

DEVELOPMENT BANK OF KIRIBATI V MAITINNARA [2015] KICA 2; CIVIL APPEAL 02 OF 2015 PATERSON, BLANCHARD AND HANDLEY JJA

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Development Bank of Kiribati v Maitinnara [2015] KICA 2¹ is a significant case because it is the only time the Kiribati Court of Appeal has considered rules of professional conduct and practice for lawyers in Kiribati. The decision of the Kiribati Court of Appeal upheld the validity of a percentage-based costs agreement which was entered into before the *Professional Conduct and Practice (Kiribati Lawyers) Rules* 2011 ('Code of Ethics')² came into force. The decision itself was not controversial. However, in its judgment, the Court made a number of statements on the interpretation and applicability of the Code of Ethics and the *Kiribati Law Society Act* 2006 ('KLS Act')³. This has led to disagreement and debate by lawyers in Kiribati over the legal and binding status of the Code of Ethics. The contention regarding the validity or applicability of the rules defining competent and ethical practice in Kiribati has undermined the regulatory role of the Kiribati Law Society ('KLS'). In the wake of the *Maitinnara* decision it may be timely 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.

FACTS

The Respondent, Botika Maitinnara, a lawyer, entered a general costs agreement ('Master Agreement') with the Development Bank of Kiribati ('DBK') dated 7 January 2011, which was to govern particular retainers to be determined by

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¹ *Development Bank of Kiribati v Maitinnara* [2015] KICA 2 <http://paclii.org.vu>

² Kiribati Law Society, *Professional Conduct and Practice (Kiribati Lawyers) Rules* 2011.

³ *Kiribati Law Society Act* 2006 (Kiribati) (hereinafter 'KLS Act').

DBK from time to time.⁴ After signing the Master Agreement, DBK retained Maitinnara to recover debts against Onotoa Shipping and General Services Cooperative Society Ltd ('Onotoa'). A provision of the Master Agreement provided that Maitinnara would be entitled to receive an agreed commission of 5% of the amount of debt recovered in such cases. Maitinnara had commenced proceedings on behalf of DBK against Onotoa which resulted in Onotoa approaching DBK to seek settlement. Settlement was successful and achieved without Maitinnara's presence. DBK refused to pay the commission and Maitinnara brought action against DBK for recovery of amounts owing under the costs agreement.

At trial in the High Court,⁵ DBK claimed the commission was unreasonable due to a lack of work by Maitinnara. DBK also sought to rely on Rule 41(1) of the Code of Ethics which prohibits lawyers from entering cost agreements that include a percentage-based commission on costs recovered. Based on evidence provided by Maitinnara, the trial judge rejected DBK's claim that the commission was unreasonable due to a lack of work. The trial judge also rejected DBK's claim that Rule 41(1) applied to prevent Maitinnara from charging DBK a percentage-based commission on costs recovered. The trial judge held that Maitinnara was entitled to receive the commission because DBK failed to prove on the balance of probabilities that both the Master Agreement and any particular retainer governing recovery of the Onotoa debt were entered into after the Code of Ethics came into effect. Maitinnara was awarded \$25,178.50 being 5% of the relevant amount recovered. DBK appealed to the Court of Appeal.

THE APPEAL

The Court of Appeal dismissed the appeal and accepted that Rule 41(1) of the Code of Ethics did not prevent Maitinnara from receiving a percentage-based commission on costs recovered by DBK from Onotoa. The legal issue was whether or not Rule 41(1) operated to invalidate the Master Agreement between Maitinnara and

⁴ Curiously at trial in the High Court the date 15 December 2010 is given as the unequivocal date the Master Agreement was signed and no mention of the date '7 January 2011' appears. The date preferred by the Court of Appeal has been used for the purpose of this case note.

⁵ *Botika Maitinnara v Development Bank of Kiribati* (Unreported, High Court of Kiribati, Civil Case no 7 of 2013, 13 November 2014, Muria CJ.

