

“Released 18 March 2009: This is the judiciary’s initial response to the IBA Report on the rule of Law in Fiji. An individual response from the Chief Justice will be released later.”

A “Moon hoax”: IBA’s Fiji Report

Since time immemorial men and women often wondered whether there was life on the moon. It was only when two human beings actually walked on the moon on 20 July 1969 that this question was finally answered. The answer could not be found by remote control.

So it is with the recent IBA report on the rule of law in Fiji. The IBA admits that it is a “remote review”. That is, that none of the five member IBA team actually stepped inside a court house in Fiji.

It is 40 years this year since the first human beings walked on the moon. Despite the conspiracy theorists saying it all happened in a movie studio, we know that the astronauts brought back with them to Earth hard evidence - “841 pounds of Moon rock” which scientists around the world have confirmed could not have come from earth.

Just as NASA’s web site refuses to waste its time and resources doing a “a point by point rebuttal to the conspiracy theorists of a Moon hoax” stating that “moon rocks and common sense prove Apollo astronauts really did visit the Moon”, so too is the Judiciary’s response to the IBA report. Rather than wasting our time dealing with the unsubstantiated claims of disgruntled “conspiracy theorists” and their politically-inclined sources, we deal only with the flawed methodology and some key issues which demonstrate the false deductions.

It can be said that even a cursory glance at the IBA report will show that it is flawed in three ways – in its moral authority to hold an enquiry at all into Fiji’s judiciary, in the methodology and style adopted, and in the body of its contents.

What is the IBA? It might use the word “international” in its title but this is not an international body formed by nation states. It is a private group of lawyers. Despite its claim to be “the global voice of the legal profession”, its report reveals it represents only “30,000 individual lawyers” worldwide whereas in the USA alone, there are over 1 million lawyers.

Who was on the delegation? The report suggests the IBA normally appoints “a high-level delegation of respected jurists”. Other than naming a judge from Australia, the “level” of the other members is unstated. Was it just another junket of “conflict entrepreneurs” mainly from first world countries who fly around telling the third world to pull up their socks? Who do these conflict entrepreneurs represent other than themselves? The delegation of five comprised at least three white Australians, a token Malaysian and an unknown other. Significantly, the report is silent on how the team was chosen.

The report claims that the IBA has “a long history of monitoring Fiji”. If that is so, then where was the IBA from 1987 until 2001? Where was the IBA monitoring the litigation which arose out of the 2001 and 2006 elections? Where was the IBA during the Qarase v Bainarama case in March 2007?

As to methodology, did the IBA ask their sources whether they have been closely connected to political parties, institutions or causes? If so, why is this not cited in the report? If the IBA spoke with lawyers as to specific cases in which they have appeared, did the IBA then speak with the lawyers to whom they were opposed in an attempt to achieve a balanced view? Did the IBA delegation even pause and consider whether their “legal” sources might be disgruntled because of a loss of power, money and influence? Did the IBA even stop and question as to who was benefiting from the previous practices of non-random case allocation, “judge shopping” and closed courts?

The IBA has questioned why judges would not talk with the delegation after the IBA’s proposed visit was declined. Does it really need to be spelled out for a supposedly “high-level delegation”? To put it bluntly, judges cannot discuss matters which are, or are likely to be, before the courts (including immigration disputes), something which the IBA report seems to have been oblivious to and, indeed, which it has decided to indulge in with little thought for the repercussions.

The report also cites a recent contempt case involving the media. It mentions an apology and an admission but fails to spell out in clear and plain language that the accused pleaded guilty. That is not the only half-truth or “spin” in the report. Indeed, it is littered with them.

