Chapter 8
Joint 'Anormative' Regulation from Status Inconsistency: A Multilevel Spinning Top Model of Specialized Institutionalization

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Weak Culture: Proliferation of Anormative Rules and the 'Democratic Deficit'

Margaret Archer (this volume) argues that social regulation becomes anormative with social morphogenesis: "[. . .] 'Anormative Regulation' of the contemporary social order or, if preferred, its 'Bureaucratic Regulation' – replete with Weber's 'iron bars'. In other words, normativity plays a much reduced role in furnishing guidelines for social action because the law and social custom diminish proportionately in relation to non-normative forms of regulative social control". From a neo-structural perspective, this link between anormative regulation and morphogenesis has far-reaching implications. This chapter argues that this link sheds a strong critical light on joint regulatory processes driven by the two most powerful actors in contemporary societies: states and business (i.e. mostly large multinational corporations and their industrial representatives). Indeed business usually tries as much as it can to participate in the governance of its markets, as well as in the governance of society at large. As a consequence, the staggering number of specialized, unelected, and taken for granted rules (bundled in complex systems of rules) that organize society based on both public administrative law and private standards has created a situation in which institutions of electoral democracy are strongly challenged by a new political economy.

I examine the construction of such "joint regulatory institutions" (as differentiated from what the sociological tradition considers to be public institutions) by looking at how specific institutional entrepreneurs, who are part of collegial oligarchies mixing public and private elites, use 'weak culture' (Breiger 2010) to

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produce and rank specialized norms in the organizational society. Both the state and large business corporations and industries create their own normative spaces and work on extending them to the whole of society, most frequently via entire populations and occupations of 'dual alters' or brokers in multilevel networks (Lazega et al. 2013). Among institutional entrepreneurs, the most central in this creation are "multistatus oligarchs" (MSO), i.e. central players in the accumulation of different, socially incompatible powers and resources, and skilled at creating closed normative spaces that they can misleadingly present as public spaces operating in the public interest. This institution represents a form of joint governance or a combined regime of endogenous and exogenous conflict resolution in markets. The label 'joint' refers to the fact that governance is mainly a combination of self-regulation and exogenous regulation, a combination in which costs of control are shared. The joint element in 'joint regulation' can be defined as the coexistence of several sources of rules and constraints, both external and internal, that weigh on the actors in charge of solving conflicts by making, interpreting and enforcing the rules. Thinking about joint regulation in those terms follows both an organizational and a broadly conceived neo-structural approach to economic institutions (Lazega and Mounier 2002; Lazega 2009).

As outlined by neo-structural sociology, the joint regulatory process stresses the ways and means used by this oligarchy, often in situations of conflicts of interests and making use of status inconsistencies, to build/buy a form of legitimacy that does not require election and constitutencies, and that cuts across the boundaries of Montesquieu's division of powers. This political activity is based on multilevel institutional entrepreneurship, in which the collegial oligarchy includes heterogeneous professionals and experts of various sorts, high level bureaucrats, technocrats and civil servants. All represent both the organizations to which they are affiliated and themselves as committed persons taking political initiatives.

In this chapter, I look at an extreme case of how business gets organized collectively to do so by creating a judicial institution that is both public and "captured" as the result of a complex historical and institutional process. The focus is on the dimension of this process that is brought to light by social and organizational network analysis and a neo-structural approach. This multilevel regulatory process is represented by the image of a multilevel spinning top. Without any 'conspiracy', organized and superimposed levels of collective action neutralize public debate in democratic institutionalization mechanisms based on electoral politics. They do so by enrolling and promoting small networks of institutional entrepreneurs using boundary work, personalized social relationships and social alignments in lobbying to impose selective and narrow choices of weak culture, thus framing normative judgments epistemically.

In turn, this weak culture is taken for granted and gives individuals the opportunity to develop pragmatic decision making that, under specific conditions, is equivalent to procedural norms bringing joint regulation closer to institutional capture. This capture has often been defined as "the efforts of firms to shape the laws, policies, and regulation of the State to their own advantage by providing illicit private gains to public officials" (Hellman et al. 2000). I suggest that this definition is too quickly focused on individuals. The definition of the process of institutional

capture should be broadened to involve corporatist efforts to design or redesign institutions themselves, to frame issues and set premises for decision making in rule enforcement and to obtain systematic collective gains for interest groups in these institutions. These elements add to the capacity of collective actors to gather invisible advantages. A court can thus be captured in as much as interest groups are successful in using their influence to benefit systematically from its decisions based on 'anormative rules' (Archer 2016).

Production and Ranking of Specialized Norms in the Organizational Society

The "regulatory" mechanism in society is a political process by which interdependent but conflicting and competing actors try to control their own normative space. This process of promoting new rules involves both bottom-up and top-down dynamics. Participation in institutionalization and the regulatory process are unequal at best. Competing parties have different definitions of what the public interest is at each level. In order to participate, they count on their networks of relationships, on their own power and influence in their system of interdependencies. The formation of norms is meant to stabilize participants' commitments and exchanges to deal with the risks and dilemmas associated with individual and collective action. This regulatory process is in fact a process of institutionalisation, of institutional adaptation, most often entailing institutional redesign. The internationalization of law, for example, is an highly complex set of regulatory processes characterizing organized forms of collective action at a level unprecedented in terms of sheer size and complexity. A sociological theory of the regulatory process may be of help to think about this complex set of processes.

A broadly conceived neo-structural theory accounts for collective actors' built-in dependence on cultural processes, which are normative in kind. Saying that status provides a position of strength to define terms of exchanges is equivalent to saying that it helps define or select the values, norms, and rules from which such terms are consciously or unconsciously derived. In early structural sociology, the conceptual relationship between relational structures, on the one hand, and rules, norms and values, on the other hand, was elusive. In narrow structural approaches, resource interdependencies, more than norms, were considered the only principle of social order. A neo-structural approach, however, aligns itself with a more institutional perspective when it emphasizes the interpenetration of the interactional and normative realms in order to explain social change or stability (Lazega and Favereau 2002). Institutional theories of action have long stressed organizational values, norms, and rules as restraints on opportunistic behaviour and brutal exercise of power. Such values are debated, contested, and permanently redefined by members. In transnational as in intranational institutionalization, stakeholders try to shape each other's reasoning and framing in order to define juridical roles. They do so by combining rules and networks, conventions and relational infrastructures (Lazega and Favereau 2002).

