

Global Harmony and the Rule of Law

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CHRISTOPH LÜTGE

FUNDAMENTALS OF ORDER ETHICS: LAW, BUSINESS ETHICS AND THE FINANCIAL CRISIS

INTRODUCTION

The relation between law and business ethics is usually seen as something not quite unproblematic. Is what is legal also just? Is what is unjust also illegal? The different approaches to business ethics hold quite different views in this regard.

Many approaches see the two rather as *distinct* enterprises: Business ethics, according to them, starts where the law ends.¹ By contrast, the order ethics approach, which will be laid out here, regards law and business ethics as *complements*: Many laws and institutions themselves already incorporate ethical lessons. For example, antitrust laws serve an important ethical purpose, i.e., to prevent the rise of monopolies and oligopolies, which leave every individual worse off – even the monopolist or the oligopolists' themselves, in the long run, and in particular as consumers. In this way, an ethics of the market economy has been formulated, which after the downfall of communism lent an ethical rationale to the only economic model left.²

The financial crisis has, in the views of many, changed this picture. All of a sudden, those market critics that seemed muted are back on the scene. Governments that until recently were very much in favour of market self regulation and cutting down on government shares are now spending hundreds of billions for stabilising financial institutions, but also other industries deemed crucial for the economy. Suddenly all those pledges of reducing debt and of decreasing government seem forgotten. Keynesian deficit spending seems to be back – and once the floodgates have been opened, it gets very difficult to find any rational justification for restricting government money to only specific utilisation. Sometimes it even becomes difficult to rationally argue about markets and capitalism at all, as if the results of decades of economic research have been rendered invalid all at once.

In this article, I will lay out fundamental ideas of the order ethics which employs economics as a key theoretical resource and which focuses on institutions for implementing moral norms. In the course, it will become clear that this ethics of the market economy has not ceased to be of value after the financial crisis.

1 See, for example, Andrew Crane / Dirk Matten, *Business Ethics: A European Perspective*, 2003, 9.

2 Cf. Christoph Lütge, Economic Ethics, Business Ethics, and the Idea of Mutual Advantages, *Business Ethics: A European Review* 14(2) (2005), 108–18; Karl Homann / Christoph Lütge, *Einführung in die Wirtschaftsethik*, 2005; Ingo Pies / Markus Beckman / Stefan Hielscher, Moral Commitments and the Social Role of Business, *Business Ethics Quarterly* 19(3) (2009), 375–401.

I ORDER ETHICS

Order ethics highlights the importance of rules, which in the case of the banking system means the (global) rules for financial markets. In this regard, order ethics (“Ordnungsethik”) is the complement of the German conception of ‘Ordnungspolitik’ which also stresses the importance of a regulatory framework. This framework is needed not to tame the market, but to make it more profitable in the long run.

Philosophically, the conception of order ethics relies heavily on contractarianism.³ The idea of justifying normative statements in a contractarian approach goes back to origins in Plato’s *Crito*. It has been elaborated in the classic contractarian tradition of Hobbes, Hume and Spinoza, and in the contemporary works of John Rawls and James Buchanan.⁴ The basic idea is that society is seen as a cooperation for mutual self-interest. The rules of a society, and of its economy, are agreed upon by the participants in a situation like Rawls’ “original position”⁵. In accordance with Rawls’ principles of justice, it will be in the mutual interest of all to devise rules that will improve everyone’s position, and in particular, that of the least well-off. This idea is taken up in the order ethics conception, which focuses on the order framework of a society as a means for implementing ethics within the economic world.

I will present the basic logic of the order ethics approach, starting with its treatment of social conditions, including the law and competition. Second, I will explicate the distinction between action and rules, and third, the role (mutual) advantages play in its treatment of ethical norms.

1.1 COMPETITION AS A SOCIAL CONDITION

Unlike many other conceptions of ethics, order ethics does not start with an aim to achieve, but rather with an account of what the social world – in which ethical norms have to be implemented – is like.⁶ And most important: The modern social world differs strongly from the pre-modern one. Pre-modern societies played zero-sum games in which people could only gain significantly at the expense of others. This view of a “zero-sum society”⁷ is concisely expressed in the words of the successful 15th century Florentine merchant Giovanni Rucellai: “by being rich, I make others (which I might not even know) poor”⁸.

