Bank Secrecy at an Ethical Crossroads

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"…sometimes, the most expedient solution to an ethical dilemma is to get rid of the person who thinks it a dilemma."
(Scrivastava, 2021)

Legally and morally, a bank customer is entitled to the privilege of non-disclosure from any bank with which the customer agrees to enter into a contractual relationship. (Sealey and Hooley, 2008). This privilege for the customer, and duty for the bank, is known as "bank secrecy". It is undeniable that bank secrecy is a principle and practice that has invariably been a chief cornerstone of the bank-customer relationship universally. This is primarily because it is a feature that safeguards the customer's fundamental right to privacy (Sealey and Hooley, 2008). However, over the years, the abuse of bank secrecy has resulted in a pervasive criminal enterprise of illicit financial flows (IFFs) in the banking industry (Beer, Coelho, and Leduc, 2019). This prevalence of IFFs under the protection of bank secrecy has seemingly led regulators to find good ground to question the workability of bank secrecy (Beer et al, 2019); especially as communitarian interests such as tax justice, anti-money laundering and sustainability are at stake.

Thus, as the banking industry struggles to get rid of IFFs via the abuse of bank secrecy, an ethical dilemma lies at the heart of this struggle. Essentially, this is a dilemma in which it appears that the proponents of the classical liberal individual rights ethical theory which underpins bank secrecy are diametrically opposed

to proponents of the ethical theory of utilitarianism which underpins the communitarian interests behind the regulatory approaches aimed at combatting bank secrecy. Against this background, this essay asks whether this apparent war of values could simply be another false dichotomy and an opportunity for the hybridization of normative ethical theories? If so, we further ask who or what is to blame for this false dichotomy? Could it be that the current monomaniacal approaches to teaching ethical philosophy leave no room for hybridization are to blame?

In answering these questions, this paper explores how finance in its struggle to pull the plug on IFFs via the abuse of bank secrecy can meet the communitarian interests of society such as sustainability, tax justice, and anti money-laundering, without jettisoning the fundamental rights of individuals. This is a central consideration in normative ethics and is of vital significance for the future of the bank-customer relationship. The body of this essay is divided into three sections : (i) Part one will discuss the prevalence of IFFs via the abuse of bank secrecy, and critically, the effect of such IFFs on the sustainability agenda ; (ii) part two will cover the ethical war of values in the struggle to eliminate IFFs ; (iii) and part three will delineate how this ethical dilemma can be succesfully navigated.

The Abuse of Bank Secrecy

According to Global Financial Integrity (2018), any money that breaks laws in its origin, movement, or use, falls within the characterization of IFFs, also commonly known as “dirty money”. Over the last decade, the banking industry has been repeatedly rocked by scandals involving IFFs via the abuse of bank secrecy. They include the 2012 revelations of HSBC’s violation of the Bank Secrecy Act in America; the 2015 Swiss leaks by the International Consortium of Investigative Journalists (ICIJ); the 2018 revelations of money laundering at Danske Bank’s Estonian branch; and most recently, the 2020 FinCEN Files revelations, also by the ICIJ. These revelations, which are by no means exhaustive, have reinforced the public perception that financial institutions are inherently unethical.

Some of the revelations were merely suspicious and not firm evidence of misconduct; for instance, the FinCEN Files consisted of suspicious activity reports involving about $2 trillion of potentially dirty money. However, most of the public outcry against financial institutions has concerned proof of actual IFFs via the abuse of bank secrecy. The most notable cases are the 2012 revelations of HSBC’s violation of the Bank Secrecy Act in America, where the bank was found to have turned a blind eye to $881 mn in drug money from the Sinaloa and Norte del Valle drug cartels; and the 2015 Swiss leaks by the ICIJ, which according to one

media outlet, revealed how HSBC's Swiss private banking subsidiary had become the "home of tax cheats".

