

**Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis, 2009)**

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—BOOK NOTE—

Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis, 2009).

This treatise on the ambiguous concept known as corporate social responsibility (CSR) is an essential primer for the legal practitioner. With few substantial legal texts in the field to build upon, the authors undertake not just to explain CSR but to define it for the legal practitioner. In so doing, the authors give some much needed shape to the concept while revealing the real lack of clarity there still remains as to what CSR truly entails. While not conclusive, this text provides an immensely useful starting point for what will likely be a highly interesting debate that will challenge the way lawyers understand their role as advisor to corporate clients.

The text provides both a theoretical and practical review of a number of developing principles that coalesce into the concept of CSR, and that create an imperative for corporate organizations to seek compliance with societal expectations beyond those expressed by the edicts of legislatures and courts. Structure for the discussion is provided by the authors' elucidation of seven "CSR legal principles":<sup>1</sup> (1) Integrated, Sustainable Decision-Making; (2) Stakeholder Engagement; (3) Transparency; (4) Consistent Best Practices; (5) Precautionary Principle; (6) Accountability, and; (7) Community Investment. These principles provide a categorical context to the authors' discussion of the many multilateral initiatives and private regulatory frameworks, as well as legislative and regulatory interventions and propositions that have been created in the name of CSR. In addition to the useful assemblage of existing CSR-related "hard" and "soft" law falling under each of the seven principles, the authors also bring together a diverse academic literature spanning business ethics, stakeholder management theory, corporate law, and regulatory theory.

The authors formulate a thesis (seemingly in two parts) of how CSR ought to be viewed 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."<sup>2</sup> As the duality of the the-

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<sup>1</sup> Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis, 2009) at 91.

<sup>2</sup> *Ibid* at 420, citing Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) ("enforced self-regulation"); *ibid*, citing Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1978) 88:5 Yale LJ 950 ("shadow of the law").

sis suggests, the authors struggle at times to find definitive conceptual anchors for their subject. Far from being evidence of a shortcoming in the authors' work, it is instead evidence of the uncharted legal territory into which this book ventures.

Reflecting this novelty, a significant amount of consideration is given to the existential question of CSR as a legitimate field of study for lawyers and legal theorists. The text anticipates the criticism that CSR, by nature, is voluntary and therefore lacks the quality of obligation necessary for law. To tackle this question, and indeed to justify their endeavor to the reading audience, the authors point to the empirical facts of corporate adherence to normative frameworks generally referred to as CSR and to the proliferation of CSR standards, multilateral frameworks, and consciousness amongst corporate actors, non-governmental organizations, and governments alike. In light of such trends, the characterization of CSR as a purely "voluntary" concept is misleading. If one can conclude that CSR and related social expectations are perceived, internalized into corporate self-governance, and consistently acted upon or at least referred to as standards of corporate behavior, then the question of whether CSR "ought" to be so viewed is practically immaterial. The focus of the authors moves beyond those increasingly (practically) irrelevant arguments, towards a consideration of the much broader and more fascinating question of how the phenomenon generally referred to as CSR should be understood by the legal practitioner.

But even getting past such inhibitions, the authors face the daunting task of defining a very elusive topic, which lacks clearly defined content and defies simple explanation. These challenges may, unfortunately, dissuade a significant portion of the book's intended audience from giving the text and its contents serious consideration. Lawyers in private practice may well view the book as lacking authoritative insights into the law as it is conventionally understood—as a series of black-letter edicts of government and governmental authorities. Conversely, the book may be overlooked by business theorists (considering issues of CSR from an ethical or organizational behavior perspective) who may find the discussion too legalistic to be useful. To this reviewer, both conclusions would be unfortunate and short-sighted. This text makes a valuable contribution to the academic literature on CSR and indeed to the fields of legal and business theory more generally.

Certainly, a legal analysis of CSR will force the lawyer to move beyond a search for authoritative sources of law towards a more nuanced understanding of law as part of a complex, over-lapping, and hierarchical set of social expectations that affect social actors including corporations and their agents. Far from being an indulgence, such an evolution in thinking is much needed in order to align the thought processes of legal counsel with the real dilemmas faced by their business clients. With businesses

operating in often competing and overlapping normative frameworks, preservation of corporate legitimacy, and the ever essential “social license to operate” necessitates consideration of more than black-letter law. These are imperatives that sophisticated corporate actors do not take lightly. To comprehend this reality, a perceptual adjustment on the part of the legal practitioner may be necessary, not only to truly understand this book, but also to prevent the obsolescence of the legal practitioner as strategic advisor to business in a globalized world. The strategic problems posed by CSR are real for the businesses that grapple with them. If private practitioners of law are unable, or unwilling, to provide guidance that takes these issues into consideration, then corporate clients will simply look elsewhere for support and advice. The proliferation of CSR consultancies staffed by accountants and management advisors with little or no legal training suggests this has already occurred.<sup>3</sup> Practitioners of law interested in staunching this trend and preserving a role of strategic importance within corporate management structures would be well advised to give this book a close read.

