

From individual to shared responsibility for financial crime¹

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Abstract

Analysing individual acts committed by financial criminals requires not only addressing the collective perception of individual responsibility but also the need for shared responsibility in the fight against financial crime. Given that financial crime impacts both on the functioning and financing of society, this paper highlights the need to explore the far-reaching implications of every criminal act. Engaging the necessary resources to effectively and collectively combat this scourge cannot be achieved if analysis is restricted to the nature of criminal acts and motives of the perpetrators.

Introduction

The social, economic or environmental responsibility of agents, according to the circumstances of their establishment, is firstly determined by making a clear legal distinction between criminal offences that harm others or society itself, and civil offences. The responsibility of physical and moral persons should be dealt with judicially before attempting a more sociological approach. The legal terms describing the nature of acts committed in a given place relate to the concepts of civil, penal and professional responsibility. Therefore, if the victim of a tort is entitled to civil compensation for damage caused by a third party, then the perpetrator should also face a fine or a custodial sentence, proportional to the harm caused to society. In the case of non-compliance with professional guidelines or ethics, standard-setting authorities can be empowered to impose sanctions ranging from temporary suspension to a lifelong ban. The civil basis of this approach emphasizes the need to understand and perceive the exact nature of the harm caused, determined by a fair trial, under criminal law if warranted. The penal definition of the term financial crime covers corporate offences, fiscal fraud and money laundering but also related crimes such as pimping, kidnapping and murder, requiring the intervention of law enforcement agencies. The opening statement should be balanced by the need to understand, interpret and put into perspective the reasons which lead economic agents to become criminals. What drives individuals to decide on their own volition to compromise their company's development by extorting funds, an act leading ultimately to a new form of utilitarian exploitation of rare and precious resources and public assets? Given that an isolated offender has a limited capacity to cause harm, the fight against financial crime should attempt to uncover any form of collusion,

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including that of state or transnational players. It is essential to question the nature of individual acts committed by financial criminals and their public perception (I) with the consequent necessity of focusing not only on individual responsibility for these acts (II) but also shared responsibility in the fight against financial crime (III).

I- Individual acts and shared perception of financial criminals

Durkheim (1893) claimed that punishment is above all designed to act upon upright people, not on criminals and we do not reprove an act because it is a crime, but it is a crime because we reprove it. Therefore, the effectiveness of sanctions against financial crimes cannot be gauged without assessing the level of responsibility felt by the perpetrators. This standpoint calls for a multi-faceted approach to understanding, evaluating and punishing financial crimes whilst raising two key questions: when a financial crime is committed, should the perpetrator be held solely accountable or does the social perception of financial crime also need to be challenged? Can the perpetrator be dissociated from his/her social context?

Both questions suggest an uncertain relationship between means and ends. Morin maintains that both the deontological aspect (belief in rules) and teleological aspect (belief in purpose) are morally lacking as the former favours the means and the latter is means-dependent. (2006: 49) This dichotomy makes clear that financial criminals have a distinct morality. Since an inherent desire for a guaranteed income or excessive profits takes precedence over compliance with ethical guidelines, financial criminals see no need for soul-searching during a fraud investigation, for instance, basing their defence on good faith and claims of persecution

The uncertainty principle of ends and means. Since ends and means inter-retro act on each other, base means put to noble ends almost inevitably pervert them and finally replace them. (Morin, 1999: 46)

Profit-seeking, key to corporate growth in a capitalist system, is not inherently amoral but the underlying conditions may well be. Thus, all depends not only on the chosen reference model but also on how it works. Financial crime is the continuum between a given economic situation and the means used to achieve individual wealth. Capitalism, whether financial as in the Anglo-American tradition, religious as in Saudi Arabia and Qatar or state-run as in China, generates similar behaviour, in which belief in purpose, namely profit, takes precedence over belief in moral law, namely, the development of the common good. When a system favours ends over means, solidarity is seen as secondary to efficiency in the exploitation of rare and precious resources, leading to a potential perception of financial crime as a pecuniary counterpart of physical exchange. Morin asks if there can ever be an improvement in human relations and in the links that bind the individual to society. (2006: 49)

His reply does not inspire optimism

It should first be noted that the historic failure of every attempt to improve humankind, whether by moral and religious preachers or by eliminating dominators and exploiters, is often replaced by something worse. There have only been ephemeral moments of concord and harmony during liberations or emerging revolutions which are quickly reabsorbed and dissipated. (2006: 49)

