

*Fundamental Rights and the Legal Obligations of Business*. By DAVID BILCHITZ.  
[Cambridge University Press, 2022. xxii + 499 pp. Hardback £110.00. ISBN  
978-1-108-84194-8.]

Following the publication of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011, and subsequent attempts at the national and international level to enforce human rights in the commercial sphere (like the UK’s Modern Slavery Act 2015), there has been renewed scholarly interest in the human rights duties of corporations. “Business and human rights” is a difficult area of inquiry: making sound policy proposals requires attention to the intersection of human rights, corporate law, tort, both private and public international law, and other legal fields besides. Moreover, it frequently requires a theory of these fields, including a theory about which field should be deployed to solve certain problems under certain conditions. Depending on the author’s aims, it can also require engagement with economics and with difficult philosophical issues concerning the nature of the corporation. This call for interdisciplinarity is what makes “business and human rights” an exciting field of study, but the difficulty of answering that call has created a body of scholarship that sometimes feels superficial or theoretically thin.

In this regard, David Bilchitz is exceptional. Bilchitz is one of the leading figures in the field; he has been working on tricky pieces of the business and human rights puzzle for a long time. He has captured the depth and breadth of his knowledge in his latest book, *Fundamental Rights and the Legal Obligations of Business*, which is stunning in its sophisticated coverage of numerous legal fields as well as some associated areas of philosophy.

The book is divided into three parts. After an initial chapter on the nature and purpose of the corporation (to which I return below), Part I describes and critiques various models of legal reasoning that courts have adopted to address human rights infringements by corporations. Most of the chapters in this part describe models which assume that human rights obligations bind only the state.

Chapter 2 focuses on the state’s duty under international law to protect a person’s human rights from violation by a third party (say, another individual or a corporation). Chapter 3 describes the “indirect application model” that exists in some national legal systems. It is the domestic analogue of the international law duty to protect: once again, human rights obligations fall on states only, requiring them to enact legislation and develop their common law with a view to preventing human rights violations by corporate actors. Chapter 4 describes what Bilchitz calls the “expanding the state” model, which redraws the boundaries of the state to extend human rights obligations to at least some kinds of state-like corporations.

The overriding critique of all three foregoing models is that they wrongly suppose that corporations themselves bear no human rights obligations, and so depend on circuitous reasoning to implicate the state in a corporation’s human rights abuses. By closely analysing case law which adopts these models, Bilchitz convincingly shows that courts cannot (and, in fact, do not) attribute the relevant obligations to the state without first having some view of what the state must protect people from – that is, a view about what corporations may not do with respect to human rights. Thus, the courts which embrace these models implicitly and inevitably determine a corporation’s human rights duties while professing that such duties bind only the state. Building on these criticisms, Bilchitz offers his preferred model of reasoning in Chapter 5 – the “direct obligations model” – which explicitly

recognises that corporations themselves have obligations to respect human rights and builds on that premise to give content to those obligations. I return to this model below.

Part II develops what Bilchitz terms a “multi-factoral approach” for ascertaining the substantive content of a corporation’s human rights obligations: what, exactly, does some human right require of a corporation in a concrete situation? Drawing on relevant case law, Chapter 6 identifies and normatively defends two groups of salient factors: “beneficiary-oriented” factors (e.g. the impact on the victim) and “agent-relative” factors (e.g. the functions that the corporation performs).

As Bilchitz recognises, these factors might pull in different directions, and it may be that no single factor is decisive in every case. Chapters 7 and 8 offer two different frameworks for balancing these conflicts. The former focuses on a corporation’s negative human rights obligations and borrows the well-known human rights concept of proportionality. Bilchitz’s test essentially asks whether the corporation’s human rights violation has been committed in the name of some significant public policy goal, and whether that goal could have been achieved by some measure that is less violative of human rights. In Chapter 8, Bilchitz modifies his multi-factoral approach into a seven-step test for determining the content of a corporation’s positive human rights obligations.

Part III is concerned with institutional reforms that will help “ensure that corporations adequately address their obligations” (p. 19), as those obligations are conceived by Bilchitz. Chapter 9 proposes significant reforms to domestic regimes of corporate law which would require directors, by way of a new fiduciary duty, to consider their corporation’s human rights obligations (using Bilchitz’s multi-factoral approach). Chapter 10, proposes a range of international mechanisms that might promote corporate accountability in this area, including a brief but ambitious proposal for a “World Court on Business and Human Rights” (pp. 454–56).

In the spirit of critical engagement, I turn now to two aspects of the book which prompted some disagreement on my part. First, the opening chapter offering a theory of the corporation seems largely unnecessary. The dominant view (in corporate law, at least) reduces the corporation to a legal fiction which serves as a nexus of contracts among its individuals, shareholders, managers, creditors and employees. Bilchitz rejects this theory (pp. 30–35) in favour of what he calls a “supervenience model” of the corporation. This model holds that “corporate actions are not reducible to the actions of particular individuals” while also recognising that “there can be no corporate action without the action of an individual” (p. 36). The concept of supervenience in metaphysics and its potential application to the ontology of group entities like corporations is an interesting idea to which some philosophers have recently attended, but it is too complex to address in the short space that Bilchitz dedicates to it.

