Is money laundering an ethical issue?

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Abstract

Purpose – The purpose of this paper is to describe philosophical positions about money laundering activities, depending on the way one looks at ethics and law.

Design/methodology/approach – The paper analyzes four philosophical positions about money laundering activities, given that one accepts/refuses to make connections between ethics and law. It explores the pitfalls of each philosophical position.

Findings – The sceptical way (ethical relativism) asserts that there cannot be any intrinsic notion of good/evil. The legally focused way (legal positivism) presupposes that ethics is irrelevant, when lawmakers are doing their job. The distorting way (legal moralism) takes for granted that lawmakers are deciding what is moral/immoral. The ethically focused way (normative ethics) means that ethics say something different than law. Each of the four philosophical positions about money laundering has its own pitfalls.

Practical implications – The four philosophical positions could influence the way ethical concerns are institutionalized in the organizational setting. Managers could better distinguish ethical discourse and legal/judicial realm. Ethical training sessions could be used to make organizational members circumscribing their moral duties, as to the detection/prevention of money laundering activities. Qualitative surveys could help to better understand if such philosophical positions are relevant for decision-making processes and philosophical questioning about ethical issues.

Originality/value – The paper addresses the issue of money laundering, from both a legal and moral perspectives. It is at the edge of ethics and philosophy of law.

Keywords Ethics, Money laundering, Philosophy of law

Paper type Conceptual paper

Introduction

Money laundering activities are based on various predicate crimes. Unger and den Hertog (2012) considered fraud and drug trafficking as the two most important predicate crimes. Most of the dirty money which is laundered in legitimate economy comes from:

(1) Frauds, such as corporate frauds, investment fraudulent schemes and bankruptcy frauds (38.6 per cent: Maitland Irwin *et al.*, 2012a, 2012b and 40 per cent: Schneider and Windischbauer, 2008); and

(2) Drug trafficking (27.5 per cent: Maitland Irwin *et al.* (2012a, 2012a and 15 per cent: Schneider and Windischbauer, 2008).

So, money laundering cannot exist without predicate crimes. Such legal treatment of dirty money makes possible to address money laundering activities quite

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differently, depending on the way we are considering that ethics and law are related one to the other.

The purpose of this paper is to describe various philosophical positions about money laundering activities, depending on the way we look at ethics and law:

- *The sceptical way (ethical relativism)*: There cannot be any intrinsic notion of good/evil.
- *The legally focused way (legal positivism)*: Ethics is irrelevant, when lawmakers are doing their job.
- *The distorting way (legal moralism)*: Lawmakers are deciding what is moral/immoral.
- *The ethically focused way (normative ethics)*: Ethics says something different than law.

Ethical relativism and legal positivism share the principle that money laundering could not be an ethical issue, while legal moralism and normative ethics do believe that money laundering is actually an ethical issue. Ethical relativism and legal positivism take for granted that positive law is the ground of natural law: there could not be any natural law which is not actually defined by positive law, and thus, by lawmakers themselves. Legal moralism and normative ethics rather assume that natural law could be the ground of positive law: lawmakers could not really contribute to define public policies and given laws/regulations without being inspired by natural law principles.

In each of those four philosophical positions, lawmakers could have an ethical sight and/or an ethical intent. On one hand, having an ethical sight means aiming at ethical ends. It has three basic components:

(1) defining originating principles through which words, attitudes and behaviours could be interpreted as being ethical/unethical;

(2) identifying optimal results we would like to achieve; and

(3) describing the path from originating principles to optimal outcomes.

According to Aristotle, happiness is the end at which all action aims (*The Nicomachean Ethics*, 1097b12-1098a2). On the other hand, having an ethical intent implies that our way to be, to speak, to feel and to behave is determined by ethical concerns. Anybody who has an ethical intent in a given situation is ready to launch philosophical questioning about ethical issues. He/she uses ethical decision-making processes. He/she can make an interconnectedness between philosophical questioning (about ethical issues) and ethical decision-making processes in the daily life. According to Kant (1983), nothing is good except good will. Good will is the *sine qua non* condition for happiness. It is not enough to have an ethical sight, we must also be guided by an ethical intent. The four philosophical positions towards money laundering activities deal with ethics and law in general, but more specifically with ethical sight/ethical intent and law-making processes.

The sceptical way (ethical relativism)

The sceptical way implies that money laundering is not an ethical issue, and that lawmakers did not have any ethical sight, when designing anti-money laundering

(AML) laws and regulations, although they could be guided by an ethical intent. Such basic principle is quite mirroring a perspective of ethical relativism. It is grounded on two presumptions (*a priori* beliefs):

(1) We can never know what is ethical/unethical (ethical relativism); and

(2) Lawmakers probably never have any ethical concern, when designing one or the other law/regulation.

