

The Emergence of a New Area of Legal Practice: Corporate Social Responsibility

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Abstract

'An evolving challenge that faces lawyers is the need to more securely integrate the litigation and policy dimensions of CSR lawyering-for lawyers to merge their reactive and proactive inclinations. "Most lawyers no doubt welcome the trend [towards extension of formal legal liabilities with new forms of 'moral liability'], but it is worth asking whether the net result will be improved social and environmental performance on the part of targeted industries and companies, or whether it will be little more than a feeding frenzy for the legal profession.

Keywords: Emergence; Legal practice; Corporate social responsibility; Globalized economy; Moral liability

Introduction

'The great debate for lawyers in the coming century is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service' [1].

"Most lawyers no doubt welcome the trend [towards extension of formal legal liabilities with new forms of 'moral liability'], but it is worth asking whether the net result will be improved social and environmental performance on the part of targeted industries and companies, or whether it will be little more than a feeding frenzy for the legal profession- forcing companies back into compliance mode and minimalist solutions' [2].

'An evolving challenge that faces lawyers is the need to more securely integrate the litigation and policy dimensions of CSR lawyering - for lawyers to merge their reactive and proactive inclinations. This may of course cause structural as well as cultural clashes within the traditional model of large law firms-as one UK-based litigator has put it to me ironically it is in the lawyers' financial interests for their clients to become embroiled in costly litigation' [3].

With India enacting the world's first corporate social responsibility law two years back; it is time to acknowledge the emergence of a new area of legal practice - Corporate Social Responsibility. It is a blessing in disguise for idealistic lawyers who want to work with corporates but are hesitant in choosing hardcore commercial law jobs over their social inclinations (the latter being the reason for opting for the profession in the first place). Though it's still a niche and an under-developed area of law, supplemented together with a management background, CSR can be an ideal profession for someone bent upon going off the trodden path and pursuing societal impact.

The role of corporate social responsibility in corporate governance is increasingly being recognized in a globalized economy. It is at the top of the board of director's agenda and is also good for business. Attempts are fervently being made to integrate it as a part of the corporate DNA consistent with the corporate assumption of human right responsibilities. Moreover, there is an active search for eco-efficient solutions [4].

Though CSR efforts have generally been viewed as voluntary actions undertaken by corporations, the new mandatory CSR model that has

emerged in India is a marked departure as it is known in the United States and as has been developing through global norms. (International organizations such as the UN, the OECD and the ILO have adopted guidelines for good business practice aimed at safeguarding human rights and promoting respect for key social considerations. The White Paper on corporate social responsibility from 2009 and ISO 26000 are other initiatives which are influencing corporate work on social responsibility.) However, there is still no sign of consensus and clarity on CSR rules, structures, or procedures in India; hence, offering tremendous scope for policy, research and the opportunity to set business precedents.

Moreover, the norms that lawyers draw on in giving their advice to companies are shifting. There is increasingly an ethical case for lawyers to maximize their contribution to corporate social responsibility beyond the 'business case' for action. Until now, there has been very little reflection on the nexus between corporate responsibility and the wider public functions of the legal profession. Yet in wake of a statutory obligation concerning the same in one part of the world that is precisely what may now be needed.

The Role of a Lawyer in CSR

'The role of the lawyer in the old days involved compassion for the client's entire predicament, tempered by detachment and also a measure of concern for the public good. The growing ascendancy of the economic view of law and a decline of its self-image as a helping profession, will continue the decline of idealism and professionalism unless this is arrested' [5].

Lawyers need to be given a significant place within CSR because their profession is at the foundations of corporate social responsibility:-

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“The significant present involvement of lawyers in corporate responsibility (CR) is no accident but directly referable on the one hand to the relevance to CR of legal skills and technical expertise and on the other hand to the fact that the ability to make independent and objective judgements is a core professional attribute of lawyers. It is natural for the lawyers to be involved. CSR is partly about compliance with the law and regulations so it falls naturally within a lawyer’s scope. Many lawyers also have a secondary role, that of conscience of their company.

