

Government by Relational Infrastructures: The Case of the Transnational Institutionalization of the European Unified Patent Court 

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The Oxford Handbook of Institutions of International Economic Governance and Market Regulation

Edited by Eric Brousseau, Jean-Michel Glachant, and Jérôme Sgard

Subject: Economics and Finance, International Economics, Financial Economics

Online Publication Date: Nov 2020 DOI: 10.1093/oxfordhb/9780190900571.013.18

Abstract and Keywords

This chapter analyzes the transnational institutionalization of the European Unified Patent Court (created in 2013) as a case illustrating government by relationships and mobilization of relational infrastructures in joint regulation of the economy. This court, specializing in patent litigation, originated from a public-private network of corporate lawyers, national judges, and European-level technocrats as institutional (or judicial) entrepreneurs, a collegial oligarchy using their own personal social networks across borders to start negotiating a common interpretation of the European patent and to lobby for the creation of the institution. A neostructural sociological approach is then proposed to frame this example in a more general perspective on institution building. This chapter identifies specific characteristics of institutional entrepreneurs who punch above their weight in regulatory processes, in particular the importance of being part of a collegial oligarchy and having several high, heterogeneous, inconsistent, and multilevel dimensions of social status combined with the right rhetorics.

Keywords: institutional entrepreneurship, collegial oligarchy, social networks, relational infrastructure, transnational court, harmonization, patent law, multilevel status, rhetorical skills

1. Controlling One's Own Relational, Epistemic, and Normative Space: A Public-Private Struggle in Joint Regulation of the Economy

Business usually tries to participate in the regulation of its markets as much as it can. It tries to promote its regulatory interests by creating, closing, and controlling new institutions as self-contained epistemic and normative spaces for its production processes and transactions. This political work is a form of joint regulation—"joint" because it necessarily involves collaboration between public authorities and private actors in the process of

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defining interests and establishing and managing these institutions. It points to the fact that when public authorities try to regulate the private sector, the latter also tries to shape the public sphere (Huault, Lazega, and Richard 2012; Lazega 2003; Lazega and Mounier 2002).¹

This chapter looks at this joint process of institution building in two steps. First, it looks at an empirical case study: the controversial construction of a new public-private, transnational judicial institution, the European Unified Patent Court (UPC), which first emerged outside of the European Union's official judicial architecture. This nascent but not as yet operational transnational court system, specializing in patent litigation, originated from a public-private network of corporate lawyers and judges acting as institutional (or judicial) entrepreneurs (Alter 2009; McIntosh and Cates 1997; Quack 2007), with strong support from the public-private European Patent Office (EPO) and a director in charge of intellectual property at the European Commission.² This small, collegial oligarchy of institutional entrepreneurs used their own personal social networks and created their own relational infrastructures across borders to facilitate the court's institutionalization. They negotiated new patent rules on behalf of national and transnational corporations, organizations, and national judicial institutions that they represented or with which they were affiliated. The UPC was created in 2013 and is scheduled to become operational when European countries ratify the agreement that created it. As of 2016, this process is on hold due to Brexit and a constitutional challenge in Germany.

Second, a neostructural sociological approach frames this example in a more general perspective on institution building that combines specific social and organizational networks with the selection of priority norms among competing norms. This neostructural theory accounts for transnational institutionalization by focusing on the importance of combined relational infrastructures and rhetorics of "sacrifice" of specific dimensions of social status used by institutional entrepreneurs. We present the specific characteristics of these judicial entrepreneurs who punch above their weight in institutionalization processes as ingredients of such processes—particularly the importance of being part of a collegial oligarchy and having high, inconsistent (i.e., conflicted), and cross-level status combined with co-evolving rhetorical skills.

2. A Case Study: The Emergence of a New European Intellectual Property Regime

Intellectual property (IP) is a key institution of contemporary capitalism, at the heart of strategic rivalries between superpowers. However, IP rights do not constitute a coherent and stable system across boundaries. They bring together complex and heterogeneous laws, rules, and regulations protecting patents and innovators against competition. Negotiating common IP rights, especially pragmatic definitions of patents (Bessy and Brousseau 1997; Brousseau and Bessy 2006; Brousseau, Coeurderoy, and Chaserant 2007; Gallini 2002; Weatherall and Webster 2014) and common protection against infringing goods traveling across borders, is therefore a revealing joint regulatory political

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process. In many ways, this negotiation is part of a general institutionalization pattern that will be presented in this chapter.

With respect to IP, European countries have different, competing legal cultures (understood in a broad sense, including bodies of law, doctrine, legal actors, and legal institutions). As of 2016, Europe still has twenty-seven different national patent laws and jurisdictions, with deep disagreement between types of capitalism concerning patents and underlying competition and innovation policies, including national innovation systems (Amable et al. 1997; Lundvall 1999). The UPC began with a network of IP judges who became institutional (judicial) entrepreneurs lobbying for the construction of a transnational European court. In fact, European government created the European patent in 1973, but it failed to create the specialized court that many thought should have come attached to enforce this new legal instrument. This failure was due to, among other factors, contrasting interpretations of this new European patent. With help from the EPO and corporate lawyers working in the interest of large European companies (in sectors with patents at the core of their business model, such as pharmaceuticals, biotech, semiconductors, etc.), these judges met at the so-called Venice Forum (VF), a field-configuring event (Lampel and Meyer 2008). Their purpose was to push for a unified approach to intellectual property and related litigation, but also to lobby the European Union to support their transnational judicial project.

