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Understanding the European Courts

International courts are critical actors in contemporary global governance. How can we best study and understand these bodies? What features of these often-opaque institutions should be the focus of scholarly inquiry?

These questions have special salience in Europe. Through expansive and dynamic readings of foundational treaty texts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have positioned themselves as key actors in European governance. More recently, their pronouncements on highly controversial issues, and substantial impact on European law and politics, have triggered fierce backlash that may prefigure a shift in their roles. For these reasons, the two European courts have attracted sustained scholarly attention, including groundbreaking contributions from many of the contributors to this publication. Nonetheless there is still much about these Courts that we do not adequately understand.

In a long-term research project, we call for a shift in scholarly approaches to the study of international courts including the European courts. While international legal scholars and international relations scholars often focus on legal outcomes, they have shown little interest in how courts actually function. As a result, we know surprisingly little about judicial decision-making practices, including processes of judicial deliberation, collective decision-making, and opinion drafting, that in turn shape the meaning and significance of legal outcomes.

Our research seeks to open up the black box of the courts, to study what judges do and how they do it. To do so, we examine the everyday practices of international judges, with particular focus on practices associated with judicial decision making. This practice turn reveals a wide range of otherwise hidden patterns and activities. This approach should be attractive to scholars who emphasize the socially constructed nature of meaning and knowledge, as well as to positivist scholars who seek to describe and explain judicial outcomes. Indeed, because of its ability to spark inter-disciplinary and inter-paradigmatic exchange, the study of judicial practices can serve as the basis for a new generation of scholarship on international courts.

We cannot fully defend these large claims in this short article.¹ Instead, we synthesize some of our work with the goal of sparking interest in practice-oriented research programs. Part 1 introduces practice theory, a sociological approach that has been influential across the social sciences, and our conception of international judicial practices.² We also provide a brief synoptic overview of international judicial practices. Part 2 demonstrates how practice theory can be applied to courts by analyzing one of the most striking differences in judicial practices between the European courts, namely the use (or non-use) of separate opinions. A brief conclusion follows.

1. Practice theory and judicial practices

One of practice theory's founders explains:

[P]ractice connotes doing, but not just doing in and of itself. It is doing in historical and social context that gives structure and meaning to what we do. In this sense, practice is always social practice. Such a concept of practice includes both the explicit and the tacit. It includes what is said and what is left unsaid; what is represented and what is assumed. It includes the language, tools, documents, regulations, and contracts that various practices make explicit for a variety of purposes.³

Practice theory was popularized in international relations by Emanuel Adler and Vincent Pouliot, who write that "[p]ractices are competent performances. More precisely, practices are socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody [and] act out background knowledge

¹ More extensive analyses can be found in earlier works, parts of which we draw on and summarize here, including: J.L. Dunoff, M.A. Pollack, "Separate Opinions" [in:] *Max Planck Encyclopedia of International Procedural Law* (forthcoming); *idem*, "The Road Not Taken: Comparative International Judicial Dissent," *American Journal of International Law* 2022, vol. 116, no. 2, p. 340; *idem*, "International Judicial Practices: Opening the 'Black Box' of International Courts," *Michigan Journal of International Law* 2018, vol. 40, no. 1, p. 47; *idem*, "The Judicial Trilemma," *American Journal of International Law* 2017, vol. 111, no. 2, p. 225; *idem*, "A Typology of International Judicial Practices" [in:] *The Judicialization of International Law – A Mixed Blessing?*, eds. G. Ulfstein, A. Føllesdal, Oxford 2018, p. 86; *idem*, "International Judicial Performances and the Performance of International Courts" [in:] *The Performance of International Courts and Tribunal*, ed. T. Squatrito et al., Oxford 2018, p. 261; *idem*, "Practice Theory and International Adjudication," *Max Planck Encyclopedia of International Procedural Law*, ed. H. Ruiz Fabri, Oxford 2018–2019.