DBK, or any specific retainer agreement regarding the Onotoa debt. The Court of Appeal held it was unnecessary to rule on this point because the Master Agreement was signed on 7 January 2011, before the Code of Ethics was signed by the President of the KLS on 21 January 2011, and could have come into force.⁶ Further, DBK failed to establish that any specific retainer regarding the Onotoa debt was created after 21 January 2011 – when an agreement for percentage-based commissions on amounts recovered would have breached Rule 41(1) provided the Code of Ethics were in force.⁷

The Court was not aware of a commencement date for the Code of Ethics and determined that if the Code was currently in force, it came into force after they were signed by the President of the KLS on 21 January 2011.⁸ The Code of Ethics could not be applied retrospectively to the Master Agreement signed on 7 January 2011. Accordingly, charging a percentage-based commission at that time was not in breach of the Code of Ethics.

At paragraph 8 and 9 of its judgment the Court of Appeal considered the interpretation and applicability of the Code of Ethics and the KLS Act:

*8. The Rules were signed by the President of the Law Society on 21 January 2011. We were provided with a copy of the Rules but neither Counsel nor the Court could identify any provision which fixed **the date they came into force which was probably some time after 21 January. They were made by the Law Society under s.8 of the Kiribati Law Society Act 2006 without any requirement for the approval of the Beretitenti of the Republic or the Attorney General. They do not have the legal status of Regulations as delegated legislation made pursuant to s.25 of the Act.***

*9. **The Rules appear to form part of the consensual compact between the Society and its members, and between the members inter se. If so, a breach of the Rules may not make the contract unlawful. The only consequence could be to expose the offender to disciplinary action by the Society or the Court. It would follow that a breach of Rule 41(1) would not make the relevant "costs agreement" illegal and void. The***

⁶ *Development Bank of Kiribati v Maitinnara*, above n 1, 10.

⁷ *Development Bank of Kiribati v Maitinnara*, above n 1, 11. The Court of Appeal did not question whether or not the Code of Ethics had entered into force, although the Court noted it could not determine its precise commencement date.

⁸ *Development Bank of Kiribati v Maitinnara*, above n 1, 8.

point was not argued, and the appeal can be disposed of without the need to deal with it or express any view about it. [emphasis added]

It is necessary to note that paragraphs 8-9 were *obiter dicta*. However, they have unfortunately led to vigorous debate between lawyers in Kiribati on both the binding nature of the Code of Ethics on lawyers in Kiribati and the power of the KLS to regulate lawyers.⁹ Debate has centred around two main contentions:

- A. The Code of Ethics, by not having the status of Regulations pursuant to s. 25 of the KLS Act, is not *legally* binding on any lawyers in Kiribati.
- B. To the extent that the Code of Ethics is enforceable against lawyers it is only enforceable against members of KLS.

A third proposition arose in the course of researching this paper:

- C. The Code of Ethics is not binding because it was not adopted at a validly constituted General Meeting of KLS.

It is argued that provided the Code of Ethics was adopted at a validly constituted General Meeting of the KLS, it is binding on all admitted lawyers in Kiribati. Given the issues arising from this case and this paper, it may be timely for the KLS to engage in a dialogue with the entire legal profession of Kiribati regarding the Code of Ethics and more broadly on the regulation of lawyers in Kiribati under the KLS Act.

IS THE KLS CODE OF ETHICS BINDING ON THE KIRIBATI LEGAL PROFESSION?

The Code of Ethics is not legally binding, but it is enforceable

At paragraph 8 of its judgment, the Court of Appeal noted that the Code of Ethics was not law. Therefore, even if the Master Agreement or a specific retainer breached the Code of Ethics, it could not be held to be ‘illegal and void’ – as DBK had sought to argue. The Code of Ethics expresses the normative values of the legal profession, a breach of which may be punishable in the form of disciplinary action by

⁹ Interviews (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

the KLS pursuant to its objects under section 5 of the KLS Act. Accordingly, the fact that the Code of Ethics is not delegated legislation and therefore is not *legally binding* is irrelevant to whether or not a lawyer may be sanctioned for breaching them.