Journalists, regulators and academics are all asking the same question : is bank secrecy being used as a value proposition strategy to deliberately enable some banks to act as conduits for IFFs that offer a lucrative client base? Speaking to the broadcaster France 24 in the aftermath of the Swiss Leaks, Serge Michel, a senior reporter for *Le Monde*, seemed to asnswer the question in the affirmative. According to Michel, "HSBC because of its aggressive objectives in client acquisition had developed clients in very dangerous areas such as arms merchants, drug dealers, and terrorism financers" (France 24 English, 2015, 01:16-34). Moreover, the abuse of bank secrecy to enable IFFs has generated ever more urgent calls for scrutiny, as world leaders have acknowledged that the negative effects of IFFs are now undermining efforts to achieve sustainable development (UNCTAD, 2020).

Sustainability at stake

As global leaders become more aware of the reality that finance is indivisible from sustainability, IFFs have been established as a bona fide hindrance to climate change mitigation efforts. Under target 16.4 of the Sustainable Development Goal (SDG) Agenda, states have committed to eliminating IFFs by 2030 (United Nations, 2015b). One reason for seeking to eliminate IFFs in relation to sustainability is the need to stop the transmission and sheltering of proceeds of environmental crime (UNCTAD, 2020). Today, environmental crime such as illegal logging, illegal mining, and illegal fishing has reached a scale where it has become an economy in its own right. It is reported that worldwide, environmental crime proceeds are between $110 bn and $281 bn per year (UNCTAD, 2020).

Beyond targeting direct environmental crime proceeds, governments are also concerned with the impact of IFF-related tax evasion on sustainable development. Increasingly, tax evasion, especially through banks in offshore financial centres (also known as secrecy jurisdictions), has become inextricably linked to reduced financing for sustainability development in poorer countries. Governments have agreed that such IFFs affect the ability of the least developed states, particularly in Africa, to raise the money needed to finance the SDG agenda (United Nations, 2015a). According to UNCTAD (2020), pulling the plug on $88.6 bn in IFFs lost annually from Africa could bridge half of the continent's SDG financing gap.

Why IFFs are an ethical problem

The problem of IFFs has brought to light an ethical deficiency within the banking industry (UNCTAD, 2020), intensifying the debate about the greed of some of the world's

biggest banks. According to Serge Michel, these banks have knowingly "accumulated this unique brand of risky clients" (France 24 English, 2015, 01:35-45).This pursuit of profit at all costs and without moral responsibility is the main ethical indictment against banks. Indeed, in his book *Capitalism's Achilles' Heel*, the former president of Global Financial Integrity, Raymond Baker, argues that IFFs in the banking industry are being caused by what in ethical terms would be called normative approval for criminality. within the industry. Baker's damning verdict is captured when he writes that:

> "Rampant illegalities regularly perpetrated by businesspeople and bankers cannot exist in an intellectual vacuum. Both must be dependent on justifications that have settled into the substructure of capitalism itself. […] Something is saying to practitioners in the free-market system that this is okay, this is reality, this is the way the process works, this widely condoned illegality." (Baker, 2005. p.280)

Evidently, this normative approval for IFFs in some banks can be traced to the attitudes of leaders within the banking community. One example is the 2015 interview by former Credit Suisse General Director Hans Geiger with the German news outlet, DW News. When asked whether banks were responsible for some of the infractions revealed by the Swiss leaks, Geiger remarkably stated that : "It is absurd to make banks responsible for their clients' payment of their taxes. It does not work that way. It isn't ethics, it is just political nonsense" (DW News, 2015, 02:40-59).

This indifference by Geiger unfortunately represents what Peters (2021) refers to as the lack of "moral responsibility of enterprise" (para 15). Generally, we understand this to mean a non-ethical market culture that has jettisoned ethical considerations from business decisions and hence developed a normative approval for the harmful effects of business activities on society. For instance, Peters (2021) argues that it is this very lack of moral responsibility for enterprise that implicated McKinsey in the opioid crisis. According to Peters (2021), we must remember that "the Mckinsey recommendations to Purdue were directly aimed at extreme sales improvement and the analysis failed to address the potential of specific incentives to increase addictive, destructive behavior" (para 14). Sadly, it is this same attitude that can be discerned in the decision-making processes of some banking institutions.