Take for instance the selective use of media reports. It is ironical that the delegation claims to have been the subject of inaccurate media reports but then puts forward other media reports as the alleged “truth” on certain issues. So on the one hand inaccurate media reports which denigrate the judiciary are to be accepted but those which are inaccurate as to the IBA’s attempted visit are to be dismissed out of hand? This is exactly why courts are always cautious in accepting media reports as evidence, as they are invariably based upon second and third hand hearsay. Such caution does not appear to have been applied by the IBA delegation. Instead, it has placed heavy reliance upon media reports (over 120 citations at a cursory glance), some less than objective web sites, spurious sources, and other “commentators”.

A lack of balance and objectivity is also obvious in the report’s selective use of judgments. The report refers to Justice Bruce’s decision to grant the Law Society leave in judicial review proceedings concerning the appointment of the then acting Chief Justice. It is strange that the report does not mention, however, that Justice Bruce is a post-2006 appointment nor that he was the presiding judge when a much-applauded permanent stay was granted to stop the DPP proceeding with a charge against Ballu Khan of an attempt to murder members of the interim

government. Nor did it mention that Justice Goundar, also a post-2006 appointment, ordered the release of property to the same Mr Khan and varied his bail conditions favourably pending the trial.

Mr Khan was represented by a Mr Graham Leung. Mr Leung did not question the presiding judges' appointments at the time nor their decisions. Perhaps he forgot to mention this to the IBA? A strange omission indeed.

The report also fails to cite a single judgment post-2006 where the judiciary has found against the State. The truth is otherwise - and there have been many such cases. How could a fair minded inquiry team omit this as part of its "desk review"? Most of the judgments are easily accessible on the net through "Paclii" for all to see and scrutinize.

Suppose, for example, the IBA had looked at judgments handed down in the three months from July until September 2008. They would have found in July that members of the police force were convicted of the murder of Tevita Malasebe. In August, a travel ban was lifted to allow a citizen to travel to the USA with the Court finding that the ban was in breach of the freedom of movement provisions set out in the Fiji Constitution. Also in August, damages were awarded for an assault by soldiers following events in 2000. In another case that month, damages were awarded against the police for the unlawful detention of a mother and her child. In September, damages were awarded against the police for the unlawful detention of the wrong person on a warrant. These cases could have been referred to in a balanced report. Why was the IBA report strangely silent on these significant judgments?

And such cases are continuing to be heard and dealt with in 2009 without fear or favour. Just last week, damages were awarded against the Military in a case arising out of the events of 2000, while in another a group of soldiers and police officers were convicted of manslaughter. These cases demonstrate the continuing and ordinary application of human rights law in the Courts.

The IBA report selectively refers to intimidation of some pre-2006 judges without providing precise "police report" details. It fails to mention, however, that physical and verbal attacks on the judiciary pre-dated December 2006. It also fails to mention any of the incidents involving judges appointed post-2006: a bomb threat, car damage, three home "break-ins" and a "mugging". There has been an eerie silence from the Australian High Commission in relation to such incidents. A strange consular approach indeed, seeing that all but one of such incidents involved Australians. Does the IBA condemn the attacks on pre-2006 appointments but not those on judges appointed post-2006 as it is not politically correct to do so? Alternatively, is this again something which the IBA's sources failed to mention to them?

The IBA report condemns travel bans imposed on some foreigners visiting Fiji. By the same token, the Australian and New Zealand governments have imposed travel bans on visits by some of Fiji's citizens, including members of the judiciary and the legal profession. Does the IBA only condemn travel bans imposed by Fiji but not those imposed by Australia and New Zealand? So Australia and New Zealand's sovereignty is to be respected but Fiji's is to be dismissed out of hand?

It is astonishing that the report does not mention moves made by the current judiciary for transparency and reform in the courts. In May 2008, three memoranda were released from the Judiciary introducing a "duty judge" roster to stop "judge shopping" on urgent matters, requesting that all judges and magistrates conduct proceedings in open court, that they not hold "grog" sessions in chambers, and asking that all judicial officers exercise care in entertaining private visitors in chambers. All of this was published in the media but seems to have slipped by the IBA's gaze. Then again, one wonders whether the IBA's sources showed this to them? Perhaps they were not interested in providing such examples to the IBA as they revealed good governance and open justice on the part of Fiji's judiciary post-2006? But it did not fit in with the story.