In the hypothetical situation that the Master Agreement or a specific retainer regarding the Onotoa debt was entered into after the Code of Ethics entered into force, it would have breached the Code of Ethics.¹⁰ In this situation, the correct approach for DBK to seek remedy would be to file a complaint against Maitinnara with the KLS alleging that Maitinnara had breached the Code of Ethics by entering into a costs agreement that offended Rule 41(1) and was not entitled to receive a percentage-based commission.¹¹ If, after following the processes set forth in ‘Part III Professional Conduct’ of the KLS Act, a Professional Conduct Committee agreed that Maitinnara had breached Rule 41(1), it could make an order to reduce Maitinnara’s fee by the percentage-commission, or to refund to DBK any commission that it had already paid to Maitinnara.¹²

The Code of Ethics is enforceable (by a Professional Conduct Committee, not by a Court) against those to whom the Code of Ethics applies by operation of the statutory scheme prescribed in the KLS Act. Consequences for breach of the Code of Ethics¹³ can range from an order for apology to striking off. But, against whom is the Code of Ethics enforceable?

The KLS is responsible for control and regulation of all admitted lawyers in Kiribati

Scope of KLS’s power to regulate lawyers

Section 5(d) of the KLS Act empowers the KLS to ‘control and regulate the practice in Kiribati by lawyers of the profession of the law, and ensure compliance with the Code of Ethics.’ Section 5(d) is notable as it does not explicitly limit KLS’s statutory duty to only regulate members. Section 5(d) may be contrasted with provisions surrounding it, specifically Sections 5(a), 5(b), 5(c) and 5(e), which

¹⁰ *Development Bank of Kiribati v Maitinnara*, above n 1, 11

¹¹ In accordance with Section 13(1)(b) of the KLS Act, above n 2.

¹² pursuant to the powers granted by sections 20(c)(i) and (ii) of the KLS Act, above n 2.

¹³ Or for breach the fundamental obligations of lawyers in s11 of the KLS Act, above n 2.

explicitly restrict the scope of KLS's activities to members. Section 5 states the objects of the society shall be to:

- (a) *safeguard and promote the interests of its **members***;
- (b) *Uphold the honour, dignity, reputation and independence of its **members***;
- (c) *Further the interests of its **members** ...*;
- (d) *control and regulate the practice in Kiribati by **lawyers of the profession of the law**, and ensure compliance with the Code of Ethics*;
- (e) *uphold standards for the education... of its **members**... (**emphasis added**)*.

The scope of authority of KLS to control and regulate the practice of law clearly extends not just to members, but to all 'lawyers of the profession of the law.' Section 2 of the KLS Act defines a 'lawyer' as a person 'admitted to practise as a legal practitioner of the High Court [of Kiribati] under the Admission Rules.' It is apparent that KLS's obligation to control and regulate lawyers extends to all lawyers admitted under the Admission Rules. In Kiribati, private practitioners, in-house counsel and government lawyers are all admitted as legal practitioners under the *Lawyers' Admission (Amendment) Rules (No. 2) 1992 (Kiribati)*.¹⁴ There is no statutory provision that grants immunity from discipline for a breach of the Code of Ethics to any person other than the Attorney-General or a judicial officer.¹⁵ The proposition that any lawyer is excluded from regulation by the KLS could only be sustained if the lawyer is not part of 'the profession of the law.' Unfortunately, the KLS Act provides no express definition of 'the profession of law'. It is therefore necessary to consider what might be meant by this term.

What is 'the profession of law'?

