

BOOK REVIEW*

Law, Infrastructure and Human Rights

by MICHAEL B LIKOSKY

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Scholarly works linking construction and human rights are few and far between, indeed this reviewer knows of only one other such work.¹ The law pertaining to construction projects and human rights are generally viewed as two very separate and distinct disciplines. However, Dr Michael Likosky's *Law, Infrastructure, and Human Rights* provides an excellent illustration of just how and why these two disparate fields are inextricably linked. One of the main aims of this book is to demonstrate that infrastructure projects, often privately carried out by large foreign corporations, are sites of immense human right struggles that have led to complex human rights litigation.

Books considering human rights litigation against transnational corporations are not new. Professor Sarah Joseph recently provided a cogent analysis of human rights litigation trends in the USA, England, Australia and Canada;² Professor Janet Dine authored a text entitled *Companies, International Trade and Human Rights*,³ and Rory Sullivan edited a collection called *Business and Human Rights*.⁴ Where Likosky's book differs is in its exclusive focus on the human rights issues surrounding large infrastructure projects, particularly public private partnerships ('PPPs'), and in examining non-litigious solutions to the issue of human rights breaches.

The book is divided into two parts. Part one consists of only two chapters and provides the framework for the discussion. It examines the nature and history of PPPs, noting that it was Margaret Thatcher who initiated the move towards privatised infrastructure projects in the UK in the late 1970s, and that the United States under the Reagan Administration soon followed suit. It analyses the impact that this shift to PPPs has had on human rights, explores the role played by non-government organisations ('NGOs') in ensuring the upholding of human

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1 Paula Gerber, 'Construction Law and Human Rights: Building a Bridge Between Two Disciplines' (2006) 80(8) *Law Institute Journal* 48.

2 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004).

3 Janet Dine, *Companies, International Trade and Human Rights* (2005).

4 Rory Sullivan (ed), *Business and Human Rights* (2003).

rights on privatised infrastructure projects, and considers the response of both governments and transnational corporations.

Contracts for construction projects are largely concerned with identifying and allocating risks such as unforeseen ground conditions and/or inclement weather. In a somewhat novel approach, the author presents the concept of a 'human rights risk' which he describes as 'the possibility that a human rights problem will adversely affect the interests of those persons undertaking a project'.⁵ Likosky asserts that once a human rights risk is identified strategies can be put in place to minimise this risk, and the consequences which might flow should it eventuate. Such strategies may include the application of corporate codes of conduct,⁶ government implementation of anti-corruption legislation, or taking out political risk insurance.

After conducting a general overview of human rights and infrastructure projects, Part Two of the book moves on to specific case studies. Six scenarios are examined in depth, ranging from Iraq and anti-terrorism to banks⁷ and the enlargement of the European Union. In the interests of brevity this reviewer focused on the two most topical of these studies: Iraq and anti-terrorism.

Likosky notes that if the current war in Iraq is in part about oil, 'then it is unsurprising that postwar reconstruction is also in part about safeguarding oil supplies and laying the infrastructure necessary to bring them to international markets'.⁸ Realising the importance of infrastructure to the United States' postwar plans for Iraq, insurgents are targeting pipelines, disabling electricity lines and destroying roads. Regrettably, the author does not analyse the targeting of these infrastructure projects in Iraq in terms of human rights. Rather he discusses the situation largely in terms of security and power, concluding that to have any hope of succeeding, US led PPPs making up the infrastructure reconstruction effort will need to relinquish a degree of power and control if Iraqi infrastructure is ever to reach, let alone succeed, pre-war levels. Unfortunately this case study eschewed any in-depth insight into the human rights issues surrounding PPP projects in Iraq.

In the anti-terrorism chapter the author repeats the assertion that terrorists persistently single out infrastructure for attack. He claims that the destruction of the World Trade Center was intended to target US banking and other financial infrastructures such as insurance, resulting in the 'biggest insurance claim in

5 Michael B Likosky, *Law, Infrastructure, and Human Rights* (2006) 47.

6 Companies can develop their own code of conduct or adopt one already developed by an NGO or international institution. See, eg, the International Labour Organisation, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (3rd ed, 2001); United Nations, *Code of Conduct on Transnational Corporations*; and, the Organization for Economic Cooperation and Development, *Declaration and Decisions on International Investment and Multinational Enterprises* (1976).

7 In particular the author examines the major role that banks play in infrastructure projects through their financing initiatives. Likosky then considers the campaigns NGOs and human rights legal strategists have mounted against financiers such as Citigroup, the US Export-Import Bank and the Inter-American Development Bank.