Collectives change in part because they can redefine their formal and informal rules. Any regulatory process – or process of redefinition of rules governing the collective – is a form of change that involves broken promises in the redistribution of resources (Reynaud and Reynaud 1996). When the rules of the game are changed; some parties lose resources and others win resources compared to the *ex ante* distribution and commitments. This is why, in organizations as in any political community, regulatory changes need the support of members with both power and legitimacy to push for these changes. Specific members, those with multiple and loosely connected forms of status, are the key in such changes, because they can use such dependencies and legitimacy in the regulatory process. This institutional level of organization was explicitly formulated by many sociologists (for example Merton 1959) and by studies of political or micro-political efforts, by competing interests, to change the rules. Such efforts may or may not be successful, and social arrangements are often stable enough to hide underlying contests. But neo-structural analysis can help in identifying them.

Specifically, two notions combine a neo-structural and an institutional perspective: Selznick's idea (1957) of 'precarious values' and the notion of 'multi-status oligarchs' (Lazega 2001). A value is precarious because it is always in danger of losing its representatives, that is, the active support by organized interest groups and elites that help preserve it as a candidate for top priority on the list of all competing values. 'Multi-status oligarchs' are precisely the members of a collective with enough status to redefine priorities between precarious values and derived policy options. Indeed, regulatory changes need the support of members with several forms of status. These oligarchs must have the capacity to promote regulatory changes and deal with the negative effects of broken promises and betrayed commitments induced by social change. Particularly when differences in power are not huge among members, this capacity often rests on the 'sacrifice' of resources by such multi-status oligarchs, and on the legitimacy obtained from such 'sacrifices'. Those who can afford to give up resources, presumably for the common good, while not losing power are people with several inconsistent forms of status. Thanks to this inconsistency, or loose coupling, losing one form of status does not entail losing another. Multistatus oligarchs can thus drive change (the redefinition of rules) while staying in power.

In sum, competitors very often cooperate in order to establish a common language of reference and common rules. In this area, status competition is an essential element of the regulatory process, whether leading to real changes or to resistance to change. From a neo-structural perspective, special dynamics characterize regulation: that of oligarchic negotiation of precarious values and the construction of legitimacy through relative (often false) sacrifices (Lazega 2001). The regulatory process for markets, for example, shows that entrepreneurs can become "institutional entrepreneurs" active in the social construction of their markets. Even in an egalitarian system, everyone does not defend their regulatory interests with the same efficiency. It is not simply a question of stating that the strongest impose their rules: rather, neo-structural sociology shows that actors with multiple and inconsistent forms of social status can be the most influential in this

definition of the hierarchy of rules because they combine a form of legitimacy (an ability to speak on behalf of the collective in a credible manner) with their power (the control of resources that others need) precisely by using the rhetorics of this very relative ‘sacrifice’ to build/buy legitimacy.

Joint Regulation of the Economy by Collegial Oligarchies

Regulation of business is of particular interest in market societies. It is today openly characterized by a great polynormativity. Faced with quantities, coordination in a market involves prices and calculations, but also qualities and interpretation. It is notably through competition by quantities that a plurality of partially autonomous normative orders provides the business world with numerous sources of regulation. The relative weight of the law versus other types of norms depends on the force that the State and public institutions muster to influence this joint regulation in concrete situations of economic action. In the business world, the law occupies a position of primacy with respect to other norms not only because of the primacy of the State, but because the corporate actors in the economy, especially business, have the ability to participate in the definition of the law via processes of lobbying and joint regulation.

Business intervention in the regulatory process has always existed. But it is becoming increasingly more systematic today, as the so-called “regulatory” State tends to establish – in all the domains of public policy – general and vague legal frameworks, leaving the task of defining the substance of the rules to the discretionary interpretation of stakeholders who contribute to governance. Professions such as business lawyers, investment bankers, or consultants play a role of mediation that is significant from a regulatory point of view, especially at the international level. This mediation role is all the more important in international commercial contracts in the absence of stabilized market rules (Flood 2007). Through various forms of lobbying, enterprises greatly contribute to the campaigns of political parties in nation-states, and in exchange they obtain the right to discreetly fill in the void.

The fact that the regulatory deliberation is dominated by such “important” members is not sufficient in itself to account for the social mechanism of negotiation of precarious values. In effect, issues of status consistency must be brought in. As suggested by Frank (1985), the price of status is high when members interact intensively. Cumulating several forms of status, multi-status members muster added legitimacy by showing that they ‘sacrificed’ resources when siding with specific – and costly to some – policy options) to drive the negotiation of precarious values. Several dimensions of status can be described in social life, both exogenous and endogenous. The role played by members cumulating such heterogeneous and inconsistent forms of status has been shown to be a key one in the regulatory process as a social mechanism (Lazega 2001). Inconsistency, or at least loose-connectedness, of the multiple forms of status is functional. In effect, it allows

"oligarchs" to lose resources along one dimension, while still maintaining prominence and concentration of resources along other dimensions. Correlations between forms of centrality in different elite networks, for example, show that persons with such loosely-coupled forms of status are present in any community or society.

Negotiating precarious values is thus the ultimate way for actors to politicize their exchanges. Actors who are strategic and polemical in their appropriateness judgments can argue endlessly about changes in the rules of the game. Multi-status actors, with such relatively loosely coupled – or 'inconsistent' – forms of status control and stabilize the regulatory process. The source of their influence is both control of resources and bureau-professional legitimacy. Since any such change means broken promises, they are in a better position than others to handle the effects of these transformations among members. They can legitimize them by (pretending that they are) sacrificing resources of their own for the collective good, thus reaching a position where they can ask for similar sacrifices from others as well. Taking this high road, however, may not be efficient in itself (the losing party may object that 'similar losses' are relative, and may not be equally bearable by all), which is why multi-status actors are also in a position to force these changes by using their control of resource dependencies. Both legitimacy and power go hand in hand in the management of social change.

