

Corporation as rights actor

A critical analysis of Creating Shared Value's possibility to fulfil human rights

Susanna Starck

Though corporations affect humans in social, economic and environmental ways the state is traditionally viewed as the primary human rights fulfiller. There is, however, a burning-point such that corporations in some cases are bigger economic actors than states are. Meanwhile, those companies do not have the same duties as states have towards citizens.

The business concept Creating Shared Value (CSV) was first formulated by scholars Porter and Kramer. CSV is described as a way of increasing the integration of corporation and society, with the objective of increasing the legitimacy of corporations; but the concept is also described as a means for obtaining competitive advantage. A shared value is created when there is a value for society, such as development in some way, and a value for corporations such as profit.¹

In this article, I question the common assumption of the state as the primary human rights fulfiller. When doing this, I chose to compare the business concept of CSV with UN Guiding Principles on Business and Human Rights (UNGPs). By studying how these different texts relate to each other in their ideas and expression I was able to see a high level of

¹ Porter, Michael E., & Kramer, Mark R., "Creating Shared Value", *Harvard Business Review* 89, no. 1/2, 2011, p. 65.

interdiscursivity, i.e. how much they relate in their textual practice describing the idea of who is the right-fulfilling agent. The second task I take on is to review CSV as a mean of fulfilling and upholding rights. Lastly, I discuss the theoretical consequences of a business concept, such as CSV, doing so. What consequences can come from shifting the responsibility/duty to fulfil human rights from states to corporations?

The case of fulfilling rights

The theoretical framework that the study adopts is inspired by Thomas Pogge's institutional perspective on human rights fulfilment and upholding. When the availability of an object, which a right requires, is secured the right is fulfilled. This means that a human right can be fulfilled and upheld only when it's institutionalised: i.e. fulfilled and upheld by a social institution.² Through this perspective, human rights aren't primarily addressed to a government of a state. Rather, they are addressed to the institutional structure of a society and other overarching social systems.³ When the rights claim is addressed to the creator and upholder of social institution the scope of a human rights duty bearer is broadened. This could mean that even corporations possess a duty to fulfil human rights.

When examining consequences of a shift of duty bearer, the article adopts the theoretical framework of "marketization of discourse", formulated by Norman Fairclough. The framework describes the case when institutions operate as a corporation would.⁴ In other words, when market discourses tend to colonise public institutions' discursive practices.⁵ In this article, that action is applied to the state and the identity of corporation as rights-fulfiller and as

² Pogge, Thomas Winfried Menko, *World poverty and human rights: cosmopolitan responsibilities and reforms*, Cambridge: Polity, 2008, pp. 25, 50-51.

³ *Ibid.*, p. 53.

⁴ Fairclough, Norman, "Critical discourse analysis and the marketization of public discourse: the universities", *Discourse & Society*, Vol. 4, Issue 2, 1993, p. 143.

⁵ Winther Jørgensen, Marianne & Phillips, Louise, *Diskursanalys som teori och metod*, Studentlitteratur, Lund, 2000, p. 77.

a possible authority. Thereby, "marketization of discourse" is a shift of usage of specific discursive practices that previously and exclusively belonged to a specific order of discourse.

‘Creating Shared Value’ as a right-fulfilling agent

What makes CSV distinctive is its focus on long-term strategy and its claimed differentiation from philanthropy. The concept aims to find intersections between societal issues and corporate profit. Through these intersections the legitimacy of investing in solutions to solve these issues is granted through a profit maximisation perspective. The creation of a shared value should be located in the company’s core, and by that shape the whole business and its strategy. The indirect consequence of this concept could in that case be overall improved health and increased level of education within a community, or even reduced environmental impact. According to Porter and Kramer, there are three ways for companies to create opportunities where a shared value can emerge: by reconceiving products and markets, redefining productivity in the value chain, and by enabling local cluster development.⁶ In summary this means that:

1. companies can find new markets and clients through the development of a product
2. from an environmental perspective, the products could, from production to consumer, be improved and thereby drive economic development
3. support and develop local clusters, i.e. support those areas and its institutions where the company is operating. This could mean that the company itself creates clusters, but also that the company takes measures regarding defects of existing clusters’ surroundings.

⁶ Porter & Kramer, 2011, p. 65.

