected part of Pacific justice systems’ despite their vital contribution to the ‘effective functioning of justice processes and access to justice.’⁶⁴ Poignantly, she states:

*The first and foremost recommendation of this review is acceptance by governments and donors of the premise that having competent, independent and well-regulated legal professions in Pacific societies is not a ‘nice to have’ but rather, a public necessity and a public good.*⁶⁵

Support for professional communities may take many forms including financial or in-kind support for activities, conferences and events; or ensuring the statutory regulator has an office and functioning secretariat.⁶⁶

3.2. Encouraging Elements of Self-Regulation

To Parker, self-regulation involves elements of both individual responsibility and collective professional norms. Activities that align with encouraging elements of self-regulation may take many forms including: encouraging individual accountability for ethical behaviour;⁶⁷ mentoring and peer review;⁶⁸ supporting ethical infrastructure within law firms;⁶⁹ support for professional communities;⁷⁰ and responsive regulation.⁷¹ Encouraging elements of self-regulation is particularly

⁶⁴ Graydon, ‘Situation Analysis of Pacific Lawyer Associations’ (2021) 4.

⁶⁵ Ibid. 33.

⁶⁶ Ibid.; South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (2011); South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017).

⁶⁷ ‘What makes you a good lawyer? It’s you.’ See Chapter Four, p. 163.

⁶⁸ See discussion in Chapter Four, section 3.3. Mentoring and Supervision, p. 157.

⁶⁹ See Chapter Six, section 3.1.1. The Impact of Customary Norms on Lawyer Conduct, pp. 234-4.

⁷⁰ The case studies of each jurisdiction in Chapter Five each illustrate how the development of professional communities of lawyers has encouraged elements of self-regulation in Fiji, Kiribati, and Vanuatu.

⁷¹ For example, Judge Wilten’s regulatory approach in Vanuatu. Chapter Five, section 3. Igniting Lawyer Regulation in Vanuatu, p. 189.

important to nurturing autonomous self-regulating professional communities of lawyers, but must be balanced by the need for oversight and accountability.⁷²

In this thesis, the utility of ‘encouraging elements of self-regulation’ as an adaptive strategic framework for strengthening lawyer regulation is exemplified by the case studies on Fiji and Vanuatu in Chapter Five.⁷³ The case study on Vanuatu illustrated the various ways Judge Wiltens encouraged elements of self-regulation, including by supporting senior lawyers to lead by example and by seeking to ensure sustainability of regulatory functions.⁷⁴ Additionally, in Fiji, the FLS, despite having been stripped of its formal regulatory role, has continued to be an important regulator of lawyers in Fiji by promoting professional standards through its advocacy, CPD events, and members services, including mentoring.⁷⁵

In Chapter Seven, this thesis showed how practical norms emerge as a form of self-regulation and often operate to strengthen regulatory legitimacy even where they may be highly divergent from professional norms.⁷⁶ This extends Parker’s framework by revealing an important mechanism lawyers in PICs use to reconcile conflicts between public and private interests.⁷⁷ A responsive regulator of lawyers in PICs can encourage self-regulation and nurture professional communities by supporting practical norms that strengthen regulatory legitimacy; while also seeking to disrupt practical norms that increase social distance. Table 11 in Chapter Seven provides a helpful starting point for regulators seeking to identify practical norms of lawyers within their own jurisdiction.⁷⁸ The specific regulatory actions and responses to practical norms available to a regulator ultimately depend on its available resources and the specific context of the practical norms. By better understanding the effects of different divergent conduct and norms on the legitimacy of the regulator, or regulatory system, responsive regulators can more efficiently direct their limited resources to activities that strengthen regulatory legitimacy and reduce social distance with regulatees.

⁷² Parker, ‘Lawyers’ Justice, Lawyers’ Domination: Regulating the Legal Profession for Access to Justice’ (1997). 207. On the risks of regulatory capture see Garoupa and Markovic, ‘Deregulation and the Lawyers’ Cartel’ (2021) 951-7.

⁷³ Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170; section 4. Lawyer Regulation in Kiribati. p. 198.

⁷⁴ Chapter Five, section 3. Igniting Lawyer Regulation in Vanuatu, p. 189.

⁷⁵ Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170.

⁷⁶ See discussion above section 2.5. p. 294. See further Chapter Seven section 2.1. Regulatory Responses to Practical Norms, p. 250.

⁷⁷ See Parker, *Just Lawyers: Regulation and Access to Justice* (1999). 115.

⁷⁸ See Chapter Seven, Table 11, p. 256.

Two additional pathways forward for encouraging elements of self-regulation in the specific contexts of PICs are considered below – strengthening opportunities for quality mentoring of lawyers and ensuring enduring support for local professional development opportunities.

3.2.1. Mentoring and CPD: Supporting Lawyers to ‘Bridge the Gap’ From Education to Practice

As discussed in Chapter Four, Pacific scholars have identified many opportunities and conceptual approaches to ‘bridge the gap’ between legal education and legal practice in PICs.⁷⁹ Two of the primary strategies discussed by scholars and also raised by participants of the empirical study are: effective mentoring of lawyers, especially in the early years of practice;⁸⁰ and ensuring the availability of locally-relevant CPD opportunities.⁸¹ In regard to the first, Holmes et al, writing on best practices for training new lawyers said:

[T]he optimum work environment for developing in new lawyers both competence and the capacity for autonomous practice exhibits two characteristics. First, the new lawyer is exposed to gradual and planned learning which balances the known, safe and comfortable, but which also provides an exposure to the unknown and unfamiliar. Second, the new lawyer is encouraged, and given the opportunity, to reflect on lessons learned from such exposures.⁸²

This also applies to lawyers in PICs. However, as was reported in Chapter Four, good mentoring and careful supervision of lawyers remains regrettably the exception, not the norm.⁸³ A considerable barrier to establishing ‘optimum work environments’ for mentoring and supervision is that vast majority of private law firms in PICs operate as sole practitioner firms.⁸⁴ In practice this means that private firms generally lack resources to support employees with a structured mentoring program and time off for reflection. Apart from ad hoc mentoring opportunities through professional communities, an opportunity to strengthen mentoring of lawyers exists in the significant movement of lawyers between government legal roles and private practice in PICs.⁸⁵ As the largest single employers of lawyers in PICs, it is important that government legal departments

⁷⁹ See Chapter Four, section 3.2.1, The Gap from Legal Education to Legal Practice, p. 151-154.

⁸⁰ Chapter Four, section 3.3. Mentoring and Supervision, p. 157.

⁸¹ See 3.2.2. Continuing Professional Development (CPD), p. 154.

⁸² Holmes et al, ‘Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers’ (2012) 46.

⁸³ See Chapter Four section 3.3. Mentoring and Supervision, p. 157.

⁸⁴ Graydon, ‘Situation Analysis of Pacific Lawyer Associations’ (2021) 23. At the time of my fieldwork in 2018 in Kiribati, there was one partnership of two lawyers. All other private lawyers were sole practitioners.

⁸⁵ See Chapter Four section 3.3. Mentoring and Supervision, p. 157.

and legal aid services be ‘model employers’ and leverage their size and resources to ensure lawyers are effectively mentored in their early years of practice.

In relation to CPD, historically, demand for locally relevant CPD in PICs has been met by a melange of local advisors, ad hoc workshops, and regional and international associations through conferences,⁸⁶ web-portals⁸⁷ and even via post.⁸⁸ In most PICs, the available CPD has never been sufficient to meet local demand, a fact noted by lawyers and academics since at least 1995.⁸⁹ In Kiribati and Vanuatu, CPD is not mandatory and private practitioners typically lack a combination of the time, capacity, and/or desire to coordinate CPD locally.⁹⁰ This makes developing self-sustaining systems for CPD in PICs challenging for reasons of supply, demand, and local capacity.⁹¹ Notwithstanding this, the only way to ensure a sustainable locally-sourced system of CPD in PICs is by strengthening the local capacity of the legal profession to coordinate and deliver relevant legal education and training opportunities.