Participation in institutionalization and the regulatory process is unequal at best. However, conflicts of interests provide a specific competitive advantage in this process. Conflicts of interests are situations – often incompatible from an ethical perspective – that help specific actors to cumulate inconsistent forms of status and concentrate resources and legitimacy that provide a competitive advantage in the regulatory process. This is particularly visible in certain professions that have played a central role in the political history of Western societies, such as lawyers. Conflicts of interest are a classical ethical preoccupation for many professions: for lawyers who represent successively or concurrently potentially competing clients; for medical doctors who, for instance, own a laboratory to which they send their clients for medical tests; for industrial engineers who move from one employer to another and have to sign agreements preventing them from working competitively on the same matters for at least 2–5 years; for U.S. bankers who are allowed to underwrite securities. And so on: the problem looms large when conflicts of allegiance divide actors invested with some discretion and trust. These professions have traditionally tried to deal with this problem by formulating codes of deontology that are meant to protect confidentiality and secrecy in the relationship between the professional and the client. However, recent growth of organizations (both private and public) employing professionals and semi-professionals (law firms, hospitals, advertising agencies, financial institutions), their increasing specialization, increased mobility of their members and flexibility of their labour markets, all contribute to the need to redefine this problem and to design new measures to deal with it.

It is thus possible to argue (Lazega 1994, 2012) that such organizations actively *seek* conflicts of interests, then put their members in what could be called a 'situation'. Situations of conflicts of interests are opportunities for organizations to increase brokerage capacity, access to resources and to power. As long as they

can hide the fact that they are exposed to conflicts (Katz 1977) or as long as they can blame their individual members for unethical behaviour when they get caught, organizations look for network positions that help them span multiple boundaries, mediate between conflicting interests, create procedures that become a form of ‘weak culture’, in Breiger’s sense (Breiger 2010). These positions help them reframe so as to control the interpretation of the substantive issues. Individual members are then expected both to put the interests of the organization first and not to behave like ethical heroes.

Large corporate law firms’ role as brokers, mediators and boundary spanners in international business is particularly important in the absence of true business law and stabilised market rules.[1] Large corporate law firms can be regarded as powerful players in modern globalisation. Sellers (1991) calls them the ‘shock troops of capitalism’ imposing standards in international business and providing ‘trust’ for deal-making in very uncertain situations. Because they are permanently in situations of conflicts of interests, they have an important power of arbitration in commercial contracts between multinational firms (they hold information about the two sides) and play a part in their enforcement or possible renegotiation. In the absence of clear and applicable law, they provide formats for documents, contracts and written agreements or procedures. At the same time they contribute to building the international financial market and the market for legal services. In becoming experts and go-betweens in the field, they also take part in national or international regulation of business. This gives them a position of strength vis-à-vis their corporate clients and international regulation authorities. They are in a position of developers of law, promoting what Edelman calls an endogenous notion of law (Edelman and Suchman 2007). This set of roles heavily depends on being as often as possible on both sides, i.e. on using conflicts of interests strategically.

Joint Regulation in Judicial Institutions

In the organizational society, it is this elitist regulatory process that produces “anormative rules” (Archer, Chap. “7”, this volume) when the tragi-comedy of relative sacrifice by players with status inconsistency provided by situations of conflict of interest is successful enough to build a form of legitimacy for specialized rules that no longer make sense for non-expert citizens. In order to illustrate this argument, an interesting example is provided by the new rules being hammered out in similar circumstances to define property, in particular intellectual property,

[1] Flood (2002): “The rise of the international law firm is unconquerable. Why? State and supranational lawmaking have not been able to keep up with the rapid developments in the globalization of law. The only institution that has marched in step has been the large international law firm. No global transaction – contract, distribution agreement, securitization, franchise – can be done without them. They have colonized the world of global law”.

a central institution in a society that needs to innovate in order to survive. This is the case of the construction of the European Unified Patent Court, a transnational institution, whose underlying regulatory process aims at defining “good patents”.

Intellectual property (IP) is a key institution of contemporary capitalism. Current debates about such property rights are an example of such processes. These IP rights do not constitute a perfectly coherent and stable system. For example they bring together complex, heterogeneous rules and regulations protecting patents. Negotiating how IP rights can be established is a political compromise. Establishing property rights has always been one of the most decisive actions of governments and one of the main reasons to fight and use powers in society at all levels. Intellectual property is especially crucial in societies that have cornered themselves into a situation where they need technological innovation to survive. Negotiating a solution to the economic dilemma of knowledge (its non-rival nature in use and freedom for better diffusion on the one hand; and the high price of the production of knowledge goods and the establishment of price mechanisms inciting actors to produce them, on the other hand) is the goal of the definition of IP, especially of pragmatic definitions of patents. These definitions are historical and institutional constructions that change with technological evolution, but also with the capacity of players to steer the definition of a “good patent” in one direction or another. They thus respond to political and economic interests with legal, cultural and administrative rules and practices.

This example of the development of the knowledge economy and intellectual property law at the international level is based on a recent study (Lazega 2011) of an interesting process of ongoing internationalization of patent law in the European context. European States cannot agree on what is the right interpretation of the “good patent” and whether or not there should be a European Patent Court. Should Europe define patents as an ‘exception’ [very special protection against competition] or as a ‘reward’ [an ordinary return on investments for incremental innovators]? Industries and large corporations whose business models have patents at their core (food, medicine, semi-conductors, etc.) pushed for the creation of a new kind of court. The Unified Patent Court is a hybrid, semi-public institution that will operate as a public one. Here also, cross-level regulatory competition and regulatory cooperation among competitors involves many heterogeneous actors, some of who are able, thanks to their inconsistent forms of status, to build legitimacy through false/relative sacrifice and thus push through their priorities and rules. Building legitimacy helps them deal with the losers created by such changes in the rules of the game.

