

CULTURE, IDENTITY, AND CONTRACT BOILERPLATE

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Presentation Outline

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Panel Question: Can legal professional subgroups - be they academic, judicial, professional/lawyerly, governmental, social, or other - be understood as cultures in their own right? What role do they play in defining or shaping the legal systems and/or legal cultures in which they work? How can or do these professional subcultures function as agents for or against legal change, either in particular substantive areas (e.g., criminal, administrative or constitutional law) or in a more generalized, conceptual and systemic sense? What role, if any, is currently being played by transnational networks of such professional subcultures?

Abstract

We studied the role of lawyers, investors, economists and officials in a recent shift of standard-form foreign sovereign bond contracts to promote collective action. The change was publicly hailed as a great advance in managing international financial crises. However, most of the over 100 people we interviewed told us in private that they thought the new contract clauses were unimportant. They explained their own work to advance the clauses in political, economic, and reputational terms barely related to the substance of the underlying debtor-creditor relationship. In this relatively small transnational community, actors performed professional roles but also frequently acted out of character and explicitly disclaimed professional identity for the sake of other affinities. Many described themselves as custodians of the “emerging market asset class”.

This talk considers the advantages of framing the incident in terms of professional cultures. Applying the culture lens to the interviews would reflect the actors’ own emphasis on the role of identities in the boilerplate shift; it could also enrich the analysis of the rhetorical and political role of contract boilerplate and of the role of private contracts in the politics of international capital flows.
I. Introduction

- This talk is based on material collected with Mitu Gulati for an article on contracts.
- Our project started as a conventional study of how standard (boilerplate) contract terms change. We asked why a group of middle-income countries (Mexico not Zambia or Germany) raising money in the capital markets changed the terms of their New York-law bonds in 2003 to make them easier to amend.
  - This was interesting because conventional wisdom says contract boilerplate rarely changes, and a large literature has grown up around the question of why this is so and what drives change when it happens.
  - This particular change has attracted huge amounts of media, policy and academic attention because the new contract clauses were supposed to allow countries to restructure debt, save the world from financial crises, and preempt the need for statutory sovereign bankruptcy.

- To the extent we wrote about culture, we backed into it from methodology – the paper is based on over 100 interviews with lawyers, officials, bankers, investors, academics, and others involved in the shift. We estimate this to be over half of everyone involved.
  - The interviews were deliberately open-ended; this was not a statistical survey.

- If the professional subgroups about which we wrote can be understood as cultures or subcultures, then surely what they did in our case study was drive legal change – in the literal sense of changing the contracts governing a $300 billion market, and possibly in the broader sense of managing financial crises and governing international finance

- In the remainder of my talk, I want to mull over what we gain by framing our study in terms of culture and transnational networks. I see at least three advantages:
  - First, it allows us to let the participants’ framing of their own identities to come to the foreground – and the people we spoke to were anxious to talk about identities in connection with contract boilerplate
  - Second, it permits a focus on the networks of officials, professionals, and academics that drove change as reasonably self-contained systems for generating meanings and norms
  - Third, it normalizes our “abnormal” result – the fact that almost everyone involved in this seminal change told us in private that the new terms were unimportant as a crisis management tool – and allows us to analyze contract and contract change as rhetoric, ideology, and political action.
II. Boilerplate Identity

- When we decided whom to interview, we effectively defined a community of “emerging market sovereign debt practitioners” based on our own work in this field since the mid-1990s.
  - On the one hand, we were event-driven (who participated in the boilerplate shift – made the calls, drafted the contracts) – but for us, the event reflected and shaped a context/community that we already knew.
- We defined the subgroups in professional terms (lawyers, economists, debtor, creditor country officials), acknowledging that people’s affiliation would change over time as they changed positions even as they remained part of the emerging market finance/sovereign debt world (Cf. Garth & Dezalay, Palace Wars)
- But our “informants” either challenged our classifications openly or acted out of character. Three examples:
  - Debt managers in middle-income countries saw themselves above all as “market participants” – not that they rejected their identity as developing country politicians, but rather they presented their ability to engage with the market on its own terms as the fulfillment of their political identity
  - From this position, they opposed statutory sovereign bankruptcy and contract change that could signal “weakness”
  - Law was a language of weakness for this group; finance of strength
- Younger lawyers and bankers, particularly ones with national or ethnic ties to poor and middle-income countries, described themselves above all as part of a new capital markets community that was emphatically transnational, diverse, and liberating
  - They defined themselves in opposition to the old “senior statesmen” – white male commercial bankers and their lawyers, who had ruled Wall Street and the City of London in the 1980s in close, informal cooperation with G-7 governments whose support they needed to make bank lending work
  - In the new capital markets community, law and finance professionals got together to make deals happen and keep governments out of everyone’s hair. Law was useful only or primarily insofar as it advanced this goal
- Bondholders – end investors – emerged as a distinct community during the period we studied.
  - The so-called “buy-side” defined itself in part in generational terms and also in opposition to the “sell-side” – investment bank establishment, which was by implication in cahoots with deviant debtors and G-7 governments
  - The buy-side leaders were especially aggressive in taking ownership of bond contracts and trying to impart novel meanings to contract terms
  - But their coherence as a community behind the practices and meanings that they claimed has been provisional
III. Boilerplate Meaning