Vanuatu’s experience under Judge Wiltens demonstrated the potential for regulators to strengthen professional communities through sustained and collaborative engagement around CPD and a shared value of continued learning. Within PICs, there are many institutions available to share responsibility and accountability for education and training of lawyers tailored to local practice contexts and issues. These include: the judiciary; legal education institutions; government employers such as legal aid; local law firms; and transnational communities of lawyers. The experience of Fiji, discussed in Chapter Five, indicated that a move to mandatory CPD, combined with enduring resources to support CPD events such as an annual legal education conference,⁹²

⁸⁶ See ‘Fiji Law Society Annual Convention’, *Law Council of Australia* (Web Page, 2021) <<https://www.lawcouncil.asn.au/media/news/2021-fiji-law-society-annual-convention>>; ‘Lawasia Alternative Dispute Resolution Conference’, *Lawasia* (Web Page, 9-10 September 2022) <<https://lawasiafiji2022.com/>>.

⁸⁷ For example, SPLAhub ‘South Pacific Lawyers Association’, *Projects* (Web Page, November 2023) <<https://www.southpacificlawyers.org/projects>>.

⁸⁸ I have personally boxed DVDs and books for distribution to a dozen PICs.

⁸⁹ Grimes, ‘Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific’ (1995); South Pacific Lawyers’ Association, ‘Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report’ (2011); South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017).

⁹⁰ Interviews conducted between 5 July and 10 September 2018, South Tarawa, Kiribati. Examples of foreign CPD opportunities include legislative drafting training, advocacy skills courses and regional conferences.

⁹¹ In recent years large Australian based law firms, such as DLA Piper, have provided ever increasing support for pro bono work including legal education in PICs. This is likely partly linked with rules governing Australian government procurement.

⁹² Preferably jointly supported by government, the profession, and the judiciary.

can lead to the development of a self-sustaining system for CPD.⁹³ Fiji's experience also shows that with ongoing resources and support by government, supply of CPD can lead demand.

3.3. Embracing Competition Reform

Parker's strategy of embracing competition reform aims to ensure legal services are more consumer-oriented. This thesis has shown that regulators in Fiji and Vanuatu have successfully embraced elements of competition reform through initiatives such as strengthening enforcement of professional standards through disciplinary mechanisms, and increasing public awareness about consumer rights.⁹⁴ These approaches by Pacific regulators are consistent with Parker's framework, again demonstrating its application to pluralist Pacific regulatory contexts. While embracing competition reform is an important strategy for protecting consumers, the innate emphasis on reform invariably means it requires amendments be made to statutory frameworks. This is a problem because, as discussed below in section 3.5, local capacity constraints and path dependencies mean opportunities for law reform are relatively rare. Accordingly, responsive regulators of lawyers in PICs should be alert to opportunities for reform, but prioritise their limited resources on strategies nurturing professional communities and developing institutions of state and community accountability.

3.4. Developing Institutions of State and Community Accountability

Parker frames the key strength of this strategy as ensuring that, over time, regulatory and community institutions can be responsible and accountable for implementing effective regulatory strategies and actions.⁹⁵ This emphasis on accountability is aligned with the regulatory ideals of responsive regulation, where regulation is dynamic and responsive to the behaviour and needs of both those being regulated and the wider community. State and community institutions provide forums for lawyers and regulators to meet and *talanoa*, which strengthens professional communities and supports deliberative processes for regulatory reform. In this thesis, the case

⁹³ In 2009, Fiji moved to a system of mandatory CPD for all lawyers under the *Legal Practitioners' Decree 2009*. The move was controversial for many reasons, not the least of which was that, initially, the only way to meet the annual minimum CPD requirement (10 hours) was to attend the Attorney-General's Annual Legal Education Conference. However, failure to attend and obtain points resulted in a lawyer being denied renewal of their practising certificate. After several years, growth began in the number of CPD accredited seminars, conferences and events in Fiji coordinated by different providers. Fijian lawyers are today also able to meet mandatory requirements by participating in foreign accredited CPD activities online or overseas. See Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170.

⁹⁴ Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170 and section 3. Igniting Lawyer Regulation in Vanuatu, p. 189.

⁹⁵ Naturally fledgling institutions with little capacity may not be able to ensure other strategies are consistently being implemented. However, by building the capacity of institutions over time space is created for on-going conversations between different nodes of regulation and governance. By setting out a framework about how it will regulate, a regulator's actions become predictable and accountable, provided they are also responsive to place, time, and people.

studies of lawyer regulation in Fiji and Vanuatu, and the case study of KILN, illustrate the effectiveness of developing institutions as a strategy for nurturing professional communities of lawyers, embracing elements of self-regulation and strengthening regulatory legitimacy.⁹⁶ Two recommendations are made below regarding the funding of statutory regulators and strengthening tertiary legal education institutions.

3.4.1. Long-Term Funding of Statutory Regulators

As discussed in Chapter Five, one of the key strengths of Fiji's current regulatory system is its funding model.⁹⁷ In Fiji, a small percentage of revenue collected from lawyers' trust account deposits is diverted to fund the current regulatory activities of the LPU and the ILSC. This funding has supported permanent office facilities, growth in staff numbers and all aspects of professional licensing and discipline. By contrast, in all other jurisdictions in the Pacific Region, statutory regulatory institutions operate on a volunteer basis and have a deep unmet need for resources.⁹⁸ Because the state must regulate lawyers, it must ensure regulatory institutions receive sufficient funding to enable them to regulate effectively. Fiji's model demonstrates one possible pathway forward to achieving this.

3.4.2. Strengthening Tertiary Legal Education Institutions

Pacific scholars have long written about the need for robust tertiary legal education institutions in the Pacific Region. The year 2024 will mark the 30th anniversary of the opening of the USP School of Law. For Powles, Angelo, Grimes, Corrin, Penfold, and many other scholars of Pacific legal education, the challenge for educating Pacific Island lawyers is ensuring they receive regionally relevant training on 'law in the context of the South Pacific and its customs and cultures'.⁹⁹ Writing in 2006, Corrin noted how much legal education in the South Pacific Region had developed positively since the late 1990s and observed that legal training in the region was 'well ahead' of other common law jurisdictions in responding to the needs of society.¹⁰⁰

⁹⁶ Chapter Five, section 2. Lawyer Regulation in Fiji, p. 170; section 3. Igniting Lawyer Regulation in Vanuatu, p. 189; section 3.2.2, The Kingdom International Legal Network (KILN), p. 234.

⁹⁷ See Chapter Five, section 2.2.2. Unique Funding Model, p. 176.

⁹⁸ See South Pacific Lawyers' Association, 'Needs Evaluation Survey for South Pacific Lawyer Associations - Final Report' (2011); Graydon, 'Situation Analysis of Pacific Lawyer Associations' (2021).

⁹⁹ Guy Powles, 'Law in the Pacific Island States' (1982) 8 *Commonwealth Law Bulletin* 1189, 1195-6; Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998) 193; Angelo and Goldring, 'The Study of Law at the University of the South Pacific' (1994) 104; Corrin Care, 'Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific' (2006) 184; Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012) 51-3. See also discussion in Chapter Four, section 3.2.1. The Gap from Legal Education to Legal Practice, p. 151.

¹⁰⁰ Corrin Care, 'Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific' (2006) 185.

By 2017, Penfold's pioneering study of legal education in Vanuatu and Solomon Islands identified many opportunities to strengthen USP as an institution for legal education to better serve local needs.¹⁰¹ Amongst other recommendations to strengthen legal education,¹⁰² Penfold identified four key initiatives: faculty development;¹⁰³ curriculum reform;¹⁰⁴ developing local legal resources;¹⁰⁵ and encouraging USP to lead in nurturing relationships with other regulatory institutions and professional communities.¹⁰⁶ Each of the initiatives identified by Penfold is aligned with Parker's framework for lawyer regulation, and in particular with strategies of nurturing professional communities and developing accountable institutions. While some of the curriculum issues identified by Penfold have likely been addressed by a curriculum alignment undertaken by the USP School of Law in 2018,¹⁰⁷ the research undertaken for this thesis supports Penfold's findings regarding the need for curriculum reform at USP particularly in the teaching of customary law and contextually appropriate applied ethics.¹⁰⁸

In relation to Penfold's call for the development of more local legal resources, while various efforts have been made to localise legal education and training, dominant narratives about professional standards of lawyers in PICs remain heavily foreign influenced.¹⁰⁹ Narratives about what a good lawyer is and how individuals become good lawyers ultimately underpin pedagogies for educating and training lawyers throughout the common law world.¹¹⁰ PICs are no exception. It is hoped that

¹⁰¹ Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017)

¹⁰² It is unfortunately not possible within the scope of this study to explore Penfold's findings in full. For this see: *ibid.* 332-358.