Even judges or lay jurors (or both) do not necessarily reach actual truth, but rather formal legal truth, that is, what has been considered as truth throughout legal evidence (Summers, 1999). According to Nietzsche (1968), law is nothing but false freedom:

> Law-giving moralities are the principal means of fashioning man according to the pleasure of a creative and profound will, provided that such an artist's will of the first rank has the power in its hands and can make its creative will prevail through long periods of time, in the form of laws, religions, and customs (Nietzsche, 1968, p. 501).

A Nietzschean perspective radically criticises the use of law for imposing given notions of good and evil. Because there are no facts at all, but only interpretations, said Nietzsche, lawmakers are indeed interpreting reality rather than reflecting given facts. There cannot be any intrinsic goodness/wrongness of thoughts, words, feelings and emotions, attitudes and behaviours. Sartre adopted a similar view on good/evil: human being is the origin of good/evil. Because essence is determined by existence, there cannot be any absolute notions of good/evil. Good and evil are not notions at all. They are not essences. We could only understand good and evil from an historical perspective. However, a priori, nothing is good or evil, said Sartre (1983). Throughout our decisions, we are deciding who we would like to be, and thus, we are choosing our values. Sartre (1983) concluded that if existence would not precede essence, there would not be any morality. If we assume that we cannot always know what is right/wrong (Simonova, 2011), then we are falling into moral relativistic approach. We cannot decide which principle of action would be the most relevant and useful to ensure right decisions and behaviours.

The legally focused way (legal positivism)

According to Verhage and Ponsaers (2009), money launderers are led by two basic desires/needs:

(1) the desire to show growing power and influence;

(2) the need to secure their illegal businesses; and

(3) the need to secure that personal future.

A legally focused way tends to reduce the propensity of money launderers to increase their economic/political power, so that a better social justice could emerge. Since 1989, the Financial Action Task Force (FATF) has a positive contribution to money laundering control, particularly through its Recommendations. However, from a legal viewpoint, such Recommendations do not have any status that makes possible to impose them, as global standards. The FATF Recommendations are not international conventions (Gallant, 2010). According to Gallant (2010), the FATF Recommendations imply two basic pitfalls:

(1) FATF Recommendations tend to replace domestic law; and

(2) The process of FATF Recommendations is undemocratic.

It is particularly true when given countries which are not FATF members are used to comply to FATF Recommendations (Hülsse and Kerwer, 2007).

The legally focused way reflects a perspective of legal positivism. Here, money laundering is not considered as an ethical issue, although lawmakers had ethical sight and intent, when designing AML laws and regulations. If lawmakers actually have ethical concerns when designing AML laws/regulations, they could create unjust/unethical laws and regulations. Law is open to moral criticism, and social morality evolves in accordance with legal/regulatory changes. Any legal system is grounded on given moral assumptions. However, the enforcement of social morality through laws and regulations does not guarantee that it will contribute to preserve society (Hart, 1971). Laws are morally neutral: they could be either just or unjust (Lyons, 1973). The inner morality of law could be immoral (Lyons, 1984, 1970/1971), although legal processes could be right means to good results or means of implementing process values such as participatory governance and procedural rationality. According to Summers (1974), legal processes include processes for selecting officials; legislative, judicial and administrative processes; processes for publicizing and disseminating law; processes for applying and enforcing law; and processes for creating and modifying processes. Such legal processes could be immoral. Thoreau (1982) said that we have moral obligation to disobey to immoral laws/regulations/rules (for instance, the apartheid laws in South Africa). Such principle of civil disobedience has deeply influenced Gandhi's and Martin Luther King's non-violent resistance. Legal positivism implies that law and morality must be separated: legality does not require any significant moral contents. Natural law tradition rather insisted on the inseparability of law and morality: to be genuine laws, laws must have significant/adequate moral contents (Brink, 2012a). When the legal system lacks the moral attributes required to endow it with legitimate authority, it cannot have any moral authority (Raz, 1985). Every citizen does not have any moral obligation to obey the laws of a just legal system (Raz, 2003, 1983). If such moral obligation would exist, then it would presuppose that citizens can always distinguish the point of no-return where a legal system is becoming wholly just/unjust (in spite of specific anomalies). Because nobody could easily define the point of no-return, then anybody can never be sure that the legal system of his/her country is globally just/unjust. Moreover, political and moral disobedience to laws of a just legal system could be rooted on revolutionary intents, civil protest against given laws or conscientious objection for given ethical issues (Raz, 2003, 1983). In those three cases, if we would safeguard a moral obligation to obey laws of a just legal system, then individual/collective freedom would be annihilated. That is why we must assert that there could not be any moral obligation to obey the laws of a so-called "just" legal system.