Modern societies, by contrast, are societies with continuous growth. This growth has only been made possible by the modern competitive market economy which

3 For the classic contractarian tradition, cf. John W. Gough, *The Social Contract. A Critical Study of Its Development*, 1967.

4 Cf. Thomas Hobbes, *Leviathan*, ed. by R. Tuck, 1651/1991; David Hume, *A Treatise of Human Nature*, 1739–40/1978; Baruch Spinoza, *The Political Works*, ed. by A. Wernham, 1670–77/1965; John Rawls, *Political Liberalism*, 1993; Lütge (Fn. 2), 108–118; Christoph Lütge, An Economic Rationale for a Work and Savings Ethic? J. Buchanan’s Late Works and Business Ethics, *Journal of Business Ethics* 66(1) (2006), 43–51.

5 Rawls (Fn. 4), 22 ff.

6 Cf. Lütge (Fn. 2), 108–118; Homann/Lütge (Fn. 2).

7 The term has been made popular – in a slightly different sense – by Lester C. Thurow, *The Zero-Sum Society: Distribution and the Possibilities for Economic Change*, 1980.

8 Rucellai 1772 (written about 1450).

enables everyone to pursue their own interests *within a carefully devised institutional system*. In this system, positive sum games are played, which makes it in principle possible to improve the position of every individual at the same time. Most kinds of ethics, however, resulting from the conditions of pre-modern societies, ignore the possibility of win-win-situations and instead require people to be moderate, to share, to sacrifice. Indeed, this would have been functional in a zero-sum society: The types of ethics still predominant today have been developed within pre-modern zero-sum societies. And these conceptions distinguish – in more or less strict ways – between self-interest and altruistic motivation. Self-interest is seen as something evil.

Such an ethics is not functional in modern societies. Ethical concepts lag behind. Within zero-sum games, it was necessary to call for temperance, for *moderate* profits, or for a condemnation of lending money at interest. Within positive-sum games, however, the morally desired result of a social process cannot be brought about by changes in motivation, by switching from ‘egoistic’ to ‘altruistic’ motivation. Instead, in the modern world, the individual pursuit of self-interest promotes traditional moral ideals in a much more efficient way: These ideals are implemented in the order framework of a society. They govern the market, and via competition on the market, the position of each individual can be improved: the positive sum results. And this positive sum is visible in the form of innovative products at good value for money, of jobs, of income, of taxes and so on. So within the positive sum games of modern societies, the individual pursuit of advantages is in principle compatible with traditional ethical ideas like the solidarity of all.

Competition is pivotal in this picture: Order ethics emphasizes the special role competition plays in a society which is characterized by market interactions throughout. Competition has positive and negative aspects: It fosters innovation, the spreading of new ideas and it tends to erode positions of power (for example, those of former monopolists).⁹ It has, however, negative aspects too: The outcomes of a competitive situation are efficient, but not necessarily just. Moreover, luck plays a role, not only merit. But most important for ethics is that in competitive situations, morality is constantly in danger of getting crowded out. The prisoners’ dilemma¹⁰ is the classic model for highly competitive situations which can work against morality, but which can also work in favour of morality if the rules of competition are set adequately. In particular, the incentives set by the rules should not thwart what is deemed ethical. As an example, if corruption is seen as unethical, then rules which allow for corruption (for example, allowing bribes to be deducted from tax) will promote unethical behaviour – no matter what public calls for morality are being launched. Therefore, order ethics aims at changing the order framework of a society rather than at appealing to moral behaviour. This does not imply that people cannot behave ethically, but rather, that ethical behaviour must not get punished by the incentives. The role of rules will be made more explicit in the following section.

9 Cf. Friedrich A. von Hayek, *Competition as a Discovery Procedure*, in: *F.A. v. Hayek: New Studies in Philosophy, Politics and Economics*, 1978.

