



Governance Codes

A Compass for Good Behaviour?

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A compass is a navigational instrument that shows directions in a frame of reference that is stationary relative to the surface of the earth. The frame of reference defines the four cardinal directions – north, south, east, and west. *Wikipedia*



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Executive Summary

This paper raises the question of whether we may expect Corporate Governance Codes to create responsible behaviour. I defend the position that the Codes are not the right instrument to create responsible behaviour.

The argument is built by digging deeper into the current Governance theories and their view on human nature and on how humans are motivated for responsible behaviour. Some key concepts of business ethics, such as the position given to economic activity in human life, the understanding of the company as an economic entity and its position, as well as the interests of agents involved in the economic process, are discussed. The purpose of this exercise is to get to the philosophical bottom of Corporate Governance. The Corporate Governance Codes are defined as the acting rules to sustain the basic views of Corporate Governance. The question focuses on these Codes, as articulated codes of conduct, while the historical background and the philosophical foundations of Utilitarian, Kantian and Contractualist approaches are discussed. Questioning the foundations of governance theories philosophically leads to abandoning of some key concepts directly connected to the current praxis. Examples of these concepts are the notion of a closed company structure, unconnected with its environment, and governance arrangements accordingly involving merely the board of directors and shareholders. Symptomatic are recurring scandals ‘out of the blue’ and captured within the same paradigm of false representations, numerous efforts to improve details, while the leaders still do not seem to understand what went wrong. As a result, the trust of the public is in the current situation is difficult to gain, or to retain.

The argument then follows an alternative path. I reconsider the Corporate Governance Codes, not in the light of ethical theories, but in the light of open processes based on human and community relations. The reframing process in the alternative path is based on phenomenological views, with an unusual combination of Jürgen Habermas' discursive theory and existentialistic views of thinkers like Hannah Arendt and Jean-Paul Sartre. My argument for this unusual combination is that governance is a typically political, power related, therefore non-ethical issue, as it involves not so much personal accountability, but specifically institutionalized responsible decision making and acting where the collective ‘always’ overrules the personal. Individuals and their need for a meaningful life do play a role, which is why we need the insights of existentialist theory to understand how the individual develops, not as a lonely inhabitant but *as part of* the collective. But personal ethical or moral convictions are not the ones at stake. The institutional responsibility of companies (in public or in private industry) puts the collective above the personal. Personal responsibility matters because it *contributes* to the development of the institutional responsible behaviour. It does not stand on its own, but constitutes the building stone for a discursive engagement, capturing the compass. This connection between the institutional and personal is elaborated connecting the philosophical arguments to the economic world. The overall purpose is to include the ‘system’ into the ‘lifeworld’ of people and their natural environment. This movement of inclusion requires for the closed circles to open up and allow themselves to become part of the lifeworld. As the two worlds interact, the reality of an asymmetry in power needs to be recognized and will require ‘in-between’ spaces where people can take the time to interact and encounter

different views, recalibrate their value systems, then decide and act.

Reframing also leads to redefining the principles, deciding on core values behind the structure, from a different perspective than the apparent reality. In this context, I argue that economic activity has an existentialist element complementary to its role to provide for our basic needs. Economic entities therefore are not justified to use false representations of their own choosing. The deliberative society requires a different perspective, where human life in connection with its environment is the pivotal centre, and the economy is an activity that serves more than the basic needs of those in it. It also requires acceptance that the crowd, the people, have the wisdom if they are given a chance and the space to develop their identities, through exchanges with each other and guide the leaders.

The system of governance faces, sooner or later, with an inevitable readjustment to re-invent itself and develop resilience to absorb the critical arguments. The compass does not come in the shape of 'rules to follow' but in the form of a process to secure interconnectivity between humans and their environment. Economic activity and its agents are a natural part of this community. Companies and communities are related and need to engage in a discursive decision process, defining the *raison d'être* of the company including the values that will evaluate its results. It is the community that needs to 'manage' the institutions, not the institutions to manage the stakeholders. This paradigm shift leads to a different path than the current focus on the amendment and refinement of Governance Codes.

GOVERNANCE CODES: A COMPASS FOR GOOD BEHAVIOUR?

“Ethics requires that we risk ourselves precisely there, at moments of our unknowingness, when what conditions us and what lies before us diverge from one another, when our willingness to become undone constitutes our chance of becoming human, a becoming whose necessity knows no end.”

(Butler, Giving an Account of Oneself: A Critique of Ethical Violence, 2003, p. 80)

1. Introduction

When the financial crisis hit the markets in 2007, people panicked, some understood the implications better than others, but all suffered. Millions of people lost their jobs, homes or savings. We sought for the responsible persons to punish them for the harm done, but the complexity of the situation made it difficult to pinpoint one or few responsible parties. However, there has been a general agreement that the financial system developed after the Second World War has caused the crisis¹. Whatever the causes, we tried to fix with bandages and hoped that lessons learned would make a difference.

Now, in 2015, the public is still confronted with behaviour we find unacceptable: Management of companies ‘cooking’ the books, (Ahold, Brunel, Imtech, DE), worldwide operating companies caught slandering (Philips, Siemens) or managers of public institutions like social housing companies ‘rearrange’ investments to their own personal advantage (Rochdale, Vestia, Woonbron, Servatius) or financial closed circle arrangement as the Libor-rates, or company ethics that lead to suicides (the Dutch Healthcare Authority). And this is not even a complete list.

This growing gap between expected and delivered behaviour has caused lack of trust in institutions and their leaders and continues to do so². To compensate for this lack of trust, we have, and had before the 2008 crisis, systemic arrangements in place. Their role is to prevent these wrongful incidents from happening. The Governance Codes have been developed over the years in almost all sectors, public and private. The European

¹ The financial system of banks and trading connected to the capitalist system: A documentary with a good overview of what and how in 2008 things went wrong with original news clippings and reports is “Inside Job” directed by Charles H. Furgeson (2010).

www.dailymotion.com/video/x1zx56p_inside-job-full-movie-hd_shortfilms

² A recent example of the gap between expected and delivered behaviour is the ‘legal’ extra €100.000 per person for the board of directors of ABNAmro Bank in the Netherlands. The decision is legally correct, in the sense that after the bank’s request for public support to survive, more than half a million Euros per year for the management were cut off their bonuses, while base salaries were topped by 100K per person per year. Top management thought that this was ‘neatly arranged’ but the public was shaken. Divergence in expectations is one of the key reasons why people question corporates.

Corporate Governance Institution, the ECGI, keeps track of governance rules worldwide.³ While we continue conferencing on the subject and scholars keep working on improvements and adjustments, scandals keep coming. Why do these arrangements we call ‘corporate governance rules’ and their codes of conduct ‘the governance codes’ not prevent these wrongdoings? In fact, the rules and codes are designed not only to prevent ‘unethical behaviour’ but also help people to find the ‘right way’ when in doubt or in crisis. Here lies the core of this thesis, my aim and my question, which I will develop further, in the next paragraphs: Are these governance codes a compass for good behaviour? I will defend the position that they are not. Let me elaborate on how I will argue for that position.

1.1 Corporate Governance Codes: a Solution to a Problem

Corporate Governance Codes were developed to clarify the do’s and don’ts in the corporate world. As companies grew and professionalized, their need for finance grew as well. External parties put in money in return for ownership and a share of the profit realized with their investments. This changed the relations between agents inside and outside the company. Regulating these relations, defining what should be considered as ‘the right choice’ when one is confronted with tough choices⁴ became part of a large number of case studies, jurisdiction, legal instrumentation and national and international regulations, called Corporate Governance. The level playing field this created was articulated in Corporate Governance Codes. These Codes not only regulate relations, they also act as a compass for -what one could define as- ‘preferred behaviour’ of the agents involved. If the intention of the codes is to regain lost trust after years of mistrust, then it should be considered as a positive step. Something needed to be done, as many were not able to distinguish right from wrong when money and power were involved. The subject of this master thesis is whether the solution found is the right one.

Corporate Governance rules are meant to correct the failure of the market, as the capitalist market is known to have imperfections. Some correction is always necessary, even according to supporters of the liberalist view. Normally, market parties involved in a specific sector would regulate their own level playing field to prevent monopolists or market disruptions favouring some above others. Recent developments and initiatives in corporate governance show that not so much the market, but official regulators take initiatives to put governance codes in place. Consequently, outside interventions kick in, as the market does not self-regulate. These regulators are mainly guided or influenced by institutional investors or states, all aiming to protect their interests, some in private corporations, others in public institutions. Typically, issues that companies prefer to leave to their own discretion are regulated: ownership and power relations, decision-making processes, scope and limit of responsibilities, rewards and information requirements⁵.

³ See www.ecgi.org for a worldwide list of codes and laws around codes, from Albania to Yemen.

⁴ What can be found in the business literature on tough choice cases: look for short term results or long term, do I follow the company’s policy from headquarters, or do I adjust to local circumstances, etc. Usually the choices reflect daily decisions to managers make where a larger group of people are affected.

⁵ An overview of the principle of governance codes, globally enforced through national and sectorial regulations and laws is in Annex II.

Their intention is to prevent unwanted misfortune to consumers or the public in general, especially misfortunes caused by misuse of power, self-enrichment, asymmetries of information and the like.

So, if market failures are well regulated after these interventions, why do the above-mentioned abnormalities still happen? Some possible answers scholars have discussed are:

1. The abnormalities are incidents;
2. The Governance Codes are sufficient and effective in their formulation but they are not well enforced or cannot be well enforced;
3. The Governance Codes are not sufficient or in some other way deficient, they need to be improved, beyond the point that we have already improved them, additions or amendments are necessary;

Obviously, I am not the only one discussing these options. Others have discussed all three options. The Sage Handbook for Corporate Governance sums the answer to the first option as part of a culminating development, an inevitable consequence of apparent deficiencies:

*“Recurrent waves of corporate failure, climaxing in the systemic 2007/2008 global financial crisis, has focused attention keenly on the apparent defects in regulatory institutions and corporate governance.”*⁶

As theories of maximizing profit through market mechanisms manifested their malfunctions, things got tougher. The political leaders took position and required explanations and action as most institutions realized governance codes were not enough. The second option, the enforcement failure was generally recognized and actions were taken. However, the efforts continuously end up regulating more details, trying to capture mechanisms to control incidents but miss the overall effective approach:

*The dark side of the increasing complexity of business structures, competitive strategies and financial instruments was demonstrated catastrophically in the global financial crisis (Lazonick; Clarke). The impact of the global financial crisis undermined confidence in the Anglo-American model of corporate governance and risk management: instead of risk being hedged, it had become interconnected, international and unknown. Massively incentivized irresponsibility became the operating compensation norm in the financial community, which drove markets to the point of self-destruction. The regulatory responses remain in the course of development and implementation, but the concern is that they may prove incomplete and insufficient. When regulatory intervention occurs, it is often accumulative over-regulation, rather than selective better regulation.*⁷

As these handbooks state, much is done to improve but results are poor. We have reached the stage that the measures taken up till now do not convince the public. The problem has remained, one could even say the problem has grown: Discussions continue as fierce as ever, on how and why specific decisions are taken, whose interest is served, and as public

⁶ (Clarke & Branson, The Sage Handbook of Corporate Governance, 2012, p. 1)

⁷ (Clarke & Branson, The Sage Handbook of Corporate Governance, 2012, p. 5)

money is invested to save public and private companies, questions emerge around the purpose for the existence of these companies. The general understanding remains that option 3 is the best guess at this moment in time, alternatives lacking; we need to keep amending the Codes to improve them. Most scholars focus therefore on improvements from the point of view of option 3. I will add another option in this paper, from a philosophical standpoint.

4. The Governance Codes are well defined and enforced as well as can be expected under the given paradigm. They are still not effective in creating responsible behaviour because the solution lies in a different paradigm.

With this addition, I intend to show that Governance Codes are a product of a limited thought world, known under the name of ‘Corporate Governance’. As its name says, this world is concerned with the governance; the way things are organized and decided within the world of corporations. This world has become pretty diverse over the years, and includes both public and private companies, predominantly larger ones, but also smaller or growing companies. The key feature of what is corporate is mainly financial risks involved in decision-making, their consequences, but it could also indicate (as we know by now) risks involved in services provided or promises to be kept to the public. Examples of these can be found in (semi) public corporations for housing, education or health. The limitations of the paradigm in which scholars and practitioners think and live, make it impossible for them to find the real compass to calibrate with. This is how it works:

Corporate Governance serves a purpose, intends to recover lost trust, as mentioned earlier. Lessons learned with great harm to public required a playing field with accountable actors, transparency and some fairness⁸. Corporate Governance negotiations formulated ‘codes’, rules and regulations to follow, interpreting how one is expected to behave, if one wants to comply with the requirements of good governance. So, Governance *Codes* are instruments for good Corporate Governance. A code is a rule-based⁹ compass in finding the responsible way of governing corporations within the public sphere. Hence, governance codes are a means to an end, so if they are not effective, either adjustment is needed or we need to conclude that we don’t have the right instrument. While accountability is an issue that is regulated in Codes, Corporate Governance itself has a broader purpose:

“Corporate governance is not just about accountability. Governance has an important role to play in value creation, innovation and strategy (Van Ees; Huse; Zattoni). Governance without strategy leads to paralysis, as strategy without governance leads to recklessness”¹⁰.

The Cadbury Report expressed the necessity for Corporate Governance, the essence of it

⁸ This fairness is not an exact scientifically measurable thing. The word summarizes more a sentiment than a fact. It refers to the public and employee’s requirement that fair treatment for employment, promotion and reward policies.

⁹ I will come back to this ‘rule based’ concept from utilitarian origin in the second section more elaborately.

¹⁰ (Clarke & Branson, The Sage Handbook of Corporate Governance, 2012, p. 5)

as part of the freedom of enterprise wish of the capitalistic liberalism:

The ... economy depends on the drive and efficiency of its companies. Thus the effectiveness with which their boards discharge their responsibilities determines ... competitive position. They must be free to drive their companies forward, but exercise that freedom within the framework of effective accountability. This is the essence of any system of good corporate governance. (Cadbury, 1992: 11)¹¹

The Corporate world not only wanted to regulate what good governance (hence good behaviour) looks like. It also wanted to define the space for free enterprise. The Codes are a result of these arrangements.

The question of this thesis focuses therefore on the ‘codes’ as expressions of Corporate Governance vocabulary as we know it now.

1.2 Questioning the Solution

May we expect Governance *Codes* to create responsible behaviour? If not, what is the alternative? Will the current conceptual paradigm of Corporate Governance create a new set of rules to work with?

To understand why compliance with existing codes has not brought about the end result one looks for, a discussion of how Corporate Governance is organized is inevitable. For this purpose I will refer regularly to the broader context of Corporate Governance, Codes being an offspring of the way the definers of Corporate Governance have imagined that *their* codes would work.

Lord Cadbury, in his above-mentioned citation, stops short at the ideal of free enterprising, which suggests that if my company is free to make a profit, than all is well at the front of responsible behaviour. Clarke & Branson take an additional step and mention the value creation and strategy as a purpose of corporate governance, but it stays unclear for whom this value is created, possibly referring to the purpose of generating more sales. The result of these definitions for the economy in general and the purpose of Governance more specifically has manifested itself in an abundance of reports on governance, as the compliance requires, while scandals still go on. The box-ticking activity in the reporting resembles a ‘game’; answering all the questions but still finding the gaps in the rules, cutting edges or more extreme forms of behaviour like, “the rules do not apply to me”, or “I delegated to others, so I am not responsible” type of behaviour. Delegation and extreme specialization of tasks make this escape easier, but the main question remains: if individuals can hide behind reports, their use is at the very least questionable. By questioning the effectiveness of the instrument, I assert that governance codes do not perform the task as they were designed for. The intention is good, but the result is poor.

Loss of trust, property, money, jobs, pension or even lives is often defined as a matter of justice or a quest for fairness. My motivation is broader; I see it as a quest for social welfare, a need for meaningful life, something is lost, when trust gets lost. I assume that

¹¹ As cited in Clarke & Branson, 2012.

everyone is affected when social structures get lost, when organisations and institutions do not function in such a way that they contribute to our welfare, irrespective of justice claims.

Throughout the paper, I use the metaphor of a compass to clarify the function of the Codes in relation to Good Governance. The ‘moral compass’ is a term that is often used when individual behaviour is discussed. As in the compass, codes are not a purpose or the aim of the journey. The compass is a tool, an instrument to help find the right direction. The comparison with a compass can be useful as a metaphor to catch the meaning of the right direction as opposed to following a straight line or only going to the North. In the *moral* compass¹², the distinguisher is the social nature of morality. If you were the only one in the world, you would not need any moral rules. Such a concept is only relevant in a social environment. So is the morality and freedom of enterprise of companies. The process is per definition interactive, recalibrating to stay on track. The interaction, the social dimension of morality, distinguishes humans; as solitary organisms who have no need for moral rules. Although there is more to say on the subject of moral compass deviation, on the aggravating or amplifying factors and inter- or intrapersonal consequences of these, I will not go deeper into those theories but assume that the moral compass is an understandable concept with which to calibrate.¹³

1.3 Looking for an Answer: the Approach of the Paper

Before I get to reframe the governance elements, I will first identify the key features of Governance Codes. Codes are evaluated as ill-defined or insufficient depending whether your approach is in option 1, 2 or 3. My approach with the 4th option includes, *inter alia*, the lack of connectedness and understanding with the community and their environment. When rules function in a closed world of their own, they miss the connection to the environment with which they interact. The nature of this link makes the difference between option 3 and option 4 as mentioned under §1.2. The mind shift that separates option 3 from option 4 is the radical difference between inclusive and exclusive thinking in terms of the community and the environment. I will approach the issue from a phenomenological stance to underscore the difference in paradigm; following among others Hannah Arendt’s¹⁴ conceptual framework, and going to the company’s *raison d’être* for the community. This connection with the community is crucial in this approach, because otherwise any rule of conduct can become a checklist to satisfy the outside world,

¹² Moral Compass is a popular expression used often to relate to an intuitive understanding of what distinguishes right from wrong. See for example (Malik, 2014) where Kenan Malik gives as global overview of the human moral compass, from Socrates to Confucianism.