Judges in particular have long played a political role in the construction of European Community institutions (Dehousse 1999), as have corporate lawyers (see, for example, Coen and Richardson 2009; Schepel and Wesseling 1997). In the case of the UPC, it took the business world and these judicial entrepreneurs forty years of lobbying until a transnational European judicial institution was created in 2013. Jettinghoff and Schepel (2004) and Jettinghoff (2011) have provided a detailed reconstruction of the history of the failed attempts to build a common interpretation of the European patent and a transnational judicial court for it, in two parallel and competing political arenas. They present the underlying political dynamics as driven by groups of “patent law experts,” who were the respondents of a research project conducted at the 2009 VF (Lazega 2012a). This community of legal experts, committed “legal specialists that are directly involved in the development of material and procedural patent law,” was struggling to “harmonize the interpretation of European patent law” (Jettinghoff, 2011: 57–58). Their target initially was to present the European Commission and European governments with a turnkey court, which these official political powers would not find it reasonable to reject.

This emergence of a new European regime of intellectual property as a case of joint regulation in transnational institution building requires dialogue between patent judges across borders, which is no trivial endeavor. A Dutch IP judge interviewed at the 2009 VF illustrates this very clearly:

It is not difficult to look at foreign decisions. The problem is how easy it is to follow them, to really figure out what thinking is behind these decisions. Not all judges express their motives in the same ways; the decision must fit with the way

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in which it was brought to the court, with local proceedings and local traditions and history. You have to “construe the claim,” as the British would say. But how do you do that? You can read a number of foreign decisions without being able to see how the foreign judge comes to the decision. That is more difficult to do. If the other judge deals with the same patent, it is very interesting to see what he did with it, even if inevitably one comes to different conclusions. It also depends on what parties have argued in this case. If the arguments are the same, the conclusion may be the same. If not, it can be prohibitive to give a decision that you would like to give, given what they have done. It is useful to see what others have done. But it is difficult to analyze. If you are not very well informed about the ins and outs of German law and its applications in that country, you cannot analyze a German decision properly. The most useful thing is ... to go sit down with the German judges and participate in their decisions, see how they do it, and then compare: would we have done it the same way or not? This is more effective than just reading.

Controversies do emerge among judges working on the harmonization of divergent national interpretations of the same European patent. In fact, the emergence of such controversies follows a more general European institutionalization pattern.

2.1. A General European Institutionalization Pattern: A Five-Step Approach

The joint regulation process examined here is part of a wider process of European legal integration (or lack thereof) that starts in the 1960s, as identified by a rich political science literature (Dehousse 1999; Leron 2014; Thatcher 2005). This history of the emergence of European institutions is full of well-documented examples of similar and recurrent dynamics, and this institutionalization pattern likewise pertains to the integration of European judicial institutions. Analytically speaking, it is useful to look at this pattern to contextualize the joint regulation process deployed in regard to IP.

The first step in this pattern is the emergence of a functional need for cooperation and harmonized regulation when national regulators in a given sector encounter similar problems. The case of the European regulation of the telecom industry provides a good example.³ Telecom operators have trans-border problems and they seek regulatory coordination at the European level to solve these problems; although the political level (i.e., governments) is mobilized, it is not ready to concentrate powers sufficiently at the European level to impose a common solution.

A second step consists in depoliticizing the problem sufficiently so as not to threaten the governments. A European market for each specific sector is created, and national regulators are brought together in a network where they talk to each other, measure the distance that separates them in terms of preferred solutions to such trans-border problems, and look for acceptable concessions, pragmatic solutions, and institutional leaders able to represent, carry, and justify such solutions both among the regulators and to European-

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level public authorities. When national government representatives failed to build consensus to coordinate judicial institutions, judges built a network that bypassed the European executive powers; in the case of IP law, this took place with the quiet support of the public-private EPO and private operators such as corporate law firms. While the judges who proceed in this way are public servants, they also think of themselves as citizens who need to make alliances to push forward the stalled integration process.

The third step for this network of regulators is to codify the pragmatic solutions hammered out by the assembled national regulators and to ask the European Commission (EC) to create a decentralized European agency that would have the power to enforce these solutions.⁴ In the case of IP, this step took forty years, from the creation of the EU patent in 1973 to the UPC in 2013. At the Venice Forum, the judges worked to outline a political vision of their institutions, sometimes losing sight of the division of powers characterizing Western democracy. Such processes have been widely documented (Cichowski 2007; Dehousse 1998; Dehousse et al. 2010; Green 1969; Jettinghoff and Schepel 2004; Levi-Faur 2011; Slaughter 2004; Slaughter et al. 1998; Stein 1981; Stone Sweet 2004; Thatcher 2005; Weiler 1994). It is important to realize here that the creation of such institutions elevates the national judge to a first-level European Community judge. Thus, the regulatory strategy of this network is to convince the national judges to participate in the push and to enroll them in the institution-building process—that is, a European-level court topped with a Court of Appeal (a functional equivalent to the agency).

The fourth step consists in this agency separating itself over time from the network of national regulators when the leaders come to use their newly acquired powers of enforcement. In the case of the UPC, this step should start upon its ratification.

A fifth step begins when governments of large countries—often with very Europhilic discourses but quite reluctant practices and attitudes—reenter the stage and argue that they are happy with one common and codified solution to the problem and that it should be enforced by the agency, provided the solution is its own national solution.⁵ Recurrent and self-destructive dynamics are then triggered at the level of the European Commission, which increasingly perceives as rivals these agencies that it has itself created. Due to the fact that it also acts as the watchdog of these decentralized agencies, the European Commission tries to interfere with their work and steer their activities. This war between the EC and the decentralized agencies is a very real problem of political control between the top of the European administration (controlled remotely by national governments) and its internal substructures, which have very different visions and strategies. This problem throws into question the public's unitary view of these institutions (Thatcher 2002, 2005). In the case of the UPC, the European institutional entrepreneurs hope that this fifth step will not come to pass and that UPC's Court of Appeal will quietly homogenize the European IP regime. However, this new judicial institution is also meant to be part of the broader EU judicial architecture, and thus to operate under the control of the European Court of Justice (ECJ)—a step that will necessarily be triggered when a decision by the Court of Appeal is challenged at the ECJ.