¹⁰³ *Ibid.* 336-350.

¹⁰⁴ *Ibid.* 351-4.

¹⁰⁵ *Ibid.* 333-6.

¹⁰⁶ *Ibid.* 354-8.

¹⁰⁷ Foukona et al, 'Curriculum Alignment: A Legal Experience' (2021) It is not known how these changes were affected by the COVID-19 pandemic.

¹⁰⁸ See Chapter Four, section 3.2.1. The Gap from Legal Education to Legal Practice, p. 151; Chapter Six, section 3.3. Legal Education and Education Environments: Shaping Professional Values and Conduct, p. 240.

¹⁰⁹ As discussed elsewhere in this chapter, legal education and regulation in PICs are based primarily on Australian models. See further: Corrin and Paterson, *Introduction to South Pacific Law* (2017); Penfold, 'Contextualising Legal Education: The Case of Solomon Islands and Vanuatu' (2017); Penfold, 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012); Corrin Care, 'Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific' (2006); Grimes, 'Culture, Custom and Clinic-a Model for Legal Education in the South Pacific' (1998); Grimes, 'Vocational Legal Education in the South Pacific - Designing and Implementing a Programme for Progress' (1996); Corrin Care and Farran, 'Law in the Pacific: Implications of Jurisdictional, Cultural and Ethnic Diversity for the Teaching of Law' (1997); Grimes, 'Identifying and Satisfying Needs for Continuing Legal Education in the South Pacific' (1995).

¹¹⁰ On good lawyers in the rest of the common law world see: Economides and de Rezende Alvim, 'Bar Exams, Legal Ethics and the Fight against Corruption: Lessons from Brazil' (2020); Thornton, 'The Challenge for Law Schools of Satisfying Multiple Masters' (2020); Kim Economides, 'Cynical Legal Studies' in Jeremy Cooper and Louise C. Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Routledge, 2018).; Parker and Evans, *Inside Lawyers' Ethics* (2018); Wald, 'The Contextual Problem of Law Schools' (2018); Holmes et al, 'Australian Legal Practice: Ethical Climate and Ethical Climate Change' 2017; Robert A Prentice, 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves' (2015) 29 *Notre Dame Journal of Law, Ethics & Public Policy* 35.; Ferguson, 'Creating Practice Ready, Well and Professional Law Graduates' (2015); Evans, *The Good Lawyer* (2014); Holmes et al, 'Practising Professionalism:

the good lawyer archetype developed for this thesis and discussed in Chapter Four might provide an opportunity to enrich existing debates by Pacific lawyers and law students on ethics and professionalism; and on being and becoming a good lawyer.¹¹¹

Overall, despite the complexity of Pacific regulatory paradigms, the discussion in this section has shown that Parker's four strategic pillars provide a flexible strategic framework to guide the activities of state and non-state regulators to support lawyers to be competent and ethical in PICs beyond law reform alone. This section has further shown how the findings of this thesis, such as the operation of practical norms in PICs, can enhance Parker's framework, enabling insights from the 'Global South' to inform contemporary theories of lawyer regulation in the 'Global North'. In the next section, I offer some final comments on ways forward for supporting lawyers in PICs through consultative and holistic reform of laws regulating lawyers.

3.5. Supporting Lawyers Through Law Reform

For more than 20 years, researchers of the legal profession in PICs have identified an urgent need to reform laws regulating lawyers, many of which have not been amended since their enactment more than 35 years ago.¹¹² In its 2017 comparative study of laws regulating lawyers in PICs, the SPLA identified diverse areas requiring statutory reform, including: rules regarding admission of lawyers; practising certificates; trust accounts; costs agreements; professional conduct; and complaints and discipline handling.¹¹³ The research conducted for this thesis lends further weight

Observations from an Empirical Study of New Australian Lawyers' (2012); Douglas, Nottage and Tellier, 'The Role of Practice in Legal Education: National Report for Australia' (2012); Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21.; Vivien Holmes and Simon Rice, 'Our Common Future: The Imperative for Contextual Ethics in a Connected World' in Reid Mortensen, Francesca Bartlett and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics* (Routledge, 2010) 66.; Abbott et al, *Australian Law Dictionary* (2010); Margaret Thornton, *Privatising the Public University* (Routledge, 2011).; David Luban, 'The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's the Path of the Law' (1997) 72 *Nyu Law Review* 1547.; Christine Parker and Andrew Goldsmith, 'Failed Sociologists' in the Market Place: Law Schools in Australia' (1998) 25(1) *Journal of Law and Society* 33.; Holmes and Rice, 'Our Common Future: The Imperative for Contextual Ethics in a Connected World' 2010; Luban, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1984) Outside common law jurisdictions, Stern and Liu present an excellent analysis of state narratives about the good lawyer in China, and the way the state signals its expectations to the profession, see Rachel E Stern and Lawrence J Liu, 'The Good Lawyer: State-Led Professional Socialization in Contemporary China' (2020) 45(1) *Law & Social Inquiry* 226. Stern and Liu's depiction of the state sending signals to lawyers is consistent with a pluralist relational approach to understanding lawyer regulation.

¹¹¹ See Figure 5, p. 128 and discussion in Chapter Four.

¹¹² South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017). 8-9. For example, the SPLA 2017 Report identifies diverse areas where reform might be considered, including: lawyer admission rules, complaints and discipline handling processes, auditing of lawyers' accounts and continuing legal education. See further, Bartlett, 'A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands' Legal Profession' (2018); Mogish and Lambu, 'Rights and Procedures of Admission in South Pacific Countries' (2013); Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' 2017; MacFarlane, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002)

¹¹³ South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017). 13-24.

to calls for comprehensive and holistic reform of statutory systems regulating lawyers in Fiji, Kiribati, and Vanuatu to better support lawyers to be competent and ethical.¹¹⁴

In most PICs, the capacity of government law departments and formal institutions such as Law Reform Commissions has developed slowly since independence. For example, in 2005, MacFarlane and Lakshman observed that '[a]part from PNG and Fiji, it must be said that the region does not have a strong history or commitment to law reform institutions.'¹¹⁵ The situation has improved since then, with Law Reform Commissions now active in Samoa, Vanuatu, and Solomon Islands.¹¹⁶ Despite this, the law reform capacity of many governments in the region, including Vanuatu and Kiribati, remains modest. Beyond capacity, Pacific governments have many governance priorities in areas such as health, education, and economic development, meaning opportunities to consider reform of laws regulating lawyers have been comparatively infrequent.

In Chapter Three, I used the analogy of waves depositing sedimentary layers over time to illustrate the development of frameworks for regulating lawyers and better understand regulatory systems in the Pacific Region. Unfortunately, the (typically) glacial pace of law reform has meant that in most PICs, new sedimentary layers – representing innovations in regulatory theory and practice – have been infrequent. This historical inertia is compounded by path dependence whereby the earlier and maladapted legal frameworks, once set, create conditions that are resistant to change.¹¹⁷ This has contributed to the mixed success of previous attempts to reform laws regulating lawyers. For example, in Vanuatu, the *Legal Profession Act 2005* was drafted as part of an Australian Government funded law and justice project. The Act was passed by Parliament, but was never gazetted and thus has never entered into force. The reason why has to do with perceptions by

¹¹⁴ Note: In 2023, the Government of Fiji commenced a process to review the *Legal Profession Act 2009*. See discussion in Chapter Five, section 2.2.1., from p. 175.