¹³ Cecilia More and Francesca Gino define in their article the social facilitators of moral neglect. They point out that individuals are better equipped to make moral decisions if they are aware of the relevant moral values, how they distort their understanding of their actions and justify them. Or even if they are aware of moral content, due to social processes that create obstacles to doing the right thing.

¹⁴ Hannah Arendt is known for her existentialist phenomenological approach of the human activity, particularly in her work on the philosophy of action, in reconstructing the nature of political activity. She discusses and refers to philosophers like Martin Heidegger and Karl Jaspers. I will not discuss their work in this paper extensively, but in section 3, I will include their thoughts into the discussion. Arendt will return more often in this thesis, as she was one of my main inspirers for this approach.

once the boxes are ticked off, you can look away for another year and declare you have done your best. To get away from this distortion, we need to know why we are in business and how we develop our moral compass in that community.

In the third section, I will therefore take a step back and look at the philosophical foundations of Governance Codes. Business literature on Governance codes seldom refers to a philosophical approach or explains their view on human nature. Different ethical approaches are discussed from the philosopher's point of view, looking into the main relevant concepts of utilitarian, deontological and contractual philosophies. For an alternative philosophical perspective, I will rely on feminist, phenomenological and existential accounts in relation to business. The section concludes with main concepts that will challenge the actual Governance scene.

The fourth section is about 'reframing'. It pulls together the building blocks for an alternative way of looking at Governance to remedy the shortcomings of traditional approaches by changing the perspective. Priorities are turned upside down. Economy does not dictate human life, but it becomes the servant of human existence and human needs. The justification for this approach is in the existentialistic concepts of 'being' and 'becoming'. With existence issues I mean, production of what is needed to survive: food, shelter, light and warmth. In addition however, a meaningful life is part of existence as much as other things. A job is more than 'just' income; it also gives a social environment, learning opportunities and a possibility to interact with others under a common purpose. Humans are born into the world and build and develop an identity by being together. The other person's existence defines my existence as well. From an existentialist account, which I will then follow, this existence and the becoming is shaped in the public space. Economy is, I will argue, part of this public space. The claim, that Governance theories make, for a code of conduct with the purpose of profit maximization is not, or should not be valid in a connected community of private and public spaces. I will put the principle of deliberation and discourse above the requirement for a morally perfect individual. The paradigm shift comes with an understanding of human existence and its struggle to accept the temporality of life and death and the role of economy and economic activity in giving meaning to this existence. This account changes the understanding of decision-making processes. The exclusive nature of the corporations with sole decision power on existence related is questioned. The existence of corporations becomes part of human existence, and this leaves no room for sole decision rights of a limited group of people as the Board of a Company.

From there, I build further with Habermas¹⁵ and, Gutmann and Thompson¹⁶ for a connection between the lifeworld of the phenomenological view to the society's systemic arrangements. Two separate but parallel worlds that need to reconnect to serve the humans and their requirements. Some might argue that the individualistic view of existentialist approach to life does not combine well with the discourse theory of

¹⁵ (Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 1996); (Habermas, *Theorie des Kommunikativen Handelns*, 1981)

¹⁶ (Gutmann & Thompson, 2004); (Thompson D. F., *Restoring Responsibility, Ethics in Government, Business and Healthcare*, 2005) or earlier concepts from (Thompson D. F., *The Democratic Citizen*, 1970)

Habermas. I think they complement each other well, as different parts of the puzzle, where the systemic disconnect between the human and life world to the bureaucratic system can be bridged by building on both ends. The analysis is based on theories of an understanding of society from the perspective of language, communication and self-determination and connections between the system and the 'human' lifeworld. The paper argues that the actors and the system of governance needs to re-invent itself to become embedded in the environment where they can become part of a process, develop resilience to absorb the critical arguments and needs for their real purpose. The compass does not come in the shape of 'rules to follow' but in the form of process to secure interconnectivity between humans and their environment. Economic activity and its agents are a natural part of this community. They can only function if they are related. The compass of the governance rules has become so isolated that it has lost its magnetic field with the human pole. Reframing is recovering this magnetic attraction.

Finally the conclusion will sum up but also recognize that the proposed alternative will open new issues to be solved, inevitably so. There is no easy solution for the problems we are encountering. The beauty of life and nature lies in its diversity and in the unicity of each living creature. The innovative opportunities this gives are both complex but also exciting. Capturing this potential is the task ahead, not simplifying and closing doors. We do need to focus on the added value of communities to find the compass for a rescue and leave the path of the myopic and synthetic language of corporate finance. Not as a compass, but as a way of redefining the purpose of economic activity.

My approach to the question is not a typical philosophical argumentative approach, in logical steps like: A is true, because, B and C bring about D, which is equal to A. My argument is in the reframing and the reconstruction of the nature of governance in general, Corporate Governance more specifically and within that framework the Codes for Corporate Governance. By changing the paradigm and the perspective, I create a different approach to Governance, which I think does more justice to the search for responsible behaviour. An extensive research in literature on philosophy and Corporate Governance preceded my writing process. There was a striking difference between the start of my research for this thesis two years ago and this last year when my university library opened up a digital treasure of recently published works of scholars on the subject. The literature on the subject grew enormously within the year. So I made extensive use of this possibility, which is reflected in the many connotations and the bibliography attached.

Two annexes will help the interested reader: the case of Recife, Brazil, as an example, where the deliberative governance has gained its merits for more than a decade (annex 6.1) and an elaborate historical overview with relevant quotes from literature to summarize the developments of Governance in theory. This annex, initially written as a chapter, found its place in the annex and includes a summary of some empirical research and the main principles of Governance Codes for those who are look for detailed content (annex 6.2).

2 Corporate Governance Codes

This section gives an overview of the key elements of Corporate Governance and the basic dilemma it creates. The purpose is to underline the core of Corporate Governance and to deploy the way the dilemmas are being addressed. A more elaborate and chronological overview of the development of Governance theories and the Codes can be found in Annex 6.2. along with the Principles for Good Governance to give a concrete idea of the content of the Governance Codes.

The emergence of the Governance Codes as described in the previous chapter is a process that initiated after incidents, and develops further as new insights are added to it. It is a process of becoming, still with an open end but with a core that has defined its key features. This core consists of the agency dilemma. Let me first clarify how agency is defined and then get to the dilemma. In an article on responsibility of Corporations¹⁷ Philip Pettit defines agency as follows:

“A system will constitute an agent, under more or less received analyses, if it forms and reforms action-suited desires for how its environment should be and action-suited beliefs as to how its environment is and if it then acts in such a way that those desires are satisfied according to those beliefs.”¹⁸

This sounds complicated but it is another way of saying that an agent is someone who has wishes concerning her environment and acts upon those wishes. At the same time, the definition points to the existence of beliefs about the environment, registered from her own perspective. This perspective is therefore ‘personal’ and ‘subjective’ in nature. So, an agent registers the environment through the filter of her own beliefs, defines wishes according to her desires and acts to get those desires realized in the reality perceived by her.

This definition and characterisation of an agent leads to several questions with regard to Corporate Governance: Who are the key agents in corporate governance terms? How do they relate to each other and what are the beliefs and desires they act upon?

The dilemma agency theory addresses is typical of the thinking in the corporate world. It is based on a worldview of contractarianism, where each agent bargains to maximize her own interests. I will elaborate on this and other philosophical accounts in the next paragraph. In the corporate world, the agency theory is a well-known beginning point for governance discussions. The reason for this lies particularly in the dilemma of the corporate world where Agent B (the CEO for example) runs the company that is owned by Agent A (the shareholder). If Agent B acts according to the above definition, then she acts in her own best interest. If she has to act in the best interest of Agent A, then she has to ‘adopt’ the perception of Agent A. This can become a problem (called ‘agency costs’) because the best interest of Agent A is not the same or can even be contradictory to the best interest of Agent B. This occurs when, for example, the CEO wants more power for herself or a higher salary. This can influence considerably the profit

¹⁷ (Pettit 2007) *Responsibility Incorporated*. Pettit argues here that not only individuals are agents but also corporations. His argues for a distinction between holding an agent responsible by regulation for deterrent sanctions or by developmental sanctions.

¹⁸ Idem, page 178

for the shareholder as she has to pay more to Agent B, and her own share from the profit diminishes. In addition, through daily work involvement, the CEO knows more about the company and the operations; there is, a so-called ‘asymmetry of information’. All of this implies, such is the assumption, that the shareholder cannot be sure that the CEO is also acting in her best interest.

This theory in a nutshell, defines most of the Corporate Governance Codes. It has dominated the field of the Codes, both in the public and the private sector. The public sector version usually replaces the ‘shareholder’ with the public interest issue at hand (education, health, housing, etc.) but the general idea stays the same. In the private sector, this model is known under the name of the ‘Shareholder model’ because the model believes in the primacy of the shareholder. Over the years, with excesses causing too much harm to the employees or the environment, a more social version of the model has developed: the ‘Stakeholder model’. In this model, additional stakeholder(s) like members of local community or customers from outside the company, in other words, external agencies get into the picture. These third parties also influence the company’s outcomes in terms of profit, through strikes, supports or actions against, petitions, boycotts or lobby activities. One thing stays constant though; the legal definition under which the entity of these agencies operates: The Company. This legal and anonymous entity is steered according to governance rules and operates as if it were an agency. Philip Pettit’s article argues that this entity also qualifies as an agency¹⁹.

The emergence of Codes for governance is often stimulated by incidents, as part of an effort to prevent recurrence and to show that something is being done. This can also be interpreted as an inevitable aspect of the liberal economy where individuals’ rights to maximize their own benefits are recognized as legitimate actions. The system prioritizes the individual’s right to freedom to act (as an agency), highlighting personal interests and problematizing public interests as if they were opposites.

Establishing this picture of the status quo does not suffice to answer the ineffectiveness of the Codes for our question, the quest for responsible behaviour. If the capitalist society is happy with the supremacy of the capital, then it should be acceptable that some excesses happen, a few more rules and regulations should be able to deal with that. Critics still claim however, that for those who know what to do, codes are not necessary, others who want to ignore or bypass it, still do. In other words, Codes are redundant because they do not serve the purpose for which they are designed. So ‘A Perfect Code’ would not solve this problem. The problem lies in those choices agencies make when there is a perfectly well formulated Code in place, but the agency *chooses* to ignore it. Following Pettit’s definition, the solution would lie, not in yet another Code or in an improvement of it, but in reviewing the agent’s beliefs, or her desires and the way she intends to pursue those. So for the moment the compass is still at a loss. I will therefore dig further into what is behind the Governance and its Codes. With that I will make the connection for my fourth option presented in the Introduction: that the current paradigm will not be able to solve the problem. Another view on economic agency and human nature is needed to find out what that is. The next section will take it from that point to position the philosophical perspectives on the issue.

¹⁹ (Pettit, 2007), page 192.

3 Philosophical Perspective(s) for Governance Theories

Earlier, I had mentioned four possible reasons why Governance Codes are not effective in creating responsible behaviour. My fourth option introduced the philosophical point of view. This section aims to discuss what light the philosophical perspective can shed on Governance Codes and their developments. Only relevant aspects and interpretations to business ethics and to Corporate Governance issues are included in the review. Inherent to each philosophical approach is a specific view on the nature of humans, determining the nature of the relations he is capable of and the type of concepts he works with. From these views, I will pursue the question of how this view on human nature is embedded in the business world and what that means for the Governance and their Codes.

Handbooks on Governance usually refer to ethical theories why responsible behaviour is required and how to stimulate such behaviour. Arguments are for the most part of utilitarian origin (Nordberg, *The Ethics of Corporate Governance*, 2007, p. 12) (Luetge, 2013, pp. 297-313), some to Kantian categorical imperatives or to the necessity of an Aristotelian virtuous character (Bowie, 2013, pp. 47-73) or to Hobbes' contract theories (Okpara, Idowu, & (eds), 2013) (Luetge, 2013, pp. 603-659). Most of the scholars writing about practical issues around corporate governance are not explicit about which philosophy they build on. But, as the earlier mentioned Sage Handbook suggests, they rely mainly on utilitarian and deontological assumptions. (Clarke, 2005). I have interpreted these assumptions as supporters of these theories. Others use a different philosophical framework but miss as yet the practice to illustrate how this works: they *wish* or *hope* for a specific version of corporate governance to facilitate responsible behaviour. This applies particularly for accounts based on Aristotelian, feminist or phenomenological philosophies. In terms of practice, empirical evidence, these theories still lack enough constituents to substantiate their theories and illustrate their perception. This does not mean that their approach is less valuable. It only shows that the mainstream economy still functions along the lines of another approach.

I will therefore start with the first group of philosophical concepts and bring in later the other approaches. Each paragraph will introduce the account in general, referring to literature, and the main concepts that philosophical approach brings into corporate ethics. The conclusion will summarize the implications of the philosophies discussed and review their relevance for Corporate Governance.

3.1 *The Utilitarian philosophy*

Claus Frederiksen and Morten Nielsen describe in their paper *The Ethical Foundations for CSR*,²⁰ the utilitarian, deontological and contractualist perceptions of social responsibility in corporations. According to Frederiksen and Nielsen, the utilitarian corporation will look at social responsibility of People, Planet and Profit in the following way:

“Unlike today, where companies seem to focus on the interests of its stakeholders, a utilitarian approach would imply that companies took everybody’s interest into account, meaning that companies should consider the interests of faraway strangers as just as important as the interests of

²⁰ (Okpara, Idowu en (eds) 2013) pages 17-34

*closely related groups, e.g. the local community. The utilitarian so-called agent-neutral perspective, where everybody's interest counts equally, combined with the demand of maximizing well-being thus imply that companies should direct a large portion of their CSR resources (and some of their other resources as well) towards the needs of the poor living far away from where they operate, instead of spending them on "closer" stakeholders, which seems to be the current policy. It seems likely that using resources on saving children from dying of hunger or (easily curable) diseases would promote more well-being than spending the resources on, e.g., relatively well-off workers in the rich parts of the world."*²¹

This view is connected to a CSR position, which refers to a corporate view with a societal awareness. Without the social input, the corporate responsibility seems to lose most of its agent neutral perspective and gain, which Peter Ulrich²² referred to as the shareholder primacy overriding all other interests. Both views rely on utilitarian principles, but vary on the amount of societal orientation.

In the classical utilitarian analysis of business ethics, Nikil Mukerji²³ asks whether utilitarian realm helps understand business ethics. Mukerji states that the nature of the utilitarian beast is based on the 'right' and on the 'good' and its determinant is how it connects these two notions. An action is right if it brings about moral good, only if it *maximizes* moral good. Therefore, Mukerji concludes that classic utilitarian thinking has its advantages, in terms of criteria such as clarity of concepts, simplicity (cost/benefit) but becomes problematic if it is applied classically. For example, the justification of any self-interested behaviour can become problematic because it does not ask the morality question once the utility requirement is satisfied. But, if legal borders exclude and specify what is considered to be immoral, an economic agent can choose to behave in a way that promotes general wellbeing.

A generally accepted view of utilitarian requirements is formulated by Amartya Sen²⁴ in three elementary requirements for a utilitarian account: (1) Consequentialism, asserting that actions are judged in terms of their consequences or effects, rather than their intrinsic features. Outcome matters, not process, intention or motivation. (2) "Welfarism", the required nature of the outcome, sometimes called happiness, sometimes utility, some hedonistically call it pleasure. Economists usually avoid the discussion and conclude that each can define for her what she considers a good outcome. In practice, this is an amount in cash or in materials, (3) Sum ranking, the effect of all affected by the action must be aggregated and ranked. This crucial part of utilitarianism demonstrates the non-egoistic nature of utilitarianism. Under this assumption, one could give to the poor to the extent that it would begin to hurt oneself. It is wrong not to do so. The difficulty however is that if slavery maximizes the wellbeing of a large number of people, utilitarians would also accept that as the 'right choice'. Utilitarianism also does not give a good solution on how to weight different utilities. The choice becomes arbitrary and therefore lacks moral leverage.

Another option is rule utilitarianism, which applies the same utilitarian principle on rules and not on actions: A rule is right if and only if the sum total of utilities produced by that rule is greater than the sum total of utilities produced by any other rule the agent could apply in its place. Basing

²¹ (Okpara, Idowu, & (eds), 2013, pp. 22-23)

²² See on Ulrich's position regarding shareholders' interests. A more elaborate discussion is given in the Annex 6.2.3 referring to (Ulrich, Ethics and Economics, 2013) and (Ulrich, Integrative Economic Ethics: Foundations of a Civilized Market Economy, 2008)

²³ (Luetge, 2013) pages 297-312

²⁴ From (Sen, 1987) page 39

utilitarianism on rules avoids unjust or unfair acts. Governance Codes comply greatly with this type of utilitarianism, stipulating rules to follow as norms. However, what is required in utilitarianism is compliance, not necessarily acceptance. Acceptance would mean that an agent would feel guilty about an act, even if it complies to the rule; when wrong steps are taken, the act of complying to rules ‘collapses’ into act utilitarianism.²⁵

3.2 Deontological Philosophy²⁶

A deontological company would reflect on its economic activity from a moral obligation perspective. The view takes its inspiration from Immanuel Kant’s categorical imperative and states mainly that if people and companies were to follow the imperative, they would (rationally) have to respect human dignity and autonomy.²⁷ The company would treat the humanity of stakeholders as an end rather as a means merely. With this attitude, the company would be acting from a duty, an obligation, which implicates that the right action is a matter of choice by duty. This so-called Ethical Right (ER) approach would look like this:

“In general, a CSR-policy heavily informed by ER will emphasize the rights and moral dignity of all agents that are affected by the actions of the business. A key notion here is respect; respect for all involved agents, in virtue of their standing as proper rights-bearers. On the face of it, this makes ER especially relevant for global contexts where (equal) respect for persons adhering to different sets of beliefs and cultures is in demand. The emphasis on respect can of course take many different forms. But generally, it seems to imply models of corporate governance where all-important actions are carefully scrutinized from the point of view of rights—“do we respect the rights of affected agents?”—and where key members of the organizations are held accountable for their actions.”²⁸

Put in a more formal way, according to (Bowie, 2013, p. 61) the argument would run as follows:

1. In a publicly held firm the managers have entered into a contract with the stockholders;
2. A contract is a type of promise
3. The terms of the contract are that the managers should attempt to maximize profits for the stockholders (Milton Friedman) or should have a major concern for profit (stakeholder theory or sustainability capitalism)
4. For Kant, keeping a promise is a perfect duty
5. Therefore managers have a moral²⁹ obligation – indeed a perfect duty – to at least seek profit. Thus doing good when it leads to profit is a moral duty, all else being equal.