Morin's teachings show the sterility of moral, supernatural discourse when not backed by a superior value such as the rule of law with a concomitant desire to develop a just society that imposes deterrent punishments which strip perpetrators of their liberty and rights. By combining the hypothetical imperative, or legality, with the categorical imperative, or morality, Kant shows access to liberty is only possible if these two imperatives are met. This thesis forms the basis of a secular society in which law is a guarantor of a successful transition from a state of nature to a social order. Financial crime should be seen as inevitable when a state of nature is abandoned to an unbridled free market. In a rationale of market efficiency, whenever methodological individualism asserts the primacy of 'I' over the collective 'we', then a distortion of rules seems logical. In order to ensure wealth creation,

financial crime fighters should thus balance protection for the community, through taxation for instance, and standardised individual development.

Elias also evokes

The curious party game that certain groups in western society are apt to indulge in over and over again. There are two opposed parties: one says, 'Everything depends on the individual, the other, 'Everything depends on society'. The first group says: 'But it is always particular individuals who decide to do this and not that.' The others reply: 'But their decisions are socially conditioned.' The first group says: 'But what you call "social conditioning" only comes about because others want to do something and do it. (1991: 61-62)

He then goes on to explain that

The whole debate tacitly assumes – as a point of secret collusion, the undiscussed basis of the discussion – that the 'social' is what is 'the same' or 'typical' among a number of people, while what makes a person unique and different from all others – in short, a more or less pronounced individuality – is an extra-social element that is forthwith assigned, for rather obscure reasons, either a biological or a metaphysical origin according to taste. At this point thought and observation come to an end. (1991: 61-62)

The power of law, essential in the fight against crime, offences and misdemeanours, takes account of the specificity of the individual in a given society. The inherent question posed by Elias hinges therefore on the choice and implementation procedures of social norms to ensure that they are recognised and agreed as being fair and equitable. Financial crime or deviance merely amplify the basis of a utilitarian system, in which Manne defended the concept of insider trading, maintaining that as insiders pay a high price for information, it would be unjust to prevent them from using it. Hence, perfectly equal access to financial information would be counter-productive because operators would no longer be able to make their expected profits and improve on average market performance (1966: 113).

This position raises questions about the role of financial markets. Are they places where personal enrichment is achieved through high-risk speculative operations or places where mid-term and long-term development projects are financed? The adoption of social norms based on improving general well-being entails that financial information should be considered a public good and any distortion of such data by insider dealers must be categorised as an infringement or offence.

Measuring the accountability of perpetrators is a key challenge in adapting the scale of repressive sanctions for financial crimes. Ricœur strove to give a precise meaning to the word 'responsibility' and responding to Aeschlimann, he stated that

The word: 'responsibility', also suffers from ambiguity. In the weak sense, the word is used thus: a person who is the author of his/her acts is described as responsible. Personally, I think it would be better in this case to use the term 'imputability': an action is considered 'imputable' to a person. In its strong sense, which is also its true sense, the notion of 'responsibility' is developed by Jonas. (...). The author shows that true responsibility is exercised towards something or someone fragile, entrusted to us (...) The notion of accountability is absolutely key here. We also find the play between personal structure and otherness because I am always responsible for another who might eventually hold me to account. (1994: 24-25)

This approach to responsibility, in which financial criminals are punished in proportion to the impact of their crimes on society, is crucial to its very survival. The level of liability incurred by a given individual determines whether his/her positioning is fair or unfair. Aristotle maintained that 'Firstly, he who breaks the laws is considered unjust and secondly, he who takes more than his share, or the unfair man.' (1898: 138) When insider traders are seen as economic agents engaging in unjust schemes, this underscores the need for their liability to be incurred well beyond the act committed. Indeed, the offence goes beyond the damaged suffered by their co-shareholders in that it seriously

undermines the economic concept of trust in financial information. The insider trader erodes the essential respect for the other which company owners must uphold for their businesses to prosper. As in the case of misuse of corporate assets, the perpetrator weakens the structure he/she is charged with protecting. The notion of responsibility, as developed by Ricœur, assumes its full dimension, when a sanction is imposed against an offender whose behaviour is unjust. It is thus important to return to the genesis of the criminal act.

Bourdieu points out that

Sociology thus postulates that there is a reason in what agents do (in the sense that one speaks of a reason of a series) which must be found; this reason permits one to explain and to transform a series of apparently incoherent, arbitrary behaviours into a coherent series, into something that can be understood according to a unique principle or a coherent set of principles. In this sense, sociology postulates that social agents do not engage in gratuitous acts. (1998: 76)

A motivational analysis of financial criminals would enable investigators to track the development of their intellectual approach while a rationality analysis of the criminal act in the financial arena would ensure that legal players or sociological agents are not isolated from their social context.