A 'profession' is a term used by sociologists to refer to the 'numerous occupational groups' that by virtue of their specialised 'education, training, experience and tacit knowledge;' and shared normative value system; are given a 'market

¹⁴ *Lawyers' Admission (Amendment) Rules (No. 2) 1992 (Kiribati)* <http://paclii.org.vu>

¹⁵ 'Exempt members' are listed in schedule 2 of the KLS Act, above n 2.

monopoly' over, in this case, the practice of law.¹⁶ 'Professionalism requires professionals to be worthy of that trust, to maintain confidentiality and conceal such guilty knowledge by not exploiting it for evil purposes.'¹⁷ At its broadest, the term 'legal profession' can refer to all occupations which require some form of specialised training in law, including judges, paralegals, legal secretaries, solicitors, barristers, etc.¹⁸ At its narrowest, it typically refers to those duly admitted and licensed as legal practitioners, regardless of whether or not they presently occupy positions as lawyers in private law firms, community legal centres, government law offices, the military, etc.¹⁹

The intention of the *Maneaba ni Maungatabu* ('Parliament') that the KLS should regulate all lawyers in Kiribati is made clear in the Explanatory Memorandum to the *Kiribati Law Society Bill 2006* (Kiribati) which states 'This Bill provides for the establishment of a Kiribati Law Society and for dealing with unprofessional or unethical conduct **by any lawyer**.'²⁰ As noted already, the KLS Act defines a lawyer as all persons 'admitted to practise as a legal practitioner of the High Court under the Admission Rules.'²¹ There should therefore be no doubt that the KLS is empowered by section 5(d) to regulate all lawyers duly admitted in Kiribati and ensure their compliance with the Code of Ethics.²²

¹⁶ Julia Evetts, 'The Sociological Analysis of Professionalism: Occupational Change in the Modern World' (2003) 18(2) SAGE 395–415, 410. See also Terence Halliday *Beyond Monopoly Lawyers, State Crises and Professional Empowerment* (1987).

¹⁷ Julia Evetts, above n 16, 400.

¹⁸ See for example the overview of the duties and differences between legal professionals provided by The Law Society of England and Wales <https://www.lawsociety.org.uk/for-the-public/legal-professionals-who-does-what/> (accessed 7 September 2019), or the comprehensive explanation of the legal profession provided by Encyclopaedia Britannica, referring in common law jurisdictions to <https://www.britannica.com/topic/legal-profession#ref65821> (accessed 17 September 2019).

¹⁹ See for example the portals for different sectors of the American legal profession provided by the American Bar Association (peak body of the legal profession in the USA). https://www.americanbar.org/portals/government_public_sector_lawyers.html (accessed 19 September 2019).

²⁰ Explanatory Memorandum, *Kiribati Law Society Bill 2006* (Kiribati), 1. (**emphasis added**).

²¹ KLS Act, section 2 (definition of 'lawyer').

²² The KLS's power to regulate lawyers excludes the AG and judges (listed in Schedule 2). The KLS is also not empowered to regulate lay people - although section 23 creates an offence for lay people to hold themselves out as lawyers (except where they are paralegals employed by a lawyer or the Government with leave of the Chief Justice – section 23(2)).

The Code of Ethics applies to all admitted lawyers in Kiribati

The *Maitinnara* decision has given rise to confusion regarding the application of the Code of Ethics to non-members of the KLS due to what appears to have been a mistake by the Court of Appeal.²³ At paragraph 8, the Court of Appeal incorrectly asserted that the KLS created the Code of Ethics²⁴ using powers granted by section 8 of the KLS Act. However, there is no power under section 8 of the KLS Act for the KLS to create a Code of Ethics. Section 8 of the KLS Act refers only to the making of ‘Rules of the Society’ ‘for the conduct of the Society’s affairs’²⁵ providing for such things as the procedures for meetings and membership fees.²⁶ The Court of Appeal’s mistake was not merely typographical. At paragraph 9 the Court of Appeal asserted that the Rules ‘appear to form part of the consensual compact between the Society and its members, and between the members inter se...’²⁷ Unfortunately this statement has been interpreted by some lawyers in Kiribati as indicative that the Code of Ethics applies only to members of the KLS.²⁸

The Code of Ethics was in fact made by the KLS pursuant to its obligation under section 12 which provides:

12. Code of Ethics

(1) Within six months of the date of the first general meeting of the Society, the Society shall convene a general meeting for the purpose of adopting a Code of Ethics for lawyers.

(2) The Code of Ethics may be amended only at a general meeting of the Society.

