

PAVOL JOZEF ŠAFÁRIK UNIVERSITY IN KOŠICE

The Judicial We

Collective Intentionality in Collegial Adjudication

Marco Mazzocca



Faculty of Law

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PAVOL JOZEF ŠAFÁRIK UNIVERSITY IN KOŠICE
FACULTY OF LAW
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PLÁN [OBNOVY]

The Judicial We: Collective Intentionality in Collegial Adjudication

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*To Miriam,
who opposes me
and yet completes me*

*“Men han har jo ikke noget paa,” sagde et lille Barn.
“Herre Gud, hør den Uskyldiges Røst,” sagde Faderen;
og den Ene hvidskede til den Anden, hvad Barnet sagde.
“Men han har jo ikke noget paa,” raabte tilsidst hele Folket.
Det krøb i Keiseren, thi han syntes, de havde Ret,*

*“But he hasn't got anything on,” a little child said.
“Did you ever hear such innocent prattle?” said its father.
And one person whispered to another what the child had said,
“He hasn't anything on. A child says he hasn't anything on.”
“But he hasn't got anything on!” the whole town cried out at last.
The Emperor shivered, for he suspected they were right.*

(Hans Christian Andersen)

PREFACE

This book comes from afar. I do not mean geographical distance so much as temporal distance. It is the record of a journey that began more than ten years ago, when I first approached research in legal philosophy, somewhat tentatively, while working on my Master's dissertation.

It may therefore be said that this book was, in a sense, conceived and written over the course of the past decade between Trento, New York, Padua, and Košice – sometimes even on the planes and trains carrying me from one of these places to another. At the time, of course, I did not yet know that these apparently separate inquiries would one day find a common home in a single book.

For this reason, *The Judicial We* should not be read as an exhaustive treatise on collective intentionality or collegial courts. Nor does it claim to provide a complete theory of collective judicial decision-making. It is better understood as a collection of theoretical and empirical notes taken along a research journey: notes written at different times, prompted by different questions, and only retrospectively recognized as stages of the same inquiry. The resulting structure is deliberately cumulative rather than systematic.

The journey did not begin with collective intentionality, nor even with collegial courts. It began with a seemingly simpler question: how do jurists reason about events? From there, my attention gradually moved to the constraints under which judges exercise their decision-making power; from the individual judge to the collegial panel; from voting to participation and deliberation; and from the process of deciding together to the ontological problem posed by a decision attributed not to several judges, but to *the Court*. Legal ontology eventually led me to collective intentionality. Collective intentionality, in turn, led me from theoretical speculation to empirical observation.

A substantial part of this book took shape during my recent fellowship as a Recognized Researcher (R2) and Principal Investigator of the project *The Emergence of Collective Intentionality in Participatory Decision-Making Processes of the Courts* (COIN), funded by the European Union – NextGenerationEU through the Recovery and Resilience Plan for Slovakia, at Pavol Jozef Šafárik University in Košice. I am deeply grateful to Alexander Brörtl, Gabriela Dobrovičová, Marta Breichová Lapčáková, and Dominik Šoltys, as well as to all the members of the Gustav Radbruch Institute of Theory of Law.

Parts of the arguments developed in these pages have also accompanied me into the classroom. I have discussed them in courses and seminars on Jurisprudence, Sociology of Law, and Legal Methodology at the Universities of Trento, Padua, and Košice. I am grateful to all the students who attended those classes. Their objections, intuitions, and observations have shaped this book more profoundly than they probably realize.

Individual aspects of the research were also presented and discussed at conferences and workshops between 2023 and 2026, in Košice, Venice, Kanazawa, and Istanbul. I am grateful to all those who took part in those discussions. Academic conferences are sometimes described primarily as occasions for disseminating results. In my experience, their more valuable function is often quite the opposite: they are places where apparently satisfactory ideas are subjected to sufficiently intelligent objections to become problems again. Several pages of this book owe their present form to precisely such conversations.

The genealogy of the chapters reflects the cumulative character of the inquiry. The ontological questions addressed in the Prologue originate in “The Modes of Existence of the Law. A Preliminary Study on the Possible Existence of Abstract Legal Entities”. Chapter 1 returns to, and substantially revises, ideas first explored in my Master’s dissertation, *Inference and Interference: How the Laws of Reasoning Shape the Space of Laws*. Parts of Chapter 2 develop arguments originally presented in my 2021 essay, “Some Insights into the Concepts of Judicial Independence, Accountability, Control, and Constraints”. Chapter 3

brings together and reworks two subsequent studies: “Collegial Decision-Making Procedures of Courts. One More Guarantee for the Rule of Law?” (2023) and “From Debate to Consensus: A Theoretical Decision-Making Model for Collegial Courts” (2024). Chapter 4 was written for the present volume as a theoretical bridge between those earlier analyses of collegial decision-making and the empirical inquiry conducted within the COIN project. Its discussion of collective intentionality, legal status, and the judicial ‘we’ also develops questions first formulated in “The Collective Mind of the Court. Insights from a European Project on Collective Intentionality in Collegial Courts” (2025). Chapters 5 and 6 then move from this theoretical framework to the qualitative empirical part of the research: Chapter 5 explains the interview-based design ultimately adopted in COIN, while Chapter 6 presents preliminary lines of tendency emerging from the thematic analysis of nineteen interviews with judges in Italy and Slovakia. These earlier studies have therefore not been reproduced as they stood. They have been revised, reorganised, and integrated into the argument of the present volume. I remain grateful to the editors and reviewers whose comments helped me refine the original versions of these works.

A special debt of gratitude is owed to Achille Varzi. It is to him, more than to anyone else, that I owe my first serious interest in research at the boundaries of law and philosophy. I owe him much more besides: from his earliest suggestions to the unfailing injections of confidence that somehow still accompany almost every coffee we have the opportunity to share.

I am equally indebted, as always, to my first supervisor, Paolo Sommaggio. His gentle invitation to take participatory decision-making seriously provided the initial impetus for a line of inquiry that, through routes neither of us could probably have predicted at the time, eventually reached the judicial ‘we’.

My thanks also go to the Padua school and, in particular, to Federico Reggio, for the many opportunities for intellectual and personal growth, and for the affection he has shown me over the years.

I am especially grateful to Miriam, to whom this book is dedicated, for the many suggestions, conversations, and forms of help that accompanied its final preparation.

I would also like to thank my colleagues and friends at various universities and research centers who have supported me with their appreciation throughout these years of more or less voluntary academic exile, especially Giovanni Comazzetto and Alessia Schiavon.

Finally, I thank my family: my father, my mother, my brother, my sister (and my brother-in-law) and my nieces. Whatever I have become, I owe in no small part to them.

Marco Mazzocca

Padova, 2026

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PROLOGUE

On Legal Entities and their Ontological Status

Before asking how a judge or a panel of judges reaches a decision, one must have at least some idea of what that decision concerns. The proposition sounds almost banal. Yet much of legal philosophy has traditionally begun one step later. Jurists have asked what law is, what distinguishes it from morality, where its authority comes from, or how legal norms should be interpreted. These are metaphysical, conceptual, and normative questions of obvious importance. A more elementary question has received comparatively less attention: what kinds of entities must there be for legal discourse to make sense at all?¹

Ontology is usually introduced through a disarmingly simple question: what exists? The simplicity is deceptive. Tables, trees, people, elephants, and grains of sand appear to offer easy cases, at least for present purposes. They are material entities. They possess mass, occupy space, and can normally be located at a particular time. The law instead is less cooperative. A right has no weight. An obligation cannot be placed on a desk. A legal principle does not occupy a region of space in the way a building does. Yet jurists speak of rights being violated, obligations being discharged, principles being balanced, and laws being enacted or

¹ The contrast is methodological rather than historiographical. Contemporary work on legal ontology is substantial; the point is that jurisprudential debates have traditionally been organised more visibly around the nature of law than around the modes of existence of particular legal entities. For the preliminary formulation of this distinction, see MAZZOCCA, M. (2022), “The Modes of Existence of the Law. A Preliminary Study on the Possible Existence of Abstract Legal Entities”, in BRÖSTL, A., BREICHOVÁ LAPČÁKOVÁ, M. (eds.), *Spravodlivosť, spoločenstvo, sloboda*, Košice: ŠafárikPress, 73–88.

repealed. More importantly, whole institutions act as if such entities mattered.²

The temptation is to dismiss the difficulty as merely verbal. Perhaps legal language is only a convenient shorthand for more ordinary facts about human behavior. If I say that a house belongs to me, perhaps I mean no more than that people generally allow me to enter it, exclude others from it, sell it, or leave it to someone else. But the reformulation already presupposes a pattern of permissions, powers, expectations, and institutional responses. The relationship of ownership may be abstract, but it appears to organize very concrete conduct. The law itself cannot physically stop a stranger from crossing a threshold; at most, it operates within the sphere of what is lawful and unlawful and requires human action to become causally efficacious. That limitation does not make it unreal.³

This book begins from that modest difficulty. Its principal subject is not the ontology of law in general. It is the judicial ‘we’: the passage from individual judicial standpoints to a decision attributed to a court. But the problem cannot be approached without first clarifying what is at stake when judges identify an event as legally relevant, qualify an act, recognize a right, or issue a judgment. The inquiry therefore begins before the judge and, in a sense, before the courtroom. It begins with the entities that legal decision-makers claim to find, reconstruct, classify, and sometimes bring into institutional existence.

The argument developed in this Prologue substantially revises and reorganizes an earlier preliminary study on the possible existence of abstract legal entities. In its original form, that study ended by insisting that legal ontology required clearer premises and a more explicit methodology. The present volume, however, takes a different step. It treats the ontological problem not as an isolated destination, but as an

² Cf. VARZI, A. C. (2007), “La natura e l’identità degli oggetti materiali”, in COLIVA, A. (ed.), *Filosofia Analitica. Temi e problemi*, Rome: Carocci, 17–56, 17.

³ On the distinction between the sphere of what is lawful and the sphere of what is materially possible, see ZANETTI, F. (2017), “I limiti del diritto. Aspetti del dibattito contemporaneo”, *Rivista di filosofia del diritto*, VI, special issue, 25–40.

entrance. The question “what exists?” becomes relevant because courts must continually decide what, for legal purposes, has happened, what something counts as, and whose act the resulting decision is⁴.

From Ordinary Entities to Legal Entities

One source of confusion is the apparently innocent assumption that every grammatically well-formed expression refers to an independently existing entity.

Ordinary language does not work that way. If I say that there is a height difference between two buildings, I need not populate the world with mysterious objects called “height differences”. The statement may simply express a relation between the heights of the buildings. The same caution is necessary in legal discourse. Jurists are prolific producers of nouns: rights, duties, powers, competences, offences, marriages, contracts, judgments, courts. Ontological commitment should not follow grammar automatically.

At the same time, linguistic suspicion can be pushed too far. The world does not become many worlds merely because it can be described in many vocabularies. The “metaphysical realism” assumed here is deliberately modest: most ordinary objects and events do not depend for their existence on the descriptions through which we approach them. Caesar's death did not wait for a Roman lawyer to classify it. A sheet of paper exists whether or not anyone calls it a contract. A group of people

⁴ Parts of the argument developed in this Prologue substantially revise and reorganise MAZZOCCA, M. (2022), “The Modes of Existence of the Law. A Preliminary Study on the Possible Existence of Abstract Legal Entities”, cit. The earlier essay treated the ontology of abstract legal entities as a preliminary problem; the present Prologue recasts that problem as the entry point to the book’s inquiry into legal status, adjudication, and collective intentionality.

can move around a field even if an observer has no idea that they are playing football⁵.

This last example is instructive. Searle once imagined observers who describe American football entirely in terms of recurring physical regularities: organisms in similarly coloured shirts cluster, separate, and collide in statistically recognisable patterns. No accumulation of descriptions of that kind, however precise, would by itself amount to a description of American football. The observers would have described movements. They would not yet have described the game⁶.

Legal reality presents an analogous difficulty. People may fall in love and live together in the absence of marriage law. They may exchange promises even where no legal order recognizes contracts. The material events are not created by the legal categories through which they are later observed. Yet a marriage is not simply two people living together and a contract is not simply ink on paper or a sequence of uttered words. The legal description identifies a status that the brute description does not contain.

For present purposes, the distinction can be expressed without committing to a complete metaphysics of social reality. An ordinary entity or event may be described without legal terminology. A person signs several sheets of paper. Two individuals utter words before witnesses. A group of judges enters a room, speaks, votes, and signs a document. These descriptions may be incomplete, but they do not yet presuppose legal categories. A legal description introduces another question: what does the object, act, event, or group count as within a legal order?

The difference is not merely semantic. If the sheets count as an employment contract, powers and duties may follow. If the utterances count as a marriage, a legal relationship may arise. If the signed document counts as a judgment, it may alter the legal position of persons who were

⁵ The realist assumption is close to LOWE, E. J. (2008), "Essentialism, Metaphysical Realism, and the Errors of Conceptualism", *Philosophia Scientiae*, 12, 9–33, 9.

⁶ The example is adapted from SEARLE, J. R. (1969), *Speech Acts. An Essay in the Philosophy of Language*, Cambridge: Cambridge University Press, 52.

not present when it was drafted. Legal status reorganizes the practical and institutional significance of an entity without necessarily altering its material composition.

This is why the phrase “the same thing” must be used with care. My employment contract may be a concrete object: several inked sheets of paper with a specific history and location. From one perspective, it is entirely possible to describe it as such. Yet when I say that the contract binds me to a university, I am not merely reporting the chemical properties of ink or cellulose. I am referring to the social and legal status of that object and to the relations that follow from it. In one sense, the piece of paper and the contract are the same concrete particular. In another, the legal description attributes to that particular properties that cannot be read from its material structure alone.

The point is particularly important for events. An event does not arrive before a court with its legal name attached. The physical occurrence may be over long before the legal process begins. What remains are traces, testimonies, documents, recordings, memories, and competing accounts. The judge must reconstruct an event and then determine which of its characteristics matter under the applicable legal categories. The difference between “A died” and “B murdered A” is not a difference between two bodies. It is a difference in the reconstruction and legal qualification of an event.

The first part of this book will return to this problem from the perspective of judicial reasoning. For now, the ontological point is narrower. Legal entities often appear at the intersection between something that exists independently of legal description and a status that cannot be explained by material properties alone. The law does not create the whole world *ex nihilo*. It does, however, contribute to a world in which a piece of paper can count as a contract, an event can count as an offence, a person can count as a judge, and a plurality of persons can count as a court.

If the Law Disappeared

A familiar example can make the problem sharper. Hans Kelsen writes that “Schulze the thief is to be punished with imprisonment” follows from the proposition that all thieves are to be punished with imprisonment in the same way that “Socrates is mortal” follows from the proposition that all humans are mortal. Chapter 1 will return to this example to examine the legal syllogism. Here Schulze serves another purpose⁷.

Suppose that I say: Schulze is a thief. The sentence appears to commit me to at least three claims. There is a person, Schulze. There is at least one action or event attributable to him. And that action falls under a legal category conventionally identified as theft. If one of these elements disappears, the statement changes its character. Without Schulze there is no subject. Without an action there is nothing to classify. Without a legal category, there may still be a taking, a movement of an object, or a transfer of possession, but there is no theft in the legal sense.

Now imagine asking a law student to show us the rule Schulze violated. The student will probably reach for a criminal code, open it at the relevant provision, and point to a page. “Here,” the student may say. The gesture is entirely understandable and, in ordinary legal practice, usually sufficient. Ontologically, however, the student has shown us a material object. The book has a mass, a shape, a history, and a location. The rule appears to be something else.

If the student's copy is destroyed, the rule on theft does not thereby cease to exist. If every privately owned copy of the criminal code is destroyed, the code is not repealed. If new copies are printed the following morning, a new criminal code is not created each time the printer produces another object. The physical supports are many; the legal entity to which jurists refer appears, in the relevant sense, to be one.

⁷ Cf. KELSEN, H. (1991), *General Theory of Norms*, Oxford-New York: Oxford University Press, 251.

In a nutshell, the law cannot be reduced to (or confused with) paper and ink.

The point is even clearer when the law is unwritten. A customary norm has no privileged material support to confuse with the norm itself. Yet jurists do not ordinarily infer from the absence of a codified text that nothing exists. From an ontological perspective, there is no difference between written and unwritten law. At most, writing provides a particularly important mode of fixation, publicity, and epistemic access⁸.

One possible response is to invoke social ontology. Searle's account of institutional reality is built around the idea that collective forms of recognition and constitutive rules permit an entity X to count as Y in a context C. A piece of paper can count as money; a person can count as an officeholder; an act can count as a promise. This vocabulary is extraordinarily attractive to a jurist because law is full of status functions. It appears to explain how physical entities acquire powers and consequences that their material structure cannot produce by itself⁹.

The solution is nevertheless incomplete for the present inquiry. It is easier to explain how this document counts as a contract than to explain what the rules on contracts themselves are. It is easier to describe the status of a particular banknote than the ontological status of the monetary rules that make the note institutionally intelligible¹⁰. The legal world contains both concrete legal particulars and entities that seem markedly more abstract: norms, principles, rights, competences, and perhaps legal systems themselves. The former can often be approached through the attribution of status to an identifiable object, person, or event. The latter

⁸ See MAZZOCCA, M. (2025), "Three Axioms on Unwritten (Sources of) Law", *Bratislava Law Review*, 9(Spec), 137-146.

⁹ See SEARLE, J. R. (1995), *The Construction of Social Reality*, London: Allen Lane. Searle's account of constitutive rules and status functions provides one of the best-known formulations of this socio-ontological approach.

¹⁰ On the ontology of money and the relation between physical supports and institutional status, see SEARLE, J. R. (2017), "Money: Ontology and Deception", *Cambridge Journal of Economics*, 41(5), 1453–1470.

raise the additional question of what makes the relevant status-attributing framework exist and persist.

This is where an apparently childish thought experiment becomes useful. Imagine that, during the night, every physical copy of every statute, constitution, code, judgment, and regulation disappears. Servers are erased. Archives are emptied. Books become blank. Human beings wake with their memories intact. Judges remember the law; citizens remember their rights and obligations; officials remember the institutions in which they work. Has law disappeared?

The most plausible answer is no, or at least not immediately. The catastrophe would create enormous epistemic and practical problems. Disputes about wording would multiply. Publicity would collapse. Proof of enactment would become difficult. But the mere destruction of material supports would not seem to abolish every law at the instant of their disappearance. The thought experiment therefore separates two questions too often merged: how do we know or prove what the law is, and in what sense does the law exist?

Now change the experiment. The books remain, the databases remain, and every official text can still be read. But all human beings lose the capacity to understand the social practices, institutions, and status distinctions to which the documents refer. They can see signs on pages, but “judge”, “appeal”, “property”, and “judgment” mean no more to them than an unknown code. Has law survived this second catastrophe merely because the paper remains?

Here the answer is far less comfortable. Material supports appear insufficient. The legal character of the entities under discussion depends, in some sense, on human intentionality and social practices. The dependence need not mean that each legal entity exists only because every individual subjectively believes in it. Legal orders routinely bind dissenters, strangers, and people who misunderstand the law. The stronger and more interesting possibility is that legal reality depends on

forms of collective recognition, acceptance, and institutional practice that cannot be reduced to one person's mental state¹¹.

Existence Is Not Validity

Jurists possess a vocabulary that seems ready to dissolve the ontological difficulty. A norm exists, one might say, when it is valid. Or perhaps when it is effective. The move is tempting because validity and effectiveness are familiar legal concepts, whereas existence sounds suspiciously metaphysical. Yet substituting one word for another does not necessarily solve the problem.

Kelsen himself sometimes writes in a way that closely connects the existence of a norm with its validity¹². Elsewhere, the effectiveness of a legal order operates as a condition of validity. Other accounts treat validity as a summary concept referring to a complex set of relations between norms and a legal system. The doctrinal and philosophical literature is vast, and this Prologue cannot reconstruct it. The narrower point is that validity, effectiveness, and existence answer different questions unless a theory explicitly demonstrates that they are coextensive.¹³

Consider a statute that has been duly enacted but never applied. It is valid according to the ordinary criteria of the system. Its effectiveness may be uncertain, especially if no conduct has yet tested it. It would nevertheless be strange to say that the statute does not exist until the first official relies on it. If existence depended on application, legal norms

¹¹ For an initial overview of collective intentionality, see SCHWEIKARD, D.P.; SCHMID, H.B. (2020), "Collective Intentionality", *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/collective-intentionality/> (accessed 7 July 2026).

¹² Cf. KELSEN, H. (1991), cit., 139.

¹³ See VON DER PFORDTEN, D. (2018), "Validity in Positive Law: A Mere Summary Concept", in WESTERMAN, P. et al. (eds.), *Legal Validity and Soft Law*, Cham: Springer, 1–16, 4.

would emerge precisely when they were invoked. A rule against theft would exist paradigmatically at the moment of prosecution, not during the countless unremarkable occasions on which no theft occurs.

The inversion is conceptually costly. We normally think that a contract can be legally recognised because rules concerning contracts already form part of a legal order. If the existence of the rules were inferred only from their concrete applications, the order of explanation would be reversed: the rules would exist because contracts and judgments manifest them. That may be a defensible metaphysical theory, but it cannot be smuggled into legal ontology under the innocent heading of “validity”.

Repealed norms create the opposite difficulty. The *Lex Aquilia* no longer operates as a valid norm of a contemporary Roman legal system. Yet Roman law scholars make true or false statements about it, disagree about its scope, reconstruct its development, and compare it with modern tort law. What is the object of those statements? One can answer that the *Lex Aquilia* existed in the past and no longer exists as law today. But even that answer presupposes criteria of identity and persistence: the object discussed by the historian must be sufficiently determinate for different statements to concern the same law¹⁴.

The issue becomes more obvious if validity is treated as the sole criterion of existence. The day before repeal, the norm exists. The day after repeal, it does not. Yet the text may be physically unchanged, institutional memory may remain intact, prior judgments may continue to presuppose it, and legal scholars may still distinguish correct from incorrect descriptions of its content. We have not made the ontological problem disappear. We have merely hidden it inside a temporal rule about validity.

Effectiveness fares no better as a complete solution. A norm can be widely obeyed without anyone consciously directing conduct toward it.

¹⁴ For an introduction to the *Lex Aquilia* and its historical scope, see JOLOWICZ, H. F. (1922), “Original Scope of the *Lex Aquilia* and the Question of Damages”, *Law Quarterly Review*, 38(2), 220–230.

Conversely, a norm can be deliberately violated and thereby become highly visible to legal institutions. If effectiveness is inferred from observable conformity, it may be impossible to determine which of several overlapping normative systems explains the same conduct. A person who quietly pays for coffee may simultaneously conform to contract law, tax law, criminal prohibitions, local regulations, and norms of politeness. The observed action alone does not reveal which norm, if any, has guided the actor.

The distinction matters for the rest of this book because courts do not merely ask whether an entity exists in the thin ontological sense. They ask whether it possesses a legal status under institutional conditions. A norm may exist as an object of historical inquiry without being valid law. An event certainly occurred in the ordinary world yet may fail to count as legally relevant. A person undeniably exists yet may or may not count as a judge for the purpose of issuing a judgment. A document exists as paper while failing to acquire the status of a judicial decision.

Existence is therefore only the beginning. The more specifically legal question concerns status. What makes this act a contract, this death a homicide, this person a judge, this signed document a judgment? And what makes the resulting attribution authoritative rather than merely descriptive?

From Legal Status to the Judicial ‘We’

Ontology is an old discipline, conventionally traced to questions that already occupy Aristotle's *Metaphysics*¹⁵. Legal ontology is not made easier by the fact that jurists have their own technical vocabulary. If anything, legal terms can conceal the philosophical choices on which they depend. It may be unclear whether we are dealing with imprecise things or merely saying imprecise things about them. The appropriate

¹⁵ Cf. ARISTOTLE (1924), *Aristotle's Metaphysics*, Oxford: Clarendon Press.

response is not to abandon legal ontology, but to identify where conceptual analysis reaches the boundary of another problem¹⁶.

The earlier version of the argument developed in this Prologue ended at that boundary. It concluded that an ontological inquiry into laws, rights, and legal principles required explicit choices about ontology, metaphysics, epistemology, and legal philosophy. That conclusion remains correct, but it now appears incomplete. The most interesting question is what happens after the legal philosopher has identified the boundary.

A court cannot suspend judgment until every ontological controversy has been resolved. Judges must work with legal entities while philosophers continue to disagree about their ultimate nature. They identify norms, reconstruct events, classify conduct, recognize statuses, and issue decisions. Their practice is institutionally authorized precisely because the legal system requires closure under conditions in which complete philosophical certainty is unavailable.

Part I begins from the individual judge. Chapter 1 asks how factual and normative premises are formed. Its central claim is that the movement between events and legal categories is not simply linear. A preliminary reconstruction of what happened may direct attention to a norm; the norm may, in turn, make additional characteristics of the event legally salient; the revised reconstruction may suggest another interpretation or another norm. What the law “sees” in an event emerges through a constrained interaction between factual reconstruction and legal qualification.

Seen from the perspective of this Prologue, that interaction is also a process of status determination. The judge does not create the underlying event at will. Evidence, language, procedural rules, and institutional materials constrain the available descriptions. Nevertheless, the final judgment may determine that a sequence of ordinary occurrences counts,

¹⁶ The formulation echoes BOTTANI, A. (2001), “Oggetti vaghi e identità vaghe”, in FANO, V., TAROZZI, G., STANZIONE, M. (eds.), *Prospettive della logica e della filosofia della scienza*, Catanzaro: Rubbettino, 380.

legally, as homicide, negligence, breach, discrimination, or some other legally recognized category. The conclusion is not merely a new sentence about the world. It can alter rights, duties, powers, and institutional responses.

Chapter 2 then places the individual decision-maker inside a structure of judicial power. The fact that a natural person has been appointed as a judge does not mean that every sentence uttered by that person is a judicial act. Independence does not eliminate competence, procedure, jurisdiction, or other constraints. The legal system distinguishes between the human being and the institutional status through which some of the person's acts may count as exercises of judicial power.

This distinction prepares the transition from one judge to several. A collegial court is made of natural persons, but legal language rarely treats its judgment as a bundle of parallel individual acts. We say that the court decided. We attribute reasons to the court. We speak of the opinion of the court, even when the panel was internally divided. The institutional subject appears grammatically singular while its human composition is plural.

The materialist shortcut fails again. A court is not simply the courtroom, the bench, the robes, or the bodies occupying seats. Nor is the judgment merely the document on which signatures appear. Destroying the certified copy does not erase the institutional act. Reprinting the judgment does not create a new decision. Conversely, three judges sitting in the same room do not become a court merely because their bodies are spatially proximate. Something more is required for their acts to be attributable to the institutional entity.

One could respond that legal rules solve the problem: a properly constituted panel acts according to the relevant procedure, and the legal order attributes the resulting act to the court. This answer is important and will remain part of the analysis. But it leaves another question open. If collegial decision-making were nothing more than the aggregation of several isolated individual positions followed by an attribution rule, what theoretical significance would deliberation possess? Why should the interaction among judges matter?

Part II therefore asks how many standpoints become one institutional voice. Chapter 3 distinguishes voting from participated decision-making and examines the possibility that judges modify their positions through reciprocal engagement. The issue is not whether deliberation magically guarantees a correct answer. It does not. The question is whether the process can generate reasons and a decisional standpoint that cannot be adequately described as the mere sum of preferences held before discussion.

At that point, collective intentionality becomes unavoidable. The concept is not introduced as a decorative sociological label for the obvious fact that several people are present. It is introduced because the book confronts a specific ontological and institutional puzzle. Legal systems routinely attribute one act, one decision, and sometimes one intention to a plural body. We need to understand whether such attribution is purely external and conventional or whether, in some circumstances, the interaction among participants contributes to the emergence of a genuinely shared decisional orientation.