R. Le Loire, investigative judge and senior member of the Finance Division of the Tribunal de Grande Instance de Paris, made the following remark when asked about the standard criteria, common motives and identical motivations of major financial criminals

Everything's confused in their minds. The lure of financial gain makes them feel they exist and stand out from the crowd. Indeed, some big criminals make a profession out of it. Take VAT carousel fraud for instance. People do it because they can make a very good living from it. They drive around in expensive cars and have beautiful wives. Their lifestyle is far removed from the humdrum lives of ordinary people.

This analysis helps clarify the notion developed by Bourdieu that 'political morality does not fall from heaven'. (1998: 144) But how can one develop a sense of morality, how can agents be convinced not to slip into crime?

(...) the cult of public service and of devotion to the common good, cannot resist the critique of suspicion that will endlessly uncover corruption, clientelism, ambitiousness, and at best a private interest in serving a public purpose. By a "legitimate imposture", in Austin's words, public persons are private persons socially legitimated and encouraged to think of themselves as public persons, thus to think of themselves and to present themselves as servants devoted to the common good. (Bourdieu, 1998: 144)

II- Individual responsibility for acts committed

Highlighting the criminal liability of perpetrators can only be realised in an Aristotelian framework in which 'the laws prescribe about all manner of things, aiming at the common interest of all (...) by reference to personal excellence, or to some other such standard.' (Aristotle, 1898: 139) The perception of a crime or offence depends on the scale of values embraced by a free and organised society. Thus, if Aristotle is right in claiming that 'justice, then, in this sense of the word, is complete virtue, with the addition that it is displayed towards others' (1898: 138) then it follows that a scale of sanctions should be applied according to how much damage is inflicted on society. White-collar financial crime is based on a particularity which is both visible, due to the absence of crimes of blood, and invisible, due to the misuse of a vital resource such as financial information. The criminal misappropriation of information reaches a paroxysm in the privatisation of a vital public good such as knowledge. Indeed, financial information, manipulated and exploited for private purposes, deprives its users of transparent access to an essential resource and thus prevents them from acting in full

knowledge of the facts. Those, such as tax evaders, who exploit the fault lines of a system, harm not only public finances but also undermine the trust economy. No long-term development project can be realised as long as public finances are siphoned off by economic predators. Hence, it would be pointless to separate the individual from an act committed in a company, as such positioning would only result in vain excuses by perpetrators, wishing to exculpate themselves.

If, like Elias one considers that

Society with its regularity is nothing outside individuals; nor is it simply and 'object' 'opposite' the individual; it is what every individual means when he says 'we'. But this 'we' does not come into being because a large number of individual people who say 'I' to themselves subsequently come together and decide to form an association. The interpersonal functions and relations that we express by grammatical particles such as 'I', 'you', 'he', 'she', 'we' and 'they' are interdependent. None of them has an existence without the others. (1991: 61)

Unity of thought and action among individuals in a company requires shared responsibility for any deviant behaviour and this can only be achieved when individual deviant behaviour is no longer allowed to undermine the ability of a company to function

There are different ways to approach the issue of responsibility. One way is through imputation: recognising ones acts, being capable of taking more or less complete responsibility for them (...) The notion of responsibility as a response concerns not only the capacity to be accountable but also refers to the publicity dimension, in the sense of making public what one has done: the capacity to respond publicly, an integral component of democracy. The other key dimension of democracy is to include those who are potentially involved in the decision-making process. I do not know to what extent this is possible in the area of financial innovation for instance. (Monod et al., 2011: 28, 41)

This requires a company to use fair and implementable coercive provisions against perpetrators of financial crimes

The repression of acts committed by individuals is the primary vector for criminal policy. We assume that an individual set on engaging in such activity will justify his/her attitude based on the expected gains, probability of being arrested, the fine and/or prison sentence likely to be imposed and the negative value attributed to the time spent in prison. This hypothesis does not assume that such agents actually make such an economic calculation but it is the best possible simplification, particularly in the area of economic crime. (Kopp, 2001: 3)

Based on this assertion, a repressive penal policy may prove effective in cases where the perpetrators' intellectual approach is driven only by financial gain and the exploitation of legal and regulatory loopholes. Any punishment imposed must fit the crime, assuming that the perpetrator acted of his/her own free will.