Actors, credibility and certainty

Reviewing CSV and UNGPs shows that Porter and Kramer mostly use “society”, “company”, “companies”, “corporations” and “governments” when describing actors, while UNGPs use “states”, “business enterprises” and “business”.⁷ UNGPs often use “human rights” when talking about society as a whole.⁸ A trinity prevails, as the three actors (state, corporation and society) are described as interdependent and synergetic. Porter and Kramer depict companies as most able to act, thereafter states, while UNGPs split the states’ duties and companies’ responsibilities towards human rights into two separate parts.⁹

In the UNGPs the word “should” is often used when describing what actions “business enterprises” are expected to carry out/conduct: “business enterprises *should* carry out human rights due diligence.”¹⁰ When put in contrast with a principle on what is expected of states when acting, it becomes clear that states *must* and businesses *should*: “States *must* protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.”¹¹ In this case the usage of “must” in contrast to “should” signals a greater certainty regarding state action, but a weaker and more open interpretation for company action. While this is the single time the word “must” appears in the document (part I and II) – describing action taken by states/companies – it further strengthens the assumption that the UNGPs is a framework with only one principle that is definitely certain. Like others have observed, the usage of “should”, in UNGPs, creates a weak

⁷ Examples: Porter & Kramer, 2011, p. 64; Porter & Kramer, 2006, p. 82; Guiding Principle No. 3, Commentary.

⁸ Example: Guiding Principle No. 13, Commentary.

⁹ Guiding Principle, “I. The state duty to protect human rights” & “II. The corporate responsibility to respect human rights”.

¹⁰ Guiding Principle No. 17, et al.

¹¹ Guiding Principle No. 1.

framework.¹² In the section “General Principles” of UNGPs support for this notion can be found: “Nothing in these Guiding Principles should be read as creating new international law obligations [...]”¹³. This confirms the uncertainty of implementing definite restrictions upon corporations.

Porter and Kramer describe corporation as the actor with the most capacity to meet human needs:

[...] businesses will often be far more effective than governments and nonprofits are at marketing that motivates customers to embrace products and services that create societal benefits.¹⁴

In summary, Porter and Kramer imply that corporations have more capacity and more opportunities to make some sort of change – UNGPs ascribe responsibility to companies, while the duty to fulfil human rights is exclusively attributed to the state. The reason for this is that states must protect from violations of human rights by third party actors, which includes corporations. The state’s duty does not only span over the state as an actor itself, but also other actors within its territory and/or jurisdiction.¹⁵

The similar usage of “needs” and “rights”

All the documents reviewed use, in some extent, the word “need” when describing what is to be fulfilled. Porter and Kramer speaks about “customer needs”,¹⁶ “social needs”,¹⁷ “human needs”,¹⁸ but mainly “societal needs”. The

¹² Nolan, Justine, “Mapping the movement: the business and human rights regulatory framework” i Baumann-Pauly et al., *Business and human rights: from principles to practice*, Routledge, Abingdon, 2016, p. 44.

¹³ Guiding Principles, General Principles.

¹⁴ Porter & Kramer, 2011, p. 67.

¹⁵ Guiding Principle No. 1.

¹⁶ Porter & Kramer, 2011, p. 64.

¹⁷ Inter alia Porter & Kramer, 2011, p. 70.

¹⁸ Inter alia Porter & Kramer, 2011, p. 75.

UNGPs use, almost exclusively, “right”/“rights” when describing the effect of states’ and corporations’ actions and what these actors should take into account when proceeding. Porter and Kramer suggest that *needs* should be evaluated and that the corporate strategy is to be defined based on those *needs*. UNGPs take its guidance from the *right* when determining the course of action. Although, when talking about groups in high risk of being marginalised, UNGPs broaden the basis of guidance: “with particular attention to the rights and needs [...]”.¹⁹ The concept of “rights” has now been combined with the concept of “needs”, which shows a linkage between the two when establishing proceedings.

An interesting aspect in the usage of “needs” is how Porter and Kramer link it to social institutions:

The best companies once took on a broad range of roles in meeting the *needs* of workers, communities, and supporting businesses. As other social institutions appeared on the scene, however, these roles fell away or were delegated.²⁰

Porter and Kramer explicitly use the word “needs” when referring to social institutions (and before that, companies) as the fulfiller of these. With the perspective that social institutions fulfil and uphold rights, a distinct link between “needs” and “rights” appears.