Chapter 4 will therefore return, at a different level, to the question opened here. The Prologue asks how legal entities and statuses can exist without being reducible to material supports. Chapter 4 asks whether collective intentionality helps explain the construction of legal reality and, more specifically, the institutional reality of the court. The path from ontology to collective intentionality is not an excursion away from judicial decision-making. It is an attempt to understand who or what the subject of the decision is.

Conceptual models, however, create their own danger. Once a theorist has constructed an elegant account of participated deliberation or shared intention, actual courts can begin to look suspiciously similar to the model. The temptation is to infer practice from concept. Part III resists that temptation. It turns to qualitative research, interviews, and observation because the theoretical possibility of a judicial ‘we’ does not establish its empirical emergence. Judges may deliberate extensively, or they may aggregate votes. Hierarchy may suppress disagreement. Drafting practices may permit minority reasons to reshape the judgment,

or they may conceal them. The institutional attribution of a decision to the court tells us little, by itself, about how the judges understand what they have done together.

The movement of this book is therefore cumulative. It begins with entities and events, moves to the standpoint of the individual judge, places that judge within institutional constraints, multiplies the decision-maker, and finally asks whether plurality can become a ‘we’. The empirical inquiry does not replace the ontological one. It returns to it from the other side. To observe how judges speak about a panel, a decision, or the Court is also to observe the practices through which legal actors recognized and sustain institutional entities.

The ontological question that opened this Prologue was “what exists?” The legal question soon became “what does this count as?” The judicial question is more difficult still: “who has the authority to make that attribution?” In a collegial court, a final question follows.

*When the Court says “we decide”, what exists – and
who is the ‘we’?*

Part I
ONE FOR ALL

*At the first establishment of judges there are no laws;
every one trusts the natural feeling of justice
he has in his own breast and expects to find in others.*

(Adam Smith)

Chapter 1

Concerning Judicial Reasoning

One of the most immediate questions raised by the study of law concerns the way legal decision-makers reason. Asked to describe judicial reasoning, a novice law student might offer a relatively simple model: given a legal rule and an act falling within its scope, the legal consequence prescribed by that rule should follow. Hans Kelsen illustrates this intuition through a familiar example:

“Schulze the thief is to be punished with imprisonment” follows logically from the meaning-content “All thieves are to be punished with imprisonment”, just as the meaning-content “Socrates is mortal” follows logically from the meaning-content “All humans are mortal”¹⁷.

This model reflects a particular application of the Aristotelian syllogism¹⁸, commonly described as the legal syllogism¹⁹. The

¹⁷ KELSEN, H. (1991), *General Theory of Norms*, Oxford-New York: Oxford University Press, 251.

¹⁸ Aristotle famously defines the syllogism as «[a] discourse in which, certain things being posited, something other than what was laid down results by necessity because these things are so. By “because these things are so” I mean that it results through these, and by “results through these” I mean that no term is required from outside for the necessity to come about»: ARISTOTLE (2009), *Prior Analytics*, Vol. I, Oxford-New York: Oxford University Press, 24b 18–22. It should also be emphasized that the Aristotelian model of syllogism is not introduced here for its specific subject matter, but rather as a formal scheme capable of illustrating the relation of necessity, or logical consequence, that connects the elements of reasoning, irrespective of the content to which that reasoning is applied and of the role played by each element within it.

¹⁹ In this regard, one of the earliest and most explicit formulations of the legal syllogism can be found in Cesare Beccaria's *Of Crimes and Punishments*. As Beccaria writes: “[i]n every criminal case the judge should reach a perfect syllogism. The major premise

proposition “All thieves must be punished” constitutes the major premise (MP) and represents the relevant legal norm. The proposition “Schulze is a thief” constitutes the minor premise (mp) and describes the legally relevant fact. From these premises, the conclusion (C) follows: “Schulze must be punished”.

The attraction of this model is evident. It presents judicial decision-making as a logically ordered movement from premises to conclusion and, at the same time, provides a clear structure through which a decision may be justified. Once the premises are accepted, deductive reasoning determines the conclusion. In this sense, the legal syllogism appears to offer both a model of reasoning and a model for the rational reconstruction of a judicial decision²⁰.

Much legal scholarship has therefore concentrated on judicial reasoning in an attempt to formulate standards of rational acceptability capable of making the exercise of public decision-making power intelligible and controllable. The underlying intuition is that a judicial decision should not appear as the product of arbitrary choice: the path from the applicable law and the relevant facts to the final conclusion must be capable of being articulated through reasons.

Yet the apparent simplicity of the legal syllogism is deceptive. The main difficulty does not lie in deductive validity as such. If the premises are accepted and the inference is valid, the conclusion follows. The real difficulty is epistemological and interpretive: where do the premises come from?

Neither the legal premise nor the factual premise is simply given to the judge in a ready-made form. The relevant norm must be identified

should be the general law, the minor premise whether the action does or does not conform to the law; the conclusion should be either release or punishment. If the judge is compelled to make, or makes of his own free will, even two syllogisms, he opens the door to uncertainty.” BECCARIA, C. (1996), *Of Crimes and Punishments*, New York: Marsilio Publishers, 16.

²⁰ However, it should be noticed that deduction does not generate new knowledge in the strict sense, since its conclusion is already implicit in the premises. Thus, the conclusion merely makes explicit what is logically contained in them.

and interpreted; the legally relevant events must be reconstructed and qualified. The apparent linearity of the syllogism therefore conceals two distinct but closely interconnected problems:

1. the formulation of the major premise, or the legal premise; and
2. the formulation of the minor premise, or the factual premise.

As the following sections will show, these two operations cannot always be neatly separated. The determination of the relevant facts may depend on the legal categories through which they are observed, while the identification and interpretation of the applicable norm may in turn depend on how the events are reconstructed. The movement from event to legal fact is therefore considerably less linear than the syllogistic model initially suggests.

1.1 Beyond Legal Syllogism

The legal syllogism appears simple only so long as its premises are treated as already available. Once attention shifts from the validity of the inference to the construction of those premises, however, the apparent linearity of the model begins to dissolve. Neither the legal norm constituting the major premise nor the fact constituting the minor premise enters judicial reasoning in a fully determined form.

Consider first the legal premise. The norm applicable to a case cannot simply be stated as if it were an axiom. It must be identified among the available legal materials and, once identified, interpreted. A relatively simple example illustrates the problem.

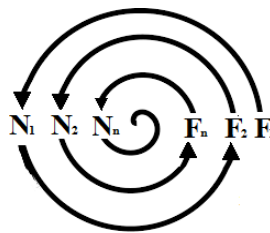
Suppose that A parks his car in an area operated by Company B. When A later returns, the car is missing. A brings an action against Company B, claiming compensation on the ground that the latter was responsible for the custody of the vehicle. Company B does not dispute the basic sequence of events. It argues, however, that

the agreement concerned merely the use of a parking space and did not impose any obligation to safeguard the vehicle²¹.

The physical sequence underlying the dispute is, at least at first sight, common to both parties: A parked a car and the car subsequently disappeared. Yet the parties organise those events through different legal categories. If the relationship involved an obligation of custody, one set of legal consequences may follow; if it amounted merely to the provision of a parking space, another legal framework becomes relevant. The question is therefore not simply which rule should be mechanically applied to a previously established fact. The description of the facts itself directs attention towards certain legal norms, while the possible legal norms indicate which features of the events require further specification.

This creates a difficulty for any strictly linear account of legal reasoning. A top-down model suggests that the decision-maker first identifies a norm and subsequently determines whether the facts fall within it. A bottom-up model, by contrast, appears to begin with a complete description of the facts and only afterwards searches for the relevant legal category. In practice, however, the relationship between fact and norm is often neither purely top-down nor purely bottom-up.

It may be better represented as a spiral.



²¹ The example is adapted from SOMMAGGIO, P., MAZZOCCA, M. (2016), “The Only Impossible Solution. The Case of the Parking Lot”, in SOMMAGGIO, P. (ed.), *Philosophy, Law & Society. Seven Simple Samples*, Padova: Libreria Universitaria, 73–83.

A preliminary description of an event, F_1 , may suggest a potentially relevant norm, N_1 . The legal requirements expressed by N_1 may then direct attention towards additional features of the event, producing a more specific factual description, F_2 . That revised description may confirm the relevance of N_1 , require a different interpretation of it, or suggest another norm, N_2 . The process may continue until the factual and normative descriptions have been sufficiently specified for the purposes of the decision.

The metaphor of the spiral is preferable to that of a circle because the process need not return to an identical starting point. Each movement between fact and norm may modify the configuration from which the next interpretive step begins. Aleksander Peczenik describes an analogous justificatory process in which an initial item p supports q , while q subsequently becomes a reason for a modified version of p . In his words, the “theory circle” is more accurately understood as a “theory spiral”: data and theory progressively contribute to the reformulation of one another²².

Applied to legal reasoning, the model undermines the assumption that *quaestio facti* and *quaestio juris* always constitute two entirely independent operations. This does not mean that fact and norm collapse into one another. It means, more modestly, that their specification may be mutually dependent. To determine which factual characteristics are legally relevant, the decision-maker must already have some conception of the potentially applicable legal categories. At the same time, the identification and interpretation of those categories may change as the factual reconstruction becomes more precise.

The difficulty is therefore often one of classification rather than deduction. Even assuming a general proposition of the form “All S are P ”, the crucial question in a legal case may be whether the conduct under consideration is an instance of S . As O. C. Jensen put it, “the problem is

²² Cf. PECZENIK, A. (2009), *On Law and Reason*, Dordrecht: Springer, 106. Peczenik describes the justificatory process as a progressive interaction between data and theory: an initial theory contributes to the description of further data, which may, in turn, justify a modified theory.

one of classification rather than one of deduction”²³. The inferential transition from the premises to the conclusion may be logically unproblematic, while considerable disagreement remains about how one or both premises should be formulated.

The legal premise is itself a product of interpretation. Legal provisions do not invariably carry a single, context-independent meaning that can simply be inserted into a syllogism. Their application presupposes linguistic practices, interpretive methods, and criteria accepted within the relevant legal community. Wróblewski famously distinguished between first-level interpretive directives, which guide the determination of the meaning of a legal rule in its semantically relevant contexts, and second-level directives governing the selection and use of those interpretive criteria²⁴. For present purposes, the details of that taxonomy are less important than its underlying implication: the normative premise is constructed through a constrained interpretive activity rather than merely discovered in a legal text.

The same difficulty arises, in a different form, with the factual premise.

To say that a court must determine “what happened” may suggest that the relevant fact exists in the world in a ready-made form and simply awaits discovery. Yet a distinction must be drawn between events and their legally relevant reconstruction. Some occurrences possess an immediately observable material dimension. A human body may be found at a particular place and time. A car may no longer be where its owner left it. Even in these apparently straightforward cases, however, the judicial question is rarely exhausted by the acknowledgement of the physical event. A body may be present, but the legal inquiry must still determine whether the death resulted from homicide, suicide, accident, or natural causes. A car may be missing, but the legal consequences of

²³ JENSEN, O. C. (1957), *The Nature of Legal Argument*, Oxford: Blackwell, 16.

²⁴ Cf. WRÓBLEWSKI, J. (1992), *The Judicial Application of Law*, Dordrecht-Boston: Martinus Nijhoff, 91. Wróblewski distinguishes first-level interpretive directives from second-level directives concerning the procedures and preferences governing their use.

its disappearance depend on how the preceding relationship between its owner and the parking operator is qualified.

The factual premise of the legal syllogism is therefore not simply a neutral description of reality. It is a description of reality formulated for legal purposes. The reconstruction of a case focuses on those characteristics of an event that may justify its inclusion within a legal category. In that limited sense, the determination of facts is already guided by the questions that law makes relevant.

Suppose, following Wróblewski, that we initially express a factual claim as follows:

Fact F occurred at time t and place p²⁵.

The statement immediately invites a further question: on what basis can this be maintained? A legal assertion cannot ordinarily rest on the mere declaration that an event occurred. Once challenged, it must be supported by materials capable of grounding the proposed reconstruction. Toulmin's broader analysis of argumentation captures precisely this movement: a claim, when challenged, requires data in its support and may subsequently require an account of how those data justify the transition to the claim²⁶.

The initial formulation must therefore be refined:

Fact F occurred at time t and place p, according to the accepted evidence $E_1, E_2, \dots E_n$ ²⁷.

²⁵ See WRÓBLEWSKI, J. (1971), "Legal Decision and Its Justification", *Logique et Analyse*, 14(53–54), 409–419, 414.

²⁶ See TOULMIN, S. (2003), *The Uses of Argument*, Cambridge: Cambridge University Press, 90. Toulmin distinguishes, inter alia, between the claim advanced, the data invoked in its support, and the justificatory connection that permits the transition from those data to the claim.

²⁷ The formulation is adapted from WRÓBLEWSKI, J. (1971), "Legal Decision and Its Justification", cit., 414.

This distinction makes it useful to separate two forms of reasoning that are frequently compressed into the generic expression “factual reasoning”. The first is evidential reasoning in the strict sense, through which a possible reconstruction of an event is developed from the available evidence. The second is subsumptive reasoning, through which the legal classification of the reconstructed event is justified²⁸.

The first operation moves from evidential traces towards an account of what may have occurred. The second asks whether the event, as reconstructed, possesses the characteristics required for it to fall within a particular legal category. Schematically:

Evidence $E_1, E_2, \dots E_n$ is available.

Fact F explains $E_1, E_2, \dots E_n$.

Therefore, F may have occurred.

and:

Fact F has characteristics $C_1, C_2, \dots C_n$.

Cases falling under norm N have characteristics $C_1, C_2, \dots C_n$.

Therefore, F is classified under N .

The two schemes should not be confused. In the first, even where the evidence is accepted, the reconstruction remains potentially fallible: the same evidential configuration may be compatible with more than one hypothesis. In the second, the difficulty lies primarily in determining whether the reconstructed event is sufficiently similar to the class of cases addressed by the norm.

Here again, the legal syllogism conceals rather than eliminates the main problem. To categorize is not simply to deduce. Legal language displays what Hart famously described as an “open texture”: however effectively a legal standard operates in ordinary cases, situations will

²⁸ A comparable distinction is adopted by CANALE, D. (2013), “Il ragionamento giuridico”, in PINO, G., SCHIAVELLO, A., VILLA, V. (eds.), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Turin: Giappichelli, 223.

arise in which its application becomes uncertain²⁹. Subsumption therefore cannot always be reduced to matching a set of factual atoms with a fixed catalogue of normative properties. It may require comparing the case under consideration with cases that are more clearly covered by the norm and determining whether the relevant similarities justify treating the new case in the same manner³⁰.

The point is not that legal classification is arbitrary. Nor does the spiral model imply that facts are freely manufactured by judges or that norms can be made to mean whatever an interpreter wishes. Both factual reconstruction and normative interpretation operate within constraints: evidence, linguistic conventions, interpretive practices, procedural rules, and the existing legal materials all restrict the range of defensible positions.

The more limited claim advanced here is that the premises of judicial reasoning are themselves the products of reasoning. Before a legal syllogism can be formulated, events must be reconstructed through evidence and characterized in legally relevant terms; legal materials must be selected and interpreted in light of the case to which they may apply. The major and minor premises thus emerge from a process in which factual and normative specifications repeatedly interact.

This has an important consequence for the analysis of judicial decision-making. If the same body of evidence can support competing reconstructions, and if those reconstructions can in turn direct the decision-maker towards different legal classifications, the central problem can no longer be expressed simply as the validity of the final inference. We must instead ask how alternative hypotheses are formed, compared, challenged, and eventually accepted or rejected.

²⁹ Cf. HART, H. L. A. (1997), *The Concept of Law*, 2nd ed., Oxford: Oxford University Press, 127-128.

³⁰ See HILGENDORF, E. (1995), "On Some Problems of the Theory of Legal Argumentation", in BANKOWSKI, Z., WHITE, I., HAHN, U. (eds.), *Informatics and the Foundations of Legal Reasoning*, Dordrecht-Boston: Kluwer Academic Publishers, 163.

1.2 From Uncertainty to Institutional Closure

The difficulties examined so far might suggest that judicial reasoning is condemned to remain permanently open. If facts must be reconstructed from evidence, if the same evidential material may be compatible with competing hypotheses, and if legal qualification itself depends on a progressive interaction between fact and norm, how can a court ever reach a decision?

The question is particularly significant because judicial reasoning takes place under an institutional condition that distinguishes it from many forms of theoretical inquiry: uncertainty cannot always remain unresolved.

Alf Ross once compared the bringing of a lawsuit to “pressing a button to set going the machinery of law”³¹. The mechanical metaphor may be unfortunate, especially if it suggests that law operates automatically or independently of human agency³². Yet Ross's image captures an important feature of adjudication. Once a dispute is brought before a court, the legal system is called upon to provide an answer. The initiation of proceedings transforms an unresolved social conflict into a matter requiring an institutionally recognized decision.

This does not mean that the court necessarily discovers a complete and incontrovertible account of what occurred. As the previous section has shown, the evidential material available to legal decision-makers may remain compatible with different reconstructions. New evidence might emerge; an apparently convincing explanation might later prove mistaken; a legal classification accepted at one stage of the proceedings might subsequently be revised. Judicial decision-making is therefore not rendered infallible simply because it takes place within a court.

³¹ ROSS, A. (2004), *On Law and Justice*, Clark: The Lawbook Exchange, 177.

³² On the limits of mechanical metaphors in describing law and adjudication, see TUZET, G. (2010), *Dover decidere. Diritto, incertezza e ragionamento*, Rome: Carocci, 159-178. Tuzet emphasises the fallible and perfectible character of law as a human institution.

Nevertheless, litigation cannot ordinarily continue until every conceivable source of doubt has been eliminated. Somewhere in the inquiry, as Eggleston observes, “a halt must be called; otherwise litigation would become interminable”³³. The legal process must thus confront a tension between two different demands. On the one hand, a judicial decision must be sufficiently grounded in evidence and reasons. On the other hand, the search for further evidence, better explanations, and more refined legal arguments cannot continue indefinitely.

The law responds to this tension by structuring the conditions under which uncertainty is processed. Rules concerning admissible evidence determine which materials may enter the decisional process. The burden of proof allocates the consequences of evidential insufficiency. Standards of proof establish the degree of support required before a factual hypothesis may be accepted for particular legal purposes. Procedural rules regulate when arguments and evidence may be introduced, challenged, or reconsidered. Other institutional mechanisms—including the obligation to give reasons and the possibility of appellate review—subject the resulting decision to further forms of scrutiny.

These rules do not remove uncertainty in an epistemological sense. Rather, they determine how much uncertainty the legal system is prepared to tolerate before attaching legal consequences to a particular reconstruction of events.

The burden of proof offers a particularly clear example. A court may be required to decide even where the relevant facts remain unclear³⁴. Modern adjudicative systems generally do not allow the decision-maker simply to declare a *non liquet* and refuse to resolve the dispute because

³³ EGGLESTON, R. (1983), *Evidence, Proof and Probability*, 2nd ed., London: Weidenfeld and Nicolson, 4.

³⁴ KOKOTT, J. (1998), *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, The Hague-Boston: Kluwer Law International, xvii.

the truth remains uncertain³⁵. The allocation of the burden of proof therefore identifies who bears the risk of an unresolved evidential situation.

In its simplest formulation, the party advancing a disputed proposition must provide sufficient support for it. The burden may concern both the production of evidence and the consequences of failing to persuade the decision-maker³⁶. What matters here is not the detailed variation of these concepts among procedural systems. The broader point is that legal rules assign institutional consequences to epistemic uncertainty.

Suppose two competing reconstructions remain possible:

H_1 : B killed A.

H_2 : B attempted to assist A.

The evidence may support H_1 more strongly than H_2 without making H_1 logically certain. If absolute certainty were required before any legal consequence could follow, many disputes could never be resolved. As Laplace observed in a broader discussion of probabilistic judgment, were certainty always required, “we should then be obliged to abstain from judging”³⁷.

³⁵ The expression *non liquet*—literally, “it is not clear”—refers to the possibility of declining to decide a dispute on the ground that the matter remains unclear. In modern adjudicative systems, courts are generally not permitted to avoid a decision on this basis. See GARNER, B. A. (ed.) (2004), *Black's Law Dictionary*, 8th ed., St. Paul, MN: Thomson/West, s.v. “non liquet”.

³⁶ On the distinction, particularly developed in Anglo-American procedural theory, between the burden of producing evidence and the risk of non-persuasion, see GASKINS, R. H. (1992), *Burdens of Proof in Modern Discourse*, New Haven: Yale University Press, pp. 3, 21. The terminology and allocation of these burdens vary across procedural systems; the distinction is used here only to illustrate the institutional allocation of evidential uncertainty.

³⁷ LAPLACE, P. S. (1951), *A Philosophical Essay on Probabilities*, trans. F. W. TRUSCOTT and F. L. EMORY, New York: Dover Publications, p. 133.

Legal systems therefore operate through standards of proof that differ according to the nature of the decision to be made. The familiar common-law distinction between a civil standard based on a *preponderance of the evidence* and the criminal requirement of proof *beyond a reasonable doubt* illustrates the point. The former generally asks whether a proposition is more likely than its alternative; the latter requires a substantially higher degree of persuasion because of the consequences attached to criminal conviction³⁸.

Neither standard, however, can be reduced without difficulty to a precise mathematical threshold. Attempts to translate “beyond a reasonable doubt” into a fixed percentage merely relocate the problem. One may stipulate a probability of ninety-five or ninety-nine per cent, but the normative question immediately returns: why should that particular numerical threshold be sufficient for conviction?

The relevant standards are consequently better understood not as devices for transforming uncertainty into certainty, but as normative thresholds for legal acceptance. They specify when a hypothesis is sufficiently supported to count as established for the purposes of a particular legal decision.

The distinction is fundamental. Consider once again the formula introduced in the previous section:

Fact F occurred at time t and place p, according to the accepted evidence $E_1, E_2, \dots E_n$.

The expression “according to the accepted evidence” already introduces an institutional element into the reconstruction. Evidence must

³⁸ On the historical development of the criminal standard of proof beyond a reasonable doubt, see MCCORMICK, C. T. (1984), *McCormick on Evidence*, 3rd ed., E. W. CLEARY (ed.), St. Paul, MN: West Publishing, § 341, p. 962; SHAPIRO, B. J. (1991), *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley: University of California Press. The constitutional status of the standard in United States criminal proceedings was expressly affirmed in *In re Winship*, 397 U.S. 358 (1970).

be admitted, evaluated, and related to a hypothesis within a legally structured process. A subsequent judicial finding does not erase the difference between the event itself and its reconstruction. It determines which reconstruction the legal system is prepared to treat as established for the purposes of the case.

In this sense, adjudication performs a form of institutional closure.

By closure I do not mean that the judgment renders every competing account irrational or historically impossible. Nor do I mean that a final decision metaphysically changes the past. If an innocent person is convicted of a crime, the conviction does not make them the physical author of the act. What the judicial process does is different: it reaches a point at which one reconstruction acquires authoritative legal consequences.

This explains why the finality of judicial decisions should not be confused with epistemic infallibility. Courts may make mistakes. Appellate procedures and extraordinary remedies are themselves institutional acknowledgements of that possibility. Yet a legal system must also determine the point at which ordinary reconsideration ends. Otherwise, the dispute would remain indefinitely open and the decision would never acquire the stability required to perform its legal function.

Justice Jackson famously captured this distinction in his observation concerning the United States Supreme Court:

We are not final because we are infallible, but we are infallible only because we are final³⁹.

Taken literally, the Court is obviously not epistemically infallible. Jackson's paradox instead reveals the institutional dimension of legal certainty. At some point, a decision is treated as authoritative not because every possibility of error has disappeared, but because the legal order attributes final decisional authority to a particular institution.

³⁹ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

1.3 From Competing Reconstructions to Judicial Authority

Uncertainty does not always arise from the absence of an explanation. Sometimes the opposite is true. An event may be uncertain because no sufficiently plausible reconstruction of its causes is available; but it may also be uncertain because several mutually incompatible reconstructions appear capable of accounting for at least part of the available evidence.

These are two different forms of the unknown. In the first, the problem is a lack of hypotheses. The decision-maker must move from evidential traces towards a possible account of what occurred. In the second, uncertainty is generated by an excess of hypotheses. The problem is no longer simply to formulate an explanation, but to compare competing accounts of the same event.

A criminal proceeding provides an obvious illustration. The uncertainty surrounding the defendant's responsibility may not derive from an absence of explanations. One reconstruction may attribute the event to the defendant; another may deny that attribution or offer a different explanation of the same evidential material. Each position may incorporate some of the same evidence while assigning it a different inferential significance.

Suppose, once again, that the available evidence is represented by $E_1, \dots, E_n$. One party may organise that material into a reconstruction F_1 , while another may rely partly on the same evidence to support F_2 :

$$E_1, E_2, E_3 \rightarrow F_1$$

and

$$E_1, E_3, E_4 \rightarrow F_2$$

The disagreement does not necessarily concern the existence of every evidential item. The parties may accept that a witness made a particular statement, that a document exists, or that a person was present at a

particular place. What they dispute is the role those elements should play in explaining the event as a whole.

The same evidential trace may therefore occupy a different place within two competing reconstructions. A person seen running away from a house may be described as escaping after committing a crime or as leaving in search of assistance. The observation remains the same; the inferential relation through which it is connected to the broader hypothesis changes.

Once competing reconstructions enter the proceedings, each becomes exposed to the arguments directed against it. A party may challenge the reliability of an evidential source, dispute the inferential connection between evidence and hypothesis, identify an internal inconsistency, or introduce additional material requiring the reconstruction to be revised. The opposing party may do precisely the same.

Judicial proceedings are therefore not merely a space in which pre-formed narratives are independently submitted to a passive decision-maker. At least where adversarial confrontation is institutionally available, competing positions enter into a dialectical relation. An argument is no longer required merely to answer the question:

Why should my reconstruction be accepted?

It must also confront another question:

Why should my reconstruction be preferred to the available alternatives?

This distinction is important because the confrontation between hypotheses may alter the hypotheses themselves. A reconstruction presented at the beginning of a proceeding need not remain identical throughout it. Some elements may be abandoned, others reformulated, and new inferential connections introduced in response to objections. Legal reasoning is, in this sense, defeasible: the introduction of further

information or arguments may require a previously accepted conclusion to be reconsidered⁴⁰.

Yet the dialectical confrontation of competing positions does not guarantee agreement.

The parties may continue to endorse incompatible reconstructions even after every procedural opportunity for argument has been exhausted. Indeed, one or both parties may reject the court's eventual account of the case. Judicial decision-making cannot therefore depend on the achievement of consensus among the litigants.

This is where the institutional dimension identified in the previous section becomes decisive. A proceeding establishes a framework within which competing hypotheses may be presented, tested, and challenged according to common rules. Rules of evidence, procedural restrictions, burdens and standards of proof do not determine the outcome mechanically, but they structure the space within which alternative reconstructions can acquire legal relevance.

Eventually, however, the legal process must move from the confrontation of positions to the attribution of a decision.

The question is no longer only which hypothesis offers the strongest account of the available evidence. It becomes necessary to identify a subject legally empowered to select, modify, combine, or reject the competing reconstructions and to formulate an authoritative judicial position.

For present purposes, this subject may initially be represented by the judge.

⁴⁰ On defeasibility in legal reasoning and the possibility that additional premises may require the revision of a previously supported conclusion, see SARTOR, G. (1995), "Defeasibility in Legal Reasoning", in BANKOWSKI, Z., WHITE, I., HAHN, U. (eds.), *Informatics and the Foundations of Legal Reasoning*, Dordrecht-Boston-London: Kluwer Academic Publishers, 119–157. More generally, the concept is associated with non-monotonic forms of reasoning, in which a conclusion supported by a given set of premises need not remain supported after further information is introduced.

