Corporations can significantly affect the fundamental rights of individuals. This book investigates how to determine the substantive content of their obligations that emanate from these rights. In doing so, it addresses important conceptual issues surrounding fundamental rights. From an investigation of existing legal models, a clear structural similarity surfaces in how courts make decisions about corporate obligations. The book seeks to systematise, justify and develop this emergent ‘multi-factorial approach’ through examining key factors for determining the substantive content of corporate obligations. The book defends the use of the proportionality test for ascertaining corporations’ negative obligations and outlines a novel seven-step test for determining their positive obligations. The book finally proposes legal and institutional reforms – on both the national and international levels – designed to enhance the quality of decision-making surrounding corporate obligations, and embed fundamental rights within the corporate structure and the minds of key decision-makers.

David Bilchitz is Professor of Fundamental Rights and Constitutional Law, University of Johannesburg, South Africa and Professor of Law, University of Reading, United Kingdom. He is also Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law. He is a member of the Academy of Science of South Africa and Vice-President of the International Association of Constitutional Law. He is the author of Poverty and Fundamental Rights: the Justification and Enforcement of Socio-Economic Rights (2007) and has published extensively in the area of business and human rights.
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FUNDAMENTAL RIGHTS
AND THE LEGAL
OBLIGATIONS OF
BUSINESS

DAVID BILCHITZ
University of Johannesburg and University of Reading
To Ruvi Ziegler
In love, companionship and a joint commitment to a better, rights-respecting world.
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PREFACE

The finalisation of this manuscript has taken place in the shadow of the COVID-19 pandemic that has severely disrupted life across the globe and, sadly, led to millions of deaths. Whilst the origins of the virus in humans is still being researched, the current thinking has been that it emerged from a market for live animals – a place where abuse of sentient creatures is routine in the name of economic gain. Once the virus had started spreading, critical shortages of personal protective equipment arose: reports soon started emerging of workers in developing countries being forced to work long hours in unsafe conditions to ramp up production. Corporations in many countries were involved in the development of new mobile applications to trace people and their contacts. Early on, the search for a vaccine began: large pharmaceutical companies teamed up with universities and research institutes in a competitive race. The names of pharmaceutical corporations – Pfizer, AstraZeneca, Moderna, Novavax and Johnson & Johnson – have quickly become the subjects of daily conversation and synonymous with potential routes out of this dark period in world history. Their patent rights will allow them to profit from our common desperation and to place limits on who can manufacture the vaccine, thus restricting the use of any spare manufacturing capacity across the world to produce more vials of these life-saving injections.

The current role of corporations in the health crisis facing our world highlights the power they hold today both within states and internationally. They, at times, control whether we are able to live or die and, in many instances, affect our most basic interests – free speech, privacy, food and healthcare. They have the capacity profoundly to impact on our most precious entitlements – fundamental rights. It is, for this reason, there has been a growing discourse internationally around ‘business and human rights’: yet, in these debates, limited attention has been paid within legal discourse to the question of exactly how we are to determine the obligations of businesses – and corporations in particular – with
respect to fundamental rights. Indeed, there has been a reluctance to engage with the exact implications of fundamental rights beyond the realm of state. The relative neglect of this question and the centrality of corporations both to constitutional orders and the international community is what motivated me to write this book. As will become evident from the argument, there is no simple formulaic answer: I grapple with the implications of fundamental rights for corporations and argue that we can identify an analytical framework for making decisions both in relation to their negative and positive obligations. That, in turn, requires changes to what we require of all decision-makers – both within corporations and outside of them – when they consider corporate obligations and, to this effect, I make proposals for law reform both at the national and international levels. I hope the book will help advance our understanding of what can be expected of corporations through identifying a structured process of reasoning for determining their obligations and thus, in turn, help advance the realisation of fundamental rights in our world.

I am deeply grateful, in the long shadow of our own mortality that COVID-19 has created, that I have been able to complete this book. It was a huge undertaking and represents a culmination of thinking that has developed since I first grappled with business and fundamental rights in 2008. I am grateful to Theunis Roux, the then director of the South African Institute for Advanced Constitutional, Public, Human Right and International Law (SAIFAC) (now a centre of the University of Johannesburg), for his encouragement and pressing on me the importance of these questions. Two wonderful collaborations with my esteemed colleague Surya Deva resulted in two edited collections seeking to engage with two of the most prominent developments at the international level – the ‘United Nations Guiding Principles on Business and Human Rights’ and the process for negotiating a ‘Treaty on Business and Human Rights’. A co-authored article with Laura Ausserlad Scheider Jonas, an intern at SAIFAC at the time, started my thinking about the application of the proportionality test in the corporate sphere – I am grateful to Laura for her permission to draw on this prior work which I have sought to develop here. The book itself has taken around four years to complete since its origins in thinking of a larger project for my sabbatical leave in 2017–2018. I am deeply grateful to the University of Johannesburg for granting me a year of research leave, something sadly that is becoming increasingly rare and rendering it difficult for academics to embark upon extended projects such as this. I am grateful for the continuing support for my research and the institute I direct – SAIFAC – at the Faculty of
Law of the University of Johannesburg and wish to thank colleagues, both junior and senior. I am excited also to have recently joined part-time at the University of Reading and thank my colleagues there for a warm welcome.