¹¹⁵ Peter MacFarlane and Chaitanya Lakshman, 'Law Reform in the South Pacific' (2005) 9(1) *Journal of South Pacific Law* 3.

¹¹⁶ 'Samoa Law Reform Commission - Home', *Samoa Law Reform Commission* <<https://www.samoalawreform.gov.ws/>>; 'Vanuatu Law Reform Commission - Home', *Vanuatu Law Reform Commission* <<https://lawcommission.gov.vu/>>; 'Solomon Islands Law Reform Commission - Home', *Solomon Islands Law Reform Commission* <<http://www.lawreform.gov.sb/>>. Note Fiji's Law Reform Commission languished from 2006-2024 due to the 2006 Coup. An announcement was made in April 2023 that it would be reestablished Jale Daucakacaka, 'Fiji Law Reform Commission to Be Reestablished', *Fbc News* (Web Page, 12 April 2023) <<https://www.fbcnews.com.fj/news/fiji-law-reform-commission-to-be-re-established/>>. It was reported in December 2023 that this is anticipated to occur in 2024. See Mansi Chand, 'Law Reform Commission to Be Re-Established Next Year', *Fiji Village*, 8 December 2023) <<https://www.fijivillage.com/news/Law-Reform-Commission-to-be-re-established-next-year-f5x84r/>>.

¹¹⁷ See discussion in Halliday, 'Time and Temporality in Global Governance' 2017 306; and what Liebowitz describes as 'lock-in by historical events' Liebowitz and Margolis, 'Path Dependence, Lock-in, and History' (1995) 206; see further W Brian Arthur, 'Competing Technologies, Increasing Returns, and Lock-in by Historical Events' (1989) 99(394) *The Economic Journal* 116.

Vanuatu lawyers and judges that consultations were rushed and that the final Act remained flawed.¹¹⁸ The will of relevant stakeholders to revisit the Act, or start a new reform process from scratch has not returned in the nearly 20 years since. Similarly, in Solomon Islands a process for reforming the *Legal Practitioners Act* 1987 (Solomon Islands) commenced around 2009. A proposed bill was read in Parliament in 2016 and public consultations took place. It was redrafted many times before languishing with few drafting resources and no sign of political will to resolve the many issues raised in public consultations.¹¹⁹

Halliday and Shaffer offer a helpful conceptual tool for understanding how regulators of lawyers can respond to this sort of complexity. Discussing global legal orders, Halliday and Shaffer refer to ‘unfolding temporalities where impulses for change emerge, frequently over long periods.’¹²⁰ These ‘temporal pulses’ – where the conditions for conducting a review of laws regulating lawyers arise in a jurisdiction – means that regulators who seek reform must be vigilant because genuine opportunities for reform may not come again for many years. The temporality and the uncertainty of successful law reform leads to three possibilities for regulators seeking positive change: ‘do law reform’ better in PICs; seek opportunities to support lawyers in PICs beyond law reform alone; and nurture professional communities and regulatory institutions to be ready for the next ‘pulse’.

3.5.1. Doing Law Reform Better

*The history of law reform in the Pacific, particularly in relation to the growth of new or adapted institutions, is full of examples of the failure of laws because the people rejected them.*¹²¹

Many scholars have discussed the persistent challenges of law reform in PICs since independence. These include: the limited resources and capacity of Pacific bureaucracies to undertake comprehensive public consultations; challenges to state legitimacy and decisions by state institutions; the capacity of civil society organisations; and the limited capacity of states to

¹¹⁸ See discussion in Chapter One, section 4.2.3 Contemporary Era: 2018 – Present, p. 41.

¹¹⁹ Bartlett, ‘A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands’ Legal Profession’ (2018); see also Leslie C Levin and Lynn Mather, ‘Beyond the Guild: Lawyer Organizations and Law Making’ (2019) 18 *Washington University Global Studies Law Review* 589.

¹²⁰ Halliday and Shaffer were discussing transnational legal orders and describing periods of law making within such orders/institutions. However, they extend the concept to national and local levels where the concepts of temporality and impulse/ignition as periodic opportunities for change resonate with empirical observations of reforms of lawyer regulation in PICs over time. Terence C Halliday and Gregory Shaffer, ‘Researching Transnational Legal Orders’ in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015) 473. 476-81.

¹²¹ Powles, ‘Law in the Pacific Island States’ (1982) 1195. Powles, writing shortly after independence for many PICs, noted further that ‘[m]ost of these failures were colonial, but now examples come to mind of similar problems under independent governments.’ In the years since 1982 there have been many more examples.

implement laws.¹²² To meet these challenges, Pacific governments have generally sought to develop local legislative drafting and policy capacity while seeking to meet short-term needs through heavy reliance on foreign legal consultants and foreign aid to boost capacity.¹²³ These approaches have come with additional challenges. For example, training high-quality legislative drafters is both time consuming and expensive and as Nand notes:

*[O]ften the lack of interest from young qualified lawyers to take up legislative drafting as a career of first choice means that governments more often than not rely on donor friendly countries to send their experienced drafters to assist with much of their work.*¹²⁴

This reliance on foreign legal experts has come with many additional considerations such as the problems associated with legal transplant.¹²⁵

Fortunately for PICs, a growing body of academic research has developed on doing law reform in Pacific contexts. For example, the Guy Powles 'minimum standards framework' is taught to USP law students as a broad theoretical framework for analysing laws on the basis that 'the legal system and laws within it must be responsive, understood, fair, effective, appropriate and available.'¹²⁶ As a general analytical framework this starting point enables 'holistic and systematic analysis of a particular piece of law, starting from a student's own general knowledge... which should then be supported by research.'¹²⁷ However, it does not assist Pacific law makers to overcome the issues and challenges for successful law reform.

The book entitled *Law Reform in Plural Societies* written by Teleiai Dr. Lalotoa Serumanutafa, former Executive Director of the Samoa Law Reform Commission (SLRC), is the most significant recent work on conducting law reform in Pacific Island contexts.¹²⁸ It offers an in-depth account of overcoming the challenges and barriers to law reform in the pluralist context of Samoa and working

¹²² See for example *ibid.* 1193-5. See also Seumanutafa, *Law Reform in Plural Societies* (2017) 121-3. See further discussion of the challenges of law reform by: MacFarlane and Lakshman, 'Law Reform in the South Pacific' (2005); Jowitt, 'The Future of Law in the South Pacific' (2008) 43-5; Don Paterson, Yoli Tom'tavala and Anita Jowitt, 'Legal Traditions and Systems in the Pacific: An Overview of Challenges and Opportunities for Legislative Reform' (Conference Paper, Pacific: Sub-Regional Meeting 25-28 August, 2008). 14-17; Sue Farran, 'Palm Tree Justice? The Role of Comparative Law in the South Pacific' (2009) 58(1) *International & Comparative Law Quarterly* 181. 192-3.

¹²³ See further below.

¹²⁴ Nainendra Nand, 'Teaching Legislative Drafting: The Pacific Experience' (Pt IJLDLR) (2012) 1(1) *International Journal of Legislative Drafting and Law Reform* 28. 29.

¹²⁵ Issues of legal transplant and challenges for reliance on foreign legal expertise is considered in Chapter One, section 3.3. Decolonisation and Patriation of Laws p. 30. Chapter Three, section 3.1 Legal Transplant p. 96.

¹²⁶ Jowitt, 'The Guy Powles Minimum Standards Framework' (2016) 141; See also Jowitt, 'The Future of Law in the South Pacific' (2008) 45-7.

¹²⁷ Jowitt, 'The Guy Powles Minimum Standards Framework' (2016) p 142.

