
Corporate Human Rights?

Andreas Kulick*

Abstract

Do corporations have human rights? This article addresses, to date, a rather understudied issue of the corporations and human rights debate: whether and to what extent corporations can be bearers of human rights, with a focus on the European Convention on Human Rights and the European Court of Human Rights (ECtHR) jurisprudence. In a nutshell, it argues that what subsequently will be called ‘the individualistic approach’ – that is, purporting that the corporate form itself cannot be bearer of human rights – counter-intuitively leads to almost unfettered human rights entitlements of corporations. Thereby, this article provides a critique of both established corporate law thinking as well as the dominant view in human rights scholarship. Instead, it is submitted that taking the corporate form seriously and granting it some entitlements to some extent under a functionalist theory emerges as the preferable approach – theoretically, doctrinally and practically. The article draws on ECtHR jurisprudence, general legal as well as corporate law theory and comparative constitutional law in order to corroborate its argument.

1 Introduction

To some, they are anathema – to others, such as the European Court of Human Rights (ECtHR or Court), they seem to be self-evident. Flying under the radar until fairly recently, the issue of corporate human rights – that is, whether and, if so, to what extent corporations can be bearers of human rights – has gained much less scholarly and public attention¹ than its sister issue, corporate human rights

* *Privatdozent (venia legendi)*, Senior Research Fellow, University of Tübingen, Germany; visiting professor (*Lehrstuhlvertreter*), University of Marburg, Germany (summer semester 2021). Email: andreas.kulick@uni-tuebingen.de. I wish to thank the Lauterpacht Centre for International Law (LCIL), particularly its director, Eyal Benvenisti, for giving me the opportunity to write a first draft of this article during a lovely summer in Cambridge. Furthermore, my thanks go to Stephanie Schiedermaier and Dominik Steiger, who invited me to speak at the Leipzig Summer School for Human Rights in early September 2019, where I could present and discuss some of the ideas further developed in this piece.

¹ However, see recently P.J. Oliver, *The Fundamental Rights of Companies: EU, US and International Law Compared* (2017); see also Grear, ‘Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights’, 7 *Human Rights Law Review* (2007) 511; A. Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (2010); Scolnicov, ‘Lifelike and Lifeless in Law: Do

obligations.² At first glance, it may appear almost absurd: mere creatures of the law, not of flesh and blood, claiming human rights protection; ‘artificial’ creatures thus, which, above all, oftentimes accumulate tremendous power, whereas human rights are intended to protect the weak against the powerful and not vice versa. This may very well be the reason why some international human rights instruments grant human rights exclusively to individuals, such as Article 1(2) of the American Convention on Human Rights (ACHR) or Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR).³ However, the European Convention on Human Rights (ECHR or Convention) is less clear in this regard.⁴ While containing indications,⁵ the ECHR does not make explicit mention of a general acceptance of human rights of corporations – that is, separate legal entities.⁶ Nonetheless, as stated above, the ECtHR usually does not spend much time on the matter, assuming that corporations enjoy the rights enshrined in the Convention. For those who argue that corporate human rights are nothing short of a perversion, such scant reasoning appears particularly outrageous.

Regardless, however, whether one embraces or rejects the concept of corporate human rights, the prevalent view in human rights scholarship and practice seems to subscribe to what I will call in the following the ‘individualistic approach’: that the

Corporations Have Human Rights?’, University of Cambridge Faculty of Law Legal Studies Research Paper no. 13/2013 (2013), at 6ff; Scolnicov, ‘Human Rights and Derivative Rights: The European Convention on Human Rights and the Rights of Corporations’, in T. Kahana and A. Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (2016) 194, at 194ff; Steiniger and von Bernstorff, ‘Who Turned Multilateral Corporations into Bearers of Human Rights? On the Creation of Corporate “Human” Rights in International Law’, MPIL Research Paper no. 2018–25 (2018), at 1ff; see also U. Baxi, *The Future of Human Rights* (3rd edn, 2008), chs 8, 9; C. Harding, U. Kohl and N. Salmon, *Human Rights in the Marketplace* (2008), ch. 2; T. Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* (2002).

² See only UN Global Compact for Business and Human Rights, available at www.unglobalcompact.org/what-is-gc/our-work/social/human-rights; OECD Guidelines for Multinational Enterprises, available at <http://www.oecd.org/corporate/mne/>; John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5, 7 April 2008; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 195–270; Ruggie, ‘Business and Human Rights: The Evolving International Agenda’, 101 *American Journal of International Law* (2007) 819. For a good overview of the scholarly discussion, see also the contributions in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013).

³ American Convention on Human Rights (ACHR) 1969, 1144 UNTS 123; International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171; see also Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol to the ICCPR), adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, which does not allow corporate applications before the Human Rights Committee.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

⁵ See Section 3A.

⁶ Here and in the following, I choose the term ‘corporation’ to denote legal entities separate from their shareholders – hence, characterized by limited liability. The ensuing considerations do not apply to other companies that do not possess these traits, such as partnerships or other entities not sporting the corporate form that clearly distinguishes the entity from the human beings behind it.

corporate form itself cannot enjoy human rights protections. On this notion, only human beings ultimately deserve the protections of, for example, the ECHR. Hence, this means that either corporations cannot have human rights at all ('no corporate human rights' position) or corporations may only enjoy human rights to the extent that the human beings behind them are entitled to human rights protections ('derivative rights'⁷ position). Underlying this individualistic approach is the narrative that granting human rights to the corporate form itself is dubious or even perverse and that focusing on the human beings as (at least eventually) the sole entities capable of possessing human rights limits and prevents the expansion of corporate human rights and thus corporate power.

In this article, I will seek to demonstrate that this individualistic approach leads to the exact opposite – that is, the unfettered expansion of corporate human rights. In the following, I will offer a theoretical argument why, counter-intuitively, acknowledging corporate human rights – that is, granting (some) human rights to the corporate form *per se* – serves to limit them. The focus of this article is on the ECHR. The article's considerations are tailored primarily for the specific framework of the Convention and submit a new approach that is intended first and foremost as the adequate solution within such framework. Other human rights instruments and mechanisms may require different nuancing. However, the arguments employed regarding the nature of the corporate form and the functional approach as an alternative to the prevalent individualistic approach⁸ may potentially prove convincing beyond the realm of the ECHR.

Section 2 will flesh out the individualistic approach to corporate human rights in more detail and will elaborate on its two variants, the no corporate human rights and the derivative rights positions. In Section 3, the ECtHR's take on the matter of corporate human rights will be examined. The stock taking here is varied. It reveals that the Court takes a rather pedestrian approach. The Court assumes that corporations are entitled to ECHR rights. It does so without explaining its underlying theory and without displaying a consistent view on whether it is the corporate form for its own sake or only the human beings behind it that can enable the corporation to enjoy human rights. In Section 4, I will investigate examples of derivative rights approaches in constitutional law jurisprudence, focusing on case law from the USA and Germany that indicate a cautionary tale with respect to the ability of the individualistic approach to limit corporate human rights. In fact, as I submit in Section 5, employing basic insights from legal theory, the individualistic approach is founded on a naturalistic misconception of legal personhood that leads to corporate apotheosis and, thus, to the opposite of what it intends to achieve. Instead, as Section 6 seeks to explain, a functional approach, taking seriously the corporate form and the social reality that it represents, is indeed the more adequate alternative. It avoids the naturalistic trap and promises to curb much better corporate human rights expansion. Section 7 concludes the article.

⁷ Terminology adopted from Scolnicov, 'Human Rights', *supra* note 1, 194ff; Blair and Pollman, 'The Derivative Nature of Corporate Constitutional Rights', 56 *William and Mary Law Review* (2015) 1673.

⁸ See Sections 5 and 6.

2 Corporate Human Rights? *Quel Horreur!*

A *An Intuitive Reaction to Global Corporate Power: Corporate Human Rights Are Bad*

In our present day and age, there is no denying that large corporations yield an enormous amount of power.⁹ In the third quarter of 2018, the market capitalization of the top 10 corporations in the world exceeded the nominal gross domestic product (GDP) of all but 31 countries.¹⁰ Apple, which heads the list, sporting almost US \$1.1 trillion in market capitalization, dwarfed the GDP of countries such as Indonesia, the Netherlands, Turkey, Switzerland or Iran, to name but a few.¹¹ Global tech companies are tremendous data processors, collecting information that may not only predict and influence what people buy but also how they interact, how they conduct public discourse and how they vote.¹² In addition, the influence of lobbyists on the floors of Congress or at the Berlaymont in Brussels, which has been considerable for decades, has only increased in recent years. The US Supreme Court's decision in *Citizens United* in 2010¹³ has facilitated even further the impact that big money has on the political process in the most powerful country in the world.¹⁴

Furthermore, as is often forgotten in contemporary international law debates, the influence of large corporations on the development and outlook of international law and the protection of their interest through international legal rights is not a recent phenomenon. The Trading Companies of the 17th and 18th centuries shaped the concept of sovereignty and colonization,¹⁵ with their directors as literal 'merchant kings',¹⁶ such as Robert Clive, who conquered the Indian subcontinent on behalf of the British East India Company, which went on to rule what is modern-day India, Pakistan and Bangladesh, among others, for the next 100 years.¹⁷ In the early 1600s,

⁹ On the economic, social and political influence of the modern corporation, see Siebecker, 'A New Discourse Theory of the Firm after *Citizens United*', 79 *George Washington Law Review* (2010) 161, at 169–179.

¹⁰ Cf. List of public corporations by market capitalization, available at https://en.wikipedia.org/wiki/List_of_public_corporations_by_market_capitalization#2019 (last visited 24 May 2021); list of countries by GDP, available at [https://en.wikipedia.org/wiki/List_of_countries_by_GDP_\(nominal\)](https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal)) (last visited 24 May 2021).

¹¹ Cf. List of public corporations by market capitalization, *supra* note 10.

¹² For a comprehensive and critical account, see S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019).

¹³ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

¹⁴ Cf., e.g., Levitt, 'Confronting the Impact of *Citizens United*', 29 *Yale Law and Policy Review* (2010) 217; Kang, 'The End of Campaign Finance Law', 98 *Virginia Law Review (VLR)* (2012) 1; Gerken, 'The Real Problem with *Citizens United*: Campaign Finance, Dark Money, and Shadow Parties', 97 *Marquette Law Review* (2014) 903.

¹⁵ See, e.g., K. Miles, *The Origins of International Investment Law* (2013), at 33ff; J. Micklethwait and A. Wooldridge, *The Company: A Short History of a Revolutionary Idea* (2003), at 17ff; S.R. Brown, *Merchant Kings: When Companies Ruled the World, 1600 to 1900* (2009). On the Dutch and English East India Trading Companies, in particular, see J. Keay, *The Honourable Company: A History of the English East India Company* (1991); C.R. Boxer, *The Dutch Seaborne Empire 1600–1800* (1965).

¹⁶ Cf. Brown, *supra* note 15.

¹⁷ Cf. Keay, *supra* note 15, at 294ff.

the Vereenigde Oostindische Compagnie (VOC), the Dutch East India Company, tasked a young aspiring lawyer by the name of Hugo Grotius to bolster its claim to the freedom of the high seas, establishing the concept of *mare liberum*,¹⁸ which is still commanding in the modern day law of the sea.¹⁹

And, of course, contemporary international law reflects the long-standing influence of corporations on international law, maybe most prominently epitomized in international investment law and arbitration, which grants investors – thus, mainly large corporations – the right to claim violations of international treaties – that is, international investment agreements (IIAs) – before an international arbitral tribunal without having to exhaust local remedies.²⁰ Similar to human rights in their outlook, the investor rights enshrined in IIAs corroborate the tremendous power that large corporations yield in international affairs, forcing countries to reverse policies or even already chilling their regulatory endeavours altogether.²¹

In this context, considering the enormously powerful position corporations enjoy on the domestic and international plane, as reflected in the present state of international law, advocating for corporate human rights intuitively seems like an outright perversion. With the ‘social reality’²² of their power glaringly obvious, why grant corporations the additional privilege of being bearers of human rights? Are human rights not instead made to empower the powerless, the *individuum* and minorities, to grant them a privileged status by way of the law because their status in the reality of socio-economic life is rather underprivileged?