Létourneau and Naccarato claim that

Deviant behaviour and the failure of financial service providers to meet contractual obligations lead to a breach in the relationship of trust between parties. More importantly, legislators, courts and perpetrators recognise, from a relatively harsh discourse, the severity of crimes committed in this area, not only the harmful consequences suffered by the victims but also the erosion of trust towards financial markets and players and even the legal system which is partially responsible for controlling such deviance. (2010: 14)

From an economic analysis standpoint, the cost-effectiveness of sanctions is justified as a means of dissuading potential criminals and maintaining an optimal level of crime

The public decision-maker can work with two variables: the severity of the sanction and the probability of arrest, recommending an increase in the probable fine that will result in benefits outweighing the costs of repression. This process is interrupted when the last crime avoided costs more to avoid than the net damage it would have caused. The process is interrupted when the cost of preventing a crime is greater than the net damage it would have caused.³ (Kopp, 2001: 3)

An economic analysis of the true cost of financial crime should include a socio-legal approach of the personalities of perpetrators. As members of the company in which they operate, they seek to stand out from other social groups by seeking to make as much money as possible in the shortest possible time. Economically removing the agent from his/her reference group results in a form of rhetoric, unceasingly denounced by Lebaron

The rhetoric of 'neutrality' has become key to building legitimacy into institutions and economic policies. However, it is not imposed in absolute terms, to the point of eliminating all challenges: more than ever, the economic order is about symbolic struggles. The balance of powers between social groups thus corresponds to a dominant form of economic beliefs which help define the basis of the economic order and this is why times of crisis are useful for highlighting more clearly how easily these beliefs are accepted as self-evident truths. (2000: 215)

The attribution of responsibility for financial crimes can only be legitimate if perpetrators admit that they cannot claim to be unwitting players in the financial capitalist system and deny that they acted of their own free will. Imposing individual sanctions to fit the crime or offence should thus be the first step in challenging the deviant behaviour of a system based on individual utilitarianism. The fight against crime should thus balance recognition of the free will of agents engaged in the economic circuit against the power of the law to adapt individual behaviour to norms for the common good. Ignoring the decisional capacity of economic agents and only focusing on the societal causes of their deviant behaviour merely serves to weaken the very essence of the rule of law. In other words, it is vital to challenge criminal players without minimising their impact under the pretext of the moral bankruptcy of the capitalist system. An individual or collective tort or criminal act implies a proportional sanction, imposed on the physical or moral persons concerned. Harmonious relations, in a given society need to be supported by a legal framework guaranteed by national sovereignty. This implies that any action that interferes with national sovereignty, such as fraudulent tax evasion, will be seen as anti-democratic and result in individual tax offenders facing the full weight of the law. The main issue, and one not easily resolved, involves clearly identifying the authors of financial crimes

In the course of their function, white-collar criminals of economic or financial political elites commit crimes which are less visible by their very nature (corruption, insider trading, fraud etc.) than those generally committed by blue-collar criminals (armed robbery, racketeering, etc.) particularly as these economic and financial crimes can easily take the form of legal transactions and thus remain hidden. This is why the perfect crime is far more prevalent on the Mount Olympus of 'white-collar' crime than it is in the streets. Invisibility creates a sense of impunity and acts as an incitement to carrying out a crime. (...) Particularly as mental and social representations tend to have difficulty associating criminal deviance with elites (...) In the case of financial crime, the line between legal and illegal is even more blurred than it is for other crimes as the 'body' of the crime is largely immaterial and thus uncertain. Stigmatising financial behaviour as 'criminal' depends as much on its

³ "The argument can be summed up as follows: Net damage caused by the offence = damage suffered by the victim – gain for the criminal. The sanction is dissuasive when the gain for the criminal is equal to the expected fine. The optimal sanction is such that the cost of discouraging an additional offence = net social damage = damage for the victim – expected fine.

By rearranging the above expression: Expected fine = damage for the victim – cost of dissuasion of an additional crime." Kopp P., *op. cit.*, p. 6

physical and legal reality as on the commitment of public opinion and authorities.
(Gayraud, 2011: 212)

This reality should be weighed against a scale of values, adhered to by citizens of democratic societies. Among these values, consent to taxation remains a characteristic of well-being and harmonious living together. A material connection between money laundering and tax fraud is thus hardly surprising since tax evasion relies on the existence of offshore financial centres and tax havens to hide undeclared income. Responsibility, in the Kantian sense, is subjective; a reasonable person should accept the moral consequences of his or her actions since individual responsibility goes hand in hand with free will. To deny the role of free will in actions that harm the community is also to deny the faculty of discernment. Hence, moral responsibility is inextricably linked to civil or legal responsibility and any freely performed action underpinned by positivist internal and supranational legal frameworks.