¹²⁸ Seumanutafa, *Law Reform in Plural Societies* (2017). 171.

within the constraints of local systems to develop institutions and processes for effective and locally-engaged law reform. While it is not possible to fully consider Serumanutafa's work here, a few key points are worth noting. In relation to resource constraints, Serumanutafa notes that 'there are no easy responses', but suggests two approaches: involving leaders and members of customary structures, such as villages and churches to conduct consultations; and prioritising reforms that impact custom.¹²⁹ Serumanutafa recommends that frameworks for law reform be 'all-inclusive'; focus heavily on extensive consultation through *talanoa* sessions with the public;¹³⁰ and take an incremental and cautious approach to reform, especially reforms affecting custom.¹³¹

This incremental approach is supported by other scholars of regulation within pluralist Pacific contexts who frame regulation in terms of balancing 'solid' (command) and 'liquid' (relational) regulatory approaches,¹³² and the need to 'think incrementally' about achieving desired change¹³³ and to 'activate' the powers of law.¹³⁴ Complementing this scholarship, Parker also proposes a 'responsive' and 'reflexive' approach to regulatory design in pluralist contexts that draws from social theories of law as well as research on regulation and governance.¹³⁵ To Parker, responsive law is about law seeking to adapt to social realities and promoting broad substantive values while respecting the autonomy of other social fields.¹³⁶ Examples of such fields include customary law, professional communities, and religious communities. By contrast, reflexive law seeks to 'catalyze [sic] processes of social coordination' that support and enable self-regulation within social fields'.¹³⁷

Reflexive and responsive law recognizes [sic] that substantive goals cannot come from inside law itself but only from political discussion outside of law, yet law has to help make sure that discussion happens freely and fairly, and go on to continuously make sure it takes on and elaborates the substantive justice goals that result. This need not be the monistic product of a state. It may well "emerge" and converge out of plural social orderings within and outside of states. Yet

¹²⁹ Ibid. 155-7. Fa'amatuainu reports that the SLRC also makes heavy use of social media for public consultations Bridget Fa'amatuainu, 'Samoa Law Reform and Legal Pluralism: Critical Challenges to Achieving Legal Recognition of Fa'atama and Sogiec' (2023) 30 *Canterbury Law Review* 97. 114.

¹³⁰ Seumanutafa, *Law Reform in Plural Societies* (2017) 173-6.

¹³¹ Ibid. 157, 61. See also Fa'amatuainu, 'Samoa Law Reform and Legal Pluralism: Critical Challenges to Achieving Legal Recognition of Fa'atama and Sogiec' (2023) 115.

¹³² Miranda Forsyth and Thomas Dick, 'Liquid Regulation: The (Men's) Business of Women's Water Music?' (2022) 18(2) *International Journal of Law in Context* 133.

¹³³ Rooney et al, 'Thinking Incrementally About Policy Interventions on Intimate Partner Violence in Papua New Guinea: Understanding 'Popcorn' and 'Blanket' (2022).

¹³⁴ Forsyth, 'Activating' the Powers of Law in the South Pacific' (2018).

¹³⁵ Parker favourably cites Philippe Nonet, Philip Selznick and Robert A Kagan, *Law and Society in Transition: Toward Responsive Law* (Routledge, 2001).; Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.; and others.

¹³⁶ Parker, 'The Pluralization of Regulation' (2008) 356.

¹³⁷ Ibid. 368.

*responsive, reflexive law must remain a normative ordering with an aspiration to universal applicability, for otherwise the very concept of law is normatively meaningless.*¹³⁸

In conclusion, successful law reform in PICs requires an inclusive, responsive and reflexive approach, leveraging local capacities and engaging deeply with embedded social orders and structures. Such an approach is inevitably resource intensive and, for reform of laws regulating lawyers, highly subject to temporal pulses. Fortunately for regulators of lawyers, law reform is only one of several strategies for strengthening regulation. As we have learned from the discussion in the previous chapters, while the tools for designing and operating regulatory systems for lawyers exist within the state, tools for influencing lawyer conduct in practice also exist beyond the state.

¹³⁸ Ibid. 369.

4. CONTRIBUTIONS OF THIS THESIS

This thesis has made significant contributions to discourses of law and legal practice in PICs. These contributions encompass empirical insights, theoretical advancements, methodological innovations, and practical recommendations. Together, these contributions fill existing knowledge gaps and extend understanding of lawyer conduct in pluralist contexts. The empirical study focused on three developing post-colonial PICs. However, it holds broader relevance to discourses of lawyer regulation in former colonising states in the ‘Global North’ where lawyers are also regulated by a melange of state and non-state sources. This thesis therefore serves as an invitation for scholars of lawyer regulation to consider a multi-dimensional perspective that considers the intricacies of legal practice in pluralist societies.

The SPLA’s 2017 report entitled *Legal Professional Regulation the South Pacific*¹³⁹ compared statutory frameworks for regulating lawyers in 16 PICs.¹⁴⁰ It recommended that research be undertaken into the application of existing complaint-handling and disciplinary procedures, and into ‘non-state mechanisms for enforcing legal professional standards.’¹⁴¹ This thesis complements the SPLA’s earlier work through its detailed consideration of the operation of state systems regulating lawyers in Fiji, Kiribati, and Vanuatu. In addition, this thesis reports an autochthonous archetype of a ‘good lawyer’ drawn from the responses of local lawyers. The thesis offers an in-depth analysis of key non-state regulators of lawyer conduct identified by Pacific lawyers revealing significant potential for institutional linkages to support professional standards in the Pacific Region. Hopefully the contribution of this research will help to advance regional dialogue on lawyer regulation.

The empirical study and analysis undertaken for this thesis is the first comprehensive academic consideration of lawyer regulation in practice in a PIC. It is therefore an important contribution that invites both critique and further research. At a time when global focus on law and governance in PICs is heightened,¹⁴² this thesis has challenged the existing paradigm for lawyer regulation in

¹³⁹ South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017).

¹⁴⁰ There are a few minor errors in the SPLA Report as it pertains to Kiribati, which reflects the complexity of the Report.

¹⁴¹ South Pacific Lawyers’ Association, ‘Legal Profession Regulation in the South Pacific’ (2017). 10.

¹⁴² See Peter Layton, ‘Fixing Australia’s Failing Pacific Step-up Strategy’, *The Interpreter* (Web Page, 26 April 2022) <<https://www.lowyinstitute.org/the-interpreter/fixing-australia-s-failing-pacific-step-strategy>>; Mihai Sora, ‘Digital Dominoes: Australia’s Strategic Play in the Pacific’, *The Interpreter* (Web Page, 23 November 2023) <<https://www.lowyinstitute.org/the-interpreter/digital-dominoes-australia-s-strategic-play-pacific>>; Brian Harding and Camilla Pohle, ‘China’s Search for a Permanent Military Presence in the Pacific Islands’, *Usip Publications* (Web Page, 21 July 2022) <<https://www.usip.org/publications/2022/07/chinas-search-permanent-military-presence-pacific-islands>>; Indo-Pacific Strategy of the United States, February 2022.

Pacific contexts. It has invited local professional associations, governments and foreign donors to critically reassess the existing, mostly positivist, approach to defining and understanding regulatory “problems” within pluralist local contexts. It has also invited statutory regulators of lawyers to approach regulatory action responsively, from an evidence-based and holistic perspective. It has encouraged individual lawyers, academics, and judicial officers to embrace their *de facto* role as regulators of lawyer conduct and to look beyond rules and law reform alone and embrace mechanisms that strengthen compliance ‘beyond the state’.¹⁴³

This thesis has introduced an innovative theoretical framework for researching lawyer conduct in pluralist contexts that combines insights from pluralism, relationality and compliance theories of regulation. This enriches existing literature on lawyer regulation and legal pluralism, particularly in the context of post-colonial states. It provides empirical support for de Sardan’s framework of practical norms¹⁴⁴ to environments of legal practice in PICs, offering a fresh perspective on how lawyers navigate diverse legal and normative systems in the course of legal practice.¹⁴⁵ Additionally, this thesis has demonstrated the utility of Parker’s framework for lawyer regulation in pluralist Pacific contexts. It builds on Parker’s framework by demonstrating that practical norms are a key mechanism of self-regulation used by lawyers in PICs to reconcile conflicts between public and private interests.