(3) The Society must make a copy of the Code of Ethics available for public inspection and purchase during office hours. (emphasis added).

Section 12 was not mentioned at all by the Court of Appeal, yet it is clear from a reading of sections 8 and 12 of the KLS Act that the Code of Ethics could only have come into force by operation of section 12. Section 12(1) of the KLS Act specifically

²³ Interviews (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

²⁴ or ‘Rules of Conduct’ in the words of the Court of Appeal.

²⁵ KLS Act, section 8(1).

²⁶ For example, section 8(2)(a) of the KLS Act specifies the ‘Rules of the Society’ shall provide for ‘(a) the manner of convening of general meetings of the Society and of meetings of the Council and any committee, and the quorum and procedures thereat.’

²⁷ *Development Bank of Kiribati v Maitinnara*, above n 1, 9.

²⁸ Interviews (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

empowers and obligates the KLS to create a Code of Ethics ‘for lawyers.’ Given both the definition of ‘lawyer’ under section 2 of the KLS Act and the intention of Parliament discussed above, the Code of Ethics clearly applies to all lawyers admitted to practice under the Admission Rules. Thus, the Code of Ethics is not part of a consensual compact between just the Society and its members, but **between the Society and all admitted lawyers in Kiribati**. There is no legal basis for any lawyer admitted in Kiribati to reject the applicability of the Code of Ethics to their conduct.

The Code of Ethics entered into force in April 2011

The Court of Appeal concluded that the Code of Ethics came into force ‘probably some time after 21 January.’²⁹ The word ‘probably’ denotes some uncertainty is this sufficiently certain for a future Professional Conduct Committee to apply the Code of Ethics as part of a disciplinary process? There are two notable points of doubt regarding whether or not the Code of Ethics has entered into force: As noted by the Court of Appeal, the Code of Ethics does not contain a provision which fixed the date it was to come into force, putting into doubt whether it ever did; and The Code of Ethics were not adopted by KLS within six months of its first General Meeting.

Date of entry into force

KLS has no official records of the Society dating back to 2011.³⁰ However, persuasive evidence exists which substantiates the fact that the Code of Ethics was adopted by the KLS in early 2011 and the fact that it entered into force thereafter. In 2010-2011, draft versions of the Code of Ethics were debated by the KLS Council and public consultations took place with members of the legal profession and other stakeholders.³¹ Correspondence in 2013 between the author and the then President of the KLS confirms that the Code of Ethics was adopted at a General Meeting of the KLS

²⁹ *Development Bank of Kiribati v Maitinnara*, above n 1, 8.

³⁰ Inquiries made to the current Executive of KLS between 5 July and 10 September 2018.

³¹ Interview with former member of KLS Council (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

in 2011.³² Metadata on an electronic copy of the Code of Ethics corroborates the fact that someone intended the rules to be in a final form as at 21 January 2011 – the date the Court of Appeal took the Rules to have been adopted by KLS.³³ Perhaps most definitively, in its Country Report to the 30th PILON Conference held in Auckland, New Zealand, from 4-6 December 2011, the Attorney-General's Office of Kiribati reported that the KLS had 'adopted a Code referred to as the Professional Conduct and Practice (Kiribati Lawyers) Rules which was adopted and came into effect on 1st day of April 2011.'³⁴ It can be said with near certainty that the Attorney-General of Kiribati was satisfied that the Code of Ethics entered into effect from 1 April 2011.

Is the 2011 Code of Ethics invalid because it was not adopted within six months of the first KLS General Meeting?

It is unlikely a Court would accept an argument that the April 2011 Code of Ethics is invalid due to a delay in their adoption. To hold such would be inconsistent with the fundamental purpose of the KLS Act.