Courts are indeed a locus of joint governance. They are not static institutions making a-temporal and purely rational decisions. They are contested terrain, the prizes or objects of broader economic competition and conflicts that occur outside courthouses (Flemming 1998). This is especially the case in courts in which judges are themselves business people elected by their own business community – as will be the case of many technical judges at the UPC. Attempts at influencing what goes on in the court from outside the court come from various angles. Flemming lists five such angles: external stakeholders can try to influence jurisdiction (the range of

disputes over which the court has authority), positions (actors formally authorized to participate in the disposition of cases), resources (the capacity to influence the decisions of other actors), discretion (the range of choices available to actors), and procedures (rules governing courtroom processes). Parties involved in that contest may not be directly concerned by all the conflicts that are dealt with by the court, but they may have indirect concerns, material or symbolic, in the decisions of the court, and thus attempt to influence what goes on.

Flemming’s categories help focus on specific processes of influence. Indeed, collective actors involved in conflicts on markets, such as companies, whole industries (in class actions, for example) and even State administrations, may have strong incentives to influence who becomes a judge and what resources are available to these judges. For example, the more litigious these sectors are, the stronger their incentives to share the costs of conflict resolution. These collective actors are usually conceived of as external actors. Their incentives to influence the jurisdiction of the court are to protect their interests in the long run. They may do this by helping some of their own selected members in becoming judges. The stronger their incentives, the more they can be expected to take care of their representation among the judges. Such judges, once in a position to resolve conflicts between parties, may have combined incentives to influence the jurisdiction of the court: on the one hand, they represent the law and are meant to proceed in all independence; on the other hand, they may represent, and therefore protect the interests of the organizations that supported their becoming a judge in the first place.

Influencing who becomes a judge and what resources are available to these judges can be a very strong, although indirect, way of influencing the outcome of judicial decision making. In effect, collegial deliberation among judges is built into legal institutions. This deliberation – whether formal or informal – relies heavily on knowledge management by the court. This brings us to the second process (in Flemming’s list above) by which influence characterizing joint governance is exercised in such organizations. One way to influence the behaviour of judges is to try to set the premises of their decisions by attempting to control the information and advice available to them while sitting in judgment. Judges coming from one sector of the economy may thus, as “judicial entrepreneurs” (McIntosh and Cates 1997), attempt to keep particular definitions of problems alive, or promote the ideas, customs, rules, and interests that are commonplace in their sector, although not in others. Control over the premises of decisions can be assumed to influence the probability of who wins even if this “framing control” by players is almost invisible to outside observers.

The law and the courts are aware of the fact that different types of actors in the environment of the court are involved in such attempted influence. Anticipating that the court will be the target of such external attempts at influence, the legal system provides rules concerning conflicts of interests for judges: when they are too close to one of the parties, for example, when they sit in judgment on a competitor, sometimes even of a business in the same industry as their industry of origin, they must self-disqualify or, if discovered, be removed from the case by their hierarchy. However, a neo-structural approach to joint regulation can question the success of

such procedural attempts in neutralizing external influences, especially when the judges are elected or self-selected by ideological commitment to political ideas.

This approach is useful in part because it helps identify the small collegial oligarchies with particular influence in transnational institution building. They are enrolled to work on the professional hurdles linked to the diversity of approaches to the same issue in different countries. To describe social and communication networks during these ‘field configuring events’ helps explore the micropolitics of institution building among multi-status oligarchs. In particular, I look at the production of alignments in networking among collegial oligarchies. I argue that such normative alignments take place in combining norms and status, i.e. in alignments between epistemic leaders who are *primi inter pares*.

The Case of a Transnational Institution Specialized in Intellectual Property

The European Unified Patent Court (UPC) is an informative case for further exploration of these micropolitics of institutionalization. The main actors in this work of joint regulation are corporate lawyers and judges as institutional entrepreneurs. In this case, corporate lawyers create, on behalf of their clients, a social network of heterogeneous judges so as to pre-organize future normative alignments on the anormative rules selected as the procedural basis for the future institution.

During the last two decades, judges who specialized in patents in their own countries were brought together in a ‘field configuring event’ to network and get to know each other, learn about each other’s logics and discuss substantive interpretation and procedural choices that will create the framing of this future European judicial institution. The event in which this process is examined is the so-called Venice Forum (VF), a microcosm that was orchestrated by the corporate lawyers representing large European companies (in sectors with patents at the core of their business model, such as pharmaceutical, biotech, semi-conductors, etc.) and organized in an association called European Patent Lawyers Association (EPLAW), the European Patent Office (EPO), the European office awarding European patents to companies),[2] and an association of judges (called IPJA, for Intellectual Property Judges Association) coming from all over Europe. The main institutional and long-sighted entrepreneurs driving the institutionalization process have been the corporate lawyers, whether large law firms or powerful in-house lawyers of large corporations. But the main actors at this event, the judges, are a heterogeneous set of judges in the sense that they can be top level judges as well as low level in the judicial hierarchy, specialized or generalist judges, and at different stages of their career, the structure of this career being different in various European countries

[2]EPO is the executive arm of the European Patent Organisation, an intergovernmental organisation that was set up on 7 October 1977 on the basis of the European Patent Convention (EPC) signed in Munich in 1973. It has two bodies, the European Patent Office and the Administrative Council, which supervises the Office’s activities.

and legal cultures. At the time, and still today in practice (2015), Europe had 27 jurisdictions and 27 kinds of patent decisions. During this event, lawyers and judges got to know each other, gave conferences, organized mock trials and dreamed up the future institution and its procedure.