²⁵ See (Shaffer-Landau, 2013), pages 428-440 by Brad Hooker, on Rule Consequentialism, a reprint with permission of his article in Blackwell Guide to Ethical Theory, 2000.

²⁶ Deontological philosophy is geared to ‘*Seon*’ (deon), duty or obligation as a norm for morality.

²⁷ Immanuel Kant is one of the modernizers of the worldview on human nature. His argument as presented here by Bowie, (Bowie, 2013), page 61 relies on the human mind functioning and justifying actions based on his rational abilities and logic. Kant’s views might seem rigid and too rational now, but they were revolutionary in the 18th century, when all justification was sought in God’s Will. The ‘enlightenment’ Kant brought with his theories in ‘*Groundwork for the Metaphysics of Morals*’ (1785), in his *Critique of Practical Reason* (1785) and his *Metaphysics of Morals* (1797) a different understanding of human nature and its moral base (as opposed to moral based on God’s Will). His definition of enlightenment is “*Sapere Aude!*” meaning: dare to think!, use your rational capacity to define what is morally good.

²⁸ (Okpara, Idowu, & (eds), 2013)

²⁹ Moral duty as an obligation, because Kant puts his theory in the metaphysical area of moral duties.

The problem that we solve here from a Kantian perspective in theory is unfortunately problematic in daily practice of corporations or in institutional setting in general. Contracts for example are renegotiated all the time in business, making it a challenge to define when a ‘real’ promise is made. Or some markets have difficulty following rules of fair and clear information, non-disclosure agreements close ranks, prevent transparency. Or even the purity of motive required by Kant for an action to be intrinsically good, is difficult to register or to perceive. In short, in real life, things are less strict than the categorical imperatives of Kant.

This approach also introduces the question whether Governance is about an individual and her character or behaviour, or an issue of the malfunctioning system denying justice, or better said, ignoring the wrong distribution of justice, despite its rationalistic approach to follow the universal maxim. I will come back to this issue when we discuss the relation between the individual’s identity and its becoming in the public area (3.4.3 and 4.2).

3.3 Contractarianism

Some of the mainstream governance theories go back to an understanding of human societies based on the idea of a hypothetical contract between citizens, greatly influenced by the ideas of Thomas Hobbes³⁰. Later modern versions have elaborated on the classical notion of contracts and developed in a more social context. Some of these come closer to the stakeholder approach, basing their assumptions on (hypothetical) contractual arrangements between a company and its stakeholders.³¹ Some theoreticians³² find a reasonable alternative in this modern version of contractualism. Given the globalisation of the operations of corporations, the same universalistic view of equal rights for every individual applies here as in the deontological view:

*“...The idea of a “contract” seems to fit the relation between businesses and society very nicely on an intuitive or allegorical level: there is a (to some degree but not wholly) explicit contract between the two: businesses are expected to deliver goods and services, to produce a surplus and provide jobs and opportunities etc., it is obliged to follow the law and special regulations not relevant for other legal agents. On the other hand it benefits from special permissions and privileges such as the right to managing and distributing work, to profit from its employees work, to have status as a legal entity etc.”*³³

At the same time, they note that the quasi empirical contractual notion does not cover the relation between business and society at its full extend as it still needs to justify the contract’s reciprocity and all the underlying implications with the hypothetical situation such as mutual understanding and

³⁰ As in (Hobbes, 1651) The Hobbesian contract depicts a contract of everyone with everyone else. Its design corresponds exactly to the individualistic conflict structure of the state of nature. As the state of nature represented a state of war of all against all, the contract that puts an end to this state must be a contract of everyone with everyone else. I personally would interpret Hobbes more as a contract for government, in terms of letting the monopoly of violence and power in the hands of the state, not so much as a governance arrangement.

³¹ I refer here to the distinction between Contractarianism and Contractualism. The first is based on Hobbes mutual contract agreement; the second is more in the Kantian sense, a theory for freedom and equality of autonomous people. Its earlier versions are from Rousseau, its most known social version is from John Rawls, who places the parties behind a ‘veil of ignorance’ to ensure that they make the most fair choice of the social contract. The imaginative ‘veil’ is a hypothetical position where you cannot know that you are going to be a rich white man in the real world, so you will have to make the choice based on ‘what if I am in the most disadvantageous position’. Rawls believes that you then make the fairest choice.

³² Like Klaus Strue Frederikson and Morten Ebbe Juul Nielsen in (Okpara, Idowu, & (eds), 2013), pages 17-35

³³ Frederikson & Nielsen in (Okpara, Idowu, & (eds), 2013, pp. 26-27)

reasonability of expectations:

“The actual or implicit contracts between business and societies are not necessarily justified (or lends justifiability) in the way contractualists envisage. A CSR-policy informed by contractualism will necessarily emphasize the key issues reciprocity and mutual acceptability, alongside the notion of reasonability.”³⁴

Reciprocity and mutual acceptability are the notions that make it “reasonably” acceptable for parties to engage in a mutual agreement. Essential to this type of contractual relation is the element of dialogue or communication to come to terms with each other. As opposed to the rationale of the imperative, executing dutiful action is not enough. The unsolved issue remains though that asymmetric power relation between the resourceful company and less fortunate citizen. This unequal relation may undermine the reasonableness based on the asymmetry of information and financial positions. Also in situations like bribery (where parties agree to pay and receive money but ignore rules of fair play along the way), money laundering (where both parties agree to pay and receive money, but do not report it for taxes) can be defined as contractual arrangements between two parties in mutual agreement, while it does not mean that they are morally or ethically acceptable.³⁵ In fact, new developments or change of priorities or values, can very well lead to a change of contract, making it look more like the provisional agreement till both parties find common ground again.

These philosophical approaches outline how ethical concepts translate into business behaviour. But they are not the only possible way to look at economic activity and business related behaviour. The persistence of problems and the controversial effectiveness of governance codes in the ‘orthodox’ way give all the more reason to look for new approaches.

3.4 Other Philosophical Approaches to Governance

3.4.1 Aristotelian Ethics

Although Aristotle was not very much taken with business (he considered it an activity of lower level citizens to serve the higher level politician and intellectuals), some important scholars³⁶ consider him one of the first ethical philosophers on economic activity. His philosophical concepts are mostly known under the Google search item ‘virtue ethics’, referring to a fundamental orientation to the quest for happiness and human flourishing, but different from the utilitarian version. Business ethics

³⁴ Frederikson & Nielsen in (Okpara, Idowu, & (eds), 2013, p. 26)

³⁵ An interesting development here is the development of different views on ‘contracts’. While (mostly legally schooled) experts and supervisory board members insist that ‘contract is contract’, public and politicians bring more nuance to the subject: they expect that a contract can be terminated, with a reasonable argument or an expiration period if the circumstances require it. See recent Dutch media coverage and interviews on executive compensation and bonuses (<http://fd.nl/economie-politiek/1099303/afspraken-zijn-heilig-voor-dijsselbloem-behalve-als-het-om-bankiersbeloningen-gaat>)

³⁶ See for example several scholars where this paragraph gets its summary from: (Werhane & Freeman, 1997)(Freeman R. E., 1984). Philippa Foot (Virtues and Vices, in pages 163-178 of (Crisp & Slote, 2007), G.E.M (Elisabeth) Anscombe (Modern Moral Philosophy, 1958 in pages 26-45 (Crisp & Slote, 2007)), Bernard Mayo (Ethics and the moral life, 1958, Macmillan Press, London) and Alasdair Macintyre (After Virtue: A study of Moral Theory, 1984, University of Notre Dame Press, Notre Dame) are among the best-known figures of this movement.

is about acting in ways that induce authentic wellbeing, in connection with a virtuous character, developed after years of training and disciplined habits in living. The way to connect to utilitarian thinking would be its individual approach, to a person's character. Other than that, virtue ethicists find little comfort in current governance theories and continuously propose the alternative to develop governance arrangement that will favour virtuous behaviour. One of the main contributors to business ethics in this respect is Robert Solomon³⁷. In his account, the corporate world is not an independent entity, disconnected from the larger community:

"...We can no longer accept the amoral idea that "business is business" (not really a tautology but an excuse for being socially irresponsible and personally insensitive). According to Aristotle, one has to think of one-self as a member of the larger community- the polis for him, the corporation, the neighborhood, the city or the country (and the world) for us- and strive to excel, to bring out what is best in ourselves and our shared enterprise. What is best in us involves our virtues, which are in turn defined by that larger community, and there is therefore no ultimate split or antagonism between individual self-interest and the greater public good."^{38,39}

With this, Solomon brings business into ethical theory and as he calls it the "people problems" and the import of emotions into business. Solomon's argument is that every emotion is judgmental, that is, it emotionally evaluates an event, an experience, a friendship, a policy, and an historical moment. Solomon thinks of judgments as constitutive of emotions, and he claims, "[a]n emotion is rather a complex of judgments and, sometimes, quite sophisticated judgments, such as judgments of responsibility (in shame, anger or embarrassment) or judgments of comparative status (as in contempt or resentment [or even love.])"⁴⁰

Patricia Werhane and David Bevan translate this in business ethics as:

*"In business terms, this means that the mental model of profitability with the same terminology, "value added," Solomon's work forces us to think beyond bottom-line considerations to different mindsets that redefine value creation as human flourishing for all those affected by free enterprise. This shift enables companies and critics to evaluate many dimensions of value-creating or destructive behaviours. Global companies and their individual managers are thus challenged to take emotionally inspired action, to do better all the way around."*⁴¹

Solomon emphasizes several core concepts of virtue ethics, such as the corporation as a community, the search for excellence, the importance of integrity and sound judgment, as well as a more cooperative and humane vision of business. Viewed this way, corporate governance codes are part of efforts to regulate behaviour. Although Solomon does not explicitly note his concern for the behaviour of the leadership, he does underline the importance of such leadership in the development and acceptance of a virtuous (Aristotelian, in his words) business ethics to be teaching to his students, the future managers of the corporations. Or, as Solomon puts it, his approach is not a direct interpretation of Aristotle but inspired by him. The Greek philosopher described "*chrematistike*," or

³⁷ Solomon, 1993

³⁸ Solomon's book 'Ethics and Excellence' has the subtitle of "Cooperation and Integrity in Business". He refers to his theory as an Aristotelian theory of business, although the Greek philosopher called the people engaged in activities for profit, parasites, as those whose activities did not contribute to society. Solomon asserts that capitalism not only needs capital but also character.

³⁹ Solomon, 1993, p. 102

⁴⁰ Solomon 2003: p. 188.

⁴¹ Higgins, Sherman, & Eds., 2012, p. 101

trade for profit as “wholly devoid of virtue and called those who engaged in such purely selfish practices ‘parasites’”. But, Aristotle was in his time a typical spokesman of the aristocracy. As such, he reminds us that aristocrats are not the natural allies of capitalism.

In its core, as its proponents would argue, an Aristotelian business ethics aims to advance human flourishing in general, so why not in commercial life as well? Aristotle proposes the dialectical method in what leads to this goal, as well as explicating the specific features of the virtues. This involves the examination of expert opinions and open meetings with a view to reaching a non-contradictory understanding. Using this method, Aristotle argues that the moneymaking art characteristic of business should serve the requirements of courage, self-restraint, generosity, magnificence, sociability, justice, prudence, and wisdom. In other words, making money is secondary to the main purpose of human flourishing and the virtuous attitude to create and maintain that.

In reality, many would agree with these noble aims and requirements. And many also strive to practice them as well. The question remains however, when these philosophical concepts are the core of our approach, would this help explain and recover responsible behaviour? The answer is yes, but partly; it gives the ideal picture but remains unclear on how to get everyone on that note.

3.4.2 Feminist philosophers’ approach

In the ’80s many of these mainstream assumptions were challenged by feminist philosophers, and became known under the name of ‘ethics of care’. Care ethicists do not reject rights as obligations or consequences as utilitarians do, but they underline the importance of understanding that morality is more than rights and actions.

The initial awareness was triggered by Carol Gilligan, who wrote a reaction to Lawrence Kohlberg’s study on development of moral maturity: *A Different Voice: Psychological Theory and Women’s Development*. Kohlberg was building on the above-mentioned blocks of Kantian and consequentialist elements⁴² in his research to find when and how moral maturity develops in children. Gilligan started a revolution in ethical thinking, by stating that care was significant for moral theory⁴³.

Gilligan thought from her inquiries that it is possible to discern a “different voice” in the way many girls and women interpret, reflect on, and speak about moral problems: they are more concerned with context and actual relationships between persons, and less inclined to rely on abstract rules and individual conscience. Gilligan asserted that although only some of the women studied adopted this different voice, almost no men did. As she put it in a later essay, this meant that “if women were eliminated from the research sample, care focus in moral reasoning would virtually disappear.”

Gilligan’s claims were not yet developed enough to counter the utilitarian and Kantian rationalistic views, but on the hind side we can safely say that it revolutionized our thinking on morality. The difference between men and women was clear, but other differences were striking as well: For example, also men (for example from African origin) thought about morality in terms of care.

So, what is ‘care’? Several definitions have been offered since Gilligan, mostly trying to answer questions like, why should people care? How can one make them care? And what do we do with those who do not care at all? Issues of power arise here while caring does not answer the question on how to account for subjects who actively *desire* to care. Defining care becomes critical.

⁴² Kohlberg, 2008

⁴³ Citation from Virginia Held on Gilligan (Held, 2006) page 27

Caring entails a disposition toward others but action on behalf of others as well. In general, care can be characterized as a relational approach to ethics that values emotion, context, and connection in a manner that integrates epistemological and metaphysical considerations with ethics. Epistemological aspects of care require knowledge, but also a specific kind of knowledge, one with a ‘thick’ understanding of reality. Selma Sevenhuijsen describes care as involving “*attentiveness, responsibility and the commitment to see issues from differing perspectives*”⁴⁴. In other words, knowledge is a necessary condition of care but not a sufficient one.

Furthermore, care rests on a different metaphysical premise of human ontology than do Kantian ethics or consequentialism. In answering the normative question, “what is the right thing to do?” traditional moralities assume autonomous individuals making free decisions. Although care has normative implications, it assumes that human beings are fundamentally social beings that exist in a web of relationships that cannot easily be bracketed out.

Virginia Held⁴⁵ characterizes care as both a practice and a value. As a practice, it shows us how to respond to needs and why we should. It builds trust and mutual concern and connectedness between persons. It is not a series of individual actions, but a practice that develops, along with its appropriate attitudes”⁴⁶. As a value it does a different kind of work from traditional moral categories.

*“Yet all care involves attentiveness, sensitivity, and responding to needs. Needs are of in- numerable subtle emotional and psychological and cultural kinds, as well as of completely basic and simple kinds, such as for sufficient calories to stay alive. It is helpful to clarify what different forms of care have in common, as it is to clarify how justice in all its forms requires impartiality, treating persons as equals, and recognizing their rights. This is not at all to say that a given practice should involve a single value only. On the contrary, as we clarify the values of care we can better advocate their relevance for many practices from which they have been largely excluded.”*⁴⁷

Care ethics is not really a substitute for the ethics of duties, rights and consequences. It covers an additional aspect in human relations. It does question the individualistic and egoistic approach which the Kantian or utilitarian morality propagates.

Although feminist philosophers have developed care ethics initially, it does not mean that it is gender specific; not only women are capable of thinking and acting ‘caringly’. Humanity in general is, but mainstream morality has not developed this aspect of human capability. Hence, the critical reaction to Kohlberg’s study on the development of moral maturity.

The question now is how can this account can be incorporated into the business world? Initially care ethics has found fertile grounds in nursing and medical areas. Later on, closer to above mentioned stakeholder theories, scholars like Freeman and others⁴⁸ connect caring to efficient and effective business, like caring for your customers or other stakeholders, (which later leads to ‘customer focused business’, or ‘employee programs’). The argument here is that caring improves business results, not

⁴⁴ Sevenhuijsen, 1998

⁴⁵ Idem, as mentioned by Crespo & van Staveren p. 246. Virginia Held, “The Ethics of Care-Personal, Political, and Global” 2006, Oxford University Press, Oxford

⁴⁶ Held, 2006

⁴⁷ Held, 2006, p. 39

⁴⁸ Some others not discussed here are for example, Thomas J. Donaldson, Jeanne Liedtka, Sheldene Simona. They introduce the management and corporate culture to understanding relational aspects of business, like taking care of your clients, good relations with suppliers etc.

caring leads to poor results. At the same time arguments are made to point out that the results that can be reached could enrich all stakeholders, not the company alone.

In a paper on the ethical dimensions of the financial crisis, Ricardo Crespo and Irene van Staveren⁴⁹ argue that economic rationality only considers the best way of achieving preferences, regardless of their specific content and whether harm to others may be done without backfiring. Crespo and van Staveren ask themselves whether the actions leading to the crisis could have been prevented by the principles of the ethical theories? Or would they (even) have been fostered by them? Trying to answer these questions they compare three ethical theories, utilitarianism, deontology and ethics of care. Crespo and van Staveren refer to ethics of care “from the choices being made that affect other people”⁵⁰. The ethics of care is attentive to the interpersonal level, where ethics is concerned with sustaining human relationships and preventing harm to others. Also other feminist philosophers, like Rosi Braidotti⁵¹ insist on the primacy of the human in relation with other humans or even other living elements of the world, before the primacy of justice and equality for humans alone. In Virginia Held’s words: “*whereas justice protects equality and freedom, care fosters social bonds and cooperation*”.

