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BOOK REVIEW

Fundamental Rights and the Legal Obligations of Business, by David Bilchitz (Cambridge: Cambridge University Press, 2022), 499 pp.

There is a general, though not uncontested, view that precision and elaboration constitute necessary hallmarks of international legalisation.[1] As the business and human rights (BHR) field moves from a nascent to an established status, questions about whether corporations hold rights-based obligations and what (legal) form these obligations should assume are being supplemented by inquiries into the substance or nature of these obligations. David Bilchitz's *Fundamental Rights and Legal Obligations of Business* leads this shift. It begins by acknowledging that existing academic discussion fixates on the question of *whether* corporations have obligations derived from fundamental rights but rarely considers *what* those obligations entail. To address this gap, Bilchitz assumes the considerable task of 'developing a general legal analytical framework for determining the content of corporate obligations regarding fundamental rights.'[2] This on its own is a significant contribution. It adds needed specificity, argumentative rigor and a plan for practical application to efforts that seek to advance meaningful legal obligations to mitigate the rights-based impacts of corporate activity. But, perhaps, Bilchitz's most significant contribution comes from how the book engages with its central questions from varied, intersecting legal perspectives. It blends the theoretical and the applied, public and private law, corporate and human rights-based approaches, domestic and international legal engagements and comparative accounts of judicial decisions that span numerous jurisdictions to advance BHR through an interdisciplinary approach that the field often claims but has rarely applied in such a contained and informed manner.

Bilchitz sets the book in three parts. The first provides critical overviews of the dominant models that are applied both domestically and internationally to address the substantive, rights-based obligations of non-state actors.[3] Foremost among these is the state duty to protect the model (chapter 2). Grounded in the international sphere, this maintains that states are the sole duty bearers of rights but are obligated to ensure that individuals do not experience rights-based harms from non-state actors.[4] Bilchitz dismisses this as normatively undesirable. He argues that there is no reason to place the state as an intermediary between the individual and the non-state actor, which can impact fundamental rights. If, as Bilchitz suggests, 'protecting the fundamental interests of individuals is the goal of rights protection … then that proposition would seem adequate

[1] For example, Kenneth W. Abbott, et al., 'The Concept of Legalization' (2000) 54:3 *International Organization* 401, 414.

[2] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge: Cambridge University Press, 2022), 4–5.

[3] On this point, it is worth noting that Bilchitz frames his approach as determining the rights-based obligations of non-state actors generally; however, the book's focus, as its title implies and its readership likely assumes, focuses almost exclusively on business and corporations.

[4] Bilchitz, note 2, 59.

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to justify placing direct obligations on corporations and other non-state actors.'[5] Furthermore, as Bilchitz shows by drawing on examples from the European Court of Human Rights, when courts do apply this model, they perform a legal sleight-of-hand, formally recognising that only states bear rights-based obligations while nevertheless articulating some vision of 'the obligations of the non-state actors in question vis-à-vis one another.'[6]

The indirect application model (chapter 3) and the expanding state model (chapter 4), which Bilchitz considers in turn, do not fare better. By exploring how the German Constitutional Court has employed the indirect application model, Bilchitz convincingly shows that the approach fails on its own terms. Despite the professed formal distinction between state and non-state actors, German courts still interpret the substantive meaning of corporate rights-based obligations. Similarly, the expanding state model, once commonly applied by US courts, unconvincingly delineates between state and non-state actors, assuming that these entities can be neatly separated when, as Bilchitz demonstrates, they exist on a continuum.[7] The direct obligation model (chapter 5), defies the more circuitous approaches featured in the early sections of Part I. Informed by case law from Colombia and South Africa, Bilchitz considers efforts to impose binding obligations directly on non-state actors. This is the preferred model for many of the normative reasons that are detailed in the earlier chapters, but, as Bilchitz demonstrates, many efforts to apply the direct approach still fail to articulate the substantive content of a non-state actor's rights-based obligations, an accusation that Bilchitz levies against the United Nations Guiding Principles on Business and Human Rights (UNGP).[8]

Bilchitz shows in Part I that regardless of the approach that a particular jurisdiction or court assumes, the indirect and direct models ultimately collapse into one another. This is unavoidable because, as Bilchitz documents, when courts perform legal acrobatics to articulate how the state must ensure that business activities respect fundamental rights, courts necessarily begin articulating the nature of the resulting corporate obligations. But in so doing, whether indirectly (by design) or directly (by neglect), each of the discussed models of extending obligations to non-state actors collectively fails to articulate 'the exact nature, type, or extent of the obligations.'[9]

While the absence of a resulting framework that details the specific nature of these obligations is well established throughout Part I, the book's second part begins the heavy lifting of setting out Bilchitz's preferred approach. This begins from the proposition that as the field of BHR has advanced, it has persuasively articulated how business activities can impact fundamental rights. But such foundational recognitions 'incorrectly assume that one can move directly from understanding the impact of an activity on a right to an obligation to prevent that impact.'[10] To facilitate the shift from description to prescription, Bilchitz advances a 'multi-factoral approach.' This builds on Bilchitz's earlier observations about how courts indirectly address corporate obligations to 'systematise what emerges from these judgments into an analytical framework for determining the obligations of non-state actors.'[11]

Because the nature of a corporation's rights-based obligations cannot be determined by a single criterion, the necessary framework must assess multiple considerations. The

[5] Ibid, 67.
[6] Ibid, 86.
[7] Ibid, 136.
[8] Ibid, 176, 194.
[9] Ibid, 176.
[10] Ibid, 214.
[11] Ibid, 220.

