

## 2000 WORDS

### “Corporate Social Responsibility: an oxymoron? Philanthropy versus commercial reality?”

*There has always been a strong **pro bono ethic** in common law systems, which has been taken advantage of by governments who fail properly to fund litigation.*

*To what extent is the legal profession's **pro bono ethic** and the current regimes of **Corporate Social Responsibility** altruistic? To what extent are they **client driven**? Can such regimes be **client driven and unselfish**?*

*In the UK, the **Investors in People (IIP) Standard** is a recognised framework designed to help firms improve their performance and realise their objectives through effective management, support and development of their organisation and their people **but it is voluntary**.*

*To what extent should this be enforced with regulatory authorities requiring law firms to have a **CSR strategy**.*

*What impact does **pro bono** have on the not-for-profit sector, which is so often in the vanguard of law reform.*

### What is corporate social responsibility (CSR)?

Well, if we drop the corporate bit, it is simply about organisations, private and public, operating in a socially responsible way - a bit like us humans are expected to behave in a socially responsible way. Which is why it is sometimes referred to as **corporate citizenship**. There being no real statutory basis for

CSR, it is a QUALITATIVE self-regulating business model to help a company be socially accountable — to itself, its stakeholders, and the public.

### **Where did CSR come from?**

The ideas may be traced back to workers welfare programmes and the philanthropy that emanated from the industrial revolution and the advent of social democracies.

Howard Bowen, an American economist, is widely regarded as the father of modern CSR, a term he coined in his 1953 book “Social Responsibilities of the Businessman” - he concluded his book with this:

***“As major objectives I suggest a concerted attempt to eliminate the excessive display and conspicuous waste that result from large incomes; an all-out effort to establish codes of practice for business that will mitigate the harshness of the competitive struggle — in other words, to eliminate unfair practices instead of depending on the government to do it; a resolute undertaking to outlaw the exploitive aspects of advertising and make it in reality a form of service to consumers; encouragement, in all sectors of the economy, of the nonfinancial human incentives which temper acquisitiveness and make for social harmony; a bold attempt, in cooperation with labour, the***

***community, and government, to tame that most dangerous enemy of our economy — the business cycle of boom and depression.”***

That certainly seems to have stood the test of time.

CSR has been gaining ground since, driven by societies concerns for civil rights, equity, and now sustainability. The UN has its Sustainability Development Goals (SDGs), which provide organizations with a standard framework to build CSR programs around.

**Even buzzwords evolve – now we have ESG**

But has CSR become just another policy to be rubber stamped by the board, more boxes to be ticked rather than thinking outside the box? How does it get measured and assessed? In a globalised world, how does it benefit OUR communities?

Enter **Environmental, Social & Governance (ESG)** standards. Driven largely by institutional investors, ESG reporting is supposed to provide a QUANTITATIVE metric to measure a company’s sustainability and societal impact. A welcome evolution, or just more box ticking, more opacity for consumers and the public to be frustrated by? And how are small businesses supposed to embrace the costs of ESG protocols and reporting?

So, while big business is driven to ESR by institutional investors, CSR is probably around for a while for medium and smaller businesses and collectives.

**What drives CSR? Altruism, philanthropy? Or is it simply a commercial imperative? Can something that is commercially driven be benevolent?**

**Is it an oxymoron – or a paradox?**

Full disclosure – I am no fan of CSR. Probably because it has the word CORPORATE writ large and when I grow up, I want to be a socialist. I see CSR as an affront to democracy, a means to dupe the pesky masses into abandoning their demands for more regulation and more taxes to address the real costs of business and ensure integration of evolving societal norms – to convince us the people that our governments have no business in business, that business is our best agent for the greater good. CSR has had a bad rap, mostly seen as a marketing tool, allowing businesses to make symbolic gestures.

But CSR is here to stay. And has done some good, in some situations.

Anecdotally, in countries with weak and corruptible governments, where public resources do not cover delivery of even basic needs, CSR can contribute significantly to LOCAL communities – in Zambia we have agricultural out-grower programmes, industry trades schools, mainstreaming of HIV/AIDS healthcare, and even some support for environmental conservation. But global initiatives in global or regional collectives may be less helpful, and even

harmful. Take the distribution of insecticide-treated mosquito nets which in Zambia are often re-purposed (immediately) as fishing nets, critically depleting fry and fingerlings in our already mismanaged fish stocks, never mind adding insecticide to our rivers and streams. However, even private philanthropy can have unintended negative consequences, so

CSR in terms of internal processes has possibly proved more beneficial - promoting equality & diversity in the workforce, providing training and staff wellbeing programmes, incorporating environmentally sustainable practices, interrogating supply chains and striving for ethical sourcing. But some of these practices can squeeze out small local businesses that do not have the wherewithal to provide the necessary assurances or which operate within different cultural norms. Fair trade initiatives are good, right? While Fairtrade may have provided some measure of protection to cocoa farmers in Ghana against commodity price fluctuations, there is little evidence that the living income of certified farmers is higher than for non-certified farmers, and there is evidence that the smallholders remain in structural poverty, unable to improve their living standards.