This thesis’ methodological contribution lies in providing a roadmap for future research on lawyer regulation in PICs. Chapter Two details the combination of qualitative research techniques used to triangulate data, including diverse participant interviews, case studies and analysis of literature while seeking to adhere to principles for conducting Pacific research. The data was synthesised using an abductive analytical framework, which enabled me to theorise lawyer regulation from a position grounded in the empirical data, albeit a position filtered through my own ‘western’ positionality. Beyond its application to the specific context of lawyer regulation in PICs, this methodology holds broader relevance for studies of other professions in both developing and more developed jurisdictions, including the ‘Global North’. The innovative combination and adaptability

¹⁴³ Braithwaite, *Crime, Shame and Reintegration* (1989); Sorenson, Rivkin and Fleming, ‘Complexity, Networks and Knowledge Flow’ (2006); Tubiana, Miguelez and Moreno, ‘In Knowledge We Trust: Learning-by-Interacting and the Productivity of Inventors’ (2022).

¹⁴⁴ de Sardan, ‘Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)’ 2015.

¹⁴⁵ Bierschenk and de Sardan, *States at Work* (2014). See from 399.

of these methods enriches existing methodological literature and opens new possibilities for interdisciplinary research of law and society.

Finally, this thesis has contributed practical recommendations for strengthening lawyer regulation in PICs that are firmly grounded in robust empirical data. These recommendations indicate possible pathways to activate policymakers, regulators, professional associations, and legal practitioners and invite them to identify as regulatory actants within the unique contexts of local legal practice environments. Each recommendation is made in the spirit of suggestion as an invitation for further discussion and debate. The ultimate direction for improving lawyer regulation in the Pacific Region must be determined by national actors.

5. CAVEATS AND FUTURE RESEARCH

5.1. Caveats

The research focuses on lawyer regulation in three PICs: Fiji, Kiribati, and Vanuatu. While the selection process for these jurisdictions was methodologically sound, it may have introduced biases that influence the results in ways that limit generalisability to other PICs which have their own distinct legal and regulatory landscapes.¹⁴⁶ Additionally, understanding lawyer regulation in each of these jurisdictions requires careful consideration of the socio-cultural paradigms and legal traditions specific to each. While the pluralist-relational approach to lawyer regulation adopted by this thesis was developed to help navigate this issue, inherent limitations may exist in fully capturing and interpreting culturally nuanced aspects of local legal practice environments. Finally, while the recommendations proposed in the previous section are tailored to the local paradigms revealed by the robust empirical study, their specific applicability may be constrained by the particularities of the studied contexts – especially as the fieldwork was undertaken prior to the COVID-19 pandemic. Regulators in other jurisdictions and regions must consider these contextual dependencies when attempting to apply recommendations across legal systems or cultures.

5.2. Future Research

This research has traversed much ground and revealed many promising and interesting directions for future research. I have confined myself here to discussing three.

5.2.1. Expanding Empirical Scope of Research on Lawyer Regulation in PICs

There is natural scope to expand the geographic coverage of research on lawyer regulation to some or all of the PICs not covered in this study and to other jurisdictions. This would provide additional valuable perspectives from lawyers in other jurisdictions on important questions such as what it means to be a good lawyer and how state and non-state regulatory systems function in practice. Longitudinal studies could enable sampling of how perceptions and practices of lawyers change over time. Given lawyers' instrumental role in core governance functions such as facilitating access to justice and sustaining governance and justice systems. This research is important and aligns seamlessly with broader policy objectives of Pacific governments such as advancing Sustainable Development Goal 16: Peace, Justice and Strong Institutions.¹⁴⁷

¹⁴⁶ See generally Chapter Two, section 5.2. Limitations of the Research p. 78.

¹⁴⁷ See 'Sustainable Development Goals', *Sustainable Development* (Web Page, 6 June 2023) <<https://www.un.org/sustainabledevelopment/>>.

Beyond the geographical scope, there is scope to expand research on comparing ethical indicators between foreign lawyers and indigenous lawyers to identify relative similarities and differences that may be relevant to legal education and regulatory interventions. The empirical data collected for this study indicated that foreign lawyers face many of the same tensions in practice as indigenous lawyers – including to kin through marital ties. Indeed, a key finding in Chapter Four was that knowledge of local custom is essential for all lawyers, not just indigenous ones, to be good lawyers in PICs. In short, foreign lawyers cannot escape context. However, in jurisdictions such as Vanuatu, foreign lawyer operated law firms do dominate commercial and high value legal work. A more granular understanding of the practices of firms valued by clients representing different social domains would assist a regulator in understanding ethical risks of lawyers and their strategies for dealing with them.

5.2.2. Women in Law in the Pacific

This research identified distinct gender inequalities within the legal profession in the region, especially in relation to the representation of women in senior professional, government and judicial roles. It was also apparent that customary norms regarding gender roles give rise to significant tensions and complexity for female lawyers, underscoring the urgency to delve deeper into the experiences and perspectives of women in the legal field within the region. The last significant study of women in the legal profession in PICs was the SPLA's 2014 Report entitled *Women in Law in the South Pacific*.¹⁴⁸ It would be timely for a new research project to collect data on the demographics, experiences, and perspectives of women in law in PICs about legal practice and lawyer regulation in PICs.

5.2.3. Mental Health of Lawyers

Over the past 20 to 30 years a growing body of literature has emerged in economically developed common law countries on the link between physical and mental wellbeing and resilience of legal professionals under stress.¹⁴⁹ A contemporary framing of this is that being a good lawyer means

¹⁴⁸ South Pacific Lawyers' Association, 'Women in Law in the South Pacific - Survey Report' (2014). See also related research on female judges: Anna Dziedzic, 'To Join the Bench and Be Decision-Makers': Women Judges in Pacific Island Judiciaries' in Melissa Crouch (ed), *Women and the Judiciary in the Asia-Pacific* (Cambridge University Press, 2021) 29.

¹⁴⁹ See for example: Justin Anker and Patrick R Krill, 'Stress, Drink, Leave: An Examination of Gender-Specific Risk Factors for Mental Health Problems and Attrition among Licensed Attorneys' (2021) 16(5) *Plos One* e0250563.; Reich, 'Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being' (2020); Gary B Melton et al, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (Guilford Publications, 2017).; Margaret Thornton, 'The Flexible Cyborg: Work-Life Balance in Legal Practice' (2016) 38 *Sydney Law Review* 1.; Holmes et al, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012); Jennifer Jolly-Ryan, 'The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities out of the Stigma Straitjacket' (2010) 79 *Umkc Law Review* 123.; Laura Rothstein, 'Law Students and Lawyers

'being a healthy lawyer'.¹⁵⁰ Recent studies in the United States suggest as much as 50% of the legal profession experiences symptoms of depression and anxiety and screened positive for risky drinking behaviour.¹⁵¹ Another US study of 2,000 lawyers showed 9% thought about suicide several times per week.¹⁵² One of the objectives of supporting lawyers' mental health is to support lawyers to develop more resilience and better coping strategies than maladapted coping strategies such as drugs or alcohol.

At the time of the research in Fiji, a prominent and highly respected senior lawyer was experiencing a very public battle with drug addiction and mental health.¹⁵³ Unfortunately, no studies exist on mental health of lawyers in PICs, and critically none of the participants of the primary study identified either being healthy or having good mental health as necessary to being a good lawyer. It is worth noting that in PICs, mental health has long been a taboo subject and this stigma greatly complicates the delivery of education, training, and support.¹⁵⁴ As discussed in Chapter Four, what participants shared was that practising law was stressful, they faced significant workplace and social pressure as a lawyer; and that it was important to develop coping strategies.¹⁵⁵ Concerningly lawyers in all countries referred to the reputation of lawyers as 'being big drinkers'.¹⁵⁶ Further research may yield deeper insights into underlying causes of stress for lawyers in PICs and perhaps also test different strategies for supporting lawyers' positive mental health.

with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual' (2007) 69 *University of Pittsburgh Law Review* 531.

¹⁵⁰ Lawson, 'To Be a Good Lawyer, One Has to Be a Healthy Lawyer: Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline' (2021).

¹⁵¹ Anker and Krill, 'Stress, Drink, Leave: An Examination of Gender-Specific Risk Factors for Mental Health Problems and Attrition among Licensed Attorneys' (2021).

