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**"Tone at the Top": Building a "Culture of Compliance" in Company Codes of Conduct**

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let me begin with two postulates about the anthropology of policy,

first that new policies bring with them new policy specialists, and that these are worth studying

and second, that we need to understand whether policies in the private sector are somehow different than the public sector policies we usually study.

This is the theme of this presentation. The new field is called ethics and compliance, or business ethics, with the emergence of a new specialist the E and C officer

And E and C is now something of concern to business, as they are prosecuted for anti-bribery, or have their reputations crushed by disasters at their 3rd world textile factories, to take the most prominent example.

Policies are not just plans of action. They are mobilizing instruments. A policy sets out a problem, declares a solution, and outlines a course of action which seems reasonable and effective. Policy launchings, policy rollouts, policy implementation, and certainly policy evaluations thus have rhetorical elements. Rhetorical in the sense that it is language with a purpose beyond simply informing. It is meant to sway or convince those who are partaking, observing and receiving the policy. Language is thus part of any policy world (so integral that the word Language is not even listed in the index of the ‘Policy Worlds’ book, of which Cris Shore was coeditor). This paper is about one such policy world, that of business ethics and compliance. It is largely a world of the private sector, which has been accused of being devoid of ethics; and it is a world that was suddenly created about 10 years ago, by, of all people, the U.S. Federal Government following the Enron scandals, which I will explain below.

Policies tend to highlight certain terminology, and oft times the terminology must be both generalized to attract the public and media, but specialized to indicate to other experts that we know what we are doing. Policy-making, like so much social and symbolic action in complex societies, is about the launching, negotiation and manipulation of words and phrases. Some of these words and phrases are metaphorical, others technical, others quasi poetic. Some policies are even recited in such a way that they may be seen as singing, or chanting, of mantras, or invocations. In the field of business ethics, the top phrases are ‘tone at the top’, ‘risk appetite’ ‘message in the middle’ and ‘culture of compliance’ are some of the catch phrases.

The world of business ethics uses jargon, clichés, metaphors and catch phrases to set itself off. Those of us who study policy or policy communities are invariably fascinated with jargon. Jargon, after all, is the way people let others know that they know. It creates and sustains a community, and like all language acts, it both includes and excludes. The technical language of jargon affirms groups, builds authority, and sets boundaries. This applies to street gangs or hobby groups, as well as to professionals, including professionals like ourselves. Jargon is a restricted code. We assume that the language our informants use reflects something deeper about the kind of world they live in, the kind of relations they have, even about who they are. We know that like other communities, no matter how engaged, that they are also capable of an ironic distance to the kind of values and words they use, what Herzfeld calls ‘cultural intimacy’.

I have been studying the community of business ethics specialists, the so-called ethics and compliance officers (EandC) who are an emergent group within the management teams of most large companies. E and C officers occupy positions alongside the more established units for Human Resources, Legal Office and Internal Audit. Firms that have a CEO, CFO (chief financial officer), and COO (chief operating officer), the three often called the C-suite, now also have a fourth person at the table, the Chief Ethics and Compliance Officer (CECO or ECO). The compliance function in a firm is often subsumed under the larger soft areas of business operations known as Governance, Risk and Compliance or GRC (here containing functions such as CSR, diversity management and risk assessment, including reputational risk, as well as ethics and compliance issues).

In the past year, largely through attending training and conferences and unstructured interview with compliance officers, I have tried to learn what it is like to be an ethics and compliance officer in the post-Enron era. (Enron, by the way, had a code of conduct, it was for sale on ebay, in mint condition, for 15 dollars; former Enron officers now, reborn as ethical guardians, often speak at compliance and fraud examiner conferences). And a lot of my learning was in trying to decipher their special language, by listening, talking and reading, without trying to act too stupid. On top of attending compliance conferences with endless power-point presentations of do’s and don’ts, I also read websites and magazines such as Compliance Insider, Compliance Week and Compliance Professional, textbooks such as Compliance 101 and training brochures such as ‘Dealing with your GRC demons’, and ‘Fighting Compliance Fatigue.’. I have been to training courses and seminars, generally costing as much as 1200 dollars per day, and obtained limited access to magazines with subscription rates of 1000 dollars a year. The language of compliance has seeped in to my work, and as an anthropologist, my interest was piqued by the fact that one of their most common expressions referred to ‘the culture of compliance.’ Culture, for compliance professionals, combines values, attitudes and practices, and *building a culture of compliance* is about engaging employees with the company values, building a climate of trust, hence the mantra: ‘Trust is the New Black’.