The basic principle of the legally focused way is grounded on three presumptions (*a priori* beliefs):

(1) financial regulation bodies, governmental agencies, police officers, corporate and banks employees always behave in the right way, when trying to detect and repress money laundering;

(2) the ethical grounds of AML laws and regulations are not quite relevant and important; and

(3) ethics has thus been totally erased.

Law has been substituted to ethics. The function of law is to make an interconnectedness between rights and duties and to focus on justice. According to Rousseau (1978), laws express a general will. Social conventions about the morality/immorality of given actions give birth to laws and regulations. Contracts are nothing but exchange of rights (Hobbes, 1972). Social contract makes possible for individuals and groups to define their respective rights and duties, so that they will constitute a specific political body (Locke, 1985). Social contract philosophers could help us to better understand how AML laws, regulations and international initiatives are built up.

The economic, social, cultural and political context of developing countries is quite different than that of developed countries. According to Tang and Ai (2010), some developing countries either select given AML international standards to be actually implemented or choose to adopt international standards without any enforcement mechanism. How could we reduce the pervasiveness of money laundering activities in developing countries? Efficient laws and regulations, good governance systems and high-innovative capacities could lower the pervasiveness of money laundering activities (Vaithilingam and Nair, 2007). The economic, social, political and cultural context of developing countries makes them more vulnerable to money laundering activities (Aluko and Bagheri, 2012). However, could we prove that Western money launderers actually have money laundering activities in developing countries? Dirty money is laundered everywhere. We could hardly know the proportion of dirty money that is laundered where money launderers live as well as the proportion of dirty money which is laundered in developed and developing countries. Money laundering is not a phenomenon we could directly observe (Argentiero *et al.*, 2008). When Aluko and Bagheri (2012) assumed that "over the last decade, developing countries have been more exposed and vulnerable to the exploits of money laundering", they are expressing an *a priori* belief. Of course, money launderers will take into account various weaknesses of financial, political and judiciary systems in developing countries, when choosing countries for their money laundering activities. But it does not mean that greater proportion of dirty money is laundered in developing countries than in developed countries.

The distorting way (legal moralism)

Money launderers use financial activities which are either lawful in given countries and unlawful in other countries. They thus show an opportunistic way to look at financial activities and tend to reduce basic costs and risks of money laundering (Ross and Hannan, 2007). Reducing risks is much more important than reducing costs (Reynolds, 2002). That is why countries in which there is bank secrecy are particularly exposed to money laundering activities (He, 2004a; Cuéllar, 2003). Bank secrecy means low risks for money laundering activities. Electronic money, Internet banking services and Internet casinos facilitate money laundering activities and reduce costs and risks for money launderers (Unger and den Hertog, 2012; He, 2004b). However, cyber-laundering does not necessarily imply that cyber payments constitute real money laundering threat

(Van Duyne, Groenhuijsen and Schudelaro, 2005). Factors for facilitating money laundering activities include:

- Corruption (Mugarura, 2010);
- The collaborative and/or voluntary blindness of bankers, lawyers, accountants, and even real estate builders (Otusanya *et al.*, 2012; Agarwal and Agarwal, 2004): in Canada ($N = 149$ cases) deposit institutions (76.5 per cent), insurance industry (64.4 per cent), motor vehicles (59.7 per cent) and real estate (55.7 per cent) are very frequent destinations for the proceeds of crime (Schneider, 2004); and
- Offshore finance centres as tax havens and secrecy spaces (Levi, 2002; Rider, 2002; Hampton and Levi, 1999).

Paradoxically, banks will seek advice from accountants and lawyers to support the implementation of AML procedures and methods (Verhage, 2009). That is why AML regulations must address the typical relationships between accountants/lawyers and their clients (Yasin, 2004). If the ultimate client of lawyers is community itself, then lawyers do not have to embrace the role morality and thus feel necessary "to do whatever the client could legitimately do for himself if he had the knowledge and ability to conduct his own case" (Crispin, 1995).