Responsibility and duties

When reviewing UNGPs, the demand of *responsibility* put on corporation is “[...] that they should avoid infringing on the human rights of others.”²¹ This responsibility is described as a global standard that is expected to be pursued.²²

¹⁹ Guiding Principles, General Principles.

²⁰ Porter & Kramer, 2011, p. 66.

²¹ Guiding Principle No. 11.

²² Guiding Principle No. 11, Commentary.

States' duty to protect against human rights violations is both a standard of conduct, but it is as well a part of international human rights law.²³ Porter and Kramer do not link, as opposed to UNGPs, to responsibility when speaking about the company's business. Rather, they want to use the concept of CSV to claim a kind of duty for companies in increasing legitimacy for their businesses:

The purpose of the corporation must be redefined as creating shared value, not just profit per se. This will drive the next wave of innovation and productivity growth in the global economy. It will also reshape capitalism and its relationship to society. Perhaps most important of all, learning how to create shared value is our best chance to legitimize business again.²⁴

The “duty” a company bears is to redefine its purpose into shared value creation, and by that achieving legitimacy. This shift of objective is justified by the assumption that societal needs defines the market.²⁵ The concept of CSV wants to redefine companies' objectives into fulfilling needs (and by that generate profit, as the company discourse), similar to states' duty, and thereby objective, of fulfilling rights. Though, UNGPs explicitly note companies' role in fulfilling rights: “Business enterprises should not undermine States' abilities to meet their own human rights obligations [...]”²⁶. This implies that corporations should neither create nor uphold social institutions – something that *is* a part of the strategy in pursuing shared values, according to Porter and Kramer.²⁷ This confirms an interdiscursivity between the state discourse (articulated in UNGPs) and the discourse that CSV is a part of (articulated by Porter and Kramer), regarding duty.

²³ Guiding Principle No. 1, Commentary.

²⁴ Porter & Kramer, 2011, p. 64.

²⁵ Porter & Kramer, 2006, pp. 83–4.

²⁶ Guiding Principle No. 11, Commentary.

²⁷ Porter & Kramer, 2011, pp. 72-5.

Actions

The three ways for companies to create opportunities where a shared value can emerge constitute the actions formulated by Porter and Kramer. In the third way, “Enabling Local Cluster Development”, aspects that can very much link to the creation and upholding of a social institution are mentioned:

Firms create shared value by building clusters to improve company productivity while addressing gaps or failures in the framework conditions surrounding the cluster.²⁸

By cluster, Porter and Kramer are referring to a geographical concentration of businesses within a field of work, which also includes surrounding social institutions such as education and healthcare. When creating such clusters, and thereby social institutions, CSV puts companies in a role as a possible rights-fulfiller.

In UNGPs, actions are derived from the first principle in its framework: the states’ duty to respect, protect and fulfil the human rights of individuals in its territory.²⁹ As shown in GP No. 5: “States should exercise adequate oversight in order to meet their international human rights obligations [...]”³⁰, UNGPs are constructed in a similar way as the framework that CSV constitutes. The difference is that the framework of UNGPs is to be used for maintaining respect towards human rights, while the framework constituted by CSV has the purpose of creating opportunities for a shared value to emerge. Again, an interdiscursivity appears between them, in this case in term of actions and roles when accomplishing these: the concept of CSV speaks about *companies* and UNGPs speak about the *state*.

²⁸ Porter & Kramer, 2011, p. 72.

²⁹ Guiding Principle No. 1 and Commentary.

³⁰ Guiding Principle No. 5, see also GP No. 3.

CSV within social practices

By looking at other discursive practices and how they influence the studied discourse, the understanding of CSV as a concept is broadened. There are three prominent components of the practice: profit maximisation, rights fulfilment and globalisation.