Using a legal practitioner to develop a CSR strategy makes sense because ‘there are few people whose job it is to see the consequences and the whole picture for the organization that either fails to comply with the law or that complies partly or provides an inadequate response.’

As part of a profession premised on ethics, lawyers can provide advice to clients beyond just compliance and risk management processes, encompassing the issue of human rights, societal impacts and the leverage a company can use to institute positive change, including communication through its brand, economic leverage and technical expertise. Although there are a multitude of CSR professionals, lawyers have the ability to provide advice on strategic CSR and within the appropriate context. They can help create company structures to best serve the emerging norms on the corporate duty to respect and for corporates to go beyond just philanthropy and charity [6].

CSR and law are not mutually exclusive but are in fact intrinsically interrelated concepts. Lawyers have long held leadership roles in society, whether as leaders of institutions themselves or counsellors to those leaders and institutions. For CSR, the lawyers can exercise leadership by seeing, then working for, a vision of more equitable, multi-stakeholder outcomes that respect everyone’s rights and creatively accommodate them in the long-term interests of the company and its stakeholders. CSR emerges from a complex network of social expectations, through the interplay of hard law legislation and jurisprudence, constantly evolving customary and soft law norms, international best practice standards, private regulations, and direct contract-like understandings between corporations and their stakeholders. Comprehension and navigation of such a complex web of rules and expectations is squarely within the competence of legal theorists and practitioners, and cannot be fully understood as simply a branch of ethics or organizational behavior. Transcending notions merely focusing on “zealous advocacy,” modern ethical codes for lawyers expect the lawyer to bring the whole person as an “officer of the legal system and a public citizen having special responsibility for the quality of justice” to representing and advising clients. This includes knowledge of social and legal trends, expectations, and moral concerns that affect how the client actions will affect long term success and perceptions by society. This context of legal, social, and moral trends, expectations and standards can come from hard law, non-binding yet influential “soft law,” self-regulation by the business itself, and ethical regimes and norms, all of which lawyers must be familiar with and take into account as matters of basic competence these days.

Moreover, as with ensuring high-quality, ethical decisions in government, doing so in the context of corporate governance requires attention to good policies, procedures, and checks and balances. Lawyers play critical roles in such areas. At their best, leading lawyers help clients seize new opportunities, such as constructing new bottom-of-the-pyramid business models, creating positive social value and innovation via social entrepreneurship that conceives of new socially useful products and services, partnering with others in multi-stakeholder initiatives like the UN Global Compact, and engaging in

strategic philanthropy that helps solve persistent social problems.

Furthermore, CSR is a natural fit for lawyers because it reflects the enormous role that corporations have in all aspects of our economy and the moral imperative to exercise that influence in a way that involves doing well and doing good. A significant component of that moral imperative is promoting a sustainable future, which means complying with environmental, health and safety laws and conducting business activities in ways that limit the use of natural uses and minimize adverse ecological impacts- all of which requires innovative thinking and strategic planning.

Role as a CSR strategy consultant

A field like CSR is of immeasurable value to all professionals and academic in relevant fields of law, policy and business. And with CSR becoming a statutory obligation in India, lawyers have an even more vital role to play in designing and implementing effective CSR policies and procedures [7].

Lawyers can advise the company on the scope of an effective CSR program permissible under Section 135 and Schedule VII of the Companies Act, the disclosure and reporting requirements while ensuring that they are adhered to along with legally required Board reports concerning the CSR activities to be submitted as part of the financial statements. Lawyers can play a significant role in CSR strategy chiefly because of their expertise in understanding relevant concepts and because of their legally protected role as confidential advisors. In India, an effective CSR strategy has to attend to both legal and stakeholder concerns. So CSR is as much about good business as it is about legal compliance. When it comes to establishing a monitoring mechanism, lawyers once again can play the primary role in overseeing the development of an effective CSR strategy, incorporating legal insights and legal protections without sacrificing stakeholders, while relaying on diverse groups on corporate staff and independent consultants to implement it. A lawyer can not only play the role of an information manager but also that of an intermediary between the company and any third parties involved in CSR implementation.