2.2. A Handful of Lobbyist Judges Unifying the Future European IP Regime

The group of VF judicial entrepreneurs who participated in our project was a heterogeneous set, bringing Supreme Court judges together with lower-level judges specializing in patent litigation, and including judges at various stages of their careers. Judges invited to this forum were selected by representatives of the European Patent Lawyers Association (EPLAW) and the EPO (and later the IPJA, the International Patent Judges Association) according to several criteria: responsibilities for making decisions on patents in national courts, international reputation, diversity of nationalities, and probably personal ties to the organizers (although this is difficult to establish *ex post*). Although selected *intuitu personae*, they also, inevitably, represented their national public authorities and the dominant type of capitalism of their respective countries.⁶

In this social construction of a European patent judiciary as a bottom-up process relying on transnational interactions and dialogue between judges, it is important to stress the heterogeneity and status inconsistency of these judges as institutional entrepreneurs: they were both civil servants (subject to the division of powers in force in Western democracies) and private citizens involved in lobbying; they had to be invited *intuitu personae* but were nevertheless considered to be country delegations; and they were a mix of activist judges committed to the idea of building a European institution to protect European interests in the global IP competition, more curious judges concerned with patent issues and about the emergence of the future UPC, and judges who simply wanted the voice of their country to be heard in this semipublic, semiprivate arena. Patent judges are often targeted by groups lobbying on behalf of industry, and some of them saw the Venice Forum as part of such industrial lobbying. Some had mixed feelings about participating in a process that involved lobbying and politics, and others refused to participate. All of those who chose to participate knew that their gathering was part of a broader political process.

Initially, the idea was to bring together one judge and one patent lawyer from each of twelve European countries, and then to expand the network. Their initial purpose was to help judges become aware of how their colleagues across borders worked and interpreted patents. The second purpose was to build a social network of judges who would get to know each other personally. The third purpose was to discuss the substantive and procedural rules related to patent litigation, and to converge toward a common interpretation of the patent—for example, in mock trials bringing together sitting judges and practicing lawyers from diverse European countries. The idea was that national judges would then be guided by this jurisprudence and work under the unified control of the UPC. National and European levels were, thus, meant to co-constitute each other (Breiger 1974).

The VF became the field-configuring event of this regulatory process. The VF judges were the functional equivalent of the network of regulators (see the description of the second step of the European institutionalization pattern earlier in this chapter) codifying pragmatic solutions—all were seeking intervention by the European Commission to create a

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European patent court with the power to enforce the codified solutions that the judges were negotiating in Venice.

The VF became a “conclave,” as some participants called it, dedicated to this complex activity of aligning conventions and social networks in the joint regulation and institutionalization of a transnational judicial institution. During this event, lawyers and judges got to know each other, participated in conferences, sat in mock trials, assessed the extent to which they did or did not agree on their substantive interpretation of the European patent, dreamed up the future institution, and drafted a number of compromises related to its procedures. They began to define the case law and main lines of litigation in relation to patents, for themselves but also for future first-instance national courts. As future judges of the UPC, they thought of themselves the most expert judges in patent law in Europe, with legitimacy that would give them an important influence on patent professionals on the continent. Their decisions would be analyzed by all the professionals who would try to adapt, and even by national courts looking for inspiration.

Given the failure of national states in the elaboration of a European system of patents, a collegial oligarchy of lobbyist judges (with status inconsistency) took into their hands a quasi-legislative power—namely, the power to eventually reinforce or weaken whole industries depending on the law that they would choose.⁷ Part of building this new IP regime was also to position the new court in relation to other EU institutions such as the ECJ and its body of legal rules (especially its arguments and famous decisions in terms of competition law, consultation mechanism, etc.). It was also meant to streamline the different offices that deliver patents (EPO and the national patent offices), creating even closer ties between the different national states and their legal systems.

2.3. Controversial Issues in Judges’ Convergence Work at the VF: A Mock Trial

The complex institutionalization process that led to the creation of the UPC in 2013 was part of several attempts at organizing a single European economic space for intellectual property. A survey carried out at the 2009 VF shows that the judges who fell in around a core of already committed judges diverged in their opinions on several controversies involving patent interpretation.⁸ For example, concerning the assessment of inventive step—justifying patent grants, 75 percent of the judges followed the problem-and-solution method of the EPO, although not systematically. Concerning the determination of the scope of protection offered by the European patent, 63 percent of the judges decided not to take into consideration the applicant’s initial statements in the grant procedure before the EPO. Concerning the enlistment of technical experts by the judge, 60 percent did end up selecting experts, though they followed differing procedures. And concerning the approach to patents as “exceptions” versus patents as “rewards,” 45 percent sided with patents as exceptions. Some of these disagreements threatened legal certainty deeply.