Can organizations be depended on to act responsibly? People the world over have proved incapable of simply carrying their Coke can and disposing of it in a bin somewhere, and as societies we address this through a combination of

regulation and sanction, community initiatives (including education) and social opprobrium. Businesses, corporates, collectives if you will, probably need the same approach.

CSR and ESG will be part of addressing the challenges ahead, but regulation and sanction will also be necessary, and I think most importantly, a realignment of our company law and statutes to expressly include considerations beyond the bottom line. There are signs that the shareholder primacy model is on the way out, probably driven by the excesses of the 1980s hostile takeovers, the 2002 tech bubble burst and the 2008 financial crisis. The common law weigh in what the “best interests” of a company are, for example. The Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v Wise* and *BCE Inc. v 1976 Debenture-holders*, did just this, emphasizing that directors should endeavour for a “better corporation” and may look to a myriad of factors to “*inform their decisions*” taken in the best interests’ of corporations. Following on, the *Canada Business Corporations Act* was amended in 2019 to include factors that may be considered: shareholders, employees, retirees and pensioners, creditors, consumers, governments, the environment and the long-term interests of the corporation. In many states in the USA, for-profit benefit corporations are provided for, where public benefit objectives are embedded in the corporate statutes, and directors and officers

must consider the effect of decisions on shareholders and employees, suppliers, customers, the community, and the environment. But these remain a voluntary option.

A recent note from a large multinational law firm provided me with interesting insights into the new age of ESG disclosures, advising:

1. boards to think about their role in ESG oversight and to set up protocols to decide which factors are most relevant to their business and how to include those in their decision-making.
2. Companies to incorporate ESG performance indicators for executive pay to influence behaviours.
3. Companies to be cautious when making ESG disclosures, taking into consideration *potential liability* and using *“forward-looking cautionary language when appropriate.*

ESG will of course incur costs, and generate all sorts of business opportunities for lawyers, auditors, governance and risk & compliance practitioners, more oversight bodies. One could argue ESG is indeed a commercial imperative, far removed from philanthropy – and that may be no bad thing as climate change and environmental sustainability should no longer be relegated to philanthropy. Of course, directors, managers, employees will obviously have

some influence on what philanthropic causes are supported, what internal ESG is prioritised.

Hot off the press: the Institute of Business Ethics in the UK has just released a report on the codes of ethics of the FTSE 100 companies, and it is not too compelling for self-regulation – 19 do not have a publicly available code, and only 46 meet the standards expected by the Institute.

### **CSR in the legal profession**

The General Council of the Bar in England and Wales, in its GUIDE TO CHAMBERS SOCIAL RESPONSIBILITY defines CSR as “an approach to business that promotes ethical practices and socially responsible behaviour, and which contributes to sustainable development.”

In Zambia we even have such objectives enshrined in our Law Association of Zambia Act which provides that the association should:

- a) further the development of law as an instrument of social order and justice and as an essential element in the growth of society.
- b) provide a means by which lawyers can participate together fully and effectively in the development of society and its institutions.



c) encourage lawyers as individuals to join actively in the life of, and identify themselves, with people and to utilise their skills and training in their service.

g) consider legal aid legislation and other ways of securing representation for persons who are unable to secure it.

i) promote research, development and reform of the law

l) seek advancement of the rule of law and the rights and liberties of the individual.

Borrowing from The Bar Council's guide, CSR:

**gives firms a competitive advantage** in attracting and retaining top talent and clients.

**reduces costs and risks** (implementing equality and diversity reduces the likelihood of chambers facing costly claims; and high standards reduce the need for regulation and associated compliance costs; financial benefits through a more efficient use of resources; retention and a happier and more effective workforce.

**improves reputation and legitimacy** of the legal profession which is always under public scrutiny, facing accusations of greed and elitism.

That all sounds like commercial imperative rather than philanthropy doesn't it?

Of course, pro bono work is a big part of CSR for the legal fraternity. How prevalent is it, and what impact is it having? Should law firms be required by their regulatory bodies to have CSR strategies, and big law firms be subjected to ESG disclosures?

## **ZAMBIA**

In Zambia, our law association has some CSR initiatives, but a quick web search reveals few law firms have any CSR presence (to be fair, until recently our law firms were not allowed web platforms and IT beyond desktops and laptops is not that prevalent in our sector except in the few bigger commercial firms). As a practitioner, I know I do a fair bit of unofficial pro bono work and I suspect most lawyers do, mainly because access to legal services is so limited.

LAZ did establish and continues to fund the National Legal Aid Clinic for Women, which provides invaluable support to marginalised women and children but only in 3 cities: Lusaka, Livingstone in the south and Ndola on the Copperbelt.

We do deploy election monitors during general elections, but with the bulk of our lawyers being in the larger urban areas, we have limited reach into rural communities – although the biggest and most contentious polling stations are in the urban centres.

LAZ does prison visits when we provide some legal advice, and we mobilise some charity when there are particular needs such as floods.

Any pro bono work must be approved by LAZ, adding more work to our already over-stretched council – participation in the council’s committees is not well subscribed, sadly. Beyond time, funding for pro bono work is essentially up to firms and individual lawyers.