Companies should make lawyers a part of CSR committees and develop the program incorporating their recommendations, sensitive to legal and reputational risk to be implemented, as appropriate, for the company’s different functions. Legal expertise ensures that businesses accurately understand the scope of relevant legal requirements and business responsibility as well as particular legal risks they need to address. By appointing a lawyer incharge, the company can ensure control over the information flowing from CSR due diligence. Independent consultants can be retained to advise on stakeholder concerns and reputations risks, develop appropriate due diligence and report indicators based on definitions of core terms, train company executives and staff on CSR policies and procedures, prepare independent reports on the company’s impact and market it in order to value. Although this is the reason why a lawyer with a management background is recommended for the role of an external sustainability/ CSR consultant in an organization, i.e., to ensure a multi-disciplinary and 360 degree approach towards the formulation and execution of a CSR program without increasing the team numbers leading to varied perspectives.

Getting external/independent CSR strategy consultants on board will help preserve the legitimacy before stakeholders and ensure effective engagement. The functions that a lawyer can perform in a CSR Committee can include the following and more:

For long-term assignments:

Analyse strengths, weaknesses, opportunities and threats (SWOT-analysis) of a given company in relation to CSR;

- Design CSR policies;
- Design a strategy for the company to address CSR adequately; (It is recommended that longer-term tasks be performed in co-operation with either in-house or external competencies in organisation management – including crisis management, communication, human resources, training etc. depending on the objectives of the client.);
- Integrate CSR under existing risk management and compliance programmes;
- Design and implement concrete projects under CSR;
- Create CSR screening systems for investments;
- Develop a framework for supply chain management systems with due regard to the participation of SME's;
- Develop a framework for CSR as part of Quality Management;
- Implement in-house training on CSR; and
- Integrate CSR into existing risks and quality management schemes and compliance programmes.

For short-term assignments:

- Consider the 'what, why and how' of a CSR approach – its challenges, dilemmas and opportunities;
- Undertake CSR assessments of affiliates, branches, investment opportunities, suppliers, licensees or other partners;
- Undertake CSR assessments as part of due diligence;
- Respond to media or NGO criticism;
- Provide assurance statements on CSR reporting in relation to scope, relevance and compliance with international standards;
- Undertake assessment of concrete CSR projects;
- Network with other companies and/or associations;
- Coordinate and supervise the CSR work of the company; and
- Assess the legal implications of CSR reporting and advertising.

Therefore, Lawyers can advise on all aspects of an effective CSR strategy, from the operationalisation of the company's CSR efforts at management level to the implementation, reporting and compliance within the organisation. The goal is to help businesses stay ahead, and help ensure that CSR becomes a value-added element in the business.

Role as an in-house counsel

Traditionally, it is the in-house lawyers within large businesses who lead development and supervise implementation of compliance programmes reflecting the business's core values or operating principles. For in-house counsels attempting to understand and implement a CSR agenda, what will be more of relevance is (1) what a CSR mandate should entail, and (2) how it should be carried out? The internalization of a CSR mandate; initiation of conscious stakeholder engagement; development of reporting and transparency processes; implementation of best practices beyond compliance with minimum legal expectations; development of review, auditing, and accountability

systems, and; defining the appropriate role of community investment within the scope of CSR will be essential high points of any serious CSR program [3].

However, despite in-house counsels already being deeply involved in CSR – more may still need to be done to place the legal function at the heart of strategic decision-making. The boundaries of what lawyers can realistically do to promote corporate responsibility are determined by the culture in which they work and their ability to position themselves as more than 'legal facilitators'; by the extent of the 'business case' for responsible action on the part of their employer or clients; and in the case of external legal advisors, by the extent to which they may themselves be subject to 'drivers' or incentives to integrate CSR-related considerations into the delivery of advice [4].