Crespo and Staveren therefore claim that the Utilitarian perspective has shown the failure of the system to generate a sufficient number of winners on the long run. Even if not everybody is a winner in the system, one can always claim that the greatest possible number is, depending on the timeframe taken into account. In the financial and economic timeframe of the last decades, the procedures of the codes have been followed, but not all moral problems could be reduced to rights in utilitarian perspective. In fact, even deontology does not always give a compass on how to behave in case of conflicting duties, for example short-term interests and long-term winnings. Consequently, Crespo and Van Staveren conclude that deontology also failed to prevent the financial crisis: Central Banks could not control the individual institutions, governments allowed deregulation, bailed out banks and the financial firms misevaluated risks and the existing rules were insufficient to prevent irresponsible risk taking and dangerous financial strategies and products. From the point of view of care ethics the world would have been better off if more care, and less utilitarian return on investment would lead the community. This view will come back later on in Section 4 when I will use these insights to reframe the concepts of Governance new style, the alternative I propose.

Another alternative view, close to care ethics is phenomenology and the related existentialist account. Before getting to the alternative, I need to elaborate more on these as well, as they define the metaphysical understanding that carries my key arguments.

3.4.3 Existentialist and phenomenological views

Phenomenological view has started off a totally different approach to human existence than the utilitarian and Kantian view. Much like the feminist approach on care, phenomenologists believe that being human means experiencing life through our personal interpretations and these interpretations develop by relating to “Others”. The Stanford Encyclopedia of Philosophy (SEP) defines phenomenology in the following way:

⁴⁹ (Crespo en van Staveren 2011)

⁵⁰ Idem, p. 246

⁵¹ See for example, in (Braidotti 2011)

*The discipline of phenomenology may be defined initially as the study of structures of experience, or consciousness. Literally, phenomenology is the study of “phenomena”: appearances of things, or things as they appear in our experience, or the ways we experience things, thus the meanings things have in our experience. Phenomenology studies conscious experience as experienced from the subjective or first person point of view. This field of philosophy is then to be distinguished from, and related to, the other main fields of philosophy: ontology (the study of being or what is), epistemology (the study of knowledge), logic (the study of valid reasoning), ethics (the study of right and wrong action), etc.*⁵²

Within phenomenology, existentialism is one of the philosophical accounts that build on concepts introduced by a range of philosophers like Martin Heidegger, Edmund Husserl, Emmanuel Levinas but also Friedrich Nietzsche and Søren Kierkegaard.⁵³ According to the existential view, it is not enough to know the truths that natural sciences bring to us as knowledge to understand what a human being is. Existentialism does not deny the validity of exact sciences, nor the ‘measurable’ truth categories in centimetres, kilowatts, depth and light measurements or even causalities and psychologies. Existentialism simply claims that there is more in the world than our anatomic senses and instruments can catch and calculate, in other words, more to existence than what is measurable and arguable.

From an existentialist view, to understand human behaviour, the ‘iron cage’ of reason is one way of putting things (referring to the Kantian categorical imperative), but it certainly does not cover the ‘whole’ way. Human existence is part of natural life, its embedded part, and follows therefore, the logic of nature more than the logic of human rationale only. It claims that we cannot prove that we are able to hold an ‘objective’ view of the reality, as if we were not part of the whole, as if we could observe and interpret the phenomenon around us as a visitor from another planet, and even then, we could not be sure.⁵⁴ The existentialist account requires a first person (me or I) perspective to narrate. It also acknowledges that the ‘Other’ is there, and that their existence confirms my existence. A notion like freedom, for example, is only possible if I can communicate with other free beings because that is how I define myself to be free. Otherwise I would not even have the notion of freedom, or feel the necessity to define it.

“*Existence precedes essence*”⁵⁵. Sartre is saying here, according to experts, that being human, means existing. We are what we can make of our existence in relation to our environment and to the image of our created selves. Existence is “self-making-in-a-situation”.⁵⁶ In contrast to other entities in the world, whose essential properties are *fixed* by the kind of entities *they are*, (like a tree is of wood, it is its own material and defines its essence, independent of others) what is essential to a human being, is

⁵² Smith, David Woodruff, "Phenomenology", *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2013/entries/phenomenology/>>.

⁵³ What follows is not a summary of each of these philosophers extensive work, but a short summary of the existentialist view extracted from (Dion, 2014)

⁵⁴ Thomas Nagel's *What is it like to be a Bat?* (The Philosophical Review, Vol. 83, No. 4 (Oct., 1974), pp. 435-450 Published by: Duke University Press on behalf of Philosophical Review Stable URL: <http://www.jstor.org/stable/2183914> Accessed: 16-04-2015 17:14 UTC) explores the mind and the consciousness that is understandable for the human but asks himself what life would look like if you were a bat? His point being, that it is almost impossible for us even to imagine what a bat would feel or even acknowledge.

⁵⁵ Quote from Jean-Paul Sartre, *La Nausée*, but also in other essays like *Existentialism est Humanism*. John E. Atwell published a famous explanation, in 1969 in the Journal Man and World on this sentence. Atwell discusses Sartre's approach in relation to other existentialists as Schopenhauer, Heidegger, Jaspers and others.

⁵⁶ (Fackenheim 1961: 37) as cited in (Dion, 2014)

not the material she is made of, but by *what she makes of herself*, who she becomes. Existing is about becoming. The fundamental contribution of existential thought lies in the idea that one's identity is constituted neither by nature nor by culture, since to “exist” is precisely to construct such an identity. Existential concepts and notions are therefore related directly to an almost active understanding of the way we influence and define our life. In her famous book *La Deuxième Sexe* Simone de Beauvoir states the same idea in a different way by saying “*one is not born, but rather, becomes a woman*”. By which, she does not refer to her biological state, but to all the other aspects of life as a woman, that makes us a woman. So notions like facticity, transcendence, alienation, authenticity cannot be understood through an objective science but only through the eyes of the subjective me, being in existence and deciding how to define myself. In an essay on phenomenology and feminist theory Judith Butler (Butler, 1988), records that both Merleau-Ponty and Simone de Beauvoir refer to being a woman as an ‘historical idea’ than of ‘natural species’.⁵⁷ Fiercely trying to ignore this ‘given’ and concentrating only on the hard core of the material and objective perspective causes alienation, dehumanizes, and loses the lifebuoy we need to keep our identity as humans intact.

How does this all connect to a business world?

Following this line of thought Michel Dion (Dion, 2014) proposes an existential questioning of the financial world to combat the distortion of our being. The technology and derivative thinking in the financial world, constitutes, on Dion’s account, a serious threat to our human existence. In his conclusions⁵⁸ he formulates six philosophical concepts, which I will summarize as follows: (1) *A structural transmutation of values*, a view from Nietzsche⁵⁹, re-evaluating good and evil, accepting them as part of the same coin, if you will. Good can have evil consequences, and evil can have good effects. Nietzsche’s account requires courage to continuously question our moral values and shake the foundations of our beliefs. (2) *Accepting the challenge to reach ethical life* instead of aesthetic life, referring to Kierkegaard. As long as we stay in materialistic values, immediacy overrules our world-perception and connectedness with others; we will not be able to transcend from personal pleasure. Criminals and immoralists profit greatly from aesthetic life. (3) *Communication and truth*, referring to Buber and Jaspers. Financial crimes impose a radical change in the way we relate to each other. The lack of trust in the ‘Other’ brought about by financial crimes endangers the trust basis we need to further our search for the truth and meaning. This search is based on communicational exchanges, to understand what others consider to be truth or to create shared truths. (4) *Critical on technology* (Marcel, Heidegger), as users of technology but without forgetting that we are able of interpreting phenomenon and making moral assessments, not the technological creations we use, (5) *The courage to be oneself* and as *part of the community* (reference to Tillich). Faced with criminal crimes, we have to be courageous to stay ourselves, as part of the community, with an understanding of what criminal activities do to the sense of togetherness. (6) *The Reading process of Organizational Life* (Sartre) as members of organisations, we are both readers and writers at the same time of the life within. We have the power to redefine organizational culture, in narrating decisions we take, giving meaning to them and using the corresponding ethical vocabulary and syntax.

⁵⁷ (Butler, Performative Acts and Gender Constitution: An Essay on Phenomenology and Feminist Theory, 1988) page 520.

⁵⁸ (Dion, 2014), conclusions from page 195 on.

⁵⁹ Dion gives an extensive analysis of financial crimes in his book, and discusses existentialist concepts of several philosophers’ relating them on financial crimes: He includes Nietzsche, Marx, Habermas, Heidegger, Hume, Levinas, Rousseau, Sartre, Schopenhauer, Spinoza, Seneca and Weil. The summary of concepts here is from his concluding paragraph.

I find Dion's efforts rewarding to the deepening of the understanding of an existentialist account of the financial crimes. Although some other emphasis can be put on, for example, his analysis of the technology around us, his contribution gives a sound basis we can build on.

I will get back to the phenomenological implications of the governance theories in the next section with the discussion of the core economic concepts, making the bridge between the analysis of existence and the economic activity. For the moment suffice to say that the above-mentioned existentialist concepts are key to the new solution. They help to understand that the concepts employed by current governance codes, are not necessarily the 'only' ones or even the good ones to build on.

3.5 Conclusions from Philosophical Perspectives

This section summarised different philosophical perspectives and connected these to the corporate and business world. It gave an overview of these insights as a background for the next chapter where the alternative can be presented building on these insights.

While governance aims at organizing corporate activities in a certain way, the choices it makes to define the Governance Codes are not accidental. They are based on a specific view of the world and of human nature. To challenge these views and their philosophical origins, alternative views were presented to question the assumptions as the 'one and only truth'. This questioning of the so-called 'self-evident' representation of economic reality has been chased through the ontological groundings (such as context, time and space) as well as by the understanding of the epistemological issues of human knowledge and subjective experience. Current governance arrangements, especially when they are poured into concrete, are in great danger of missing the diverse meaning of existence humans strive for. The current function of Governance is predominantly from the utilitarian account, aiming at maximizing happiness while it fails to include all the affected in the stipulated rules fairly, because it functions in a limited world of interested parties. At the same time, current Governance assumes that "impartial" rules are applied equally to all, which inevitably disrupts reality accordingly.

Critics of these consequentialist approaches argue that the immoral conduct this philosophy requires is not acceptable. Even if you could produce the most possible good from your actions, being forced to make 'dirty hands' along the way is inevitable. A correction is therefore required to restrict or to prevent the unwanted side effects. Duties, obligations of deontological nature therefore appear in the shape of laws and regulations to limit the damage. Deontologists however require a strong commitment to each act being right in itself. So in reality life develops in a series of actions, some with conflicting results from which to choose, making daily life a practice of difficult dilemma's without any other compass than the rules. In this practice, Governance Codes give no guarantee for responsible behaviour, nor a support mechanism to connect to.

From a phenomenological perspective the existing governance system is not only exclusive in its thought base (defined in structures of 'them' versus 'us'), but also based on a sequence of wrongful representations. This includes the way we understand and perceive concepts of a company, of economic activity, how we prioritize return on investment and position the relations with the community including stakeholders outside the company. Most of these fallacies, are build on

accumulated bits and pieces from different interests and conflicts of interests. The result is a system that functions within the limits of a myopic way of thinking based on limited conceptual vocabulary of economics. If economic activity is defined as “*there is an economy, because there are human persons*”⁶⁰ things look different. Then, it is not economy that rules humans’ life, it is humans that define the existence of economy. This section thus questioned the representation of economic reality in this way, the concepts it is founded on and unpeel the false representations it creates. From this perspective, developing further in the utilitarian or deontological paradigm does not seem to head for a solution.

Given the above, if we want to develop a useful compass for good behaviour, we need to change our thinking about the place of economy in our world and its potential for a meaningful life. This is what the next chapter will present, from a phenomenological account as discussed in this chapter, rebuilding for a different paradigm for business.

⁶⁰ Arthur Rich (Business and Economic Ethics), as quoted in (Ulrich, Integrative Economic Ethics: Foundations of a Civilized Market Economy 2008): page 185

4 Reframing Governance

Let me summarize where we are on responding to the question of this paper. Section 2 established the main agencies involved and the dilemma the Codes attempt to solve, to create responsible behaviour. Their good intentions are recognized but already the agency dilemma problematizes the conflicting interests of agents, which questions the usefulness of a Code, even if it is an ideally ‘perfect’ one. Its expected effectiveness is in reality disappointing as problematic behaviour stays on the agenda. It is as if we have difficulty in defining the North on our compass. We keep looking for a moral compass while our current vocabulary is unable to articulate a Code of conduct adequate enough to solve the problem. Section 3 therefore looked into the philosophical foundations behind these developments and the different perspectives for a re-evaluation of business ethics. The philosophical concepts these new perspectives consider relevant for economic activity helped understand why and how the current base for governance is constructed the way it is. Different views on human nature and existence described under the phenomenological umbrella produced another role for economic activity and created a different set of values to guide economic activity to satisfy these values. Now that the groundwork is done, this section will define a new set of priorities and propose the vocabulary to go with it. It will argue for a transformation of perspective, the new compass to calibrate with. Presented views are based on phenomenological and existentialist scholars’ definitions and argumentations, partly already cited in the previous section. Some additional scholars will be cited to support the foundations of the argumentation. I will specifically elaborate how economic activity fits into the definition of public space, to counter the arguments⁶¹ that ‘all things economic’ fall into the narrow definition of necessities of the private world.

4.1 *Public or Private realms*

As discussed under section 2, corporations define *their* (business) world as a separate and private world, where *their* agents (see 6.2.2, 6.2.3, 6.2.4) and *their* interests are key to economic activity. I interpret this as a distinct effort to define their space, separate from the public world. In general, the purpose of this effort is to have a controllable entity to govern. At the same time, developments in the 20th and 21st century have shown that it is not a premise that will hold: Companies depend on the public sphere for free enterprising in all possible ways. They need legal recognition to operate, to go bankrupt, to trade, to make transactions, generate contracts, comply to penal and civil laws, all part of the democratic discretion. At the same time, their social involvement and requirements have gotten interwoven with the public sphere more than ever: they lobby public authorities, they join forces in public and private contract partnerships, they require armies to protect them in international waters and lands, they define working hours, learning opportunities, childcare, housing to sporting or ‘personal’ time of their employees. In short, they not only exist next to the private sphere but, in the purely existentialist and phenomenological understanding, they are part of the definition of public sphere.⁶² For the individual working in a corporation, work is public life. Seyla Benhabib describes

⁶¹ As presented by, for example by Hannah Arendt and other existentialists or even Aristotelians, that only politics is public life, and economic activity, satisfies basic needs and therefore should be considered private. See also note ⁶⁴

⁶² I follow here the discussion of Seyla Benhabib in (Benhabib, 1993) where she discusses the feminist theory on the understanding of ‘the private is public’ and what Hannah Arendt meant with the distinction of public space and private space. In Benhabib’s understanding of Arendt, private is ‘home’, ‘intimacy’, where not only feminists but all others suffering from power misuse can be misused. This is not to say that everything is public, or to say that anything literally social or

the change with these words:

Undoubtedly, our societies are undergoing tremendous transformations at the present. In really existing western democracies, under the impact of corporatization, the mass media and the growth of business-style political associations, like PACs and other lobbying groups, the public sphere of democratic legitimacy has shrunk. The autonomous citizen, whose reasoned judgment and participation were the sine qua non of the public sphere, has been transformed into the 'citizen consumer' of packaged images and messages, or the 'electronic mail target' of large lobbying groups and organizations. This impoverishment of public life has been accompanied by the growth of the society of surveillance and voyeurism on the one hand (Foucault) and the 'colonization of the lifeworld' on the other (Habermas)⁶³.

The 'civic citizen' being transformed into a 'citizen consumer' is, on Benhabib's account, a consequence of the 'impoverishment' of public life. Another way of looking at this is that, the 'citizen', in the plurality of her existence, can enrich the public life by participating in it, by becoming an actor and not only a consumer of it. This can only be done if the individual is able to step back and become a spectator to reflect for her own input.⁶⁴ Without this necessary room for reflection, the equation becomes negative, as the citizen impoverishes as well. To make my argument, I will review the core elements of corporate governance from the alternative philosophical perspective of paragraph 3.4, while I will clarify how economic activity can become part of the realm where both thinking and acting are relevant. The Company will be embedded in the larger community and create a discursive environment, based on Habermas's understanding, and corresponding interaction with all affected stakeholders. The moral compass we are looking for, the feeling of doing the right thing, taking responsibility, follows inevitably from this. Driven by values of the community, the North is then not difficult to find. The capabilities of thinking and acting, find the moral compass in exactly that interaction, by the space the economic entities create together with their environment.

4.2 Building Blocks of Governance Redefined

The paragraph takes up on the key concepts for Governance and reviews how these concepts can be redefined, from phenomenological account, incorporating focusing on the following issues: (1) economy in relation to environment and community (2) economic activity as part of human existence, (3) the firm or the company as economic entity, (4) the concept of responsibility. Repositioning these key features will create a new understanding of how economy fits into our existence, how it relates to the business world. From these understandings I will reconstruct the new compass, the way a governance of the corporate world should continuously recalibrate itself, in relation to its purpose and the way it operates. Whether the Governance Codes are still relevant in this new world is, in my perception, not of major importance. The new way of Governing will create, as I will argue under

household or economy connected is 'private'. It means, according to Benhabib, that the public space is defined by the space where people express themselves by their action, gain identity and define themselves in relation to others.

⁶³ (Benhabib, *Feminist Theory and Hannah Arendt's Concept of Public Space*, 1993, p. 109)

⁶⁴ The distinction between public and private realms is a concept from Hannah Arendt. (Arendt, *The Human Condition*, 1958) specifically pages 22-78. As Arendt puts it "...In the modern world, the social and political realms are much less distinct...since with the rise of society, that is, the rise of the 'household' (oikia) or of the economic activities to the public realm, housekeeping and all matter pertaining formerly to the private sphere of the family have become a 'collective' concern. In the modern world the two realms indeed constantly flow into each other like waves in the never-resting stream of the life process itself". (Arendt, *The Human Condition*, 1958) page 33.