The judge encounters the dispute neither as an entirely external observer nor as the author of a purely private account of the events. The material reaching the court has already been selected and organised through procedural practices; the factual hypotheses have been articulated through legal categories; and the judge's own assessment takes place within an institutional framework. Nevertheless, the judge must develop a position from which evidence, factual reconstruction, and legal qualification can be related to one another.

I shall refer to this provisional configuration as an individual judicial standpoint: the particular arrangement of factual hypotheses, legal classifications, inferential relations, and reasons from which an individual judge approaches a judicial decision.

The adjective *individual* requires some care. It does not imply that judicial reasoning is private in the sense of being detached from shared legal practices. A judge reasons through a professional language, institutional categories, rules of evidence, interpretive conventions, and legal materials that precede the individual decision-maker. The judicial standpoint is individual because it is formed and endorsed by a particular judge; it is not institutionally unconditioned.

This qualification opens the next problem.

If judicial decision-making involves the formation of an individual standpoint, how free is the judge in constructing and acting upon that standpoint? Judicial independence is frequently invoked to describe the position of the decision-maker. Yet independence cannot plausibly mean complete freedom from law, procedure, reasons, or institutional conditions. A judge who was entirely unconstrained would no longer be identifiable as exercising judicial power in any meaningful legal sense.

The next chapter therefore turns to the relationship between judicial independence and judicial constraints and, more specifically, to the conditions under which an individual judicial standpoint may become a legally valid judicial decision.

A further difficulty will remain in the background.

The discussion in this chapter has consistently referred to *the judge* in the singular. But the subject to which a judgment is legally attributed is

not always an individual decision-maker. In a collegial court, several judges may enter deliberation with different factual reconstructions, legal qualifications, and inferential commitments.

The legal order nevertheless speaks of the decision of the court.

How several individual judicial standpoints become attributable to a single institutional subject is the problem to which the later parts of this book will return.

Chapter 2

Independent but Constrained

The previous chapter introduced the notion of an individual judicial standpoint: the provisional arrangement of factual hypotheses, legal qualifications, inferential relations, and reasons from which an individual judge approaches a judicial decision. The adjective individual, however, was immediately qualified. Judicial reasoning is not private reasoning conducted in isolation from institutional practices. Judges reason through legal materials, professional languages, evidential rules, interpretive conventions, and procedures that precede and surround the individual decision-maker.

This immediately raises a question. If a judicial standpoint is formed by an individual judge, how free is that judge to construct and act upon it?

The language of judicial independence appears to offer an intuitive answer. The judge should be independent. Few propositions concerning the judiciary enjoy comparable rhetorical force within contemporary constitutional discourse. At the same time, the apparent simplicity of the term often conceals considerable conceptual ambiguity. Independence is sometimes treated as freedom, sometimes as institutional autonomy, sometimes as immunity from political interference, and occasionally as a general claim that judges should not be subject to external constraints. Discussions of independence are further intertwined with concepts such as accountability, control, and judicial responsibility, to the point that, as Burbank once observed, debates on judicial independence have frequently produced “more heat than light”⁴¹.

The purpose of this chapter is not to formulate an exhaustive constitutional theory of the judiciary. Nor is it to identify an ideal

⁴¹ BURBANK, S. B. (2007), “Judicial Independence, Judicial Accountability, and Interbranch Relations”, *Georgetown Law Journal*, 95, 909–927, 911.

mechanism for balancing judicial power against democratic accountability. The more limited aim is conceptual. Before asking how several judges decide together, it is necessary to clarify the institutional position of the individual judicial decision-maker identified in the previous chapter.

Four concepts will be particularly useful: independence, accountability, control, and constraints. They are closely related but should not be treated as synonyms. Their distinction will eventually permit a more precise formulation of the problem that matters for the argument of this book.

The central claim is relatively simple: judicial independence does not imply the absence of constraints. Independence may protect the formation and exercise of an individual judicial standpoint against certain forms of external interference. It does not, by itself, transform that standpoint into a legally valid judicial decision. For this to occur, the exercise of judicial power must satisfy institutional conditions that define the space of legally recognizable adjudication.

2.1 Judges, the Judiciary, and Judicial Power

The conceptual ambiguity surrounding judicial independence partly derives from the tendency to move too easily among three different subjects: the individual judge, the judiciary as an institution, and judicial power as a legally recognized form of decision-making. The distinctions may appear elementary, yet they become crucial when concepts such as independence, accountability, control, and constraints are applied to adjudication.

The judiciary is an institution and, in constitutional systems based on the separation of powers⁴², generally constitutes one of the principal

⁴² For an introduction to the principle of separation of powers, see, for example, MARAVALL, J. M., PRZEWORSKI, A. (eds.) (2003), *Democracy and the Rule of Law*, Cambridge-New York: Cambridge University Press; RAHE, P. A. (2009), *Montesquieu and the Logic of Liberty: War, Religion, Commerce, Climate*,

branches of the state⁴³. Judicial power, by contrast, concerns the exercise of adjudicative authority: the interpretation and application of legal rules and principles for the purpose of producing legally recognized decisions. Judges are the persons institutionally authorized to participate in the exercise of that power. Although the three levels inevitably intersect, they should not be treated as interchangeable. A judge may perform activities as a member of the judiciary without exercising judicial power in a particular case; a measure may affect the organization of the judiciary without directly determining the content of a judicial decision; and an interference directed at the decision-making of an individual judge may affect judicial power even where the formal institutional structure remains untouched.

It should also immediately be clarified how the concepts examined in this chapter are relational concepts.⁴⁴ This means that every concept acquires meaning only if it is placed in relation to something else. No judge or judicial power is independent, accountable, controlled, or constrained in itself; they are independent, accountable, controlled, or constrained only in relation to other things. Thus, when independence is discussed here, I always talk about independence concerning something. In this work, when “independence” is mentioned, it is meant as

Terrain, Technology, Uneasiness of Mind, the Spirit of Political Vigilance, and the Foundations of the Modern Republic, New Haven-London: Yale University Press.

⁴³ The account proposed here is intended merely as a simple—and perhaps schematic—characterisation of judicial power. The concept has, however, been defined in different ways in both legal scholarship and case law. An influential formulation was provided by the United States Supreme Court in *Muskrat v. United States*, 219 U.S. 346, 356 (1911), according to which judicial power is “the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision”. A general definition of judicial power is, moreover, difficult to provide independently of a specific institutional and legal context. For an introductory comparative discussion, see SWEET, A. S. (2017), “Constitution, Rights and Judicial Power”, in CARAMANI, D. (ed.), *Comparative Politics*, 4th ed., Oxford: Oxford University Press, 155–172.

⁴⁴ For an introductory discussion of the concept of relations, see MACBRIDE, F. (2025), “Relations”, *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/relations/> (accessed 7 July 2026).

independence from influences outside the judicial institution. Even the most extreme case of “absolute independence” simply means independence in relation to everything else.

It is more complex to identify the relations in the case of the concept of “accountability.” The very concept of judicial (or judges’) accountability has at least two relational meanings: one concerning the object of accountability (i.e., judicial decisions and judges’ behaviors) and the other concerning the institutions to which judges and the judiciary should be responsible.

A concept that is probably more easily identifiable as relational, instead, is the concept of control. After all, even self-control expresses a relationship – with the self. However, it is difficult to delineate this concept with respect to judicial power, the judiciary, and judges. When, indeed, can one talk about the government of the judiciary and when of judicial control? And to what extent is an act of government not an attempt at control?

Finally, the concept of “constraints” to judges’ decision-making power is certainly a concept that implies a relational nature. Constraints concern a relation between judges’ decisions and something else, mostly a formal relation.

Having established this common background to the concepts covered by this chapter, all that remains is to explain each of them in depth, starting, in the next section, with the concept of independence.

2.2 Judicial Independence and the Individual Judge

The previous section briefly mentioned the principle of the separation of powers. Specifically, it has been argued that judicial power is mostly concerned with interpreting and applying legal rules and principles generally not established by the judiciary.⁴⁵ I also mentioned that judges

⁴⁵ Questions may arise in legal systems in which judicial decisions participate in the development of law, as is particularly evident in common-law systems. In such contexts,

exercise their decision-making power in legal disputes in the context of a public institution. They could, therefore, be considered in the same way as bureaucrats.⁴⁶

Depending on the country, those entrusted with adjudication can be: elected (directly by the people or indirectly by their representatives); appointed by some other institution (such as the judges of the American Supreme Court); or co-opted by the same judicial institution – in which case they can be selected following an individual evaluation or a competition for recruitment to the public sector (such as in Italy).⁴⁷ In all cases, one might wonder whether judges are part of ordinary politics or whether, in any case, it is not the duty of the democratically elected representatives of the citizens that “seek to implement the vision of justice that they proposed in their electoral platform”⁴⁸ to interfere with the exercise of judicial power. In other words, one might wonder whether judges are nothing more than mere executors of the will of the people, expressed through the laws enacted by the representatives of the people.

the distinction between recognising existing law and creating new law is not always clear. On the rule of recognition and the identification of valid legal norms, see HART, H. L. A. (2012), *The Concept of Law*, 3rd ed., Oxford: Oxford University Press, 100–109.

⁴⁶ The question whether judges should be regarded as bureaucrats has attracted considerable scholarly attention. See, for example, ALESINA, A., TABELLINI, G. (2007), “Bureaucrats or Politicians? Part I: A Single Policy Task”, *American Economic Review*, 97, 169–179; CHOI, S., GULATI, M. G., POSNER, E. (2010), “Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary”, *Journal of Law, Economics, and Organization*, 26, 290–328; CHERTOFF, M. (2010), “Trends in Judicial Selection in the States”, *McGeorge Law Review*, 42–62.

⁴⁷ For a useful systematisation of different mechanisms of judicial appointment, see TSCHENTSCHER, A. (2006), *Demokratische Legitimation der dritten Gewalt*, Tübingen: Mohr Siebeck, 270–299; SCHÖNSTEINER, J. (2007), “Alternative Appointment Procedures for the Commissioners and Judges in the Inter-American System of Human Rights”, *Revista IIDH*, 46, 196–215.

⁴⁸ LEMENNICIER, B., WENZEL, N. (2018), “The Judge and His Hangman: Judicial Selection and the Accountability of Judges in the US”, *ICL Journal*, 12(3), 239–256, 243.

Although on the face of it reasonable, these remarks do not seem able to get to the point. Indeed, if it is true that judicial power is primarily concerned with applying the laws and principles enacted by another power, it is equally true that it can and should also apply these even to those who have enacted such laws or principles. In this regard, consider the following example proposed by John Goldring:

At the beginning of the seventeenth century in England, the judges were the King's judges. They sat in the King's courts, and were appointable and removable by the King. The King was the repository of the executive powers of government, and some English Kings at the time took the view that they had a prerogative power to legislate. The lawyers, however, considered that the King was, like all other mortals, subject to the rules of the common law which was established by the decisions of the judges. Although it might be argued that the King was not subject to the will of any other mortal, he was subject to God and to the law.⁴⁹

In other words, the law should be above everyone, including those who enact it, those who enforce it and even those who apply it. For this reason, any measure aimed at undermining judicial independence should be considered intolerable.

Judicial independence, it is necessary to point out, is not only a relational concept, but also a two-way relational concept. Indeed, if the other powers of the state should not interfere with the judicial power, the opposite is also true: the judicial power should not interfere with the state's other powers. In theory, judicial independence should imply judges' duty not to be associated with any particular policy adopted by other branches of the state. In other words, "judges should not provide advice to government [and parliament] on policy, especially if they may subsequently be called upon to make judgments in court on the

⁴⁹ GOLDRING, J. (1987), "The Accountability of Judges", *The Australian Quarterly*, 59(2), 145–161, 149.

consequences of that policy.”⁵⁰ If this were to happen, not only would the very principle of separation of powers be undermined, but the judiciary would also be invested with the power to influence – in case of judges that are not elected, in an undemocratic way – the politics of a country.

Having outlined these profiles related mainly to judicial independence, one might wonder what happens to the independence of individual judges. In particular, one might wonder whether they are independent of other judges in the performance of their office, or whether, in fact, we can assume that for organizational issues concerning the court’s functioning, there may be some form of relations among judges. The issue related to their independence in the exercise of their decision-making (judicial) power is different. In this latter case, indeed, it is necessary to distinguish between a single-judge proceedings and a collegial proceedings.

No major issues seem to arise concerning the independence of judges in single-judge proceedings. In those cases, indeed, judges should be able to resolve disputes free from outside influences. The only thing that could happen to them is the appeal against their judgments. However, the latter is a possibility that concerns the sphere of accountability rather than their independence.

Indeed, more interesting seem to be the issues concerning judges’ independence when they are part of collegial proceedings.⁵¹ Can an individual judge who is part of a panel be considered independent from other members of the panel?

⁵⁰ *Ibidem*, 159. Particularly instructive in this regard is Calamandrei’s observation that a judge who openly aligns with the ideas of a political party can hardly expect to retain, as a judge, the confidence of those adhering to opposing political positions. See CALAMANDREI, P. (1989), *Elogio dei giudici scritto da un avvocato*, 4th ed., Florence: Ponte alle Grazie, 239. This ideal is, of course, difficult to realise fully in practice; the relevance attributed to candidates’ perceived political orientations in appointments to the Supreme Court of the United States provides an evident example.

⁵¹ It should also be noted that many apex courts are composed of panels of judges and therefore exercise their adjudicative functions collegially.

Definitely, one can argue that, even within a judicial panel, a judge can reason and decide as they sees fit. In the most extreme case, they may express a minority opinion that will not be considered for the resolution of the legal dispute. Thus, from this point of view, the so-called “dissenting opinion” seems to be a means to preserve every individual judge’s independence.

However, it is also worth noting that the relationship with other panel members may affect an individual judge's reasoning and, consequently, the position that the judge ultimately endorses. The arguments of a colleague may reveal an overlooked evidential connection, undermine an initial legal classification, or suggest a different formulation of the reasons supporting the decision.

This influence should not automatically be described as a limitation of judicial independence. If another judge changes my position through persuasion, my situation is not equivalent to that of a judge whose decision is dictated by a political authority under threat of sanction. Independence cannot plausibly mean the absence of every causal or argumentative influence upon judicial reasoning.

The distinction between influence and interference will become particularly important when collegial decision-making is examined. For the moment, it is sufficient to note that a judge may remain individually independent while being genuinely responsive to the reasons advanced by other members of a panel.

At this point, one might wonder whether a judge may be considered independent even concerning the law itself. In this regard, if at first glance this may seem a question with an obvious negative answer, it is necessary to remember how, for example, the Radbruch formula seems to suggest an original solution in all those cases where the discrepancy between a positive law and justice reaches a level so unbearable that that law has to make way for justice.⁵² In those cases, therefore, judges seem

⁵² See RADBRUCH, G. (1946), “Gesetzliches Unrecht und übergesetzliches Recht”, *Süddeutsche Juristenzeitung*, pp. 105–108, at p. 107. For a modern English translation, see RADBRUCH, G. (2006), “Statutory Lawlessness and Supra-Statutory Law”, *Oxford Journal of Legal Studies*, 26(1), 1–11.

independent from the law, but this is precisely a mere appearance, for two reasons:

1. it is their decisions that appear independent and not them; and
2. their decisions appear to be independent of the law, but in truth they are independent of a single law – the unbearable one.

The Radbruch formula indeed does not claim that judges' decisions may be independent of the law, but only that their decisions could be independent of a specific law. Even in borderline cases of unbearable laws, judges, although independent of such laws, must ground their decisions on – other – laws. In other words, the Radbruch formula does not justify judges' independence from the law, but only their independence from those laws that are unbearable.

2.3 Accountability and the Boundaries of Independence

As briefly mentioned in the second section, the relational concept of judicial accountability is significant in at least two respects:

1. the object of responsibility (i.e., what one is responsible for); and
2. and to whom (or what) one is responsible.

With regard to the first aspect, it is usual to hold members of the judiciary accountable for all inappropriate behavior that does not pertain to their office. As already pointed out, the law applies to everyone: even members of the judiciary. Therefore, judges remain subject to ordinary legal rules and may also incur professional or disciplinary consequences connected with their institutional role.⁵³

Instead, the issue regarding judges' accountability for acts performed in exercising their judicial power is very different. In this regard, indeed, one might wonder whether it is possible to hold a judge responsible for a decision taken in the exercise of his or her prerogatives without compromising the very idea of the separation of powers.

⁵³ See JOHNSON, Z. (2019), “#CourtsToo: Constitutional Judicial Accountability in the #MeToo Era”, *Journal of Legislation*, 46(2), pp. 346–370.

In the previous section, it was argued that judges and the judiciary should exercise judicial power independently.⁵⁴ However, this does not affect the very concept of accountability. The latter, in fact, arises after the judicial decision. Thus, judges' decisions should always be independent – that is, with no external influence or pressure. However, once a decision is adopted, the judge takes accountability for his or her decision. In other words, the judge is independent when deciding, but once they have decided, they become accountable for the decision. The judge should, therefore, always be considered independent and accountable.

What may seem at first glance a contradiction – that is, to be independent and accountable – actually is not. Indeed, it could be argued that independence is a necessary condition for accountability. To better understand what I mean, suppose that there are two subjects: A and B. Let us suppose, then, that in one case, A is independent from B, and in another case, A is dependent on B – which means that B can affect the work of A. Finally, let us assume that in both cases, A is accountable to B. Could B, in the second case, criticize A's actions without blaming itself? After all, if A depends on B, should it not be B's responsibility to prevent A's mistakes? Furthermore, as B is able to influence A, one could argue that it cannot be impartial. B could perhaps argue that A is accountable for not doing what B suggested. In this way, however, it would admit that:

A is responsible for having acted independently of B; and
B itself failed to influence the work of A.

From this point of view, therefore, it is easier to address the first case, in which A is independent of B. In this case, indeed, B can criticize A's actions without blaming itself.

⁵⁴ Judicial independence also possesses an internal dimension: judges must remain independent from hierarchical or collegial pressures exercised by other members of the judiciary. This dimension forms part of the broader guarantee of an independent tribunal embodied in Article 6 of the European Convention on Human Rights.

From the point of view of the separation of powers, however, the issue could be much more complicated than that. Consider, for instance, the following case in which:

A is independent from B and A is accountable to B; and
B is independent from A and B is accountable to A.

In this case, if, on the one hand, the decisions of A and B are independent of, respectively, B and A, on the other hand, there is the risk of a struggle in terms of accountability. Indeed, suppose that A makes a decision “X.” Subsequently, B makes a decision “Y” on the accountability of A for X. At this point, suppose that A makes a decision “Z” on the accountability of B for Y. As will be noted, this is more a theoretical than a practical problem, which, in truth, could be infinite. However, it is useful to emphasize an important and very concrete aspect: accountability could be viewed – and used! – as an indirect influence on judges and judicial independence.

At this point, far from having exhausted the subject of the object of accountability, one might wonder to whom (or what) judges and the judiciary are accountable anyway. Obviously, the problem does not arise for all those acts performed outside of their work. In this sense, as repeated several times, judges are accountable exactly like any other citizen.⁵⁵ However, it is more difficult to identify to whom judges should answer in case they make a wrong decision. In other words, who can assess the work of judges and the judiciary?

A possible temptation is to hold judges responsible to those who appointed, elected or co-opted them. However, this seems to be a hazardous idea. Indeed, if it is true that whoever appoints, elects, or co-opts judges should also assume the responsibility for such a choice, this does not imply that the chosen ones should be accountable to those who chose them. In fact, to assert appointees’ responsibility to the person who

⁵⁵ Precisely because of their institutional position within the judiciary, it may be argued that judges should be subject to heightened forms of accountability, since judicial misconduct is capable of undermining public confidence in the judiciary as a whole.

appoints them means accepting the possibility that their gratitude to (or fear of) those who appointed them may affect their independence. Such a situation would also affect accountability, since, as already pointed out, those making the appointment should evaluate their appointed and, in this way, also themselves.

However, the issue remains: to whom should individual judges and the judiciary be accountable? In this regard, four forms of accountability should be considered:

1. internal accountability, to more senior judges or courts;
2. accountability to the executive branch of the state (generally the government);
3. accountability to the legislative branch of the state (generally the parliament); and
4. public accountability to the electoral body.

Naturally, in concrete examples that can be brought, these forms of accountability generally overlap. However, let us analyze them one at a time.

With regard to internal accountability, there is no doubt that judges' decisions are generally subject to appeal. Indeed, individual judges are generally accountable to senior judges or judges holding positions of responsibility. Concerns arise with regard to higher-ranking judges. Indeed, with regard to the highest-ranking judges, one could ask the well-known question: *quis custodiet ipsos custodes* ("who watches the watchers")? Of course, under rigorous separation of powers, in which each power is independent and accountable to itself, a solution is abstractly conceivable according to which senior judges could be accountable to other judges of the same rank. This solution, however, is inadvisable because of the concrete risk of stalemate.

Many constitutional systems therefore entrust judicial accountability to a specialised body. This solution, however, does not eliminate the underlying problem; it merely shifts attention to the body's composition and to the question of its own accountability.

In general, these bodies are mostly composed of judges and jurists who, depending on the system, can be appointed, elected, or co-opted by

different institutions according to different criteria. Basically, this suggests a twofold risk: on the one hand, the creation of a “caste” of jurists,⁵⁶ and on the other hand, the excessive influence of the other powers in the judiciary. As far as the second problem is concerned, it seems clear that it is nothing more than a repetition of the classic problem already mentioned of “who watches the watchers?”

There are some convincing arguments regarding the possibility of holding judges (especially those of high rank) and, more generally, the judiciary accountable to the executive power. Indeed, if one considers judges as public servants, then one should admit that “it is central to the notions of representative and responsible government that public servants should be responsible to Ministers, and that, in turn, the Ministers should be responsible to the representatives of the people in Parliament for their actions both collectively and individually.”⁵⁷ After all, one could argue that there is not much difference between judicial officers and other public servants. Instead, it could be argued that many public servants who are not judges perform important activities that require knowledge of the law, the ability to understand it, and, in a sense, to apply it. So, why not treat judges like all other public servants?

The answer is actually quite simple: because they are different. Indeed, judges are in a very different position compared to other public servants. Each member of the judiciary is, or should be, an independent agent whose decisions are subject to appeal to a higher court. In other

⁵⁶ The risk that judges may prove reluctant to assess misconduct by their colleagues is far from merely theoretical. Institutional solidarity may itself affect the scrutiny of alleged misconduct. As a witness before the United States Senate Committee on the Judiciary observed: “[T]he chief judge is a peer of an accused judge who may understandably tend to give valued colleagues the benefit of the doubt when evaluating whether they have engaged in harassing behavior. This process could certainly deter individuals from coming forward out of a concern that they will not be believed or appropriate disciplinary action will not be taken”. U.S. SENATE COMMITTEE ON THE JUDICIARY, 115th Cong., *Jenny R. Yang's Response to Questions for the Record* (2018), 7.

⁵⁷ GOLDRING, J. (1987), “The Accountability of Judges”, *The Australian Quarterly*, 59(2), 145–161, 148.

words, they can be compared to other civil servants as long as they do not exercise their judicial power. It is therefore the accountability for judicial power that is the problem. Certainly, one could argue that, at least as far as higher-ranking judges are concerned, one could envisage a liability to the executive power. However, in this case, there would be a risk of an incorrect balance between state powers. Perhaps this risk could be overcome by making each power accountable to another power. Thus, for example, it is possible to imagine an executive power responsible to the legislative power, a legislative power responsible to the judicial power, and a judicial power responsible to the executive power. The idea is interesting, but there may still be the risk of a Mexican-style stalemate.

In a certain sense, the more democratic choices seem to be the last two mentioned: to make judges and the judiciary accountable to the legislative body or directly to the people. However, the problem in these cases is the possible interference of the political majority in the judicial power. In fact, this could lead to treating similar cases of judicial accountability differently, depending on the political majority of the time, thereby compromising the very foundations of the rule of law.⁵⁸

A further aspect regarding judges' accountability that should be briefly discussed is what it involves. In this regard, Vernon Bogdanor distinguishes between "explanatory" and "sacrificial" accountability.⁵⁹ The former involves giving an account of a decision – in other words, motivating it. The latter involves taking the blame for an, eventually wrong, decision.

However, this distinction is misleading, because the first sense is more about constraints than accountability. One could even go so far as to say that explanation is a necessary condition for the validity of a judicial decision – this means that judges are accountable if there is no explanation. By comparison, sacrificial accountability is too vague,

⁵⁸ As Kelsen famously observed, a decision taken by popular vote once resulted in Barabbas being chosen over Jesus. See KELSEN, H. (1955), "Foundations of Democracy", *Ethics*, 66(1), Part 2, 1–101, 39.

⁵⁹ BOGDANOR, V. (2006), *Parliament and the Judiciary: The Problem of Accountability*, Sunningdale Lecture.

because it is not clear what it means to take responsibility for a wrong decision. I suppose one can imagine several consequences, ranging from censorship (or modification) of the decision to the judge's removal. Anyway, judicial officers are generally assumed to be professionally competent at the time they are appointed. This implies a large degree of independence and accountability due to their professional qualifications, and, at the same time, an objective difficulty in justifying their failures by legal ignorance.

2.4 Governance or Control?

To give an idea of what is meant by judicial control, one can compare this concept with those of judicial independence and judicial accountability as outlined so far. In this way, one would discover that, on the one hand, it differs from accountability, since any form of control after a decision is hardly imaginable. It is possible to control a judicial decision, but in a different sense from what is referred to when we talk about the control of the judiciary. On the other hand, it seems the exact opposite of judicial independence. Indeed, if judges are independent, then they are not controlled by anyone. Thus, in this work, judicial control means control over the judiciary and judges – and a controlled judiciary is a non-independent power.

However, contemporary liberal democracies have a need for both independent justice and legitimate justice. Furthermore, it is one thing to interfere with judicial “decisional independence,” which is defined as “the ability of a judge to make legal decision unfettered by the threat of coercion,”⁶⁰ but another to interfere with judicial “administrative

⁶⁰ BERMANT, G., WHEELER, R. R. (1995), “Federal Judges and the Judicial Branch: Their Independence and Accountability”, *Mercer Law Review*, 46(2), pp. 835–861, at p. 838. The distinction adopted here represents a simplification of the broader taxonomy discussed by the authors, itself derived from Judge J. Clifford Wallace's distinction between decisional, personal, procedural, and administrative independence. For present purposes, procedural and administrative independence are treated jointly, while

independence,” defined as “the ability of the judiciary to administer itself according to systems it established.”⁶¹ While it seems risky to interfere with the first form of independence, it is not clear why one should not intervene in the administration of justice. Judicial independence, in other words, could not be considered one large conceptual totem soaking up all the other concepts.

Indeed, it should not be forgotten that all citizens bear the costs and enjoy the benefits of judicial decisions and that, although independent, the judiciary is part of a broader system also composed of the legislature and the executive. Thus, independence does not mean a lack of loyal cooperation with other powers.⁶² On the contrary, it seems to require at least a certain degree of organizational management which, with reference to the judiciary, can be called judicial governance – understood as the government of the judiciary. Such governance may involve different acts all sharing the same limit: the limit of judges’ political role. Wrong governance, in fact, could make the judiciary appear as a mere means to a political end, thereby undermining its independence. At the same time, however, excessive independence from other powers could lead to delegitimizing the judiciary. In this sense, I read Judge Arnold’s statement that the judiciary must have the “continuing consent of the governed.”⁶³

In other words, if the judiciary wants to be legitimized, it should have some public and institutional support – even in those cases in which it makes unpopular decisions. For this reason, as pointed out by Burbank:

personal independence is addressed through the concept of constraints, thereby retaining a twofold distinction.