B *Three Theories of the Corporation*

Corporations are creatures of domestic law.²³ An investigation into corporate human rights thus, at the outset, may profit from taking a look at domestic corporate law theories. How is corporate personhood conceptualized in Western legal thought and how may it influence the view on whether and to what extent corporations may be bearers of human rights? In continental and Anglo-American corporate law, over the course of the past 200 years,²⁴ three theories reign supreme: the real entity theory, the fictional theory and the aggregate theory.²⁵ The real entity theory, originating in the work of German legal scholar Otto von Gierke²⁶ and having travelled to the common law world

¹⁸ Cf. H. Grotius, *Mare Liberum* (1609).

¹⁹ Cf. Convention on the Law of the Sea 1982, 1833 UNTS 3, Art. 87.

²⁰ See, e.g., most prominently, Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159, Art. 26.

²¹ Cf. A. Titi, *The Right to Regulate in International Investment Law* (2014); Barker, ‘Legitimate Regulatory Interests: Case Law and Developments in IIA Practice’, in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2017) 230.

²² Grear, ‘Challenging’, *supra* note 1, at 519, 521.

²³ See I. Seidl-Hohenveldern, *Corporations in and under International Law* (1987), at 1ff.

²⁴ For example, for an overview of the history of US corporate legal thought, see Millon, ‘Theories of the Corporation’, 39 *Duke Law Journal* (1990) 201, at 205–240.

²⁵ For an elaborate account, see S.K. Ripken, *Corporate Personhood* (2019), at 21ff.

²⁶ See, in particular, O. von Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (1887), at 603; O. von Gierke, *Das Wesen der menschlichen Verbände* (1902), at 3ff.

through the works of Frederic Maitland and Ernst Freund,²⁷ regards the corporation as a real existence, with its own legal personality – similar to the personality of a ‘natural person’ and independent of the ‘natural persons’ that are behind it (shareholders, management, employees and so on). Human beings may establish the corporation, independently of a state concession, but, once it is created by them, it takes on a life of its own, as a person with full legal capacity, able to act in its own right and able to be a bearer of rights.²⁸ Therefore, at least at first glance, the real entity theory epitomizes the horrors of those fearing unfettered corporate power.²⁹ As a non-human entity that asserts its own ‘life’ and ‘reality’, its consequential ability to be the bearer of rights and duties would make it a natural contender to also claim human rights, ranging from property and procedural rights to all sorts of freedoms and non-discrimination rights.

By contrast, the older³⁰ fictional or artificial person theory views corporations as artificial creations, traditionally of the state by concession,³¹ nowadays rather of the law through autonomous legal acts of its founders.³² As an ‘artificial being, invisible, intangible, existing only in contemplation of law’³³ there is nothing ‘real’ about it. It is a legal invention designed as a vehicle to enable human activity, commercial or otherwise.³⁴ Since the corporation must rely on human beings to act and on the law to exist, it thus seems rather far-fetched to grant it human rights.

Similarly, the aggregate theory of the corporation ‘retains the fictional element of the artificial person theory’.³⁵ This theory, including its more recent law and economics iteration as ‘nexus of contracts’ theory,³⁶ holds that a corporation is in fact nothing but the agglomeration or ‘aggregate’ of the people behind it.³⁷ As merely an artificial construct of the law, the corporation is rather an ‘association’ of its shareholders that are connected through a web of contractual relationships.³⁸ This ‘nexus’ is what constitutes the corporation. Therefore, again, such a loose web or nexus itself would hardly be suited to claim being the bearer of human rights.

C A New Perspective

Despite this rich theoretical arsenal offered by domestic legal thought, I suggest in this article a somewhat different conceptual perspective on the matter for the following

²⁷ See Horwitz, ‘Santa Clara Revisited: The Development of Corporate Theory’, 88 *West Virginia Law Review* (1985) 173, at 179.

²⁸ Cf. van Gierke, *supra* note 25, at 3ff; Ripken, *supra* note 25, at 35ff; Millon, *supra* note 24, at 211ff.

²⁹ See Section 2A.

³⁰ See in particular USSC, *The Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819); F.C. von Savigny, *System des heutigen Römischen Rechts*, Vol. II (1840).

³¹ See, with further references, Ripken, ‘Corporations are People Too: A Multi-Dimensional Approach to the Corporate Person Puzzle’, 15 *Fordham Journal of Corporate and Finance Law* 97 (2009), at 107.

³² Cf. W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Vol. II/2 – Die juristische Person* (1983), at 6 et seq.

³³ *Trustees of Dartmouth College*, *supra* note 30, at 636.

³⁴ Ripken, *supra* note 25, at 21.

³⁵ *Ibid.*, at 30.

³⁶ *Locus classicus*: Jensen and Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’, 3 *Journal of Financial Economics* (1976) 305.

³⁷ Cf. Millon, *supra* note 24, at 220ff.

³⁸ See Miller, ‘Guns Inc.: Citizens United, McDonald and the Future of Corporate Constitutional Rights’, 86 *New York University Law Review* (2011) 887, at 928ff.

reason. As many domestic law scholars acknowledge, these theories do not seem to present clear-cut answers for approaching the theoretical challenge of corporate human or, in the domestic context, constitutional rights.³⁹ This is particularly so because these theories have been developed and honed, over the course of the past centuries, in order to address a large variety of issues vexing corporate lawyers and legal philosophers for ages: is the corporation public or private;⁴⁰ which rights do minority shareholders enjoy against majority shareholders;⁴¹ who may represent the corporation, take decisions on its behalf and bind it legally;⁴² and, hence, what is the relationship between management and ownership?⁴³ The list goes on.

The theories presented above, therefore, are primarily tailored for addressing matters secondary or peripheral to the central issue at hand. Instead, so I submit, it seems more appropriate for approaching the theory of corporate human rights to start from a perspective that focuses specifically on the relationship between the corporate form, on the one hand, and the human beings behind it, on the other. Consequently, this change in perspective tackles this matter of corporate and human rights theory by asking who is deemed the bearer of human rights: the corporate form itself or the human beings behind the corporation? May they be the medium for the corporation to accrue, through them, a status as derivative bearer of human rights or is even this human rights intermediacy rejected? Of course, this is not to say that aspects of the established corporate theories may not prove relevant or instructive, as will be highlighted throughout this article.⁴⁴

D *The Individualistic Approach*

Taking this new perspective, a growing number of voices in international legal scholarship submit that human rights are 'human' rights – that is, the rights of human beings.⁴⁵ They are founded on the premise of human dignity, human embodiment and human vulnerability and, thus, on features that corporations, as disembodied creations of the law, do not share.⁴⁶ This view, which I will in the following call the 'individualistic view', thus focuses on the *individuum*, the human being that deserves and needs protection. It does so because all human beings share an inherent and

³⁹ With further references, see Pollman, 'Reconceiving Corporate Personhood', 2011 *Utah Law Review* (2011) 1629, at 1660. On the conceptual differences and similarities of human versus constitutional rights, see Section 4, before Section A.

⁴⁰ Cf. Millon, *supra* note 24, at 251ff.

⁴¹ Cf. *ibid.*, at 205–240.

⁴² Cf. Bebchuk and Jackson, 'Corporate Political Speech: How Decides?', 124 *Harvard Law Review (HLR)* (2010) 83, at 97ff.

⁴³ Cf. Horwitz, *supra* note 26, at 183ff.

⁴⁴ See, in particular, Sections 4A, 4B, 5A, 5D, 5C, 6B.

⁴⁵ See, e.g., Grear, 'Challenging', *supra* note 1, at 521ff; Scolnicov, 'Lifelike and Lifeless', *supra* note 1, at 6ff; Scolnicov, 'Human Rights', *supra* note 1, at 194ff; Steiniger and von Bernstorff, *supra* note 1, at 1ff; see also Baxi, *supra* note 1, chs 8, 9; Harding, Kohl and Salmon, *supra* note 1, ch 2; Hartmann, *supra* note 1.

⁴⁶ For the most profound account of this argument, see Grear, 'Challenging', *supra* note 1, at 521ff; as well as Grear, 'Challenging', *supra* note 1, at 114ff.

inviolable dignity because the human being is trapped in the human body and is thus vulnerable – capable of suffering⁴⁷ – and because the human being, by itself at least, is rather powerless against the full apparatus of the state and other powerful entities. For these reasons, a first incarnation of the individualistic view denies corporations human rights altogether.

However, there is a second incarnation of the individualistic view. While it insists that corporations by themselves cannot have human rights, this second incarnation, other than the first, submits that corporations may enjoy human rights protection to the extent, and for the purpose, of promoting the human rights of the individuals behind the corporation. Under this derivative rights position, human beings are the ones who enable corporations to claim human rights because, eventually, they serve the interest of individuals.⁴⁸

It is important to emphasize again that, while leading to different results, these two incarnations of the individualistic view share a common ground. They share an underlying rationale that focuses on the *individuum*: the corporation as such does not enjoy protection, only human beings deserve protection – either as exclusive individual rights bearers (first incarnation) or as those behind the corporation (second incarnation). Both thus deem the corporate form to be incapable of accruing human rights protection. This is the ‘individualistic approach’: there is no justification – doctrinal or theoretical – why the corporate form should enjoy human rights; only individual human beings enjoy this privilege.⁴⁹

E Conclusion: Intuition

The position that rejects corporate human rights at all and the position that grants corporations human rights to the extent that they serve the interest of the human beings behind them share an individualistic approach that focuses on the *individuum*. With this individualistic approach, I offer a change in perspective compared to the established theories of the corporation under domestic law. Doctrinally founded, this individualistic approach asks: who is the actual bearer of human rights: the corporate form or the individual behind it? And it contends that only the latter may be entitled to human rights protection. Through this claim, it conforms well to the intuition that human rights are made for human beings, not for corporations. It sits well with the view that granting human rights to the corporate form promotes corporate power and cements the power imbalance in favour of large corporate entities at the international and the domestic level. However, does this intuition hold up?

⁴⁷ Cf. B.S. Turner, *Vulnerability and Human Rights* (2006), at 3, 9, 25ff.

⁴⁸ See, e.g., Addo, ‘The Corporation as a Victim of Human Rights Violations’, in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 187, at 189; see also Scolnicov, ‘Lifelike and Lifeless’, *supra* note 1, at 17ff; Scolnicov, ‘Human Rights’, *supra* note 1, at 201ff. For a domestic law iteration, see Blair and Pollman, *supra* note 7.

⁴⁹ This is in effect the result of the fictional and aggregate theories of domestic corporate law, see Section 2B: The corporate entity itself is ‘artificial’ and not ‘real’ and thus only made up of the human beings behind it, which, at best, may under certain circumstances impart the status as human rights bearer on the corporation. Cf. Blair and Pollman, *supra* note 7, at 1687, n. 53.

3 The Approach of the European Court of Human Rights

In order to investigate the viability of this intuition, I will now turn to the ECHR. The ECtHR recognizes corporate human rights,⁵⁰ as the Convention, at the very least, does not exclude them explicitly and contains a few indications to the affirmative, most prominently in Article 1 of its Protocol no. 1.⁵¹ However, how does the Court argumentatively support its recognition of corporate human rights? Does it respect the corporate form and grant the form itself rights protection or, rather, consider the corporation's human rights entitlements derivative of its human shareholders, management and employees?

A What the Convention Says

Let us start with a textual analysis of the ECHR, of what it does – and does not – say. The Convention does not contain a textual limitation of its scope to 'human beings', as does, for example, the ACHR in its Article 1(2).⁵² On the other hand, there is also no general clause granting the rights to legal persons, such as corporations, under certain conditions, as does, for example, Article 19(3) of the German Grundgesetz, which states: 'The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.'⁵³ Of note, such clauses – and the way they are drafted – may shape intuitive perceptions of the rule/exception relationship. For example, while the German general clause settles the issue that the rights enshrined in the Grundgesetz can generally apply to corporate entities, the wording 'to the extent that the nature of such rights permits' places the burden of showing on the corporation claiming protection. It is only entitled to a specific right if it demonstrates that such a right is by its very nature capable of application to persons that are not human beings. The lack of such a clause may thus possibly influence intuitive – if maybe unfounded – assumptions as to what is the default rule and who incurs the burden of showing.

The ECHR however does contain three clear indications in its text that demonstrate at least its general openness towards corporate human rights. First, and

⁵⁰ See Section 3B.

⁵¹ Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol no. 1) 1952, ETS 9.