The Venice Forum had three general goals. The first was to facilitate communication and recognition among European patent judges who were likely to work together in the future Unified Patent Court (UPC). The judges who accepted the invitation to participate came from the lowest specialized jurisdictions as well as from the highest national courts in the European countries. The second was to help lawyers know the judges. Corporate lawyers participate in this effort to build a new market institution because it helps them get to know their judges and to observe mock trials in a way that allows them to prepare a toolkit of strategies, including a multilevel and sophisticated way of carrying out ‘forum shopping’ for their clients. The third was actually to promote a specific perspective on the European patent as well as the construction of the UPC as an expression of European legal patriotism that is meant to protect the economic interests of European innovation in the competition with other continents. The judges coming to the Venice Forum knew that their gathering was part of a broader political process.

The ambition of EPLAW and EPO is to create convergence towards a unified substantive interpretation of good patents. They however do not succeed in getting rid of interpretive differences in political economies and forms of capitalism as diverse as, for example, the UK and Germany. Redesigning the institutional framework of intellectual property is in fact an enormous political ambition. In addition, the regulatory activity of the judges is not simply aligned on the institutional model and constraints of their respective countries. The multilevel character of the structure allows for discretion and flexibility at the individual level. Judges from the same country can understand what a ‘good patent’ is in different ways. Their conception of the good patent in terms of goals and scope varies. These variations still exist today and our purpose is to examine the extent to which alignments on possible dominant views takes place through a set of processes bringing together conventions and structures, culture and networks, norms and status (Favereau and Lazega 2002).

Jettinghoff (2011) has provided a reconstruction of the history of the attempts to build a European patent and a European Patent Court in two parallel and competing political arenas (Venice vs. Brussels, to simplify), with a presentation of the underlying political dynamics, including a presentation of the stakeholders and an exploration of the influence of groups of “patent law experts” in the process, i.e. the corporate lawyers and judges who were, for the latter, our respondents. Jettinghoff argues that the Venice Forum mattered in the regulatory process. In 1973, a treaty called the European Patent Convention was signed and the European Patent Office in Munich created as an agency outside of the EU. The Patent was not a Community Patent, only a “Unitary Patent” for Contracting States, but EPO was allowed to bypass national patent offices in Europe. “The intention was that the integration of the patent system would be completed with a unitary patent and a common court of appeal.” It took 40 years until a European judicial institution was

created (in 2012) due to become operational in 2015. Rules produced in Venice as opposed to Brussels thus qualify as anormative rules.

In the core of the network and personalized collegial elite around which the Venice Forum is constructed, actors know that it is not likely that a single substantive interpretation and political consensus will emerge among them on the definition of what a good patent is. Their purpose is to start with the goal of creating procedural norms and the adhesion of European judges to these norms. For the members of the elite of judges, the job is to circulate the procedural norms that they are used to rely upon and that they want to champion. Mock trials are meant to stage the use of such norms, discuss them, compare them to other norms, and try to reach consensus on how to use them. In fact the core judges are mediators between their national interests and the other judges and their job is to circulate the norms. The more central they are in the VF network, the more successful they are in that respect. Open and direct political discourse is not allowed because European judges, as a principle, are used to defend their independence in that area; but the same ideas are framed in discourse on convergence between legal cultures and bodies of law.

The VF succeeded in enrolling and mobilizing a whole population of judges around a core of already committed judges, to recognize them individually as representatives of their countries, to create ties between them (i.e. build a personalized network of European judges who know each other well), to provide them with both epistemic leadership and the opportunity to meet, talk and rub shoulders with these leaders, and thus to construct the support of the less committed judges. This social exchange provides the semi-peripheral and peripheral judges with a chance to be listened to and with a chance to feel that they co-constructed the procedural norms coming out of these events as guidelines for the future Patent Court. It is well known that actors who contribute to construction of norms are much more likely to enforce these norms than actors who are simply subjected to them.

European countries have different judicial cultures, which allows for forum shopping by multinational corporations that select the courts of the country that interprets substantive patent law in a way favourable to their interests.[3] But IP related normative choices framing the future institution can be either substantive or procedural. Based on interviews (Lazega 2011), with respect to a personal substantive interpretation of the rule in the application of patent law, the judges were asked about their personal and substantive views on patents, in particular whether they think that they are exceptions to the freedom of copying which means that the validity of patents and the scope of protection are to be critically assessed; or whether they are rewards for the contribution of the inventor and therefore their validity is to be subject to a mild assessment and the scope of protection is to be broad. The results were that, on the one hand, 45.5 % of the polled judges believed patents to be exceptions to the freedom of copying. The reasons provided are not necessarily homogenous. For example a UK judge generalizes the definition: “patents are exceptions to the freedom of independent action”. A French judge

[3] See for example the case of the “Italian Torpedo” (Franzosi 1997).

thinks that too many patents are delivered, and therefore judges should be more critical: "The problem is that there are all sorts of patents. In France, we have between a 50 % and 70 % cancellation rate for European patents awarded by EPO with an 80 % confirmation rate on appeal. In the awarding of patents there will be a need to show more rigor and requirements – of raising the bar (. . .) EPO's problem and solution approach is not always reliable in France, we are more demanding about an inventive step than EPO. EPO's budget depends on the number of patents awarded and we spend our time cancelling their patents". Another argument used in favour of critical assessment is that "allowing small changes or small innovations [to be patented] too often would increase the workload of courts and patent offices".

On the other hand, 27.3 % of the judges thought that patents are rewards for the contribution of the inventor. A Portuguese judge thinks that "progress and innovation should be promoted – it takes a lot of work to create something and this work should be rewarded by creating a calm environment". However a few judges express the opinion that the second part of the statement, "mild assessment of the validity of the patent and broad scope of protection" is not necessarily a consequence of the first part of the statement, and thus has to be balanced. This divide led 21.2 % of the judges to take a position "in between", a position often labelled "The European Compromise", i.e. to assert that they apply one rule or the other depending on cases: "Decisions are made on the merits of the case and whether they demand a strict or wider interpretation of the innovation".