⁶¹ *Ibidem*.

⁶² As argued in the Section 2, judicial independence may, in extreme circumstances, extend to the refusal to apply a statutory provision where the discrepancy between positive law and justice becomes intolerable. Even in such a case, however, judges are not independent of law as such, but merely from a specific statutory provision: the decision instead rests upon a different legal norm or principle.

⁶³ ARNOLD, R. S. (1983), “Judges and the Public”, *Litigation*, Summer 1983, p. 5, as quoted in BURBANK, S. B. (2007), “Judicial Independence, Judicial Accountability, and Interbranch Relations”, *Georgetown Law Journal*, 95, 909–927, 914.

there is reason to fear that the distinction between support for courts irrespective of the decisions they make (“diffuse support”) and support depending on those decisions (“specific support”) will disappear. If that were to occur, the people would ask of the judiciary not, “What does the law require?” but rather, “What have you done for me lately?”⁶⁴

In the case of “specific support,” citizens would see judges as nothing more than politicians. Thus, what are the acts governing the judiciary without undermining its independence? And to what extent are they acts that govern it, and not attempts to control it?

To answer these questions, the following three ways of governing the judiciary are briefly presented:

1. judicial selection;
2. the budget allocation for justice; and
3. the regulation of the judicial system.

As has been mentioned several times in this work, there are at least three systems of judicial selection: appointment by elected officials, direct election, or co-optation by the judiciary itself. Indeed, it does not seem possible to manage the judiciary without the possibility of generational change. In other words, judicial selection is necessary to ensure the course of justice over the years. Furthermore, as demonstrated by certain empirical research, such as that of Lemennicier and Wenzel, it seems that judges’ selection has a certain influence on the quality of their judicial decisions.⁶⁵ The risk, as said, is all political in nature. Suppose, indeed, that following a political agenda, someone tries to fill judicial vacancies with individuals they believe will decide cases according to their preferred policies. In such cases, judges would be considered as a

⁶⁴ *Ibidem*, 916.

⁶⁵ See LEMENNICIER, B., WENZEL, N. (2018), “The Judge and His Hangman: Judicial Selection and the Accountability of Judges in the US”, *ICL Journal*, 12(3), 239–256.

mere means to a political end – while risking losing their independence and legitimacy.⁶⁶

Another measure to govern judicial power is the budget allocation to the courts. It is well known that to work, the courts need a certain economic availability. Indeed, since they do not have the possibility to collect taxes, it is generally up to the executive to provide the justice administration budget. This is certainly a judicial governance measure. However, if the criteria for the allocation of economic resources were to depend on non-objective evaluations based on political convenience, there would be a real risk of “bankruptcy” of those courts considered hostile by the political majority.

Finally, it is necessary to consider how the law generally regulates the judiciary’s organization, procedures, or activities. In this sense, the legislative and executive powers have significant authority over the administration of the judicial system. For example, they can regulate several aspects, such as judicial salaries or the spending power of courts, and influence the very organization of judicial power by establishing general inspectors, agencies, special courts, etc. It seems superfluous to specify how, even in this case, there is a risk that a partisan regulation of the judiciary could affect its work.

The acts of judicial governance are actually many more than those mentioned. Furthermore, it should be noted that many cases of self-regulation of the judiciary are due to the legislative and executive delegation of a significant portion of its authority. Anyway, even in the latter case the discourse does not change: the judiciary can govern itself – as well as affect its own independence – if it is allowed to do so. Indeed, every act of judicial governance has the potential to govern and, at the same time, to control the judicial system.

The boundary between governance and control cannot therefore be identified solely by reference to the formal type of measure adopted.

⁶⁶ A comparable dynamic can be observed in appointments to supreme and constitutional courts in many legal systems, particularly where political actors seek to preserve or alter the perceived ideological balance of the court.

Judicial selection, financial allocation, and institutional regulation may each constitute legitimate forms of governance or, under different conditions, become instruments capable of affecting decisional independence. Their assessment must take into account their function, institutional design, practical effects, and the extent to which they permit another actor to substitute its preferred outcomes for the independent exercise of judicial power.

2.5 Judicial Constraints

From what has been argued so far, it seems to emerge that, in a democratic state based on the separation of powers and the rule of law, the judiciary (and judges) should decide independently of any influences and be accountable for its decisions. It has also been stressed how a certain degree of judicial governance is necessary to ensure its good functioning over time.

All that remains is to briefly outline the last relational concept, that of judges' constraints. In particular, in this work, judicial constraints are considered as something closely related to judicial decisions. Indeed, it is a relational concept precisely because it relates judicial decisions with something else.

After what has been said about independence, one might be tempted to consider judges free to decide as they wish, precisely because they are independent. This is because the concept of independence is often confused with the concept of freedom. Indeed, as briefly outlined in this paper, the very idea of independence seems to refer to a negative conception of freedom understood as the absence of constraints on actions – in this case, that of deciding.⁶⁷ However, it should be noted that this essay never argued that judges are not constrained by anything. It

⁶⁷ For an introduction to the distinction between positive and negative freedom, see CARTER, I. (2026), "Positive and Negative Liberty", *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/liberty-positive-negative/> (accessed 7 July 2026).

only claimed that judges should decide independently of external influences. In truth, some of the most important judicial constraints have already been presented in the previous sections.

Before analyzing some of the main constraints on judges' power of decision, it seems appropriate further to explore the very concept of freedom and its relationship with independence. Indeed, if, on the one hand, independence means the absence from external influence (negative freedom), on the other hand, it does not necessarily imply the possibility to do something (positive freedom). As David Miller reminds us: "Discussion of freedom and constraint usually and properly start from the distinction between being free to do something, being able to do it, and desiring to do it."⁶⁸ Therefore, for the sake of the argument, let us say that independence makes judges free to decide; can their independence alone enable them to make a legally valid decision?

It should be noted that it is not a question of being able to decide, but of being able to issue a legally valid decision. Indeed, independence makes it possible for judges to decide freely, but it does not make them able to reach valid judicial decisions. In order to issue a valid judicial decision, something more is needed: judges must respect the constraints.

The violation of a judicial constraint may have different consequences depending on the nature of the requirement and on the relevant legal system. Some defects may affect the validity of a decision; others may provide grounds for appeal or annulment; and, in extreme cases, the question may arise whether the act should be recognized as an exercise of judicial power at all.

The distinction between an invalid judicial decision and an act that never acquires the relevant legal status is an ontological problem that cannot simply be presupposed here. It will be revisited in Chapter 4. For present purposes, the narrower point is sufficient: independence alone does not determine whether an act performed by a judge is legally recognizable as a judicial decision. The exercise of judicial power remains subject to constraints.

⁶⁸ MILLER, D. (1983), "Constraints on Freedom", *Ethics*, 94(1), pp. 66–86, 68.

At this point, one might wonder what the constraints are to which judges are subject in the exercise of their power. Actually, the main constraints on judicial decisions have already been mentioned in the course of this paper. In this sense, a valid judicial decision must, at least respect the law, and be explained.

The first of these constraints, that judges' decisions must be based on the law (in a broad sense), was previously introduced when talking about judicial independence. Indeed, it was indicated that even in the most extreme case where a judge chooses to decide independently of a specific law, they will base his or her decision on another law or legal principle.⁶⁹

The second constraint was introduced when talking about judicial accountability. Indeed, it has been argued for years that the legitimacy of judicial adjudication rests, among other things, on the capacity of judges to issue justified decisions.⁷⁰

These constraints are not even the only ones possible. Many constitutions, many laws, and even some international treaties provide many more constraints. In this sense, consider, for instance, the first paragraph of Article 6 of the European Convention on Human Rights, which states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public hearing* within a *reasonable time* by an *independent and impartial tribunal established by law*. Judgment shall be pronounced *publicly* but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly

⁶⁹ Even in the case of the Radbruch formula, for example, the specific statutory provision regarded as intolerably unjust is displaced in favour of a legal principle of substantive justice.

⁷⁰ See, for example, RAWLS, J. (1996), *Political Liberalism*, New York: Columbia University Press, pp. 231–240; SEN, M. (2013), “Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System”, *Notre Dame Journal of Law, Ethics & Public Policy*, 27, 303–331, 304.

necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁷¹

It is notable that the first paragraph alone of Article 6 of the European Convention on Human Rights contains many more constraints than the two just discussed, constraints that judges should respect if they do not want to incur the censorship of the European Court of Human Rights. The constraints, however, are not all alike, nor does their violation necessarily produce identical legal consequences. Depending on the relevant legal framework, non-compliance may affect the validity of the decision, make it vulnerable to appellate review, or, in particularly extreme cases, raise doubts about its recognition as an exercise of judicial power. A failure to hear the parties, for example, may constitute a serious procedural defect without implying that no act of adjudication has occurred at all.⁷²

In these cases, the judicial decision exists, but could be invalid. Therefore, once decided, the judge takes responsibility for it. After all, it is quite common to appeal a judgment for violation of such constraints and, as Duncan Kennedy rightly points out, it is not in the interests of a court to reach a decision that a higher court may reverse.⁷³ Of course, one could wonder before whom the higher-ranking judges assume their responsibility. However, this is an issue regarding accountability rather than constraints.

Thus, the issue of substantial constraints seems to be more interesting. Indeed, one might wonder whether there are substantive constraints. In other words, if judges, who respect all procedural constraints, explain their decisions and base them on the law, can they be

⁷¹ Article 6(1) of the European Convention on Human Rights (my italics).

⁷² It is worth noting that these further constraints frequently derive from the first constraint examined above, since they are often established by procedural rules.

⁷³ See KENNEDY, D. (2008), "Freedom and Constraint in Adjudication", in KENNEDY, D. (ed.), *Legal Reasoning: Collected Essays*, Aurora: The Davies Group Publishers, pp. 12–85, at pp. 26–27.

accused of not respecting other types of constraints related to the merits of a decision?

The answer depends largely on what is meant by a substantive constraint. If the expression merely means that judges are constrained to reach the “correct” result, it adds little to the analysis. Legal systems may, of course, permit appellate review of substantive reasoning, including interpretations of law and assessments of evidential support. Yet the useful function of the concept of constraint is to identify legally articulated conditions structuring judicial decision-making, rather than to restate the generic expectation that judges decide correctly.

The problem becomes particularly acute at the highest level of judicial decision-making, where ordinary mechanisms of appellate correction eventually come to an end.

2.6 From the Independent Judge to the Collegial Court

The argument developed across the first two chapters may now be stated more precisely.

Judicial reasoning begins with events, evidence, and legal materials that do not organize themselves into a ready-made syllogism. Facts are reconstructed; norms are identified and interpreted; factual and normative specifications interact. Competing hypotheses may remain possible, and the law structures the uncertainty within which a decision must eventually be reached.

An individual judge approaches this decisional task from an individual judicial standpoint.

The present chapter has added an institutional qualification.

The judge who forms that standpoint is expected to be independent from illegitimate external interference. Yet independence does not imply institutional isolation, immunity from accountability, or absence of constraints. Judicial power is exercised within an organized judiciary and under legal, procedural, and justificatory conditions.

The individual judicial standpoint is therefore neither externally dictated nor institutionally unlimited.

This formulation appears relatively manageable where one judge decides alone.

A single judge reconstructs the facts, identifies the relevant law, forms a standpoint, and—subject to the applicable constraints—produces a decision legally attributed to that judge or to the court acting through that judge.

The problem changes when the deciding body is plural.

Suppose three judges sit on a panel.

Each is individually independent.

Each is subject to the applicable legal and procedural constraints.

Each may nevertheless enter the decisional process with a different judicial standpoint.

Judge J_1 may prefer reconstruction F_1 and legal qualification N_1 .

Judge J_2 may accept F_1 but consider N_2 applicable.

Judge J_3 may reject the factual reconstruction itself and endorse F_2 .

Nothing in the concepts of independence and constraints, taken alone, explains how these positions become the judgment of the court.

One possible answer is procedural aggregation. The judges vote. A majority prevails. The decision is attributed to the court because the applicable procedural rule says that the position receiving the required number of votes constitutes the court's decision.

This answer may be legally sufficient.

It is not necessarily theoretically complete.

The very existence of collegial courts suggests that the presence of several judges may serve a function beyond the arithmetic multiplication of independent decision-makers. Judges may discuss the case, challenge one another's premises, introduce arguments, modify formulations, or search for a conclusion capable of obtaining broader support.

Indeed, the discussion of judicial independence has already revealed a curious feature of collegial adjudication. An individual judge should

not be coerced by the other panel members. Yet the judge is expected to be capable of listening to them and, potentially, of changing position because of their arguments.

Influence is not necessarily interference.

Modification is not necessarily surrender of independence.

Agreement is not necessarily the simple coincidence of pre-existing individual positions.

The problem is no longer merely how an individual judge reasons, nor under what constraints an individual judicial standpoint may become a valid judicial decision. It is how several independent and constrained judges, potentially approaching the case from different standpoints, produce a decision attributable to a single court.

In other words, the question is no longer simply how a judge decides.

It is how judges decide together.

Part II
ALL FOR ONE

*Les dés, répondit Bridoye, des jugements,
alea judiciorum, et desquels dés vous autres, Messieurs,
ordinairement usez en cette votre cour souveraine;
aussi font tous autres juges en décision des procès.*

*The dice, quoth Bridlegoose, of sentences at law,
decrees, and peremptory judgments, Alea Judiciorum, [...],
and which your worships do, as well as I, use,
in this glorious sovereign court of yours.
So do all other righteous judges in their decision of processes*

(François Rabelais)

Chapter 3

Deciding Together

The previous chapter ended with a panel of judges approaching the same case from different judicial standpoints. Each was individually independent. Each was subject to the same legal and procedural constraints. Yet neither independence nor constraints explained how their positions could become the judgment of a single court.

The simplest answer is voting. The judges express their positions. Votes are counted. A majority prevails. The decision supported by the required number of judges is attributed to the court.

As a legal description of many collegial decision-making procedures, this answer may be sufficient. As a theoretical explanation of collegial adjudication, however, it remains incomplete.

Voting explains how a position may be selected. It does not necessarily explain how the positions submitted to the vote were formed, whether they changed during deliberation, or whether the final decision incorporates contributions that cannot simply be traced back to one judge's initial standpoint. The distinction matters because, as Chapter 1 has already shown, a judicial standpoint is not a single preference capable of being represented without loss through a binary choice. It is a provisional configuration of factual reconstructions, legal qualifications, inferential relations, and reasons.

Two judges may cast the same vote for entirely different reasons. Two judges may initially disagree about the legal qualification of an event and nevertheless converge upon the same disposition. A judge may support the final result while rejecting part of the reasoning through which another member of the panel reaches it. Conversely, a judge may begin from a position opposed to the eventual judgment and modify that position after listening to the arguments of colleagues.

The vote records a choice. The judicial standpoint that precedes it is considerably more complex. The central question of this chapter is therefore not whether collegial courts vote. Nor is it whether majority rules possess legal validity. The question is more specific: what happens between the individual judicial standpoints identified in the previous chapters and the final act attributed to the court?

The first difficulty is methodological as much as theoretical. The internal decision-making processes of collegial courts have traditionally remained largely inaccessible to external observers. Judgments reveal the official result and the reasons the court chooses to publish. They do not necessarily disclose the process through which individual judges arrived at that result. Earlier reflections on collegial decision-making and participated decisions were developed precisely from this gap.⁷⁴

This chapter brings those reflections together. It begins with the opacity of collegial deliberation and the limits of voting as an explanation of collective judicial choice. It then turns to strategic interaction and game theory, not because adjudication can be reduced to a mathematical game, but because game-theoretical models illuminate an elementary point: where more than one agent participates in a decision, the possible outcome may depend upon reciprocal expectations, communication, and position modification.

⁷⁴ Parts of the argument developed in this chapter substantially revise and integrate MAZZOCCA, M. (2023), “Collegial Decision-Making Procedures of Courts. One More Guarantee for the Rule of Law?”, in DOBROVIČOVÁ, G., BREICHOVÁ LAPČÁKOVÁ, M. (eds.), *Súdna moc v právnom štáte. Pocta Alexandrovi Bröstlovi k 70. narodeninám*, Košice: ŠafárikPress, 443–452; MAZZOCCA, M. (2024), “From Debate to Consensus: A Theoretical Decision-Making Model for Collegial Courts”, in BRÖSTL, A., BREICHOVÁ LAPČÁKOVÁ, M. (eds.), *Právny štát, spravodlivosť a budúcnosť demokracie*, Košice: ŠafárikPress, 120–133. While the former focused primarily on the distinction between voting and participation, the latter developed the game-theoretical and procedural model revised below. The present chapter integrates both arguments around the transition from individual judicial standpoints to an institutionally attributed decision.

3.1 The Opacity of Collegial Decision-Making

The history of collegial adjudication is considerably older than modern constitutional courts or appellate benches. Its origins are old enough to be partly surrounded by myth.

In Aeschylus' *Eumenides*, Athena faces a matter judged “too large [...] for mortal men to judge” and responds by founding a tribunal composed of selected citizens⁷⁵. The institution of the court appears, in the tragedy, as an answer to the inadequacy of a single decision-maker. Several judges are called upon to listen to accusation and defence and to decide a matter of exceptional gravity.

Yet the process described by Aeschylus has a peculiar feature. After hearing the competing positions, the judges do not appear to engage in a genuine internal discussion. They vote. The final result is therefore generated through the aggregation of individual choices. Each judge contributes a vote, and the numerical relation among votes determines the outcome⁷⁶.

The example is ancient, but the conceptual problem is familiar: why establish a collegial court?

One possible answer is that the multiplication of judges provides additional safeguards against individual arbitrariness, error, prejudice, or corruption. Another is that different expertise or perspectives may be brought to bear upon a difficult case. Collegiality may also distribute decisional responsibility or increase the perceived authority of the resulting judgment. Whatever the institutional justification, however, a

⁷⁵ AESCHYLUS (1984), *Eumenides*, New York: Penguin Books, 224–225. On the foundation of the tribunal in the *Eumenides* and its juridical significance, see CAVALLA, F. (2011), *All'origine del diritto al tramonto della legge*, Naples: Jovene, 111.

⁷⁶ On the aggregative character of the vote in the trial narrated by Aeschylus, see MAZZOCCA, M. (2023), cit. The trial of Socrates provides another well-known ancient example of a numerically determined judgment: according to the traditional account, the jury found Socrates guilty by 281 votes out of 501. See PLATO (1997), *Apology of Socrates*, Warminster: Aris & Phillips; PELLOSO, C. (2019), *Socrate. La democrazia contro il libero pensiero*, Milan: RCS Media Group.

distinction must be drawn between the presence of several judges and interaction among several judges.

A panel may be plural in composition while remaining aggregative in operation.

Suppose five judges independently study the same case. Each forms an individual judicial standpoint without discussing the matter with the others. The five judges then enter a room and vote. Three support solution A; two support solution B. The court decides A. This is undoubtedly a collegial decision in a formal sense. Five judges participated in the decisional procedure, and the applicable majority rule transformed their votes into an institutional outcome. But did the judges decide together?

The answer depends on what is meant by deciding together. The difficulty is compounded by the secrecy traditionally associated with judicial deliberation. Secrecy may be justified, *inter alia*, as a means of protecting judges from external pressures and preserving a space for free internal discussion, and permit provisional ideas to be expressed without fear that every tentative observation will later be attributed publicly to its author. At the same time, secrecy creates a substantial epistemic limitation for those who study courts.

Judgments ordinarily state the legally relevant facts, identify applicable norms, and provide the reasons supporting the court's conclusion. They may tell us what the court decided and how the court officially justifies its decision. They ordinarily do not tell us:

- what position each judge initially held;
- whether those positions changed;
- which judge introduced a particular argument;
- whether a factual reconstruction was challenged during deliberation;
- whether the wording of the judgment resulted from compromise;
- whether a formally unanimous judgment followed immediate agreement or extensive disagreement.

In this sense, a judgment is both highly informative and profoundly incomplete. It reveals the institutional voice of the court. It does not necessarily reveal the process through which that voice was produced.

Dissenting and separate opinions provide a partial opening into this otherwise closed space. Where permitted and published, they make visible the existence of disagreement and permit individual judges or groups of judges to articulate reasons not incorporated into the majority judgment. Yet the expression “dissenting opinion” itself covers several different phenomena. Disagreement may concern the disposition, the reasons, or only part of the reasons. An opinion may be individual or joined by several judges. A judge may agree with the outcome and disagree with the path taken by the majority. In some systems or cases, the structure of opinions may produce plurality rather than a single majority rationale⁷⁷.

Most importantly for the present analysis, a dissenting opinion does not necessarily reconstruct the deliberative process. It tells us that a judge or group of judges ultimately endorsed a position different from that expressed in the majority judgment. It does not tell us whether the dissenting judge began from that position. It does not tell us which arguments were exchanged. It does not show whether the majority modified its reasoning in response to objections raised by the minority. The dissent is usually another finished text. It is, in this sense, often another monologue.

The internal practices of the United States Supreme Court provide a familiar illustration of the distinction between the visibility of positions and the visibility of deliberation. Descriptions of the Court's conference procedure have shown a structured sequence in which the Justices state their views according to institutional conventions, initial alignments become apparent, and responsibility for preparing the majority opinion is

⁷⁷ See CASSESE, S. (2009), “Una lezione sulla cosiddetta opinione dissenziente”, *Quaderni costituzionali*, 4, 973–983, 973. On the indirect visibility of disagreement within the Italian Constitutional Court through changes in the judge responsible for drafting the judgment, see RUGGERI, A., SPADARO, A. (2009), *Lineamenti di giustizia costituzionale*, 4th ed., Turin: Giappichelli, 57.

assigned according to the majority's composition⁷⁸. Subsequent exchanges of draft opinions and memoranda may certainly influence the wording and support of the Court's opinions. Yet the published result still gives an external observer only partial access to the successive interactions through which the positions developed.

The problem is not specific to the United States Supreme Court. The broader point is that case law does not transparently reproduce collegial deliberation. The legal order normally presents the judgment as a product of the court. Even where individual dissent is visible, the process connecting the individual judges to the institutional decision remains only partly knowable.

This opacity has encouraged a particular way of thinking about collegial adjudication. One may treat the internal process as theoretically secondary. On this view, what matters is that the final judgment be legally valid and adequately reasoned. The judges may arrive at their positions through different intellectual or psychological paths. They may discuss extensively or hardly at all. The law does not need to reconstruct these private processes. What matters is the institutional act. There is considerable force in this position.

Chapter 2 has already stressed that judicial authority operates through constraints and legal attribution. An act may acquire institutional consequences because the legal order recognizes it as a judgment, not because an external observer possesses complete access to the subjective reasoning of every participating judge. Nevertheless, the position leaves a question unanswered. If the internal interaction is entirely irrelevant, what is the theoretical significance of collegiality itself? Why should three, five or even more isolated votes be institutionally preferable to one judicial standpoint?

The answer may indeed lie in the multiplication of independent assessments. But another possibility must be considered: perhaps the

⁷⁸ See CASSESE, S. (2009), cit., p. 977; WOODWARD, B., ARMSTRONG, S. (2005), *The Brethren: Inside the Supreme Court*, New York: Simon & Schuster; POSNER, R. A. (2008), *How Judges Think*, Cambridge, MA: Harvard University Press, 303.

value of collegiality also lies in the capacity of judges to expose their individual standpoints to the reasons of others. If so, the internal process ceases to be merely biographical information about judges. It becomes part of the theoretical problem of how a plurality of judicial standpoints produces a single institutional decision.

3.2 Casting a Vote Is Not Shaping a Decision

Voting is among the most familiar procedures for producing collective decisions. A group is confronted with several alternatives. The members express their preferences. The votes are counted. The applicable rule (i.e. simple majority, qualified majority, unanimity, or another threshold) determines which alternative prevails.

The apparent transparency of this procedure is one of its great attractions. Votes matter because they can be counted. In this sense, a vote may appear to operate as a unit of measurement. It makes possible the numerical representation of the distribution of choices within a group. The difficulty is understanding what exactly the vote measures.

One possible answer is: opinions. Yet, as Roberto Casati and Achille Varzi have observed in their analysis of votes, an opinion is often considerably more nuanced than the vote through which it is expressed. Opinions contain qualifications, distinctions, reservations, and afterthoughts. Voting compresses this complexity into one of the options made available by the decisional procedure⁷⁹.

A voter cannot ordinarily cast one-third of a vote for one proposal and two-thirds for another. The vote is indivisible.

The same problem becomes particularly significant in collegial adjudication. Chapter 1 defined an individual judicial standpoint as the

⁷⁹ See CASATI, R., VARZI, A. C., “Voti e altri buchi elettorali. Che cos'è un voto? Come si contano i voti? E i voti contano davvero?”, *Rivista di estetica*, 37, 169-194. The argument is adopted here in a narrower judicial context: the complexity of an individual judicial standpoint cannot necessarily be reconstructed from the discrete vote through which a final preference is expressed.

configuration of factual hypotheses, legal classifications, inferential relations, and reasons from which a judge approaches the decision. That standpoint is structurally richer than the vote through which the judge may eventually express support for a disposition.

Consider three judges.

Judge J_1 concludes that the defendant is liable because factual reconstruction F_1 falls within the legal category defined by N_1 .

Judge J_2 accepts the same disposition but rejects F_1 , preferring F_2 , which is nevertheless classified under N_1 .

Judge J_3 accepts F_1 but believes the applicable norm is N_2 , which happens to produce the same immediate legal consequence.

All three judges may vote for the same outcome. Numerically:

3 – 0

The vote shows unanimity. It does not show identical reasoning.

Conversely, two judges may disagree at the beginning of deliberation and progressively modify their positions until a shared formulation emerges. The final vote may again be:

3 – 0

The same numerical outcome therefore remains compatible with profoundly different decisional processes. However, this does not make voting meaningless. A vote is an act of expression and choice. By selecting one alternative, a decision-maker ordinarily manifests a preference for that alternative over those rejected at the moment of the vote⁸⁰. In a collegial court, the legal consequences attached to this act

⁸⁰ For earlier reflections on voting as an act of choice and expression, see MAZZOCCA, M. (2020), “The Brexit Referendum Paradox”, in BRÖSTL, A., BREICHOVÁ LAPČÁKOVÁ, M. (eds.), *Demokracia, dôstojnosť, diverzita*, Košice: UPJŠ, 85–98; MAZZOCCA, M. (2023), “The Color of Democracy”, in BALTRUSCH, B.,

make it particularly significant. A judicial vote may contribute to a decision capable of depriving a person of liberty, transferring property, awarding compensation, invalidating an administrative act, or defining the constitutional meaning of a legal provision.

Voting in a court is therefore not equivalent to answering an opinion poll. An opinion poll records the position expressed by a respondent at a particular moment. The respondent may change their mind immediately afterwards without thereby changing the institutional world.

A judicial vote enters a legally structured decisional process. Once the required number of votes supports a position and the judgment acquires legal effect, a subsequent change of mind by an individual judge does not ordinarily reopen the decision.

Voting thus performs an important act of closure. But closure should not be confused with formation.

Suppose a presiding judge enters the deliberation with two prepared alternatives: A and B. The other judges are invited to vote. Each judge formally participates. Each has one vote. Each vote possesses equal numerical value. The procedure may therefore satisfy a basic requirement of formal equality.

Yet a further question arises: Who created A and B?

The distinction is between participating in a decision and shaping a decision⁸¹. To participate in a decision may mean choosing among alternatives formulated by someone else. To shape a decision means contributing to the construction of the alternatives themselves. The distinction is subtle only at first sight⁸².