⁵² Art. 1(1) 'ensure[s] to all persons subject to the jurisdiction [of the ACHR parties] the free and full exercise of [the] rights' enshrined in the Convention. Article 1(2) clarifies: 'For the purposes of the Convention, "person" means every human being.' This was confirmed by the Inter-American Court of Human Rights in a recent advisory opinion. See IACtHR, *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and Scope of Article 1(2), in Relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*, Advisory Opinion OC-22/16 of 26 February 2016. Series A No. 22, para. 70: '[L]a Corte concluye que de una interpretación del artículo 1.2 de la Convención Americana ... se desprende con claridad que las personas jurídicas no son titulares de derechos convencionales, por lo que no pueden ser consideradas como presuntas víctimas en el marco de los procesos contenciosos ante el sistema interamericano.'

⁵³ Official translation by the German Ministry of Justice (Christian Tomuschat and David P. Currie), available at https://www.gesetze-im-internet.de/englisch_gg/.

most unequivocally, Article 1 of Protocol no. 1 extends the right to property to '[e]very natural or legal person'. Thus, corporations are protected against deprivation of their 'possessions' under the Convention.⁵⁴ Second, Article 10(1) refers in its last sentence to the 'licensing of broadcasting, television or cinema enterprises', thereby corroborating corporate claims as to the freedom of expression, particularly by media companies. Third, those who can introduce individual applications under Article 34 include, in addition to 'person[s]' and 'group[s] of individuals', also 'non-governmental organization[s]'. The Convention thus explicitly foresaw entities other than humans individually or as a group applying to the Court. This is not only in contrast with provisions such as Article 1 of the Optional Protocol to the ICCPR, under which the Human Rights Committee can only receive communications from 'individuals'.⁵⁵ The general openness of the Convention to applications from non-governmental, non-individual 'organizations' gains further relevance when read in conjunction with the text of the other human rights provisions in the ECHR that do not, explicitly or implicitly, refer to legal persons. Article 1 of the Convention states that 'everyone' is entitled to the rights enshrined therein. In addition, the ECHR grants rights such as the right to a fair trial (Article 6), the right to private life (Article 8), the freedom of expression (Article 10) and the right to an effective remedy (Article 13) to 'everyone'. While 'everyone' is considerably broad and, thus, at least does not textually exclude corporations, the coexistence of such wording in most ECHR provisions with a general clause on individual applications, which also allows legal entities access to the Court, further indicates that the ECHR may protect (some) corporate human rights. Of course, this argument has its obvious limits in the fact that provisions evidently not made to protect legal entities, such as the right to life (Article 2) or the prohibition of slavery, also extend their protections to 'everyone' or state that 'no one[']s' rights may be impaired. Nonetheless, the ECHR's text, despite what is sometimes argued,⁵⁶ displays clear indications as to a general recognition of corporate human rights (with some exceptions) and contains a few provisions explicitly and implicitly granting protection to legal persons.⁵⁷

⁵⁴ Cf., e.g., ECtHR, *Sovtransavto Holding v. Ukraine*, Appl. no. 48553/99, Judgment of 25 July 2002, paras 90ff; ECtHR, *AMAT-G Ltd and Mebagishvili v. Georgia*, Appl. no. 2507/03, Judgment of 27 September 2005, paras 58ff; ECtHR (GC), *G.I.E.M. S.R.L. and Others v. Italy*, Appl. nos. 1828/06, 34163/07 and 19029/11, Judgment of 28 June 2018, paras 288ff.

⁵⁵ The first sentence of Article 1 of the Optional Protocol to the ICCPR, *supra* note 3, reads in full: 'A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from *individuals* subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant' (emphasis added).

⁵⁶ Scolnicov, 'Lifelike and Lifeless', *supra* note 1, at 20ff; see also Scolnicov, 'Human Rights', *supra* note 1, at 207ff.

⁵⁷ See also M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (2006), at 198.

B What the Court Does

This may very well be the reason why the ECtHR takes a rather pedestrian way with respect to corporate human rights. '[G]enerally brief and enigmatically phrased', thus Marius Emberland's assessment that still poignantly characterizes the Court's approach,⁵⁸ the relevant Strasbourg case law usually assumes without much further ado that corporations enjoy (most of) the rights under the ECHR. For example, in the cases of *Autronic* and *Colas Est*, the Court spent little more than a paragraph on the issue whether corporations may enjoy the freedom of expression, even for mere commercial purposes,⁵⁹ or whether they could resort to Article 8 in order to claim protection against searches of their business offices.⁶⁰ In the former case, the Court was curt in merely observing: 'In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article applies to "everyone", whether natural or legal persons.'⁶¹

In this vein, the Grand Chamber judgment in *Satakunnan Markkinapörssi Oy* did not even deem it necessary to question at all whether and to what extent the corporate applicants were entitled to the freedom 'to impart information as guaranteed by Article 10 of the Convention'.⁶² In *Colas Est*, the judges contented themselves with reiterate[ing] that the Convention is a living instrument which must be interpreted in the light of present-day conditions. ... Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that *in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises*⁶³

1 The Court Respects the Corporate Form

However, despite its brevity on the matters and foundations of corporate human rights under the ECHR, a few instructive tendencies in the Strasbourg jurisprudence can be gleaned for the purposes of this study, particularly with regard to the Court's overall respect of the corporate form. In cases such as the aforementioned, the Court focused on the rights of the corporations themselves,⁶⁴ that is, whether the corporate

⁵⁸ *Ibid.*, at 200.

⁵⁹ ECtHR, *Autronic AG v. Switzerland*, Appl. no. 12726/87, Judgment of 22 May 1990, para. 47.

⁶⁰ ECtHR, *Stes Colas Est and Others v. France*, Appl. no. 37971/97, Judgment of 16 April 2002, paras 40–42.

⁶¹ *Autronic*, *supra* note 60, para. 47.

⁶² ECtHR (GC), *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Appl. no. 931/13, Judgment of 27 June 2017, para. 140. Similarly, also with regard to Article 10 ECHR, see, e.g., ECtHR, *Magyar Jeti Zrt v. Hungary*, Appl. no. 11257/16, Judgment of 4 December 2018, para. 56.

⁶³ *Stes Colas Est*, *supra* note 61, para. 41 (emphasis added).

⁶⁴ See, e.g., ECtHR, *Observer and Guardian v. United Kingdom*, Appl. no. 13585/88, Judgment of 26 November 1991, paras 48ff, 72ff (with respect to Arts 10 and 14 of the ECHR); *Sovtransavto Holding*, *supra* note 54, paras 71ff, 90ff (with respect to Art. 6(1) of the ECHR and Art. 1 of Protocol no. 1); *AMAT-G*, *supra* note 54, paras 47ff, 53ff, 58ff (with respect to Arts 6(1) and 13 of the ECHR and Art. 1 of Protocol no. 1); ECtHR, *Central Mediterranean Development Corporation Limited v. Malta*, Appl. no. 35829/03, Judgment of 24 October 2006, paras 38ff (with respect to Arts 6(1) and 13 of the ECHR); ECtHR, *Varnima Corporation*

body itself was entitled to the freedom of expression under Article 10(1) or the protection from searches of its offices pursuant to Article 8(1). In addition, the Court has generally rejected claims by shareholders seeking protection under the Convention on behalf of the corporation. In *Agrotexim and Others v. Greece*, it did not permit the applicants the status of ‘victims’ for the purposes of standing according to Article 34 of the Convention.⁶⁵ Since they were mere shareholders of the corporation suffering infringements of its property rights under Article 1 of Protocol no. 1, the Court held that they could only claim ‘violations of rights vested in them as shareholders’ but not of the corporation’s ‘right to the peaceful enjoyment of its possessions’.⁶⁶ In accordance with the approach under general public international law, as emphasized by the International Court of Justice in the *Barcelona Traction* case,⁶⁷ ‘the piercing of the “corporate veil” or the disregarding of a company’s legal personality’,⁶⁸ as the ECtHR held in *Agrotexim*, was generally not permissible under the ECHR.⁶⁹ In a line of cases, the Court has reiterated its stance on the separateness of the corporation and the corporate form, refuting arguments seeking to confound the corporation with its shareholders. For example, in cases such as *Ukraine-Tyumen*⁷⁰ and *Iranian Shipping Lines*,⁷¹

International S.A. v. Greece, Appl. no. 48906/06, Judgment of 28 May 2009, paras 26ff (with respect to Arts 6(1) and 14 of the ECHR); ECtHR, *Hotel Promotion Bureau S.R.L. and Others v. Italy*, Appl. no. 34163/07, Decision of 5 June 2012, paras 30ff, 36ff (with respect to Arts 6(1) and 13 of the ECHR and Art. 1 of Protocol no. 1); ECtHR (GC), *Delfi AS v. Estonia*, Appl. no. 64569/09, Judgment of 16 June 2015, paras 110ff (with respect to Art. 10 of the ECHR); *Satakunnan Markkinapörssi Oy, supra* note 63, paras 139ff, 208ff (with respect to Arts 6(1) and 10 of the ECHR); *G.I.E.M., supra* note 54, paras 288ff (with respect to Art. 1 of Protocol no. 1); *Magyar Jeti Zrt, supra* note 61, paras 56ff (with respect to Art. 10 of the ECHR). For examples from the case law of the Commission, see only ECommHR, *X. and Church of Scientology v. Sweden*, Appl. no. 7805/77, Decision of 5 May 1979 (with respect to Art. 9 of the ECHR, overruling ECommHR, *Church of X. v. United Kingdom*, Appl. no. 3798/68, Decision of 17 December 1968, adopting an argumentation that leaves some room for looking past the corporate form); ECommHR, *Association X. and 165 Liquidators and Court Appointed Administrators v. France*, Appl. no. 9939/82, Decision of 4 July 1983 (with respect to Art. 14 of the ECHR and Art. 1 of Protocol no. 1); ECommHR, *Fayed and House of Fraser Holdings Plc. v. United Kingdom*, Appl. no. 17101/90, Decision of 15 May 1992 (with respect to Art. 6(1) of the ECHR); ECommHR, *Scientology Kirche Deutschland e.V. v. Germany*, Appl. no. 34614/97, Decision of 7 April 1997 (with respect to Art. 8 of the ECHR and Arts 2 and 3 of Protocol no. 1).

⁶⁵ On the notion of standing under Art. 34 of the ECHR and the ‘victim’ requirement, see W.A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), at 737ff.

⁶⁶ ECtHR, *Agrotexim Hellas and Others v. Greece*, App. No. 14807/89, Judgment of 24 October 1995, para. 62; upheld, *inter alia*, in ECtHR, *Teliga and Others v. Ukraine*, Appl. no. 72551/01, 21 December 2006, para. 87; ECtHR, *Družstevní Záložna Pria and Others v. Czech Republic*, Appl. no. 72034/01, Judgment of 31 July 2008, para. 100; ECtHR (GC), *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Appl. no. 38433/09, Judgment of 7 June 2012, paras 90–95; ECtHR, *Sandu and Others v. Republic of Moldova and Russia*, Appl. no. 21034/05, Judgment of 17 July 2018, para. 52; ECtHR, *Albert and Others v. Hungary*, Appl. no. 5294/14, Judgment of 29 January 2019, paras 68–71. The principle was also recently restated as an *obiter dictum* in ECtHR (GC), *Lekič v. Slovenia*, Appl. no. 36480/07, Judgment of 11 December 2018, para. 111, which, however, dealt with a different matter.

⁶⁷ Cf. *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports (1970) 3, at 39–41.

⁶⁸ *Agrotexim, supra* note 67, para. 66.

⁶⁹ *Ibid.*, paras 66–71.

⁷⁰ ECtHR, *Ukraine-Tyumen v. Ukraine*, Appl. no. 22603/02, Judgment of 22 November 2007, paras 26–27.

⁷¹ ECtHR, *Islamic Republic of Iran Shipping Lines v. Turkey*, Appl. no. 40998/98, Judgment of 13 December 2007, paras 80–81.

the Court has rejected the governments' position that these corporate entities would not rise to 'victim' status pursuant to Article 34 because they were fully or partially owned by the state and thus did not constitute 'non-governmental organizations', emphasizing, in particular, their 'institutional autonomy'⁷² from the state shareholders.⁷³

2 Does It?

However, at second glance, the ECtHR's case law appears much more equivocal on the issue of the separateness of the corporate form. With regard to Article 34, the Court has in fact disregarded the corporate form in cases where the corporation was wholly or almost wholly owned by one shareholder. Such a shareholder, so the Court reasoned, should be regarded as a 'victim' of an infringement of rights of the corporation, regardless of the distinction between the corporation and its shareholders where the company was but a 'vehicle'⁷⁴ of the shareholder, considering that she had a 'direct personal interest'⁷⁵ in it. As indicated by phrases such as 'in reality'⁷⁶ or 'it would be artificial',⁷⁷ the Court has taken a pragmatic approach,⁷⁸ seeking to ensure effectiveness of protection under the ECHR.⁷⁹ Hence, if, from an economic perspective, a corporation and its shareholder – that is, its one shareholder, owning the vast majority of shares – are virtually identical, the Court disregards the corporate form.