Profit-driven companies that apply CSV to their business strategy do so with the purpose of making money. Thereby, CSV operates within the social practice of profit maximisation.³¹ Therefore, CSV belongs to the same order of discourse as profit maximisation and is shaped by business discourse. Porter and Kramer claim that CSV: “[...] is integral to a company’s profitability and competitive position.”³²

By applying CSV to a company’s strategy, its involvement in meeting societal needs is legitimised on the basis of profit maximisation. According to economist Milton Friedman, the only responsibility a board of a company has towards its shareholders is to operate the business so that the profit is maximised while the rules of society are followed.³³ CSV is located within a (grey) area, which Friedman does not speak about, namely where profit maximisation is considered to depend on society’s well-being. The core of corporate responsibility, according Friedman, is kept, but in order to create the conditions for profit maximisation there must be social development.³⁴

With that in mind there is reason to believe that CSV operates within a social practice of human rights fulfilment. Within this practice, the state is often mentioned as the primary actor.³⁵ Thus, CSV is shaped by a state discourse, where the actor is supposed to fulfil needs. CSV uses this as a basis in creating economic value, instead of seeing it as a weakness.³⁶ Tendencies of

³¹ Porter & Kramer, 2011, p. 64.

³² *Ibid.*, p. 76.

³³ Friedman, 1970.

³⁴ Porter & Kramer, 2011, p. 66.

³⁵ Guiding Principles, General Principles.

³⁶ Porter & Kramer, 2011, p. 67.

an overlap between the corporation and the state discourse is explicitly found in the concept of CSV: “The principle of shared value creation cuts across the traditional divide between the responsibilities of business and those of government or civil society.”³⁷ According to Porter and Kramer, one should assume a societal perspective where the actor is less important and that benefit to cost will determine who should fulfil needs.³⁸ While Porter and Kramer imply that CSV is not corporate social responsibility (CSR), the concept’s focus on social development, as a mechanism for economic development, signals a link between the two. What Porter and Kramer do show is that corporations’ contributions to social development do not postulate either philanthropy or the adoption of universal responsibility; the social development is a by-product of implementing CSV.³⁹

The last social practice to be highlighted is globalisation. Globalisation is described as developing processes within politics, economy and culture. Primarily referring to economic relations, national economies are becoming increasingly integrated.⁴⁰ In other words, an interdependency exists between economies, and between their politics and cultures. Interdependency and cooperation is central within CSV: “[...] shared value can come only as a result of effective collaboration among all parties.”⁴¹ CSV’s manifestation is shaped by an interdependency between society, state and corporation. Corporations need a community with a demand for its products, that can provide manpower and possess a good attitude towards the business. Meanwhile, the community needs a society with successful businesses with source of employment.⁴² Porter and Kramer often speak about “the narrow definition of capitalism”⁴³ and how it limits the success of companies. The

³⁷ Ibid., p. 72.

³⁸ Ibid.

³⁹ Ibid., p. 64.

⁴⁰ ”globalisering”, *Nationalencyklopedin*.

⁴¹ Porter & Kramer, 2011, p. 73.

⁴² Porter & Kramer, 2011, p. 66.

⁴³ Examples: Porter & Kramer, 2011, pp. 64, 66.

boundaries of capitalism are redefined by applying CSV.⁴⁴ What Porter and Kramer are implying is that companies must embrace the mechanisms of globalisation. Because of an increasing globalisation, a company's actions will affect more aspects than just those within the economic context it operates in. Companies must acknowledge that the interdependency between business and society is strong enough to constitute each party's success. This implies that the traditional view of corporation as "businesses" expands.⁴⁵

The exclusion of corporation as the primary rights-fulfiller

Reviewing UNGPs show that corporations are excluded as a right-fulfilling agent. Porter and Kramer highlight this:

Solving social problems has been ceded to governments and to NGOs. [...] The concept of shared value, in contrast, recognizes that societal needs, not just conventional economic needs, define markets.⁴⁶

This study shows that CSV is striving towards taking over this role from the state, to some extent. Corporations are often discussed in the literature as an agent that affects the environment and social conditions: either corporations contribute to the improvement of these, e.g. as they affect the economic growth of states, or, corporations contribute to their deterioration, e.g. through transportation and production or poor working and living condition for people, in conjunction with the business. The problem with the existing literature is the absence of a discussion surrounding the fulfilment and upholding of human rights by corporations, and the consequences of such a scenario.

⁴⁴ Porter & Kramer, 2011, pp. 64, 67.

⁴⁵ Ibid., p. 77.

⁴⁶ Ibid., p. 65.