§4.3 and 4.4, its own principles that will need constant adjustment at the discretion of the community.

4.2.1 Economy for and from Communities

Hegel's view on ethics and economy is often referred to as scholars search for new theoretical perspectives⁶⁵. The core lies in the meaning Hegel gives to 'ethical life' as opposed to 'morality'. Hegel experienced in his lifetime both the industrial revolution in England and the political revolution in France (lived between 1770 and 1831). His analysis reflects on the ethical impact of these changes, as they form the very basis of the globalisation and economisation of social life, as we know it today. I suspect this is one of the reasons why scholars⁶⁶ consider him as relevant for today's business ethics. Hegel's views are relevant but do not necessarily solve the issues of today. A point that goes for all philosophers mentioned in this thesis: their insights can give our thoughts direction, but not necessarily give a solution to current issues.

In the tradition going back to Kant, 'morality' is understood, as the universalist attitude in which one respects all subjects equally as 'ends in themselves' or as autonomous persons; 'ethical life' on the other hand, refers to the settled 'ethos' of a particular lifeworld, and normative judgments are to be made about this ethos only to the extent to which it is more or less able to approach the demands of universal moral principles. [As cited in: (Honneth, 1995, p. 172)]

Hegel argues that a social practice can only be fully acceptable to humans if it allows them to actualize their most fundamental human capacity, namely their ability to will. Hegel believes, unlike Kant, that freedom or autonomy is manifest not primarily in individual actions undertaken on valid maxims, but that autonomy is only fully realized when we are 'with ourselves', in the lively unity of 'universal and individual freedom'⁶⁷. Public life is not a restriction of liberties, but on the contrary, it is an opportunity for the fulfilment of the individual's freedom. In addition, Hegel's understanding of the relation between the individual and the public points to the mores and customs (*Sitte* or *Sittlichkeit* in Hegel's terms) developed by the interaction between subjects. This 'Sittlichkeit', the living customs, form the basis for morality, and not the laws prescribed by the state or the moral convictions of isolated subjects.

The modern economy, in Hegel's view, does not have a solution for a balanced production process. The law of supply and demand in the capitalist economy is not capable of ensuring the economy against over-production. Market oriented mechanisms aim for efficiency in the production process, but they do not give any priority for the employee. It is assumed that the public arena accommodates that need while the production process relies on substantial reserve of labourers to keep the production process running. What is needed, according to Hegel, are mechanisms that take into account the interest of the worker in having stable employment, as well as the interest of society as a whole in the efficiency of the production process. In his view, the corporation is that kind of a public entity where everybody who exercises a trade can participate. Now, we would define this as a cooperative, not a corporation. It delivers services, develops products and teaches craftsmanship

⁶⁵ For example, (Herrmann-Pillath & Boldyrev, 2014), (Honneth, 1995), (Painter-Morland & Werhane, 2008)

⁶⁶ See a book discussion on this issue of relevance of Hegel for economy and specifically for business ethics in: Neschen A, (2008) *Ethik und Ökonomie in Hegels Philosophie und in Modernen wirtschaftsethischen Entwürfen*. In: Siep L, Jaeschke W (eds) Hegel-Studien 49. Meiner, Hamburg

⁶⁷ Hegel from *Natural Law*, as cited in (Honneth, 1995), pages 11-31

while at the same time it gives employment to the community. This type of corporation is very different from the ones we now know which serve the owners, and where according to the Governance Codes responsible behaviour is connected to that purpose. Nevertheless, it does give an idea on how economy does not have to be a phenomenon of its own with its own priorities, but on the contrary, a public activity to serve the society. It will serve to provide for the necessities of life while it helps create a meaningful existence, as the next paragraphs will argue.

After this introductory note on approach of Hegel's positioning of the economy, a more precise understanding of economic activity needs to be defined.

So I will continue my reframing with the repositioning of the economic activity in the context developed from the phenomenological framework of the last Chapter, and proceed with other core elements, dismantling them from their 'given' truth, to later rebuild them again from a different perspective.

4.2.2 Economic Activity Repositioned

Aristotle's *Politics*, refers to economy as 'household management'⁶⁸. Aristotle did not speak of the economy or economics but rather of "all things economic" (*oikonomikê*), taking an adjective that describes a characteristic of reality, and turning it into a noun: "the economic". Deriving from this, the household and the purpose of economy, one could define all activities with the purpose of satisfying human needs as economic. In our dictionaries, however, economic is also defined as the most efficient way of performing with available resources. These definitions seem rather narrow if we look at economic activity from an existentialist point of view. Household activity might necessitate managing resources as economically as possible, but for a meaningful life more is needed: action and activity in the public sphere with a purpose, with choices to be made, in coexistence with others. Economic activity serves the purpose of feeding, clothing and sheltering us; we know that at the same time, economic activity gives meaning to our lives.

We now live in an area where our identities are formed, shaped, redefined and sometimes reinvented by our public activity. This is a totally different social context from the old Greek times, when who you were was defined by your sex or your family origin (aristocratic or slavery for example). This public activity, is 'political' in the sense that it depends on how we act and manifest ourselves in the public sphere, usually in relation to 'political' concerns of democratic agenda. However, identities are also defined by other activities within corporations, interacting with other individuals. Our income generating activity is part of our public acting, for ourselves and for the public, while it defines at the same time, who we are, our position in the society, and whether we are appreciated or not. This often manifests itself in our possibility to be heard, or even to decide for ourselves and for others. As much as a specific craftsmanship or agricultural activity was part of surviving necessities like shelter, food, light, economic activity is now about 'being somebody' (or not if you are jobless) and having a say in things. Our public identity is defined by our 'job', our position in the company, our income, and connected networks in which we manifest ourselves.

Axel Honneth developed a phenomenology-based account that I find particularly relevant for an understanding of the 'struggle for recognition'⁶⁹ in society, claiming that conditions for personal integrity are based on three necessary elements: Love, Rights and Solidarity. Love in early life by the

⁶⁸ As cited by Alejo José G. Sison, *An Aristotelian Corporate Governance*, in (Brink, 2011), pages 179-200

⁶⁹ (Honneth, 1995)

caretaker(s) creates emotional bonds, reciprocity and recognition. Legal recognition of Rights is the formal recognition to being free and equal and makes one socially relevant. Solidarity engages humans who are not necessarily related to each other, in an interactive relationship where they mutually sympathize with their various different ways of life because, amongst themselves, they esteem each other symmetrically.⁷⁰ Economic activity, evaluated from this perspective, is not so much an activity to produce the household necessity, but one that can contribute to the realization of reciprocal esteem, despite individual differences, to further develop social relevancy and an enlargement of the caring and bonding possibilities. The activities in economic realm, within a corporation, under the guidance of Corporate Governance Codes are inevitably part of this realisation of esteem, social relevancy and caring and bonding. I would argue, that from a care ethics point of view, there is all the more reason to include economic activity within the sphere of identity development giving meaning to existence.

Looking at it this way, economic activity not only gives meaning to life, but also accomplishes the sense of belonging to a chain of activities together with others. Several ethicists we discussed in the previous section as well as economists of the first section acknowledge the role of top management in corporations in both defining the economic activity as well as observing what ‘others’ want from economic activity. The difference between these approaches is the selection of the relevant ‘other’. The traditional point of view is that shareholders and a few others are relevant; the more inclusive approach defends the premise of relevancy for all affected. Either way, the discussion is not so much whether economic activity is important, but rather who do we involve in it.

4.2.3 Core of Corporate World: the ‘Company’ Reframed

The legal entity for economic activity is the company. If all economic activity relates to these entities, then the question arises on how to define them if they are part of our meaning to life, which is an old discussion:

“The current debate on corporate governance is traceable to a nineteenth century argument on the nature of the corporation in corporate law theory, between the “aggregate theory” and the “nature-entity theory”. The aggregate theory claims that the corporation as a legal person is not a real person, but an artificial person created by law or the state as a matter of convenience. The corporation is only a collective name for its members and the aggregate rights of its members. By contrast, the nature-entity theory argues that the reality of the corporation is a real person with its own enduring personality, distinctive mind and will and a capacity to act through its organs.”⁷¹

As the company becomes a legal “person” comparable to the natural person, its potential to act changes. Both (the natural and the legal persons) have relations with others, they have their own ‘identity’ and even behavioural peculiarities. As the utilitarian and deontological approaches focus on the results of their actions, the discussion is mainly about ‘what’ they did do, and not about ‘how’ they did or toward ‘whom’ their actions were developed.

Mollie Painter-Morland points out to the consequence in current systems:

⁷⁰ Honneth, 1995, pp. 92-130

⁷¹ Letza, Smallman, Sun, & Kirkbride, 2011, p. 163. See also later on in responsibility of the company and the individual.

Misconceptions about the nature of individual moral agency are often reflected in the way that corporate agency is described. Business organizations are regularly portrayed as closed systems that occupy the central, pivotal position on stakeholder maps. From this perspective, it is assumed that a business organization operates as a self-contained entity that freely interacts with stakeholders on its own terms. Those who attempt to curb corporate misconduct through legislation and regulation tend to assume that responsible business behaviour is a matter of staying within legal boundaries, following rules and institutionalizing systems and procedures. These legalistic parameters are supposed to provide business practitioners with “objective” behavioural guidelines.⁷²

A new understanding of the company also requires an awareness of the relational context within which responsibilities and duties develop. Human relations are not linear as in cause for an effect. Awareness of other emerging patterns uncovers a whole web of adaptive systems, where relations are complex, reactive and reciprocal. At the same time, relations are uneven, asymmetric or unequal. They are also dynamic and not static.

This, in my view, is an opportunity to view the corporation in its original sense as a human construction, a social world that is fully constituent of human minds and direct experiences in addition to physical materials, which are fundamentally hermeneutic in nature. The fundamental understanding here is that top management of a company both writes (as in defines life within the organization) and reads (observes, is part of, understands) organizational life in a company. Not only the top but also other parties in and around the organization can find the signs and symptoms of processes of organizations that are ethically questionable. What the processual approach offers is the option to turn our attention away from the theoretical abstraction of governance models to the fundamental human experience and practice of governing processes, concentrate on the narrative capability to design preventing strategies. It gives the means to develop awareness of the complex relationships and forces, the knowledge generated in direct and indirect experiences, the firm-specific and contextual-dependent governing problems and their pragmatic solutions.

As the old static concept fades away, it becomes possible to look at the concept of a company from a different perspective, as part of a constructed and changeable reality, depending on the specific context. The context then becomes a relevant aspect and opens the question of necessity to reconsider its ‘given-ness’ as opposed to subjective and changing conditions. This will have its effects on individuals on their responsibility in these companies.

4.2.4 Individual Being and Responsibility

Following the do’s and don’ts of Governance Codes as the initial question of this paper asks should trigger responsible behaviour. So what is responsibility? Can it be triggered by rules or does something else make it tick?

Mark Bovens⁷³ defines two different concepts of responsibility; a passive and an active one. The passive responsibility is the one that most governance codes refer to, the form that Bovens calls the *accountability* version, “*where someone, has caused a blameworthy action. Usually after an event or a situation is perceived as harmful or shameful. Either you are responsible or you are not. There is no middle*

⁷² Painter-Morland & Werhane, 2008, p. 35

⁷³ (Bovens, *The Quest for Responsibility, Accountability and Citizenship in Complex Organisations*, 1998) and also in (Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 2010)

way; you cannot be somewhat accountable".⁷⁴ In active responsibility Bovens turns to a more Aristotelian understanding of *virtuous* and actively seeking character, such as courage, temperance, liberality, excellence, pride, equitability, friendliness, truthfulness, justice and practical wisdom. With more protestant influence, virtues can change into more puritan ones such as love of truth, obedience, zeal, frugality, sobriety, chastity, or even industry and hygiene. This type of responsibility requires *character*. You are not necessarily born with this character, but you can cultivate it, nurture it, develop it, train it, and discipline it. In the active responsibility, Bovens looks for different criteria from the passive one: "*active understanding of risks, consideration for consequences, autonomous account, a verifiable conduct code, taking role obligations seriously*".⁷⁵

Other approaches to responsibility come from different perspectives. Robert Solomon, in a paper on *Responsibility and Bad Faith*,⁷⁶ discusses the dispute around the source and nature of agency and responsibility based on Hegel's analysis:

Hegel, defending the idea of an all-embracing Spirit (Geist) that includes us all, concludes that: "the individual must all the more forget himself . . . that [his] individual responsibility does not amount to much" (even though Hegel adds, "Of course, he must make of himself and achieve what he can"). Kierkegaard, in a witty response, suggests that if someone took Hegel seriously in this, "he would not even be in a position to have a letter addressed to him." In this reply, Kierkegaard captures the essential insight of existentialism, that one's personal identity, indeed his or her very existence, depends on our individuality, and that in turns depends on our taking responsibility for what we do and, most importantly, who we are.

For existentialists, responsibility has deeper ramifications and meaning than being accountable actively or passively. It relates strongly to the human needs such as, purpose, meaning, choice, self-worth by being, acting, belonging and becoming. Arendt is known to have referred to Socrates and his version of consistency with oneself: "*it is better that everyone disagrees with me than I disagree with myself, be out of harmony with myself*"⁷⁷

Jean-Paul Sartre is one of the existentialists who distinguishes but also integrates the individual and its capability to think, imagine and engage on another level than facts alone.

Sartre's official theory, the one that is most easily promulgated with the aid of two of his more famous pieces of jargon, is this: we (as consciousness or "Being-for-Itself") are essentially, phenomenological & ontologically, free. That is to say, we have transcendence, the ability to intend and reach beyond any factual situation in which we find ourselves. We have desires. We hope. We fear. We have ambitions. We make plans and resolutions. The factual situation Sartre calls our facticity (a term borrowed directly from Heidegger). Thus we find ourselves "abandoned" or "thrown" into a world not of our choosing – born into a violent century, an unjust society, a troubled family, a religious tradition, stuck with a sickly body, a homely face, a troubled personality, a bad job with a horrible boss, a falling stock market, a tightening of credit. We have facticity, the facts that are true of us, and we have transcendence, so we can always imagine "possibilities," alternative ways that the world and we might be and devices by which we might try

⁷⁴ Bovens, 1998, p. 31

⁷⁵ Bovens, 1998, p. 37

⁷⁶ Painter-Morland & Werhane, 2008, p. 10

⁷⁷ As cited in (Assy, 2008); page 62

to bring these about. Thus human reality has two very different aspects, the facts that are true of us, the “given,” if you like, and our ability to choose, to aspire, to “transcend” ourselves⁷⁸.

An important part of existentialism is the possibility to choose, even to shape our future by imaging situations where we picture ourselves in a desired role or position. By doing so, we are prepared to transcend from our factual situation and take responsibility for shaping our own future. Refusing to take that responsibility is in Sartre’s words ‘bad faith’, finding excuses while we are free and responsible to choose the meaning we give to reality and to choose how we live within our limitations or prepare for new ones.

In today’s practice, Sartre’s followers in post-structural view, claim that corporations are also places one can avoid responsibility, by their scattered organizational roles and responsibilities. At the end, ‘nobody is responsible’. In large corporations as well as in public administration, the structure and the division of labour amongst many functionaries at various levels and in various measures is such that it is difficult to determine who is responsible for the organization’s actions. In his article on Corporate Responsibility, Philippe Pettit asks the question whether a corporation can be seen as an agent and held responsible for its actions.⁷⁹ He defines an agent as someone who is fit to be held responsible in a given choice and requires three conditions for her to satisfy for responsibility: that there was a moral choice to make, that the agent knew what was at stake and that she was in position to act on it. Dennis Thompson has identified this as the problem of ‘many hands’; Pettit calls it the problem of ‘no hands’ and comes to the conclusion that Corporations comply with the definition of agents that can be held responsible even if many or no hands can be individually pointed out⁸⁰.

There is however a distinction between the collective responsibility of many hands and the personal responsibility. Each person can be held responsible for her own participation in the (for example) organized crime of Enron, whether the defendant is a member of the management team or not. Each individual is like a cog in the mechanism, and chooses to be part of the system. Deciding to stay part of the cog is as much of a choice as not choosing to participate. The responsibility does not diminish. This argument follows from the understanding of the above-mentioned existentialistic view that by being, manifesting, acting and belonging, responsibility is taken by the individual not by the collective. This responsibility cannot be denied by just ignoring it. Ignoring it makes it ‘bad faith’.⁸¹

Enhancing relations with procedural requirements as well as content-related ones is key to the understanding of responsibility. The ultimate purpose is to enable us to find meaning in life, understanding that meaning is only created through interaction and connection with the Other.

In an article on redefining accountability as relational responsiveness, Mollie Painter-Morland also questions accountability without the understanding of underlying parameters:

“...some form of deontological, utilitarian or rights-discourse when they describe the way in which agents make moral decisions (Jones, Parker, ten Bos 2005). Those who subscribe to this view of

⁷⁸ Robert Solomon in (Painter-Morland & Werhane, 2008, p. 12)

⁷⁹ See (Pettit, 2007).

⁸⁰ See page 198 in (Pettit, 2007) and Thompson, Dennis. 2014. “Responsibility For Failures Of Government: The Problem Of Many Hands.” *American Journal Of Public Administration* 44 (3): 259-73.

⁸¹ In French ‘mauvaise foi’: *L’être et le Néant*, 1943, Gallimard. Translated into English as *Being and Nothingness*, 1956, Routledge.

moral agency assume that corporate agents have a clear understanding of societal principles or values and the behavioural parameters that they suggest.”⁸²

In essence, her question touches the heart of the matter: individual responsibility or moral agency is not an isolated rational decision making entity. It is by its nature, shaped, informed, defined, and therefore inevitably connected to the Other and the Environment in which it is embedded. It incorporates the sense of belonging, the recognition and the ability to connect.