Hence, the ECtHR's adherence to the separateness of the corporate form is less iron-clad than it seems. Granted, the particular observation with respect to Article 34, at least in itself, is not sufficient evidence for the Court's tendency towards an individualistic view: these cases are not about corporate ECHR rights via their shareholders but, rather, about shareholders' ECHR rights claims via the corporations in which they own shares. However, they indicate that the Court is willing to disregard the corporate form due to the individual shareholders' close ties with the corporation, particularly

⁷² *Ukraine-Tyumen*, *supra* note 71, para. 27.

⁷³ For a similar principle with regard to separateness, but with regard to non-commercial public corporate bodies, see ECtHR, *Radio France and Others v. France*, Appl. no. 53984/00, Decision of 23 September 2003, para. 26; ECtHR, *Österreichischer Rundfunk v. Austria*, Appl. no. 35841/02, Judgment of 7 December 2006, paras 46–54.

⁷⁴ E.g. ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, Appl. no. 12742/87, Judgment of 29 November 1991, para. 42; ECtHR, *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, Appl. no. 16163/90, Judgment of 31 July 2003, para. 21.

⁷⁵ ECtHR, *G.J. v. Luxembourg*, Appl. no. 21156/93, Judgment of 26 October 2000, para. 24; see also ECtHR, *Ankarcrona v. Sweden*, Appl. no. 35178/97, Decision of 27 June 2000. More recently confirmed in ECtHR, *Rafailović and Stevanović v. Serbia*, Appl. nos 38629/07 and 23718/08, Judgment of 16 June 2015, paras 50–53.

⁷⁶ *Eugenia Michaelidou Developments*, *supra* note 75, para. 21.

⁷⁷ *Pine Valley*, *supra* note 75, para. 42.

⁷⁸ See *Emberland*, *supra* note 58, at 104ff.

⁷⁹ See also ECtHR, *Begus v. Slovenia*, Appl. no. 25634/05, Judgment of 15 December 2011, paras 25–26; see also ECtHR, *Feldman and Slovyansky Bank v. Ukraine*, Appl. no. 42758/05, Judgment of 21 December 2017, paras 25–29, where the Court accepted an application of a former majority shareholder of a bank on behalf of the corporation because it had been liquidated and, at the date when the application was lodged, had been under majority control of the government.

from an economic perspective. Similarly, based on Article 35(2) of the Convention, which excludes an application before the Court if the application ‘has already been submitted to another procedure of international investigation or settlement’, the ECtHR denied access for a corporation that was 100 per cent owned by an individual who had brought the same set of facts before an investment arbitration tribunal.⁸⁰

In the *Comingersoll* case, granting a corporation non-pecuniary damages according to Article 41 of the ECHR, the Court ascribed a human rights position to the corporation through the individuals behind the corporation.⁸¹ Again relying on a pragmatic approach that emphasized the principle of effective interpretation, the ECtHR held in this judgment:

The Court reiterates that *the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective*. Accordingly, since the principal form of redress which the Court may order is pecuniary compensation, it must necessarily be empowered, if the right guaranteed by Article 6 of the Convention is to be effective, to *award pecuniary compensation for non-pecuniary damage to commercial companies, too*. Non-pecuniary damage suffered by such companies may include heads of claim that are to a greater or lesser extent ‘objective’ or ‘subjective’. Among these, account should be taken of the company’s reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, *the anxiety and inconvenience caused to the members of the management team*.⁸²

Referring to earlier case law that also had equated the suffering of an organization’s personnel with the organization itself, albeit not in the case of a corporation,⁸³ the majority’s opinion in *Comingersoll* argued that a corporation was entitled to non-pecuniary damages if, *inter alia*, its managers – that is, human beings – had suffered ‘anxiety and inconvenience’ due to the violation of rights under the ECHR.⁸⁴ In their concurring opinion, Judges Rozakis, Bratza, Caflisch and Vajić criticized this individualistic justification for non-pecuniary damages of corporations, stressing that a ‘company is an independent living organism’ and that, as such ‘autonomous legal entit[y]’, it ‘may suffer non-pecuniary damage, not because of the anxiety or uncertainty felt by its human components, but because, as a *legal person*, in the society in which it operates, *it has attributes, such as its own reputation, that may be impaired by acts or omissions of the State*’.⁸⁵

⁸⁰ Cf. ECtHR, *Le Bridge Corporation Ltd S.R.L. v. Moldova*, Appl. no. 48027/10, Decision of 27 March 2018, paras 25–33 (see also ICSID, *Mr. Franck Charles Arif v. Moldova – Award*, 8 April 2013, ICSID Case no. ARB/11/23). Compare this case with ECtHR, *AO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Judgment of 20 September 2011, paras 519–526, where the Court refused disregarding the corporate form in a case where the shareholders held only about 60 per cent of the corporation.

⁸¹ ECtHR, *Comingersoll S.A. v. Portugal*, Appl. no. 35382/97, Judgment of 6 April 2000.

⁸² *Ibid.*, para. 35 (emphases added).

⁸³ Cf. ECtHR, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, Appl. no. 15153/89, Judgment of 19 December 1994, paras 60–62; ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Appl. no. 23885/94, Judgment of 8 December 1999, para. 57, in both instances without providing any reasoning. The ÖZDEP case is cited approvingly in *Comingersoll*, *supra* note 82, para. 32.

⁸⁴ *Comingersoll*, *supra* note 82, para. 35.

⁸⁵ *Ibid.*, Concurring Opinion of Judge Rozakis joined by judges Sir Nicolas Bratza, Caflisch and Vajić (emphases added).

In addition, in several other cases, the ECtHR failed to strike a clear distinction between an interference or violation of a legal entity's rights as opposed to the individuals' rights behind it.⁸⁶ In *Sanoma Uitgevers B.V. v. The Netherlands*, for example, the Court did not distinguish between a corporation that edited a magazine and its journalist with respect to the issue as to what extent the protection of sources fell under the purview of the freedom of the press under Article 10 of the ECHR.⁸⁷ Similarly, no noticeable distinction was established between the rights of a religious community organized in corporate form and those of its individual members pursuant to Articles 9, 11 and 14 of the Convention, *inter alia*, in *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*.⁸⁸

C Conclusion: Individualistic Pragmatism?

The ECtHR thus generally grants corporations human rights protection under the ECHR. However, although the ECHR's text contains a few clear instances of corporate human rights protections and indicates an overall favourable approach towards corporate human rights,⁸⁹ due to the absence of a general clause permitting or excluding corporate human rights overall, the curt and often apodictic reasoning, if any, provided by the Court gives rise to considerable confusion. This is even more so when it comes to the underlying view of the ECtHR as to the separateness of the corporate form and, thus, as to why, in the end, corporations should be entitled to human rights protection. While some case law has upheld the corporate form and stressed its separateness from shareholders and other individuals behind the corporation,⁹⁰ several judgments have looked behind the corporate form and focused on the individuals owning or working for the corporation.⁹¹ While this does not clearly point at an individualistic approach to corporate human rights, it also does not exclude it. In brief, the examination of the Court's case law on corporate human rights has proven rather inconclusive, at least with respect to the theoretical foundations why (or why not or to what extent) corporations should be afforded protection under the ECHR.

4 Constitutional Rights of Corporations: A Cautionary Tale

The record of the ECHR and the ECtHR's jurisprudence has proven rather inconclusive.⁹² This section will briefly look at the constitutional rights practice of two of the

⁸⁶ See also Kleinlein, 'Die juristische Person des Privatrechts in der Rechtsprechung des EGMR', 65 *Jahrbuch des Öffentlichen Rechts der Gegenwart neue Fassung* (2017) 85, at 96ff.

⁸⁷ ECtHR (GC), *Sanoma Uitgevers B.V. v. The Netherlands*, Appl. no. 38224/03, Judgment of 14 September 2010, paras 50, 59–72.

⁸⁸ Cf. ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, Appl. no. 40825/98, Judgment of 31 July 2008, paras 60ff, 87ff.

⁸⁹ See Section 3A.

⁹⁰ See Section 3A1.

⁹¹ See Section 3A2.

⁹² As mentioned before, other international human rights regimes do not allow corporate human rights, see Section 3A. This appears to be indicative as to the prevalent view in international human rights law. Cf., e.g., Grear, 'Challenging', *supra* note 1, at 519, 521ff; Grear, *Redirecting Human Rights*, *supra* note 1,

most influential domestic courts that permit individual rights applications, the US Supreme Court (USSC) and the German Federal Constitutional Court (GFCC). It is intended to tell a cautionary tale about the derivative rights position, which both the USSC and the GFCC embrace: in short, their corporate human rights practice refutes the often-held position that an individualistic approach prevents corporate human rights expansion.⁹³ Of note, while domestic constitutional rights are not identical to international or regional human rights, they share a common historical heritage⁹⁴ and are similar in their structure and function as limits on the exercise of governmental authority that are justiciable and trump⁹⁵ ordinary state conduct.

A Under the US Constitution

The US Constitution does not mention corporate constitutional rights. The Bill of Rights and the Fourteenth Amendment either contain neutral wording, as does the First Amendment ('Congress shall make no law ...'), or refer to 'person[s]' (for example, the Fifth or the Fourteenth Amendments). However, the genesis of the Fourteenth Amendment, in particular, which was a response to slavery and disenfranchisement as the central pillar of the Reconstruction era after the Civil War,⁹⁶ points to an individual focus, as confirmed in the wording of the first sentences of its sections 1 and 3: 'no person born or naturalized' and '[n]o person shall be Senator or Representative in Congress' is unequivocal that such a 'person' is a person of flesh and blood.

As is well known, however, the USSC has granted rather vast constitutional rights protections to corporations. The infamous *Citizens United*⁹⁷ and *Burwell v. Hobby Lobby*⁹⁸ cases have garnered reception way beyond the constitutional and human rights discourse.⁹⁹ What is less known is that, first, strictly speaking, the USSC has never argued that the corporation as such can claim the rights enshrined in the US Constitution. Rather, it embraces what I call a derivative rights approach,¹⁰⁰ looking behind the

at 114ff; Scolnicov, 'Lifelike and Lifeless', *supra* note 1, at 6ff; Scolnicov, 'Human Rights', *supra* note 1, at 194ff; Steiniger and von Bernstorff, *supra* note 1, at 1ff; see also Baxi, *supra* note 1, chs 8, 9; Harding, Kohl and Salmon, *supra* note 1, ch. 2; Hartmann, *supra* note 1. However, such an embrace of the no corporate human rights position generally is rather uninformative as to corporate human rights practice. This is due to the fact that competent treaty bodies usually do not discuss the matter because the treaty text clearly excludes corporations from its scope of protection, as, for example, Art. 1(2) of the ACHR or Art. 2(1) of the ICCPR (for a rare exception, see *Entitlement of Legal Entities*, *supra* note 51, which eventually arrived at the conclusion that corporations are not right-bearers under the ACHR).

⁹³ See Sections 2A–D.

⁹⁴ Cf., e.g. with respect to the ECHR, its preamble and last recital ('common heritage of political traditions, ideals, freedom and the rule of law').

⁹⁵ Cf. R. Dworkin, *Taking Rights Seriously* (1977), at xi.

⁹⁶ See only K.M. Stampp, *The Era of Reconstruction, 1865–1877* (1965); H.M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (1973); R.M.M. Valeyly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (2004).

⁹⁷ *Citizens United*, *supra* note 13.

⁹⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁹⁹ Note T.B. Edsall, 'After Citizens United, a Vicious Cycle of Corruption', *New York Times* (6 December 2018), available at www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html.

¹⁰⁰ In the terminology of classical US corporate legal thought, the Court usually oscillates between remnants of the aggregate and fictional theories. Cf. A. Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (2018), at 68, 364, 381, 387. For a summary of these theories, see Section 2B.

corporate form at the constitutional rights of its founders or shareholders.¹⁰¹ Second, such a derivative rights approach, looking past the corporate form, is not a recent phenomenon in USSC jurisprudence. Instead, it can be traced back to the early days of the Marshall Court of the beginning of the 19th century.