Role in policy, research and law-making

There are exciting times for CSR and sustainability in India with their being a radical change in the landscape ever since the enactment of section 135. The participation of the company in CSR policy-making at such times can be an asset to the organization. As it is, CSR not only assumes legal compliance, it also influences public policy and law-making in a more hidden and indirect way. When giving advice on CSR matters to clients, Lawyers can participate in the tailoring of their CSR policy and normative framework. This role is of extreme importance as the CSR commitments undertaken by companies are going to be evaluated under the prescribed Act, and may form a basis for an explanation, even if the law is not yet penal.

Businesses of all kinds are generally comfortable with the idea that lobbying public policy makers to uphold their commercial interests is an acceptable activity. Thus, corporate responsibility could spur Lawyers to play a positive advocacy role in public policy processes that touch on the sphere of influence of the legal profession. Lawyers are also likely to be called upon to assist companies in compliance. Law firms are no exception. It won't be long before law firms start establishing teams, even that of a multidisciplinary nature, to answer these demands. Commercial law firms around the world are explicitly beginning to take up corporate responsibility in their own practices. And the contributions that Lawyers and law firms make to public policy debates – for example consultations on proposals for new legislation – may on occasion expressly be framed to further the commercial interests of their clients. This can serve the incidental purposes of drawing the attention of potential clients to the suitability of individual Lawyers or law firms as advisers.

Even though the contours of the role of a lawyer in corporate social responsibility in India are still unclear with companies mostly relying on accounting professionals for the implementation of their CSR programs, the fact that lawyers have always been considered invaluable to this field is affirmed by their assuming this responsibility even in countries that only endorse voluntary CSR. The need for viewing CSR from a legal perspective: as a stakeholder-oriented form of *lex mercatoria* (customary commercial law), and as a form of "enforced self-regulation in the shadow of the law" encompassing the seven legal principles of Integrated, Sustainable Decision-Making; Stakeholder Engagement; Transparency; Consistent Best Practices; Precautionary Principles; Accountability and Community Investment has already been recognized.

With a rise of 'voluntary' corporate responsibility tools internationally, lawyers are already deeply embedded within the corporate responsibility agenda. And now with India becoming the

first country in the world to provide for a mandatory CSR obligation, it has become the legitimate field of study for lawyers and legal theorists. Now we have a law that promulgates CSR obligations which legal practitioner can use to apply CSR in a legal context. It can be identified in the course of advice or advocacy as an obligation that can guide or justify corporate behavior.

Clearly, the field of CSR is growing and is a potential growth area for lawyers- especially those with an interest in working around the world. It is expected that CSR, in its own right, will engage lawyers more and more in the years to come. In India, it is an area of the law that is still in its infancy, so any decision that is made will in some way establish precedents and best practices for others in the industry. While the vision is clear, the means to get there is still under discussion. Far reaching duties for the legal profession regarding CSR are being suggested and it is important that the legal profession determines its own future in the area and develops policies and practices which are fit for the purpose, proportionate and take account of the imperative of our role, consistent with the regulatory regimes. It is the Lawyer's role to assist their clients in positioning their business successfully in this new legal landscape. And they need to address this role with humility, so that the essential vibrancy and innovation inherent in corporate social responsibility can be sustained. And this Lawyers need to do immediately, before the role of the legal practitioner as a strategic advisor to business in a globalized world becomes obscenest. Specially, practitioners of law interested in staunching the trend of proliferation of CSR consultancies staffed by accountants and management advisors with little or no legal training, and preserving the Lawyer's role of strategic importance within corporate management structures need to start acting now [8].

Conclusion

Lawyers moved quickly to claim a stake as mediators and facilitators, arguing that their problem- solving skills and independence made them well suited to the task. Even so, some commentators questioned whether legal skills and the lawyer's mindset were in reality sufficiently well-tuned to the consensus-building process of mediation- "The mediation process can be preserved, while still admitting lawyers into mediation, if there are changes. The legal attitude, curriculum and environment must be broadened. Lawyers must learn how to generate creative options. They must understand collaboration. And they must learn how to facilitate, not just evaluate."

A similar shift may now be required of the legal profession as it seeks to define its space in the corporate responsibility agenda.

It is an opportunity to define leading edge practice for business lawyers. The field is open for pioneering lawyers – wherever they are based – to show the way.

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