SALZANI, C., VANHOUTTE, K. K. P. (eds.), *A Responsibility to the World: Saramago, Politics, Philosophy*, Berlin: Frank & Timme, 109–122.

⁸¹ For terminological purposes, I shall use *participated decision* to refer to a decision whose alternatives and reasons have been substantively shaped through the contributions of the participants, reserving *participatory decision-making* for the broader family of procedures designed to enable participation.

⁸² For earlier reflections on voting as an act of choice and expression, see MAZZOCCA, M. (2020), “The Brexit Referendum Paradox”, in BRÖSTL, A., BREICHOVÁ LAPČÁKOVÁ, M. (eds.), *Demokracia, dôstojnosť, diverzita*, Košice: UPJŠ, 85–98; MAZZOCCA, M. (2023), “The Color of Democracy”, in BALTRUSCH, B.,

Consider, for example, a referendum. Citizens may be invited to choose between “Yes” and “No”. Their votes determine the result. They participate in the decision in a politically and legally important sense. Yet the citizens who vote do not necessarily participate in formulating the question. They do not necessarily determine the alternatives. The decisional space is partly constructed before they enter it. A similar problem may arise in a judicial panel.

Suppose five judges are considering a case. In the first scenario, the reporting judge submits solutions A and B. The panel may vote immediately. Alternatively, the panel may discuss A and B, modify some of their details, and then vote. In both versions, the initial architecture of the decision is structured by the alternatives introduced by one judge.

Now consider a second scenario. Each judge is invited to formulate an initial position. The panel begins with: A, B, C, D, and E. The judges identify areas of convergence. Some positions prove compatible. Others are reformulated after objections. Elements of C may be incorporated into A. Judge J₄ may abandon D. A new proposal A' may emerge that no individual judge had formulated in precisely that form before deliberation. The final vote concerns: A' and E. In the second scenario, the vote closes a process that has already transformed the decisional alternatives.

This is the difference that matters here.

A decision is not “fully participated” merely because each member possesses a formally equal vote. In a stronger sense, participation requires the capacity to contribute to the formation, testing, and modification of the positions among which the group ultimately chooses.

To cast a vote is not necessarily to shape a decision.

SALZANI, C., VANHOUTTE, K. K. P. (eds.), *A Responsibility to the World: Saramago, Politics, Philosophy*, Berlin: Frank & Timme, 109–122.

3.3 Strategic Interaction and the Judicial Panel

The distinction between an isolated decision-maker and a plurality of interacting decision-makers can also be approached through game theory. The use of game theory in this context, however, requires caution. A judicial panel is not reducible to a game in the ordinary recreational sense. Judges do not necessarily seek to maximize personal utility, nor should legal deliberation be portrayed as a strategic contest detached from legal reasons and institutional duties.

Nevertheless, game theory provides a useful conceptual vocabulary for situations in which the outcome of one agent's choice depends partly upon the choices or expected choices of others⁸³.

Decision theory traditionally examines the choices of an individual agent. Game theory examines situations of strategic interaction. In such situations, an agent cannot determine the outcome solely through their own choice. Each participant must act in a decisional environment partly constituted by other participants. A commercial negotiation is an obvious example. So is a cabinet meeting. So, potentially, is the deliberation of a judicial panel.

A judge who argues for a legal interpretation before colleagues does not speak into an empty space. The argument may alter another judge's assessment. A dissent may be drafted partly in response to the majority's reasoning. A majority opinion may be reformulated in order to retain the support of a judge whose agreement is conditional upon a narrower legal

⁸³ On game theory as the study of strategic interaction among multiple agents, see CEVOLANI, G. (2008), "Introduzione. Giochi, dilemmi sociali e scelte collettive", in DE JASAY, A., *Scelta, contratto, consenso. Una nuova esposizione del liberalismo*, Soveria Mannelli: Rubbettino, 13–56, 15. The term 'game' is not used here in a merely recreational sense: game theory also concerns negotiations, political decisions, and other forms of strategic interaction. On rational choice, strategies, and payoffs, see HARGREAVES HEAP, S. et al. (1992), *The Theory of Choice: A Critical Guide*, Oxford: Blackwell; Italian trans., *La teoria della scelta razionale. Una guida critica*, Rome–Bari: Laterza, 1996, 129.

proposition. The positions of participants are therefore potentially reciprocal.

The point can be illustrated through the most famous game-theoretical model of strategic interaction: the Prisoner's Dilemma. Imagine two prisoners, P_1 and P_2 , who are questioned separately. Each may remain silent or confess. A simplified payoff structure may be represented as follows:

	P_2 : Silent (s)	P_2 : Confess (c)
P_1 : Silent (s')	-1, -1	-9, 0
P_1 : Confess (c')	0, -9	-6, -6

The precise numerical values are illustrative. What matters is the structure. For each individual prisoner, confession is the dominant strategy. If the other prisoner remains silent, confessing produces the best individual outcome. If the other prisoner confesses, confession still avoids the worst individual outcome. Thus, individually rational choice leads both prisoners to confess:

(c' , c)

Yet both would be better off if both remained silent:

(s' , s)

The game is a social dilemma because the individually dominant strategies produce an outcome inferior, for both participants, to another collectively available outcome⁸⁴.

However, the Prisoner's Dilemma does not model judicial deliberation. Judges are not prisoners, the judicial outcome is not ordinarily a utility payoff, and the objectives of a court cannot be assumed to consist in the maximization of individual advantage.

Its relevance lies elsewhere.

The model demonstrates that the aggregation of individually rational choices need not produce the collectively preferable outcome. Once multiple agents participate in a decision, the relationship between individual rationality and collective result becomes theoretically complex. Communication may change that relationship. In the classical Prisoner's Dilemma, the players are isolated. They cannot discuss strategies or test reciprocal commitments. If interaction becomes possible, the decisional environment changes. The players may disclose preferences, formulate agreements, and create expectations concerning the conduct of the other.

Communication does not mechanically solve every dilemma. Promises may be broken. Strategic deception may occur. The structure of incentives may remain powerful.

Nevertheless, interaction expands the space of possible conduct. Consider a simpler coordination problem. Two players must independently choose x or y. The payoffs are:

	P ₂ : x	P ₂ : y
P ₁ : x	1,1	0,2
P ₁ : y	2,0	0,0

⁸⁴ On the limits of equating democratic participation with the mere selection of pre-established alternatives, see HELD, D. (2006), *Models of Democracy*, 3rd ed., Stanford: Stanford University Press, 150. For a broader discussion of participation in democratic decision-making, see DELLA PORTA, D. (2011), *Democrazie*, Bologna: Il Mulino.

Each player is attracted by y because, where the other chooses x , y produces the larger individual payoff. Yet if both choose y , both receive nothing⁸⁵. If the players remain isolated, they must select strategies under uncertainty concerning the other's choice. If they may interact, further possibilities appear. They may agree to choose x . They may devise a rotation mechanism across repeated interactions. They may negotiate a distribution of benefits. They may even reformulate the problem in a way not represented by the initial matrix. The important point is not that dialogue necessarily produces the optimal solution. It is that dialogue may change the practical set of alternatives and reciprocal expectations through which the participants approach the decision.

A collegial court operates in an even more complex decisional environment. The judges are not choosing between two fixed strategies with predetermined payoffs. They are interpreting evidence, evaluating legal arguments, testing classifications, and formulating reasons. The possible positions are not necessarily fully defined before deliberation begins. In this sense, the interaction among judges may do more than coordinate pre-existing preferences. It may generate new positions.

Let the individual judicial standpoint of Judge J_1 before deliberation be S_1 . After hearing J_2 , Judge J_1 may: i) retain S_1 ; ii) revise it into S_1' ; iii) abandon it and adopt S_2 ; or iv) contribute, together with others, to the formulation of S_3 , a position not initially held by any member of the panel. The process is reciprocal. Judge J_2 may also change. Judge J_3 may identify a point of convergence between S_1 and S_2 . What Chapter 2 described as influence without interference can therefore be understood as an ordinary feature of strategic and argumentative interaction.

Influence becomes problematic where one participant substitutes coercion, hierarchical pressure, or an extraneous threat for the reciprocal exchange of reasons.

⁸⁵ The simplified example is a variant of the dilemma described above. Comparable structures are found in public-goods games in experimental economics. See FEHR, E., GÄCHTER, S. (2000), "Cooperation and Punishment in Public Goods Experiments", *American Economic Review*, 90(4), 980–994; CARPENTER, J. P. (2022), *Game Theory and Behavior*, Cambridge, MA: MIT Press

Persuasion is different. A judge who changes position because a colleague has identified a flaw in their factual reconstruction has not necessarily surrendered independence. The standpoint has been modified through reasoning. The crucial issue is therefore not whether judges influence one another. They almost inevitably do. The question is how the decisional structure permits, distributes, and transforms that influence.

3.4 From Competitive Debate to Participated Deliberation

The word *debate* may conceal different types of interaction.

One model is competitive. Two positions confront one another. Each side seeks to demonstrate the superiority of its own thesis and the weakness of the opponent's arguments. The aim is victory. This model is familiar in forensic advocacy and formal debating competitions. The participants occupy opposing positions, and an external subject – a judge, jury, audience, or scoring system – determines the winner⁸⁶.

The trial itself frequently contains a competitive dialectical dimension. Chapter 1 already described the way competing reconstructions may be presented and challenged. One party does not simply explain why its own hypothesis should be accepted. It also attempts to explain why the opposing hypothesis should be rejected. The structure is:

⁸⁶ On competitive debate, its educational functions, and the tension between persuasion, dialectical opposition, and openness to complexity, see SOMMAGGIO, P., TAMANINI, C. (eds.) (2020), *La didattica del dibattito. Dal duello al dialogo*, Turin: Giappichelli; REGGIO, F. (2020), “Il dibattito tra persuasione, logica e capacità dialettiche. Una proposta formativa a partire dalle esperienze trentine di WordGames e WortBewerb”, in SOMMAGGIO, P., TAMANINI, C. (eds.), *A suon di parole: il gioco del contraddittorio. Il format trentino del dibattito per l'innovazione della didattica*, Milan: Mimesis, 141–164; REGGIO, F. (2024), “Educazione alla complessità e debate”, in SOMMAGGIO, P. (ed.), *La città del dibattito. Prassi e principi di dialogo oppositivo*, Turin: Giappichelli. See also SOMMAGGIO, P. (2012), *Contraddittorio Giudizio Mediazione. La danza del demone mediano*, Milan: FrancoAngeli.

accept F_1 , rather than F_2 .

This competitive form of debate performs an important epistemic function. Arguments are exposed to objections. Evidential connections are challenged. Alternative explanations become visible.

Yet internal judicial deliberation presents a different problem. The judges are not formally parties to the case. They are not expected to “win” against one another. The panel must eventually produce a legally attributed decision. For this reason, competitive debate cannot provide the only model of interaction among judges.

A distinction can be drawn between competitive debate and what I shall call participated deliberation. The adjective ‘participated’ is used here deliberately to mark a stronger condition than mere participation: the participants’ contributions must be capable of co-shaping the position that emerges from the process. In competitive debate, participants seek the success of a position. In participated deliberation, they are permitted to contribute to the construction of the position that will become the collective outcome⁸⁷.

However, the distinction should not be romanticized. Judges may enter deliberation strongly committed to initial views. Professional reputation, personality, hierarchy, ideology, or the desire to preserve doctrinal consistency may affect interaction. A judge may attempt to persuade colleagues because they genuinely believe their interpretation is correct. Another may resist modification. Participated deliberation does not require judges to become disinterested philosophical observers. Nor does it require unanimity. The relevant difference lies in the openness of positions to reciprocal contribution.

⁸⁷ From a mediative perspective, a comparable form of participated interaction can be found where the parties are not merely invited to defend pre-existing positions, but are enabled to contribute to the construction of a shared normative outcome. See REGGIO, F. (2017), *Concordare la norma. Gli strumenti consensuali di soluzione della controversia in ambito civile: una prospettiva filosofico-metodologica*, Padova: CLEUP.

Suppose Judge J_1 enters the deliberation defending A. In a purely competitive model, J_1 's objective is to persuade enough judges to vote for A. Objections are answered in order to preserve A. The alternatives remain: A versus B.

In a participated model, J_1 may still defend A. But the deliberative procedure allows the objections of J_2 and J_3 to modify the position itself. The final solution may become: A'. Judge J_1 may remain its principal advocate. Yet A' is not simply the initial private proposal of J_1 . The contributions of the other judges have become part of its structure. This is what distinguishes participating in a decision from producing a participated decision. The former may involve formal inclusion within a procedure established by others. The latter implies some capacity to act as a co-author of the decisional space.

James Bohman's distinction between formal and substantive equality is particularly relevant here. Deliberative participation requires not only formal equality among participants but substantive consideration of the reasons they advance⁸⁸.

Formal equality means, in a simplified model:

$$J_1 = J_2 = J_3$$

Each judge possesses a voice. Each judge possesses a vote.

Substantive equality is more demanding. It requires that the reason advanced by, for instance, J_3 not be ignored merely because J_3 is younger, less senior, less prestigious, or institutionally less influential.

This does not mean that every argument must be accepted. Equal consideration of reasons is not equal acceptance of conclusions. A weak argument remains weak. A legally irrelevant argument may be rejected. The requirement is that the argumentative contribution be assessed

⁸⁸ See BOHMAN, J. (1998), "The Coming Age of Deliberative Democracy", *Journal of Political Philosophy*, 6(4), 399–423. The distinction between formal equality and the substantive consideration of reasons was previously employed in MAZZOCCA, M. (2023), cit., in developing the initial model of participatory judicial decision-making.

through criteria appropriate to judicial reasoning rather than through the social status of its author.

The distinction also clarifies why a formal opportunity to speak does not necessarily establish participation. A judge may be permitted to state an opinion at the beginning of the conference while the practical outcome is already determined by informal hierarchy. A minority judge may be heard but never answered. A reporting judge may possess such control over the drafting process that other members of the panel can only accept or reject the prepared text. These may remain legally valid procedures. But they raise questions about the depth of participation. For this reason, participated deliberation should be understood through at least three dimensions initially identified in my earlier work: inclusiveness, discursive quality, and participant empowerment⁸⁹.

Inclusiveness concerns the possibility of introducing a plurality of perspectives into the decision-making process. Discursive quality concerns the capacity of participants to interact with the arguments of others rather than merely presenting parallel monologues. Empowerment concerns the ability of participants to affect the development of the collective decision.

The three dimensions are connected. A process may be inclusive in a formal sense because every judge is invited to speak. Yet if no position is capable of affecting a draft prepared in advance, empowerment remains limited. A discussion may be extensive but discursively poor if judges repeat fixed positions without addressing objections. Conversely, a short intervention may substantially alter the final reasoning. The quantity of speech is therefore not a reliable measure of deliberative participation.

⁸⁹ On participation and inclusiveness, see DELLA PORTA, D. (2011), cit. On formal and substantive equality in deliberative participation, see BOHMAN, J. (1998), cit. On participant empowerment and the capacity of deliberation to broaden participants' understanding of interests and reasons, see ABERS, R. N. (2003), "Reflections on What Makes Empowered Participatory Governance Happen", in FUNG, A., WRIGHT, E. O. (eds.), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, London: Verso, 200–207, 206.

The question is whether the process permits reciprocal position modification.

Participation, in the stronger sense proposed here, therefore does not require consensus. A majority decision may be participated. A unanimous decision may not be. Three judges may discuss a case openly, modify their reasoning, and eventually divide two to one. The majority judgment may nevertheless incorporate arguments introduced by the dissenting judge. The decision-making process was participated even though the outcome was not unanimous. Conversely, three judges may enter deliberation with identical positions and immediately vote. The result is unanimous. Yet little collective deliberation has occurred. Unanimity and participation must therefore be kept conceptually distinct.

3.5 A Theoretical Model of Participated Judicial Decision-Making

The considerations developed so far permit the construction of a simplified model of participated judicial decision-making. The model is not intended as a universal description of actual judicial practice. Different courts operate under different procedural frameworks. Panel size, jurisdiction, seniority rules, the role of the reporting judge, time pressure, and institutional culture may all affect deliberation. The model is instead an idealized analytical sequence. Its function is to identify the stages through which individual judicial standpoints could be transformed through interaction before the final vote. Four phases may, then, be distinguished:

1. *inventio*;
2. emergence and grouping of positions;
3. dialectical confrontation;
4. final vote.

3.5.1 *Inventio*

The first phase is the emergence of possible solutions. The Latin term *inventio* is used here in its broad rhetorical sense: the identification and formulation of arguments, positions, or possible paths through which a problem may be addressed.

Each judge approaches the case from the individual judicial standpoint described in Chapter 1.

Judge J₁ may identify factual reconstruction F₁, norm N₁, and conclusion C₁.

Judge J₂ may accept F₁ but interpret the legal materials through N₂, reaching C₂.

Judge J₃ may begin from F₂ and arrive at C₃.

A participated process requires that the judges possess some opportunity to make these positions visible within the panel.

The model does not require every judge to deliver a formal speech. Nor does it require the positions to be completely developed before discussion. Indeed, one of the implications of the spiral model developed in Chapter 1 is that judicial standpoints may remain provisional.

The essential point is that the decisional alternatives should not be treated as exhaustively fixed before the judges have had an opportunity to contribute.

The judges are not merely voters. They are potential sources of proposals.

3.5.2 *Emergence and Grouping of Positions*

A difficulty immediately follows from the first phase. The multiplication of possible solutions can make decision-making more complex.

Suppose a panel of five judges produces five initial standpoints: A, B, C, D and E.

More options are not automatically better. Research on choice has repeatedly shown that increasing the number of alternatives may improve perceptions of autonomy and control up to a point, while excessively large choice sets may also increase decisional difficulty⁹⁰.

In a judicial panel, the number of judges is ordinarily limited. Yet the potential legal and factual variations within each standpoint may be considerably greater than the number of panel members.

The model therefore requires a second phase. The positions must emerge and become mutually visible. Once visible, relations among them can be identified. Perhaps A and B differ only in the formulation of one legal reason. Perhaps C and D share the same factual reconstruction but propose different legal consequences. Perhaps E is genuinely incompatible with every other position.

The panel can therefore begin to group positions according to areas of convergence and disagreement.

Earlier formulations of this model described this stage as “polarization”⁹¹. I now prefer the more neutral expression “emergence and grouping of positions”.

Polarization suggests the progressive consolidation of opposing camps. This may indeed occur. But it is not the only possible result. Positions may converge without forming factions. One standpoint may

⁹⁰ On the relationship between choice, intrinsic motivation, perceived control, and performance, see DECI, E. L., RYAN, R. M. (1985), *Intrinsic Motivation and Self-Determination in Human Behavior*, New York: Plenum Press; TAYLOR, S. E., BROWN, J. D. (1988), “Illusion and Well-Being: A Social Psychological Perspective on Mental Health”, *Psychological Bulletin*, 103, 193–210. On the difficulties associated with extensive choice sets, see IYENGAR, S. S., LEPPER, M. R. (2000), “When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?”, *Journal of Personality and Social Psychology*, 79(6), 995–1006.

⁹¹ See MAZZOCCA, M. (2024), *cit.*, p. 129. The earlier model identified *inventio*, polarization, debate, and voting as four phases of participatory decision-making. The present formulation replaces polarization with the emergence and grouping of positions, thereby avoiding the assumption that deliberation necessarily produces opposing factions and allowing for the convergence, combination, or disappearance of positions.

disappear when its author recognizes that it rests on a factual mistake. Two proposals may merge.

The aim of the second phase is therefore not to manufacture majority and minority blocs. It is to identify the structure of disagreement.

Let:

$$A \approx B$$

because A and B share most of their reasoning. Let:

$$C \approx D$$

for a different reason. Let, finally:

$$E$$

remain isolated.

The deliberative field is now more intelligible. The judges know not only what positions exist but where the principal points of divergence lie. This prepares the third phase.

3.5.3. Dialectical Confrontation

Once the positions and their relations have become visible, they may be subjected to dialectical confrontation. Arguments are advanced. Objections are raised. Judges ask one another to clarify inferential steps.

A factual hypothesis may be challenged through evidence. A legal qualification may be tested against a precedent or principle.

The position after deliberation need not be identical to the position before deliberation. Modification may be extensive or minimal.

Judge J_1 may retain conclusion C_1 while accepting a new reason proposed by J_2 .

Judge J_2 may abandon the legal classification of F_1 under N_2 .

Judge J_3 may move from C_3 to C_1 .

The confrontation may also produce a position C_4 that did not exist in the initial phase. Indeed, this is the stage in which the distinction between influence and interference becomes decisive.

A participated process must permit judges to influence one another through reasons. At the same time, it should protect the independence of individual judges against coercive mechanisms capable of replacing their assessment with that of another participant.

This balance is delicate. Hierarchy cannot simply disappear. Courts possess presidents, chamber chairs, reporting judges, senior members, and institutional roles. Experience differs. Some judges may possess specialized knowledge relevant to a case.

Formal equality therefore does not imply the sociological absence of authority. The normative aim is more modest: institutional or social authority should not make reasons unnecessary. A senior judge may persuade. Seniority itself should not function as a substitute for justification.

The third phase is thus dialectical because positions confront one another within a shared institutional framework.

The judges are neither enemies nor isolated monads. They disagree over the case while participating in the same decisional enterprise.

3.5.4 *Final Vote*

The final phase is voting. This might seem paradoxical. After criticizing aggregation throughout the chapter, the model ends with aggregation.

However, there is no contradiction. The point has never been that voting is unnecessary. A collegial court requires a mechanism of closure. Deliberation may fail to produce unanimity. Time is finite. The legal order requires a judgment. At some point, the panel must determine which disposition will acquire legal effect.

Voting performs this function. The difference lies in what is being voted upon. In a purely aggregative model, individual positions remain fixed and are counted. In the participated model, the judges' initial positions enter deliberation and may be modified or even contribute to the generation of a new position. In other words, voting does not replace deliberation: it closes it. This difference changes the theoretical meaning of the majority.

The majority is no longer necessarily the numerical coalition that entered the room supporting a pre-existing position. It may be the result of position modification. A judge originally in the minority may help shape the final majority reasoning without joining the majority disposition. A position initially supported by one judge may become the unanimous result after substantial revision. The final numerical distribution does not reveal these processes. Yet they may be central to understanding how the court decided.

3.6 Participation Without Romanticism

Of course, even a model like that may fail. Deliberation may fail. Judges may talk past one another. A dominant member of the panel may influence others through professional authority rather than argumentative force. Time pressure may make extended discussion impossible. Workload may encourage reliance upon a reporting judge. Coalitions may emerge. Consensus may become an institutional value so strong that judges suppress disagreement. Conversely, the availability of dissent may encourage the preservation of individual positions rather than reciprocal modification.

A participated process is therefore not automatically an ideal process. Nor is consensus necessarily the measure of its success.

The Prisoner's Dilemma illustrated the possibility that individually rational strategies produce collectively inferior outcomes. But the opposite mistake must also be avoided: collective convergence cannot simply be assumed to produce the correct legal answer.

A unanimous panel may unanimously err. A dissenting judge may be right. Chapter 1 has already distinguished institutional closure from epistemic infallibility. Collegial deliberation does not eliminate that distinction. The value of participation must therefore be formulated with greater precision.

First, participation may increase the number of perspectives exposed to scrutiny. This may reveal evidential or legal problems overlooked by an individual judge. There is, of course, no guarantee that this will occur.

Second, participation may permit reasons to be tested through reciprocal objection. Again, this does not guarantee correctness. A bad argument may survive discussion. A good argument may be ignored.

Third, participation may permit individual judges to contribute to the formation of the institutional reasons eventually expressed by the court. This point is especially important for the present book⁹². The theoretical model developed here is not offered as an algorithm for producing correct judgments.

It is a model for distinguishing different ways in which a plural judicial body may reach one institutional result.

At one extreme lies pure aggregation; at the other lies a strong model of participated deliberation. However, actual courts may occupy positions between these poles. Some panels may discuss extensively. Others may rely heavily upon the reporting judge. Some may pursue unanimity. Others may accept division as an ordinary feature of adjudication. Some institutional cultures may encourage junior judges to challenge senior colleagues. Others may not. These are empirical questions. The theoretical model cannot answer them.

Indeed, one of the dangers of purely conceptual work is to convert a normative aspiration into a descriptive assumption. Because participated deliberation appears attractive, one may begin to describe actual collegial courts as if they necessarily worked in this way.

⁹² For different accounts of the institutional value and requirements of participatory decision-making, see BOHMAN, J. (1998), cit.; ABERS, R. N. (2003), cit.; SMITH, G. (2009), *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge: Cambridge University Press, 17

Nothing established in this chapter permits that conclusion. A court is not a participated decision-making body merely because it is collegial. Several judges may sit together and still produce an outcome largely through aggregation. Nor does the institutional attribution of the judgment to “the court” prove the emergence of a shared intention.

The process must be investigated. This limitation is not a weakness of the model. It identifies the boundary between conceptual analysis and empirical inquiry. The model specifies what one might look for:

- initial plurality of positions;
- visibility of disagreement;
- reciprocal engagement with reasons;
- modification of judicial standpoints;
- contribution of minority arguments to majority reasoning;
- practices concerning unanimity and voting;
- the role of hierarchy and panel culture.

Whether such phenomena occur, and how judges themselves understand them, cannot be inferred from the concept of collegiality. The court must eventually be observed. Before that methodological turn, however, a prior philosophical problem remains.

Chapter 4

Collective Intentionality and the Construction of Legal Reality

The previous chapter ended with a warning. A collegial court is not a participated decision-making body merely because several judges sit on it. Nor does the institutional attribution of a judgment to “the court” prove that a shared intention has emerged among its members. The warning creates a conceptual gap. If a rule of procedure can transform the position supported by the required majority into the decision of the court, what explanatory work remains for collective intentionality?

One possible answer is: none. For the limited purpose of legal validity, that answer may often be correct. A procedural rule may identify the votes that must be counted, establish the relevant threshold, and determine which position acquires legal effect. Once those conditions are satisfied, the resulting act may be attributed to the court whether the judges agreed enthusiastically, reluctantly, or not at all.

But the inquiry pursued in this book asks a different question. It asks not only why an act counts as the court’s judgment, but whether and in what sense the judges who produce that act may act and reason together. The difference is between legal attribution and an explanation of collective agency. The first may be supplied by procedural rules. The second requires us to look at the relations among the agents whose acts are being attributed to a single institutional subject.

The expression “collective intentionality” covers a family of phenomena rather than one uncontroversial mental state. Shared intention, joint attention, collective acceptance, shared belief, and collective emotion are commonly discussed under this broad heading. The theories developed to explain these phenomena differ considerably. Searle treats we-intentions as irreducibly collective; Bratman constructs shared agency from interlocking individual planning attitudes; Gilbert places joint commitment at the center of plural subjecthood; and Tuomela

distinguishes individual and group-oriented modes of acting. This book does not need to settle the disputes among these accounts⁹³.

For present purposes, a minimal formulation will suffice. Collective intentionality concerns situations in which a plurality of agents is jointly directed towards an object, state of affairs, goal, or activity, and in which the practical orientation of each participant is structured, at least in part, by the understanding that the relevant activity is not simply mine or yours, but ours⁹⁴. The formulation is deliberately broad. It does not imply that the agents must possess identical beliefs, feel the same emotions, or agree on every step required to reach a shared goal.

This qualification matters immediately for courts. Suppose three judges read the same case file separately, never discuss the case, and independently reach the same conclusion. The final vote is “3–0”. Their standpoints happen to coincide. Yet numerical convergence alone gives little reason to describe the process as the formation of a collective intention. The judges may simply have performed three parallel individual acts whose results were subsequently counted together.