A shift of duty bearer

Just as UNGPs suggest, states have a duty to fulfil, protect and thereby uphold human rights. A question that should be asked is what a broadened understanding of “responsibility” for corporations would entail. Could the increasing criteria of corporate social responsibility be harmful for states and their citizens? Or is it desirable for states that the scope for companies is widened? As Gonzalez Correa claims, a shift of duty bearer, solely based on how much a corporation affects society, would mean that a large part of a state’s duties should be transferred to companies.⁴⁷ A problematic scenario would be if states deliberately didn’t fulfil their duties, expecting that corporations would “take over”.

A problem that appears with the difference of obligation between state and corporation is when a business uses CSV and engages in societal problems in seeking profit maximisation. In this case, a company may adopt a way of business similar to the state’s duties (e.g. the right to education, healthcare), but these are coded as “responsibilities” due to the origin of the actor. With this “shift” of the duty bearer, but with the semantic and juridical difference of “responsibility”, the issue of how a citizen should claim their rights when corporations don’t have the duty to fulfil them emerges. However, if rights are seen through an institutional perspective this issue would vanish due to companies being the actor that creates social institutions. Nevertheless, corporation and state are two very different actors even though a corporation may discursively act as a state in rights fulfilment; mainly because corporations lack the membership that exists between state and citizen.

⁴⁷ González Correa, Flor, “Human Rights Ltd.: An Alternative Approach to Assessing the Impact of Transnational Corporations on Human Rights” in Mills, Kurt, & Karp, David Jason, *Human Rights Protection in Global Politics: Responsibilities of States and Non- State Actors [Electronic resource]*, Basingstoke : Palgrave Macmillan, 2015, p. 161.

Consequences of a shift: “Marketization of discourse” and neo-colonialism

The consequences Fairclough foresees regarding a “marketization of discourse” concerns sovereignty, authority and identity – in this article those are applied to the state.⁴⁸ The state’s identity is shaped and transformed if another actor colonises its discursive practices; what was previously exclusive for the state is no longer unique for that kind of actor. This means a change of attitude towards the state and a weakened position towards its citizens and global society. States’ authority and sovereignty is thereby undermined as a result of a transfer of discursive practice. Instable institutional identities entail a shift in authority relations between state and corporation.⁴⁹

Not only does a colonisation of discursive practices tend to emerge when these orders of discourse overlap each other; a movement towards neo-colonialism occurs. Neo-colonialism is described as when a formally independent country’s economic system is controlled by an external force, and thereby its political line of actions.⁵⁰ The concept of CSV encourages corporations to involve themselves in the community they operate within, both economically and, more implicitly, politically. CSV entails that in a scenario where a company is the creator and upholder of social institutions it has power over the population that is forced under the institution. According to Pogge, the group that controls most of the means of coercion within the country is the legitimate government regardless of how the group got and uses its power or whether the group is supported by the population it rules.⁵¹ Even though companies do not control means of coercion they may have an authoritarian position in the society since the citizens are missing the democratic (judicial) influence over corporations that they have over the democratic state. Therefore, corporations cannot take on the role as a

⁴⁸ Fairclough, 1993, pp. 143-4

⁴⁹ Ibid., p. 157.

⁵⁰ “nykolonialism”, *Nationalencyklopedin*.

⁵¹ Pogge, 2008, p. 118.

legitimate government, but as a holder of an authoritarian position they might receive rights claims.⁵²

Conclusions

A larger moral question remains in how the fulfilment of human rights should be prioritised: they can be fulfilled momentarily with an uncertainty whether the social institution persists. Alternatively, the rights-fulfilling role is ascribed to the state with the hope of more established social institutions, being aware of how time-consuming such a project could be in politically weak or poor states. The consequences that has appeared when theorising a shift of duty bearer are especially the different character of the actors and the system of rules they are bound by. In the case of CSV the profit and cost-benefit perspective is constantly referred to, which questions whether it is always positive to fulfil human rights, even if corporation takes on a “temporary” duty when an aspect of profit exists. When excluding corporations as a potential rights actor one may fail to notice the power of corporations in rights fulfilment. With an inclusive perspective on rights actors the rights holder, citizens, may have difficulties in claiming those rights, since corporation as a rights fulfiller lacks the mutual exchange in terms of rights and duties.

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⁵² Ibid., p. 65.

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