Collegial oligarchy and networks of normative alignments in transnational institution building

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ABSTRACT

This paper presents a combined relational and cultural approach to transnational institution building by focusing on a network analysis of a small collegial oligarchy and normative alignments among its peers. To contribute to a theory of institutionalization, we propose hypotheses about whom professionals as institutional entrepreneurs are likely to select as members of their collegial oligarchy, about the role of social networks among them in identifying these leaders, and about the costs of alignments on these leaders' normative choices. We test these hypotheses using mainly Exponential Random Graph Models (ERGMs) applied to a dataset including network information and normative choices collected at the so-called Venice Forum – a field-configuring event that was central in creating and mobilizing a network of European patent judges for the construction of a new transnational institution, the European *Unified Patent Court*. We track normative alignments on the collegial hierarchy in this network of judges and their divergent interpretations of the contemporary European patent. Highlighting this under-examined articulation of relational infrastructures and cultural framing in transnational institutionalization shows how Northern European forms of capitalism tend to dominate in this institutionalization process at the expense of the Southern European forms. It also helps reflect on the usefulness of analyses of small networks of powerful players in organizational societies, where power and influence are highly concentrated.

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1. Introduction

In his work on precarious values, Selznick (1957) provides an early combination of a structural and an institutional perspective in sociology. A precarious value 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 value is therefore precarious because it is always in danger of losing its flag carriers and 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. In our view, this connection between structure and culture is still illuminating today with respect to understanding institution building by small networks of top level institutional entrepreneurs. At a very high level of generality, defining norms for collective action, i.e. the political process in a collectivity, depends

upon who are the actors promoting these rules, what are their strategies to carry out this task in the system of interdependencies and what are the relationships between them. In this spirit, this paper looks at institution building by exploring the relational dimension of 'institutional work' (Lawrence et al., 2011), i.e. at the system of interdependencies between a collegial oligarchy of institutional entrepreneurs (DiMaggio, 1988) involved in institutional framing.

We argue that, in the organizational society (Perrow, 1991), where power is extremely concentrated, this relational and cultural perspective enriches the study of institutionalization processes by focusing on their often collegial, elitist and personalized nature. In this process, the selection of priority norms and the personalization of authorities who champion them important step in the creation of frames of reference that become taken for granted over time, and thus institutionalized. Therefore, the creation of an oligarchy of actors, who are able to guide the regulatory process and to mobilize followers by helping them align upon the new rules, are key underlying mechanisms that belong to the institutionalization process as theorized by Selznick and encapsulated in his notion of precarious values. This is particularly the case in transnational

situations where governments cannot agree on a political compromise. Collegial oligarchies exemplified by the network that we analyze in this paper are then enrolled and brought in by powerful players to pursue the political process in the shadow of the failing officials and out of the limelight.

To apply and develop this perspective, we look at the construction of a new transnational judicial institution, the European *Unified Patent Court* (UPC) that was created in 2012 and that is scheduled to become operational when European countries will have ratified the agreement that created it. This institution provides an opportunity to develop this combined relational and perspective because it originated from a network of corporate lawyers and judges as institutional entrepreneurs who negotiated new patent rules on behalf of the transnational organizations and national institutions that they represented or in which they were affiliated. Intellectual property is a key institution of contemporary capitalism, but IP rights do not constitute a perfectly coherent and stable system across boundaries. They bring together complex, heterogeneous laws, rules and regulations protecting patents. Negotiating how IP rights, especially pragmatic definitions of patents (Gallini, 2002; Weatherall and Webster, 2014), can be established is a political, compromising process.

Judges have long played a political role in the construction of the European Community institutions (Dehousse, 1999), as have corporate lawyers (see for example Coen and Richardson, 2009; Schepel and Wesseling, 1997). With respect to intellectual property, European countries have different, competing legal cultures. Still today (2015), Europe has 27 jurisdictions and 27 different patent laws and jurisdictions with deep disagreement between European kinds of capitalism with respect to patents and underlying competition and innovation policies. We describe below the pattern of institution building that political scientists have identified and underline the similarities between the construction of the UPC and this pattern. With corporate lawyers working in the interest of large European companies (in sectors with patents at the core of their business model, such as pharmaceutical, biotech, semiconductors, etc.), these judges have lobbied the European Union for more than forty years, pushing for a unified approach to intellectual property and related litigation.