Now reverse the example. Three judges begin with different factual reconstructions and different legal classifications. They nevertheless understand themselves as engaged in the common task of deciding the case as a panel. They present reasons to one another, respond to objections, and alter parts of their positions. The process may still end in a divided vote. Disagreement about the answer is compatible with a collective orientation towards the activity of deciding together.

⁹³ The four approaches are mentioned solely to illustrate the theoretical plurality of the field. For broad accounts of collective intentionality and social facts, see GILBERT, M. (1989), *On Social Facts*, Princeton: Princeton University Press; SEARLE, J. R. (1990), “Collective Intentions and Actions”, in COHEN, P. R., MORGAN, J., POLLACK, M. E. (eds.), *Intentions in Communication*, Cambridge, MA: MIT Press, pp. 401–415; TUOMELA, R. (2013), *Social Ontology: Collective Intentionality and Group Agents*, New York: Oxford University Press; BRATMAN, M. E. (2014), *Shared Agency: A Planning Theory of Acting Together*, Oxford: Oxford University Press. The present argument does not presuppose that these theoretical approaches are mutually reducible.

⁹⁴ Cf. SCHWEIKARD, D.P.; SCHMID, H.B. (2020), cit.

Collective intentionality must therefore be distinguished from the mere identity of individual attitudes. To say that “we intend to decide this case together” is not equivalent to saying that each of us already intends the same outcome. The shared object may be the decisional enterprise itself, while the substantive position to be adopted remains contested. This is why unanimity is neither a necessary nor a sufficient indicator of collective intentionality. A unanimous panel may consist of coincidentally aligned individuals; a divided panel may nevertheless have deliberated as a genuine collective.

The point also clarifies the transition from Chapter 3. The distinction between casting a vote and shaping a decision was introduced there as a distinction between aggregation and participated deliberation. Collective intentionality provides a further conceptual vocabulary for describing what may occur between those poles. The relevant question is no longer simply whether several judicial standpoints are counted, but whether the judges orient their reasoning towards a common institutional activity and permit their standpoints to enter relations of reciprocal dependence.

4.1 Collective Intentionality and Legal Status

The ontological argument of the Prologue can now be recalled without being repeated. Legal reality contains persons, objects, and events whose legal status is not reducible to their physical properties⁹⁵. A judge is a human being, but no anatomical property makes that person a judge. A judgment may be materially instantiated in paper, ink, or digital data, but none of those materials is sufficient to make a text a

⁹⁵ For the idea of ontology as an inventory or catalogue of the entities and categories that populate the world, see BROAD, C. D. (1923), *Scientific Thought*, London: Routledge & Kegan Paul, 242; QUINE, W. V. O. (1948), “On What There Is”, *Review of Metaphysics*, 2, 21–38; VARZI, A. C. (2001), *Parole, oggetti, eventi e altri argomenti di metafisica*, Rome: Carocci, 13–19. On events as particulars entering our ordinary ontology alongside objects, see DAVIDSON, D. (1980), *Essays on Actions and Events*, Oxford: Clarendon Press.

judgment. A court may occupy a building, but the building is not the court.

Searle's familiar formula captures an important part of this structure:

*X counts as Y in context C.*⁹⁶

The formula expresses the assignment of a status that an entity cannot perform solely in virtue of its physical structure. In a legal context, a person may count as a judge; a properly constituted plurality of judges may count as a panel; an act performed under specified conditions may count as a judicial decision; and a text produced through the relevant procedure may count as the judgment of the court. None of these statuses is a natural property of the underlying persons, acts, or objects.

One further qualification is important. Legal status does more than furnish a second description of an underlying entity. In many cases, it places that entity within a normative position. To count as a judge is to occupy an office associated with powers, duties, and competences. To count as a judgment is to produce an act capable, under the conditions of a legal system, of settling a dispute, altering legal positions, and triggering further institutional consequences. In Searle's terminology, status functions are characteristically connected with deontic powers. For present purposes, this matters because a court is not merely a collectively recognized label attached to a group of persons. It is an institutional configuration through which certain acts acquire a normative force that the same words, votes, or documents would not possess outside the relevant legal practice⁹⁷.

⁹⁶ SEARLE, J. R. (1995), *The Construction of Social Reality*, New York: Free Press, 28 (my italics). Searle subsequently reformulated the mechanism of status assignment in terms of status-function declarations; the simpler formula is retained here because it more clearly isolates the relation relevant to the present argument

⁹⁷ On the relation between status functions, collective recognition, and deontic powers, see SEARLE, J. R. (2010), *Making the Social World: The Structure of Human Civilization*, Oxford: Oxford University Press, 8–9; ROVERSI, C. (2012), *Costituire. Uno studio di ontologia giuridica*, Turin: Giappichelli; DE VECCHI, F. (2012), "Ontologia sociale e intenzionalità: quattro tesi", *Rivista di estetica*, 49.

Yet the dependence of legal status upon collective practices does not reduce law to private belief. An unsuccessful litigant cannot deprive a judgment of legal existence by refusing to accept it. A driver cannot make a traffic rule inapplicable by sincerely believing that no such rule exists. The relevant recognition is institutional and distributed. It does not require every member of the population to entertain the same explicit belief at the same time. Collective attitudes may be dispositional, embedded in a background of practices, or differentiated according to institutional roles. A judge, a court clerk, a police officer, and an ordinary citizen need not possess the same legal knowledge for the same legal status to be sustained⁹⁸.

This is one reason why legal systems can continue to operate despite widespread ignorance, disagreement, or even resistance. What is required is not a permanent plebiscite on every legal entity but a sufficiently stable practice through which texts, offices, procedures, and acts are treated as possessing particular legal statuses. As Searle has observed in the legal context, an institutional system works only insofar as it is generally accepted within the relevant community. “Generally” is doing important work here. Collective recognition is compatible with individual dissent⁹⁹.

For the present analysis, however, the move from legal ontology to collegial adjudication requires a distinction between two sites at which collective intentionality becomes relevant.

The distinction that follows is heuristic rather than a received taxonomy. It separates two explanatory questions that different strands of the literature often address without placing them under a common label: how an institutional subject and its acts acquire legal status, and

⁹⁸ On standing or dispositional beliefs within social practices, see TUOMELA, R. (1995), *The Importance of Us: A Philosophical Study of Basic Social Notions*, Stanford: Stanford University Press, 131. Searle likewise argues that collective intentional states may become part of the Background and therefore need not remain objects of conscious reflection. See SEARLE, J. R. (1995), cit., 142.

⁹⁹ CONDELLO, A., SEARLE, J. R. (2017), “Some Remarks about Social Ontology and Law: An Interview with John R. Searle”, *Ratio Juris*, 30(2), 226–231, 230.

how several agents may orient themselves towards an activity as something they do together¹⁰⁰.

The first will be called, here, *constitutive or attributive collective intentionality*. It concerns the broader institutional practices through which a plurality of natural persons counts as a court and through which an act produced under specified conditions counts as the decision of that court. At this level, the relevant ‘we’ extends beyond the judges deciding a particular case. Legislators, officials, judges, lawyers, and other participants in legal practice sustain the status structure within which a judicial body can act at all.

The second will be called, here, *deliberative or agentive collective intentionality*. It concerns the members of a concrete panel and the way they orient themselves towards the task of deciding together. At this level, the question is not whether the legal order recognizes the panel as a court. It is whether the judges themselves participate in a shared decisional activity capable of structuring their individual reasoning in relation to the reasoning of their colleagues.

The two levels are analytically distinct. A majority rule may be entirely sufficient at the constitutive level. Suppose three judges remain intellectually isolated throughout the proceeding. Each forms a fixed standpoint; no judge seriously engages with the reasons of the others; a vote is taken; two positions coincide; and the applicable procedural rule attributes the majority position to the court. The judgment may be legally valid. Constitutive attribution has succeeded. Deliberative collective intentionality may nevertheless be weak or absent.

¹⁰⁰ The terminology proposed in the following paragraphs is heuristic and is introduced for the purposes of this book; it is not a received taxonomy. The first side of the distinction draws on social-ontological accounts of institutional facts and status functions, especially SEARLE, J. R. (1995), cit.; ROVERSI, C. (2012), cit. The second draws on accounts of shared and group agency centred, in different ways, on joint commitment, we-mode agency, interdependent planning, or group-level agency: GILBERT, M. (1989), cit.; TUOMELA, R. (2013), cit.; BRATMAN, M. E. (2014), cit.; LIST, C.; PETTIT, P. (2011), *Group Agency: The Possibility, Design, and Status of Corporate Agents*, Oxford: Oxford University Press. No claim is made that these authors endorse the present two-level distinction.

The converse is equally important. Three legal scholars may jointly analyze a dispute, expose their views to reciprocal criticism, and eventually formulate a position that none of them could plausibly call merely their own. Their interaction may display strong collective intentionality. Yet unless they possess the relevant jurisdiction, institutional status, and procedural authority, their conclusion does not thereby become a judgment. Deliberative collective intentionality cannot manufacture legal competence.

Collective intentionality may therefore be constitutive of legal reality at one level and an empirically variable feature of judicial practice at another. This distinction prevents two opposite errors. The first is to infer a shared judicial intention merely from the legal attribution of an act to “the court”. The second is to deny the legal reality of a collegial decision whenever the internal process fails to display genuine convergence. Legal attribution and collective agency answer different questions, even though in an institution such as a court they constantly interact.

4.2 The Court as a Collective Agent?

Legal language speaks about courts with remarkable ease. The Court holds. The Court finds. The Court considers. The Court rejects an argument and accepts another. Sometimes the Court even “believes” that a particular interpretation is preferable. The grammar is agentive: a plural institution is treated as a subject capable of speaking, reasoning, and deciding.

That grammar is not institutionally neutral. Courts differ in the extent to which their public decisions suppress or display the individual voices from which a judgment emerged. Some traditions favour a single unsigned or impersonal judgment and present the court as speaking with one institutional voice; others publish separately authored concurrences and dissents, making disagreement part of the official judicial record. Comparative studies of judicial discourse and opinion-writing have therefore treated the form of the judgment itself as one of the ways in

which a court constructs and presents its institutional identity. The phrase “the Court holds” should thus be read cautiously. It tells us something important about the public attribution of a position, but it may tell us considerably less about the deliberative relations that produced it¹⁰¹.

Grammar alone does not settle ontology. It would be a mistake to infer from ordinary judicial language that a court possesses a mysterious super-mind located somewhere above the minds of its members. Nothing in the present argument requires such an entity. The more modest question is whether there are forms of coordinated judicial activity for which the institutional level supplies an explanatory perspective that cannot be replaced, without loss, by an unordered list of individual mental states and acts. The literature on group agency has developed different answers to this broader problem. Here the question can be narrowed to the decisional practice of a collegial court¹⁰².

At least three readings of such statements are possible. “The Court believes p” may be shorthand for a specified distribution of beliefs among the individual judges. It may instead be an institutionally authorized attribution: p is the position of the court because the relevant decision procedure has made it so. Or the sentence may be read more strongly, as the attribution of an intentional state to a group agent. The literature on organizations and group agency has defended and criticized these moves

¹⁰¹ On judicial form, authorship, and institutional voice, see LASSER, M. de S.-O.-l’E. (2009), *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford: Oxford University Press; ROSENFELD, M. (2006), “Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court”, *International Journal of Constitutional Law*, 4(4), 618–651; COHEN, M. (2016), “On the Linguistic Design of Multinational Courts: The French Capture”, *International Journal of Constitutional Law*, 14(2), 498–517. On the CJEU as a “faceless court” and the suppression or re-emergence of individual judicial identities within a collegial institution, see GRAGL, P. (2023), “The Faceless Court? The Role of Individual CJEU Members”, *Maastricht Journal of European and Comparative Law*, 30(1), 15–44.

¹⁰² For a systematic account of collective intentionality and group agency, see TUOMELA, R. (2013), cit. The present chapter uses “collective agent” in a deliberately modest explanatory sense and does not presuppose a collective consciousness distinct from the consciousness of individual judges.

in different forms, while legal theory has also explored the possibility that institutional intentional discourse can perform explanatory or coordinative work without committing us to a literal collective mind. The present inquiry need not settle that general metaphysical dispute. It needs, however, to keep these readings apart. Otherwise, a legally impeccable attribution of a position to a court risks being mistaken for evidence that the judges formed that position together¹⁰³.

Chapter 1 introduced the idea of an individual judicial standpoint: a provisional configuration of factual hypotheses, legal classifications, inferential relations, and reasons from which an individual judge approaches a decision. Chapter 3 then asked what may happen when several such standpoints enter the same decisional process. Collective intentionality allows the relation among them to be described more precisely.

A useful heuristic is to distinguish three progressively stronger forms of collective orientation. These should not be read as necessary and sufficient conditions for the metaphysical existence of a group agent. They are analytical levels through which the possible emergence of a judicial ‘we’ can be examined.

The focus on relations among judges has an evident affinity with the literature on judicial collegiality, which has emphasized the often hidden importance of inter-judicial dynamics in multi-member courts. Yet collegiality is a broader and institutionally thicker notion than the minimal analytical vocabulary required here. The three levels below are not proposed as a theory of good collegiality. They isolate progressively

¹⁰³ On the literal attribution of intentional states to organizations, see TOLLEFSEN, D. (2002), “Organizations as True Believers”, *Journal of Social Philosophy*, 33(3), 395–410. On group-level agency, see LIST, C.; PETTIT, P. (2011), cit. For a legal-theoretical fictionalist treatment of collective intentionality in the context of legislative intent, see CANALE, D. (2021), “Legislative Intent, Collective Intentionality and Fictionalism”, in MARQUES, T.; VALENTINI, C. (eds.), *Collective Action, Philosophy and Law*, London: Routledge, 45–68. The legislative context is different, but the underlying problem of what follows from intentional predicates attributed to an institution is instructive here.

stronger ways in which individual judicial standpoints may become practically interdependent during a decisional process¹⁰⁴.

1. *Joint task orientation*. At the most basic level, the judges understand themselves as participants in one institutionally defined task: deciding this case as a panel. Each judge knows that the decision is not produced by their own act alone and that the acts of the other members are relevant to the completion of the common task. The judges may still disagree radically. What is shared is the activity towards which they are oriented.

2. *Reciprocal deliberative orientation*. A stronger form appears when the judges treat one another's reasons as inputs capable of affecting their own standpoints. An objection by J₂ is not merely information about what J₂ will vote. It is a reason to which J₁ may have to respond. Positions are exposed to mutual challenge, clarification, and possible revision. The dependence is reciprocal because each participant can, in principle, influence and be influenced through reasons.

3. *Common decisional standpoint*. The strongest form relevant here appears when the deliberative process produces a configuration of reasons and a disposition that the participating judges treat as the institutional standpoint of the panel. The resulting position need not reproduce any judge's initial standpoint. Elements introduced by different judges may be combined; an initial objection may become a qualification in the majority reasoning; a factual reconstruction may survive while its legal classification changes. The final standpoint is attributable to the court not only because a procedural rule says so, but also because it has been shaped through a practice the participants understand as their common decisional activity.

¹⁰⁴ On the often hidden role of inter-judicial dynamics in multi-member courts, see MURRAY, S. (2021), "Judicial Collegiality", in APPLEBY, G.; LYNCH, A. (eds.), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia*, Cambridge: Cambridge University Press, 189–207. The analytical levels proposed here are not offered as a general theory of judicial collegiality.

The third level comes closest to the strong sense of the judicial ‘we’ pursued in this book. It does not require psychological fusion. Individual judges remain individuals, retain their own memories and experiences, and may privately formulate the reasons differently. Nor does it require complete agreement¹⁰⁵. What matters is that the institutional standpoint has become an object of joint practical orientation and has been shaped within a network of reciprocal contributions.

Dissent makes the point particularly visible. A dissenting judge may reject the substantive standpoint adopted by the majority and refuse to speak in the first-person plural about its legal conclusion. Yet the dissenter may still participate in the joint task and in the reciprocal deliberative activity. They may formulate objections, force clarification, and even contribute to qualifications appearing in the majority reasons. Collective agency is therefore not identical with consensus. Different dimensions of a judicial ‘we’ may be present to different degrees.

This graded account also preserves the argument about judicial independence developed in Chapter 2. Acting together cannot mean surrendering the individual judge’s capacity for assessment. The distinction drawn in Chapter 3 between influence and interference remains decisive. Reciprocal reason-giving may be constitutive of deliberative collective intentionality because the reasons of one judge become relevant to the standpoint of another. Coercion, hierarchical

¹⁰⁵ An objection to this stronger reading was raised by Andreas Funke during the discussion of an earlier version of the present argument at the IVR World Congress in Istanbul in 2026. Funke questioned whether collective intentionality can properly be attributed to judges insofar as they act as holders of a public office rather than as free individual agents. On this view, the apparent unity of judicial action may be sufficiently explained by the competences, duties, and institutional roles attached to judicial office. The objection remains open. One possible response, which would require further development, is that institutional office may structure judicial agency without exhausting it. Judges occupying formally comparable offices may understand and enact the common decisional task differently, particularly in the way they orient their reasoning towards the other members of the panel. Whether this underdetermination leaves conceptual space for genuinely collective intentionality is a question that the present inquiry leaves open.

pressure, or strategic silence may instead suppress the very responsiveness that makes the activity genuinely joint.

For this reason, the appearance of a common voice can be deceptive. The same “3–0” vote is compatible with at least four very different processes. The judges may have reached the same position independently. Two junior judges may have deferred to a senior colleague without testing the reasons offered. One judge may have imposed a solution through institutional or social pressure. Or the three initial standpoints may have been modified through genuine reciprocal deliberation until a common position emerged. The published numerical outcome cannot distinguish among these possibilities.

The emergence of collective intentionality in a court must therefore be sought in the relational structure of the process rather than in the result alone. The relevant indicators concern how judges understand the decisional task, whether disagreement becomes visible, whether reasons circulate among the members, whether positions can be revised, and whether the final standpoint is experienced as something shaped together. These are precisely the phenomena that a purely aggregative description tends to compress into the final vote.

4.3 Two Ways of Saying “The Court Decided”

The argument can now be condensed into a distinction between two senses of the sentence “the court decided”¹⁰⁶.

In the first sense, the sentence expresses an *attributed judicial we*. The legal order identifies a plural body, specifies the conditions under which that body may act, and attributes the resulting decision to the institution. The judges may disagree. The majority may be minimal. The

¹⁰⁶ The attributed/emergent distinction is proposed here rather than adopted from an established taxonomy. It resonates with, but is narrower than, the broader debate between fictionalism or interpretive approaches to institutional intentionality and realist accounts of group agency. Compare CANALE, D. (2021), cit.; TOLLEFSEN, D. (2002), cit.; LIST, C.; PETTIT, P. (2011), cit.

deliberation may be poor. Provided the relevant legal conditions are satisfied, the decision is nevertheless the decision of the court. This is a formal or weak sense of the judicial 'we', although "weak" should not be understood as legally defective.

The attributed 'we' should not therefore be dismissed as a merely linguistic fiction. Attribution is itself one of the operations through which institutional reality is constituted. Once a judgment is validly attributed to the court, it is the court's act for legal purposes and may exercise powers that no individual judge could exercise privately. The adjective "weak" marks the explanatory ambition of this first sense, not an ontological or legal inferiority. It explains why the decision belongs to the court within the legal order; it does not yet explain the internal relations through which the judges arrived at the position so attributed.

In the second sense, the sentence may express an *emergent judicial we*. Here the unity of the institutional decision is not exhausted by procedural attribution. Through joint task orientation and reciprocal deliberation, the judges participate in forming a common decisional standpoint. Their individual standpoints do not merely survive until they are counted. They enter a process in which reasons, qualifications, and conclusions may be modified through the contributions of others. The 'we' emerges from the relations among the members of the panel.

The emergent 'we' does not replace institutional attribution and cannot confer jurisdiction or competence upon an otherwise unauthorized group. It thickens the explanation of the decision's genesis. At this level, the unit of analysis shifts from the rule that identifies an institutional output to the relations among the persons who produce it. The question is whether the public unity of the judgment corresponds, at least to some degree, to a practical unity formed in the decisional process.

The distinction is not intended to create two species of court or to establish a new condition of validity. Every legally valid collegial judgment may be attributable to a court in the first sense, depending upon the rules of the relevant legal system. The second sense identifies a stronger form of collective agency whose presence cannot be assumed. A

panel may display it intensely, weakly, intermittently, or perhaps not at all.

Nor should the emergent ‘we’ be romanticized. A common decisional standpoint may be legally wrong. Reciprocal deliberation may consolidate a mistaken interpretation. A cohesive panel may reproduce a shared bias. The distinction developed here concerns the mode in which a plural body forms an institutional position, not the epistemic or moral quality of the position formed. Chapter 1’s distinction between institutional closure and truth therefore remains intact.

This is also why neither unanimity nor dissent can operate as a simple proxy. Unanimity may conceal three isolated standpoints or a process of deference. A divided judgment may follow an intense common deliberation in which the minority helped shape the majority’s reasons. The judicial ‘we’ is not an all-or-nothing property visible in the vote count. It is a relational and potentially graduated phenomenon.

The distinction finally explains why the opacity identified at the beginning of Chapter 3 matters. A judgment normally shows us the institutional endpoint. It tells us what the court decided and, subject to the applicable practices of reason-giving and dissent, why the court officially presents itself as having decided in that way. It does not ordinarily reveal whether the published reasons originated substantially from one judge, were assembled from several initial positions, emerged after reciprocal modification, or were accepted only because the vote had already settled the outcome.

From the judgment alone, the attributed ‘we’ is usually visible. The emergent ‘we’ is not.

The court must therefore be observed, not because ontology has failed, but because the stronger judicial ‘we’ is made, or fails to be made, in practice.

Part III
THE JUDICIAL ‘WE’

*It is the principle of the decision by which we are bound,
not a mere rule that in exactly the same circumstances
we are to arrive at the same conclusions.*

(Sir W. M. James)

Chapter 5

A Qualitative Research Design for Collegial Courts

The previous chapter ended with a methodological demand: the court must be observed. The expression was intentionally provocative. A collective intention is not an object lying on the bench beside the case file. No observer can simply enter a courtroom, point to a gesture, and say: there is the judicial ‘we’. The problem is more difficult because the phenomenon under investigation, if it exists, is relational. It concerns the way several judges understand a common decisional task, respond to one another’s reasons, revise or defend their standpoints, and eventually relate themselves to a position attributed to the court.

The ordinary sources of legal research offer only partial access to these relations. A judgment is indispensable for understanding the official position of a court, but it is an institutional product written for legal purposes. It records the reasons the court publicly gives for its decision; it does not normally provide a chronological account of the deliberative process that produced those reasons. The document may reveal a dissent, a concurrence, or a particular form of institutional voice. It rarely tells us whether a judge changed their mind after an objection, whether an apparently minor qualification was introduced to secure agreement, whether a senior colleague shaped the terms of discussion, or whether a unanimous vote merely registered three positions formed independently before the judges met.

This is a familiar methodological difficulty in socio-legal research. Legal documents are rich empirical traces, but they register social interaction in the formal language and according to the institutional concerns of law¹⁰⁷. Some authors have therefore warned against treating

¹⁰⁷ On the limits of legal documents as self-sufficient empirical data when the inquiry concerns action, agency, and interaction, see BANAKAR, R. (2005), “Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden”, in

legal cases as self-sufficient records of the social practices that produced them. Legal texts, indeed, may need to be complemented by interviews and observation when the object of inquiry concerns action, agency, and interaction. More broadly, they have stressed that interviewing judges or observing legal processes raises methodological problems that cannot be solved merely by importing a generic social-scientific technique into a legal setting¹⁰⁸.

The empirical object of the present inquiry is therefore not the judgment as an institutional product, but the relations through which individual judicial standpoints are maintained, challenged, modified, and eventually attributed to a collegial body. Judgments remain relevant. So do procedural rules, institutional structures, and the legal vocabulary through which judges describe their work. But the move from the attributed ‘we’ to the possible emergent ‘we’ requires another source of knowledge: the accounts and practices of the judges who participate in collegial decision-making.

This chapter explains the qualitative design ultimately adopted within the COIN project. The original research plan envisaged the triangulation of three empirical sources: judicial decisions, semi-structured interviews with judges, and observation of deliberative practices. During the fieldwork, the design was refined in response to the conditions of access encountered in the two judicial settings. Direct observation of deliberation could not be conducted under sufficiently comparable conditions across the selected courts, since access to chambers and to internal decisional practices was necessarily uneven. Relying on

BANAKAR, R.; TRAVERS, M. (eds.), *Theory and Method in Socio-Legal Research*, Oxford: Hart Publishing. Banakar argues that legal cases register interaction in law’s own formal vocabulary and may need to be complemented by interviews and observation.

¹⁰⁸ On the methodological specificity of socio-legal inquiry, including the problems raised by interviewing judges across jurisdictions, observing legal processes, and analyzing legal documents sociologically, see BANAKAR, R.; TRAVERS, M. (2005), “Law, Sociology and Method”, in BANAKAR, R.; TRAVERS, M. (eds.), *Theory and Method in Socio-Legal Research*, Oxford: Hart Publishing, 1–25.

observational material obtained only in some settings would therefore have introduced a significant asymmetry into the comparative design. The analysis of judicial decisions required a different methodological judgment. Gaining confidential access to nineteen professional judges across two national judicial systems was itself a significant empirical achievement. Recruitment depended on institutional mediation, professional trust, and the willingness of participants to discuss internal decisional practices that ordinarily remain inaccessible to external observation. Precisely because this access was exceptional and hard-won, the research design gave priority to protecting the anonymity of the respondents. Linking interview material to specific judgments or identifiable lines of judicial authorship could have made individual participants indirectly recognizable, particularly given the limited number of courts involved. Judicial decisions were therefore not used to establish respondent-level connections between particular statements and identifiable adjudicative outputs.

The empirical analysis presented in this book consequently draws on a distinctive corpus of nineteen semi-structured interviews: nine with judges working in Italy and ten with judges working in Slovakia. This focus should not be understood as a methodological retreat from the original design. It reflects a deliberate decision to preserve and make analytically productive an unusually valuable body of qualitative material, collected under comparable conditions in two different judicial environments, without compromising the confidentiality on which access depended. Judgments, procedural rules, and institutional structures remain essential to the interpretation of the interviews, but the judges' accounts constitute the primary empirical source through which the otherwise largely inaccessible practices of collegial decision-making can be examined.

5.1 From Legal Theory to an Interview-Centred Design

The decision to use qualitative methods followed from the character of the theoretical problem rather than from a general preference for empirical sociology. Chapter 4 did not define collective intentionality as an observable variable with a fixed set of external indicators. It distinguished joint task orientation, reciprocal deliberative orientation, and the possible formation of a common decisional standpoint as progressively stronger analytical levels. It also left open the objection that judicial coordination might be sufficiently explained by office, competence, and institutional role. A research design aimed at counting votes or measuring the frequency of unanimous judgments would have been poorly suited to these questions.

The original project description characterized the inquiry as ‘hypothesis-driven’¹⁰⁹. In the empirical phase, this orientation was operationalized in a theory-informed and exploratory form, rather than as a strictly confirmatory or falsificationist design. The theoretical chapters identify a conceptual problem and make certain phenomena analytically salient; they do not supply a checklist whose mechanical satisfaction would prove the existence of collective intentionality. The empirical task is instead to examine how judges themselves describe the practices through which a plural panel reaches, or fails to reach, a common position.