As mentioned earlier, work carried out at the Venice Forum was meant to create convergence toward a harmonized interpretation of the European patent, a so-called European

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compromise, and some of this work included mock trials involving judges and lawyers from diverse European countries. One example of a mock trial at the 2008 VF involved a plaintiff suing a defendant for infringement of its European patent. The plaintiff presented the industrial problem of dust (powdery materials generate dust dangerous to workers' health) and offered a bird's-eye view of the major pieces of prior art to show how their client's patented machine and process solved the problem of confining the dust and how the opponent's infringed on this patent. The defendant disputed infringement and contended that the plaintiff's patent was invalid because it lacked an inventive step in the light of two earlier patents. A competition ensued to define the right prior art to be taken into consideration for the patent involved in the suit. The provisional judgment of the simulated European court was that the court was not persuaded by the plaintiff. It found no real differences between the claimed invention by the plaintiff and prior patents: "We have had a vigorous debate about whether or not the invention is obvious over the combination of the two previous patents and we have not found it an easy question to determine. But in the end we have come to the conclusion that the invention was not obvious. Patent valid. Allegation of infringement dismissed."

The composition of this mock trial bench (five judges, one each from the United Kingdom, Italy, Portugal, the Netherlands, and Denmark) had consequences for the decision that was made, as can be shown from the VF survey data by comparing normative choices made by three judges on this mock bench prior to the trial and the norms applied during the mock trial. Previous qualitative interviews of three of these judges show how they assessed the inventive step: the Italian judge applied the EPO method (problem-and-solution approach); the Portuguese judge did the same for chemical and biological patents, but not for technical ones; and the UK judge never applied the EPO method. In the mock trial, the bench did not apply the EPO method. Likewise, to assess scope of protection, these same three judges declared during qualitative interviews that they would not take into consideration the statements of the applicant during the grant procedure before the EPO; again, the mock bench in this case did not, either. The Italian and Portuguese judges previously declared that they were in favor of involving an independent expert to report on the inventive step, but the UK judge was not; in this case, the mock bench did not. Their positions and the result on the mock bench also split this way in regard to involving an independent expert to report on scope of protection. Finally, with respect to siding with either "patent as exception" or "patent as reward," the Italian and Portuguese judges saw a patent as an exception and the UK judge saw it as a reward; in this case, the mock bench reasoned as if it was a reward. In short, at each step of the procedure, when initial normative choices were divergent, the Italian and Portuguese judges gave up and aligned themselves with the UK judge.⁹ We do not know how they expressed their disagreements during the deliberations (did they invoke overarching values, discuss the spirit of the law, or become political?), but what we are able to observe is that judges from different legal traditions (Napoleonic law, mixed civil law) aligned themselves with a procedure created by a collegial oligarchy of northern European judges (from the United Kingdom, Denmark, and the Netherlands)—in particular, with the UK judge (common law), who was presiding over the court.

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One way in which this mock trial involved all the judges and lawyers attending the 2008 VF, where the goal was to help create consensus and to try to converge toward harmonized positions, was by creating workgroups that also had to deliberate and come up with their own decision while the mock bench was deliberating in a separate room. These groups (divided by language: Germanophone, Francophone, and Anglophone) made their disagreements explicit and shared them with the larger group of their colleagues before the mock bench came out with its final decision. Differences between groups, on the one hand, and between groups and the mock bench, on the other hand, were then commented upon in subsequent discussions and roundtables. EPO, EPLAW, and IPJA had the mock trial filmed, and a DVD of the edited film was sent to both attending and non-attending members of their associations for educational purposes.

In itself, this kind of collective learning and convergence work, carried out both in general meetings at the VF and in smaller groups, was a mechanism to harmonize the interpretation of norms. The ambiance was quite feisty—for example, often making fun of patent attorneys and technical judges (who write patents and about patents in ways that are not easy for legal minds to understand). But a more hidden mechanism of harmonization can be brought to light here, based on combining qualitative analysis and network analytical results. Many saw these exercises as preparation for the real convergence work that would eventually be carried out by the future top-level judges who would be sitting on the Court of Appeal of the future European patent jurisdiction. The relational data can also be used to show that the mock trial was most likely an anticipatory secondary socialization, especially for the southern European judges. Indeed, in the mock trial, the personal ties between the Italian and Portuguese judges and their British colleague, who was much more central in the VF social network (discussed further later in this chapter), may have helped in aligning the first two's procedural choices with the last one's.

Personal ties and their position in the structure could have kept the southern judges from challenging the UK judge's views. The more personalized the relationships, the easier alignment became: because they belonged to a collegial oligarchy with strong consensus-building pressure, strong relational commitment, relational infrastructure, and social discipline, it became more difficult to keep expressing real disagreement over time (Lazega 2001, 2018). Desire to preserve the possibility of further discussions decreases the capacity to criticize, as if political compromise was already present, already acceptable. Indeed, collegiality can stifle contestation—personal ties can neutralize challenges or paralyze criticism of powerful positions. The following section uses a network analytical method to describe the social mechanism that facilitates this type of alignment.

2.4. Harmonization from the Emergence of Ex Ante Institutional Leadership: Freezing Anticipations to Secure Future Alignments

During the 2009 survey, all VF judges were asked to identify who among them was closest to the future uniform European position, a network later labeled the “uniform network.” This was equivalent, in their minds, to identifying the judges who they thought would sit on the yet-to-be-created Court of Appeal of the future UPC, and thus likely to

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make the decisions that would restructure the European IP regime (where politicians had failed) and who would personify future agreements on substance and procedure (the “European compromise”). These judges would constitute the core of the collegial oligarchy who would perform convergence and harmonization by creating the essential jurisprudence, signaling to followers the direction in which the harmonized interpretation was developing and clarifying the differences between the new norm (harmonized version) and their own interpretation. By identifying this collegial oligarchy and its core, judges also inferred what efforts each of them would have to make (or what costs they would have to incur, individually or collectively) in their own country in order to align with the harmonized version. Even having only a rough perception of the structure of this uniform network when making normative choices, the judges helped spell out a key stage of the social logic of transnational European integration. They helped capture the essence of the progress that takes place when heterogeneous people with similar problems are brought together in the same room and agree to work together, identify their *ex ante* leaders, and find common solutions.

