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A CULTURE OF COMPLIANCE: DEVELOPING STANDARDS FOR FIGHTING CORRUPTION

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Abstract.l Over the past decade, a new global regime of anti-corruption has taken shape. Pushed by NGOs such as Transparency International, and with coalitions of international organizations, Western governments, and private business circles, we now have a framework of conventions and regulations that impel governments and international firms to act with integrity and to prevent corruption in business and international development. New anti-bribery laws reward whistleblowers and penalize firms whose employees are caught bribing foreign governments or paying facilitation payments. Yet conventions must be enforced. Statements of good intention are not enough. Governments and firms must show the world that they are actually implementing these new regulations and conventions and establishing anti-corruption programs. We have entered the Age of Compliance. What does compliance look like? How do organizations, firms and countries ‘perform’ compliance? How do they make compliance ‘real’. How do we know that the transparency of compliance practice is not simply a vacuum? Based on fieldwork with various actors in the anti-corruption industry, including Transparency International, this paper describes the elements of the emerging compliance regime.

In a panel on standards, it is appropriate to begin with the concept of transparency. Transparency is usually understood to entail clarity between the outsider and the object or process being viewed. If an organization or an organizational process is transparent, the outsider – be it the client, the press, the controller, the evaluator, or the social scientist – the outsider can decipher what is going on. Opacity is reduced or disappears. The gap between the organization’s surface and its core dissolves. Transparency in this sense is an open window. Pursuing transparency is opening the window. A window that is closed, or tinted, or dark, is not transparent

There is of course another definition of transparency, that of emptiness, of substanceless. In this sense, a person or an organization, or a strategy is simply devoid of content. It is not opaque but simply facade. We open the window and there is nothing there. What you see is what you get, but you get nothing.

These two definitions, lets call them Transparency I and Transparency II, clarity versus emptiness, depict relations between surface and depth, or appearance in content. Going beneath the surface to reveal the true content is good. We don\t like mysteries. So we dig deeper, when others do it, it’s called exposure. When we do it ourselves, we call it disclosure, or being transparent. Being transparent in this sense is a good thing.

Although this panel is about standards and standardization, it reflects a general trend toward exposure, disclosure and the transparent. Why is transparency hot? Why is opacity so bad these days? In what way is transparency an end state to be achieved, and in what way is transparency a performative social practice. Without making up yet another cool word, let me ask, what is transparenting like?

I am interested in this because like many of you here, I have been on the trail of a global assemblage, in this case, anticorruption, or the anticorruption industry, or for want of a better word, anticorruptionism. And in studying the anticorruption industry I have found that the more they seek to expose and disclose, through campaigns, through laws, through compliance regimes, the more that this disclosure becomes an empty shell. It is as if the first definition of transparency gives way to the second, the substanceless. Let me try to flesh this out in the rest of this paper. I will do this by focusing on the latest trend in anticorruptionism, a trend that has developed after the ‘naming and shaming’ of the corruption perception index, after the awareness raising of corruption as a problem for international development and business, and after the enactment of the UN Anticorruption Convention and other global regulatory instruments. This latest trend is that of ‘enforcement’, and particularly enforcement of national and global standards. The standards are in the world of CSR, corporate ethics, and antibribery (both giving and receiving), both national and international. These set of standards need to be enforced, and because the standards are so vague and comprehensive a set of enforcement actors has sprung up. The magic word, the mantra of these actors is ‘compliance’. We have entered the world of compliance. One website actually says that there are now 250,000 compliance professionals in the private sector. Compliance is now so big that you can even outsource it, to companies like corporate compliance dot com. I don\t know if all this is a global assemblage. So let me use the rest of this paper to describe this world in more detail and to argue that perhaps compliance regimes can be used as a window for anthropologists studying a variety of global processes. In particular, the relation between standards, compliance regimes and transparenting (the acting out of transparency) might be a starting point for anthropologists to understand why the world is getting so complex. Again, the operative word here is WHY things are getting complex.

My interest in compliance, standards and transparency comes from my research on the anticorruption movement, which happens to be led by an organization called Transparency International. TI, which is seeking a corruption free world and accentuates ‘integrity’ in all its policy statements, sees itself as a model for NGO transparency. My interest is in how the anticorruption industry works, and how exposure and disclosure interact. That is, disclosure is forced upon actors who may not want to disclose and the weapons of disclosure are ensuring compliance with various anticorruption conventions and their monitoring –disclosure -- , plus a focus on whistleblowing and whistleblower protection, exposure.