The distorting way is mirroring perspective of legal moralism. It implies that money laundering can be considered as an ethical issue because it is covered by laws and regulations. Lawmakers do not have any ethical sight when designing AML laws/regulations, except the ethical intent to fight immorality. The distorting way does not acknowledge that cases of immorality are subjectively perceived and defined. Law is then ruling over social morality. This is the perspective of legal moralism. As said by Brink (2012b), legal moralism implies that "the state can and should criminalize immorality, as such, independently of whether the immorality involves harm". If there is any harm, then legal moralism loses its legitimacy. The ethical concerns of lawmakers include property rights, contracts, injustice and crimes (Hegel, 1973). Law is nothing but human reason which is ruling over all peoples of the world (Montesquieu, 1970). The distorting way implies three presumptions (*a priori* beliefs):

(1) AML laws and regulations actually bear a sense of ethical behaviour;

(2) the ethical dimension of money laundering is identical to the ethical ground of AML laws and regulations; and

(3) language is thus distorting the meaning of law and ethics.

Ethics becomes the parrot of law.

The distorting way can be observed in the banking industry: the way banks are addressing money laundering activities in their corporate moral discourse (e.g. corporate mission/vision, value statement, code of ethics, organizational policies and corporate social responsibility reports) actually show how they are ready to distort the meaning of ethics, and thus the meaning of law. In the banking industry, some authors believe that AML activities imply:

- to have AML policies (Simwayi and Guohua, 2011);
- compliance officers who oversee and monitor compliance with AML programmes and policies (Simwayi and Guohua, 2011); and

- training of employees to make them aware of AML requirements (Simwayi and Guohua, 2011).

Are financial institutions easily joining money laundering prevention initiatives/programs? Not necessarily. According to Azevedo Araujo (2008), financial institutions will have a low propensity to join money laundering prevention initiatives/programs if:

- financial regulatory bodies and governmental agencies could hardly screen banks' willingness or capacity to cope with money laundering prevention: financial regulatory bodies actually fail to exercise an efficient oversight of the extent to which banks and non-financial institutions are complying with AML laws and regulations (Otusanya *et al.*, 2012); and
- there is a low probability of punishing: without strong AML regulations, banks cannot efficiently prevent and fight money laundering activities and act as gatekeepers of the legitimate financial system (Pramod *et al.*, 2012; Verhage, 2009).

Banks cannot efficiently fight money laundering without collaborating with law enforcement agents (Favarel-Garrigues *et al.*, 2008).

The ethically focused way (normative ethics)

Two basic phenomena actually raise our awareness of ethical dimensions of money laundering detection processes:

(1) the way we detect abnormal prices in the international trade, that is, over-invoiced/under-invoiced import/export prices (De Boyrie *et al.*, 2004);

(2) informal fund transfer systems (IFT), such as Hawala systems.

In both cases, ethical questioning has not been annihilated by strong AML laws and regulations. Informal fund transfer systems are characterized by low costs, speed, reliability and accessibility as well as anonymity, lack of transparency and of official scrutiny (Van de Bunt, 2008; Keene, 2007). Hawala fund transfers could be used for right/legitimate purposes (solidarity among migrants) and for wrong/illegitimate purposes (tax evasion, money laundering and terrorist financing) (Zagaris, 2007; Passas, 2004a, 2004b, 2003, Perkel, 2004). The existence of Hawala systems is itself a symptom of social, economic, political and/or cultural weaknesses, mainly the inadequacy of formal financial institutions (Ismail, 2007). We could look at informal fund transfer systems from an utilitarian–consequentialist perspective. According to Mill (1993), in some situations, duties may be exacted from individuals, whether they are managers or followers. In other cases, there are desirable actions which are socially enhanced, although they are not subjected to any moral obligation. In some situations, such IFT systems could be morally justified.

The ethically focused way implies that money laundering is an ethical issue. However, such ethical issue is not wholly defined by AML laws and regulations. Lawmakers had an ethical sight and intent, when designing AML laws and regulations. There is then a dialectics between law and morality: laws are always influenced by social morality, and social morality cannot exclude any legal/judiciary influence. On one hand, laws are shaped by common social values (origin-focused perspective). On the other hand, laws actually have an impact on

moral attitudes, behaviours and decision-making processes (consequentialist perspective) (Lyons, 1984). Every social group implies the heterogeneous notion of morality: members do not necessarily share similar moral values. As said Lyons (2013), members could embrace the same moral value (for instance, equality), while interpreting such value quite differently. So, the way laws are shaped by common social values is not self-evident: each social group is heterogeneous, from a moral viewpoint. How could such variety of moral convictions could exert a major role on the way laws are actually shaped? Even the way laws have an impact on moral attitudes, behaviours and decision-making processes will vary, both individually (between groups' members) and collectively (between social groups). The ethically focused way is grounded on two presumptions (*a priori* beliefs):

(1) AML laws and regulations do not have the final word about the ethical aspects of money laundering; and

(2) ethical dimensions of money laundering could come from the way financial regulation bodies, governmental agencies, police officers, corporate and banks employees actually behave, when trying to detect and repress money laundering.