Venice Forum judges thus disagree on the substantive interpretation of the definition of a good patent. This shows in the variations in responses to the question on the rule that they apply in patent-related litigation. There is however a considerable agreement between them, regardless of interpretive disagreements, on several procedural rules that should be used and that stem from the rules already used by EPO: first, the assessment of an inventive step; second, the determination of scope of protection; third, the involvement of technical experts. Procedural rules can be considered to be examples of 'weak culture', as defined by Breiger (2010), as well as anormative rules as defined by Archer (Chap. "7", this volume). Building procedural agreements is much easier than building substantive consensus in interpretation. Since national courts would often disagree about the solutions to provide for similar cases the process of transnational institutionalization depends, at least for a generation, on the consensus and jurisprudence that elite transnational individual judges, the first sitting judges of this court, will be able to build based on these procedural rules.

Measuring Alignment on Anormative Rules

Given the lack of agreement on substantive interpretations of patents and derived rules, the individual composition of the oligarchy of judges becomes extremely important in the institutionalization process of this transnational court. Indeed, the future judges of this institution will have to make individual decisions that

will create a jurisprudence that is likely, derived from previous experience, to create the basis for future law. Therefore, personalized networks of mobilizing, learning, building personal adhesion to norms and alignments of the champions promoting these norms becomes a crucial process in the management of dissensus in substantive interpretation. During the interviews all the judges accepted to share their perception of who among them was personifying the future Uniform European position with respect to procedural rules, if they believed that any Uniform position would emerge over time. Nominating the judges who were closest to reflecting the future European norm in their discourse with respect to the controversial issues listed above was equivalent, in these judges' minds, to electing these opinion leaders to become the first sitting judges at the future European Court, if not the members of the future Court of Appeal under the control of which judges at the European Court would operate.

Figure 8.1 maps this Uniform network, providing information about how the judges position themselves and others with respect to a future possible uniform European doctrine on patent issues. As shown in this figure, the Uniform network is a highly centralized one.

Identifying the most central judges in this network shows that the Venice Forum judges perceived at least six judges among themselves, from five different countries, as colleagues whose positions on controversial issues are likely to reflect the future EU Uniform position. In this network, these judges are Dutch, German, British,

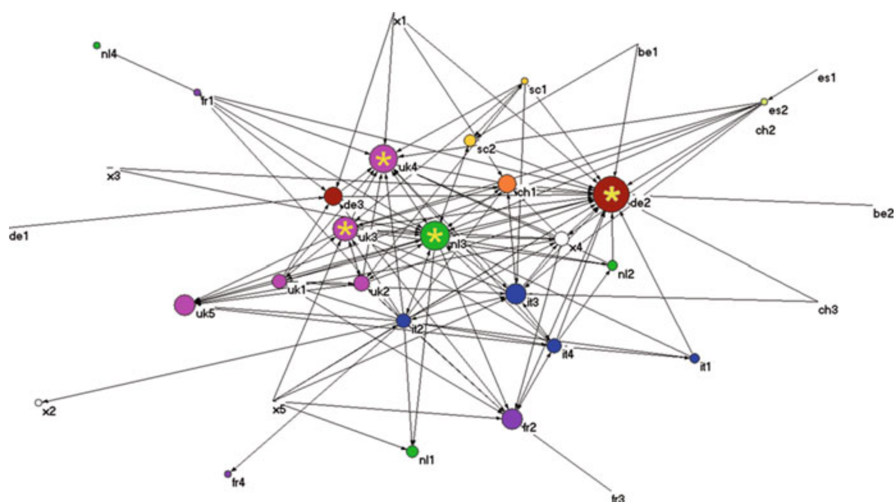


Fig. 8.1 Identifying super-central leaders (multi-status oligarchs) with inconsistent forms of status in a collegial oligarchy assembled by a transnational, public-private bureaucracy: the case of judges perceived by their peers as closest to the future Uniform European position (if any) on the interpretation of patents. The core of this network is defined as the most cited judges (indegree centralities) based on the number of citations above the 90th percentile. The core/periphery dimension of the structure of this system is confirmed by statistical analyses

Italian and Swiss. Many have different ideas with respect to ‘harmonization’ of positions in Europe, some even disapproving the idea of convergence, stressing ‘circulation’ instead of convergence, even if this must lead to diverging decisions and lack of judicial security. Thus, in 2009, convergence towards consensus on the EU uniform position in this network still remained uncertain. One can infer from this structure that field configuring events such as the VF do not necessarily, by themselves, lead to convergence of perspectives and uniform positions among IP judges in Europe. When countries are clustered into blocks that each represents a different type of capitalism (i.e. German, Anglo-Saxon, and all the others) based on the classification of types of capitalism identified by Bruno Amable (2003) in three categories,[4] this picture indicates very clearly that the UK and German forms of capitalism are at the core and that future alignments will go from the North and from the South of Europe towards these two dominant kinds of IP capitalism.

At the stage of development of this transnational institution, normative divergences among institutional leaders matter much less than the individual understanding that each of the judges gains from clarifying the differences between their own approach on these issues and that of their perceived institutional leaders. Combined analyses of conventions and relational structures in a complex institutionalization process show that this process consists in exploring with institutional entrepreneurs the price that they will have to pay, the concessions that they will have to make, in order to participate further. Experiments of role playing in mock trials with judges coming from different European countries were fleshing out these future alignments. In many ways the VF was preparing for the socialization of future European judges who will be the main powers in this institution, and signaling expected normative alignments on institutional leaders’ procedural choices. The forging of new appropriateness judgments as a specific step in the institutionalization process depends on the choice of priority norms in a controversial context, and this step is successful when this choice is collectively personalized by a collegial oligarchy, a step that is easier to achieve in such elitist assemblies brought together in selective field configuring events. Progress in the negotiation of priority norms is achieved through these identifications, these creations of pecking orders and these alignments on the normative choices made by the members at the top of these pecking orders. Network analyses thus have a revealing effect on specific dimensions of institutionalization processes, such as the negotiation of priority anormative regulation combined with the identification of a leadership that will personify the reference group and the norms that are deemed common to its members.