Second, I have an interest in conspiracy and conspiracy theories. And we might say that conspiracy is the very opposite of transparency. The work of a conspiracy theorists, connecting the dots, uncovering clues, interpreting signs, is in fact the work of exposure, of making things transparent. If we gave all this a name, we might call it ‘transparenting’

Transparenting is about the social process which are supposed to reduce opacity and stimulate ensure transparency. Transparenting is a set of practices, supported by moral imperatives: it’s not a choice or option, but something you are supposed to do. If you do it, only good things can happen: we get honest politicians, more effective organizations, more satisfied clients, happier donors.

Most processes of standardization and transparency are processes of the ‘soft power’ type, i.e., processes in which the regulating authority seeks to involve the object of power in a kind of self-monitoring regime. Some would call this governmentality. I called these processes ‘compliance regimes’.

Compliance regimes have hit home very hard as governments have sought to regulate the financial transactions and practices of transnational corporations, and particularly the bribery of foreign officials to obtain contracts, and the hiding of these bribes through accounting practices. Here I will describe three compliance regimes and how they interact with transparenting, the U.S. foreign corrupt practices act and the newly revised Dodd Frank law sanctioning whistleblowing, the UK antibribery law, and the UN convention against corruption. These laws and UN conventions, contain normative statements, legal standards, various kinds of sanctions or threats of sanctions, and monitoring and compliance mechanisms. It goes without saying that now that the politics of law-making are finished, and we are now entering the politics of enforcement. Compliance is the forum for this politics because on the one hand it sets standards, but on the other hand provides mechanisms and experts for avoiding or manipulating these same standards. In the world of anticorruption, for example, the crucial difference is whether a firm can be held liable for the corrupt behavior of one of its employees.

Compliance regimes thus link together potentially corrupt actors and the authorities who are to control them. You comply with an external regulation or law, but you also have to SHOW that you are complying with it. Compliance is a practice, but it is also a performance with an audience, spectators, producers, directors, and critics…..Certain laws actually stipulate that companies SHOW they are complying, and that companies unable show what the UK law calls ’adequate procedures’ risk legal sanctions if their employees are caught for bribery.

Compliance tells us WHAT it is we have to show. Transparenting is about HOW we show it.

In practices of transparency, as Levine, Pjelkmans among others have shown, making something transparent may also mean making something else invisible. Acts of disclosure are also acts of concealing something else. Making something transparent may be called policy, but making things invisible well that’s politics.

Like many theorists of neoliberal governance and proponents of governmentality, I believe that there is more and more compliance behavior taking place. And that this creeping compliance, in conjunction with the move toward good governance both locally and globally, has contradictory outcomes. The contradiction is that it creates both more clarity in terms of transparency, more T1 but also more façade-building, more emptiness, T2. Compliance regimes create both more transparency and more opacity simultaneously, more disclosure and more concealment. Such contradictions are good to think with, as Levi-Strauss might say. They help us understand there is, in the middle of all the ’good governance’ chatter, the openness and accountability, behind the performance of complying with ethical standards, alot of politicking is going going on.

A colleague of mine in Sweden has written a book about organizational development and audit culture. It\s called the ’Triumph of Emptiness’. All of us have been involved in evaluation or accountability exercises in which the emphasis is on the form of reporting rather than content. All of us have written, read or heard about reports and evaluations that are produced, but never read, except for the executive summary. We all complain about it, it makes us uneasy, but things keep going on. Malinowski called this the "imponderabilia of daily life," the unquestioned routines. Transparency and compliance regimes are becoming routines, and routines are what anthropologists should study.

COMPLIANCE REIGMES IN ANTICORRUPTION

I will do this by describing some of the compliance measures that have emerged in the wake of the new global anticorruption regulations. In the world of anticorruption, as in many other fields of social activity, it is not enough to establish standards, regulations guidelines or laws. The real problem is in the implementation and enforcement of these. What factors operate that global actors – countries, organizations, corporations – will in fact adhere to or respect the treaties or standards to which they have signed? Conversely, what factors operate so that these actors will ignore or contravene these same standards. In political science there is a lot of talk about the spread of standards. It is reminiscent of the way anthropologists talk about global cultural practices. This spread of standards is not always simply an imposition by powerful actors. As most anthropologists have found out, people or organizations can enthusiastically take up foreign cultural practices and discourses. They join up, they ‘get on board’. A lot of standardization politics, especially that of the ISO in Geneva or other trade associations, is about ’getting people on board’.