It is also not clear why he needs it. Theories about the nature of the corporation have been most relevant to questions of whether and how corporations can be liable for crimes, and whether corporations can be human rights *holders*. Bilchitz is not concerned with the former question (at least not explicitly) and he expressly disputes the latter (p. 184) – a position which would in fact be strengthened, I think, by rejecting the claim that the corporation is something more than a nexus of contracts.

He seems most concerned to defend the idea that a corporation can have a separate legal personality and hence be a subject of legal obligations independent of those which attach to its individual members (pp. 31, 33). However, it is not obvious why we need his ontological theory of the corporation to explain its

separate legal personality. This defining feature of the corporation is explained simply by its being a legal fiction existing solely in contemplation of the law and which is capable of bearing any combination of legal rights and duties we might give it (as long as those rights and duties cohere reasonably well with the broader set of legal norms in the relevant jurisdiction). If there are good public policy grounds for corporations to be human rights *duty-bearers* – if we think that corporations should be held responsible for harm for which no individual within the corporation was the efficient cause (p. 34), or that a corporation can cause damage that exceeds the financial resources of any responsible individual within it (pp. 34–35), and if we think that holding the corporation itself liable will help deter those harms or compensate those damages – then we should simply attribute human rights duties to corporations. The fiction theory which Bilchitz rejects does not prohibit this result but enables it.

Second, Bilchitz is unclear about what his preferred “direct obligations model” involves. To my mind, there are at least two distinct questions one might ask about a corporation’s human rights duties: (1) what is the content of those duties? and (2) how should the law give effect to that content? The literature on the “horizontality” of human rights has been largely focused on question (2). The central dispute has been between supporters of “indirect” effect (according to which the content of a corporation’s human rights duties influences the interpretation of legislation and the development of the common law) and supporters of direct effect (according to which a litigant can plead a claim without alleging a violation of statute or common law, merely by alleging that the corporation breached its human rights duties).

Bilchitz is not always clear which of these questions he wants to address. Bilchitz’s direct obligations model seems mainly concerned with question (1). As he says early on, his aim is to develop “a general legal analytical framework for determining the content of corporate obligations in relation to fundamental rights” (p. 5). Understood as a method of reasoning about the content of a corporation’s human rights duties, Bilchitz makes unimpeachable arguments that they bear these duties directly; his multi-factoral approach for giving content to those duties is commendable. So understood, he can also remain agnostic about whether those duties should be given direct or only indirect effect.

At times, however, Bilchitz frames the direct obligations model more expansively, to encompass certain aspects of question (2) and, in particular, to align it with direct effect. He says, for example, that the direct obligations model “allows for an action... where an individual may approach courts concerning direct violations of their fundamental rights” (p. 182). Indeed, it is a “major advantage” of the direct model, Bilchitz says, that it makes a corporation’s international human rights obligations independent of “whether states enact laws imposing such obligations” (p. 179). The claim that litigants should be able to plead human rights infringements without first implicating some piece of legislation or common law is controversial, as is the claim that judges, in the absence of legislation or established common law to guide them, should be in the business of balancing the competing rights claims of private actors. The book does not say much to defend such claims.

Bilchitz is also unclear about the extent to which his direct and indirect models overlap with the aforementioned matters of direct and indirect effect. The unclarity stems in part from the fact that Bilchitz develops his model of direct obligations largely from cases concerned with direct effect (pp. 197–213), suggesting at least a strong correspondence. The confusion is well captured by his discussion of the UNGPs, which embody, according to Bilchitz, his direct

model (p. 176). It is true that the UNGPs recognise that corporations can have human rights “impacts”, but they strenuously avoid claiming that corporations are human rights duty-bearers in international law: states have human rights “duties” (see Principle I), while corporations have only “responsibilities” (see Principle II). Moreover, the UNGPs urge states to prevent those impacts through national legislation, regulation and adjudication, while urging corporations to abide by national law. Hitherto, I had thus considered (as I think others would have) that the UNGPs are a central case of indirect effect, and even of what Bilchitz describes as his “indirect obligations model”: only the state has international legal duties to respect human rights, pursuant to which it must properly regulate its corporations. My criticism here may simply reflect my own failure to think myself free of the long literature on direct/indirect effect and engage with Bilchitz on his own terms, but I suspect I may not be the only human rights scholar who labours under that shortcoming while reading his book.

These criticisms aside, the book is an excellent demonstration of what it takes to make an important contribution in the difficult area of business and human rights. It is essential reading for anyone interested in holding corporations accountable for human rights abuses.

NICK FRIEDMAN  
ST. JOHN'S COLLEGE