For business, forging these common and personalized judgments is a largely invisible way of framing, building, ultimately ‘capturing’ a public institution. This

[4]Mainly the European continental capitalism (characterizing CH, NL, IR, BE, NO, DE, F, AT) with Germany, and in part the NL, as its leaders on this terrain of patent law – although the NL could also be considered in part as a representative of social democratic capitalism (characterizing DK, FI, SE); and the liberal market capitalism represented by the UK. Mediterranean or Southern capitalism includes GR, IT, Port, ES who also happen to be countries without strong IP specialization in their judiciary.

process facilitates the creation of a self-contained normative space where challenges are reduced to ‘safe criticism’ and exogenous control becomes very costly, next to impossible. The elitist nature of institution building has long been an issue for observers of a European ‘democratic deficit’. Elitism can also be a way to protect the institution: very generally, when an institution dysfunctions, individuals are blamed, which is only accepted by elite individuals. Neo-structural sociology shows that if institutionalization processes are facilitated by this personalization, then the issue raised by this deficit may be how to design institutions that depend less on this personification.

There were no clear winners and losers yet in 2009 in this institutionalization process as measured through normative alignments, although it was already obvious that some would have to make more concessions than others to be retained in the future as judges in the upcoming court. In the case in point examined here, the conditions under which this process is successful still remain uncertain. The substantive ‘European compromise’ in interpretation of patent laws is still elusive: this lack of consensus is dangerous for this institution. For example, industrialists in the UK and Germany might fear being dispossessed of their own conception of IP to the benefit of their competitors’ conception, a dangerous situation for their markets and profits that will lead to forum shopping. The future Uniform position is still unclear and replaced by procedural anormative rules. Without consensus on personal interpretation, only personified consensus on procedural norms is anticipated. These public/private institutions accept that the procedural rules will be formulated by highly selected judges who are considered epistemic and normative authorities by their peers before these rules are injected into and tested by the political process. The institution as a ‘tool with a life of its own’ (Selznick 1957) has this unpredictable element. But its specialized nature makes the process more capturable and safer for them than if the institution had been framed and built in the public arena, under the surveillance of the wider political spectrum.

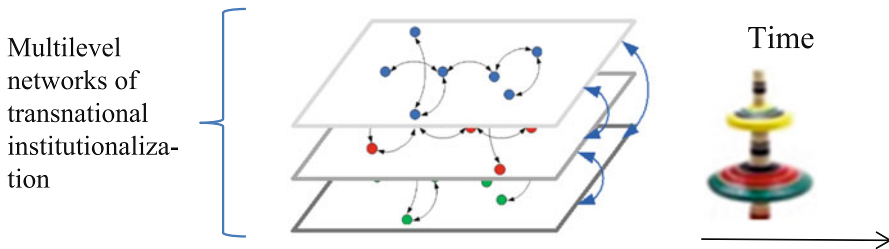
Shedding this neo-structural light on regulation is thus equivalent to analyzing the production of anormative rules. These regulatory processes take new forms in contemporary society (Archer 2013, 2014) and involve hidden costs. Increasingly, organizational societies see secondary socialization to such anormative rules as the main source of social order.

Toward a Multilevel Spinning to Model of Institutional Emergence

To reflect more generally on the link between relational structures and the process of institutionalization, especially of anormative rules, it is useful to remember that social networks are systems of interdependencies between actors (individuals or organizational) capable of collective action. A complex social phenomenon such as the emergence of a new institution takes place at several levels simultaneously that must not be conflated but that co-constitute each other (Archer 1982; Breiger 1974;

Brailly and Lazega 2012; Lazega et al. 2008). Dynamics of such multilevel systems of collective agency assume, as also suggested by Berends et al. (2011) or Grossetti (2011), that the evolution of networks at one level of collective action is influenced by that of another level of collective action, and the other way around in recursive ways.

Such dynamics can be considered to be the outcome of a meta-process bringing together both individuals and organizations, in which the evolution of one level explains in part (in causal terms) the evolution of the other. Level 1 relationships can emerge as a result of the emergence of level 2 relationships. Actors of level 1 may be able under certain circumstances to change the structure of level 2, especially by bringing an intermediary level into the picture, a substructure such as workgroups between which individuals move and that includes individuals and is capable of collective action and is included in the organization, and therefore in the inter-organizational level of collective action. This kind of intermediary level substructure – including relational infrastructures such as status and niches– represents both a tool and a "decompression chamber" between levels.



This image of a multilevel spinning top combines dynamic and multilevel perspectives on the institutionalization of norms and especially of anormative rules. In this metaphor, we find the ingredients of institutional emergence: decisions and normative choices made by individual actors and organizations, affiliations of individuals to organizations, networks of collective agency at each level, trajectories and more or less supervised circulations between places at the intermediary level (as in many labour markets in which competition is made increasingly open as one goes down the social stratification hierarchy), but also changing relationships between these intermediary level airlocks themselves as driven by relational turnover created by mobility (Lazega et al. 2006). This set of processes can perhaps become increasingly morphogenic when bringing together networks of different levels in which individuals' affiliations are thus dependent on their mobility in loops, as in carrousels. Evolution of a multilevel social space means, from this perspective, dynamics related to this third, intermediary level. To understand the dynamics of coevolution between collective actions at two levels, it is necessary to bring in an intermediary – but nevertheless, in our view, generic third level.

In many ways, the case in point of the emergence of the Unified Patent Court presented above is an application of this multilevel spinning top. It helps explain how a small network of institutional entrepreneurs with multiple and inconsistent forms of status uses, in its lobbying activity, multilevel networks and their dynamics

to acquire the staying capacity and subsequent influence that is needed to frame, build and entrench a transnational institution. The image of a spinning top represents this process heuristically.