Compliance is the process of ensuring that policies or routines are adhered to by those who participated in or are subordinated to these policies. Countries or corporations may be encouraged to sign on to certain treaties and conventions for reasons of image or propaganda – this has clearly been the case with various human rights and anticorruption conventions. But they have had no intention or little incentive to actually enforce or respect these same conventions. This gap between acting on board and actually supporting the treaties one has signed has led to a derivative industry: that of human rights or integrity indicators, with their invariable multicolored world maps showing the good countries with bright colors, and the bad ones with dark colors.

What we are witnessing, however, is a renewed effort by other global actors to not only establish moral and legal standards, but to establish effective means of enforcing these. If laws, treaties and conventions are standards , then compliance is about the standards for standards so to speak. We are witnessing not just the emergence of regimes of governance –understood here as a new relationship between power holders and objects of power in which both actors objects participate and take responsibility for their action. We are also witnessing the emergence of regimes of compliance, new methods and techniques for enforcing governance regimes.

So let me use the rest of the paper here to describe compliance and transparenting within the anticorruption industry. I do not use the word ‘industry’ lightly. An industry, as I see it, has certain properties: standardization of routines, an organizational approach to problems, globalization and division into smaller interchangeable units, a financial bottom line. The opposite of industry is ‘craft’: small, local, improvisational, done with passion, client centered. Small anticorruption activists and groups, some risking their lives against authoritarian states or vicious politicians, have now evolved into a worldwide anticorruption ‘movement’ which includes global anticorruption NGOs, measurement of corruption rates, international conventions, aid priorities and budget lines and hundreds of anticorruption projects aimed at public authorities, private firms, and raising public awareness. This ‘industry’ can be conceived as a landscape where various resources move: these resources are money, people, knowledge and symbols.

The Corruption Perceptions Index, a publicity move established almost by accident by Transparency International in 1995, is now a standard rating system for ranking countries’ credit ratings or entry into the US Millennium Challenge account. Transparency International itself, an elite group of former lawyers, world bank functionaries, diplomats and activists, now has a 10 million euro budget, 80 staff in the Berlin secretariat and 90 affiliated organizations, and plays a major role in formulating and monitoring international anticorruption conventions and organizes the International Anticorruption Conference. A host of aid organizations now have anticorruption training and aid programs. And consultants and private firms now offer due diligence, risk management, and antibribery training to governments, aid organizations and private firms. The size of this anticorruption industry has been estimated to include several hundred million dollars and perhaps 3000 anticorruption professionals. The International Anticorruption Conference biannual gathering of anticorruption experts and organizations, brings together around 2000 participants. Anticorruption is now a budget line on almost all aid programs and antibribery measures a condition of most loans, grants and cooperation agreements. With this comes the issue of compliance.

All this is happening while the problem these organizations are meant to solve, corruption, has itself undergone a conceptual expansion. Corruption once mean the abuse of power by public authorities for private benefit. It is now understood to mean the abuse of any sort of entrusted power, inside a private firm, in a charity, in an NGO, a school or public authority. Corruption is now simply abuse of authority, the abuse of trust, and can now include what we call fraud, embezzlement, nepotism, or other forms of state capture, i.e. purchasing laws, buying off judges or influencing congressmen… lobbying . Now what happens when the problem that you are supposed to be dealing with expands so much as to include many other domains. We have seen this process with other such moral domains, such as human rights, or trafficking, or sexual violence (which can now include mental violence) or environment or cultural protection. Obviously, it means whole new sets of actors can jump in and cultivate their agendas. It also means that what it is that these actors have to comply with becomes more uncertain, and therefore requires expert knowledge to sort out the difficulties and make the proper interpretations.

This has led to a new set of compliance actors, some formed as NGOs, others operating as law firms or consulting companies, whose job is to guide companies and organizations through the maze of anticorruption, corporate ethics and antibribery regulations. Compliance is making sure an organization or company can SHOW an external authority that they are respecting the law, and are not liable if an employee is caught bribing a foreign official. They have names like anticorruptioncompliance.com or U.S. Compliance Consultants.

U.S. Compliance Consultants advertises “Our solutions are designed to simplify the process and reduce the time you spend filling out forms, reviewing documents and worrying about compliance. “ Compliance, then, is something you worry about.

. … To continue: “All of our [compliance] manuals are fully customized to help you create the “culture of compliance” regulators are now demanding.

Some branches of Transnparency International, for example, are now involved in this kind of activity. After having advised and helped draft the UK antibribery law in which companies can escape penalties if they have ‘adequate procedures’, staff at TI are in the forefront of anticorruption corruption; the privatization of integrity.