In the cases of *Bank of the United States v. Deveaux* (1809)¹⁰² and *Dartmouth College v. Woodward* (1819),¹⁰³ corporate entities claimed standing before the USSC. In the former case, the Bank of the United States, a for-profit corporation, sought to avoid pursuing its claim before the presumably biased state courts and, instead, sought to receive access to the considerably more favourable federal courts. Article III(1)-1 of the US Constitution provides for so-called diversity jurisdiction – that is, grants access to the Federal Courts if the case involves ‘Citizens of different States’. The Court held in *Bank of the United States v. Deveaux* that the corporation, while not able to claim to be a ‘citizen’, can enjoy access to the USSC through its shareholders that are ‘citizens’ under the diversity jurisdiction clause:

Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed: to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and *the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted.*¹⁰⁴

Ignoring the corporate form, the USSC focused on the individual shareholders – ‘those persons suing in their corporate character’ – who, in the USSC’s opinion, ‘are said to be substantially the parties to the controversy’.¹⁰⁵ The background assumption of this decision is, of course, as the court later explained in the *Dartmouth College* case, that ‘[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law’.¹⁰⁶ As such, ‘[t]he corporation is the assignee of [the founders’ or shareholders’] rights, stands in their place, and distributes their bounty, as they would themselves have distributed it had they been immortal.’¹⁰⁷ In other words, for the purposes of constitutional rights and standing before the USSC, the corporation is but a shell created for the interests of its founders or shareholders. Thus, the USSC has to look behind the corporate form. The shareholders’ rights and interests determine the scope and extent to which corporations possess and can claim rights under the US Constitution.¹⁰⁸

¹⁰¹ Cf. K. Greenfield, *Corporations Are People Too (and They Should Act Like It)* (2018), at 18; Blair and Pollman, *supra* note 7.

¹⁰² *Bank of the United States v. Deveaux et al.*, 9 U.S. 61 (1809).

¹⁰³ *Trustees of Dartmouth College*, *supra* note 30.

¹⁰⁴ *Bank of the United States*, *supra* note 103, 87 (emphasis added).

¹⁰⁵ *Ibid.*, at 91.

¹⁰⁶ *Trustees of Dartmouth College*, *supra* note 30, 636.

¹⁰⁷ *Ibid.*, at 642.

¹⁰⁸ In a similar vein, see Winkler, *supra* note 101, at 68. Again, in corporate law terminology, this may be interpreted as embracing the fictional and/or aggregate theories. See also Miller, *supra* note 38, at 916ff, 928ff.

The recent case law of the USSC, affording corporations the protection of free speech and religious freedom rights, echoes this rationale of the early jurisprudence.¹⁰⁹ While the USSC's approach has encountered serious criticism in public¹¹⁰ and doctrinal¹¹¹ opinion, the USSC appears rather unimpressed with such backlash, promoting its derivative rights position in *Citizens United* and affirming it in *Hobby Lobby*. In *Citizens United*, refuting legislation limiting corporate campaign financing, the USSC characterized the corporations as 'associations [of human beings] that have taken on the corporate form'.¹¹² In *Burwell v. Hobby Lobby*, the shareholders of Hobby Lobby Stores, Inc., devout evangelicals, argued that legislation requiring employers to provide health care plans covering abortions violated the corporation's freedom of religion rights.¹¹³ The court followed suit, founding Hobby Lobby's claim on a derivative rights approach, holding that '[a] corporation is simply a form of organization used by human beings to achieve desired ends'¹¹⁴ and, in the following, referring to the shareholders and the corporation interchangeably as concerned the right of freedom of religion.¹¹⁵

Consequently, this brief survey of the USSC's jurisprudence has revealed two things. First, the court quite consistently takes a derivative rights approach,¹¹⁶ disregarding the corporate form and granting corporations constitutional rights protection to the extent that the human beings that have established or own the corporation can claim those rights. Second, and most pertinent for the present inquiry, such derivative rights approach in its iteration in USSC case law by no means limits the scope of corporate human rights. Quite to the contrary, looking past the corporate form means that corporations, on behalf of the human beings that stand behind them, can claim all those

¹⁰⁹ See also the analysis of Blair and Pollman, *supra* note 7, at 1677, 1742–1743; see also Hovenkamp, 'The Classical Corporations in American Legal Thought', 76 *Georgetown Law Journal* (1988) 1593, at 1642, with a similar assessment regarding the US Supreme Court's (USSC) jurisprudence in the late 19th century.

¹¹⁰ For further references, see Edsall, *supra* note 100.

¹¹¹ For only a few examples, see, e.g., Goforth, 'A Corporation Has no Soul' – Modern Corporations, Corporate Governance, and Involvement in the Political Process', 47 *Houston Law Review* (2010) 617, at 651ff; Tucker, 'Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*', 61 *Case Western Reserve Law Review* (CWRLR) (2010) 495; Rosenberg, 'The Corporate Paradox of *Citizens United* and *Hobby Lobby*', 11 *New York University Journal of Law and Liberty* (2017) 308; Pollman, 'Corporate Law and Theory in *Hobby Lobby*', in M. Schwartzman, C. Flanders and Z. Robinson (eds), *The Rise of Corporate Religious Liberty* (2016) 149; Strine and Walter, 'Conservative Collision Course?: The Tension between Conservative Corporate Law Theory and *Citizens United*', 100 *Cornell Law Review* (2015) 335, at 359ff. For a few positive reactions to the USSC's recent case law, see, e.g., Taub, 'Is *Hobby Lobby* a Tool for Limiting Corporate Constitutional Rights?', 30 *Constitutional Commentary* (2015) 403; McDonnell, 'The Liberal Case for *Hobby Lobby*', 57 *Arizona Law Review* (2015) 777.

¹¹² *Citizens United*, *supra* note 13, at 343.

¹¹³ Of note, the claim was introduced not under the First Amendment but, rather, under the Religious Freedom Restoration Act of 1993, which however affords identical protection to the freedom of religion under the US Constitution. See Religious Freedom Restoration Act of 1993 (RFRA), 42 USC 2000bb-1(a) and (b).

¹¹⁴ *Hobby Lobby*, *supra* note 99, at 18.

¹¹⁵ E.g. *ibid.*, at 32, 33, 37.

¹¹⁶ For a similar conclusion with further references to and analysis of USSC case law, see also Blair and Pollman, *supra* note 7.

constitutional rights that their shareholders or founders possess, including freedom of religion or even protection against racial discrimination.¹¹⁷

B Under the German Grundgesetz

The case law of the GFCC confirms this observation. As stated above, the German Grundgesetz contains a general clause in Article 19(3), determining the scope of corporate constitutional rights – that is, ‘to the extent that the nature of such rights permits’.¹¹⁸ From the late 1960s onwards, the GFCC consistently has been tying the ‘extent’ of constitutional rights’ ‘nature’ to the protection of the human beings behind the corporation. Corporations, so the Court held in 1967, are only afforded constitutional rights protection, ‘if their establishment and their activity are expression of the free development of natural persons’.¹¹⁹ Here and in subsequent case law,¹²⁰ the Court speaks of ‘reaching through’ the corporation (*‘Durchgriff’*)¹²¹ to the natural persons behind the corporation. Such is also the prevalent view in the literature:¹²² ‘Article 19(3) exists for the sake of the human being.’¹²³ It has led to the pervasive

¹¹⁷ Note the instances in which the Court has identified the National Association for the Advancement of Colored People (N.A.A.C.P.), a non-profit corporation, with its members and thus granted it protection from racial discrimination or the freedom of association. Cf. *N.A.A.C.P. v. Alabama ex re Patterson*, 357 U.S. 449 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

¹¹⁸ See Section 3A.

¹¹⁹ German Federal Constitutional Court (GFCC), Judgment of 2 May 1967, BVerfGE 21, 362 (369) (my translation). In German, the relevant passage reads in full: ‘Die Grundrechte sollen in erster Linie die Freiheitssphäre des Einzelnen gegen Eingriffe der staatlichen Gewalt schützen und ihm insoweit zugleich die Voraussetzungen für eine freie aktive Mitwirkung und Mitgestaltung im Gemeinwesen sichern. Von dieser zentralen Vorstellung her ist auch Art. 19 Abs. 3 GG auszulegen und anzuwenden. Sie rechtfertigt eine *Einbeziehung der juristischen Personen in den Schutzbereich der Grundrechte nur, wenn ihre Bildung und Betätigung Ausdruck der freien Entfaltung der natürlichen Personen sind*, besonders wenn der “Durchgriff” auf die hinter den juristischen Personen stehenden Menschen dies als sinnvoll oder erforderlich erscheinen läßt’ (emphasis added).

¹²⁰ E.g. GFCC, Judgment of 8 July 1982, BVerfGE 61, 82 (101); GFCC, Judgment of 31 October 1984, BVerfGE 68, 193 (205ff). For a recent decision to this effect, see GFCC, Judgment of 6 December 2016, BVerfGE 143, 246 (para. 188).

¹²¹ Note Taub, *supra* note 112, at 418, who describes the majority opinion’s approach in the USSC’s *Hobby Lobby* case, *supra* note 99, as ‘look through’ (see Section 4A).

¹²² Cf., e.g. Remmert, in R. Herzog *et al.* (eds), *Maunz/Dürig, Grundgesetz – Kommentar* (2019), Art. 19, Abs. 3, paras 34, 35, 113; Huber, in P.M. Huber and A. Voßkuhle (eds), *V. Mangoldt/Klein/Starck, Kommentar zum Grundgesetz: GG* (7th edn, 2018), Art. 19, paras 210ff; De Wall, in K.H. Friauf and W. Höfling (eds), *Berliner Kommentar zum Grundgesetz* (2015), Art. 19, Abs. 3, para. 28. For a recent critical account, see Kulick, ‘Vom Kopf’ auf die Füße: Die juristische Person des Privatrechts und die wesensmäßige Anwendbarkeit der Grundrechte’, *65 Jahrbuch des Öffentlichen Rechts der Gegenwart neue Fassung* (2017) 57, at 60ff; from a comparative perspective, see also Kingreen and Möslein, ‘Die Identität der juristischen Person: Die Hobby Lobby-Entscheidung des U.S. Supreme Court zur Glaubensfreiheit gewinnorientierter Kapitalgesellschaften’, *71 Juristenzeitung* (2016) 57, at 62ff.

¹²³ Thus, the famous quote from Günter Dürig’s highly influential commentary on Art. 19(3). See Dürig, in T. Maunz and G. Dürig (eds), *Maunz/Dürig, Grundgesetz – Kommentar* (1977), Art. 19, Abs. 3, para. 1 (my translation; the German original reads: ‘Artikel 19 Abs. 3 ist um des Menschen willen da’), which is re-stated and embraced by the current commentator. See Remmert, *supra* note 123, para. 113; see also Rupp-v. Brünneck, ‘Zur Grundrechtsfähigkeit juristischer Personen’, in H. Ehmke, C. Schmid and H. Scharoun (eds), *Festschrift für Adolf Arndt zum 65. Geburtstag* (1969) 349, at 359 (‘merely part of the fundamental rights protection of the human being itself’ (‘nur Teil des Grundrechtsschutzes des Menschen selbst’)).

protection of corporate constitutional rights, including the right to freedom of the press for a chemical corporation issuing a company newspaper,¹²⁴ the corporate right to freedom of expression,¹²⁵ the right to informational self-determination,¹²⁶ the right to freedom of assembly¹²⁷ and the right to artistic expression.¹²⁸

C Conclusion: Without Limits

To conclude this brief survey, by no means has the derivative rights approach proven to limit corporate constitutional rights protection. To the contrary, the iteration of the individualistic approach that grants corporations derivative rights by looking past the corporate form at the rights of the human beings behind them rather serves as justification for sweeping and pervasive corporate constitutional rights. Focusing on the shareholders' or founders' rights permits courts to afford corporations protection even of such rights as religious faith and conviction, prohibition of racial discrimination or artistic expression, among others.

5 The Individualistic Approach and Corporate Apotheosis

These comparative insights indicate the problems inherent in the individualistic approach. Indeed, as will be demonstrated subsequently, it disregards the basic insights of corporate law (A) and modern legal theory and thus falls into a naturalistic trap (B), which leads to nothing short of corporate apotheosis that particularly permits shareholders to live in the best of both worlds (C).

A The Corporate Form: Have Your Cake and Eat It?