These circular movements and trajectories of actors (for example mobilities in loops (White 1970) and revolving doors from public responsibilities to private jobs, and back to public positions) create an informal pecking order (metaphorically: the shaft of the spinning top) that enables the most central among these institutional entrepreneurs to obtain central formal positions in the institutionalization process and to act as brokers between conflicting sides with different political definitions of the institution. The main idea of this mechanism is that when such individual, oligarchic and dynamic positions of institutional entrepreneurs are stabilized by a supportive inter-organizational network (hence the crucial dynamics of the multilevel dimension of the process), these entrepreneurs are able to maintain their centrality and interactions long enough to surf on – if not to avoid altogether – the unpredictable and conflictual politics of the electoral process. This mechanism thus helps them succeed in their institutionalization efforts in spite of being a small collegial oligarchy: the multilevel structure of the systems of interdependencies between the actors helps them keep their initial advantage as institutional entrepreneurs in selecting rules that will become priority rules for this institution. Here, the dynamics of multilevel networks are indicators of this mechanism that mobilizes superimposed levels of collective agency, interpersonal and inter-organizational at least, i.e. two meso levels that are added to the traditional national and international levels of agency and complexity.

Taking into account the vertical complexity of the social world requires differentiating and articulating these levels and their respective dynamics, adding a problem that can be called a problem of "synchronization" between levels. Synchronization is a task of scheduling and coordinating superimposed interpersonal and inter-organizational forms of collective agency over time at the cost of one level or the other. Synchronization between levels by building and maintaining social forms is much more costly for some than for others, especially for actors who are forced to be mobile – unless they can use this mobility to create new advantageous social forms. Stabilizing synchronization costs is rewarding for actors with a strong relational infrastructure because these costs are either shared or dumped on others. From that temporal perspective, the whole process of institutionalization examined above may in itself be part of synchronization dynamics characterizing a morphogenic society (Archer 1995).

Conclusion

In tracing complex institutionalization that often presents itself as specialized, it is worth using a neo-structural approach to joint regulation processes in which business and the state structure the context of interactions and thus create favorable circumstances for the emergence and enforcement of new collective rules, at the international level in the example used here. Tracing this process leads to a series of

steps that provide a neo-structural approach to the determinants and proliferation of 'anormative regulation' (Archer, Chap. "7", this volume). The result of the regulatory process depends on the pattern of interactions between players with a specific structural identity, called multi-status oligarchs, especially on their capacity to use – thus undermining electoral democracy – their multiple, heterogeneous and inconsistent forms of status, as well as weak culture, to build/buy bureau-professional legitimacy. This register of legitimacy presents itself as both minimal and taken for granted when looking at each new and specialized rule promoted separately, but as impossible to change when looking at the system of rules bundled together. The role of this regulatory process in the recomposition of the political regime of Europe is sketched through the example of the creation and installation of the European Unified Patent Court and the question of the possible institutional crisis that could emerge from a constitutional conflict with the European Court of Justice.

In this case, failed internationalization of substantive interpretation of patent law in the European context ('patent as exception' [very special protection against competition] *vs.* 'patent as reward' [less special returns on investments]) does not prevent collegial oligarchies from creating anormative procedural rules (about assessing inventive steps, determination of scope of protection, involvement of technical experts, etc.) that will allow a small elite of national judges to operate a transnational institution that is created nevertheless – and perhaps to prevent deeper political challenges to the patent system altogether. This highlights an under-examined set of processes in the dynamics of transnational institutionalization, revolving around the identification of anormative rules and leaders in elitist settings, as well as future alignments on these norms and leaders as part of the institutionalization process. Their discussions are meant to guide their lobbying efforts in the elitist process of constructing a judicial institution dealing with patent litigation. Patents are specific types of protections against competition and the conditions under which they should be awarded to entrepreneurs and the ways in which they should be defined when adjudicating patent-related litigation are discussed by judges who, in such transnational institutions, represent themselves but also inevitably their national public authorities and the kind of capitalism that dominates in their respective country. This documents and analyses the extent to which they will play a crucial role in the joint regulatory regime set up by this European court. Important problems emerge in the progressive construction of the future Uniform European position (if any) with respect to patents. This chapter shows how Northern European forms of capitalism dominate this process at the expense of the Southern European forms of capitalism by looking at several dimensions of patents as construed by these judges and corporate lawyers.

This empirical case shows that transnational institution building is the work of collegial networks of elite institutional entrepreneurs who meet in such field-configuring events and negotiate new rules for the organizations that they represent or in which they are affiliated. In this multilevel context, individuals in personalized inter-individual networks operate with or without mandates to promote the inter-

ests of organizations in inter-organizational networks and processes of institution building (Lazega et al. 2008). In particular, professionals in transnational institution building negotiate the 'distributed agency' in how organizing occurs (Quack 2007) by thinking in multilevel network terms to make their moves and implement their strategies. They define the tasks and exercise control over their enforcement. I used network analysis to look into how such entrepreneurs interact to build institutions and try to create what I call epistemic convergence towards a common ground of anormative rules so as to control the heterogeneity of positions across borders.

In many ways the capacity of collegial oligarchies including political leaders, business executives, professionals or experts, and high level civil servants to join forces and to play the same tragi-comical game of building/buying bureau-professional legitimacy from inconsistent forms of status shows how strong national and international elites are in producing anormative rules. It also shows how weak they are in producing substantive and interpretive political compromises, i.e. to foster truly social regulation at national and international levels. In fact I would argue that social regulation does not really exist at the international level yet. Underneath every kind of rule, there is a conventional representation of the collective to which this rule is intended to apply (Favereau and Lazega 2002). Analyzing the structural basis of the normative order shows where the 'democratic deficit' comes from. Whether at the national or international level, anormative rules are the recipe for such a deficit, if not a threat to democracy itself (Mair 2013). In shaping the law of the future, the risk is that only powerful States and powerful private actors will have a voice in the regulatory process, reaching agreements in which the law is too distant from customs and social norms, and thus too costly to enforce in societies that wish to remain democratic. This is especially the case with joint regulation that comes from the private sector, spreads in societies and is never legitimized by the electoral system.

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