The first General Meeting of the KLS was held in March 2008.³⁵ Section 12 requires the KLS to have convened a 'General Meeting for the purpose of adopting a Code of Ethics for lawyers within six months of the date of the first General Meeting of the Society.' Section 12 does not require the KLS to adopt a Code of Ethics at this General Meeting, it merely requires the KLS to convene a General Meeting for the purpose of adopting a Code of Ethics for lawyers. Due to the KLS's incomplete records, it is not possible to verify if such a meeting was convened before September 2008. If

³² Correspondence on file with author dated Wednesday 2 October, 2013 with Sister Bernadette Eberi, then President, Kiribati Law Society. Regrettably, this correspondence does not specify the date of the General Meeting, simply that the Rules (attached to the correspondence) were adopted in a General Meeting in 2011.

³³ The author reviewed the file properties of the electronic 'pdf' version of the Code of Ethics he received from the President of the KLS on 2 October 2013. The file properties show it was created at 10:44:06PM on 20 January 2011. The document's author is 'Nauoi' – the name of a computer store in Betio where, it is presumed, a soft copy of the file was converted into a pdf. While not evidence of a General Meeting, the pdf creation date and time corroborates that someone intended the rules be in a final form as at 21 January 2011.

³⁴ Kiribati Country Report, 30th Meeting of the Pacific Islands Law Officers' Network, 4-6 December 2011, Auckland, New Zealand.

³⁵ Kiribati Country Report, 28th Meeting of the Pacific Islands Law Officers' Network, 12-16 December 2009, Apia, Samoa, 4.

such a General Meeting occurred, the ‘six-month’ requirement in section 12 of the KLS Act was likely satisfied and the 2011 Code of Ethics is valid.

Even if no General Meeting for the purpose of adopting a Code of Ethics took place within six months of the first General Meeting, it is likely the 2011 Code of Ethics remains valid. The ‘golden rule’ of statutory interpretation may be applied when the literal interpretation of the words in a section would lead to a manifest absurdity.³⁶ A literal interpretation of the words in section 12 ‘Within six months of the date of the first General Meeting of the Society’ would give rise to the ‘absurd’ situation that the primary tool for disciplining lawyers is invalid solely because it took longer than expected to adopt. It would prevent the Code of Ethics from ever being created and thwart the primary purpose of the KLS Act.³⁷ Applying the golden rule, it is highly likely a court would modify the words of section 12 ‘so as to avoid the absurdity and inconsistency, but no farther.’³⁸ One way to do this might be by omitting the words ‘Within six months of the date of the first General Meeting of the Society’ from section 12. This can be done without affecting the intention of Parliament that the Code of Ethics be adopted expeditiously.

Adopting a purposive approach to interpreting section 12 of the KLS Act is likely to yield a similar result. In Kiribati many laws and regulations are delayed from entering into force or from full implementation, sometimes for many years. Given the social, political and economic context of Kiribati as a Small Island Developing State, there are many well-founded explanations for such delays. In the case of the Code of Ethics, Parliament is unlikely to have intended that the new framework for regulating lawyers lack an enforceable Code of Ethics simply because it took longer than anticipated to convene a General Meeting of the KLS. Further to this, as noted elsewhere, both the Court of Appeal and the Attorney-General of Kiribati agree that the Code of Ethics came into force in early 2011.

³⁶ *Grey v Pearson* (1857) 6 HLC 61; *Adler v George* [1964] 2 QB 7.

³⁷ The express purpose of the KLS Act is to ‘provide for the taking of disciplinary action against lawyers, and for related matters.’ KLS Act above n 2.

³⁸ *Grey v Pearson* above n 36, 106.

The only remaining issue that might impeach the validity of the Code of Ethics is if the General Meeting at which they were adopted was not validly constituted.

Was the General Meeting in 2011 valid?

The President of the KLS in 2011 was Michael Takabwebe who was appointed at the inaugural General Meeting in March 2008. Section 7(3) of the KLS Act grants discretionary power to the President of the KLS to call General Meetings at a time and place appointed by the President. Provided this was done the calling of a General Meeting in 2011 would have been valid.