What is the domain of E and C? It has a dual character. It consists, first, of respecting laws, regulations and standards (‘what will keep us out of jail’). We all have to comply with something, and there are penalties for not complying. But E and C also has a further aspect of ethics, to ‘do the right thing’. This is sometimes rephrased as the difference between ‘the right thing to do’ (legal) and ‘doing the right thing’ (ethical). Ethics and Compliance officers, therefore, are supposed to be the ethical watchdogs of their companies, ensuring that everyone follows the company’s code of conduct and that potential abuse is detected before the company is called in by the FBI (‘visited by people carrying guns and with initials on the back of their windbreakers’, as one lawyer put it) with the consequent damage to their reputation (known as ‘reputation risk’).

To this can be added a prevailing general understanding of unethical behaviour in the private sector: that it is largely about good people doing bad things. They do bad because they did not KNOW it was bad. In this logic, the truly evil, the sociopaths have largely been weeded out by the Human Resources Department when hired, or at best, there is the occasional bad apple. But other instances of bribery, corruption, slush funds, illegal personal trips, speed payments, conflicts of interest, double bookkeeping, embezzlement, and tax fraud are interpreted largely as human failings, as instances of failed incentives or temptation, or grey zones, that could be caught by a robust ethics and compliance program. People are good, and ethics and compliance officers are virtuous, the conscience of the company. This is perhaps why, at a recent gathering of E and C officers, all 1500 of us stood up for a minute and simply applauded ourselves for………. ‘being good’…….

The Ethics and Compliance industry is somewhat anomalous for anthropologists of policy. Most policy researchers in anthropology have focused on *public policy*, but we forget that policies and procedures are integral to all *private sector organizations* as well. *One might ask, therefore, whether private sector policy-making and implementation is somehow different than public sector*. One might answer ‘Yes’ to such a question on the basis of the view that public sector behavior is subject to different kinds of oversight and external pressures, while the private sector is a world unto itself, including a world which can fork over hundreds of millions of dollars in bribes without getting caught. Ethics and Compliance has arisen precisely because of the new need for federal oversight, created by, of all people, the U.S. Federal Government, which in a series of sentencing guidelines for corporate crime from 2004 specified that a company convicted of violating federal law could receive a reduced sentence if it had a robust compliance program. The federal government thus mandated firms, or warned them, to be ethical, and to establish ‘an organizational culture that encourages ethical conduct’.

(The first time a government has enjoined its businesses to be ethical?).

In this light, the US Federal Sentencing Commission guidelines specified that a robust compliance program must have seven basic elements in order to achieve a better ‘culpability score’ (points given to increase or reduce sentences): 8B2.1

The elements include establishing a viable compliance program with a code of conduct and designated compliance function or officer; efforts to prevent and detect noncompliance and criminal behaviour, weed out criminal employees, promoting the program through training and information and cooperating with law enforcement when corruption or violation is detected.

Under Federal Law, a company caught, for example, bribing a foreign official to obtain a contract, would receive a certain number of points on the government's ‘culpability index’ and significantly reduce their sentence; a company flouting or not having such a program would have augmented points and risk extra fines or imprisonment (see section 8C24(d) and 8C25(b).

Using the compliance program as a lever, the federal government, SEC and Department of Justice, now enter into Deferred Prosecution Agreements and NonProsecution Agreements with dozens of companies caught bribing, tax evading, making illegal contributions, slush funds, price fixing, and other crimes. A fine of several million, or even hundreds of millions, of dollars can be reduced to a few thousand dollars under such arrangements. In addition to this carrot, there is also a stick: a strengthened whistleblower program grants generous rewards to employees who reveal crime in their companies, up to 30% of the amount; the most recent reward, in September, being 30 million dollars. Last year the Government Whistleblower Program received 3600 such tips.