10 Cf. Robert Axelrod, *The Evolution of Cooperation*, 1984.

1.2 ACTIONS AND RULES

The second theoretical element introduced by order ethics is the distinction between actions and rules. Traditional ethics concerns actions: It calls directly for changes in behaviour. This is a consequence of pre-modern conditions as reconstructed before: People in the pre-modern world were only able to control their actions, not so much however the *conditions* of their actions. In particular, rules like laws, constitutions, social structures, the market order, and also ethical norms have remained stable for centuries.

In modern societies, this situation has changed entirely. The rules governing people's actions have increasingly come under control. In this situation, ethics has to focus on rules. These rules itself cannot however be recognized by pragmatic or common sense approaches to business ethics. Morality has to be incorporated in incentive-compatible rules. Direct calls for changes in behaviour without changes in the rules lead only to an erosion of compliance with moral norms. Individuals that continue to behave 'morally' will be singled out, because the incentives have not been changed. More precisely, there are three problems here: First, only changes in rules can change the situation for all participants involved *at the same time*. Second, only rules can be enforced by sanctions – which alone can change the *incentives* in a *lasting* way. Third, only by incorporating morality in the rules can competition be made productive, making the individuals' moves moral-free *in principle*. With the aid of rules, of adequate conditions of actions, competition can realize advantages for all people involved. In this way, Adam Smith's classic idea of the market promoting the interests of all can be (re-) captured: If the rules are set adequately, self-interest as the dominant motive in actions can bring about the ethically desired results.¹¹

Thus, rules open up new opportunities in actions. But there is an even more important lesson to be learnt from this theoretical perspective: Rules and actions must be prevented from getting into opposition with one another. Ethical behaviour on the level of actions can only be expected if there are no counteracting incentives on the level of rules. In the classic model of the prisoners' dilemma, the prisoners cannot be expected to cooperate, because the conditions of the situation (the 'rules of the game') are such that cooperation is punished by defection on the part of the other player. In other words: In PD situations, actors are permanently faced with the possibility of being 'exploited' by others if behaving cooperatively, and therefore they stop cooperating themselves pre-emptively.¹² This leads to a situation where rational, self-interested actors end up with a result that leaves all worse and no one better off: Morality gets crowded out.

Actions are governed by rules, but what about rules themselves? In the order ethics picture, rules are governed by other rules of higher order. Higher order means

11 Cf. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. by R. Campbell/A. Skinner, 1776/1976.

12 This is an alternative interpretation to the popular view that in these situations, we observe a decline in morality. For a recent example, cf. Susanne Karstedt/Stephen Farrall, The Moral Economy of Everyday Crime. Markets, Consumers and Citizens, *British Journal of Criminology* 46 (2006), 1011–1036. What Karstedt and Farrall interpret as a current decline of morality in Germany, can rather be seen as a pre-emptive counter-defection by large parts of the population aiming to *protect* themselves.

that there is a greater degree of consent needed to put these rules in effect or to change them – as is the case with laws and constitutional rules, for example.¹³ Ultimately, the only normative criterion that is needed here is consent – the core criterion of the contractarian tradition.

1.3 IMPLEMENTATION AND ADVANTAGES

The relation between implementation and justification in order ethics is different from the one in many other ethical theories: Most ethical theories, whether consequentialist or deontological, proceed by first giving a justification for their norms and then looking for ways of putting these norms into effect. The problem here is that the social conditions for implementation, especially in modern societies, are taken into consideration only *after* a justification has already been established. In this way, there is no room for the idea that a norm may not be justifiable *because* there is no way to implement it: Ought implies can.

It must therefore be clear that moral norms which are to be justified cannot require people to *abstain* from pursuing their own advantage. People abstain from taking ‘immoral’ advantages only if adherence to ethical norms yields greater benefits over the planned *sequence* of actions than defection in the single case. Thus ‘abstaining’ is not abstaining in the long run, it is rather an investment in expectations of long-term benefits. By adhering to ethical norms, a person becomes a reliable partner for interactions. The norms do indeed constrain her actions, but they simultaneously expand her options in *interactions*. And people consent to rules – in the sense outlined in the previous section – only if these rules hold greater advantages for them, at least in the long run.

In general, ethics cannot require people to abandon their individual calculation of advantages. However, it may suggest *improving* one’s calculation, by calculating in the long run rather than in the short run, and by taking into account the interests of their fellows, as one depends on their acceptance for reaching an optimal level of well-being, especially in a globalized world full of interdependence.