At the VF, the judges identified their future judicial leaders, which helped them anticipate the changes that the emergence of this institution represented for them individually at the national level.¹⁰ They collectively nominated five judges from three different countries (the United Kingdom, the Netherlands, and Germany) as colleagues whose positions on controversial issues were likely to reflect the future “European compromise.” Although constituting the abovementioned core, these super-central judges were not in agreement among themselves on all the issues but were strongly connected to each other relationally. This lack of substantive agreement led to a focus on procedural rules. Agreeing on substance (that is, on the final “right” interpretation of the European patent) was considered to be the task of the future Court of Appeal of the UPC. Strengthening procedure instead of agreeing on substance was perceived to be easier, a task that Breiger (2010) would call creating a form of “weak culture.” Four members of this core (one German, two British, and one Dutch) were repeat players with respect to participation in VF events. Figure 1 visualizes their status by using a small surface at the centre of the network. Given the heterogeneity of these leaders, in 2009 convergence toward consensus on the EU uniform position in this network still remained uncertain, and learning through networks across borders at this field-configuring event did not necessarily, by itself, lead to convergence of perspectives and uniform positions among IP judges in Europe. The judges nevertheless identified sites of specific divergences and interpreted these divergences as pressure toward future normative alignments.

In the same Figure 1, a second social network is also displayed below the Uniform network, visualizing the same collegial oligarchy of VF judges as judicial entrepreneurs, but connected by a different type of relationship. The lower level network is the Explicit Reference network (Who cites explicitly whose foreign decisions in their own decisions). It is a very sparse network also dominated by UK judges. Displaying this second network shows that the core of the Uniform network is also the core of the Explicit Reference network. The same persons are most central simultaneously in both networks (nominated often, nominating each other, and located within the small surface) as members of the core

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of this collegial oligarchy. Much of the super-centrality of the five members of this core is also associated to the fact that their decisions are written in English and thus easier to read and understand by most European judges.

This vertical relational infrastructure emerged within the relatively dense social niche of the VF: an institutional leadership that was, and to some extent still is, meant to drive this institutionalization process as harmonization—to bring together, beyond national specificities, norms and networks, culture and structure. The “leaders” emerged through complex status-related dynamics (Lazega, 2001; Lazega, Quintane, and Casenaz 2017): their heterogeneous, multipositional, and inconsistent dimensions of status; their reputation in terms of giving talks around the world on patent issues and the emergence (or lack thereof) of a new European intellectual property regime; their staying capacity and long-term participation in the VF; their centrality in the specific social networks that were created there; and especially their capacity to be recognized by their peers as representatives of the future uniform European position on patents, if one was eventually established.

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Figure 1: A collegial oligarchy of judges as ex ante leaders and harmonizers personifying the future “European compromise” in the construction of a *Unified Patent Court*. Legend: Two different social networks, each visualizing the same collegial oligarchy of Venice Forum judges as institutional / judicial entrepreneurs. The lower level network is the Explicit Reference network (Who cites explicitly whose foreign decisions in their own decision); it is a very sparse network dominated by UK judges. The upper level network is the Uniform network (Who perceives whom among their peers as closest to a future European uniform interpretation with respect to patents); this is a much denser network. Judges most central simultaneously in both networks (nominated often and nominating each other, located within the small surface) are members of the core of this collegial oligarchy. The five members of this core are one German, one Dutch and three UK judges. Node size represents each judge’s centrality in each network. In the Uniform graph, nominations by same-country judges were ignored. Isolated nodes are not nominated by, and do not nominate, any of their peers. More explanations about this figure are provided in the text.

Dialogue and collective learning do not, by themselves, lead to convergence toward a uniform and harmonized position in such controversies. For these judges, just sharing the same procedural norms did not count as a basis for nominating a colleague as an ex ante institutional leader in the uniform network unless there was a multilevel match (i.e., unless the institutional leader also came from the same variety of capitalism, as defined in Amable 2003).¹¹ Social interactions and familiarity with others were other elements that facilitated a judge’s selection as an institutional leader, and coalitions by blocs of countries too had an effect on the selection of specific judges with multilevel status as members of the core of the collegial oligarchy.

These blocs were not homogenous with respect to their definitions of a good patent, which indicates that the coalitions were just as social as they were ideological, and that judges assessed each other both relationally in terms of social networks and based on their affiliation with blocs of countries with similar types of capitalism. Most interactions be-

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tween judges took place within the groups formed by the respective varieties of capitalism. It seemed that, in general, all these interactions (discussions, knowledge of others' work, etc.) were easier with colleagues similar in terms of bloc membership—they used the same language, referred to similar or comparable bodies of laws and procedures, and so on. Statistically, varieties of capitalism (as a category of individual's affiliation) and social networks were substitutable. Nevertheless, although individuals of each category of capitalism found it easier to interact with colleagues of the same category (homophily of type of capitalism), there were individuals who made choices different from those of their bloc fellows (controlling for this homophily), which showed the multilevel complexity of this institutionalization process (personal, organizational, country- and bloc-specific). Pre-Brexit UK and German capitalisms were most central, forming the core, and alignments from the north and the south of Europe tended toward these two types of capitalism.

This example of work carried out at the VF fleshes out part of the regulatory process, although it is far from illustrating all of the ways in which judges and lawyers worked together on concrete cases at the Venice Forum. Discussing how to define an inventive step, the scope of protection of a patent, whether or not judges should consider themselves bound by decisions made by the EPO (which many of them did not), the extent of involvement of technical experts, and personal philosophies of patents as rewards or as exceptions did not necessarily create consensus. It is far too early in this institutionalization process (i.e., before the Court of Appeal of the UPC – if any – has made material decisions that will serve as guidelines for national judges) to see how these normative choices and jurisprudence might actually spread in national communities and legal institutions.