Was the IBA referred by their unnamed sources to the judgment of Justice Gates from 2000 in *Khan v State* where he ruled upon the question of "allocation of cases"? Was it also mentioned to the IBA that the judgment had to be published overseas as a reported case because, for reasons never made public, there was at that time no Fiji Law Reports published in Fiji?

In addition, did the IBA's sources mention that as at January 2007, there were no Fiji Law Reports for the years 2000-2006 and that the IBA's own member, Mr Graham Leung, was president of the Law Society in 2005 and 2006 when no law reports were published? Further, in 2008, the judiciary with help from members of the local profession recommenced publication of the Fiji Law Reports. Again, did Mr Leung bring any of this to the attention of the IBA?

Was the IBA advised as to the changes in the sitting composition of the Court of Appeal in 2008? In 2006, the court was all male largely from overseas. The Court is now comprised of men and women from Fiji's High Court, as well as senior counsel appointed to the Court from overseas. It also covers a wide age span, races and religions. They provide the Court with a diversity which is reflected in the judgments. For example, apart from the changes in civil damages (overturning the previous "dogma" that damages for pain and suffering had to be lower for citizens of Fiji compared with Australian and New Zealand), appeals in sexual assault cases have turned around from a 90 per cent allowing of appeals in 2006, to an 87 per cent refusal rate in 2008. Perhaps, the victims of such horrific crimes may have something to say to the IBA? Then again, perhaps such judgments and statistics were not mentioned to the IBA by

their sources as they represent an inconvenient truth as to what has been really happening at the coalface in the Courts for the people of Fiji under a new Court of Appeal?

Indeed, the reliance by the IBA report on a few disgruntled lawyers as their sources together with the absence of the views of victims of crime as well as plaintiffs in damages cases, probably says much about the flawed nature of the IBA report. There is more to a legal system than political cases pursued by the elites and their lawyers fighting over power and influence.

The IBA report personally attacks individual judges using inaccurate and false information. For example, the report fails to disclose that there were in fact two EU visits in 2008 to Fiji. The second mission visited between 1 and 15 July 2008 and specifically looked at the rule of law. It was the report of the second visit which found “no evidence of interference by the Interim Government with the normal and independent functioning of any constitutional institutions”. The IBA report suggests that two judges made this up in their public statements when discussing the work and judgments of the judiciary in 2008. They were not (and could not) discuss the removal of the former Chief Justice as this involved various legal proceedings still before the Courts. Instead, they were talking about the work of the Judiciary, that is, the judgments, of which there was found to be no evidence of interference. Does the IBA claim not to know of the second EU visit and its findings or did their sources again fail to tell them of this report? The haste with which the IBA report dismissed the bona fides of the judges and rushed to condemn them illustrates the lack of independence and fairness in this inquiry. For neither had said anything but the truth. There were indeed two European Union visits.

Much of the IBA report has little to do with the judiciary and more to do with the IBA’s annoyance with the interim government refusing it entry. Fiji is a sovereign state. If it does not wish to allow access “at this time”, that is a matter for the interim government, not for the judiciary. Is the Australian judiciary responsible for the Australian government’s harsh immigration laws or for the travel bans?

As Chief Justice Gates said in December 2008 at the 10th Attorney General’s Conference about the flawed methodology of such unsolicited reports: “The procedure is characterised by unidentified accusers, undisclosed material, rumour, gossip and ever-present ‘perceptions’ which as you know would not count for much in a forensic inquiry or a murder trial.”

Our “moon rocks” are the facts. The IBA can go on believing its unnamed sources that it is all a conspiracy. But just as the visits to the moon were real and not made on some Hollywood film set, similarly are the achievements of the current judiciary in Fiji. The Courts are open, impartial and effective, serving all of the people. Meanwhile, can someone from the IBA commence reading the judgments?