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proposed multi-factoral approach reflects the 'normative complexity' of determining the substance of the rights-based obligations of corporations. Bilchitz begins by laying out what his proffered framework would look like and how it would determine the obligations of corporations (chapter 6). To do so, Bilchitz argues that a framework must 'specify the relevant factors, consider their normative grounding, develop a set of presumptions that can be used by decision-makers, and propose a structured reasoning process to balance competing principles.'[12] Bilchitz dedicates much of this chapter to justifying the collective value of his multi-factor approach by considering 'beneficiary-orientated factors' that reflect the interests, vulnerability and impact of and on rights-holders and 'agent-relative factors' that assess the capacity, function and autonomy of the corporate actor's capacity to affect the rights-holder.[13]

The following two chapters lay out the framework, applying it to both negative (chapter 7) and positive rights-based obligations (chapter 8). Here, Bilchitz's overarching call for specificity assumes heightened complexity. Multi-part tests are layered atop the multi-factor approach to provide decision-makers with a structure to determine whether corporate activity impacts fundamental rights and, if so, whether such an impact is justifiable when balanced against conflicting corporate interests (e.g. profit maximisation). Bilchitz presents a standard proportionality test to assess justifications of corporate conduct that adversely impact fundamental rights. In relation to negative obligations, Bilchitz convincingly shows that the test's more common association with assessing state action can be applied to the activities of non-state actors. Bilchitz acknowledges, however, that the proportionality test's application is complicated in relation to positive obligations.[14]

In response, an amended seven-stage test is presented. Here, while one may quibble with the varied stages of the test and their appropriateness to collectively assess the nature of the corporation's obligations, greater value comes from the case that Bilchitz presents to determine that corporations owe positive duties and more established obligations not to harm. This is, perhaps, Bilchitz's most ambitious claim. But in advancing it, Bilchitz reflects upon the nature of the relationship between state and non-state actors, carefully addressing the prominent view that to require the corporation to assume more than negative obligations would be to neglect functional differences between states and businesses.[15] This line of argument may struggle in the short term to gain formal recognition; however, it bolsters the book's vision of the corporation as a moral actor with the capacity to impose harm and a responsibility to contribute to broader societal goods.

Part III is the book's most pragmatic and serves as its conclusion. It advances accounts of how the multi-factoral approach that Bilchitz spends much of the book developing can be formalised through corporate law (chapter 9) and international law (chapter 10). Bilchitz presents tangible (albeit ambitious) proposals that range from an expansive set of duties that corporate officers would be required to undertake to international accountability mechanisms like a new business and human rights arbitration tribunal or court. In offering these proposals, Bilchitz returns to the animating theme of specificity, noting that the 'worry, however, is that a failure to provide concrete and specific rules governing corporate obligations opens the door for corporate decision-makers to avoid seeing them as binding requirements at all. It also opens the possibility for corporations to use normative

[12] Ibid, 220–221.
[13] Ibid, 231.
[14] Ibid, 303.
[15] Ibid, 313.

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complexity and context sensitivity as a fig leaf behind which to avoid any onerous obligations and claim that they simply adopt a different view of what their obligations are.'[16]

Perhaps. But one is left wondering whether this constitutes the most effective lawmaking strategy. As the field of BHR moves into its established phase, it is worth considering whether its evolution is best facilitated by the more maximalist (but still admirably grounded) approach that Bilchitz proposes, complete with dedicated judicial bodies and firm obligations to ensure that corporate interests are balanced against fundamental rights. Debates about a legally binding business and human rights treaty illustrate that stakeholder preferences vary between complexity and simplicity.[17] Some corporate actors who favour simplicity may do so because, as Bilchitz suggests, it provides a means to avoid more onerous obligations. But equally, the assumption that specificity is a hallmark of legalisation is challenged by the view that the flexibility afforded by ambiguity allows more parties to buy into lawmaking initiatives.[18] This is especially true within the BHR space where an either/or approach would meet much opposition from certain states and industries that have bought into initiatives like the UNGP but remain opposed to the revised draft of the BHR treaty.[19] Bilchitz convincingly shows what more specificity can look like but in so doing could further interrogate whether, amidst ongoing debates about the most effective means of advancing BHR obligations, such specificity is a help or a hindrance.

These questions remain open at both the domestic and international levels. In *Fundamental Rights and Legal Obligations of Business*, David Bilchitz enriches the corresponding debates by pushing his readers to consider the substance of the corporate obligations that follow from the now generally accepted position that business activity affects fundamental rights and should be regulated accordingly. In blending practical prescriptions with theoretical justifications, Bilchitz provides a necessary account of what these obligations can look like and, crucially, offers a framework to determine their content. As BHR moves forward, as discussions about how to further regulate corporate activities continue and as new lawmaking initiatives are advanced, Bilchitz provides a platform to structure these conversations and, ultimately, to add much-needed substance to their output. In so doing, Bilchitz offers much to the diversity of voices that have a stake in these debates. The human rights advocate, the state lawmaking delegate, the corporate agent and the individual whose rights are impacted by business activity can take much from Bilchitz's work. They will, of course, read it differently and debate the specifics; however, by reflecting on these varying perspectives, Bilchitz puts them into a necessary conversation about how to give further meaning to the obligations that regulate the many ways that business activities impact fundamental rights.

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[16] Ibid, 361.

[17] See generally Kishanthi Parella, 'Hard and Soft Law Preferences in Business and Human Rights' (2020) 114 *American Journal of International Law Unbound* 168.

[18] Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54:3 *International Organization* 421, 444–445 (noting that it is 'often more practical to negotiate a softer agreement that establishes general goals but with less precision and perhaps with limited delegation').

[19] See generally Steven R. Ratner, 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights' (2020), 114 *American Journal of International Law Unbound* 163.