One company, Ethisphere, advertises a ”Compliance Program Advisor” which is a subscription service in which companies can composes ‘benchmarking analyhsis reports’, and a ‘code of ethics scorecard’ to arrive at the Ethics Quotient. With the Ethics Quotient, companies can enter the ‘Worlds Most Ethical Companies’ competition.

Companies now have compliance officers. These officers need training, so they can attend a Basic Compliance Academy. Or the meeting of the Associaiton of Compliacne Professionals and become certificed. If a firm or organization does not have the capacity to comply with ethical standards, U.S. Compliance offers Compliance Outsourcing, in which your Chief Compliance Officer (CCO) can be a consultant with US Compliance.

So what do these companies comply to? They comply to some external authority, i.e. they do what they are told to do.. But more importantly companies and organizations comply to a set of standards. The literature on standard setting and policy making tells us that standard setting itself is complex political process: goals are set, categories designed, measurements made on the basis of priorities, compromises and strategies of various actors. Standards can be imposed, as I have said, but companies or organizations can pursue standards to full quite different agendas.

Is Compliance threatening? The private market is busy making companies feel nervous about laws which are complex and potentially expensive. C5, an international business event firm, is hosting an anticorruption compliance forum in Frankfurt in January. The conference brochure notes that while there have been no major investigations under the new UK Bribery Act, and that the number of prosecutions for the American Foreign Corrupt Practices Act has decreased. “Think your company can relax? Think again.” The website describes the case of Morgan Stanley, which escaped prosecution by persuading US investigators that one of its corrupt emplyees acted ‘against the company’s established poiclies and thus avoided costly fines and penalties’. The brochure advises companies that ‘if corruption and bribery is uncovered, it will have a similar defensive argument to Morgan Stanley. The conference officers ample opportunities to establish and improve firms’ compliance programs. Compliance does not come cheap however. The conference fee is from 3400 to 4500 EUROS (sadly, beyond the budget of the compliance anthropologist)

PROBLEMS OF COMPLIANCE

Standards for fighting corruption, however, pose problems. Standards such as this require a definition of corruption that can be measured, that is baseline standards. The baseline itself requires unambiguous agreement on how the phenomenon, an illegal practice such as bribery, nepotism, influence peddling, etc. can be determined. Baseline standards for corruption, or good governance can be based on the opinions of various experts and specialists (foreign businessmen, for example) or on more practice centered criteria, such as the number of permits needed to start a business, or reporting by business owners about how many bribes they gave. The point here is that compliance itself is full of politics, interpretations, and agendas, even though it may appear to be an expert-determined overlap with some abstract indices. The compliance firm anticorruptioncompliance.com, a branch of the Kyros internet law firm, helps companies with the following anticorruption and antibribery areas:

Facilitation Payments  
http://www.anticorruptioncompliance.com/graphics/bullet.pngBusiness Gifts, Hospitality & Charitable Contributions  
http://www.anticorruptioncompliance.com/graphics/bullet.pngCompany Policies on Business Gifts, Hospitality & Charitable Contributions  
http://www.anticorruptioncompliance.com/graphics/bullet.pngPolitical Contributions

Ethisphere offers a ’anticorruption program verification’ package so that they can prove that they have designed, implemented and enforced a robust best-in class anticorruption program’.

Two major developments have taken place to bring compliance to the forefront. First is the new The UK bribery law, which requires that companies take ‘adequate procedures’ in place to combat bribery in their firm. The problem is that the law does not specify what these would be. However, under the law, firms which give or receive bribes, or ‘facilitation payments’ in Britain or abroad, can be brought to trial and made liable for the actions of their emplyees or contractors.

Similarly, establishing a ‘code of conduct’ is easy enough, while enforcing it and adapting it to specific company practices (in England, in Nigeria, in Congo) is the real challenge. Expertise is needed, and the emerging compliance industry is now stepping up. Hence, anticorruptioncompliance.com states that

The code of conduct is the foundation document of any compliance program. The contents of a Code of Conduct will vary from company to company but the code should cover all the major compliance risks encountered by a particular business.”

Compliance programs can also center on third party agents. It is also necessary to have monitoring and oversight, that is to see if compliance is actually occurring. Compliance regimes thus foster new forms of soft power and hierarchy in organizations. Administration is now not just ensuring that things get done and products produced. There is now a parallel administration arises that things get done IN THE ETHICALLY PROPER WAY, according to the demands of external authorities…. It’s not just doing it, but doing it right, doing it GOOD…. Integrity is now a condition for the performance of companies and organisations. It is not just neoliberalism, but moral neoliberalism.