¹⁵² Patrick R Krill et al, 'Stressed, Lonely, and Overcommitted: Predictors of Lawyer Suicide Risk' (2023) 11(4) *Healthcare* 536.

¹⁵³ Ashna Kumar, 'Lateef Given Conditional Practising Certificate', *Fiji Sun* (Web Page, 3 November 2022) <<https://fijisun.com.fj/2022/11/03/lateef-given-conditional-practising-certificate/>>.

¹⁵⁴ Andrew M Subica et al, 'Mental Illness Stigma among Pacific Islanders' (2019) 273 *Psychiatry Research* 578.; See also Natasha N McDonald, 'A 'St Giles Case': Negotiating Mental Illness, Treatment and the Adverse Impact of Stigma in Suva, Fiji' (Master's Thesis, Macquarie University, 2022). 33-6; Emmaline Pickering-Martin, 'Na Gaunisala Me Vakavinakataka Kina Na Bula Ni Vakasama: The Way Towards Positive Mental Wellbeing. Frontline Perspectives of the Mental Health System in Fiji' (Master's Thesis, Auckland, 2021).. See further: Philip Culbertson, Margaret Nelson Agee and Cabrini Ofa Makasiale, *Penina Uliuli: Contemporary Challenges in Mental Health for Pacific Peoples* (University of Hawaii Press, 2007).; Graham J Roberts, 'The History of Mental Health in Papua New Guinea' in Harry Minas and Milton Lewis (eds), *Mental Health in Asia and the Pacific: Historical and Cultural Perspectives* (2017) 223.; and Kiwi Tamasese et al, 'Ole Taeao Afua, the New Morning: A Qualitative Investigation into Samoan Perspectives on Mental Health and Culturally Appropriate Services' (2005) 39(4) *Australian & New Zealand Journal of Psychiatry* 300.

¹⁵⁵ See Chapter Four section 3.2. Learning to be a Good Lawyer Begins at 'Law School, USP ... But That is Not Where it Ends', p. 149 and section 3.4. Legal Practice Experience, p. 160.

¹⁵⁶ KI5, KI11, KI16, KI17, KI20, (5 July – 10 September 2018); FI10, FI14, FI19, FI23 (18 July – 5 September 2019); and VI3, VI10, VI17, (18 July – 5 September 2019).

6. CONCLUSION AND REFLECTIONS ON MARY'S CHOICE

Let us now return to Mary's Choice. This thesis opened with a case study and an ethical dilemma regarding whether or not Mary should report her cousin Tomasi to the police. I have discussed the case study with many colleagues, including many Pacific Islander lawyers. Most initially responded with a heavy exhalation of breath and some variation of the phrase 'that's a tricky one ...'. All lawyers recognise that Mary has a duty to uphold the law. However, most were deeply concerned that upholding that duty would, in the circumstances, cause a substantial amount of trouble for others and create enmity. Most lawyers said they would send money, but only a few said they would attend the wedding. Only one lawyer said they would honour their professional duty and report Tomasi to the police – embracing a Kantian ethical approach viewing both statutory rape and not reporting it as morally wrong.¹⁵⁷ Most felt uncomfortable at this approach, viewing that the only gain was assuaging one's own guilt and mitigating a miniscule risk at the expense of the suffering of many others.

Most lawyers favoured taking a consequentialist ethical approach, reasoning that the greatest good would be achieved by not reporting Tomasi – having regard to the impacts of their actions on all parties. Some said that while they would feel conflicted at breaching a professional duty in this way, reporting Tomasi could not possibly result in justice, nor could it result in harmony within their community. This made choosing duty the most damaging outcome to the most amount of people. Others went further, reasoning that reporting Tomasi would achieve nothing and that anyway, Tomasi was not the root of the problem so it would be better to wait for a more opportune time or place to make a stand. Two female lawyers said they would quit their job and leave the country, one of these said that they would still send the money. Most felt they could not report Tomasi, but that they would feel an obligation (perhaps arising from guilt) to increase their efforts to advocate for the protection of women and children – choosing to prioritise long-term 'justice' over short-term 'compliance.' But what did Mary do?

Mary chose to send money to help her family with the wedding preparations, but did not attend in person. She did not report Tomasi, agonised over the decision and ultimately decided to quit her job. Since then, she has worked tirelessly as an advocate for the rights of women and children. Amongst her many achievements, she has established an organisation that enables her to amplify the voices of women and children to address what she and a growing number of women (and men)

¹⁵⁷ Evans, *The Good Lawyer* (2014).

in her country view as ‘unjust and immoral’ cultural practices concerning women. That was Mary’s Choice.

No Pacific Island born lawyer I have spoken with believes she made the wrong choice, just a very difficult one. A central theme of this thesis has been the fact that when faced with difficult ethical choices, lawyers in PICs have few autochthonous resources or tools, such as practice handbooks, to guide them, nor academic training in general morality.¹⁵⁸ This thesis has sought to elevate a few relevant issues and some elementary resources as a contribution to the difficult challenge of ensuring that, in the future, Pacific lawyers will be able to fall back on local resources and robust institutions. It is hoped in future that lawyers like Mary do not face dilemmas such as these alone.

¹⁵⁸ Ibid. Chapter Three pp. 62-80. See fuller discussion of Evans above, p. 153. See also Parker and Evans, *Inside Lawyers’ Ethics* (2018).

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APPENDIX 1 – SAMPLE INTERVIEW SCHEDULE

Sample Interview Schedule

NB Note different/additional questions for:

- Lawyers
- Judicial Officers (Judges, Magistrates, Registry staff)
- Regulator
- Other (Customary/Religious/NGOs/members of the public i.e. business owners)

1. The interviewee has:

Been provided with an information sheet	Yes	
Signed the consent form?	Yes	

2. Background on interviewee

Participant Name					
Male/Female	M		F		

Participant Class	X	Participant Role/title
Private Lawyer		
Government lawyer		
Regulator		
Professional body		
Judicial officer		
Other (specify)		

3. If participant is a lawyer/judicial officer

Year admitted in local jurisdiction	
Place of study LLB	
Place of study PDLP	
Other formal legal training	

4. Can you tell me what you know about the story/history of the legal profession in <country>? (e.g. , its history, growth, key people).
5. Can you tell me about how you came to study law and become a lawyer?
6. How does being a lawyer affect you socially/within your family/community? Do you have additional responsibilities because of your status as a lawyer? (I.e., obligations from income/function, privileges carried by social status as a lawyer, etc)
7. What does be a 'good' lawyer mean to you? (if needed prompt responses on Skills, Knowledge and Attitudes)
8. How/where do lawyers learn how to be a good lawyer? (if needed prompt responses on where they learn Skills, Knowledge and Attitudes).
9. Can you tell me about education/professional development opportunities for lawyers in <country> (e.g. , through mentoring, legal education opportunities organised by the Law Society, government, or others)? Who does/should provide these opportunities?
10. What challenges do <country> lawyers face in accessing professional development opportunities that are relevant to practising law in <country>? (again, if needed prompt on specific relevant skills, knowledge, attitudes identified)
11. One of the official responsibilities of the <regulator> is to uphold the standards of the legal profession through enforcement of rules of conduct/ethics. Can you tell me about how lawyers are regulated by <regulator> in <country>? (Are rules of conduct are enforced formally (examples)?)
12. Can you tell me about the last time that you had a difficult ethical dilemma? What were the circumstances? What did you do to navigate that challenge?
13. What official rules of ethics/conduct do lawyers most often breach? Why do you think they do? (e.g. , Problem with rules (I.e., impossible to always follow)/ circumstances of lawyers (I.e. (personal, professional, extraneous (ICT/electricity/etc))
14. Are and if so, how are rules of conduct/ethics enforced informally? (e.g. , common social forms of informal sanctions might include shame, criticism and disapproval from colleagues (this can influence a lawyers' future behaviour). I am also interested in other

non-state systems for influencing lawyer conduct (e.g. , the use of customary dispute resolution processes).