“What is required is a broadening of our understanding of accountability. We usually think of moral agents as being accountable for something. However, considering the interactive way in which moral knowledge comes about and moral decisions are made, we may need to re-envision a moral agent as someone who is accountable towards others or in terms of some shared sense of normative propriety”⁸³.

In this broader sense of accountability, the relations are part of an awareness of the relational context within which responsibilities and duties develop. It is also about being responsive to ever-changing interests of all stakeholders, not in a linear line of growth in capital and income but an interaction of mutual recognition and respect.

4.3 Governance Re-invented

Elaborating on the core concepts from different perspectives also requires putting things together to make a sketch of how a Governance New Style would look like. In a research paper in the ‘Academy of Management Review’ Andreas Scherer and Guido Palazzo⁸⁴ focus on an approach which I have used as a guideline for this purpose. Their work is inspired from Hegelian concept of recognition and builds on a later version of Habermas’ ideal speech theory. Scherer and Palazzo place their approach in the tradition of corporate social responsibility, as an “alternative discursive approach”.

The basis of Habermas’s theory is the differentiated society with the distinction between the ‘life world’, which primarily functions in ‘communicative action’ on the one hand, and the differentiated political and economic systems on the other hand who primarily operate through their specific media: power and money. This all means that we must proceed cautiously in working out the implications of deliberative democracy for corporate governance: Corporations are all about power and money. This implicates that by addressing Corporate Codes, the way corporations have regulated how to deal with power and money, we are addressing the key issue at the heart of the political and economic systems. In addition, we are also trying to make a connection between the two worlds, the ‘life world’ and ‘the systems’. This is the exact point where Habermas’s views on discourse theory comes in as they evolved over time more deliberative models.⁸⁵ Habermas positions the discourse theory between the ‘liberal view’ of compromises between interests, and the republican view of “culturally established background consensus shared by the citizenry” and describes it as follows:

“Discourse theory takes elements from both sides and integrates these in the concept of an ideal procedure for deliberation and decision making. Democratic procedure, which establishes a network of pragmatic considerations, compromises, and discourses of self-understanding and of

⁸² Painter-Morland & Werhane, 2008

⁸³ Painter-Morland & Werhane, 2008, p. 39

⁸⁴ Scherer en Palazzo, 2007

⁸⁵ Habermas, 1996, pp. 287-328. Citation from p.296

justice, grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed. According to this view, practical reason no longer resides in universal human rights, or in the ethical substance of a specific community, but in the rules of discourse and forms of argumentation that their normative content from the validity basis of action oriented to reaching understanding. In the final analysis, this normative content arises from the structure of linguistic communication and the communicative mode of sociation.”

Scherer and Palazzo build on this Habermas_{2.0} version⁸⁶ in search for an economic rationale that makes sense in a globalising world, where people are local but operations global. The domestic pressure is only one part of the equation. Based on this approach, their proposal is “to acknowledge a new political role of business as firms, *already engaged* (italics by S&P) in these governance processes”⁸⁷.

Unlike many others mentioned above, Scherer & Palazzo do not look for ethical basis for the role of business environment. Their analysis starts with a political analysis of the changing relations between governments, civil society actors and corporations. It then continues with the institutional and cultural consequences of the dynamics and the dialectics resulting from this change. The approach is based on the *primacy of Democracy*. The reason for this becomes clear if we look at communicative process as a way of empowering the compass, making way, giving it room to emerge. The compass is already in us; we have buried it away in an individualistic profit-maximizing world. We need to dig in and find the process to unleash its potential.

At the same time, putting political processes above ethical theories opens the discussion on the power relations. Would corporations or the leadership of these institutions listen to those stakeholders who do not have enough power to create pressure? In an earlier mentioned critique of Crespo and van Staveren, the plea for a theory based on ethics of care could substantiate a better position for less powerful stakeholders, but in the current reality of corporate world, such a dialogue is not common ground. The management practices and the corporate codes in established theory are such that the conditions of power and its reproduction is considered as a given. The switch, I think, will have to come from the stakeholders themselves, by putting issues in non-economic vocabulary on the agenda, deploying the language of love, care and recognition, closer to their life world and present that as the base premise. Changing the language does not create an ideal speech situation with the counterpart who still is in complete deprivation of that language, utterly surprised, feeling not understood from their end.⁸⁸ Bridging that gap appropriately is essential. This also turns the premise around, switching from inclusiveness of the lifeworld into the Corporate World, to inviting the Corporate World to embrace the priorities of the life world. There is a BUT, which I will come back to later.

To bridge the gap between the two worlds, we need a process that is delicate enough for the purpose.

⁸⁶ An expression borrowed from Scherer & Palazzo: “..Habermas₁ is rather limited in the context of discussions on conceptualizing the ethical validity of business. “Habermas₂” as we call the new proposal, offers pragmatically enlarged and politically embedded access to CSR.” Quote from (Scherer & Palazzo, 2007, page 1105)

⁸⁷ Scherer & Palazzo, 2007, p. 1097

⁸⁸ Support for this premise comes from arguments like in Bert van den Brink’s plea for civic ‘duty’ of citizens. (van den Brink, 2013). Discourse ethics brings along a political struggle that needs courage. There is a role to play for the political and economic leaders, as well as the stakeholders. Challenges include dealing with power issues.

Scherer and Palazzo refer the work of Amy Gutmann and Dennis Thompson⁸⁹ for deliberative democracy. Gutmann and Thompson consider the deliberative form as a “less idealistic” and “more pragmatic” approach that “*narrows down the gap between the actual practice of political decision making and the theoretical purity of ethical discourses*”⁹⁰. This builds on the reframed and redefined concepts of economic activity, company and responsibility I discussed in the previous paragraphs. The corporate responsibilities are positioned in a context of changing stakeholder relations and strategic choices. It also solves an important problem Hegel positioned as a major risk of industrial activity if it is set up as a pure process of efficient production. Its relevance to human society marginalizes for the advantage of a happy few and makes it possible to place efficiency in the service of newly defined goals. The Codes are an exponent of a world where efficiency of the process of maximization of profit is organized. Reframing governance in a relevant way to the lifeworld will give the process its content requirements as well. These may not come in the shape of a Code, but more in the shape of a process to guarantee that the visibility and contribution of involved parties has a place and time to develop.

Now comes the BUT: This requires not only a publicly organised space, but at the same time private space(s) to think and reconsider, without judging and deciding. Listening, hearing each other's dreams, desires, understanding and recognizing them; only then to interact again and develop a view that recognizes these concerns and dreams to translate them into joint ambitions. Creating room for an active responsibility understanding, it should ultimately serve the lifeworld to flourish and gain meaning. Here is also the exact point where I see a complementary connection between the individualistic account of existentialism and the discursive theory. The private ‘in-between’ space to narrate, listen and reconsider, in the existentialist way, and the exchange of propositions of the discourse theory. The others then also become humans, different from a ‘generalized’ other, where the formation of the individual is a social process of being with others. The common ground on which the existentialist account rests together with discursive theory is exactly here, where language, communication, exchanges of propositions with norms and values and interaction comes together. I will refer here to Pettit's definition of an agent in § 2, where the beliefs and the desires of the agents need to match and find each other in action.

Two important issues related to power need further clarification: (1) who is party in this deliberation? (2) How does this deliberation take place in an environment of many hands and many responsibilities? On the matter of who is involved, I opt, as do others (Scherer & Palazzo, 2007) for the ‘all affected’ principle, where the pluralistic society makes room for each stakeholder to state his or her preferences. This complexity of ‘many hands’⁹¹ in responsibility is an inevitable consequence of societal understandings on governance. Ancient Greek conceptions of a leading group of governing families, aristocrats, larger group of educated and specialized politicians are out of date. ‘People’ are not ‘lead’ by others, recent developments show that people lead the leaders⁹². They show their

⁸⁹ Gutmann en Thompson, 2004

⁹⁰ Scherer en Palazzo, 2007. page 1107.

⁹¹ See earlier remarks in § 4.2.4. Social reality is not a simple two-dimensional picture, it is aggregated from different realities and bits and pieces. See (Bovens, The Quest for Responsibility, Accountability and Citizenship in Complex Organizations 1998) and (Thompson, The Democratic Citizen 1970)

⁹² Financial innovation has for example lead to ‘crowdfunding’. Where financial specialists decided if you were eligible for credit, now the crowd decides if you deserve funding. Tasks of specialists have either become redundant or advisory on specific aspects.

preference to leaders, who then accept the ‘wisdom’ of the crowd as a direction to follow. An operational manager can then work out the details. The proposed principle accepts pragmatically the reality of disagreement and believes that that is the compass to follow as the wisdom of the crowd.

On the matter of how this deliberation takes place, Amy Gutmann and Dennis Thompson⁹³ introduce two useful concepts: *Reciprocity* and *provisionality*. This helps to understand the nature of relations: As in the earlier mentioned analysis of Letza et al. the concepts of reciprocity and provisional understanding refer to an understanding of the representation of the reality as a process in development, not as a static given. Involvement is a consequence of this reciprocity and developing understanding because we give each other room. It is the process to ensure commitment to each other and take ownership for the chosen solution. It assumes the fundamental principle of reciprocity, of citizens owing each other justification for the mutual binding laws and public policies they collectively enact. Political presence and public responsibility requires involvement. This involvement is not free of commitment. On the contrary, the political commitment to the community, as referred to by Hannah Arendt⁹⁴ is fully defined by close identification with the environment, the community one chooses to belong to. *Provisionality* means in Gutmann and Thompson’s terminology “*open to challenge and amendable to democratic discretion*”. By accepting that all choices are part of a dynamic process, we accept that the decisions will have to follow the flow of time and space. It means that morally binding rules in society are constantly up for challenge and that they are therefore constantly to be (re)approved if necessary. In practice, we learn that acceptance of bad options can happen, even in moral dilemmas and choosing from several less good options is a reality. We win because everybody gets to make that decision and experience the challenge of difficult choices, not only the leaders.

Power relations are always there. Part of the neutralizing elements for the negative sides of it that create undesirable asymmetries can be embedded in the quality of the processes. Creating commitment is about involving the other and being prepared to take the other(s) seriously by upholding judgment and reconfirming positions as often as required by one of the parties. Such a deliberative embeddedness of political decision-making can be achieved by “*making routines of bargaining, campaigning, voting, and other important political activities more public-spirited in both process and outcome*” (Gutmann & Thompson, 2004, p. 54).⁹⁵ In reality this often means, small steps of improvement with possible delay in implementation. Realities are non-ideal and difficult to predict. The uniqueness of each person and their actions brings about new reactions that cannot be put in a programmed outcome. Dealing with unexpectedness is part of the reality check. Scherer and Palazzo formulate this the following way: “*...that dealing with changing requirements of the society, corporations need to replace their implicit compliance with assumed societal norms and expectations with an explicit participation in public processes of political will formation*”.⁹⁶

⁹³ Amy Gutmann and Dennis Thompson’s argument is in their article “Deliberative Democracy Beyond Process” in Fishkin en Laslett, 2003. p.31-53

⁹⁴ see our earlier reference to Arendt’s theory in § 3

⁹⁵ In ideal theories a healthy deliberation leads to an agreement. In real societies, things are less clear. Most of the time, choices are not between the good and the bad option but between the ‘not so good’ or ‘bad’ and ‘less bad’ options. These non-optimal realities only become acceptable as all affected can also see the whole picture of who is harmed by choices that part of the public makes. Referring to Fung, “*in real societies deliberative democrats act in a wide range of suboptimal circumstances*” Fung, 2005, p. 400

⁹⁶ Scherer & Palazzo, 2007 page 1108

Their recommendation for such a conception of corporate responsibility is based on the understanding that ‘actions’ by agents can be defined as *conscious choices of means to realize their intended aims*⁹⁷. Understanding or evaluating why someone has taken an action in a certain way is to know the motivation of the agent for her choice. These reasons are not ‘objectively’ observable in an empirical research model. Empirical research gives an incomplete view of why an action is taken and how a choice is made. Including the argumentation given earlier under § 4.2 the understanding and influencing of the choices and actions requires direct interaction between agents. The way this interaction precedes is one part of the discourse. It defines the process and ensures that not only the elite is involved, but that this core mainly facilitates the capacity of citizens to develop their own understanding and their will to participate. This interaction between companies and stakeholders defines the quality of the encounter. To fully comply with the requirements the process needs an understanding of the stakeholders life-world, discover shared values, evaluate risks involved and develop a judgment on how to act. Van de Ven and Dubbink⁹⁸ identify three main values relevant for the interaction: *Self-determination, Openness, and Solidarity*. All three are derived from Habermas’ discourse understanding. I see self-determination as a series of encounters where not ‘the company’ but individuals deliberate, influence each other’s preferences, and possibly alter them or create new ones. Openness to the diversity and plurality of mankind is part of the required conditions to engage in interaction. For an open and non-coerced discussion trying to create respective and mutual understanding, not so much solidarity but connectedness is needed. Solidarity assumes that I support someone else’s stand. In my view, the understanding of belonging and connectedness is more appropriate in this context than solidarity out of compassion.

According to Van de Ven and Dubbink, these core values create four principles relevant to the ‘discourse way of doing’. They see an advantage that institutionalizing these principles leaves room for local or national business cultures. The first principle holds that (a) citizens should have a say in those corporate policy areas, which have an effect on them. The second principle is (b) that corporations are not allowed to influence the formation of the political will other than by discursive means. Third, (c) that a corporation should be responsive to legitimate claims from all those affected by corporate activity and (d) that a corporation should, on balance, make a positive contribution to the society in which it operates.

The principles are simple enough, no rocket science, the important issue underlying these principles is that they promote the interrelatedness with the social and cultural environment, accept the relativity of human existence in relation to nature and their historical context. The strength of this discourse is its ability to incorporate the communities into the business realm, putting the external stakeholder in a totally different role from a mere pressure group. Here the compass develops, defining ‘the North’ and the right way to go; it is the interactive process of becoming and developing and creating change with each action.

⁹⁷ Based on Habermas’ discourse theory. (Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 1996)

⁹⁸ In (Brink 2011), pages 203-219, *Deliberative Democracy and Corporate Governance*. Van de Ven and Dubbink call their model ‘stakeholder capitalism’, as opposed to the more radical approach of Peter Ulrich in (Ulrich, *Ethics and Economics*, 2013). I have not taken this terminology because I believe with capital also being democratized by new financial and care principles than Van de Ven & Dubbink considered (like crowdfunding or co-investing in each other) the term capitalism is not appropriate any more. The core values they define are.

4.4 Rediscovering the Compass

Humans have always sought for their compass. As non-utilitarian philosophies define it, it is already embedded in the human capabilities. Its existence emerges with a competence, the moral competence, if you will, to recognize a moral issue when encountered, to be able to evaluate and act upon it. This competence, although intuitively there, needs to develop and flourish in an appropriate environment. The discursive deliberation I propose is not the end but the means to find that compass. It repositions the company's strategic decision-making⁹⁹ as part of 'public' activities, not as part of a different system isolated in its own 'corporate' world. In this un-isolated world of activities, I also propose to understand that the principle of caring for each other is part of the responsibility of all, including of those who happen to be the holders of capital or decision powered positions in the system. Giving this framework, "Governance" is best defined in the '*Zwischen-raum*', the in-between space of deliberation, where we take the time to think, design provisional opinions and validate them in different circles of the affected environment. Key in this *process* is that the process itself is not sufficient, specific *content* is required namely that of required economic result defined and the meaning of proposed activity to others and its acceptable (reasonable) effects on those involved.

The premise of this communicative and existentialist approach is that companies are not isolated and *therefore* not entitled to isolated decision making. It is recognized that their decisions *do* affect people and planet and *therefore* require more than just accountability towards stakeholders. This repositioned company finds its compass through the understanding of new meaning created through their economic activity, not only for the shareholder and the employee but also for all affected. This new meaning is generated by the diversified perspectives, enriched by joined activity of deliberations and creating space through 'suspended and provisional' opinion exchange, that goes beyond limited economic vocabulary. The redefined New Governance is no doubt not the final version. The Old Governance has its Codes to hold on to. The New Governance relies on the commitment and involvement process and the principles based on shared values described in the previous paragraphs. You will have noticed that accordingly the focus that started around Governance Codes resulted in less focus on Codes, more on Governance in general. This is an inevitable consequence of the fact that Codes are a product of Governance theories, and the New Governance works more on the principles of caring in a deliberative discourse than in Codes.

The subject of Governance Codes, as the practice of Corporate Governance, inevitably has an empirical component to it. This philosophical elaboration does the groundwork for those empirical issues that will arise from the new approach. An interesting road to new discoveries is awaiting us in the coming years. They will undoubtedly complement and correct the discussions of this paper. I am looking forward to that.

⁹⁹ Which decisions are eligible for deliberation, and which are not is to be decided by parties involved.

5 Conclusion

The issue discussed in this paper was whether Governance Codes could help create responsible behaviour of the leaders in public and private companies. As scandals keep happening, the paper concentrated on analysing the agency problems posed by the current Governance systems and discussing their philosophical foundations: From a philosophical perspective Codes are grounded on a Utilitarian understanding of maximizing the wealth, connecting to the contractual arrangements based on Hobbes' ideas or Kantian principles of perfect duties. Governance based on these theories considers companies and agents to be static entities with predictable behaviour based on reward motivation only. This approach to corporate accountability leads in its final form to a mentality of 'checking-the-boxes' to comply with the rules. In the process, the existence of compliance measures and reporting practices are mistaken for ethical responsibility.