COMPLIANCE TECHNOLOGY

Compliance regimes would not be complete without some kind of certification technique to distinguish real experts from false ones. Two such organizations are the Society of Corporate Compliance and Ethics and the Association of Ethics an Compliance Officers. Both of them run training courses, certify members, and provide platforms for those seeking jobs and training in the compliance industry. Let us recall that most compliance regimes are systems of rewards and punishments governed by risk. In both the U.S. and the UK, if a company has a proper antibribery and ethical program in place, and can show that such program is operating, they can reduce their federal fine by as much as 95%. They can, as it were negotiate themselves out of jail.

WHISTLEBLOWING

Let me end this presentation by highlighting the whistleblowing legislation within the Dodd-Frank act. Under this provision, the is now an Office of the Whistleblower in the SEC, where the whistleblower can receive up to 30% of the take of an illegal act if the violation exceeds 1 million dollars. The SEC provides precise instructions of how to contribute a tip, which can also be anonymous, and how to claim an award. The Office’s 2011 report revealed that 334 tips were submitted, mostly dealing withy strock manipulation, fraud, and financial irregularities. The majority of tips came from California, New York and abroad. Also, the rules make the whistleblower eligible for an award if the whistleblower reports the violation internally and the company informs the SEC about the violation. The first award of 50.000 dollars was recently awarded. The Dodd/Frank Whistleblowing is also a set of standards. But instead of ethical community, it operates with punitive sanctions and rewards.

This has led to a whole set of legal firms who help people in their whistle blowing. Consider The Foreign Bribery Reporting Center, for example, whose web site says YOU MAY BE ENTITLED TO A FINANCIAL REWARD:

**Do you have information about the bribery of a foreign official?**

The Foreign Corrupt Practices Act makes bribing a foreign official illegal, and provides significant financial compensation for reporting violations of the Act.

**Bribing a foreign official violates the US Foreign Corrupt Practices Act.**

Recent changes to the US Foreign Corrupt Practices Act (FCPA) allow individuals to potentially collect millions of dollars by reporting corruption in US companies or any company traded on US exchanges. If you know of any improper payments, offers, or gifts made by a company to obtain an advantage in a business overseas report it confidentially to our attorneys.

Another such firm is McInness Law, whose slogan is ‘when it’s time to do the right thing’ **“Do the right thing. Expose fraud and "blow the whistle" on persons and businesses stealing taxpayers' money.** Under Qui Tam provisions of the federal False Claims Act, and similar legislation in many states, through your attorney you may join the government as it prosecutes a case triggered by information that you've provided.

**Individuals, in effect, can become "private prosecutors"** when they reveal **schemes in which a federal or a state agency was being defrauded but did not know it**. “

Companies and businesses have seen Dodd-Frank and the Whistleblowing Office as an obvious threat to their internal compliance monitoring systems: why go to the ethics officer and get a pat on the back, when the SEC can reward you with thousands. However the SEC did enact measures to “incentivize whistleblowers to utilize their companies’ internal compliance and reporting systems when appropriate.”

Nevertheless, the implications for trust, company loyalty, or team building are obvious here. In a company these days, no body trusts anybody. In 2011 The Wall Street Journal warned of a veritable stampede to the SEC once the first multimillion dollar whistleblower payouts are made. By mid 2012, this has yet to happen, as the first payout have been in the 50.000 range.

Let me conclude:

In the NGO world we have talked about what NGOs do as "NGO-ing." In the world of anticorruption, where we conduct a moral campaign against practices which we don’t like but cannot always demarcate, we have developed transparency as a tool: transparenting. Transparenting involved not only the calls for more transparency (in the same way that anticorruption accusations are now a kind of witchcraft accusation) but now involve a kind of performative transparency in which compliance regimes are the forefront.

In this compliance landscape are the moral entrepreneurs, but also the government agencies, and in between the companies and NGOs who will literally help you perform compliance or become your own lawyer. What we can see is that there are more calls for transparency, more incantations, more demand that this is something that we have to do , and something we should do. And at the same time, this increasing transparency, the possibility to report your firm to the SEC, connotes a degree of mistrust within organizations.

Transparency is supposed to promote trust institutions, understood as accountability. Compliance is supposed to promote integrity and ethical codes of conduct. But trust within organizations may in fact be decreasing. If we are all monitored, if we are all having to report, if we are all having to show that we are doing the right things, it must only mean that there is a climate of distrust. More transparency, more compliance, more distrust.…

Welcome to the world of compliance….