This position is consistent with a broader socio-legal understanding of methodology as the interaction between theoretical assumptions and research techniques. Methods of inquiry, after all, inevitably rest on

¹⁰⁹ Here, ‘hypothesis-driven’ is used in the limited sense of a theory-guided inquiry: the theoretical framework shaped the research questions, the interview protocol, and the sensitizing dimensions of the analysis, while remaining open to revision in light of the empirical material. It does not denote a strictly confirmatory design based on predetermined variables or the testing of a single pre-formulated hypothesis. On the role of conceptual frameworks in informing, rather than mechanically determining, qualitative research design, see MAXWELL, J. A. (2013), *Qualitative Research Design: An Interactive Approach*, 3rd ed., Thousand Oaks, CA: SAGE Publications.

epistemological assumptions concerning the social reality under investigation. The choice of interviews therefore entails a methodological and epistemological commitment: the meanings through which judges understand their institutional roles and their relations with colleagues constitute relevant data for an inquiry into collective judicial agency. This does not mean that actors possess privileged or infallible access to the social structures within which they operate. It means, more modestly, that an account of shared practical orientation cannot simply disregard the participants' own understanding of the activity in which they are engaged.¹¹⁰

Qualitative interviewing was therefore particularly suitable because, at this stage of the inquiry, the object of research required clarification of meanings before their possible standardization into variables or predetermined response categories. A quantitative instrument asking, for example, a judge to locate judicial decision-making on a closed-ended scale between “individual” and “collective” would already presuppose that researcher and respondent attribute sufficiently similar meanings to those terms. Yet part of the difficulty addressed by this research lies precisely in discovering how judges themselves describe collegiality without requiring them to adopt the conceptual vocabulary of collective intentionality¹¹¹.

For the same reason, the interview protocol did not ordinarily begin by asking participants whether they believed that a court possesses a collective intention. Such a question would have risked turning a contested philosophical category into the interviewee's problem. The interviews instead approached the phenomenon through judicial practice: when the composition of the panel becomes known, how discussion unfolds, whether reasons are exchanged orally or in writing, how

¹¹⁰ On methodology as the interaction between theoretical assumptions and methods of inquiry, see BANAKAR, R. (2015), *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity*, Cham: Springer, 5–6. On contextualization in comparative socio-legal research, see *ibidem*, 145–168.

¹¹¹ On this topic see CORBETTA, P. (2003), *Social Research: Theory, Methods and Techniques*, London-Thousand Oaks-New Delhi: Sage.

disagreement is handled, when a vote is taken, what happens when unanimity is absent, how the judgment is drafted, and whether the legal qualification of a case changes through interaction with colleagues. Collective intentionality remained the researcher's analytical problem; deciding together remained the participant's experiential field.

Four questions consequently guided the inquiry. First, how do judges understand the difference, if any, between deciding alone and deciding as a member of a collegial panel? Second, how are disagreement, reasons, and possible revisions of individual judicial standpoints managed within the panel? Third, how do familiarity, institutional roles, hierarchy, and panel-specific practices structure relations among judges? Fourth, under what conditions, if any, do judges describe the resulting decisional position as something formed together rather than as the position that happened to obtain the required votes? These are research questions in an orienting sense. They organized attention without requiring every interview to reproduce an identical sequence of propositions.

5.2 Court Selection, Snowball Sampling, and Comparative Scope

The empirical corpus consists of interviews with nineteen professional judges who work, at least for part of their judicial activity, in collegial panels composed of career judges. Nine participants were interviewed in Italy and ten in Slovakia. The sample was not designed as a probability sample and should not be read as statistically representative of either national judiciary. The number 'nineteen' does not permit claims about the percentage of Italian or Slovak judges who think or act in a particular way. The study pursues a different objective: to identify recurring forms of understanding and practice that can illuminate the theoretical problem developed in the preceding chapters.

The two institutional sites were the *Krajský súd v Košiciach* in Slovakia and the *Tribunale di Padova* in Italy. Their selection was not based on an assumption that the two courts occupy the same hierarchical position. They do not. The *Krajský súd v Košiciach* is an appellate court,

whereas the *Tribunale di Padova* is principally a court of first instance. The pragmatic territorial criterion used at the selection stage was instead the size of the population of the relevant judicial district or area served by the court. Population was used as a way of locating the fieldwork in judicial environments attached to substantial territorial communities and of avoiding a comparison between radically different demographic scales. It was not treated as a statistical variable capable of controlling institutional difference¹¹². The choice consequently produced two comparable research sites in a limited and contextual sense, not two institutional twins.

That qualification is central to the comparative logic of the study. Comparative qualitative research is weakened when formal labels are translated mechanically across legal systems. The same expression may designate different competences; the distribution between single-judge and collegial adjudication may vary; the role of the president or reporting judge may be organized differently; and the practical vocabulary of deliberation may not map neatly from one jurisdiction onto another¹¹³.

¹¹² In statistical sampling, the relation between a sample and its reference population depends on the sampling design rather than on the mere numerical or demographic characteristics of the selected cases. In a probability sample, each unit of the reference population must have a known, non-zero probability of selection and selection must follow a random procedure; only under such conditions can sampling error be formally estimated and sample statistics be used for probabilistic inference about population parameters. Sample size affects the precision of estimates but cannot by itself correct selection bias or transform a non-probability sample into a representative one. The use of population size in the present research therefore concerns the selection of fieldwork sites and should not be confused with statistical sampling, representativeness, or control of sampling error. See KISH, L. (1965), *Survey Sampling*, New York: Wiley.

¹¹³ Comparative qualitative research is understood here in a case-oriented sense: comparison concerns cases as historically and institutionally situated configurations rather than merely as collections of values attached to predefined variables. The analytical purpose is to examine similarities and differences across cases while preserving the combinations of conditions and contextual relations through which the phenomenon under investigation acquires meaning in each case. On the distinction between case-oriented and variable-oriented comparative strategies, see RAGIN, C. C.

The interview protocol was therefore kept common at the level of the research problem while being adapted to the legal system of reference in its wording and follow-up questions. Recruitment was also not confined to one substantive branch of adjudication. The interviewed judges brought experience from collegial panels working, according to the organization of the relevant court and national system, in civil, criminal, commercial, and labor matters. This breadth was not intended to support four sub-disciplinary comparisons. Its purpose was to avoid equating collegiality with the routines of a single subject-matter panel and to keep open the possibility that institutional context matters.

Participant selection combined substantive eligibility criteria with a referral-based recruitment strategy. The initial project design described this strategy as a snowball sampling model: institutional contacts and initial participants could facilitate access to other judges possessing relevant experience of collegial adjudication. Snowball sampling is a non-probability procedure in which further participants are identified through referrals from participants already reached¹¹⁴.

Access began through the institutional leadership of the courts. In ideal-typical form, the sequence would move from the court president to one or more initial judges and from those judges to subsequent referrals. The point of the procedure was not to ask the president to construct the whole sample. On the contrary, after the initial gate had been opened, referral chains were intended to move progressively through the professional network of the judges themselves.

The procedure, however, did not operate in exactly the same way in the two national settings. In Italy, recruitment came closer to the ideal-typical snowball model. Initial contacts opened access to further judges, and some participants or institutional intermediaries suggested additional

(1987), *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*, Berkeley-Los Angeles-London: University of California Press.

¹¹⁴ On snowball sampling as a non-probability referral procedure, and on its risks of over-representing socially visible subjects or following overly specific recruitment pathways, see CORBETTA, P. (2003), *Social Research: Theory, Methods and Techniques*, London-Thousand Oaks-New Delhi: Sage, 221–223.

possible respondents. Not every referral chain was ultimately pursued: some possible contacts remained unrealized referral paths because of time, availability, and the need to preserve a balanced and manageable corpus. In Slovakia, by contrast, access remained more centrally mediated. Once institutional contact had been established, the President of the court identified the judges who could be contacted or invited. The Slovak strand therefore did not develop into a participant-driven snowball chain; it took the form of gatekeeper-mediated purposive recruitment. This arrangement is relevant in two respects. Methodologically, it means that the composition of the Slovak corpus was shaped not only by substantive eligibility and willingness to participate, but also by an institutional act of selection. Analytically, the gatekeeping process is itself informative: access to judicial self-description was organized through the authority structure of the court, making visible the role that institutional hierarchy can play in determining which judicial voices become accessible to an external researcher. This does not imply that the selected judges were instructed what to say or that their accounts lack autonomy. It does, however, require the Slovak interviews to be interpreted in light of the institutional conditions under which participation became possible.

The contrast between the two recruitment pathways should therefore be treated as part of the comparative context, rather than merely as a technical deviation from the initial sampling strategy. In both countries, participants possessed direct experience of collegial adjudication, but the conditions under which their voices became accessible differed. The Italian interviews relied more heavily on referral chains moving through professional relationships, whereas the Slovak interviews depended more visibly on central institutional mediation. Snowball sampling was thus both a recruitment technique and a response to a field-access problem, but its operation was uneven across the two strands of the research. The resulting sample is purposive in its eligibility and access-dependent in its construction, with snowball elements operating more strongly in Italy and institutional gatekeeping playing a more prominent role in Slovakia.

The division between Italy and Slovakia nevertheless adds a comparative dimension. The two groups allow recurring themes to be examined across more than one legal and institutional context. This comparative sensitivity is useful precisely because a practice that appears natural within one court may become visible as contingent when contrasted with another. At the same time, country should not be treated as an independent variable capable of explaining every difference in the material. With nine and ten participants recruited through non-probability procedures, the study cannot support causal claims of the form:

Italian judges deliberate in one way, whereas Slovak judges deliberate in another.

National location is an important context of interpretation, but it is not, by itself, a sufficient explanation. Observed contrasts may also reflect differences in court level, procedural architecture, case distribution, recruitment conditions, and local professional environment; the present design does not permit these influences to be conclusively disentangled.

Access also shaped the research design. Judges are not simply members of a population waiting to be sampled. Qualitative interviewing requires identifying participants, explaining the research purpose, establishing sufficient trust, and arranging a setting in which a potentially sensitive professional conversation can occur without disturbance. This is especially important where the questions concern internal discussion among colleagues, disagreement, informal authority, and the drafting of judicial decisions. The use of referrals therefore had an access function as well as a sampling function: institutional and professional mediation could make the research intelligible to potential participants without changing the voluntary character of participation.

Participation was voluntary and interviews were conducted in person in a confidential setting. Parallel interview guides were prepared in English, Italian, and Slovak. The Italian interviews were conducted directly in Italian. During the Slovak interviews, communication was

facilitated by a bilingual Slovak-English language mediator, who assisted, where necessary, in rendering questions and responses between the researcher and the participants. This arrangement allowed participants to express their accounts of professional practice in the language with which they were most comfortable, without imposing English as the sole language of the research. Interviews were audio-recorded only with consent and subsequently transcribed in anonymized form. The information and consent procedure expressly limited the use of the collected material to scientific research within COIN and contemplated publication only in anonymous, non-identifiable form.

The anonymization strategy was deliberately strict. Names and other directly identifying information were not retained for the analysis presented here; the project materials also excluded age, gender, and similar personal details from the dataset used for publication. This decision strengthened confidentiality but created an analytical cost. The present study cannot examine whether the reported dynamics vary systematically by gender, age, or other demographic characteristics. Nor should informal references to seniority in the interviews be converted into demographic claims that the data were not designed to support. Confidentiality and analytical granularity are sometimes competing methodological goods; here the balance was resolved in favour of participant protection.

5.3 The Semi-Structured Interview Protocol

The interviews were semi-structured. A semi-structured interview combines guidance and flexibility. It relies on a common outline of topics, ensuring that the main areas of inquiry are addressed across the interviews, while leaving the interviewer free to request clarification, pursue relevant answers, and explore themes that emerge during the exchange. This combination was especially suitable for the present study. Collegial adjudication is specific enough to require a shared frame of inquiry, but the practices through which judges decide together are too

varied, context-sensitive, and institutionally embedded to be compressed into predetermined response categories¹¹⁵.

The interview guide was organized around five thematic areas. The first concerned career path and motivation. Participants were invited, if willing, to recall when and why they decided to become judges and whether they had originally imagined working in their present judicial context. These introductory questions also served a methodological purpose. They allowed the interview to begin with a professional narrative before moving towards more sensitive descriptions of colleagues and internal decision-making. More substantively, they preserved a place for the individual trajectory of the officeholder. Socio-legal research on judges has long shown that institutional position can be studied through information attached to individual agents without reducing the field to their personal biographies. In this study, biographical material was contextual rather than causal, but it helped resist the assumption that the formal office exhausts the judge's understanding of the judicial role¹¹⁶.

The second area addressed the relation between monocratic and collegial roles. Judges were asked how frequently they decided alone and how frequently as members of a panel, sometimes with a request for a rough percentage. The purpose was not to construct a numerical distribution of caseloads. The comparison created a point of contrast through which participants could articulate differences in responsibility, reasoning, preparation, and interaction. A judge who routinely performs

¹¹⁵ On semi-structured interviews as interviews guided by a common outline of topics while leaving the interviewer discretion over wording, order, clarification, and probing, see CORBETTA, P. (2003), cit., 269–271.

¹¹⁶ For a socio-legal example of using information attached to individual judges as an empirical route towards the relational and institutional structure of the judicial field, see HAMMERSLEV, O. (2005), “How to Study Danish Judges”, in BANAKAR, R.; TRAVERS, M. (eds.), *Theory and Method in Socio-Legal Research*, Oxford: Hart Publishing. Hammerslev's theoretical framework and research object differ from those adopted here; the comparison concerns only the methodological relevance of individual agents as empirical entry points.

both roles can often describe collegiality not in abstract terms but by explaining what changes when other judges become necessary to the decisional process.

The third area concerned panel composition and decision-making dynamics. Questions asked when judges learn who the other panel members will be, how often they work with colleagues with whom they have decided previous cases, and whether prior familiarity affects discussion or the search for consensus. These questions were designed to make the relational structure of the panel visible. Chapter 4 treated the judicial ‘we’ as potentially emergent from relations among members. Repeated interaction, stable panels, and familiarity may therefore matter. But the questions were open enough to permit the opposite answer: a judge might regard panel composition as irrelevant because professional office and procedure are thought to standardize the decisional task.

The fourth area moved directly into deliberation in chambers. Participants were asked to describe, in their own terms, how discussion unfolds and how the decision is reached. Follow-up questions concerned oral and written exchanges, notes or emails, speaking order, time limits, the management of disagreement, the search for compromise, and recourse to majority voting. The sequence deliberately separated ‘discussion’ from ‘decision’. This mirrors the distinction developed in Chapter 3 between shaping alternatives and merely casting a vote. Empirically, however, the interviewee was not required to accept that distinction. Some participants could collapse discussion and decision into a single practice; others could describe temporally and functionally separate stages.

The fifth area concerned drafting and legal reasoning. Judges were asked how the legal qualification of a dispute is determined within a collegial court and whether that process differs from monocratic adjudication. They were also invited to describe situations in which they had disagreed with a colleague about the legal classification of a case and, where disagreement occurred, how an agreement or final position was eventually reached. These questions connect the empirical inquiry to the spiral model of Chapter 1. If factual reconstruction and legal

qualification can modify one another, the collegial question is whether the reasoning of one judge can become part of the path through which another judge revises that relation.

The protocol was common across the Italian and Slovak strands, and the English, Italian, and Slovak guides preserve the same broad architecture. Yet semi-structured interviewing necessarily produces unequal conversations. A participant may devote considerable time to voting and say little about drafting; another may spontaneously discuss hierarchy, technology, or panel culture before the relevant question is asked. This variability is not simply noise. Lack of standardization is one of the strengths and weaknesses of qualitative interviewing: it permits unexpected themes and the respondent's own categories to emerge, while making direct comparison and quantification more difficult. The analysis therefore had to preserve both the common thematic core and the specificity of individual accounts¹¹⁷.

5.4 From Theoretical Concepts to Sensitizing Dimensions

A recurring danger in theory-informed empirical research is confirmation by design. Once Chapters 3 and 4 have distinguished participated deliberation from aggregation and emergent from attributed forms of the judicial 'we', the researcher may begin to hear every reference to discussion as evidence of collective intentionality. The more elegant the conceptual model, the easier it becomes to find the model wherever one looks. Thus every reference to discussion, agreement, or collegiality might then appear as evidence of collective intentionality. The design adopted here was intended to avoid precisely this circularity.

The distinctions developed in the previous chapters were therefore used as sensitizing dimensions, not as operational definitions¹¹⁸. They did

¹¹⁷ On this topic, see CORBETTA, P. (2003), cit., 270–271, 282–285.

¹¹⁸ See BLUMER, H. (1954), "What Is Wrong with Social Theory?", *American Sociological Review*, 19(1), 3–10, 7. Blumer contrasts definitive concepts with

not provide a list of indicators whose presence would automatically establish the existence of a collective judicial subject. They indicated where to look in the interview material: how judges describe the task of deciding in a panel, how they relate to the reasons of colleagues, how disagreement is handled, and how the final position of the court is understood by those who contributed to it.

The first dimension concerned the common decisional task. The relevant question was not whether a judge used the pronoun ‘we’, but how the judge described the activity of deciding with others. In some accounts, the presence of colleagues may appear mainly as a procedural condition: a decision requires more than one judge because the legal form of the case demands a panel. In other accounts, the contribution of colleagues may appear as part of the very way in which the decisional task is understood and performed. The inquiry was interested in this difference.

The second dimension concerned the reciprocal orientation of judicial reasoning. The interviews were examined for accounts of objections, persuasion, explanation, changes of mind, strategic silence, deference, disagreement, compromise, and the circulation of drafts or written notes. None of these practices was treated as conclusive in itself. A judge may change her mind for reasons that have little to do with collective agency; another may maintain her position while nevertheless taking the objections of colleagues seriously. What mattered was the relation between standpoints: whether the reasons of one member entered the practical reasoning of another as reasons to which a response was owed.

The possible formation of a common decisional standpoint required still greater caution. Expressions such as “our decision”, “we agreed”, or “the panel thought” are important in a study concerned with the judicial ‘we’, but they cannot carry the argument by themselves. A ‘we’ may refer to formal membership, to a numerical majority, to a stable working

sensitising concepts, the latter providing a general sense of reference and guidance in approaching empirical instances.

group, to a process of reciprocal construction, or simply to the institution on whose behalf the judge speaks. Interview language was therefore read together with the practice being described: the management of disagreement, the movement from individual views to a final position, the role of drafting, and the relation between voting and reasoning.

A further dimension concerned judicial office. Since judges act as holders of a public role, the inquiry paid particular attention to how participants described duty, competence, responsibility, independence, and professional expectations. The point was not to oppose institution and intentionality, as if collective intentionality could exist only outside formal roles. The question was more precise: whether the office fully explains the manner in which judges act together, or whether judges occupying comparable offices may enact the collegial task in different ways. One judge may understand collegiality as the expression of individual positions followed by a vote; another may describe it as a process through which reasons are tested, modified, and eventually shared. Such a contrast would not, by itself, prove collective intentionality. It would, however, show why office cannot simply be treated as a complete behavioral explanation.

The analysis was consequently organized around a set of practical questions. How is the common task described? What happens when judges disagree? Do colleagues' reasons matter only as predictors of votes, or also as possible reasons for revising one's own standpoint? Who can introduce or reformulate alternatives? Can a minority position affect the reasons of the majority? How are drafts circulated and amended? How is authority distributed between the president, the reporting judge, senior members, and other judges? Which practices are presented as specific to a particular panel or court? These questions guided the reading of the interviews. They did not predetermine the answers.

This also defines the relation between theory and empirical material in the present study. The interviews were not treated as tests of a philosophical doctrine. Judges were not asked to instantiate, confirm, or falsify a theory of collective intentionality. Their accounts were used to examine whether the conceptual distinctions developed in the previous

chapters help to make sense of actual descriptions of collegial adjudication. At the same time, the material could also expose the limits of that vocabulary: places where the theory illuminates practice, places where it requires refinement, and places where judicial experience resists the categories initially brought to it. The movement is therefore recursive. Theory makes certain relations visible; the interview material can then place pressure on the theory that made them visible.

5.5 Thematic Analysis, Reflexivity, and the Limits of Self-Description

The interview material was approached through thematic analysis. In its broad sense, thematic analysis involves the systematic identification and interpretation of recurring patterns of meaning within qualitative material. The strategy used here was neither purely inductive nor a rigid deductive coding of the categories developed in the theoretical chapters. Initial reading was informed by the research questions and sensitizing dimensions described above, while attention remained open to recurrent themes not anticipated by the original framework. This is especially important in an exploratory project whose object is a practice that has received comparatively little direct socio-legal attention¹¹⁹.

The analysis proceeded through repeated familiarization with the interview material, preliminary coding of passages relevant to collegial work, grouping of related codes into broader thematic clusters, and comparison across interviews. The unit of interest was not an isolated word. A reference to ‘unanimity’, for example, could describe a formal voting rule, a practical preference, a professional ideal, a strategy for strengthening the judgment, or a sign of pressure on dissenters. Passages were therefore read within the participant’s broader account of discussion, voting, drafting, and disagreement. After all, qualitative

¹¹⁹ For the influential formulation of thematic analysis as a method for identifying, analyzing, and reporting patterns or themes within qualitative data, see BRAUN, V.; CLARKE, V. (2006), “Using Thematic Analysis in Psychology”, *Qualitative Research in Psychology*, 3(2), 77–101.

interview analysis is characteristically case-centred: the individual account is not first dissolved into variables; complete interview texts remain relevant even when common themes are identified across cases¹²⁰.

Comparison operated at several levels. Accounts were compared within the Italian and Slovak groups and across the two national contexts. They were also compared according to the practices described: stable or changing panels, oral or written exchanges, early agreement or persistent disagreement, majority closure or continued pursuit of unanimity. The purpose was to identify patterns and contrasts capable of refining the theoretical problem. Frequencies were treated cautiously. With nineteen non-probabilistically selected participants, the fact that a theme recurs is analytically suggestive; it does not establish its prevalence in a national judiciary.

Attention was also paid to negative or deviant material. A theory of an emergent judicial ‘we’ is methodologically vulnerable if the analysis selects only accounts of persuasion, consensus, and shared authorship. Passages describing isolated preparation, mechanical voting, deference, hierarchy, strategic behavior, or indifference to colleagues are equally important. Qualitative and socio-legal methodological discussions have emphasized the value of examining material that does not fit the principal interpretation rather than treating consistency as the sole mark of good analysis. In the present inquiry, the absence or weakness of collective orientation is not failed data. It is one of the phenomena the research was designed to make visible¹²¹.

¹²⁰ On the case-centred character of qualitative interview analysis and the continued relevance of complete interview texts even where common themes are identified, see CORBETTA, P. (2003), cit., 267–268, 281–285.

¹²¹ On the methodological value of examining material that does not fit the principal hypothesis or interpretation, see LANGE, B. (2005), “Researching Discourse and Behaviour as Elements of Law in Action”, in BANAKAR, R.; TRAVERS, M. (eds.), *Theory and Method in Socio-Legal Research*, Oxford: Hart Publishing. Lange discusses deviant-case analysis as part of rigorous qualitative and discourse-analytical procedures.

A second limitation concerns self-description. Judges' accounts of deliberation are accounts of deliberation, not transparent recordings of deliberation itself. A participant who says 'we always discuss everything' provides valuable data about the participant's understanding and representation of collegial practice. The statement cannot, without further evidence, be treated as a direct observational record of every discussion in chambers. Memory selects. Professional norms shape what appears worth reporting. Confidentiality may limit detail. The interview situation itself is a social interaction in which the participant knows that a researcher is asking about judicial work.

This limitation is particularly significant because law possesses powerful forms of institutional self-description. Courts present themselves through doctrines, procedures, judgments, and professional vocabularies. Socio-legal research risks reproducing that self-presentation as an objective account if the statements of legal actors are taken entirely at face value. Yet the opposite response would be equally unhelpful. Treating every judicial account as ideology or impression management would eliminate precisely the participant perspective that the interview method was selected to explore. The appropriate position is reflexive: judicial self-descriptions are neither transparent windows nor disposable rhetoric. They are data whose meaning depends on the research question and on comparison with other accounts and institutional materials¹²².

The issue becomes clearer in light of the office-holding objection discussed in Chapter 4. Suppose a judge explains: 'I do not decide with my colleagues because I feel part of a group; I do so because that is my office and my duty.' The statement cannot settle the philosophical question. It may support an institutional explanation of coordination. But the researcher should also ask how the same participant describes

¹²² On the risk that socio-legal research may reproduce law's self-descriptions and self-presentations as empirical observations when institutional accounts are taken at face value, see BANAKAR, R.; TRAVERS, M. (2005), "Introduction to Section Four: Structural Approaches", in BANAKAR, R.; TRAVERS, M. (eds.), *Theory and Method in Socio-Legal Research*, Oxford: Hart Publishing.

disagreement, persuasion, and responsibility to colleagues. Conversely, a judge who repeatedly speaks of ‘our decision’ does not thereby establish a collective mind. In both cases, the interview provides evidence about the judge’s role-orientation and practical vocabulary. The theoretical interpretation remains a separate step.

The interview corpus was therefore analysed with a double caution. On the one hand, the study avoids treating judicial self-description as a direct record of deliberative reality. On the other hand, it avoids dismissing self-description as irrelevant merely because it is mediated, retrospective, and professionally framed. For an inquiry into collective judicial agency, the way judges understand their own participation in collegial decision-making is itself part of the object of study. The question is not whether their accounts reproduce deliberation exactly as it occurred, but what those accounts reveal about the meanings attached to collegial work.

No independent observational dataset was produced in this phase of the research. The only observational material used was contextual to the interviews themselves. During and immediately after the conversations, notes were taken on elements such as communicative attitude, hesitation, emphasis, shifts in tone, gestures, and other forms of non-verbal language that appeared relevant to the interview interaction. These notes did not concern the direct observation of chamber deliberations. They were not treated as ethnographic data and did not permit the reconstruction of actual decision-making processes. Their function was more modest: to help situate the interview as a professional and communicative encounter and, where appropriate, to contextualize how certain answers were given.

The same must be said of judgments. Although the original design of COIN envisaged the possible use of judicial decisions as one of the empirical sources, the analysis presented in this book does not connect the interviews to identifiable judgments. This choice was made for reasons of confidentiality and anonymity. Given the limited number of courts and participants involved, linking interview material to specific decisions, case-types, or lines of judicial authorship could have increased the risk of re-identification. The empirical analysis is therefore based on

the interview corpus. This narrowing of the design is acknowledged openly rather than compensated by a rhetorical claim of triangulation.

Rigor in this inquiry therefore cannot consist in pretending that the data are more extensive than they are. It consists in making clear how the material was produced, delimited, and interpreted. The relevant question is not whether the study can estimate sampling error or replicate an experiment. It is whether the path from research question to interview protocol, from interview material to thematic analysis, and from thematic analysis to theoretical interpretation remains intelligible and open to criticism.

For this reason, credibility depends on the alignment between the theoretical problem, the questions asked, and the interpretation offered in Chapter 6. Confirmability depends on leaving a visible trail from the interview design to the thematic reading of the material, so that the analysis is not presented as an unexplained intuition. Transferability remains limited and contextual. The study does not claim to generalize statistically from nineteen judges to the Italian or Slovak judiciary as a whole. It aims instead to provide enough methodological and institutional detail for the reader to judge whether the distinctions developed here may illuminate other collegial courts.

The following chapter therefore presents preliminary thematic results rather than empirical laws. The sample is limited, the research is exploratory, and the analysis remains closely tied to the accounts from which the themes emerged. No claim of statistical saturation or population-level generalization is made. The aim is conceptual illumination: to determine whether the distinction between attributed and emergent forms of the judicial ‘we’ helps us formulate better questions about collegial adjudication.

Chapter 6

Preliminary Observations and the Emergence of a Judicial We

The previous chapter explained how the empirical material was produced, delimited, and interpreted. This chapter turns to the lines of tendency emerging from the thematic analysis of nineteen semi-structured interviews with judges: nine conducted in Italy, at the *Tribunale di Padova*, and ten conducted in Slovakia, at the *Krajský súd* in Košice. Rather than offering a complete sociology of collegial courts in the two countries, the analysis examines whether the distinction between attributed and emergent forms of the judicial ‘we’ illuminates the practices through which collegial decisions are formed.