8 Likosky, above n 5, 69.

history'.⁹ In the UK and Spain the bombing of commuter trains was aimed at those countries' transportation structures. Likosky asserts that before 9/11 the emphasis of terrorists was on killing as many people as possible. Post 9/11 the emphasis has shifted to destroying the infrastructure of the United States and other Western nations. The latter is hardly a 'new' concept in modern warfare. One need only recall the 1991 Gulf war when US troops systematically destroyed virtually the whole of Iraq's infrastructure; similarly in World War II the Allies bombed German factories, power stations and rail links. The author asserts that infrastructure has become a battlefield because of the immediate impact that the destruction of infrastructure has on a country's policy-making. Likosky cites the bombing of the Spanish train system (which ultimately led to the removal of the ruling party because of the public reaction) as an example.¹⁰

Alarmingly, the author warns of the new threat posed by cyber-terrorism, claiming it has the potential to paralyse the world's information system. This threat has led many countries to develop a variety of defensive responses. There is now a much greater sharing of information about potential terrorist targets; developers, for instance, are exploring the possibility of using Islamic project finance for their projects as a way of reducing the risk of terrorist attack; and new types of insurance have been developed to cover terrorist attacks on infrastructure. An example of this is the Australian Federal Government's enactment of the *Terrorism Insurance Act (2003)* (Cth) which covers business interruption and third-party liability.

The book's final chapter is perhaps its most interesting. Likosky suggests that litigation is not a useful or practical way of ensuring that transnational corporations respect human rights when undertaking large scale infrastructure projects. Instead Likosky proposes the development of a human rights unit ('HRU') which would be 'an independent and democratically accountable extra-state, non-judicial institution of global governance within the United Nations [(UN)]'.¹¹ He sees such a body as being akin to other bodies that have been developed in international law including the International Criminal Court, the World Trade Organisation Panel Mechanism and UN Compensation Commission. The HRU would oversee private as well as state actors and set standards for international infrastructure projects in the area of human rights. Such standards could include protecting the rights of indigenous groups in the vicinity of the project by including indigenous representatives in the decision-making process for the project.

The author suggests that a centralised authority managing human rights issues arising out of PPPs would help overcome the problems that arise when grievances are adjudicated in multiple jurisdictions with varied and often suboptimal outcomes. The HRU would have various roles; perhaps its most important would be the development of uniform standards for promoting and protecting human rights in infrastructure projects. This could avoid the well-

9 Ibid 105.

10 Ibid 111.

11 Ibid 171.

known phenomena of 'race to the bottom', where transnational corporations race to engage in development projects in countries with the lowest human rights standards.

Likosky sees the HRU being comprised of members that roughly reflect the classes of stakeholders involved in infrastructure projects. Therefore, one would expect to see membership drawn from transnational corporations, NGOs, banks, and governments. It is envisaged that infrastructure projects would be submitted to the HRU for scrutiny, prior to any work commencing, and if successful would receive a UN Seal of Compliance. Such an endorsement of the project by the HRU would minimise reputation risk which, since the high profile case of *Kasky v Nike*,¹² is a major concern for transnational corporations.

After approving the project the HRU would have an ongoing role in monitoring and training. Thus, privatisation of a project need not mean a lack of public scrutiny.

Law, Infrastructure, and Human Rights asks more questions than it answers. The author does not touch upon how a HRU would be funded; nor is the issue of whether the UN is the right international institution to host such a body canvassed.¹³ The author is also silent about exactly how the existence of the HRU would prevent, or at least reduce, the attacks on infrastructure highlighted in the chapters on Iraq and anti-terrorism. Nevertheless, this book is a promising beginning to an emerging dialogue about how human rights can be better protected in PPPs, and will hopefully stimulate greater research into this important issue.

This book is not for those with a mere interest in human rights; it makes challenging reading even for a specialist in both infrastructure and human rights. Nevertheless the book is well researched and is recommended by this reviewer to those seeking a thought-provoking analysis of this issue.

12 27 Cal 4th 939 (2002). In this case Nike was sued by a private citizen under Californian laws prohibiting false advertising. The plaintiff claimed that Nike had made false and misleading statements regarding its labour practices in South-East Asian factories.

13 This is a significant issue in light of the UN's struggle to cope with recent reforms and ever tightening budgetary constraints. See, eg, Peter Prove, 'Reform at the UN: Waiting for Godot?' (2005) 24 *University of Queensland Law Journal* 293; Peter Hilpold, 'Reforming the United Nations: New Proposals in a Long-Lasting Endeavour' (2005) *Netherlands International Law Review* 389; Nazila Ghanea, 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Backwards?' (2006) 55 *International and Comparative Law Quarterly* 695; Freedom House 'The UN Human Rights Council at the Halfway Mark: A Report Card' <http://www.freedomhouse.org/uploads/special_report/47.pdf> at 30 May 2007.