Practical implications and research limitations

The four philosophical positions toward money laundering activities could have practical implications, from twofold perspective. In both cases, such practical implications aim at the institutionalization of ethics in the organizational setting (Jose and Thibodeaux, 1999). On one hand, managers could better grasp the uniqueness of ethical discourse in comparison with legal/judicial realm. Managers could then review corporate moral discourse (more particularly codes of ethics) to give it more philosophical coherence. Language actually conveys given representations of reality as well as representations of social actors, particularly when such language is impregnated with metaphors (Winkler, 2011; Van Zolingen and Honders, 2010). That is why it is so important to become more aware of our philosophical position towards money laundering activities, except if corporate language is nothing but deceitful form (McCusker, 1999). On the other hand, ethical training sessions could be used to make organisational members circumscribing their moral duties, as to the detection and prevention of money laundering activities. Only Kant seemed to be sure about what is right/wrong (moral imperatives). However, if we are not Kantian, then we could adhere to various schools of thought: philosophical egoism (Adam Smith, Thomas Hobbes: the primacy of personal interest), utilitarianism (Jeremy Bentham, John Stuart Mill, G.E. Moore, W.D. Ross: the primacy of public interest/common good), social conformism (David Hume: the need to be socially approved/the fear to be socially disapproved), moral deliberation (Jürgen Habermas: procedural justice), social justice (Amartya Sen, John Rawls) and existentialist ethics (Jean-Paul Sartre: the total freedom to create our own values). So, if we do not define the ethical theory we are adhering to, then the fact that we cannot always know what is/right/wrong does not mean anything. In business corporations, ethical training sessions for employees and managers should help to institutionalize ethical concerns and ethical questioning/reasoning in the organizational setting. If they are really focusing on ethical issues rather than legal issues, ethical training sessions could help organizational members to show a higher

level of commitment to corporate ethical values and norms of behaviour (Mugarura, 2010).

The four philosophical positions about money laundering activities have been drawn from various theoretical connections between ethics and law. However, they have not been used to check to what extent corporate managers and lawmakers actually adhere to one or the other. Qualitative surveys could help to better understand if such philosophical positions are indeed relevant for decision-making processes and philosophical questioning about ethical issues, either within organizations or among lawmakers. Managers as well as lawmakers do have personal value systems and ethics. However, we do not know how they look at money laundering activities, from a legal and moral viewpoint. They could try to prevent and repress money laundering activities, while being unaware of the presumptions which follow from their philosophical position.

Conclusion

As to money laundering activities, we could adopt various philosophical positions, given that we accept/refuse to make a precise connection between ethics and law, between ethical sight/intent and legal/judicial processes. The sceptical way (ethical relativism) asserts that there cannot be any intrinsic notion of good/evil. If it is so, then how could we justify to fight money laundering? Cultural relativism could make possible to fight money laundering in given countries, while allowing it in others. Money laundering activities are unlawful because they are connected to predicate crimes (e.g. fraud, drug trafficking). An approach of ethical relativism will make quite hard to design international initiatives and conventions against money laundering. The legally focused way (legal positivism) presupposes that ethics is irrelevant, when lawmakers are doing their job. Thus, lawmakers are losing their moral responsibility. Lawmakers become amoral agents. Such social representation of amoral lawmakers is denying any worth to ethics and gives primacy to legal/judicial processes. The distorting way (legal moralism) takes for granted that lawmakers are deciding what is moral/immoral. Although lawmakers could rightly define what should be considered as moral/immoral, they could also distort notions of good/evil in order to favour their legal interpretation. The ethically focused way (normative ethics) means that ethics says something different than law. However, how ethics could be normative in pluralistic societies? Does normative ethics inevitably give birth to subjective notions of good/evil? Normative ethics succeeds in making equilibrium between the ethical realm and the legal/judicial realm. However, it must show how ethics could learn something from law and how law could listen to ethical discourse. Each of the four philosophical positions about money laundering has its own pitfalls. What is crucial is to be aware of our *a priori* beliefs, when looking at money laundering activities from legal and/or moral perspective.

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