2.5. From Private Networks to the Official Birth of the Institution

Consistent with the third step of the European institutionalization pattern, this network of judges, lawyers, and regulators asked the European Commission to create a European court that would have the power to enforce its future codified solutions. This step took forty years between the creation of the EU patent (1973) and the creation of the UPC in 2013. After more than four decades of discussions, an “EU patent package” proposal drafted at the VF was presented by the EC and approved by the Council of the European Union and the European Parliament in 2013. The package created a unitary EU patent—that is, a uniform patent that had equal effect and was granted, transferred, and enforced in a unitary way in most of Europe. Unitary EU patents would be granted through the existing EPO, and the UPC court system would be set up to enforce these patents. The package formally entered into force on May 30, 2014, as Regulation 542/2014. The EPLAW website even mentions this “very strong and confident relationship with the European Union Commission, with the European Patent Office and with the European patent judges and their Intellectual Property Judges' Association.”¹² But this did not prevent deep disagreements, especially between judges and the EPO, from resurfacing later.¹³

In the case of the UPC, the collective work and relational infrastructures of these legal professionals were meant to guide their lobbying efforts in the process of constructing a transnational judicial institution dealing with patent litigation. Similarities between

judges in terms of the broad specificities of their national innovation and legal systems can help to explain the extent to which alignment on the views of the dominant collegial oligarchy in Europe took place in a set of processes bringing together norms and networks, culture and status.

3. Collegial Oligarchy, Multilevel Relational Infrastructures, and Management of Normative Alignments in Joint Regulation

Beyond this case study, the institutionalization process can be presented in more general terms using a neostructural sociological perspective. In his classic work on what he calls “precarious norms,” Selznick (1957) provides an early combination of structural (stable patterns of interdependencies) and institutional (valued norms or patterns of behavior) perspectives in sociology. This institutional school brings together structure, culture, and action (both individual and collective) at a high level of generality. A precarious norm is one that is essential to the viability of the collectivity but in which most members may have no direct stake. In this illustration of the entanglement of structure and culture, a norm is therefore precarious because it is always in danger of losing its champions and representatives (i.e., of losing active support by organized interest groups and well-connected collegial oligarchy and institutional leaders that help preserve it as a priority norm against all competing norms).

With respect to transnational governance, sociological approaches to institutionalization have long been dominated by the analysis of the crucial role of professions, as highlighted by Haas (1992) in his early work on “epistemic communities.” This literature suggests that transnational institutional entrepreneurs share common professional or cultural identities (Loya and Boli 1999) that facilitate the process of institutionalization, but it fails to take structural determinants into consideration. In organizational societies (Perrow 1991), where power is extremely concentrated, Selznick’s encompassing approach of structure, culture, and agency is still illuminating with respect to understanding institution building. Neostructural sociology further strengthens this framework by relying on sophisticated analyses of interdependencies using socio-organizational networks (multi-level and dynamic ones, when possible) (Lazega and Snijders, 2016). Defining norms for collective action (i.e., the political process in a collectivity) depends here on who the actors promoting these rules are—their structural characteristics, strategies to carry out these tasks in the system of their interdependencies, and the relational infrastructures they are able to create and mobilize for this purpose. In this spirit, neostructural sociology looks at institution building by further exploring the relational dimension of normative choices, “institutional work” (Glückler, Suddaby, and Lenz 2018; Lawrence, Suddaby, and Leca 2011), political work (Boyer and Saillard 2005; Favereau 1995, 2002; Lahille 2015; Smith 2016), and regulatory work (Lazega 2001, 2016a, 2018).

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Actors also govern by using private personalized relationships and relational infrastructures to make joint regulation work, including in transnational economic institutionalization. Collegial oligarchies are thus created, enrolled, and mobilized by powerful players to pursue the political process of joint regulation in the shadow of failing officials and out of the limelight. Knowledge of interdependencies between members of these oligarchies and network analyses of these interdependencies help to identify these relational infrastructures and to test new kinds of hypotheses about the production of “institutional arrangements” (Boyer and Saillard 2005; Lazega 2016a) combining conventions and structures (Favereau and Lazega 2002) in the joint regulatory process. The focus on collegial oligarchies and the personalized nature of their relational infrastructures is crucial to track joint regulation and institutionalization as social processes (Lazega 2001, 2012b, 2018). This focus combines vertical patterns of differentiations (mainly heterogenous forms of status coexisting in complex ways) and horizontal patterns of differentiations (mainly social niches in a system of niches mapping a division of work) from a multilevel perspective. The relational infrastructures of these collegial oligarchies are the backbone of this joint regulatory process in action because they help promote *ex ante* leaders who define and impose priority norms. This does not assume a “railway-based” conception of norms (Favereau 1995) because relational infrastructures and norms coevolve. To understand how such coevolution works requires combining social and organizational network analyses with qualitative analyses of how actors select and interpret norms and conventions in their political work.

4. Cross-Level Vertical Linchpins with Status Inconsistency and Rhetorics of Sacrifice: Institutional Entrepreneurs Punching Above Their Weight

As illustrated by the VF case, there is something remarkable in the way relational infrastructures are mobilized in political and regulatory institution-building processes. Their efficiency comes from the constitution of collegial oligarchies, whose members pool and take advantage of multiple, heterogenous, high, and socially inconsistent forms of status—often in situations of conflicts of interest—to concentrate power (Lazega 2012b) and punch above their weight in institutionalization processes. Neostuctural analyses show that it is often these improbable agents who create collective leadership in the joint regulatory process when they are able to span several levels of collective action (i.e., to be present at several levels simultaneously). They have the greatest influence on creative work either upholding or changing institutions and in the transformation of precarious values into priority rules (Lazega, Quintane, and Casenaz 2017; Lazega 2016b).