The problem of implementation can now be placed at the beginning of a conception of order ethics, justified with reference to the conditions of modern societies sketched above. Under the conditions of pre-modern societies, an ethics of temperance had evolved that posed simultaneously the problems of implementation and justification. The implementation of well-justified norms or standards could then be regarded as unproblematic, because the social structures allowed for a direct face-to-face enforcement of norms. Pre-modern societies not only favoured an ethics of temperance, they also had the instrument of face-to-face-sanctions within their smaller and non-anonymous communities.¹⁴ This instrument is no

13 Cf. James M. Buchanan, *The Limits of Liberty. Between Anarchy and Leviathan*, 1975; Geoffrey Brennan/James M. Buchanan, *The Reason of Rules. Constitutional Political Economy*, 1985. For the ethical dimension of Buchanan’s work, see Lütge (Fn. 4), 43–51.

14 See Christian Meier, *Athens. A Portrait of the City in its Golden Age*, 1998, for how this instrument was used in ancient Athens. Meier clearly shows that Athens was not a democratic state in the modern sense, mainly as public and political participation was required *and enforced* in quite other ways than today.

longer functional in modern anonymous societies,¹⁵ and so the problem of implementation has to be faced right at the start of a modern ethical conception. Simultaneously, an order ethics relies on the implementation of sanctions for enforcing *incentive-compatible rules*. In modern societies, rules and institutions, to a large extent, must fulfil the tasks that were, in pre-modern times, fulfilled by moral norms, which in turn were sanctioned by face-to-face sanctions. Norm implementation in modern societies thus works by setting adequate incentives in order to prevent the erosion of moral norms, which would happen if ‘moral’ actors were systematically threatened with exploitation by other, less ‘moral’ actors.

This means that neither is altruism equal to moral behaviour nor egoism to immoral behaviour. The demarcation line can be found rather between unilaterally and mutually beneficial action: In order to act morally, an actor should be pursuing her advantage in such a way that others benefit as well.

II ORDER ETHICS AND INCOMPLETE CONTRACTS

Order ethics does not deal only with those rules which are incorporated in the law, but with rules on other levels as well. This includes, in particular, agreements at branch level and also self-constraining actions of individual corporations, and leads into the area of Corporate Citizenship and Corporate Social Responsibility (CSR).¹⁶ The underlying economic idea of mutual advantages, however, stays the same: To aim for a win-win situation.

According to M. Friedman’s famous dictum, “the social responsibility of business is to increase its profits”¹⁷, corporations would have – at most – responsibilities for the order framework of the market. However, corporations are in fact doing much more, like providing social welfare, engaging in environmental protection, or in cultural and scientific affairs.

There are several possible reactions to this: A stakeholder approach would explain these observations by insisting that a corporation has to take into consideration not only shareholders, but other groups as well. If one takes the order ethics perspective seriously, however, then it is difficult to justify why the claims of stakeholders, which are already incorporated in the formal *rules* – as taxes, salaries, interest rates, environmental and other restrictions – should be incorporated a second time in the *actions* of corporations. This is not to say that corporations should not account for stakeholder interests at all, but rather that the *justification* given is not strong enough.

A suitable justification for a greater political role of corporations can be developed along the lines outlined in the rest of this section. It is consistent with the order ethics conception, especially in view of two points: Ethical norms must (1) be implemented in an incentive-compatible way and (2) be built on (expected) advantages and benefits.

15 Cf. Niklas Luhmann, *Ethik als Reflexionstheorie der Moral*, in: *Gesellschaftsstruktur und Semantik*, Vol. 3, 358–447.

16 Cf. Pies/Beckmann/Hielscher (Fn. 2), 375–401.

17 Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, *The New York Times Magazine*, 13th Sept. 1970, 32 f.; 122–126

Order ethics proceeds by extending the concept of 'order' to other, less formal orders. It therefore introduces another theoretical element, again from economics: the theory of incomplete contracts.