III- Shared responsibility in the fight against financial crime

In the wake of the subprime crisis, imputing the responsibility of institutional actors in the fight against financial crime requires objective findings on the nature and evolution of financial capitalism

The 2007-2008 crisis was the product of financial globalisation which failed to ensure the harmonious development of the world economy and allowed it to bear the brunt of imbalances and instability. It should perhaps be noted that the very products that proved to be toxic and which propagated the crisis generated very high profits for those organising their issuance and sales over a number of years. (Bachet et al., 2011: 10)

This should be a salutary reminder of the state's duty to protect the most vulnerable. Jonas reminds us that responsibility is an 'imperative' which is not inward but outward-looking, towards that which is vulnerable. (1992: 135-136) Organising public authority operations so as to ensure a fairer spread of the tax burden is the first step in overcoming individualistic profit-seeking as illustrated by Condorcet's Paradox in which rational individual preferences may lead to irrational majority preferences. Tax evasion by wealthy individuals who hide their fortunes offshore while making use of public services and leaving others to shoulder the tax burden, should be punished as harshly as embezzlement and the forced abandonment of public projects due to lack of budgetary resources. This raises questions about the nature of the State; is it, in the Marxist sense, a crutch for capitalism? Is it turning a blind eye to white-collar criminals by focusing its repressive apparatus on visible racial minorities and on more lurid, media-friendly crimes?

Gayraud raises some pertinent questions about this worrying issue

Did we witness 'a quiet coup' (S. Johnson) or 'class warfare' (W. Buffet)? Has America (USA) become a 'kleptocracy' (E. Harrison), or a 'plutocracy' (P. Krugman, S. Johnson, Y. Smith)? Was the financial system an 'economic pyramid' (W.K. Black). (2011: 213)

There needs to be a consensus on whether a criminogenic system should be described as predatory or piratical. The capitalist system cannot be properly challenged without a critical approach to the grossly unfair advantages which operate in an unfettered free-market system

Capitalism can only be 'axiomatic of decoded streams' of work and capital as long as they circulate in a relatively homogeneous normative territory. In this sense, we are close to the theses of Deleuze and Guattari, who see territorial expansion emerging from the normalisation of new modes of exchange, the defining feature of a modern capitalist state. (Durand and Vergne, 2010: 66)

The difficulties encountered by institutional actors and whistleblowers in the fight against financial crime are exacerbated by private institutions and lobbyists acting as if they are above the law and drains popular sovereignty of its trust in state control bodies. The state is seen as colluding,

directly or indirectly with predatory, mafia or piratical organisations and it stands to reason that the individual motivations of notorious financial criminals such as Madoff could not be realised without the complicity or incompetence of regulatory structures. Punishing individual actors in a criminal structure is a key deterrent against joining such structures but pointless without a crackdown on the rampant among the elite in certain countries, as revealed in Transparency International's annual global corruption index. The individual responsibility of financial crime perpetrators should be seen in the much broader context of the shared responsibility of institutions leading the fight against these scourges. The golden rule should be that shared responsibility cannot be assigned without first dealing with the individual responsibility of perpetrators whose crimes were facilitated by collective institutional failings. An individual's freedom to commit an offence is only possible if the state allows it to flourish which implies *de facto* that resources and sanctions must fit the crimes and offences so as to protect the common good rather than satisfy electoral ambitions. Habermas explains that mass loyalty stems from accepting the legitimacy of the norm and in order for it to be seen as valid, the standard setters must be of impeccable morality

Gaining acceptance on the part of a norm is encoded in a twofold fashion because our motives for recognizing normative claims to validity are rooted both in convictions and in sanctions, that is, they derive from a complex mixture of rational insight and force. Typically, rationally motivated assent will be combined with empirical *acquiescence*, effected by weapons or goods, to form a belief in legitimacy whose component parts are difficult to isolate. Such alloys are interesting in that they indicate that a positivistic enactment of norms is not sufficient to secure their *lasting* social acceptance. Enduring acceptance of a norm *also* depends on whether, in a given context of tradition, reasons for obedience can be mobilized, reasons that suffice to make the corresponding validity claim at least appear justified in the eyes of those concerned. Applied to modern societies, this means that there is no mass loyalty without legitimacy. (1981: 61-62)