Additional Questions

15. Please provide an example – or examples – of what you would consider to be a ‘minor’ breach of legal ethics? (unprofessional conduct, e.g. , Poor client communication)
16. Please provide an example – or examples – of what you would consider to be a ‘major’ breach of legal ethics/conduct rules? (‘major’ disciplinary issues (professional misconduct, e.g. , Theft of client money)
17. Do you think clients are generally aware of their lawyers’ duties and obligations? Do you think clients are generally aware of the procedures for filing a complaint? Explain?
18. What, in your opinion, makes regulation of lawyers difficult/easy in <country>?
19. What, changes would you like to see to existing systems of lawyer regulation, education and training to change in a beneficial way? What would help that change to occur?

APPENDIX 2 – ADMISSION TO PRACTICE IN THE PACIFIC REGION¹

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Cook Islands (Practitioner)	Cook Islands Law Society (CILS).	Chief Justice.	Yes; or sound knowledge of Cook Islands law.	21 years	Not specified.	Fit and proper person.	The Council of CILS may require the applicant to attend before the Council for an interview.	Australia; New Zealand; or any other Commonwealth country named by the Minister.

¹ This table is adapted from South Pacific Lawyers' Association, 'Legal Profession Regulation in the South Pacific' (2017), 36-9. It has been updated to reflect changes in the *Lawyers and Legal Practice Act 2014* (Samoa) and *Legal Practitioners Act 2019* (Nauru), *Legal Practitioners (Practicing Certificates) Rules 2019* (Nauru).

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Federated States of Micronesia (Attorney)	Not specified.	Not specified.	Each applicant shall be a resident or domiciliary of the Federated States of Micronesia, or a Federated States of Micronesia citizen.	Not specified.	A citizen applicant must satisfy one of four experience or education standards: Bar membership standard; Law School Graduation Standard Experience and Competency Standard Trial Counsellor Certificate Program Standard	Conviction of any crime or violation of professional ethics or responsibilities will prohibit admission. If any such charge is pending, full disclosure is required.	Examination: Any person wishing to become an attorney must pass a written exam.	A non-citizen applicant may sit the written exam if they submit to the Court a certificate of good standing establishing that the applicant is in good standing as an attorney eligible to practise law before the highest court in all jurisdiction(s) in which the applicant is, or has been, licensed to practise. Citizen applicants may qualify to sit the exam based on qualifications obtained overseas.

Appendix 2

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Fiji (Legal Practitioner)	Legal Practitioner's Unit / Chief Registrar.	Chief Justice.	An applicant must have been a resident in Fiji for a period of at least 3 months prior to applying.	Not specified.	An applicant must: have satisfactorily completed a course of legal study approved by the Board of Legal Education and approved practical training and obtained a certificate from the Board that his/her educational qualifications are sufficient to qualify for admission.	Fit and proper person.	n/a	Not specified.
Kiribati (Legal Practitioner)	Attorney-General. High Court.	Chief Justice.	The Act and Rules are silent on this issue.	Not specified.	The Act and Rules are silent on this issue.	Fit and proper persons to be admitted.	Applicant must satisfy the Attorney-General as to both their qualification and fitness.	For 'students at law' a law degree obtained in a common law country. Otherwise, the same as for local lawyers.

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Republic of the Marshall Islands (Lawyer)	Not specified.	Not specified.	Residency, citizenship or maintenance of an active practice in the Marshall Islands is required.	21 years	In order to sit the bar exam an applicant must have graduated from an approved law school. Approved law school means: any law school approved by the American Bar Association; or a law school in a common law nation other than the United States; or any other law school approved by the Supreme Court.	Cannot be admitted if convicted of criminal charge or any charge of violation of professional responsibility. Any such charge(s) must be disclosed when applying.	Must pass a written exam selected, developed and administered by the Supreme Court.	Graduates of 'approved law schools' (all of which are outside the Marshall Islands) may be admitted after passing the bar exam.

Appendix 2

Jurisdiction (Title used for lawyers)		Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
				Residency	Age	Qualification / Education	Character	Other	
Nauru	(Barrister and Solicitor)	Supreme Court.	Chief Justice.	Residency not required. An office or chambers must be maintained in Nauru and a barrister and solicitor must practise there one in every three months.	21 years	A degree in law from a 'designated country'; and more than 12 months experience as a pleader in Nauru; or admission to practise in an approved foreign country.	Fit and proper person to practice law.	United Kingdom; Republic of Ireland; Australia; New Zealand; or any other country specified by the Minister.	Legal experience: an applicant must have completed either: one year of practice in an approved country; one year's pupillage; one year's work in the office/chamber of a solicitor/barrister; or, a course of practical legal training.
	(Pleader)			Must ordinarily reside in Nauru.	Not specified.	An applicant must have undergone such training as the Chief Justice may prescribe from time to time by rules.		n/a	Examination(s): an applicant must pass such examinations as the Chief Justice may from time to time by rules prescribe.

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Palau (Attorney)	Not specified.	Not specified.	Not required.	Not specified.	An applicant must have graduated from an accredited law school in the US (or its territories or possessions) or other foreign country.	Is of 'good moral character,' as demonstrated by a certificate of good standing. Has never been convicted of a felony or, if so convicted, has received a full pardon.	Examination: has taken and passed a bar examination administered by the Supreme Court of Palau or its designee.	Not specified.
Papua New Guinea (Lawyer)	National Court. Admissions Council.	National Court.	Not specified.	Not specified.	Must have obtained a Bachelor of Laws from the University of Papua New Guinea or other qualification equivalent in standard.	Fit and proper person to be admitted as a legal practitioner in Papua New Guinea.	n/a	United Kingdom and Northern Ireland, Australia and New Zealand.

Appendix 2

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Samoa (Barrister Sole, Solicitor or Barrister and Solicitor)	Supreme Court. Council of the Samoa Law Society.	Supreme Court.	An applicant must be a citizen of Samoa.	21 years	A candidate must hold the prescribed academic or professional qualifications in law (as under the repealed Act, or determined from time to time by the Council). Must also demonstrate a knowledge of Samoa laws and practice.	‘Of good character’ as determined by the certificate issued by the Council of the Samoa Law Society, with respect to issues such as whether there is disciplinary action pending.	Interview: The Council may require the applicant to attend for an interview and answer such questions and provide such information as the Council thinks proper.	Academic and/or professional qualifications obtained in any country/territory/jurisdiction, which, in the opinion of the Council, has a legal system similar to that of Samoa, may be recognised.
Solomon Islands (Legal Practitioner)	Chief Justice of the High Court	Chief Justice of the High Court	Not specified.	Not specified.	Qualification is required although the Act is silent on what is required to be qualified.	Fit and proper person to be admitted.	n/a	Not specified.

Jurisdiction (Title used for lawyers)	Administering Authority	Granting Authority	Requirements for Admission					Admission via recognition of Foreign Qualifications
			Residency	Age	Qualification / Education	Character	Other	
Tonga (Law Practitioner)	Not specified.	Not specified.	No. However, an applicant must intend to practise in Tonga as a law practitioner.	Not specified.	An applicant must have obtained sufficient professional knowledge and experience and completed training in a common law jurisdiction.	Must satisfy the Chief Justice of his/her character and his/her suitability to be a law practitioner	n/a	Not specified.
Tuvalu (Legal Practitioner)	Legal Practitioners Committee	Legal Practitioners Committee	Not specified.	Not specified.	Be a qualified law graduate; and Hold a Certificate of professional legal training or practice.	Fit and proper person	Excluded if cumulative periods of incarceration of more than 12 months.	Proof of prior admission as a barrister or solicitor in England plus five years immediate practice experience.
Vanuatu (Barrister and Solicitor)	Vanuatu Law Council	Chief Justice/ Registrar of Supreme Court	For admission no. But, must be resident for practising certificate.	Not specified.	Not specified.	An applicant must not be suspended for practice.	n/a	Not specified.

APPENDIX 3 – STATUTORY COMPLAINTS PROCESS IN KIRIBATI

Procedure for making a complaint about a lawyer in Kiribati