Ethical theorists in conflict

There may be little or no divergence among ethicists regarding the view that IFFs via the abuse of bank secrecy signify a normative approval for crime in the banking industry or at least in some banks. However, there is also no convergence when it comes to determining

which ethical theory should prevail in dealing with the abuse of bank secrecy. This lack of convergence among ethical theorists is highlighted by the current public debate about the regulatory approaches being rolled out in relation to bank secrecy. Hostility in the banking community and its stakeholders towards these regulatory approaches is fuelled by a fear that they would jeopardise the future of the banker-customer relationship by dismantling a major bulwark supporting the fundamental right to privacy. By this argument, such a move would be contrary to notions of the rule of law, on which democratic societies are built.

This opposition to regulatory approaches that undermine bank secrecy indicates that for many in the banking industry, such regulatory frameworks rely on a fundamentally flawed ethical theory of utilitarianism involving selective sacrifice, which contradicts the traditional Western regard for individual rights. For instance, on 16 March 2018, the local banking community in Uganda and its stakeholders was infuriated when the Uganda Revenue Authority (URA), the country's tax collection agency, directed all Uganda's commercial banks to submit the personal account details of their resident customers for the purposes of effective tax assessment (The Independent, 2018). In a statement signed by the chairman and the executive director of the Uganda Bankers Association (UBA), the UBA noted that its members, had "reached a decision […] to file a petition in the Constitutional Court contesting the constitutionality of the various provisions of the tax law relied on by the URA in their notice" (The Independent, 2018, para 3). The Uganda Law Society also released a statement, emphasising that, "…all financial institutions and non-bank financial institutions are under a constitutional duty to ensure that no person interferes with their client's privacy" (The Independent, 2018, para 8).

Beyond Uganda, the banking industry worldwide has been faced with similar concerns. In 2009, G20 leaders decided "to end the era of bank secrecy" (OECD, 2011, p.2). True to their promise, in 2014 the OECD introduced the Common Reporting Standard through the Automatic Exchange of Information (AEoI) regime, which required banks to automatically submit the financial information of non-residents to their governments. (OECD, 2014). Opponents of the AEoI regime viewed the directive as a smoke screen for the curtailing of the civic right to privacy. In an interview for Dukascopy TV the Secretary General of the Convention of Independent Financial Advisors (CIFA), Jean-Pierre Disserens, said of the AEoI regime that, "we are basically forgetting the individual freedom of each single citizen and it is absolutely absurd to take that right which is an important civil liberty" (Dukascopy TV (EN), 2014, 02:25-38).

Should finance simply pick its poison?

Classical liberal individual rights theory is an ethical theory whose historical roots can be traced back to the 1215 Magna Carta in England, as well as the American War of Independence and the French Revolution (Tamale, 2020). In the 17th and 18th centuries, classical individual rights ethical theory was popularised by philosophers such as Thomas Hobbes, John Locke, Jean Jacques Rousseau, who argued that individual fundamental rights should be protected by the government under a social contract which regulated the relationship between the citizen and the state (Tamale, 2020). Criticism of classical liberal individual rights-based ethical theory stems from ethical theorists who rely on Jeremy Bentham's theory of utilitarianism and its emphasis on communitarian over individual interests. For instance, Tamale (2020), argues that the capitalistic nature of classical liberal individual rights theory benefits only the few who have thrived off capitalism. She writes that:

> "…the atomistic de-contextualized individual implicit in this theory excludes the communitarian interests and identities prevalent in non-western societies. […] the reality is that it serves the interests of the few who have gained dominance under the capitalist mode of production" (p.199).

Tamale's argument reflects a major characteristic of Bentham's utilitarianism: allowing the sacrifice of some individual rights for the "greater" good of society. Bentham's notion of "the greatest good for the greatest number" has also been described as an approach of "selective sacrifice" (Baker, 2005, p.302-303) which places a quantifiable value on rights and in some instances justifies the restriction of rights on the basis that the "ends justifies the means" (Baker, 2005, p.309). For many, selective sacrifice is not just a characteristic of utilitarianism, but a flaw, because it is inconsistent with the fundamental regard for individual rights that underpins modern Western democratic societies.