The Federal Sentencing guidelines, now enhanced with new laws on financial reporting, CEO personal responsibility and whistleblowing rewards (Sarbanes-Oxely and Dodd-Frank) along with enhanced enforcement of the Foreign Corrupt Practices Act and now the UK Anti-bribery Act, have led to the resurgence of Ethics and Compliance within corporate management. Companies have hundreds of E and C officers, conducting risk assessments, formulating codes of conduct, making sure these codes are read and respected, and evaluating ethical dilemmas. There are now competing compliance officer associations with hundreds of members, ethics training courses with corresponding certification as Certified E and C officer, there are E and C software companies (with names like Red Flag) selling E and C management systems. You can now obtain a master’s degree in Ethics and Compliance and subscribe to magazines like Compliance Insider or Compliance Week, as well as several ethics and anticorruption blogs. The US government how its anticorruption blog, its whistleblowing statistics, its procedures for ‘self-disclosure’, i.e. firms that confess, the Wall Street Journal now has a weekly Compliance Column paid for by KPMG. All this activity lies is aside the various civil society and public groups, and think tanks such as the Ethics Resource Center, all of which are stimulating ethics in business. Compliance, driven largely by the big four accounting firms, is an assemblage.

The OECD, World Bank debarment program and the UK Serious Fraud Office is starting the same, and several countries are now engaged in corruption prosecution, including incoming bribery of their own officials in South Korea and Nigeria. Firms are doing their utmost to avoid, preempt or reduce federal fines for financial irregularities. And you can now get a masters degree in Ethics and Compliance at a university near Boston. Compliance is hot.

Now, what happens to policy innovation when, first, *we get entirely new areas of business and management such as Ethics and Compliance, with a new group of specialists, and second, when these areas are largely in the private sector,* driven principally by fear of being caught by the FBI, DoJ or SEC, or ratted out by a disgruntled whistleblower?

Spending a lot of time among compliance officers, I obtain a mixture of technical jargon, clichés and metaphors. Like other anthropologists, I sometimes end up going a bit native. A few weeks ago, after attending a conference not far from here on the U.S. anticorruption law, the Foreign Corrupt Practices Act, I returned home and complained to my wife about a ‘lack of level playing field’. I told her of government officials explaining to cooperating firms that: ‘We’re not asking you to boil the ocean’. , and how various U.S. government regulators were all ‘trying to land on the same battleship’. I was suffering from what one vendor had called ‘compliance fatigue’ and another lawyer called ‘unethical creep’, Joining the compliance community, I didn’t understand that I was part of what they called ‘the onboarding process’.

New professions…….

This insertion of professionalism has been true of new occupational groups as they attempt to establish themselves inside preexisting hierarchies.

As a relatively new profession within the business community, often imposed on companies following a federal indictment, E and C officers must prove their worth. However, they are often without sufficient resources for ensuring that compliance actually works, which involves, training and updating on what firms must comply with. In a complex, global business climate, they are often unable to keep up with the many laws, regulations, standards, codes and risks that they have to know. They need words to reaffirm their position internally, to show that they produce a return on investment, colleagues who may not think they are adding the kind of value that the legal office, IT or HR adds.

*The anthropology of policy, in its focus on specific policies and policy networks and configurations, has overlooked what happens when entirely new classes of policy professionals emerge*. Furthermore, policy professionals in the private sector are subject to more pressure to reaffirm their usefulness under the financial constraints of a corporation in a way that is less stringent than even the most neoliberal public sector organizations. (compare for example the diversity/inclusion units of public organizations, which will invariably be larger than private firms because of lobbying and social and political pressures). In other words, *Ethics and Compliance units have to pull their weight in a manner that is more strict in a private firm than would be the case in a public authority.*

Hence, compliance professionals and associations must communicate their usefulness or Return on Investment to their firms and to the skeptical private sector generally. Ethics and Compliance is promoted as not just doing the right thing, *but as good business.* This view is usually promoted with examples of ‘the costs of noncompliance’: the spectacular fines or jail terms imposed by the government on wayward companies, or that even before prosecution that firms like Walmart, are currently spending 1 million dollars a day to simply prepare their case in the accusations of their corrupt practices in Mexico.