I am also deeply grateful to the Von Humboldt Foundation for awarding me a Georg Forster Research Fellowship which enabled me to spend over a year in Germany conducting research for this book. I was based in Berlin as a visiting research professor at the Humboldt University – Philipp Dann was a generous and supportive host, and I am deeply grateful to him for his friendship, collegiality and creating the conductive conditions in which this work could progress. A public lecture he invited me to give proved a turning point in the genesis of this book: I am grateful for a question by Christian Schliemann (from the European Center for Constitutional and Human Rights) which prompted reflections that led the structure of the book to crystallise. I am also grateful to the Minerva Center for Human Rights at Tel Aviv University for hosting me for two months as a visiting professor during my sabbatical, as well as for inviting me to deliver a public lecture there which stimulated many wonderful conversations that helped develop the book. The Bonavero Institute for Human Rights at the University of Oxford very kindly hosted an online seminar on Chapter 9 of this book (the corporate law reform proposals). I am deeply grateful to Ekaterina Aristova for organising it as well as to Peter Muchlinski and John Armour for their thoughtful comments and deep engagement with my work – I could not have asked for better interrogators who have led me to revise earlier shortcomings.

I am also grateful to have had the research assistance of a number of excellent researchers. Simon Willaschek was a diligent, intelligent and attentive researcher in Berlin who has gone beyond the call of duty and, in particular, enabled me to grapple with the relevant German legal developments. I look forward to seeing his legal and academic career flourish in the future. Gonzalo Ramirez Clevés provided me with an initial steer in addressing Colombian cases. Rafael Andrés Gomez Campo has helped me improve my grasp of the relevant cases and to refine my understanding of the relevant principles – thank you to both of them! I am also grateful to a number of researchers at SAIFAC who have helped to find relevant sources: Raisa Cachalia, Robert Freeman, Nabeelah Mia and Ropafadzo Maphosa are all extremely talented, and I look forward to watching their stars rise. Naomi Hove deserves a special mention for her administrative excellence that has helped carve out time for me to focus on the book. The library staff at the University of
Johannesburg have been incredibly helpful in finding sources and, in particular, assisting me to access material that was not readily available online in recent months – for their friendliness and helpfulness, I would like to thank Lizette Van Zyl and, in particular on this project, Catrin ver Loren van Themaat for quickly responding to queries and Gerda Van der Berg for her help with interlibrary loans.

I am also grateful to the editor of this series, Professor David Dyzenhaus, for an enthusiastic response to the initial proposal and to reviewers at Cambridge University Press for their comments that led me to plug a number of gaps. I am grateful to Marianne Nield who has been a friendly and attentive commissioning editor. I also thank Finola O’Sullivan for her support of this project. The production of this book has been extremely smooth due to the excellent management skills of Laura Blake and Priyanka Durai to whom I am extremely grateful. I also deeply appreciate the conscientious copy-editing by Padma Priya Ranganathan. It was also a delight to work with Sanet le Roux who is a highly professional and talented indexer – thank you!

On a personal level, I am deeply fortunate to have a wonderful group of supportive friends, family and colleagues who have nurtured me during the writing of this book. My time in Berlin was incredible and so enriching partly because of many new friendships formed for which I am grateful. There was also a sense of historical justice in writing a book partially in a research office that faced Bebelplatz where the books of those who share my religion and sexual orientation were burnt on 10 May 1933.

My family has been a constant source of nourishment – it is a joy to see the development of my nephews Gavi and Shalev in the caring, warm home my brother, Leonard Bilchitz, and sister-in-law, Lara Cohen, have created. The love and support of my incredible parents – Ruven and Cynthia Bilchitz – has been the source from which all else emerged. Words cannot do justice to explain how grateful I am to them for nurturing my intellectual curiosity and providing me with the foundations upon which to flourish.

The period of writing this book also overlapped with the most significant development in my personal life – finding my husband, Dr Ruvi Ziegler, and our marriage. When COVID-19 unexpectedly forced us into sharing a small space, he gave up his own desk for me to work on finishing this book. He is a companion, confidante and colleague, all-in-one, always considerate, gentle and full of joie de vivre. He never fails to brighten my day and I love him dearly. This book is dedicated to him.
ACKNOWLEDGEMENTS

This book emerges from about thirteen years of reflections on questions relating to business and human rights. It inevitably draws from ideas developed in some of my prior work though it is a significant development thereon. I list here some of the prior works that have shaped my thinking and thank the publishers for permission to draw on elements thereof in certain segments of this book. I have indicated and referenced where I have done so at the relevant points in the book.

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