Yet there is no denying that communitarian concerns have become more prevalent and valid as the misuse of rights has become a common feature of commercial malfeasance, which has had a detrimental impact on communitarian interests such as sustainable development. To mitigate some of the effects of the unethical misuse of rights, regulators have taken the position that regulatory approaches, which limit fundamental rights while pursuing a legitimate objective, are necessary. Like many rights, the right to privacy can be limited without being lost. Nonetheless, opponents of current regulatory approaches against bank secrecy view these approaches as going too far. The sharp difference

in perceptions has left the banking industry in a war with itself over its values, where the industry is being invited to pick its poison.

Is this ethical dilemma avoidable ?

However, if we look closely, it is clear that the rationale for subscribing to one ethical theory over another is a perceived sense of injustice arising from the outcomes of each ethical theory. A critical analysis of both the communitarian concerns of utilitarianism and the individual rights concerns of classical individual rights theorists suggests that both intellectual camps have a common concern for justice. For utilitarians, it is the disregard among individual rights-based theorists for communitarian social justice notions; for the latter, it is the disregard of utilitarians for individual rights and rule of law-based notions of justice.

Given this shared perception of injustice, it is worth asking if the ethical dilemmas identified by these different philosophical traditions is avoidable. Could it indicate that an "either/or" approach in ethical philosophy only creates a false dichotomy and that perhaps it is time for finance to embrace the hybridization of normative ethical theories? Indeed, this is the point that Rawls (1971) makes when he writes:

> "In this case, while men may put forth excessive demands on one another, they nevertheless acknowledge a common point of view from which their claims may be adjudicated. If men's inclination to self-interest makes their vigilance against one another necessary, their public sense of justice makes their secure association together possible. Among individuals with disparate aims and purposes, a shared conception of justice establishes the bonds of civic friendship; the general desire for justice limits the pursuit of other ends" (p. 4-5).

How, therefore, should we view the sharp divide in normative ethical theories? Is it philosophical fundamentalism? A suggestion to that effect has been made by Baker, in trying to rebut the claims of those who have traditionally held tribal biases against capitalism by citing the apparent discrepancy between Adam Smith's earlier work, "*The Theory of Moral Sentiments,*" and his later work, "*The Wealth of Nations*." Baker (2005) writes:

> "Reduced to its fundamentals, the argument is that sympathy and self-interest are incompatible at best, if not wholly irreconcilable. Economic man pursuing his profits cannot also be sympathetic man acting with benevolence. Yes, we see the dichotomy in many people. But the appropriate question is, is this a necessary condition, an inevitable tension, arising from conflicting forces impinging on each of us?" (p.294)

Baker goes on to show that in fact, Adam Smith was disposed to both moral and market sentiments

in equal measure. Indeed, because the imperative need of all ethical philosophy is to address injustice, we can confidently state that philosophical fundamentalism is harmful, not helpful.

Finance as a matter of justice

We can say that armed with an ideological clarity in which the hybridisation of ethical philosophy is based on justice as a common denominator of all theories, finance can translate the moral verdict against injustice into the building of a just financial system characterised by i) just financial institutions that look beyond the narrow confines of their own shareholder needs to the broader needs of other stakeholders in society; ii) just financial regulators who proportionately balance the objectives of regulation with the harms it causes.

For regulators, decision making processes in finance must be approached with the understanding or appreciation that in democratic societies, it is generally accepted that regulation which has the effect of limiting fundamental rights must be proportionate to be legitimate. The test of proportionality is the delicate balance between protecting fundamental rights and preventing the misuse of those rights by the holders. It is important always to bear in mind that the fundamental rights are not the exception to those rights.