The main reason the creation of a collegial oligarchy is efficient in bringing together structure, culture, and collective agency is that a group of heterogenous leaders—even fraught with initial disagreements, diverse constituencies, or antipathies—can evolve over

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time. First, an important feature of this collegial and oligarchic closure is that it excludes stakeholders (Burk 2016; Coriat 2015; Dusollier 2013; Ilardi 2015; Kranakis 2007; Orsi and Coriat 2006; Vivant 2016) who would not agree with the regulatory solutions and compromises hammered out as “weak culture” (Schultz and Breiger 2010). Oligarchic closure and cross-cutting networks have consequences for political participation: if you are not at the table, you are on the menu. Second, years, often decades, of collaboration create proximities, personalized relationships, and fragile structural equilibria where mutual critique decreases over time. Being in a collegial regime of personalized relationships reduces the capacity to challenge others’ normative choices, to disagree. Members use their personalized relationships because they facilitate discussion over time—even when these are not necessarily quiet relationships. Control of these relational infrastructures gives institutional entrepreneurs a structural position that enables them to guide the negotiation of joint regulation—that is, the building of sufficient levels of consensus and normative alignments that are more or less negotiated, more or less long-lasting (Lazega, Mounier, Snijders, and Tubaro 2012).

Third, since actors organize their collective action around projects and rules, changing the rules is equivalent to breaking promises made to these actors (Reynaud and Reynaud 1996). Using a position of status inconsistency is efficient in terms of institution building when actors are able to combine a form of power (control of resources that others need, i.e., finance, expertise, technique, time, law, etc.) with a form of legitimacy (discourse on behalf of the collective about the value of the new norms that is considered credible and compatible with its overall project). This credibility is enhanced when a change of rules is presented as a cause of loss of status for the institutional entrepreneurs themselves. Indeed, this loss of status is often presented as a personal “sacrifice” of status for the common good. But this loss is very relative, if not altogether false, when the “sacrifice” jeopardizes one dimension of status without jeopardizing another high (and uncorrelated) dimension of status.

Combined with structural factors, this justification of broken promises is thus more likely to obtain normative alignment from the losers of the process—those who had previously organized themselves around the former rules. Losing out in one dimension of status (while still keeping the other dimension) is thus equivalent to the rhetorical creation/purchase of much-needed legitimacy. Electoral politics very often relies on this rhetoric of loss of status that institutional entrepreneurs claim to accept for the general interest. Examples of such “sacrifices” can be found in the case study presented earlier, when national judges sometimes lose status in their home country due to participation in the VF. But together they are able to negotiate, select, and stabilize not only the formulation of new norms but also the conventions and interpretations of these priority norms.

An emphasis is needed here on how actors build these relational infrastructures for joint regulation at the international level and use these infrastructures to colonize the future and create normative anticipations and alignments in transnational institutionalization. The main mechanism for building these relational infrastructures is the endogenous identification of super-central members who play the role of *ex ante* normative leaders and fu-

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ture harmonizers by managing the normative anticipations of their peers, then freezing these anticipations into alignments. This discrete core of *ex ante* leaders is particularly important in transnational situations where governments cannot agree on political compromises.

Finally, the cross-level dimension of the multilevel status of institutional entrepreneurs in a collegial oligarchy is one of those entrepreneurs' crucial structural characteristics. It allows them to be present, as vertical linchpins, at several levels at the same time. In particular, it helps both with formulating norms at a higher level and with enforcing them at a lower level, driving and smoothing adoption processes. The multilevel character of regulation thus strengthens macro determinants of intrinsically micro- and meso-level processes. The organized mobility of actors—echoing, for example, Pareto's circulation of elites—and relational turnover in their networks can be among those macro determinants that structure local regulatory processes.

5. Joint Regulation and Government by Relational Infrastructures in Transnational Institutionalization

In sum, a neostructural sociological approach to institution building based on combining conventions and structures in the complex process of joint (public-private) regulation shows that social network analyses articulated with other methods can reveal specific dimensions of institutionalization processes as political work. Such dimensions include the negotiation of priority norms and the identification of an *ex ante* leadership that will personify the reference group and the conventional framework that are deemed common to its members. Relational infrastructures and social processes identified and modeled with social network analyses provide insight into the way members with several heterogeneous, cross-level, and inconsistent forms of status (often buying legitimacy through rhetorical "sacrifice") in collegial/professional oligarchies play a special role in the regulatory process in general, and in the joint regulation of markets at the transnational level in particular.

The limited example chosen here (the European UPC) is sufficient to confirm that specific relational infrastructures, mobilizing a collegial oligarchy of cross-level institutional entrepreneurs with high-status inconsistencies who select the future harmonizers among themselves, are central to joint regulation and future alignments in transnational institutionalization as a form of government by relationships. To understand how interdependencies and policy changes together affect institutionalization processes in the economy, for example how they affect the harmonization of interpretation of patent law and the European capacity of innovation, a sociological understanding of multilevel relational infrastructures adds value.

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The normative and structural complexities of the regulatory process are worth combining and taking into consideration in an approach that aims to understand political work and the development of new institutions. It is necessary to work at such a level of granularity to understand contemporary transnational regulation and institutionalization, and a fortiori the joint regulation of the economy. These collegial oligarchies are quite specific, closed, and selective. Shedding this combined structural and cultural light on institutionalization thus leads to the question (among others) of safeguards that should be created to monitor closed, cozy, or even conflictual collegial oligarchies so that the general public retains a say in the early stages of the process.