I proposed to reconsider the Corporate Governance Codes, not in the light of ethical theories, but in the light of open processes based on human relations and the relations of humans with their environment. As part of this reframing process I looked into the key concepts developed around governing of companies, and reviewed the agents involved and their responsibility. My argument to do this is that governance is a typically political and democratic, therefore non-ethical issue, as it involves not so much personal accountability, but an institutional one where the organized system overtakes personal preferences. The importance of the individual is unmistakably there but the individual's personal ethical or moral convictions are not the ones at stake. It is the institutional responsibility leaders of public and private institutions have in their organisational role and corresponding responsibilities that matters. Questioning the concepts of governance theories led to the notion of a company structure connected with its environment, able to digest the requirements and find its compass in its embedded positioning with the community. The process this connection generates is inevitably co-designed by the public, which becomes an insider, and not an outsider, avoiding false representations based on detached and limited concepts with no traceable meaning. The argument builds further to question the so-called 'given' of current concepts. Reframing takes place from an existentialist account, on what gives meaning to human life, as humans interact with each other and the natural environment. Making room for an economy of meaningful life means that human life in connection with its environment is the pivotal centre, and the economy is an activity that serves more than basic needs of those in it. Connecting the worlds of financial and economic bureaucracies and the lifeworld of humans is inevitably a challenge. This was done through the discourse theory, fully realizing that this needed additional concepts as the provisionality and in-between spaces to create room for the connection of a system of power with the community of humans.

I argued, as my introduction stated, that the actors and the system of governance need to re-invent themselves, develop resilience to absorb the critical arguments to find their real purpose. The compass does not come in the shape of 'rules to follow' but in the form of a process to secure interconnectivity between humans and their environment. Economic activity and its agents are a natural part of this community. They can only function if they are related. The compass of the governance rules has become so isolated that it has lost its magnetic field with the human pole. Reframing is recovering this magnetic attraction.

Annexes

1. An example of an alternative: the Public Budgeting Process of Recife (Brazil)

2. Historical overview of the Emergence of Governance Codes & the OECD/EBRD Governance Principles

6 Annexes

6.1 *Alternative for Governance codes: Recife (Brazil) Budgeting Process*

Recife (Best, Brabender, Spink, & Teixeira, 2011)¹⁰⁰ is a city in the north east of Brazil, one of the first coastal ports, the capital of the State of Pernambuco. With its almost 3,5 million inhabitants together with some 13 other municipalities, it has played a key role for the area both politically and economically. It is often called the ‘Venice of Brazil’ thanks to its many waterways cutting through the city. The low flood and riverbanks are also the only areas where the poorer part of the population could build their homes. This led to shaky platforms with no drinking water, electricity and sewage services. Recife is at the same time a strong intellectual fort, a home for thinkers, movers and shakers like Paul Freire. Urban planning has been a problem for a long time, where poverty is a big issue, with some 38% of the population at an income level below the minimum wage and where 40% of the population lives in almost 500 ‘spontaneously occupied’ areas. The city’s very diverse social classes and their economical and intellectual differences has been a challenge for the local government.

Brazilian budget laws require the executive branch to present the budget proposal to the legislative for approval each year. But how the executive power chooses to develop the budget is open.

The Participatory Budgeting (PB) initiative has linked its activities to this opportunity in the democratic process to secure the collective decision process and therefore the shared responsibility for the decisions taken. Recife’s PB has three components that interweave through the budget cycle: The Regional PB, the Thematic PB and the Child PB. The names of the PBs reflect the subjects; the regional one focuses on the regional issues like infrastructural investments, the thematic one takes a citywide approach to discuss public policy initiatives related to key issue areas and sectors like culture, education, social assistance, male and female afro-descendants (a relevant local issue) human rights, women, elderly, LGTB, etc., and the Child PB gives the school children opportunity to discuss their school needs but also other issues when required. Participants are school children from 5 to 15 years. They are held with a two yearly cycle according to school calendar. The Regional and Thematic PBs are open to all residents over 16 years of age. These ones are held yearly in seven phases starting from informal meetings in January to voting and convincing of the municipal legislative representatives and deliberation of the investment plan in December. Of the yearly budget of some €170 million, around €14 million is directly allocated through this process. The PB programme organisation costs about €385.000 a year, mainly on communication, IT voting and support meetings. Attendance has risen in the early years, but remains relatively stable (around 45000 participants) for regional meetings, but kept consistently raising in the thematic meetings through diversification of the participation means (electronic, internet, live meetings) up to 74500 participants. There is a predominant participation of working class residents living in the poorer areas, but more recent years show a growing number of middle class and upper class participants. The Child PB fosters the development of responsive,

¹⁰⁰ The project has won the 2011 Reinhard Mohn Prize for Citizen Participation of the Bertelsmann Foundation, Germany. http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-8E317F50-C3C6C3A1/bst_engl/hs.xml/101086_106137.htm. For the working site of the Recife municipality on participative budgeting look into: <http://www.recife.pe.gov.br/op/>

critical, engaged and participative young citizens.

More interestingly, the budget process, usually seen as a boring financial activity for a few, has become

“...new meeting ground on which civil society, municipal authorities and the city’s legislative branch are learning how to work together and assume collective responsibility for the future of the city. This not only broadens democracy; it also deepens democracy in daily life.” (Best, Brabender, Spink, & Teixeira, 2011): 13

The project observers also have concerns they mention: Brazilian laws authorize but do not determine expenditures. In practice this means that citizens may see delays in getting their decisions and expectations realized. To monitor the sometimes long lasting implementation periods, local follow up and monitoring commissions guarantee the flow of information, but until the real start, the waiting period can become frustrating.

The role of NGOs is also observed to have changed considerably during the process of years. They act less as bridging and facilitating advocacy groups, but more like informing and opinionizing platforms.

As the Brazilian case shows, horizontal debate and social control can become widespread practices of participation after some years. In Recife the Mayor has been re-elected for a second period, and his successor is the former secretary in charge of the PB program.

6.2 *An Historical Overview of Corporate Governance Codes*

This annex gives an overview of the theoretical and practical developments in Corporate Governance thinking. It is not intended as a complete overview, but one that gives background information for the interested reader and as supporting annex for the paper. It highlights the main lines of thought and the context they developed in, including some citations from original writers to keep the authenticity.

6.2.1 The Emergence of Governance Codes

The Encyclopaedia of Corporate Social Responsibility¹⁰¹, under the heading of “Theory of Corporate Governance Emergence” defines Corporate Governance as:

“A continuous process of ordering and controlling actions and activities generated in corporate interrelated webs through collectively constructed governing rules and instruments” (Sun, 2013).

Concerns about Corporate Governance developed historically as a response to major crises of confidence, fraud or market failure where many suffered financially and professionally. The earlier theories are based on the concepts of ‘a private’ company, a production unit, self-owned and self-financed. When these production and service units grew, relation between owners and managers became an issue.

Traditional accounting practice looks at companies’ balance sheets, to give a ‘reliable’ estimate of its actual value. But then, these reliable estimates in tangible assets became difficult in the ‘dot-com’ era of the 90s. Internet and IT assets were difficult to value, expected incomes and continuity of companies were uncertain, but sky-high projected. Expectations were high; realizations were intangible and greatly unpredictable. Enron collapsed in 2001, the global accounting practice of Arthur Andersen followed. Then more companies stumbled, from Ahold to public institutions, housing agencies or educational groups financed by public money. As trust becomes a problematic issue, Corporate Governance gained in importance not only for private owned or listed companies, but also for public entities and smaller companies.

What lay behind these episodes and shift in trust, was the sense “of moral hazard associated with the accumulation of financial resources and power in the hands of corporations and the sense that the directors of these corporations, public and private, entrusted with the society’s wealth, were unaccountable and open to corruption. While the issues were about the personal morality of individuals, these episodes raised questions about the ethics of the corporate systems as a whole.” [Nordberg, 3-4]¹⁰²

Looking back we could narrate a series of these events from ~~the~~ 1929 to the present day, a continuous and on-going flow of mishaps have hurt many, and lead to an understanding of necessity to capture a way of controlling and steering trust. The ethics of the corporate system, joined by the questions on the morality of leaders (public and private) did not come as one linear development. They came in waves, and somehow disappeared again, as the public seems to want to believe in an optimistic scenario. Main players got hold of themselves, made arrangements to keep in control, but

¹⁰¹ (Sun, 2013) pages 2523-2531

¹⁰² (Nordberg 2011)

then the next wave of big missteps emerged and created a new wave. The Roaring Twenties have a different spirit than the Wall Street crashes of the 'Eighties, or the 'Nineties. Societies develop their own dominant vocabulary and logic, creating new tunnelled visions, trapped in their own conviction that things are (again) under control. An intriguing historical view, as crowds gather from time to time, to ask for a correction, but always too late to prevent the damage already done.

6.2.2 Agency theory sets the scene

How can trust be regained through Corporate Governance? An answer was sought from different angles, depending on one's view on human behaviour. Over the years several theories developed, with a recognizable pattern. Let me first give a historical overview and get later to the more recent empirical research to summarize the actual setup.

An early approach is often referred in handbooks to two scholars, a law professor Adolf Berle and economist Gardiner Means who published a book called *the Modern Corporation and Private Property*¹⁰³ analysing the crisis of the '30s. Their analysis shows how the industrious economy of the firms owned by individuals (or workshops) grew upstream and downstream over the years, integrating other companies in their operations to become the managerial capitalism as we know it now. Berle and Means' two main recognized contributions are the issues of separation of ownership and control of the companies. The separation of ownership assumed a conflict of interest between management and owners. Both agencies operate within the boundaries of the same entity; the company. Laws and regulations that were created to define the company as an independent entity, subsequently support the concept of conflicting interests within one company. The aim of this entity is recognized as 'profit maximization'. Legal instrumentation is created to support this profit maximization activity while internally the 'owner' and 'the management' need continuous internal governing arrangement to prevent the conflict of interest to undermine the profit maximization of the company. This very specific interpretation of the reality has defined most of our economic thinking since it first appeared. Without questioning its assumptions, scholars like Oliver Hart developed an economic framework for a theory of Corporate Governance¹⁰⁴ based on the presence of these conditions, the "agency costs", or an assumed conflict of interest between different agents within the organisation and the transaction costs that go along. Hart's argument is explicit:

"In the absence of agency problems, all individuals associated with an organisation can be instructed to maximise profit or net market value or to minimise cost. Individuals will be prepared to carry out their instructions since they do not care per se about the outcome of the organisation's activities. Effort and other types of costs can be reimbursed directly and so incentives are not required to motivate people. Also no governance structure is required to resolve disagreements, since there are none" (Hart, 1995, p. 678)

Hart states that agency problems alone do not provide a rationale for corporate governance, as that problem can be solved by performance related (profit related) compensation. Hart's logic is based on a hierarchy model where ownership (also referred to as 'the principle') is the highest in hierarchy. His assumption is that people are only motivated by money and have no other interests that could cause

¹⁰³ See (Dietrich & Krafft, 2012) chapter 7: the theory of Agency.

¹⁰⁴ (Hart, 1995) provides a theoretical framework for the conditions under which corporate governance issues are relevant, and derives implications with a case example of a public company.

disagreements.

Agency theory assumes this static and unbridgeable divergence of interest between shareholder and management and translates it in an economic formula: gross profit is a dependant of effort and a variable (of luck or chance). The compensation for managers should be a variable not of chance but of the net profit. Economists went about these calculations while the legal profession concentrated on the legal ramifications of the contractual arrangements.

Steve Letza, Clive Smallman, Xiuping Sun and James Kirkbridge describe in their article, the agency model as follows:¹⁰⁵

“Agency theory assumes that all social relations in economic interaction can be reduced to a set of contracts (specifying duties, rewards and the rights of the principal to monitor corporate performance) between principals and agents, where the role of contracts serves as a vehicle for voluntary exchange by actors (cf. Alchian and Demsetz 1972)...

As Letza & Co state, the main goal of agency theory is to determine the most efficient or optimal contract governing the principal-agent relationship within the corporation.

“The question is especially related to whether behaviour-oriented governance (e.g., salaries, hierarchical governance) is more efficient than outcome-oriented contractual governance (e.g., commissions, stock options) (cf. Eisenhardt 1989). For agency theorists, market-oriented governance structures best discipline managers’ behaviour. Financial theorists, however, claim that since managerial behaviour could be constrained by the pressures of capital markets, factor markets and the market for corporate control can best address the issue of management underperformance (cf. Manne 1965). The advocates of this model insist that current corporate governance mechanisms should be allowed to operate freely and that any interference with the market governance mechanisms is irrational and distorts them (cf. Hart 1995)”. [As quoted in (Brink, 2011, p. 160)]

The agency theory is crystal clear on who is to be considered an agent; shareholders are key. Their main issue is how to control the management’s behaviour to get the best possible results for profit. Arrangements are contractual rewards. There is no room for other parties (consumers, suppliers, public, environment, etc.) to be involved in realizing the best possible profit. Its normative source is difficult to locate, other than minimum requirement to operate within appropriate laws and motivation to have a profitable business preferably with cash return on investment. The rhetorical formulation used in general in the markets is: *“the business of business is business”*. In other words, business is only about selling goods and services, no other ethical or normative grounds can be found, other than profitability.

6.2.3 Shareholder Theory develops Value for Shareholders

The agency theory put in practice, developed in a specific model, under capitalist economic and market conditions, mainly from the US. Peter Ulrich, criticizing the shareholder model, for example, refers to a formulation of Milton Friedman (a publication from 1970) where ‘the social responsibility

¹⁰⁵ Steve Letza, Clive Smallman, Xiuping Sun, and James Kirkbride, *Philosophical Underpinnings to Corporate Governance: A Collibrational Approach* in (Brink), pages 159-176

of business is to increase its profits'. Historically speaking, this ethos leads in time to what is known as "maximization of shareholder value"¹⁰⁶. This positions shareholders' interest in a radical manner, as overruling all other interests, as the sole standard by which successful entrepreneurial activity is measured. All governing arrangements are supposed to serve the maximizing shareholder value. Other stakeholders, internal or external, almost disappear in relation to the sole purpose of the value creation for the shareholder. This puts economic concepts such as efficiency, productivity, employee benefits, or any other economic factor, in service of the main purpose of maximizing shareholders' value:

*The only responsibility the management has is the best possible exploitation of the capital at its disposal, as all decisions on the use of capital for social (i.e. 'non-economic') ends is exclusively a private concern of the owners, more or less in accordance with the following motto: "What are you doing with my money? I didn't invest in your company for philanthropic, humanitarian, or social objectives. I invested for profits. I'll make my own decisions about other uses of my money".*¹⁰⁷

In practice, as newspapers report daily, there is not only an ongoing discussion on the purpose of the company's activities, but also on short-term or long-term profits and on who benefits from the profit. Publicly noted companies are under continuous control of their results, over the years shifting from yearly reports to quarterly reports. Financial markets await and react to each quarterly report, expecting profits to come in a row of growth percentages. Employee's and other actors or quality requirements are only at stake, as much as they influence the profit margin. Investors know by now that bringing low quality products to the market will cost money, or unhappy employees will create problems like strikes, which again will diminish the profit. So management is required to balance the minimum required costs, with maximum possible value for shareholders. From this perspective, responsible behaviour can be defined as "behaviour that maximizes shareholder value". But in time, this became controversial, as more and more people become aware of the fact that societies will not accept the costs of such egocentric behaviour at the expense of many affected who are not allowed in the closed world of a company.

As Shell realized with its oil production facilities in Nigeria or more recently the Rana Plaza¹⁰⁸

¹⁰⁶ Referred to in (Ulrich, Integrative Economic Ethics: Foundations of a Civilized Market Economy 2008). Ulrich notes that this notion of maximizing shareholder value has gained support after the publication of A. Rappaport's *Creating Shareholders Value*, (New York Free Press, 1986, second edition 1998)

¹⁰⁷ Cited in (Ulrich, Ethics and Economics 2013), page 392. The quote is the viewpoint of an anonymous shareholder in a company, as noted by in M. Anshen, 'The Socially Responsible Corporation: From Concept to Implementation', in Anshen (ed.),

¹⁰⁸ In the 1990s tensions arose between the native [Ogoni](#) people of the [Niger Delta](#) and Shell. The concerns of the locals were that very little of the money earned from oil on their land was getting to the people who live there, and the environmental damages caused by the recurring sabotage of pipelines operated by Shell. In 1993 the [Movement for the Survival of the Ogoni People](#) (MOSOP) organized large protests against Shell and the government, often occupying the company production facilities. Shell withdrew its operations from the Ogoni areas. The Nigerian government raided their villages and arrested some of the protest leaders. Some of these arrested protesters, [Ken Saro-Wiwa](#) being the most prominent, were later executed, against widespread international opposition from the [Commonwealth of Nations](#) and [human rights](#) organisations.

On 24 April 2013, Rana Plaza, an eight-story commercial building, [collapsed](#) in [Savar](#), a [sub-district](#) in the [Greater Dhaka Area](#), the capital of [Bangladesh](#). The search for the dead ended on 13 May with a death toll of 1,129. Approximately 2,515 injured people were rescued from the building alive. It is considered the deadliest garment-factory accident in history, as well as the deadliest accidental structural failure in modern human history. The building contained clothing factories, a bank, apartments, and several other shops. The shops and the bank on the lower floors immediately closed after cracks were discovered in the building. Warnings to avoid using the building after cracks appeared the day before had been ignored. Garment workers were ordered to return the following day and the building collapsed during the morning rush hour. Both examples of Shell and Rana Plaza, show how great the impact of a company's decisions can be on others, who are not

clothing industry in India, companies are not isolated entities, as they sometimes tend to think. They are part of a larger community even if they are a company (a closed entity) in the legal sense of the word. They have relations with their environment and promises to keep, whether they acknowledge them as such or not. In the reality of the physical world, they form a working unit within the local or even global community, like in the case of Shell and Rana Plaza connected not only with Nigerians, or Indians, but also with almost any country where oil and clothing can be found. The sole interest of the shareholder as dominant element was difficult to maintain. Finding the balance in creating shareholder value and doing harm to others is difficult in splendid isolation with an occasional visit to the world of the common people.

6.2.4 Stakeholders gaining position

The Stakeholder theory, with R. Edward Freeman¹⁰⁹ as its spokesperson, evolved in a more social version of shareholder capitalism. Freeman argues why the primacy of the shareholder is an erroneous and socially disruptive account of how businesses should be governed. It is based on false assumptions of egoistic and competitive human motivation, it ‘crowds out’ ethical motives from business decisions, it arbitrarily promotes the interests of a dominant group (the shareholders) over others, and it necessitates the development of a big juridical system to protect the society from the consequences of the egoistic and amoral behaviour of the business world.