For institutions, decision making processes must be approached with the understanding that financial institutions have a duty of moral responsibility implicit in the social contract that underpins a democratic society. As Rawls (1971) put it, institutions must have a "criterion for discouraging desires that conflict with the principles of justice […] so as to encourage the virtue of justice in those who take part in them" (p. 230-231). This is not merely an ideological or utopian concept. According to Baker (2005), it is "a matter of will put into practice" (p. 345); in other words, it is simply a matter of banks embracing their moral responsibility for enterprise.

Achieving hybridisation

For finance to achieve the objective of an ethical culture of justice in decision making processes, there is a need to make one final appraisal. We have already answered in the negative whether the ethical dilemma described above is avoidable. We have also identified why it is in the best interests of finance for decision making processes to be guided by justice as a common denominator. How can this be achieved? The answer must be that ethical theorists should re-examine their current approaches to teaching ethical philosophy. The current ethical dilemma should teach us that approaches to teaching ethical philosophy which leave no room for hybridisation, and which mirror pseudo-activism by pursuing indoctrination rather than education, are to blame. According to

the American philosopher Christina Hoff Sommers, academia has become increasingly intolerant of intellectual diversity. In an interview with Daily Wire's Ben Shapiro in 2016, Sommers noted that university departments have started to "hire their own," and do "not present the other side respectfully" (Ben Shapiro, 2018, 05:30-39).

Unfortunately, the tendency to treat ethical philosophy in a zero-sum manner has become common in academia. Ethical philosophy is often taught in a way that emphasises philosophical fundamentalism through a radical monomaniacal emphasis on one ethical theory, while adopting a "see no evil, hear no evil, and speak no evil" approach toward the same theory. Many ethical theorists have ignored the fact that the fragmentation of ethical theories should not affect the complementary nature of ethical philosophy; especially bearing in mind that normative ethical philosophy is based on ideology rather than quantitative empiricism.

One can view the idea that there is an unbiased point of convergence in political thought as inherently biased itself (Solnit, 2021). The same cannot be said of what one could call ethical centricism. It is consistent with general philosophical discourse to recognise that firstly, the fragmentation of normative ethical theories is simply a result of varying subjective moral interpretations of ideology (Keitch, 2018); and secondly, and that there is indeed a valid point of convergence, which is justice. (Thomas and Thomas, 1959).

To sum up, while academic activism has proved an important tool for intellectuals to dispense their duty to society (Smith and Smith, 2019), this paper advocates a non-monomaniacal approach to teaching ethical philosophy in finance. Academic activism in ethical philosophy should bear in mind that there is no substantive ethical theory that would fit all circumstances today. Consequently, the purist "one-size-fits-all" approach to rebalancing the relationship between broad human values must be substituted with a hybridised "best-fit" approach. Academic activism in ethical theory should equip students of ethical philosophy in finance with the training to select from each ethical theory elements that are essentially derived from the concept of justice and reject those that are divorced from this concept.

Conclusion

The banking industry must come to terms with the fact that while there may be many who sympathise with opponents of regulatory approaches against bank secrecy, even the most ardent classical liberal individual rights ethical theorists would be hard-pressed to continue justifying the unjustifiable if banks do not clean up their "mess". A moral responsibility for enterprise must be embraced by banks. But equally, regulators must give due regard

to the doctrinal rationale behind individual rights that form the fabric of society. In this regard, regulators should avoid what is easy. Making bad laws may be expedient to catch the "bad guys" today, but history shows that bad laws made with the best intentions can be used against good people tomorrow. The strength of western democratic civilisation depends on its ability to thwart any such opportunity for injustice to be inflicted on the individual.

The future of the banker-customer relationship rests on how the current bifurcation in ethical theories can be resolved, as do some of society's most pressing needs, such as tax justice and sustainability. This false dichotomy in ethical theories will continue to prevail at the expense of justice if ethical theorists maintain their insistence on the need for finance to pick its poison. The aim of this paper has been to demonstrate the need for the hybridisation of ethical philosophy in decision making processes within the finance industry. Ethical theorists must now guide a way towards a normative ethical approval for justice through the hybridisation of normative ethical theories, rather than perpetuate decision making processes which are based on a false dichotomy in ethical philosophy. •

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