- The traditional advantage of contract boilerplate is that it carries known, stable – in our case, tradable – meaning. A very complex set of meanings can be locked in and used by multiple sets of contracting parties ... reduces drafting, negotiating costs. (cf Davis)

- How does this meaning come to be? For example, where a contract term describes a mechanism actually deployed in a relationship (eg, poison pill, exit consents, cram down) and/or interpreted by a court – the term then means that which it performed, or what the judge said.

- In our case, the majority amendment clause has been used only a couple of times, and it is not clear that it made a difference in the restructuring outcome. No court has interpreted it.

- How did it come to be held up publicly as the preeminent tool for crisis resolution?
  - By letting its technical meaning recede into the background, and becoming a medium for communicating different messages
  - By anchoring a process that – in the words of one investment banker – created an “epistemic community” around the making of boilerplate (cf Riles)

- The same contract form conveyed different meanings depending on who was communicating, with whom, and when. Examples:
  - Officials in Mexico, the first country to use the clauses in a public offering under New York law, say they adopted the clauses to assert market and political leadership
  - Officials in the Bush II Administration, who worked tirelessly to promote the clauses, claim to have done so as a sign of market-friendliness (using market tools=contracts) and laissez-faire policies – limiting IMF funds for countries in crisis
  - Investors and investment bankers agreed to the clauses and even proposed their own as an antidote to statutory sovereign bankruptcy proposals

- These meanings make little sense within the contractual relationship where the clauses operate – nor did they emerge in a traditional two-way negotiation, business relationship, or litigation.

- They make sense where contract boilerplate is part of the public discourse about the politics of transnational capital flows, where the participants see themselves as vested in the outcome, but also in perpetuating the conversation and their role in it.
IV. Boilerplate Politics

- Based on the preceding discussion, the results of our interviews – the fact that most of the people who spent years to make the boilerplate shift happen told us that majority amendment clauses were unimportant – seem completely natural, even as they are heretical from the perspective of the large existing literature in economics and law.

- Actors pursued change for political, economic, and reputational reasons, which had more to do with their own role in/relationship with the international financial markets than with contract terms for lending and borrowing money.

- The challenge is to define the boundaries and attributes of the “culture” or “cultures” that emerge from the incident.

- Are these professional cultures?
  - Yes in the sense that groups of lawyers, economists, officials and academics performed very clear “ritual” roles in the incident, which were informed by the larger professional cultures of which they were part
  - No in the sense that the salient goals, meanings, norms, practices, and identities transcended professional boundaries

- It makes more sense to talk about a culture of the “asset class” – emerging market debt, or emerging market sovereign debt – which in turn may be a subculture in the larger world of international capital markets
  - Actors of all professional backgrounds spoke to us about promoting or resisting change “for the sake of the asset class”; bad actors were “out to destroy the asset class” – the “asset class” was an object of loyalty
  - Its continued existence and prosperity was necessary to ensure the perpetuation of this community of “asset class professionals” and the continued ability of the actors to perform their professional roles as lawyers, economists, officials, etc.
  - [Aside: the way in which “members” of the asset class treated “intruders” from mainstream corporate restructuring practice is instructive]

- Unanswered questions:
  - How does this “culture” interact with others with which it might overlap, eg, capital markets at large, Wall Street law firms, London hedge funds?
  - What is the relationship between this culture and the state/public international order?
  - Does this culture replicate or subvert the traditional power relationships?