Corporations are creations of the law. The law creates them in order to facilitate the business dealings of human beings – of a single individual or of several, or even large numbers of, individuals.¹²⁹ Their defining characteristic is that they constitute legal entities separate and distinct from the human beings that establish them and own shares in them.¹³⁰ The corporation is durable and persists even if the human beings behind it change – for example, sell, purchase shares or die. As self-standing legal entities, corporations can legally interact with other legal entities, both legal or natural persons, and can own property, conclude contracts, incur debt and sue and be sued. In the Anglo-American legal tradition, this much has been established by scholarship and practice at least since William Blackstone's *Commentaries on the Laws of England*

¹²⁴ Cf. GFCC, Judgment of 8 October 1996, BVerfGE 95, 28 (34ff).

¹²⁵ Cf. GFCC, Judgment of 9 October 2002, BVerfGE 106, 28 (42ff).

¹²⁶ Cf. GFCC, Judgment of 13 June 2007, BVerfGE 118, 168 (203ff).

¹²⁷ Cf. GFCC, Judgment of 17 February 2009, BVerfGE 122, 342 (355).

¹²⁸ Cf. GFCC, Judgment 31 May 2016, BVerfGE 142, 74 (para. 59).

¹²⁹ Cf. only Manne, 'Our Two Corporation Systems: Law and Economics', 53 *VLR* (1967) 259, at 260ff. On the historical development of the corporate form, see Avi-Yonah, 'The Cyclical Transformations of the Corporate Form: A Historical Perspective on Social Corporate Responsibility', *Delaware Journal of Corporate Law* (2005) 767, who asserts that the corporate form has undergone four major transformations over the course of history. For a prominent historical account of US corporate theory, see Millon, *supra* note 24, at 205–240.

¹³⁰ See, e.g., Strine and Walter, *supra* note 112, at 343.

(1765–1770).¹³¹ The corporate form thus provides limited liability protection for the corporation's shareholders: it is the corporation as a separate legal entity that is legally bound by contractual or other obligations, and, thus, it is the corporation alone, instead of its shareholders, that is liable to pay its debts. Only the corporation's assets, and not the assets of its shareholders, can be seized if it falls short of fulfilling its obligations.¹³²

Thus, the predominant view under private law in all major jurisdictions treats the corporation as a separate legal entity and respects the corporate form while, only in very rare circumstances, 'piercing the corporate veil'.¹³³ However, the derivative rights approach to corporate human and constitutional rights does exactly the opposite, as the brief survey of the USSC's and GFCC's jurisprudence demonstrates: it looks past the corporate form, focusing on the rights of the shareholders.¹³⁴ In other words, according to the derivate rights approach, corporations are shape shifters. Under private law, they are separate from the shareholders, whereas under constitutional or human rights law, the very same corporation is identified with its shareholders, disregarding the corporate form that private law simultaneously upholds as the defining characteristic of the corporation. This approach means that shareholders can have it both ways:¹³⁵ they are shielded against liability for private law purposes but they can shed the corporate form and can claim their own constitutional or human rights as those of the corporation under constitutional/human rights law. In brief, the derivate rights approach is the legal equivalent to eating your cake and having it too.¹³⁶

B *Legal versus 'Natural' Persons*

How could it come to this? To my mind, the root cause for effectively permitting corporate shape shifting pertains to a misguided understanding of legal personhood that underlies the overall individualistic approach to corporate human rights, thus including the view that entirely rejects corporate human rights entitlements altogether. Going back to Blackstone or Savigny, the traditional view, based on the fictional theory,¹³⁷ is that corporations are 'artificial' entities.¹³⁸ This is indeed also

¹³¹ W. Blackstone, *Commentaries on the Laws of England*, 4 vols (1765–1770). Similarly in the continental European tradition, for example, see von Savigny, *supra* note 30.

¹³² Cf. only Easterbrook and Fischel, 'Limited Liability and the Corporation', 52 *University of Chicago Law Review* (1985) 89, at 93ff; Hovenkamp, *supra* note 110, at 1651ff. See also M. Weber, *Wirtschaft und Gesellschaft* (4th edn 1956), vol. 2, at 439–440.

¹³³ Cf. Macey, 'What Corporate Veil?', 117 *Michigan Law Review* (2019) 1195, at 1204ff; Strine and Walter, *supra* note 112, at 343.

¹³⁴ See Section 4.

¹³⁵ Cf. Greenfield, *supra* note 102, at 11.

¹³⁶ Similar criticism has been levelled against the fictional and aggregate theories of domestic corporate theory (see Section 2B) on the same line of argument: particularly the latter, including its modern 'nexus of contracts' iteration, focuses on shareholder interest, on the one hand, ignoring the separate legal entity formed by the corporation but upholding the corporate form to promote shareholders' limited liability. Cf. Ripken, *supra* note 25, at 26ff, 33; see also Strine and Walter, *supra* note 112, at 343.

¹³⁷ See Section 2B.

¹³⁸ Blackstone, *supra* note 132; von Savigny, *supra* note 30.

what the USSC stated in the *Dartmouth College* case: ‘an artificial being, invisible, intangible, and existing only in contemplation of law.’¹³⁹ As has been fleshed out elsewhere,¹⁴⁰ the aggregate theory of classical corporate thought¹⁴¹ shares this view of corporations as ‘artificial’ entities. The underlying assumption here, of course, is that corporations are creatures of law, whereas human beings are creatures of nature. Hence, the different terminology: legal versus natural persons. However, while such a distinction is correct in a naturalistic sense, from the perspective of law, under the modern legal theory of roughly the past century at least, this is a rather simplistic and truncated view on the matter of legal personhood. Legal personhood – that is, the ability to be a subject of the law – itself necessarily is a legal concept. Since it is thus a legal creation as any other, it is human-made and thus ‘artificial’ in the sense that it does not naturally exist.¹⁴² Hence, both legal and ‘natural’ persons are juristic concepts and, in that sense, ‘legal’ persons. It is the law, and not nature, that bestows them with legal subjectivity.

Of course, there are no doubt important ethical background assumptions about human nature, dignity and equality that serve as justifications for why the law grants all human beings the status of legal subjects.¹⁴³ But they enjoy such status because the law gives it to them, not by ‘nature’ itself. History is a good teacher in this regard, as many legal systems, for most of their existence, have excluded certain groups and minorities from the enjoyment of (full) legal subjectivity, mostly because of their race or gender.¹⁴⁴ While ethically imperative, their status as legal subjects only changed once the law did indeed confer such status upon them.¹⁴⁵

Therefore, the individualistic approach to corporate human rights¹⁴⁶ arguably still adheres, as an underlying assumption, to a naturalistic view of personhood – as, for example, the argumentative lineage in the USSC’s jurisprudence demonstrates, ranging from *Bank of United States* and *Dartmouth College*, to *Citizens United* and *Burwell v. Hobby Lobby*;¹⁴⁷ corporations, as ‘artificial’ entities, cannot have ‘human’ rights because those are reserved for ‘natural’ persons. As submitted earlier, such a view is out of touch with the basic insights of modern legal theory.

¹³⁹ *Trustees of Dartmouth College*, *supra* note 30, 636.

¹⁴⁰ See Ripken, *supra* note 25, at 30.

¹⁴¹ See Section 2B.

¹⁴² For a *locus classicus* of modern legal theory, see H. Kelsen, *Reine Rechtslehre* (2nd edn, 1960), at 177; see also already Weber, *supra* note 133, at 439.

¹⁴³ See Section 6A.

¹⁴⁴ Gear, ‘Challenging’, *supra* note 1, at 527ff, acknowledges as much; however, Gear draws the opposite conclusion, challenging Western liberal thinking on individual rights of the past four centuries, advocating a different approach based on human ‘embodiment’ instead of abstract conceptualization of legal personhood as prevalent in the Western liberal tradition (at 525ff).

¹⁴⁵ With references to feminist and critical race theories, *cf.* also Ellis, ‘Citizens United and Tiered Personhood’, 44 *John Marshall Law Review* (2011) 717, at 727ff.

¹⁴⁶ And, therefore, in a similar vein, the fictional and aggregate theories of corporate law (see Section 2B–D).

¹⁴⁷ See Section 4A.

C Corporate Apotheosis

Based thus on misguided theoretical background assumptions, the individualistic approach¹⁴⁸ by no means limits corporate human rights but, instead, counter-intuitively leads to their boundless expansion. This is because denying corporations human rights protection altogether is not feasible (1), which, in turn, leads to embracing the derivative rights approach that means no less than unfettered corporate empowerment (2).

1 Why Corporations Must Have (Some) Human Rights

As acknowledged by even the staunchest proponents of the no corporate human rights position, corporations are 'social realities'.¹⁴⁹ They play an important role in socio-economic life, not least because they constitute separate legal entities that hence may accumulate tremendous economic and even political heft that is self-standing and distinct from the individuals behind the corporation. Acknowledging them as legal subjects under private law, but denying them the status as human/constitutional rights subjects altogether on the premise that they are not 'natural' because they are not 'human' beings,¹⁵⁰ is unsustainably inconsistent. If we recognize law as man-made, and, thus, legal personhood as a man-made construction, we confer this status on certain entities based on a decision by the law. Such a decision may have its roots in certain ethical assumptions, but only the decision itself confers the status as a legal subject. If such a concept of personhood is thus bestowed on entities other than those of flesh and blood, the mere fact that these are 'artificial' and not human beings does not make a difference in this regard. This in itself, of course, is not an argument for granting corporations human rights but merely an argument against denying them such status because they are not 'natural' persons.

However, denying corporate human rights altogether is mainly not feasible because it, in fact, considerably undermines human rights protection. This is because the exercise of certain human rights by associations of human beings taking on the corporate form constitutes social phenomena that are distinct and different from the human rights exercise of the individuals behind the corporation. The most obvious examples are the freedom of the press and the freedom to exercise one's religious beliefs or worldviews. The publication organ or broadcasting unit that are, for example, the *New York Times* (that is, the New York Times Company) or *Fox News* (that is, the Fox Corporation) are not merely legally, but also socially, something quite different from their shareholders or the journalists and other employees working at the respective companies. They are media platforms that stand for certain political positions (liberal/conservative) and give the individual opinions voiced in their newspaper or on their television shows certain connotations (political, economic, cultural, reputational and so on) and a certain thrust that they usually would

¹⁴⁸ And, by extension, the fictional and aggregate corporate theories (see Section 2B–D).

¹⁴⁹ Cf. Grear, 'Challenging', *supra* note 1, at 519, 521.

¹⁵⁰ See Section 5B.

not accrue if just voiced individually and independently of this platform.¹⁵¹ Thus, attacks on the free press are often not directed merely at specific individuals but also at the publication or television broadcaster *per se*, precisely because they themselves stand for a specific political view or have a certain reputation. In a similar vein, religious groups are often organized in corporate form. The exercise of their faith as such an organization, for which the corporate form is the legal vessel, attains a different social meaning and impact than the individual exercise of faith by their congregants. Denying media outlets, or religious groups organized in corporate form, human rights protection themselves and merely focusing on the individuals behind them ignores their specific societal role and thus diminishes human rights protection considerably.

However, such observations go beyond freedom of the press or freedom of religion and equally apply to ordinary commercial activity. If we accept that an association of people and interests organized in corporate form is more than the sum of its parts, that is, the individuals behind them, we must also acknowledge that a corporation buying or selling products or owning property enables a form of commercial activity that is distinct from the individuals behind the corporation. It differs from the shareholders acting individually, at the very least because of the limited liability shield that the corporate form offers. Denying corporate entities those human rights protections that we afford human beings for similar commercial activities – for example, the protection of ‘possessions’ according to Article 1 of Protocol no. 1 of the ECHR – therefore denies the specific socio-economic phenomenon that corporations represent as separate legal entities.

Because of the ‘social reality’ of corporate impact on the outlook of socio-economic life and because human rights protection would be considerably diminished if corporations did not enjoy any human rights, rejecting corporate human rights altogether is not feasible. Instead and therefore, the prevalent view appears to accept that corporate human rights cannot be denied entirely while, at the same time, upholding the individualistic view that only human beings can be the true bearers of human rights.

2 *Why the Derivative Rights Position Leads to Unfettered Corporate Empowerment*

However, as demonstrated above, such a derivative rights position¹⁵² means corporate apotheosis. The comparative analysis with the constitutional rights jurisprudence in the United States and Germany has shown that the derivative rights position does not limit, but, rather, expands the scope of human rights protection for corporations. At the same time, it leads to shape shifting that ponders the corporate form in private law but shuns it with regard to constitutional/human rights

¹⁵¹ On the sociological significance of difference between individual journalists and the mass media, see the seminal J. Habermas, *Strukturwandel der Öffentlichkeit* (rev. ed., Suhrkamp, 1990; 1st ed. 1962), at 275ff.