As institutional entrepreneurs, in the case of the UPC, they helped create a discrete social network of European judges who worked together on framing the future institution. These European judges met in a 'field-configuring event' (Lampel and Meyer, 2008) organized by these corporate lawyers with help from a semi-public institution, the European Patent Office. During this event, called the Venice Forum (VF), these judges were able to work on the design of a future European transnational court specialized in patents. Although they have not (yet) reached a stage where all European judges would interpret European patent law in the same way, they did carry out the groundwork for defining common procedural rules for the emerging European *Unified Patent Court*.

In this case, we combined observations of these regulatory negotiations with a network study to look into how these judges interacted to create the procedural foundation for this new institution. In the spirit of Selznick, we combine structure and culture by considering legal procedure as a case of "weak culture" as defined by Breiger (2010) and by looking at the relationship between the pattern of interdependencies between these judges and the conflicting normative choices that they were trying to 'harmonize' for this institution across national borders – a task in which judges are increasingly involved at the global level (Hol and Langbroek, 2007; Slaughter, 2000).

The paper is structured as follows. We first present a combined relational and cultural approach to transnational institutional building by focusing on the notions of collegial oligarchy and normative alignments. Second, we present the regulatory process in

which we observe and further develop this approach. Third we formulate hypotheses about whom professionals as institutional entrepreneurs, in a key moment of this process, are likely to select as members of their collegial oligarchy and the role of social networks among them in identifying these leaders and the costs of alignments (to each judge) on normative choices. Fourth, we present our empirical setting, the Venice Forum and its contribution to the construction of the European *Unified Patent Court*, as well as the network data and normative choices that allow us to look at several dimensions of patents as construed by the judges assembled at this field configuring event so as to track normative alignments on this collegial hierarchy and its still divergent interpretations of the European patent. Fifth, we use mainly Exponential Random Graph Models (ERGMs) to measure the extent to which our data confirm our hypotheses. Our analyses confirm the important problems that emerge in the progressive construction of a future Uniform European position with respect to the interpretation of the European patent (Ilardi, 2015; Kranakis, 2007). We show how Northern European forms of capitalism tend to dominate in this process at the expense of the Southern European forms of capitalism. Finally, we reflect on the implications of the results provided by these combined relational and cultural analyses in a complex institutionalization process for the principles of division of powers in Western democracies.

2. Collegial oligarchy and normative alignments in transnational institutional building

Contemporary thinking about the emergence of institutions is dominated in sociology by a variety of neo-institutional perspectives focusing on conventions and structures that are embedded in formal organizations and promoted by "institutional entrepreneurs" (DiMaggio, 1988). The latter elaborate taken for granted cultural categories, classifications, rules and procedures that include beliefs and codes stabilizing action into routines. With respect to transnational governance, professions and their crucial role in transnational governance have been highlighted by Haas (1992) in his early work on 'epistemic communities'. A broad sociological literature on building transnational institutions insists on the role of community formation around particular identities (Djelic and Sahlin-Andersson, 2006) and recursive learning between transnational and national actors (Meyer et al., 1997; Halliday and Carruthers, 2007). This literature suggests that transnational institutional entrepreneurs share common professional or cultural identities (Loya and Boli, 1999) that facilitate the process.

We argue that this institutional process includes a moment of identification of a collegial oligarchy among these professionals and a mechanism for aligning these professionals' normative choices on the choices of this oligarchy. This articulation of professional networks and negotiations used to shape transnational institution but is not very well explored empirically (Lawrence et al., 2011). In transnational institutionalization, stakeholders try to shape each other's reasoning and framing to define jurisdictional roles common to all. We argue that they do so by combining rules and networks in the perspective identified by Selznick. In the case of legal/judicial institutions, professional networks, normally composed of lawyers and judges, transnationally organize and can change how an issue is treated and who has the right to work on it (McIntosh and Cates, 1997; Alter, 2009; Quack, 2007).

We highlight an under-examined moment, a set of processes revolving around the joint identification of priority norms and judicial leaders championing them in such networks, as well as future alignments on these norms and leaders as part of the dynamics of the transnational institutionalization process. This approach is