In his later works Freeman develops the stakeholder model, later on to become the strategic management model, based and geared to the success of managing the different stakeholders to secure economic success for the company and its actors. Freeman’s input is not considered to be interested in corporate social responsibility per se, but more focused and correcting the imperfections of the shareholder (or sometimes called stockholder) model.¹¹⁰

“From an economic perspective, stakeholder management is strategic management, based on the central idea that the economic success or failure of a company is determined by those actors that take an interest in the company’s success because it simultaneously helps them realize their own interests. Management theories that deal with the function of stakeholders are basically specific value-added theories whose main assumption is that taking into account and integrating the interests of the actors involved in company decisions and transactions creates economic value and new docking points for economic transactions, both for the company and the involved actors. This version of stakeholder theory is not interested in economic democracy, co-determination, corporate social responsibility, etc. (cf. Freeman 2004), but in shaping the conditions for the economic success of a network of economic actors (cf. Freeman et al. 2011).”

Formally, the stakeholder model differs from the shareholder model in that it takes the interests of more stakeholders into account. Stakeholder model would for example include employees’ interests, consumers’ or customers’ interests, sometimes local communities like the municipalities or those living around a factory. It is however not all that clear how these interests are accounted for. This

entitled to any say in the governance and decision making process. These disasters, different in their nature to financial crises are part of insufficient functioning of limited governance arrangements in the closed entities of freely operating companies.

¹⁰⁹ See (Freeman, Venkataraman en (eds) 2002) (R. E. Freeman 1984)

¹¹⁰ See several papers in (Brink 2011)

approach is often criticised as an instrumental argument to create profit, not a fundamental improvement of the shareholder primacy. Peter Ulrich is one of those critics who doubts the value given to other interests¹¹¹:

The interests of the other stakeholders, however, are not seen to be valid in terms of their legitimacy and the corresponding claims, but are only taken into account instrumentally as a means of increasing the shareholder value. This is the specifically economic aspect of this doctrine. (Ulrich, 2008, pp. 393-394).

Some other critics are even more sceptical. In his edited handbook on Corporate Governance, Thomas Clarke does recognize the existence of stakeholder theories, but doubts if they are theories and models that can work at all:

Called by some stakeholder theory, it involves the balance of corporate responsibility, accountability and power throughout society, effectively being concerned with beliefs about relationships between the individual, the enterprise and the state. It is not a predictive theory that can be easily researched. Consequently, this societal view of corporate governance is considered by some scholars as rightly treated as a philosophy rather than a theory (Clarke, Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance, 2005, p. 58).

Companies, stakeholder advocates argue, should recognize a responsibility to *all* those affected by companies' decisions, including employees, customers, partners in the supply chain, bankers, shareholders, the local community, broader societal interests including the non-human environment and public institutions like the state. Especially in recent years, when financial institutions needed public money to save their existence, journalists and media started questioning the duties of companies and the accountability and justification of decisions by the board of directors. Clarke & cs. find no official support for this view:

The 1998 UK Hampel Committee dismissed stakeholder notions, saying, 'Directors are responsible for relations with stakeholders, but are accountable to the shareholders', a view reflecting the conventional wisdom in many boardrooms around the world.

Stakeholder theory still has other problems to deal with in the understanding of the 'all affected'. Some argue that this 'all affected' principle could include for example terrorist groups' interest. The answer of Freeman to this is that we should indeed consider interests of terrorist groups in our business, so much so, that we might decide not to serve those interests. This view, in fact does support the Hampel Committee's view on the difference between being responsible and being accountable. Stakeholders come in as relations to include in our considerations, shareholders as those we report to.

6.2.5 Empirical research on Governance Codes

While theories were discussed, empirical research looked for ways to capture the Governance Code

¹¹¹ (Ulrich, Integrative Economic Ethics: Foundations of a Civilized Market Economy 2008), pages 393-394. Ulrich discusses here different views on entrepreneurship, but inevitably for 'unproductive stakeholders', they will never be allowed to have any influence or part in the economic activity of a company.

practices.¹¹² Some only report on statistical developments¹¹³ but more interesting ones for our purpose concentrate on the following questions: How do different views look like when they are translated into Codes of Conduct? And, if the rules and regulations get better with every adjustment and amelioration after each crisis, where does it go wrong in the governance? The research on the effectiveness of Corporate Governance Codes¹¹⁴ is inconclusive: partly due to the limits of empirical research, partly because the questions asked around the effectiveness are so detailed and concentrate on specific data, that they miss the core. Research into the background¹¹⁵ of corporations and how corporate governance attempts to grasp it into governance codes inevitably leads to the conclusion that it lacks theory and methodology:

Despite the dramatic surge in academic interest in corporate governance since the 1990s, research has so far failed to offer a convincing explanation of how corporate governance really works, and has contributed little to the development of the subject. All significant regulatory and professional developments have been responses, not to research findings or theory building, but to corporate collapses, domination by powerful individuals, or corruption. The Sarbanes–Oxley Act in the United States, and the corporate governance codes in all economically developed nations, have been based on the experience and conventional wisdom of company directors, not on conclusions from rigorous research.

Today, the subject lacks a conceptual framework that adequately reflects the reality of corporate governance. The theoretical perspectives focus on different levels of abstraction: for some the relevant system covers the financial markets, for others it is the governing body, and yet for others individual chairman, CEOs and directors are in the frame.¹¹⁶

Nevertheless, different attempts to categorise and theorise corporate governance have been made based on the current practice worldwide. Although most of the literature refers shortly to ‘shareholder versus stakeholder’ models, the dichotomy is usually rejected as not representative for the reality. Hence, scholars set out to find different criteria to categorise. In such an attempt Johan Otten configures five ‘philosophies’¹¹⁷ to characterise the different models after an analysis of 131 Corporate Governance Codes of 49 countries (Otten, 2007). Otten also sees codes as manifestations

¹¹² An example of the Principles that are followed in Governance Codes is in Annex II. The version in the annex is being updated in 2015.

¹¹³ Mijntje Luckerath has for example a regular publication focusing on diversity and the building stones for improved performance of boards. <http://www.mluckerath.nl/publicaties> (Luckerath-Rovers, 2012)

¹¹⁴ (Kaptein en Schwartz 2008) give several reasons for conflicting results of research to the effectiveness of business codes. The main reasons are to be found in varying definitions of key terms, deficiencies in the empirical data and methodologies used; but also a lack of theory. In *Codes of Governance Worldwide*, by Ruth Aquilera & Alvaro Cuervo-Cazurra, an attempt is also made to understand why some areas work better with codes than others, relating it mainly to the influence the issuing institution has on the companies. (Aquilera en Cuervo-Cazurra 2004)

¹¹⁵ In 2003 a book and a documentary (Canadian film award winner) was produced named “The Corporation” narrating the growth of the corporation as an institution within the last 100 years. Corporations, once insignificant workshops, are now one of the main institutions in the world, like the government or the church. (www.thecorporation.com). Several scholars also researched a number of the scandals and group the reasons for scandals more or less as defined. See for example, Prof. Vincenzo Bavoso, *Explaining Financial Scandals*, 2012. Or even Wikipedia: http://en.wikipedia.org/wiki/List_of_corporate_scandals

¹¹⁶ (Clarke, Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance, 2005, p. 59)

¹¹⁷ The 5 inductively acquired views are labeled as philosophies, as they reflect 5 different fundamental generalized beliefs and attitudes on how corporate governance arrangements can be structured. In that sense, Otten’s ‘philosophy’ does not reflect a philosophical thought but rather a belief system within corporate governance practices.

of a specific philosophy of governance, reflecting how the company sees itself and its relation to its environment:¹¹⁸

- (1) *A structural conception of firm internal corporate governance mechanisms, labeled organizational design (e.g. see Dalton et al., 1998);*
- (2) *A corporate governance approach organized around the rights and responsibilities of parties that own large parts of the firm, labeled ownership concentration (e.g. see Shleifer and Vishny, 1986);*
- (3) *An approach oriented towards the protection of (minority) shareholders, labeled ownership dispersion (e.g. see Grossman and Hart, 1980);*
- (4) *An alternative conception of governance, rooted in the idea that executives often act as benevolent stewards rather than as potentially opportunistic agents, which is labeled as managerial empowerment (e.g. see Donaldson, 1995; Davis, Schoorman, and Donaldson, 1997); and*
- (5) *An approach of corporate governance that is structured around the flows of blame and praise, which is labeled esteem responsiveness (e.g. see Brennan and Pettit, 2004).*

Otten's analysis is that the largest chunk of the codes are the first and second model, those codes aiming to streamline checks and balances within the organization and codes aiming to clarify the rights and responsibilities of ownership and management. All 'philosophies' show that the issues concentrate around control, ownership and management behaviour. Otten brings more depth to the dichotomy of shareholder vs. stakeholder models, but not to the extent that it changes the main subject, agent and relations within the paradigm. Only the 5th approach labelled as 'esteem responsiveness' involves more than the principle-agent relation. In Otten's words: *The controlling effect of esteem has intrinsic and extrinsic components. The intrinsic component consists of the fact that all individuals are to some extent "hardwired" to desire the esteem of others*¹¹⁹. Otten connects here this 'extrinsic attraction of esteem' to the public arena, where the company has the potential of being positively evaluated by the public and creating for itself public goodwill. However, this potential for goodwill is still connected to improved performance and entitlement of the management for higher executive pay.

Governance Codes emerge as exponents of a typical Corporate Governance understanding as the capitalist economy develops its free enterprise mechanism. Its paradigm is content- and context dependent. It depends on the industry, legislation context, local or global presence. At the same time it has its defined agents in 'owners', 'investors', and 'the executive management' (or the board). Specific responsibilities and roles are attributed to agents. Equity owners expect return for their investments, while managers deliver the expected results. No noteworthy role is attributed to anyone outside the closed circle of the company, other than instrumental ones to maximize the profit or the return on investment.

This raises also the second question on the effectiveness Governance Codes. In their study on the effectiveness of Codes Muel Kaptein en Mark Schwarz come to the conclusion that the results are too diverse to be conclusive.¹²⁰

¹¹⁸ (Otten, 2007, p. 157)

¹¹⁹ Otten's reference is here to J.A.Fodor's 'the Modularity of Mind', 1983.

¹²⁰ (Kaptein & Schwartz, 2008, p. 112)

The conclusions of many conceptual studies on the effectiveness of business codes thus range from largely counterproductive (Grundstein-Amado, 2001), ineffective (Ladd, 1985), often ineffective (Warren, 1993), insufficient (Kram et al., 1989), not enough (Hyman et al., 1990), not very effective (Robin et al., 1990), uncertain (Myers, 2003), doubtful (McCoy, 1985), little impact (Lere and Gaumnitz, 2003), and less effective than their proponents think (Doig and Wilson, 1998), to needed (Rezaee et al., 2001), necessary (Cooper, 1990), valuable (Wood and Rimmer, 2003), vital (Coughlan, 2005), invaluable (Sethi, 2002), effective (Clarkson and Deck, 1992), and successful (Dobson, 2005).

The study proposes to consider the difference between business codes that *are* effective and those that *could be* effective. Empirical material is scarce and methodologies differ as much as definitions. Without getting too much into the technical details of their research, I quote:

Due to the divergent and even conflicting conceptual views on the effectiveness of business codes, the question arises as to whether empirical studies can provide more clarity on the matter. The good news is that ample empirical studies have been conducted in this field. The bad news is that the results are also mixed.

Earlier I had mentioned four possible answers for the reasons behind the recurring scandals despite corporate governance codes. There is no easy answer, both design and implementation is problematic. As Kaptein & Schwartz's insights confirm, the effectiveness of codes cannot be taken for granted. Many factors influence how effective codes are: shareholder expectations, stakeholders' expectations and therefore external codes to comply to, how codes are developed within the company, how they are implemented, characteristics of management, etc. Kaptein & Schwartz' paper largely corroborates with the factors summarized earlier in Otten's work. Most variables at stake depend on how the company's management and owners behave, and as some bluntly put it: *"those to whom it is addressed and who need it the most will not adhere to it anyway, and the rest of the good people in the profession will not need it because they already know what they ought to do"*¹²¹

After this historical overview, here is how Governance Codes look like in 2015:

6.2.6 Corporate Governance Guidelines for Governance Codes

The Core Principles of a Corporate Governance Framework (CGF) formulate the essence of Governance Codes worldwide. As Codes are differently formulated in each country, or even in each sector, OECD and other financial institutions such as EBRD work with general principles as guidelines for Codes. More about Codes can be found at the website OECD: <http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm>.

1. **A CGF should aim promote business ethics, fairness, transparency, accountability, responsibility and market efficiency.**

Markets can be transparent and efficient only if participants are educated to understand and encouraged to implement accountability and ethics. Business ethics, transparency and market efficiency are key pillars of corporate governance.

¹²¹ John Ladd as quoted in Kaptein & Schwarz (Ladd, J.: 1985, *The Quest for a Code of Professional Ethics*, in D. J. Johnson Snapper (eds.), *Ethical Issues in the Use of Computers* (Wadsworth, Belmont), pp. 37–38.

2. A CGF should be flexible and enforceable.

A CGF should be flexible enough to allow fast adaptation to market changes and sufficiently enforceable to ensure that rules are respected. A CGF should be a mix of primary, secondary legislation and voluntary codes. Secondary legislation and voluntary codes should be modelled on primary provisions. The compliance with the codes should be monitored and the market should receive detailed and reliable information about implementation, and compliance.

3. A CGF should ensure clear division of tasks, rights and responsibilities between management and shareholders.

A clear division of tasks between company's bodies is essential for an effective and transparent management of the company in a competitive market. Rights and responsibilities follow such division of tasks. Shareholders should have the possibility to participate effectively in key corporate governance decisions. The management should be free to run the company within the boundaries of the shareholders' and charter's mandate. Shareholders should have all information to control and assess the management of the company.

4. Shareholders should have easy access to their rights.

It is not only important that rights of shareholders are clearly stated, but also that shareholders – both national and foreign - have easy access to their rights. Essential rights include information, voting and profit sharing. A CGF should allow use of electronic communication and easily accessible and transparent voting in absentia procedures.

5. Shareholders of the same class should be treated equally.

The principle of the equal treatment of shareholders of the same class is a key issue in corporate governance. All shareholders should have the same possibility to take profit from increase of corporate value according to their shareholding. In case of change of control, shareholders should be fully informed and free to decide whether to sell their shares or not. Anti-takeover measures should be approved by shareholders.

6. Stakeholders should have the opportunity to obtain effective redress for violation of their rights.

Stakeholders should have the possibility to obtain redress for violation of their rights when stated by law or agreement. Effective methods should be in place to obtain redress at a reasonable cost and without excessive delay. A correct balance should be found between safe harbours and the right to seek compensation.

7. A CGF should ensure timely, accurate and verified information disclosed to all stakeholders.

8. One of the essential rights of stakeholders is to receive regular and reliable information for a sound assessment of the company management and profitability.

A CGF should ensure that investors, creditors, employees, the market, the regulator and all other stakeholders can rely on the information received by the company and act accordingly. In particular, financial information should be prepared in accordance with high quality standards of accounting. The integrity of the market requires information be reliable, timely disclosed, regularly updated and easily accessible.

9. The shareholding structure of a company should be transparent.

Arrangements, mechanisms and structures aiming to lengthen the control chain (beyond known controlling parties) or to exercise a degree of control not corresponding to the level of risk should be disclosed. Pyramid structures and cross shareholdings are usual but should not be transformed into abusive mechanisms. The market should be promptly warned about the presence of such structures, sufficiently to assess any lack of transparency or accountability/auditing problems.

10. A CGF should put in place a structure able to independently verify and safeguard the integrity of a company's financial reporting.

Internal and external control mechanisms should be tailored taking into consideration the public interest of a transparent market. Sanctions should be appropriate and tailored to discourage any possible abuse. Rating companies and firms providing recommendations to the market should be able to express their overview independently. Control mechanisms should be able to assess and verify all international cross border participations and activities.

11. The management should act at all time in the interests of the company and the shareholders.

Abusive behaviour by the board should be prohibited and discouraged. Board remuneration and compensation schemes should be approved by shareholders. Material interests by executives in transactions or matters affecting the company should be disclosed. The management should include independent directors in charge of specific tasks for the avoidance of conflicts of interest.

The Organisation for Economic Cooperation and Development (OECD) is the main platform in the world where different stakeholders as governments, trade unions and corporations discuss world economic issues. When OECD published its Principles of Corporate Governance in 1999, it stated in its introduction that the principles were developed for financial market stability, investor's trust and economic growth. In 2004 at its revised version, it still states:

"The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions. Of particular relevance are the relation between corporate governance practices and the increasingly international character of investment. International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible, well understood across borders and adhere to internationally accepted principles. Even if corporations do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, reduce the cost of capital, underpin the good functioning of financial markets, and ultimately induce more stable sources of financing." (OECD, 2004): 13)

OECD's main argument for governance codes is the regulation and normalisation of relations, helping companies to operate more efficiently, gain access to capital, safeguard against corruption and mismanagement by ensuring clear expectations on what is understood as ethical behaviour. The document is divided into two parts. The Principles presented in the first part of the document cover the key areas of governance, such as: I) Ensuring the basis for an effective corporate governance framework; such as following the rule of law and clear division of responsibilities II) The protection of the rights of shareholders and facilitation of key ownership functions; III) The equitable treatment of shareholders, including minority and foreign shareholders; IV) Enhancement of the role of all stakeholders for creation of wealth, jobs and financially sound corporations; V) Timely and accurate disclosure of all relevant materials and transparency on the financial situation, performance, ownership and governance of the corporation; and last but not least VI) The monitoring of the responsibilities of the management board and its accountability. The second part of the document gives more background and optional arrangements, as the principles are guiding not binding.

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