¹⁵² Represented, in domestic corporate theory, particularly by the aggregate or nexus of contracts theory as well as modern iterations of the fictional theory. See Section 2B–D.

law. Thereby, the shareholders of the corporation can live in the best of both worlds, claiming limited liability when it comes to obligations and insisting on their human rights interests when it comes to rights protection.¹⁵³ It means the illegitimate echo of shareholder primacy as the founding concept of dominant Anglo-Saxon corporate legal thought.¹⁵⁴ Shareholders are shielded against liability, but, at the same time, they are able to insist on their human rights protections as those of the corporation.¹⁵⁵

This idea meets with the necessary consequence of a derivative rights position: if one looks at the human beings behind the corporation and focuses on their human rights, the corporate form cannot place limits on the rights that the corporation may be entitled to claim. If corporate rights are derivative of the rights of the human beings behind them, then all the rights that these human beings can potentially claim can be claimed by the corporation as well. Hence, at least from a conceptual viewpoint, there is thus no limit to a corporation claiming violation of those rights that are intricately linked with the human body, conscience or existence. These may therefore include, for example, the right to life, the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of slavery and forced labour, to name but three of the most outrageous examples. Think, for example, of the shareholder of a corporation who has been killed by government conduct linked to the corporation. Under a consequent application of the derivative rights position, the corporation would be able to claim violation of its (!) right to life through the legal successors of the dead shareholder. Similarly, if the government tortured a shareholder, the corporation could seek remedy for violation of its (!) rights under Article 3 of the ECHR since it derives its human rights status from its shareholders and may claim impairment of the shareholders' human rights as its own.

D Conclusion: Counter-intuition

Consequently, the individualistic approach that focuses on the people behind the corporation and refuses to grant human rights to the corporate form *per se* leads to a naturalistic trap.¹⁵⁶ By focusing on the human being and shunning the corporate form in order to limit corporate human rights, it leads counter-intuitively to the opposite: unfettered corporate empowerment. Denying corporate human rights altogether is not feasible, considering the socio-economic reality of corporations shaping our everyday lives and the fact that it would considerably diminish human rights protections, particularly, albeit not exclusively, freedom of the press and religious freedom. Under the individualistic approach, this leaves the derivative rights position. The latter accepts corporate human rights but rejects granting human rights to the corporate form and looks at the human beings, particularly the shareholders, beyond the corporation.

¹⁵³ See Section 5A.

¹⁵⁴ Cf. T. Clarke, *International Corporate Governance: A Comparative Approach* (2nd edn, 2017), at 13, 211; see also Greenfield, *supra* note 102, at 186ff.

¹⁵⁵ See also Strine and Walter, *supra* note 112, at 343.

¹⁵⁶ As, therefore, do the fictional and aggregate theories of domestic corporate theory (see Section 2B–D).

Thereby, it opens up the possibility of corporations claiming practically unlimited human rights protections, including even such rights as the right to life or the prohibition of torture.

6 The Functional Approach: And What It Means for the ECHR

If the individualistic approach is thus arguably flawed, what may instead serve as a sound theoretical underpinning of corporate human rights that pays adequate attention to the corporate form and the social reality that they constitute while halting the boundless expansion of corporate human rights entitlements? The path to responding to this question properly lies in pursuing the different background justifications for why we extend human rights to individuals and why we extend human rights to corporations (A). This path leads to a clearer understanding of what corporations are about and, thus, why they do (and should) receive some human rights to some extent (B), which has repercussions for the ECHR, and this means taking corporate social reality seriously (C).

A Deontological versus Teleological Rationale; Individual versus Corporate Rights

The start for a way out of the individualistic trap and to an adequate and restrained approach to corporate human rights must be sought in the different ethical rationales for bestowing human rights on human beings versus corporations. To my mind, in the former case, the background justification is deontological, while, in the latter case, it is teleological.¹⁵⁷ Of course, this is not to refute the previous rejection of naturalism. A norm is legally binding because it is socially posited in a specific legal form, not because it adheres to certain ethical assumptions.¹⁵⁸ However, looking at the ethical assumptions underlying the decision of the law to grant a certain legal status – or not – is instructive in understanding the scope of this socially posited and formalized legal status and how far the law extends it.

So why does the law bestow individuals with human rights protection? The background justification here is deontological in that human beings are simply bestowed human rights for their own sake – because of their very existence; because of their inherent dignity and equality. While a legal order may well also see certain purposes in individual human rights, such as allowing them to conduct commercial relations in order to foster economic prosperity within a state, first and foremost, human beings are bearers of human rights for their ‘intrinsic value’, not because giving them this legal status achieves a certain goal for the greater good.¹⁵⁹

¹⁵⁷ For this very basic distinction, I borrow from the terminology as (re-)introduced by John Rawls, *A Theory of Justice* (rev. edn, 2005), at 24ff. however, without taking on board the broader and further theoretical assumptions and consequences as contended by Rawls; see also Kymlicka, ‘Rawls on Teleology and Deontology’, 17 *Philosophy and Public Affairs* (1988) 173, at 174ff.

¹⁵⁸ See Section 5B.

¹⁵⁹ For a similar effect, see Scolnicov, ‘Lifelike and Lifeless’, *supra* note 1, at 6.

By contrast, corporations do not possess such intrinsic value. They do not enjoy human/constitutional or any other right because of an inherent dignity and just for the sake of their existence. Instead, the law creates them for certain purposes. Their background justification thus can only be teleological. Such *telos* is primarily socio-economic.¹⁶⁰ Corporations exist in order to generate profit, in order to enable their shareholders, founders or members to achieve certain goals and, thus, eventually, also in order to promote certain societal goals, such as fostering economic prosperity or contributing to the existence and persistence of a free press.¹⁶¹ A legal order, as the result of legal rules and principles of a political community, sets up corporations for societal purposes – that is, both in the interest of individuals and of society.

B What Corporations Are About

It is, so I submit, precisely this teleological rationale that may serve as the basis for – and also as the limit to – corporate human rights. The law establishes the corporate form because the complexity of human interaction requires the existence – not in nature but, rather, in law – of entities that allow larger associations of people to collectively pursue certain interests. The corporate form thereby accrues, as explained above, to a social reality that is more than the sum of its parts – that is, of the individual interests of the human beings behind it.¹⁶² This social reality deserves human rights protection to the extent that the corporation is established for the pursuit of certain societal activities and phenomena encompassed by human rights and to the extent that it actually does pursue them. To the astute reader familiar with corporate theory, this may sound like wholeheartedly embracing the real entity theory.¹⁶³ Indeed, my approach bears similarity with that theory in that it recognizes corporations as social phenomena having a real effect on the world in which they operate. However, where it clearly differs is that it does not assimilate corporations with human beings of flesh and blood, possessing ‘real’ will and being able to act themselves. As has been noted elsewhere,¹⁶⁴ this idea indeed would be a misguided fiction. Corporations are not to be assimilated with human beings. From a legal perspective, in regard to legal personhood, rather the opposite is the case: both legal and ‘natural’ persons are creations of the law.¹⁶⁵ Consequently, as the following will develop, my approach is not at all naturalistic in nature but, in fact, rather positivist.

Corporations are creatures of the law. The same, however, holds true regarding legal personhood.¹⁶⁶ My approach is thus positivist in that it regards legal personhood

¹⁶⁰ For a similar effect, see Greenfield, *supra* note 102, at 61 (‘the theory we need is one that places the corporation into its institutional role in society and the economy. Why do we have corporations?’).

¹⁶¹ Cf. Colombo, ‘Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership’, 34 *Journal of Corporate Law* (2008) 247, at 262ff; Greenfield, ‘Defending Stakeholder Governance’, 58 *CWRLR* (2008) 1043. For an early and influential example, see Dodd, ‘For Whom are Corporate Managers Trustees?’, 45 *HLR* (1932) 1145.

¹⁶² See Section 5C1.

¹⁶³ See Section 2B.

¹⁶⁴ Cf. Flume, *supra* note 32, at 18.

¹⁶⁵ See Section 5B.

¹⁶⁶ See Section 5B.

as a creation of the law that exists exclusively because a specific social practice is set in a certain form that the sovereign¹⁶⁷ has established and accepted as legally valid.¹⁶⁸ However, it is soft positivist¹⁶⁹ in that the sovereign lawmaker may establish or accept a rule – or status, for that matter – as legally valid or existent because of certain value-based background justifications. In other words, the sovereign – in the case of the states parties to the ECHR, the *demoi* in the respective democracies – decides whether a legal rule or status is valid or exists. It may thus grant personhood to human beings for deontological purposes, whereas it creates corporations for functional reasons: to serve socio-economic purposes for the furtherance of human activity – in particular, the collective pursuit of certain (often commercial or other) interests.

The earlier discussion also demonstrates the merits in avoiding pigeonholing into the various domestic corporate theories.¹⁷⁰ Classically, the real entity theory asserts that the corporation ‘has a life completely separate and apart from the state’, whereas the fictional theory is presented as emphasizing that corporations are creatures of law and state.¹⁷¹ The aforesaid exhibits that it is possible, and, to my mind, even preferable, to conceptualize corporations as both ‘social realities’ and creatures of the law. Just because they are a legal concept, as is also the ‘natural person’, this does not mean that they are merely ‘artificial’ and bear no ‘social reality’. Simply because they themselves have a real bearing in and on socio-economic life does not mean that law does not construct and thereby shape them, granting them certain functions or *teloi*.

A newspaper organized in corporate form exists for the purposes of journalism and publication, a real estate corporation exists to buy and to sell, to own and to administer property. That is why the law permits their creation and why it provides a regulatory framework that allows for the establishment of legal persons for certain purposes, and that is why the founders establish such corporations. The social activity that these corporations pursue is specific to the corporate form, as it takes a different shape than if merely human beings individually pursued it – a shape, indeed, that in many instances individual human activity would simply not be able to take. Again, this applies equally to the newspaper corporation that constitutes a media outlet with a certain political thrust and reputation of its own as well as to the real estate corporation that may garner a certain economic heft and may pursue a certain business policy.¹⁷²

In other words, the newspaper corporation must enjoy the freedom of expression and the freedom of the press, *inter alia*, and the real estate corporation must enjoy the freedom of property, *inter alia*. How is the scope of corporate human rights thus defined? To my mind, corporate activity falls within the scope of a human rights

¹⁶⁷ That is, at least regarding the member states of the ECHR (*cf.* preamble, fifth recital), the *demoi* and thus eventually parliament representing the people in a democracy.

¹⁶⁸ This is roughly a Hartian form of positivism. For a summary of Hart’s positivism, *cf.* Greene, ‘Introduction’ in H.L.A. Hart, *The Concept of Law* (3rd edn, 2012) iii, at xvii, in particular, xix (‘[t]he ultimate basis of law is [...] a social construction that arises from people thinking and doing certain things’).

¹⁶⁹ See Hart, *supra* note 169, at 250ff (postscript).

¹⁷⁰ See Section 2B.

¹⁷¹ Ellis, *supra* note 146, at 738–739; see also Section 2B.

¹⁷² *Ibid.*

protection if and to the extent that it requires such protection to pursue the purposes for which it was set up.¹⁷³ Hence, the newspaper does not only require protection of Article 10 of the ECHR, but it also needs, for example, protection of its possessions under Article 1 of Protocol no. 1 of the ECHR – if the government seizes the premises on which the newspaper has its offices – or access to court according to Article 13 of the ECHR – for example, if the government withdraws its licence or otherwise impairs its ability to publish.

According to this theoretical rationale, the corporation thus can claim human rights under a functional premise as long as the protection it seeks is directly linked to the purpose for which it is established and to the aim that it actually pursues with regard to the specific activity. The corporate purpose hence circumscribes the corporation's ability to bear those human rights that can, by their nature, be exercised in corporate form. The real estate corporation, for example, may very well claim protection under Article 8 of the ECHR against searches and seizures of its offices because without unrestricted access to its offices it cannot conduct its business properly.¹⁷⁴ However, it may not claim protection of religious freedom under Article 9 of the ECHR because its shareholders or board members have a certain religious preference when it comes to whether or not to include treatment for abortion in the employees' health care benefit plan,¹⁷⁵ unless the corporation is specifically set up for the purpose of conducting business according to certain religious principles.