In reality, contracts are most often not completely determined by rules. They are not completely fixed in terms of quality, date, or content, for any possible circumstances in the future, and despite any difficulties in enforcing these contracts. In more detail, it can be said that incomplete contracts are contracts in which one or several of the following conditions apply:¹⁸

- (1) The obligations of each party resulting from the contract are not specified exactly, in view of changing conditions such as flexible prices of raw goods.
- (2) It is difficult and/or expensive to determine whether the contracts have been fulfilled. External consultants have to be employed.
- (3) The enforcement of the contract is very difficult, very expensive, or even downright impossible, due to insufficient systems of law in a number of countries.

The globalized world is indeed full of such incomplete contracts, like work contracts, long-run cooperation contracts, insurance contracts, and many others. In dealing with these contracts, there is a major problem of interdependence of the partners' actions: A partner that is honest and fulfils her part of the contract cannot automatically be sure that the other partner does the same. The other one might point to gaps within the contract, may propose differing interpretations, or it may be too expensive to enforce a claim.

A rational actor faced with these kinds of contracts would rather not sign them, especially when being risk-averse. However, if these contracts promised high benefits, the actor could try to rationally deal with the incompleteness.

Making incomplete contracts complete is no way to go: Not only is it impossible to specify all scenarios in advance, but this would also greatly reduce the flexibility which is the main advantage of the incompleteness. Incomplete contracts can be made quite productive, as the parties involved can adapt their agreements to different frameworks more easily. In order to exploit the benefits of incomplete contracts, however, trust, fairness, integrity, and good will are needed, in short: ethics. If contracts are becoming increasingly incomplete, both an ethics for the interior relations of the company (workers and management) as well as an ethics for the exterior relations to customers, banks, suppliers, and the public, become a necessity. It is rational for a company to *invest* in these ethical categories, as it contributes to the company's success in a way that directly affects shareholders.

So if rules are incomplete or if there are no rules for a specific situation, economic theory suggests relying on substitutes: Corporations, as partners in interactions, have the opportunity to commit themselves to certain policies, to mechanisms of trust and fairness, for example. This commitment has to be made credible through organizational measures and must be signalled to others. In this way, actors create by themselves the very reliability that would normally be expected from formal rules. They create a *reputation*, which especially under conditions of globaliza-

18 Cf. Oliver D. Hart, Incomplete Contracts, in: *The New Palgrave. A Dictionary of Economics* vol. 2, J. Eatwell et al. (eds.), 1987; Oliver D. Hart/Bengt R. Holmström, The Theory of Contracts, in: *Advances in Economic Theory*, T.F. Bewley (ed.), 1987.

tion is a necessary prerequisite for success in the long run. This commitment must be signalled, and thus becomes an asset for the company.

So from a theoretical perspective, order ethics can now provide an integrative view on both situations, those with well-established and those with incomplete rules. In both cases, incentives and sanctions are key issues. In the first case, incentives are set by formal rules, while in the second case, this role is taken up by informal rules in the shape of 'soft' factors like ethics and reputation. The current situation where corporations are taking on a greater political role can be seen as a tendency towards a greater role of incomplete contracts.

III RESPONSIBILITIES OF CORPORATIONS IN THE GLOBALIZED WORLD

In a world where incomplete contracts play a vital role, corporations have responsibilities that can be differentiated into three dimensions:¹⁹

1) Corporations are responsible for their actions and the immediate consequences resulting from them. This can be defined as their *action responsibility*. Corporations must comply with laws, and they are responsible for entities like their products, their marketing methods, their employment policy, their corporate culture, and so on. Also, philanthropic activities fall in this category.

In an extended sense, action responsibility also encompasses activities that go beyond the traditional, rather passive meaning. Here, investing in educational programs, fighting directly against corruption and discrimination or founding trusts can be located. These are important activities in the globalized world. However, they have mostly (a) local or regional character, and they are (b) mostly uncoordinated, because corporations hesitate to cooperate in this field with others who are normally their competitors. Thus, the structural problems of the world like hunger, poverty, terrorism and destruction of the environment are not dealt with systematically.

2) In a second step, corporations are responsible for the social and political order framework. In the national setting, this framework is easily identified. But in the global setting, it does not (yet) exist, and there is not much reason to suggest that it will come into existence in the near future. Thus, there is room for the *order responsibility* of corporations, which can have much greater impact than their action responsibility. The main task is to help in establishing basic human rights, a trustworthy judicial system, property rights and so on. This in turn improves the conditions for future, long-term company benefits. However, the main criticism here is that corporations that take their order responsibility seriously are simply engaging in lobbying.