To be validly constituted, a General Meeting of the KLS would need to have conformed to relevant rules and procedures governing General Meetings of the KLS, in particular rules regarding quorum and the conduct of the Meeting. Members of the current the KLS Council are unaware of the existence of Rules of the Society which might specify things such as quorum for a General Meeting.³⁹ In accordance with section 8 of the KLS Act, Rules of the Society are required to have been created by the first KLS Council. In 2009, at the 28th PILON Conference held in Apia, Samoa, from 12-16 December, the Kiribati Office of the Attorney-General reported that the inaugural General Meeting of KLS was held in March 2008 and noted that ‘KLS Rules’ together with a ‘Code of Conduct’ were ‘currently being drafted.’⁴⁰ However, the KLS Rules were either never created, or never put to a General Meeting.⁴¹ Accordingly, the General Meeting could not have conformed to the relevant Rules of the Society. Notwithstanding this, the General Meeting in 2011 may nevertheless have been validly constituted if it followed generally accepted conventions of the KLS concerning the quorum and conduct of General Meetings.

Without a working knowledge of the KLS’ General Meetings it is not possible to articulate precisely what conventions might govern them. General Meetings have in

³⁹ Interviews with current and former members of KLS Council (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

⁴⁰ Kiribati Country Report, above n 35, 4.

⁴¹ Interviews with former member of KLS Council (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

the past been deferred because of a lack of quorum.⁴² Given that the KLS has had three Presidents since its creation, it appears that generally accepted conventions have arisen regarding required notice for meetings, the election of Council members and voting procedures. In the absence of minutes or records of the meeting, it is not possible to definitively state that they were followed in 2011. Notwithstanding, it is nearly certain a General Meeting of the KLS took place in early 2011 to consider the Code of Ethics. In the absence of any contrary evidence it is highly likely the 2011 General Meeting conformed to established conventions of the KLS regarding the quorum and conduct of General Meetings. This leaves little room to argue that the Code of Ethics is not in force, or is not binding on all lawyers in Kiribati despite any confusion caused by the *Maitinnara decision*. Any breach of the Code of Ethics may give rise to sanction by a Professional Conduct Committee, notwithstanding any barriers to the formation of a Committee and its effective operation.

CONCLUDING REMARKS

Close scrutiny of judicial decisions by academics, the media and practitioners is relatively rare in small Pacific Island countries. Such scrutiny is important because, as the *Maitinnara decision* demonstrates, even immaterial errors in judicial decisions can influence the interpretation and application of laws. As both laws and the legal profession in the region continue to develop, the importance of analysing, dissecting and discussing the decisions of superior courts increases. This challenge is one that must be taken up by Pacific lawyers, law societies, academics and legal researchers.

For the KLS Council, the *Maitinnara decision* and this analysis bring to light issues which ought to be addressed. For example, it would be beneficial to locate any Rules of the Society, or to convene a General Meeting to approve Rules of the Society as soon as is practical. Further to this, the KLS may wish to recirculate the Code of Ethics to all lawyers in Kiribati and engage with the profession on the contents of the

⁴² Interviews with current and former members of KLS Council (South Tarawa, Kiribati, conducted between 5 July and 10 September 2018).

Code of Ethics to ensure they reflect the values and principles of the Kiribati legal profession.

Considered discussion by I-Kiribati lawyers on what the values and principles of the Kiribati legal profession are or should be is vital to developing both the profession and a regulatory environment that encourages and supports compliance. Developing or reforming the Code of Ethics may be the best way for that discussion to take place. But, as Sir Gerard Brennan, former Chief Justice of Australia cautions, simply codifying rules of ethics is no substitute for a profession whose members believe in and practice in accordance with the principles on which they are based. He said:

The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the barrister knows he or she should do: ethics are what the barrister does. They are not so much learnt as lived.

Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion. There is no really effective forum for their enforcement save individual acceptance and peer expectation.

However, among those who see themselves as members of a profession, peer expectation is sufficient to maintain the profession's ethical code. Ethics give practice expression to the purpose for which a profession exists, so a member who repudiates the ethical code in effect repudiates members of the profession.⁴³

⁴³ Sir Gerard Brennan *Ethics and the Advocate*, Speech delivered at Bar Association of Queensland, Continuing Legal Education Lectures, Brisbane, 3 May 1992.