The ethics and compliance officer is a new specialist within the private sector. They need the jargon, cliché and the cool metaphors because their jobs are new, not always recognized as generating profit, and ethically sensitive to the others in the firm. The sensitivity aspect derives from the fact that ethics and compliance officers, more than other employees, have an obligation to adhere to *public values* of trust and honesty, and they are, perhaps like accountants, supposed to represent the highest ideals *of their profession,* while at the same time being loyal to the *company*. A company accused of financial crimes can even elect not just to fire their E and C officer, but to take them to court. Pressures indeed.

Two major tropes in the compliance industry, tropes which occur repeatedly are ‘culture of compliance’ and ‘tone at the top’. The two phrases were chosen because they tended to be heard most frequently by me in the public gatherings and written materials from the compliance profession. And a consultation with the policy researcher’s trusted colleague, Professor Google, revealed about 100.000 to 400,000 hits for each of them.

Culture of Compliance.

As most of us in organization studies are aware, the culture concept is a pervasive part of organizational and management thinking. Culture is generally explained as a set of values, attitudes and practices, which may be embedded, until an intervention forces them to change. From a compliance perspective, cultures can therefore be strong or weak, proper or improper. As one compliance officer insisted, ‘we are in the behaviour business’.. A statement about culture also involves invoking a company ‘vision’ with one word values such as ‘excellence’, ‘quality’ or ‘communication’. Hence, one compliance trainer asked our group, ‘how many of you in this room have Integrity as a value?’….whereupon we are enjoined to think about taking it on. After the values are promoted, the task is to socialize the workforce and engage them in the vision, a process known as ‘onboarding’. A, a healthy organizational culture won’t take root simply by forcing employees to read the code of conduct.

Rather, the compliance officer’s job is to create an engagement with company values, and it is this engagement that creates what they call ‘a strong culture of compliance’. One of the most common expressions was ‘making the culture part of your company’s DNA’ a strange mix of nature and nurture, so to speak. Embedding these values is most difficult with those in the company who are in the field, typically the sales force who are paid on commission, and who clearly cut corners (bribes, etc.) in order to make sales. How do you walk away from a sale? Is the issue between compliance officers and the sales people.

Let me end this paper with some remarks on ‘tone at the top’, the mantra of the ethics and compliance professional. The obvious meaning here is that top management must show a genuine commitment to ethics and compliance in order for employees to engage. The phrase appears several times in virtually all ethics and compliance meetings, training materials and speeches. Speakers will often talk about tone at the top using negative examples, such as Enron, whose leadership was hypocritical about their ethics. They will also add that we also need a ‘message in the middle’ or ‘tone in the middle’, that the middle managers and field staff need to be involved. Ethics and Compliance, in this sense, is not just the E and C officer’s responsibility. It is everyone’s responsibility, beginning with top management. There should not be an E and C ‘silo’ in the organization. As one compliance officer said, ‘ You have to think of yourself as a citizen of your organization’. Or as a legal officer said, ‘I think we have a Doctor Phil moment here, It’s all about relationships’

Conclusion

In this kind of talk, we have the emergence of not just another assemblage in the making, but of new relations between employees and their firms. Employees in modern capitalist firms are flexible and career oriented; but they must also be loyal and engaged. The must be both efficient and ethical.

Organizations and companies themselves are now depicted as ethical actors now imposing their ethics on third party suppliers, who now certify their own ethics.. Unlike Milton Friedman’s dictum --that the only social responsibility of the firm is to make profits for its shareholders -- companies now are to be spearheads of a higher morality. This is why in my visit to Coca Cola’s compliance department last month, a visit where we would hear ‘War Stories from compliance’, and for which our group of ethics officers paid 250 dollars for 3 hours, I learned that Coke, has in fact two slogans:  *‘the real thing’* and *‘the right way’.* Coca Cola, we were told, has relations with 207 countries, more than the UN. The only places in the world where you cannot buy a Coke are Cuba and North Korea. Who could have thought that global capitalism would boil down to ‘the right way’ or that management offices of firms would be telling us that ‘Trust is the New Black’.

This does not mean that capitalism has become ethical. As the US prosecutor for anticorruption recently stated at a recent anticorruption review conference, the number of firms paying hundreds of millions of dollars in bribes out there is stunning. A conspiracy theory of Ethics and Compliance would say that it’s all just talk and window-dressing. Perhaps, but talk is also worth studying.