As the authors illustrate well, CSR and law are not mutually exclusive but are in fact intrinsically interrelated concepts. 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. All of this takes place in the shadow of state powers that have the capacity to introduce new hard law and regulation if corporate actors fail to act reasonably and meet legitimate societal expectations. 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 behaviour. While those other fields are undoubtedly important in their respective spheres, the legal analysis offered by this text should be viewed as a valuable contribution to the interdisciplinary field of CSR.

The value of the text will likely not be lost on corporate in-house legal counsel attempting to understand and implement a CSR agenda. Such persons will not be inhibited by the existential question of whether CSR ought to be considered from a legal perspective. For them, that question will be rendered moot once the decision has been made to take a CSR-cognizant approach to corporate governance. What will be of more rele-

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<sup>3</sup> Take for example the Corporate Sustainability consultancies established by the “Big Four” accounting firms, which generally neither promote nor offer legal advice in these areas.

vance for such persons will be: (1) *what* a CSR mandate should entail, and (2) *how* it should be carried out?

The book and its seven principles will be most helpful in response to the first question. 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 are helpfully discussed in the text and will be essential high points of any serious CSR program.

But once these areas are identified and generally understood, the text will be of more limited value in discerning the substantive content of CSR. The book's overview of best practices and the more substantive aspects of CSR are cursory in nature. While the book provides good direction on where to possibly look for substantive content of CSR expectations (academic literature, best practices, some regulatory and legislative initiatives) it is not at all comprehensive in describing what "compliance" with CSR expectations actually looks like. For example, little more than two pages is accorded to a discussion on what "integrated sustainable decision-making" would entail in practice, with the remainder of that section focusing mostly on whether the corporate law concept of fiduciary duty is an inhibitor or facilitator of CSR.<sup>4</sup> The sections on "Stakeholder Engagement" and CSR-related "Transparency" provide good overviews of the existing standards and initiatives in these areas; however, the discussion tends toward a general and high-level summary of developments, with very little critical analysis. The idea of "Consistent Best Practices" is discussed as an emerging area of international customary expectation, but its content and parameters are for the most part left undefined or only discussed in generalities. The chapter on CSR-related "Accountability" outlines the major US tort law, international voluntary frameworks, and emerging transnational monitoring mechanisms that relate to CSR, and provides an interesting discussion of how CSR accountability can be understood as a form of "enforced self-regulation in the shadow of the law". However, it is difficult to discern from that discussion how these concepts are really tied together from a legal perspective, and how legal practitioners can and ought to use CSR as a conceptual framework in the provision of advice or advocacy. In all, the reader comes away with a sense that

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<sup>4</sup> *Ibid* at 156-58.

perhaps CSR has not yet coalesced as a legal concept that can usefully inform legal analysis of contemporary business problems.<sup>5</sup>

The authors appear to resist this conclusion by focusing on empirical developments and speaking of CSR as a current reality. That approach leads to a helpful compilation of legal developments, which are undoubtedly linked to the concept of CSR. Indeed, CSR is a reality, at least for the business community. It is still, however, a very new and theoretically difficult subject for lawyers. The uncertainty of CSR as a field of legal study forces the authors to provide theoretical clarity to the discussion through their two innovative theses. But their theoretical afterthought is inevitably inadequate. One cannot help but wonder if the practical analysis offered by the authors, though very good, is an example of the cart being put before the proverbial horse in the absence of a clear exposition of the theoretical underpinning of their topic.

Offering a theoretical definition of CSR begs the question, should CSR be understood as a legal obligation? If so, how do we deal with the fact that there is no single authoritative source that promulgates CSR obligations? In the absence of clearly defined authoritative sources, how do we identify the substantive content of CSR? More practically, how can and should legal practitioners use and apply CSR in a legal context? How do companies identify stakeholder audiences for engagement? How should corporate actors choose between conflicting legitimate interests? What happens when CSR expectations conflict with “hard” law? How will corporate actors defend their CSR management practices if challenged? These questions, which force consideration of what CSR actually means, are much more complicated than the yes-or-no question of whether CSR is permissible at law. The authors rightly succeed in putting aside that banal and practically irrelevant question. They also succeed in creating a very useful and thought provoking conceptual framework that helps define CSR as a legal field of study. However, they do not provide a strong theoretical foundation to explain how a CSR concept should be identified in the course of advice or advocacy as an obligation that can guide or justify corporate behaviour. Indeed, much work remains to be done if the empirical reality of CSR is to be reconciled with conventional understandings of law and legal obligation. While it is not a panacea for those of us craving answers to these questions, *Corporate Social*

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<sup>5</sup> But see David Weissbrodt, Book Review of *Corporate Social Responsibility: A Legal Analysis* by Michael Kerr, Richard Janda & Chip Pitts (2009) 32:1 Hum Rts Q 207 at 208.

*Responsibility: A Legal Analysis* nevertheless provides a wonderful start and is highly recommended by this reader to forward-looking and innovative lawyers everywhere.

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