With respect to the legitimate purposes that corporations may be set up for and pursue, profit making certainly is of high importance, as it may further wealth creation and economic well-being. However, profit maximization does not at all constitute the exclusive legitimate purpose of a corporation. First off, the sovereign may choose, as almost all domestic legal orders do, to allow for the establishment of not-for-profit corporations such as religious organizations or recreational or sports clubs. But also with respect to for-profit corporations, it remains for the sovereign to decide for which purposes its legal creations may be established and thus receive the legal status as corporations. Therefore, the sovereign may choose, as it usually does, to enable human beings or other corporate entities to found corporations for those socio-economic purposes that it deems adequate.

The view presented here is in opposition to the prevalent view in Anglo-Saxon corporate theory that relies on shareholder primacy and therefore ponders profit maximization as the only legitimate aim of a corporation.¹⁷⁶ Such a mono-purpose of

¹⁷³ Again similarly, see Greenfield, *supra* note 102, at 135, stating that corporations should receive those rights 'necessary in order to achieve their institutional and social role'.

¹⁷⁴ Cf. *Stes Colas Est*, *supra* note 61, paras 40–42.

¹⁷⁵ Cf. *Hobby Lobby*, *supra* note 99.

¹⁷⁶ Cf. also Milton Friedman's prominent quip in Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', *New York Times Magazine* (13 September 1970). This is based on a misplaced property conception of the corporation, according to which its assets are (or are treated as) the property of the shareholders. See Clarke, *supra* note 155, at 211. For a more nuanced theoretical approach, which, however, still ultimately stresses shareholder primacy, see R. Monks and N. Minow, *Corporate Governance* (5th edn, 2011), at 9ff.

corporations is not only irreconcilable with the sovereign's – that is, in a democracy eventually, Congress's or Parliament's – competence to define the functional reasons for why it creates the corporate form and, thus, why human beings or corporate entities may establish corporations. It is also at odds with US law practice, considering that the USSC, in *Burwell v. Hobby Lobby*, has recently rejected the position that profit maximization may be the only legitimate purpose of a corporation.¹⁷⁷

Two further matters require addressing. First, as a necessary consequence of the aforesaid, under the theoretical approach submitted here, domestic law determines the international human rights law status of corporations to a considerable degree: they enjoy human rights protections to the extent that they require such protection to pursue the corporate purpose(s) that domestic law permits them to pursue in corporate form. Even more fundamentally, they only exist because domestic law creates them. However, such domestic law influence on international (human rights) law is not at all unbeknownst to international doctrine – think of matters of nationality,¹⁷⁸ sovereign immunity¹⁷⁹ or, indeed, diplomatic protection regarding shareholdings in foreign corporations.¹⁸⁰ In addition, the ECHR acknowledges the ability of national law to determine the international human rights status of legal persons at least in Article 34 and Article 1 of Protocol no. 1, which refer to 'non-governmental organizations' and 'legal persons' as established under domestic law respectively.

The second matter pertains to the corporate purpose. If it is the eventual yardstick to assess whether a specific corporation enjoys a specific human right under the ECHR, how to deal with the problem that such corporate purpose may change and that the array of possible corporate purposes is very wide? With respect to the change of corporate purpose, if a corporation changes its purpose(s), the scope of its protection changes as well. Think of an incorporated butchery that is acquired by devout Muslims who decide to abandon any pork production and to slaughter animals exclusively according to the halal method. After the acquisition, the butchery may under certain circumstances claim protection under Article 9 of the ECHR, which it could not do before the acquisition.

As for the potential of corporations to abuse the wide scope of corporate purposes possible under the approach submitted here, I suggest the following three-tiered test that corporations have to meet in order to claim human rights protection under the ECHR in a specific instance. The test departs from the premise that the corporate form must always be the starting point when determining whether and to what extent a

¹⁷⁷ See *Hobby Lobby*, *supra* note 99, at 22ff; Johnson and Millon, 'Corporate Law after Hobby Lobby', 70 *Business Lawyer* (2014–2015) 1, at 2, note that this was the 'first time' that the Court 'tackl[ed] ... the contentious issue of corporate purpose'.

¹⁷⁸ Cf. *Nottebohm (Liechtenstein v. Guatemala)*, Judgment, Second Phase, 6 April 1955, ICJ Reports (1955) 4, at 21, 23 (underlining that 'international law leaves it to each State to lay down the rules governing the grant of its own nationality').

¹⁷⁹ Cf. *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, at 123 (noting the role of domestic legislations and court decisions in the international law of jurisdictional immunities).

¹⁸⁰ Cf. *Barcelona Traction*, *supra* note 68, at 37.

certain activity of a corporation enjoys the protection of a certain human rights provision. The first question to ask pertains to whether the specific human right can be afforded at all to the corporate form. This necessarily excludes all those human rights that are intricately linked to human existence and the human body – for example, the right to life and the prohibition of torture or slavery. Second, with respect to those human rights which then are not necessarily excluded from applying to corporations, one must inquire as to the purpose or purposes for which the corporate form was established, which particularly requires a look at the corporate charter, including its interpretation that may investigate the broader context of its creation. For example, a music production company may enjoy the freedom of artistic expression, even if the corporate charter does not explicitly mention this aim. On the other hand, the charter may also detail aims of a specific character that go beyond what is usually associated with a certain line of business – for example, a corporation that wants to conduct its business according to certain strict ethical, environmental or religious standards – think of an incorporated kosher butchery, for example. Finally, the third question to ask is whether, with regard to the specific conduct in question, the corporation has in fact acted in pursuit of the purposes for which it claims human rights protection. A corporation that claims to base all its business dealings on Christian values but only really invokes them when it refuses to deal with Muslims should not be able to ask for protection under Article 9 of the ECHR, for example.

Pivotal, as an overarching premise, corporate human rights protection is limited to the corporate form and must not look past that form to human beings behind the corporation. They are entitled to claim infringements of their rights individually, but they cannot enable the corporation to claim these rights as its own because corporate human rights, as hereby understood, are exclusively about the question whether the corporate form *per se* enjoys human rights.

C Taking Social Reality Seriously under the ECHR

Hence, what are, in brief, the repercussions of the functional approach for the ECHR and for the ECtHR's jurisprudence? To my mind, it primarily does two things: providing a theoretical foundation to, and thus streamlining what seems to be, the Court's prevalent approach while, at the same time, setting more discernible limits to corporate human rights protection, thereby refuting the case law that disregards the corporate form. First, the functional approach takes the social reality that is the corporation seriously. It looks at the purpose for which the corporation is established and whether it acts accordingly regarding the conduct for which it seeks human rights protection.¹⁸¹ It focuses on the corporate form and to what extent the corporate form itself is able to claim protection for the activity in question. This is indeed what the Court often implicitly does. In *AMAT-G Ltd and Mebagishvili v. Georgia*, for example, the Court clearly distinguished between the two applicants – the company, AMAT-G, and its general manager, Mr Mebagishvili – finding only the company's submissions as admissible and discussing whether it was impaired in its rights under Articles 6(1)

¹⁸¹ See Section 6B.

and 13 of the ECHR and Article 1 of Protocol no. 1.¹⁸² In *Magyar Jeti Zrt v. Hungary*, it considered whether ‘the applicant company’s freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts’ decisions’.¹⁸³ Many more cases follow this approach.¹⁸⁴

Second, the functional approach sets limits to corporate human rights, where the corporation itself is not established to pursue the purpose for which it seeks protection – note *Burwell v. Hobby Lobby*!¹⁸⁵ – or if the specific activity does not conform to such a purpose. Therefore, the ECtHR’s jurisprudence that looks past the corporate form and focuses on the human beings behind the corporation is to be refuted according to the theoretical premises set out earlier in this article. Hence, for example, in *Sanoma Uitgevers B.V. v. The Netherlands*, protection under Article 10 of the ECHR should have been discussed exclusively with respect to interferences with the rights of the publishing corporation.¹⁸⁶ In *Comingersoll*, the majority should not have considered ‘the anxiety and inconvenience caused to the members of the management team’ when determining whether and to what extent the corporation was entitled to non-pecuniary damage under Article 41 of the Convention.¹⁸⁷

D Conclusion: Limiting Corporate Human Rights by Acknowledging Them

The functional approach thus limits corporate human rights by acknowledging them. It argues against the individualistic approach that relies on the premise that human rights protection eventually can only be afforded to ‘natural’ persons.¹⁸⁸ The no corporate human rights variant of the individualistic approach is not feasible because it disregards the social reality of the corporate form and thereby, in effect, diminishes human rights protections in pivotal areas of social life, such as the freedom of the press.¹⁸⁹ The alternative variant of the individualistic approach – the derivate rights position that focuses on the human rights of the human beings behind the corporation¹⁹⁰ – leads to boundless expansion of corporate human rights. The functional approach that focuses instead on the human rights of the corporate form thus prevents, in particular, shareholders from having their cake and eating it too. If it is about the human rights of the corporate form, and not the shareholders’ human rights, the latter cannot at the same time enjoy limited liability and reap their human rights protections for the company they own,¹⁹¹ as the jurisprudence of the USSC allows.¹⁹²

¹⁸² *AMAT-G*, *supra* note 54, paras 47ff, 53ff, 58ff.

¹⁸³ *Magyar Jeti Zrt*, *supra* note 61, paras 56 (emphasis added).

¹⁸⁴ For a selection of decisions to that effect, see note 64 above.

¹⁸⁵ See Sections 4A. and 6B.

¹⁸⁶ *Sanoma Uitgevers*, *supra* note 88, paras 50, 59–72.

¹⁸⁷ *Comingersoll*, *supra* note 82, para. 35.

¹⁸⁸ See Sections 5B, 5C, 6B.

¹⁸⁹ See Sections 5C1, 6B.

¹⁹⁰ For their distinction, see also Section 2B.

¹⁹¹ Note also the ECtHR’s case law on Article 34 with regard to the application of sole shareholders of a company on its behalf. See Section 3B2.

¹⁹² See Sections 4A, 5C2.

Thus, rather counter-intuitively, the best way to contain corporate human rights is by acknowledging the corporate form and that it enjoys human rights within the bounds – and only within the bounds – of the purpose for which it is set up and if it acts accordingly.¹⁹³

7 Final Remarks: The Taming of the Shrewd

Whether such a functional approach indeed tames corporate power by limiting corporate human rights expansion remains to be seen. Corporate power has been tremendous at least since the age of the Trading Companies¹⁹⁴ and curbing it, for several centuries now, has constituted a perpetual regulatory challenge on both the domestic and international planes. However, in this article, I have sought to demonstrate that disregarding the corporate form is not an adequate way to respond to that challenge. Rather, the individualistic approach that denies the corporate form itself the ability to be the bearer of human rights counter-intuitively fosters unfettered corporate human rights expansion.¹⁹⁵ It means ultimate shareholder primacy: shareholders enjoy the limited liability that the corporate form affords with respect to private law but may ponder their own human rights as the corporation's and thus ignore the corporate form with respect to human rights law.¹⁹⁶

Instead, the preferable approach to conceptualizing corporate human rights takes seriously the social reality that corporations represent.¹⁹⁷ Therefore, in order to investigate whether a specific corporate activity enjoys human rights protection, for example, under the ECHR,¹⁹⁸ the following three-tiered test should be applied. One must inquire (i) whether the corporate form itself can enjoy the specific human right in question; (ii) whether the activity in question is directly linked to the corporate purpose; and (iii) whether the corporation in fact has acted in pursuit of the purpose for which it claims human rights protection in the specific instance. It is important to note, however, that conceptualizing some corporate human rights under certain circumstances does not make any statement on its sister issue – that is, whether and, if so, to what extent corporations bear (some) human rights obligations. While not necessarily connected in a Hohfeldian analytical sense – besides the correlation of right and obligation in a singular legal relation¹⁹⁹ – it is undeniable that, at least from a political perspective, they are interrelated. This interrelationship, and the way in which it extends into the legal sphere, however, must remain for another study to explore.

¹⁹³ For a similar conclusion regarding the US context, see Winkler, *supra* note 101, at 387.

¹⁹⁴ See Section 2A.

¹⁹⁵ See Sections 4C, 5D.

¹⁹⁶ See Section 5A.

¹⁹⁷ See Section 6B.

¹⁹⁸ See Section 6C.

¹⁹⁹ Cf. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913–1914) 16, at 28–44; see also Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld', *Wisconsin Law Review* (1982) 975, at 986–989.