3) This leads directly to the third and most important, yet often overlooked element – which may also create a bridge to the discourse approach.²⁰ People have "Mental models"²¹ that greatly influence their actions. They can block necessary

19 I am following an idea by Karl Homann here.

20 Cf. Andreas G. Scherer/Guido Palazzo/Dorotheé Baumann, Global Rules and Private Actors. Towards a New Role of the TNC in the Global Governance, *Business Ethics Quarterly* 16(4) (2006), 505–532.

21 Arthur T. Denzau/Douglass C. North, Shared Mental Models. Ideologies and Institutions, *Kyk-*

reforms and create vehement opposition to globalization. Many people even regard it as their *moral duty* to oppose ‘neoliberalism’ and the market.

These people can however not be convinced by ‘economic’ benefits, narrowly understood, by improving factors like GNP and others, but only by engaging in a discourse about the social and economic structures and factors that shape the world. From the perspective of order ethics, e.g., it can be shown that many traditional moral ideals are better served by *intensifying*, not by slowing down competition within an adequate institutional framework. But this must be convincingly shown, by way of argumentation. What is called for is the *discourse responsibility* of corporations. Corporations must engage in (public) discourse about the social and political order of the global society. People who cannot reconcile this social and political order with their own normative self-image, with their moral or ethical views, will stand in the way of many mutually fruitful and productive cooperations.

And in several cases, these people are indeed reinforced in their opinions by bad arguments in favour of the market: For example, if the market is justified by calling it an expression of human freedom – the classic M. Friedman view²² –, this creates immediate opposition by many people who daily experience otherwise. As the figures cited in section 2 show, people in Germany (taken just as one example) see a growing danger in globalization and in the activities of corporations. Many people who are out of work, and many more who are afraid of losing their jobs, experience mainly *pressure* from competition, not freedom. It is therefore vital to stress that freedom and pressure always go hand in hand in the market economy: Pressure on suppliers creates freedom of choice for consumers.

Another popular argument, used, e.g., in virtue ethics, is that the market is not as bad as some think – because the market also provides a place for virtues like reliability or loyalty. This in turn reinforces the view that, as a *general* rule, the market *is* bad and immoral indeed. Virtues are only there to remedy the general immorality of the market. Moreover, reliability and loyalty can also be found in organized crime.²³

Finally, the last example is again a German one. The German system of the “Social Market Economy” is quite often justified – or equally criticized by others – by stating that the role of the ‘social’ is to *correct* the ‘anti-social’ consequences of the market. In this picture, the market in itself is regarded as morally dubious, to say the least. A better view, and one that the discourse responsibility of corporations should find it worthwhile to take into consideration, would be that the word ‘social’ can only mean to create a better, more productive and thus ethically more desirable market. This argument would proceed by showing that people can take more risks as market competitors if they know that the social system will support them. If the concept of a social market economy is to make sense at all in the globalized world, then this strategy of argumentation should be followed.

Of course, corporations cannot fulfil their discourse responsibility on their own. Here, business ethics can be of help in developing, shaping and promoting ethical ideas about business.

los 47 (1994), 3–31.

22 Cf. Milton Friedman, *Capitalism and Freedom*, 1962.

23 Cf. Diego Gambetta, *The Sicilian Mafia. The Business of Private Protection*, 1993.

However, two major criticisms are raised regularly against the political activities of corporations:

1) The first one is that corporations are ‘only’ maximizing their profits and are therefore ‘only’ following their own interests. In the political sphere, this is supposed to amount ‘only’ to lobbying. The status of profit maximization has been discussed in sections 4 and 5,²⁴ and it has been made clear that this cannot be used as an argument against corporations. But what about the charge of lobbying? Certainly, no corporation can control the global social order on their own. They have to justify their actions in public, and that is not the only means of *controlling* companies. This leads to the second criticism:

2) It is often alleged that corporations lack democratic legitimation, as CEOs and managers are not elected ‘democratically’. This argument presupposes that democracy can be reduced to elections and to the vote of the majority – in a Lockean sense.²⁵ However, following authors like K. Popper,²⁶ the main function of democracy is not majority vote, but *control*. In a democracy, control is exercised through many mechanisms, of which voting is only one. Others include competition on markets, public discourse, but also control of politics through corporations: Bad politics must reckon with the possibility of being ‘punished’ on capital markets.²⁷ These control mechanisms exist likewise in a global setting, with the addition of NGOs – who are of course no better ‘democratically’ elected (in the traditional sense) than corporations. The democratic legitimation of corporations depends on these control mechanisms being in place. By making their activities more transparent, corporations can enhance their acceptance and equally their democratic legitimation. This is in their own interest – and not simply a *moral duty* for a ‘good corporate citizen’.

IV THE FINANCIAL CRISIS REVISITED

The financial crisis of 2008/09 has certainly shed a new light on many of the issues mentioned here. I will discuss two of them in turn: first, the question of the scope of corporate responsibilities, and second, the question of necessary institutional reform.

(1) Regarding the scope of CSR and Corporate Citizenship measures, I believe that in the recent past (before the crisis), there may have been too much focus on them. Too much confidence has been placed in the abilities of large corporations in the financial sector to guide and channel their own behaviour. For example, too

24 Cf. also Brad Hooker, Self-Interest, Ethics, and the Profit Motive, in: *Business Ethics. Perspectives on the Practice of Theory*, C. Cowton/R. Crips (eds.), 1998, 27–41.

25 Cf. Peter Danielson, The Lockean Provison, in: *Contractarianism and Rational Choice*, P. Vallentye (ed.), 1991, 99–111.

26 Popper famously wrote that the main advantage of democracy is to be able to get rid of its governments “without bloodshed – *for example*, by way of general elections” (Karl R. Popper, *The Open Society and Its Enemies*, 1945, Vol. 1, 124, my italics). Note the wording ‘for example’.

27 For a recent account of ethics on financial markets, cf. Peter Koslowski, Business Ethics in Globalised Financial Markets, in: *Globalisation and Business Ethics*, K. Homann/P. Koslowski/C. Lütge (eds.), 2007, 217–236.

much leeway has been given to credit rating agencies, with (at least) two bad consequences: First, an oligopolistic market emerged, with only three major international players. And second, the independence of ratings could not be established, as competition between the agencies could not begin to work as a controlling mechanism. So I believe CSR mechanisms and similar ones that build on voluntary commitments of corporations should – at least in the financial sector – be scrutinized much closer. It might turn out that more formal rules will eventually be required, in particular for the global financial markets.

(2) Such rules – which are currently being discussed and which are entirely consistent with the order ethics approach – would aim at the following targets, for economic *and* ethical reasons (of course, these are only meant as tentative examples):

- *Increased transparency*: better information for investors, clearer rules for banks and financial service providers;
- *International Regulation*: for certain financial instruments like hedge funds; this could eventually lead to B. Obama's proposed 'transparent financial system'
- *Improved incentives*: for example, for employees of rating agencies, the incentive structure has to be improved, in order to make their ratings more independent of financial pay. The original idea behind the civil service system was exactly that – to create a service that delivers services independent of private ownership. Something functionally similar must have to be devised for the rating system.

In a similar vein, there will be discussion of improving incentives for managers in general, to get them into a stronger medium- and long-term orientation, by various ways of devising adequate stock options.

V CONCLUSION

Business Ethics cannot sensibly be conceptualized independently of its social conditions, which include most notably the law. The market's order framework is crucial for setting incentives that can work in favour of – or against – the implementation of ethical norms. Consequently, the conception of order ethics focuses on the order framework and aims at solving ethical problems and dilemmas at this level. Certainly, such a framework leaves much room for additional action on the corporate and branch levels, some possibilities for which have been mentioned here. However, the recent financial crisis has made the limitations of legally not binding measures painfully visible.²⁸ In the globalized world, there is still both a need as well as a demand for adequate order frameworks.

28 Cf. Daron Acemoglu, *The Crisis of 2008: Structural Lessons for and from Economics* (Working Paper), 2009.