The two corpora were produced in different linguistic and institutional conditions. The Italian corpus consists of nine semi-structured interviews conducted between May and August 2025 with judges working in different configurations of collegial adjudication: criminal panels, family matters, labour and insolvency related proceedings, and other forms of judicial work in which collegiality may be formal, residual, or reconstructed through practice. The Slovak corpus consists of ten interviews conducted between 2 and 5 June 2025 with judges of the *Krajský súd* in Košice.

At the time of writing, three of the Slovak transcripts had been revised in bilingual Slovak-English form, while the remaining seven were still undergoing linguistic revision and validation. The analysis presented in this chapter therefore offers an initial thematic synthesis of the corpus, focusing on recurrent practices, institutional patterns, and explicit judicial self-descriptions. More granular coding of the complete corpus, including closer attention to linguistic nuances and cross-case variation, will be developed in subsequent publications arising from the COIN project. For the same reason, the present thematic synthesis does not reproduce selected verbatim extracts from the interviews. Quotations will be presented after the completion of transcript revision, cross-language

validation, and more systematic coding, so that their selection can be grounded in the corpus as a whole rather than in the passages most readily available at the time of writing.

The methodological limits are also connected to the object of inquiry. The research does not ask whether a collegial court either has or does not have collective intentionality in a simple binary sense. The previous chapters distinguished the attributed judicial ‘we’ from the emergent judicial ‘we’. The first is produced by the legal order: once the relevant legal conditions are satisfied, the judgment is attributed to the court. The second is stronger and less visible: it concerns whether the judges who compose the panel participate in forming a common decisional standpoint through reciprocal reasoning, disagreement, revision, and shared responsibility. From the judgment alone, the attributed ‘we’ is usually visible. The emergent ‘we’ is not.

The present chapter therefore asks whether the interviews reveal practices, self-descriptions, and institutional arrangements that make this distinction empirically meaningful. The answer is affirmative. The material does not establish that collegial courts invariably form a collective mind. It shows something more specific: the judicial ‘we’ appears as a fragile practical achievement, produced differently in different institutional environments, sometimes reinforced by procedure, sometimes by professional ethos, and sometimes weakened by time pressure, hierarchy, asymmetry of information, or the mere need to close the case.

6.1 Collegiality as Situated Practice

The first line of tendency concerns the relation between formal collegiality and practiced collegiality. The interviews suggest that collegiality does not coincide with the procedural rule requiring a plurality of judges. A panel may exist as a formal legal unit without generating intense reciprocal deliberation. Conversely, forms of collegial reasoning may appear outside the strict boundaries of the formal panel,

in practices of consultation, shared orientation, professional memory, and informal discussion.

This is especially visible in the Italian corpus. The Italian material repeatedly shows a gap between collegiality as procedural form and collegiality as situated practice. Formal collegiality is the visible legal structure: three judges, a chamber, a unitary decision. Practiced collegiality is more dispersed. It may begin before the formal chamber, continue through informal exchanges, take place during lunch, emerge in comments after hearings, or be sustained by section meetings, shared databases, messaging groups, and professional habits. The formal moment of decision may therefore be only the point of closure of a process that has already unfolded elsewhere.

This does not mean that Italian collegiality is simply informal. It means that, in the corpus, the relevant decisional activity often appears distributed across time and space. The chamber is not always a single room at a single moment. It can be preceded by pre-chambers, informal conversations, partial exchanges, preparation by one member, circulation of materials, or repeated discussions of the same legal threshold in different cases. The judicial we is therefore not simply activated when the judges enter the room to decide. It may be gradually prepared by a practical environment in which the members of the panel already know one another's concerns, thresholds, and styles of reasoning.

The Slovak corpus presents a different configuration. In Košice, collegiality appears more visibly structured by institutional form. The central notion is the senate. The composition of the senate is predetermined by the annual work schedule, the allocation of cases follows formal criteria, and substitutions are regulated through pre-established chains. The case belongs to the senate rather than to an individual judge. The legality of the panel's composition is not a secondary matter; it is understood as a guarantee for the parties and as a condition of the legality of the decision.

This stronger formalization does not eliminate practice. It gives practice a different shape. The Slovak material repeatedly refers to the *predporada*, the preliminary meeting in which the reporting judge

presents the case, identifies the critical points, proposes a solution, and opens the matter to discussion. Unlike the diffuse Italian pre-chamber, the *predporada* appears as an institutionalized moment with a name, a rhythm, and a recognizable function. It is not merely an informal conversation before the decision. It is one of the ordinary ways in which the senate organizes collective attention.

The comparative point emerging from the interviews is therefore not that Padova is informal and Košice is formal. That opposition would be too simple. In the Padua accounts, collegiality is often described as exceeding and surrounding the formal panel; in the Košice accounts, it appears more visibly channeled through the institutional structures of the senate and the *predporada*. Across both corpora, the judges' descriptions suggest that the judicial 'we' is not reducible to the legal fact that three judges are required. Rather, they portray it as taking shape through situated practices of preparing, speaking, trusting, disagreeing, waiting, drafting, and closing.

This first tendency already complicates an aggregative account of collegial adjudication. If collegiality were merely the addition of individual votes, the relevant empirical object would be the final numerical outcome. But the interviews suggest that much of what matters happens before the vote: in the organization of attention, in the distribution of preparation, in the framing of alternatives, and in the manner in which one judge's reasons become available to the others.

6.2 The Paradox of Unanimity

The second and strongest line of tendency concerns unanimity. Both *corpora* suggest a marked tendency to avoid formalized dissent. This is striking because the Italian and Slovak institutional designs differ sharply.

In the Italian material, dissent has little public form. The judgment normally speaks with a single institutional voice. If disagreement occurred, it usually remains invisible to the parties and to the public. The

exceptional device of the sealed note or envelope appears in the interviews as something known but rarely used. Its function is not to communicate dissent to the legal community; it is primarily protective, internal, and residual. Dissent may also leave traces in the reasoning of the judgment, especially where the motivation tries to account for a difficult path of deliberation. But the ordinary public form of the Italian collegial judgment remains unified.

The Slovak material displays a different institutional architecture. Voting is more visibly formalized. The ratio of votes may appear in the decision; in civil matters, a dissenting opinion may be incorporated or attached; in criminal matters, the voting record and possible dissent may be preserved through specific procedural forms. The Slovak system therefore provides more explicit institutional channels through which disagreement may appear. The dissenting judge need not disappear entirely behind the unitary voice of the senate.

And yet the behavioral tendency appears surprisingly similar. In both corpora, formalized dissent is described as rare. The Slovak analysis formulates the comparative paradox with particular force: the Slovak system institutionalizes what the Italian system tends to hide - ordered voting, publication of vote ratios, written dissent in some areas - but the declared frequency of formalized dissent remains low in both settings. The difference is not simply whether disagreement exists. The difference is where disagreement goes. In Slovakia, when it reaches the surface, it may be channeled through visible procedural devices. In Italy, it is more likely to remain hidden, translated into internal negotiation, traces in reasoning, or the secret logic of the envelope.

The tendency towards unanimity is therefore not fully explained by institutional design. Design matters greatly: it determines whether dissent can be visible, how it is recorded, and what meaning it may have for the parties. But design does not by itself determine whether judges will pursue dissent to the end. Across both corpora, judges often describe continuing discussion even when a majority is already available. This was already one of the preliminary tendencies formulated in the COIN presentation: many judges report that panels continue deliberating

beyond the point at which a mechanical majority would be sufficient, in order to construct a common voice.

This tendency is central for the present book. It suggests that collegial decision-making is often not experienced merely as the production of a majority result. The panel may seek something more than arithmetic closure. It may seek a decision that can be presented, and perhaps experienced, as shared. This does not mean that unanimity always expresses genuine collective intentionality. Chapter 4 already warned against that inference. Unanimity may conceal deference, fatigue, professional pressure, epistemic dependence, or acquiescence. It may result from the desire to avoid relational costs rather than from reciprocal persuasion. But the very effort to reach unanimity beyond the necessary majority shows that the vote count does not exhaust the practical meaning of collegial adjudication.

The paradox can be formulated as follows: unanimity may be legally unnecessary, epistemically ambiguous, and sociologically costly, yet it remains normatively attractive. It is attractive because it gives the decision a stronger public voice, reduces the visibility of internal fracture, and may reassure the judges themselves that the case has been sufficiently discussed. The judicial *we* is therefore often sought even where the legal order would allow a thinner form of attribution. The panel does not always settle for two against one. It often tries to become, or at least to appear as, the court.

6.3 Procedure and Virtue

The third tendency concerns the different ways in which collegial equality is protected. The comparison between Padova and Košice suggests a contrast between procedural guarantees and professional virtues.

In Košice, equality within the senate is strongly connected to rules and formalised practices. The composition of the senate is predetermined. The voting order may be designed to prevent the president or senior judge

from influencing younger members. The *predporada* provides a common setting in which the relevant issues are presented to all members. The interviews also reveal an informal but significant norm against bilateral pre-agreement: speaking in two may be possible, but the result must be brought back to the whole senate. The reason is clear. If two judges reach a prior agreement, the third may already have been placed in a minority before the proper collective setting has occurred.

In Padova, the protection of equality appears less dependent on formal devices and more dependent on professional ethos, personal restraint, and local cultures of interaction. Several interviews describe the importance of the president's style: whether the president speaks too assertively, whether younger judges feel able to express disagreement, whether the discussion allows doubts to emerge, whether seniority becomes authority or pressure. The equality of the panel is not absent. It is often actively maintained. But it is maintained through attitudes, tact, trust, respect, and self-limitation more than through a detailed procedural script.

This contrast should not be turned into an evaluative hierarchy. Procedure and virtue have different strengths and different vulnerabilities. Procedure can protect equality by making certain distortions harder: it can impose voting order, prevent arbitrary composition, and require all members to be included. But procedure can also be emptied by practice. If the reporting judge necessarily frames the case first, the anti-influence function of the voting order may be weakened. If everyone already knows the likely positions before voting, the formal sequence may no longer perform the function it was designed to serve.

Virtue, by contrast, can be flexible and context-sensitive. A careful president may perceive when a younger colleague is hesitating, when an apparent agreement is superficial, when further time is needed, or when the tone of the discussion risks producing conformity rather than persuasion. But virtue is fragile because it depends on persons. A panel in which the president moderates authority differs from a panel in which authority is imposed. A culture of reciprocal respect may sustain

disagreement; a culture of hierarchy may suffocate it without leaving a procedural trace.

This tendency is important for the theory of the judicial we. A collective standpoint cannot emerge simply because the members are formally equal. Nor can it emerge where equality depends only on the good character of individual judges. The emergent we requires conditions under which disagreement can become visible, reasons can circulate, and members can respond to one another without coercion or premature closure. Procedure may support those conditions. Professional ethos may support them. Neither guarantees them.

6.4 Trust, Epistemic Dependence, and the Rapporteur

The fourth tendency concerns trust and epistemic dependence. Collegial adjudication is often described as a safeguard against the solitude of the individual judge. Several interview accounts, in both corpora, present deciding with others as a way to test one's own view, receive objections, correct possible errors, and reduce the risk of individual blindness. Yet the same material shows that collegiality also creates new forms of dependence. Judges do not always know the file in the same way. They do not always enter the discussion with the same informational position. The judicial we is therefore built through asymmetries as much as through equality.

The contrast between Košice and Padova is again illuminating. In the Slovak appellate setting, the reporting judge appears as a central epistemic figure. The *sudca spravodajca* studies the file, presents the case, identifies the relevant issues, and proposes a solution. The other members of the senate rely on the accuracy and fairness of that presentation. They may ask questions, request the file, or challenge the proposal. But the ordinary functioning of the system depends on trust in the reporting judge's account.

This does not necessarily weaken collegiality. It may make collegiality possible under conditions of workload and appellate

organization. Without division of labor, the system might become unmanageable. But the interviews suggest that trust in the rapporteur is not a neutral technical device. It is part of the epistemic structure of the panel. The judge who frames the case first may shape the possible field of disagreement. The others respond not to the raw file alone, but to the file as presented, selected, and problematized by a colleague.

In the Padova material, especially in the first-instance criminal context, the ideal appears different. Several accounts suggest that all three judges should, at least in principle, know the evidence and participate in the assessment. The value of immediate perception of evidence, the importance of the trial hearing, and the concern for equal informational access emerge strongly in parts of the Italian corpus. At the same time, the ideal of shared knowledge is under pressure. Substitutions, maternity leave, illness, changes in panel composition, heavy workloads, and the practical division of cases create asymmetries. A judge who has followed the entire trial may possess a form of authority that is not formal but epistemic.

The resulting picture is ambivalent. Collegiality is a remedy against individual error, but it may depend on selective trust. The panel corrects the solitude of the individual judge only if the knowledge of one member can become available, contestable, and responsive to the others. Trust is therefore not the opposite of deliberation. It is one of its conditions. But trust becomes dangerous when it turns into silent delegation.

This point matters for the emergent judicial we. A common decisional standpoint is not formed merely because the members accept the rapporteur's proposal. It may be formed when the proposal becomes the object of shared examination: when colleagues ask why, challenge the qualification, request further support, suggest reformulation, or require the reasoning to be adjusted. The difference between epistemic trust and epistemic passivity is therefore crucial. The judicial we may begin with reliance on one judge, but it cannot be reduced to that reliance.

6.5 Panel Cultures and Local Normativity

The fifth tendency concerns the formation of panel-specific cultures. The interviews suggest that collegial courts do not operate only through formal law, national procedure, and general professional ethics. Panels and sections may develop local standards, habits, thresholds, forms of organization, and shared assumptions about what it means to decide well.

This tendency was already identified in the COIN presentation as one of the two most visible preliminary results: each panel seems to develop its own habits, standards, ways of organizing work, dividing tasks, discussing cases, using technology, and interpreting normative thresholds. When a judge moves from one panel to another, she may need to adapt to the new panel's standards.

The Italian corpus provides particularly rich material on this point. Some interviews describe internal orientations of the panel or section: thresholds for criminal relevance, criteria for minor offences, recurrent approaches to sentencing, shared ways of reading evidence, local practices of drafting, and attempts to avoid radically different outcomes depending on which judge or door the case happens to encounter. The fear that the outcome may depend on the accidental allocation of the case expresses a normative anxiety: justice must not appear as a lottery of individual sensibilities.

This anxiety produces practices of coordination. Judges refer to section meetings, shared documents, internal databases, informal exchanges, previous decisions, appellate orientations, and attempts to formulate common standards. These practices do not abolish judicial independence. They reveal one of its tensions. The judge must decide the case according to law and conscience, but the court must also avoid appearing incoherent, arbitrary, or unpredictable. Local normativity emerges in that tension: not as legislation, not as precedent in a strict sense, but as a practical grammar through which judges seek consistency without fully eliminating discretion.

The Slovak corpus shows a different route to local normativity. There the stability of the senate, the role of the work schedule, the authority of

Supreme Court jurisprudence, and the institutionalized *predporada* create a more formal environment for the reproduction of shared standards. Memory appears important: senior judges may transmit previous decisions, remind newer colleagues of the line previously adopted, or use higher-court case law to resolve disagreement. The question is not only whether the panel reaches the right answer in one case, but whether it maintains a coherent decisional line over time.

The theoretically relevant point is that the panel may become a small normative environment. It is not merely a container for three individual judges. It may have a history, habits, thresholds, and an internal style. A judge entering the panel does not encounter only rules of procedure. She encounters expectations: how much one discusses, when one speaks, how disagreement is expressed, when a matter is postponed, what counts as sufficient persuasion, how strictly prior internal orientations matter.

This does not mean that every panel possesses collective intentionality in a strong sense. A local culture may be reflective and deliberative, but it may also be inertial. It may sustain quality, but it may also stabilize shared mistakes. It may protect equality, but it may also normalize deference. The concept of panel culture is therefore analytically useful precisely because it does not romanticize the judicial we. It shows that the ‘we’ may be a site of learning, but also of repetition.

6.6 The Communicative Register of Deliberation

The sixth tendency concerns the relation between internal disagreement, communicative register, and the public voice of the court. The interviews confirm the opacity that motivated the empirical turn of this research. A judgment tells us what the court says; it does not normally tell us how difficult it was for the court to say it, nor through which communicative form disagreement was handled before the final voice was produced. In this limited sense, deliberation has a temperature. It may be heated, restrained, ironic, formal, playful, tense, careful, or

deliberately cooled. This register matters because it affects how disagreement becomes speakable within the panel.

The Italian material contains several accounts of intense deliberation. Judges describe sharp discussion, strong disagreement, irony, laughter, and moments in which the chamber becomes a space of confrontation without becoming a space of hostility. In some accounts, heated exchange coexists with trust and esteem. Conflict is not automatically pathological. It may be one of the ways in which reasons are tested. A panel may argue intensely over a decision precisely because its members take the decision seriously and trust one another enough to expose disagreement. Yet this intensity remains largely invisible in the public form of the judgment. In Italy, the unity of the judgment often hides the internal path. Dissent may be absorbed into the reasoning, silenced by acquiescence, protected by secrecy, or displaced into the sealed envelope. The public voice remains one. The parties do not ordinarily know whether the decision was unanimous, whether one judge resisted, whether the majority shifted, or whether the reasoning was modified to accommodate disagreement.

The Slovak material presents a different configuration. The vote ratio and dissenting mechanisms make disagreement more visible, at least in some fields, but the rarity of formal dissent means that visibility remains exceptional. The legal system may permit dissent to appear, while professional culture may still encourage convergence. The communicative register also appears more restrained. The language of professionalism, respect, and composure is more prominent; some interviewees resist the vocabulary of confrontation, preferring terms closer to comparison of views, professional discussion, or reasoned exchange. This does not mean that disagreement is absent. It means that disagreement is presented through a different communicative code. Conflict may be cooled by form, understatement, procedural rhythm, or professional self-restraint.

The contrast should not be overstated. The two corpora are not expressions of national character. They concern different court levels, different procedural architectures, different kinds of cases, different interview conditions, and different professional environments. Yet the

contrast remains analytically useful. It shows that disagreement is not only a matter of whether judges diverge. It is also a matter of how divergence is expressed, tolerated, delayed, softened, ritualised, or concealed. A restrained register may protect dignity and equality, but it may also conceal unresolved disagreement. A heated register may reveal conflict, but it may also allow deeper testing of reasons where the relational foundation of the panel is strong enough to sustain it. The absence of visible conflict does not necessarily indicate consensus. The presence of conflict does not necessarily indicate failure. What matters is whether disagreement can enter the deliberative process as a reason-giving relation rather than as pressure, resentment, or silence.

The relation between secrecy and collegiality is therefore ambivalent. Secrecy protects deliberative freedom: it allows judges to speak, hesitate, and revise without external pressure. But secrecy also protects the appearance of unity. It prevents the public from seeing whether the court's voice emerged from persuasion, compromise, hierarchy, fatigue, or mere aggregation. This ambivalence cannot be solved abstractly. A legal system may reasonably choose to preserve the unity of the court's public voice; another may decide that visible dissent strengthens legal reasoning and transparency. The interviews do not settle that institutional question. They show, however, that the form of public unity should not be confused with the process through which unity was reached. The same unanimous judgment may correspond to different internal histories. The same divided judgment may follow intense and respectful common deliberation.

Temporal practices also belong to this picture. Both corpora contain forms of cooling. A difficult case may be postponed; judges may take time, return to the matter later, wait for case law, let the issue decant, or divide points for further research. Time can become a deliberative resource. It allows initial positions to loosen, reasons to be reformulated, and disagreement to become less personal. The emergent judicial 'we', when it exists, may therefore be temporal before it is verbal. It may require not only speaking together, but also waiting together.

The judicial ‘we’ is thus not identical with the public voice of the judgment. The public voice may be attributed to the court even when the emergent ‘we’ is weak. Conversely, an emergent ‘we’ may shape the reasons of the majority even where a minority position remains formally recorded. The public form of the decision is part of legal reality; it is not the whole of its genesis.

6.7 Office, Practice, and the Judicial ‘We’

The interviews also help refine the objection that judges act as holders of office rather than as free individual agents. At first sight, the material often supports an institutional reading. Judges speak of duty, responsibility, professional role, legality of composition, respect for procedure, independence, and the need to preserve the authority of the court. They are not private individuals forming an association. They act under constraints, within a legal office, and through procedures that define what counts as a judicial act.

Yet the material also suggests that office does not exhaust practice. Judges occupying comparable institutional roles may understand collegiality differently. One may describe the panel primarily as a voting structure: each member states a view, the majority decides, and the decision is attributed to the court. Another may describe it as a space in which reasons are tested until the final position becomes, in some meaningful sense, shared. A third may emphasize coherence with the section or senate; a fourth may insist on independence; a fifth may stress the epistemic function of disagreement. The office defines the space within which judges act. It does not fully determine how that space is inhabited.

This matters for the central argument of the book. The relevant question is not whether judges are officeholders or collective agents, as if the two possibilities were mutually exclusive. Judges are necessarily officeholders. Their agency is institutional from the beginning. The question is whether, within the structure of office, their practical

orientation towards one another sometimes takes a genuinely collective form. The same formal role can be enacted through deference, persuasion, resistance, cooperation, strategic silence, pedagogical leadership, or mutual correction. These differences are not external to collegial adjudication. They are part of what determines whether the judicial ‘we’ remains merely attributed or begins to emerge in practice.

The empirical material therefore complicates both extremes. Against a purely institutional account, it shows that formal office leaves room for different modes of collegial practice. Against a romantic account of collective intentionality, it shows that shared decision-making is always mediated by role, hierarchy, competence, workload, procedure, and institutional expectations. The judicial ‘we’ is neither a free collective subject hidden behind the court nor a mere fiction imposed by legal attribution. It is a practical possibility internal to an institutional role.

Of course, the lines of tendency identified in this chapter remain preliminary. They must be refined through further transcript revision, more systematic coding, and future publications devoted to narrower empirical questions. Nevertheless, they already permit a theoretically significant conclusion: the judicial ‘we’ is not a single or uniform phenomenon. Sometimes it is built, as judges discuss, challenge, persuade, revise, and gradually transform their individual positions into a common standpoint. Sometimes it is protected through procedures, voting rules, stable panel composition, and norms intended to preserve equality among the members of the court. Sometimes it is hidden behind the unitary voice of the judgment. Sometimes it is weakened by time pressure, workload, epistemic asymmetry, fatigue, or deference. What the interviews reveal is therefore not the constant presence of a collective mind, but the plurality of practices through which collective judicial agency may emerge, remain minimal, or fail to develop.

CONCLUSION

This book began from a deceptively simple expression: “the court decided”. Legal discourse routinely attributes judgments, orders, reasons, and responsibilities to courts as unitary institutional subjects. Yet collegial courts are composed of several judges, each possessing an individual standpoint, professional responsibility, and legally protected independence. The apparent unity of the judicial act therefore conceals a more difficult question: in what sense can a plurality of judges form a ‘we’?

The inquiry has shown that this question cannot be answered at only one level. At the level of legal validity, the decision must be attributed to the court. The legal order cannot treat a collegial judgment merely as a juxtaposition of individual mental states or votes. It requires an identifiable institutional author. The attributed judicial ‘we’ is therefore indispensable: without it, there is no act of the court, no judgment capable of producing legal effects, and no institutional subject to which authority and responsibility can be assigned.

Attribution, however, does not explain how the decision came into being. It does not tell us whether the judges merely contributed separate votes, whether they deferred to one member, whether they negotiated a compromise, or whether their initial positions were genuinely transformed through deliberation. These questions belong to a second level of explanation: the level of the emergent judicial ‘we’. Here the issue is not simply who is legally regarded as having decided, but how a common judicial standpoint was formed.

The distinction between attributed and emergent collective agency allows the analysis to avoid two opposite reductions. The first would treat the court as no more than an institutional fiction, assuming that legal attribution exhausts everything that can meaningfully be said about collective judicial action. The second would imagine the court as a unified group mind possessing intentions independently of the judges

who compose it. Neither account is sufficient. The court exists and acts only through institutional rules, offices, competences, and procedures; yet these structures are inhabited by judges whose interactions can take different practical forms.

The judicial ‘we’ is therefore best understood as a graded phenomenon. Different dimensions of collective agency may be present to different degrees: joint orientation towards a common task, reciprocal responsiveness, shared responsibility, mutual epistemic trust, common drafting, willingness to revise one’s position, acceptance of the final decision, and participation in the institutional voice of the court. Some decisions may display little beyond the minimal ‘we’ produced by legal attribution. Others may reveal stronger forms of practical integration, in which the final position cannot be adequately understood as the simple aggregation of predetermined individual views.

This graded account also clarifies the relationship between collective intentionality and judicial independence. Independence does not necessarily require the isolation of each judge from the others. Nor does collegiality require the disappearance of individual responsibility into a collective whole. On the contrary, meaningful deliberation presupposes judges capable of expressing independent reasons, resisting pressure, challenging one another, and revising their positions without surrendering their institutional responsibilities. The judicial ‘we’ is strongest not where plurality disappears, but where plurality is organized into a common act without being erased.

The same point applies to disagreement. Dissent, resistance, and argumentative conflict need not constitute failures of collegiality. They may perform an epistemic and institutional function by exposing weaknesses, preventing premature closure, and forcing the panel to articulate more persuasive reasons. A court does not become collective simply because its members agree. Nor does it cease to be collective because they disagree. The relevant question is how disagreement is processed and whether the members remain reciprocally oriented towards producing a decision attributable to the court.

The preliminary empirical inquiry conducted within the COIN project supports this conceptual framework while also placing limits upon it. The interviews do not demonstrate that every collegial court develops a robust collective intention. Nor do they establish a single Italian or Slovak model of collegial adjudication. They reveal instead a field of variable practices. Judges may decide together in a strong sense, but they may also decide beside one another. They may deliberate, persuade, defer, compromise, resist, or merely count votes. Formal similarities between panels may conceal substantial differences in communicative style, professional culture, hierarchy, workload, drafting practices, and local understandings of collegial responsibility.

These differences are compressed by the public form of the judgment. Once issued, the decision ordinarily speaks in one institutional voice. The internal path leading to that voice—agreement, transformation, compromise, acquiescence, or unresolved disagreement—largely disappears. The legal form states that the court decided. Empirical inquiry reopens that statement and asks what kind of ‘we’ it contains.

This does not mean that the secrecy or confidentiality of deliberation should simply be abolished. The protection of the deliberative space may serve important values, including judicial independence, freedom of discussion, institutional authority, and protection from external pressure. Nevertheless, confidentiality should not lead legal theory to treat the formation of collegial decisions as conceptually irrelevant or empirically inaccessible. Courts may be observed in a broader and more methodologically cautious sense: through institutional structures, procedural rules, published judgments, professional narratives, interviews, and the ways in which judges describe the activity of deciding together.

What emerges from this broader observation is a picture of the collegial court as neither pure institution nor pure group mind. It is an institution that may, under certain conditions, become a group in practice; a group that can act legally only through institution; and a plurality of judges whose final act is formally one, although the path towards that one voice remains plural, contingent, and demanding.

The principal result of the book is therefore not the discovery of a hidden collective subject behind every collegial judgment. It is the identification of two interconnected but irreducible dimensions of collective judicial agency. The attributed judicial ‘we’ explains how the legal order constitutes and recognizes the act of the court. The emergent judicial ‘we’ explains how that act may be formed through the relations among the judges themselves. The first is necessary for legal validity. The second is contingent, fragile, and dependent upon practice.

The judicial ‘we’, then, is neither simply found nor simply declared. It is attributed by law, pursued in practice, and achieved only where judges succeed in turning plural reasons into a common act.

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