For example, in the case described here, this approach has led to the understanding of a new type of European institution that is moving away from the Hague model:¹⁴ a hyper-specialized public-private institution that took forty years to build and has no founding political charter. It should be financially self-supporting after seven years, and it gives Europe rules that have not been democratically negotiated by governments and that generate much uncertainty related to the possible re-emergence of an EU, post-UPC alternative based on a different relationship with the judicial architecture controlled by the ECJ (Alberti, 2017), but also carried by a different multilevel relational infrastructure. Discretion, if not secrecy, in the networking between institutional entrepreneurs and in the negotiations of new norms has largely characterized the construction of post-World War II Europe. The cost of these institutionalization processes in terms of democratic deficit and their effect on democratic legitimacy—especially if individuals whose networks involve greater political disagreements are less likely to participate in politics because of cross-pressures (Mutz 2002, 838)—remains to be measured. Much remains for social scientists to do in the observation of such multilevel collegial oligarchies and regulatory processes, presenting a challenge for neostructural sociology in its dialogue with institutional economics.

Acknowledgments

I thank the editors of this volume for advice that considerably improved the readability of this chapter.

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Notes:

(1.) The concept of "joint regulation" of markets qualifies contemporary relationships between private business—especially giant companies and their law firms—and multilevel public authorities. To contextualize, see Jordana and Levi-Faur 2004 on contemporary

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states more preoccupied with steering the economy and less with rowing, and Braithwaite 2008 on the neoliberal turn at the global level, allowing nonstate regulation to grow even more rapidly.

(2.) After this position at the European Commission, Dr. Margot Fröhlinger joined the European Patent Office as director for unitary patent, European and international legal affairs. “In this function she deals with issues such as the development of patent law at the European and international levels, patent law harmonization, the strengthening and improvement of the PCT system as well as with the implementation of the Unitary Patent and the EPO’s relation with the UPC Preparatory Committee” (“Margot Fröhlinger, Principal Director of Patent Law and Multilateral Affairs, European Patent Office,” AIPPI, <https://aippi.info/margot-froehlinger>, accessed September 22, 2020).

(3.) But it is the same with other regulatory agencies, such as agencies in charge of regulating immigration, fighting drug trafficking, etc.

(4.) This agency is created for each sector by the European Commission. Unlike centralized US agencies, such as the Federal Reserve, European agencies are still decentralized and rarely have the power to impose a unique solution. The same dynamics have been observed with industrial norms: industrialists were left to define their own quality standards as if this definition was an issue only for them and not for the public in general. Normalization organizations were allowed to emerge in all sectors of the economy based on the idea (strongly supported by Germany and the UK) that what is good for the market economy is always good for society.

(5.) Sometimes national governments accept the solutions imposed by the agencies if the governments can claim that they steer the agencies.

(6.) To look at the diversity of forms of capitalism, we refer to French regulation theory (see Boyer 2015 for a recent overview), which focuses on how historically specific systems of capital accumulation are institutionalized. Very generally, this approach looks at capitalist economies as a function of social and institutional systems, not solely as a function of governmental economic policy. Since institutions facilitating the allocation of ownership rights—here, intellectual property rights on innovations—are important for capital accumulation, this theory offers comparisons between capitalist regimes that are useful to our perspective on alternative legal regimes that have significant effects on the sustainability of industries with patents at the core of their business models. In previous network statistical analyses (see, for example, Lazega, Quintane, and Casenaz 2017), we use Amable’s (2003) approach to the diversity of such regimes.

(7.) While alternative legal regimes can have significant effects on the sustainability of business models and industries, our purpose is not to exaggerate the impact of judges’ opinions and beliefs. Indeed, if the judges were to make decisions that were too radically new, a political-economic reaction would be expected from powerful stakeholders strongly impacted by such decisions. They would lobby the national governments, the European Parliament, and the commission to amend the design of the new legal order. Although the

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normative choices promoted by this network and collegial oligarchy of judges are very influential, there are several checks and balances in the process of turning their recommendations, preferences, and jurisprudence into actual new legislation.

(8.) Detailed results of the survey are published in Lazega 2012 and Lazega, Quintane, and Casenaz 2017.

(9.) Indeed, the Portuguese judge, for example, had made strong declarations such as “The man skilled in the art is the dullest person with no inventive ability,” which were contradicted on this bench. We do not know what the Dutch and Danish judges’ normative choices were, either in general or in the particulars of this case, because the mock trial took place at the 2008 VF and the qualitative and quantitative survey took place at the 2009 VF. The Dutch and Danish judges did not attend the 2009 VF and therefore were not interviewed.

(10.) The name generator used to collect the judges’ identification of the future normative leaders was the following: “Please go through the list and check the names of colleagues who you think are usually closest to what could become the uniform European position with regard to intellectual property issues.”

(11.) Statistical models confirming these results are provided in Lazega, Quintane, and Casenaz 2017.

(12.) A documented analysis of how the package was scrutinized by public authorities and members of the European Parliament remains to be conducted, in order to identify changes introduced compared to earlier European institutional failures.

(13.) See, for example, “EU—Prof. Sir Robin Jacob: Opinion on Unified Patent Court and Unitary Patent,” EPLaw Patent Blog, November 7, 2011, <http://eplaw.org/eu-prof-sir-robin-jacob-opinion-on-unified-patent-court-and-unitary-patent>.

(14.) The Hague model requires that a country entering the EU adopt all EU institutions without any exception; this would no longer be the case with institutions such as the UPC.

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