The choice of norm echoes Durkheim's notion of normality which explains that crime, a natural phenomenon, is a statistical normality and concludes that a society without crime would be pathologically affected. (1986) Gayraud, however, believes that society has evolved to the point of changing the paradigm of normality by conferring on crime the power to become a norm, maintained and protected by elites who have sanctified it in law

Thus, crimes committed by financial elites do not go unpunished because they are above the law but because they have been converted, in part, into laws. This partial legalisation of serious financial crimes has effectively whitewashed them so that they appear almost invisible in the eyes of the court, current morality and the mediasphere. From 'normality' to the 'norm', crime has crossed an historic threshold, giving rise to the following question: by taking partial control of the system, does this new, organised white-collar crime actually create the system. (2011: 209)

This fundamental question concerns the shared responsibility of citizens in their abandonment of the power of contestation and indignation by allowing their national sovereignty, their representatives, to delegate to private institutions, the drawing up of European accounting standards. This amounts to a regulatory takeover of the legal sphere and the normative development process. Individual criminal players cannot be held to account unless the State is willing to fully assume its obligations to defend and secure economic and social security. According to Lebaron, the impact of neo-classical theories that ultimately aim to dispossess the state of its social, economic and sovereign prerogatives stems from 'a tendency to perceive the economic world as the result of adjustments between individual interests, which is particularly striking among young men from dominant classes whose lifestyle focuses more readily on being perceived as rational and balanced subjects.' (2000: 118) It is precisely under the paradox of defending rationality that economic agents can choose offshore tax havens. While minimising taxes will be welcomed as a normal exercise of 'intellectual fluidity', any sense of beneficial legal constraint for the community will not be perceived as legitimate. Tax fraud will become the logical

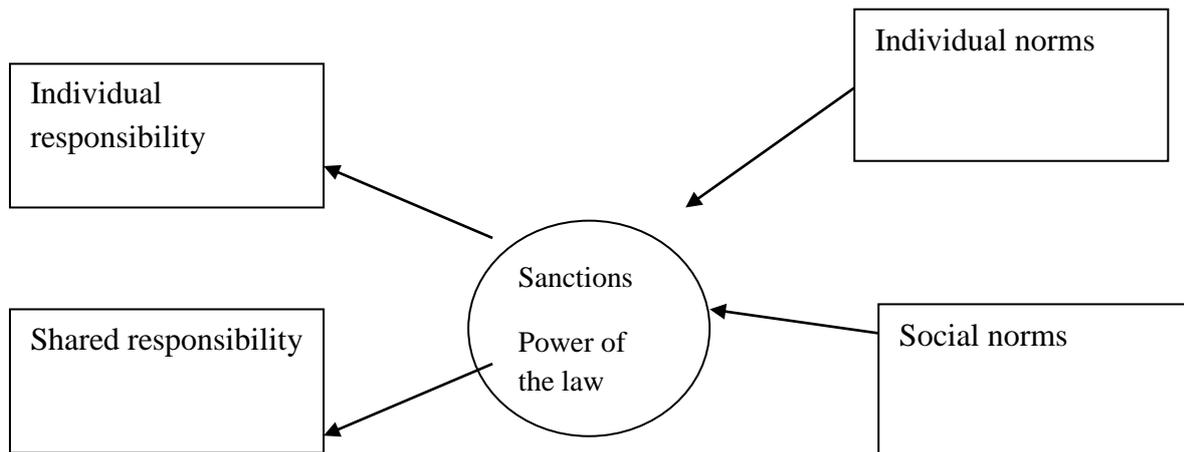
consequence of a rational choice. The neo-classical model is an inherently deviant choice of civilisation where the power of money seeks to annihilate the power of law. (Compin, 2009: 15-39)

Conclusion

The choice of a civilisation model remains inextricably linked to the moral values which people wish to adhere to. Financial crime, the final stage of economic deviance and perversion, merely conveys the degeneration of social links exacerbated by a hyper-individualistic system based on a rationale of private appropriation of profit

We can resist the cruelty of the world and human cruelty through solidarity, love, reliance and by commiserating with those who are its unfortunate victims. The ethical struggle is a dual resistance against the cruelty of the world and human cruelty. “Evils can never pass away”, said Socrates in *The Theaetetus*. Yes, but one should try to prevent their triumph. (Morin, 2006: 246)

Diagram 1: Legal norms regarding accountability



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