² Other applications of practice theory to international courts include: T. Soave, "The Social Field of International Adjudication: Structures and Practices of a Conflictive Professional Universe," *Leiden Journal of International Law* 2023, vol. 36, no. 3, p. 565; N. Stappert, "Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning in the Interpretative Practices of International Criminal Courts," *International Theory* 2020, vol. 12, no. 1, p. 33; A.N. Chaib, E. Stopponi, "Mapping Sociological Approaches to International Procedural Law," *Temple International & Comparative Law Journal* 2020, vol. 34, no. 2, p. 203; E. Yildiz, "Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights," *Temple International & Comparative Law Journal* 2020, vol. 34, no. 2, p. 309.

³ É. Wenger, *Communities of Practice: Learning, Meaning, and Identity*, Cambridge 1998, p. 47.

and discourse in and on the material world.”⁴ To explain this concept, Adler and Pouliot foreground five specific dimensions of practice. First, practices have a performative dimension. Second, practices are patterned. They have certain regularities across space and time. Third, practices are performed in a more or less competent way. Audiences comprising communities of practice can appraise performances. Fourth, practices rest on background knowledge that is intersubjective and practice-oriented, rather than theoretical and abstract. Fifth, practices weave together the discursive and material worlds. They have a linguistic element, but have a concrete effect in the world.

International judges undertake many activities that exhibit these five dimensions of practice. Specifically, international judges engage in multiple performances, both private (when deliberating with other judges) and public (in their conduct of trials and arguments, judicial opinions, off the bench speeches, etc.). Moreover, these practices are highly patterned: they occur within the highly organized context of international law and litigation, while still leaving individual judges with “wiggle room for agency.”⁵ In addition, judicial practices are performed more or less competently, as evaluated against a set of intersubjective standards by relevant audiences, such as litigants, Member States, and scholars. Judicial decisions rest on background knowledge of treaties, custom, case law, rules of court, and informal norms of “appropriate” judicial behavior. Finally, judicial opinions weave together both the discursive and material worlds, as they take the form of legal discourse but have material consequences for parties.

The practice approach provides a useful alternative to more common structural and agentic approaches to courts. Structural approaches foreground the constraints imposed on judges by court statutes or by rules of procedure. Yet these structural constraints are often under-determining. For example, statutes of the International Court of Justice (ICJ) and the CJEU each provide that the procedure of these courts “shall consist of two parts: written and oral.” ICJ judges have read this language to require an oral hearing at the merits phase in all disputes. CJEU judges read the identical language in their statute as granting discretion to decide in each case whether oral hearings are necessary. The more general point is that judges constantly make and remake choices about how to organize and conduct their work notwithstanding relevant statutes and rules of court.

Yet judicial practices cannot be reduced to individual choices by utility-maximizing judges. To be sure, agentic approaches which look for correlations between judicial characteristics (nationality, gender, professional background, etc.) and voting patterns offer important information about extra-legal influences on judicial behaviour. Yet they fail to take adequate account of the influence exercised by informal norms and standards and the collective background knowledge embedded in judicial practices. For example, while predicting voting patterns is useful, courts do more than declare

⁴ E. Adler, V. Pouliot, “International Practices: Introduction and Framework” [in:] *International Practices*, eds. E. Adler, V. Pouliot, Cambridge 2011, p. 3.

⁵ E. Adler, V. Pouliot, “International Practices,” *International Theory* 2011, vol. 3, no. 1, p. 14.

winners and losers. Attention to judicial practices, such as deliberation processes and modalities of opinion drafting, help explain the scope and reasoning of judicial opinions. Thus focusing on judicial practices productively complements existing structural and agentic studies of international courts.

International judicial practices fall broadly into one of two categories. One set consists of those not directly related to the litigation process, and include patterned interactions with officials from coordinate treaty bodies, which often seek budgetary, political, and other forms of support (such as the delivery of formal speeches by ECtHR President judges at the opening of the judicial year); regularized interactions with judges from other courts (such as the annual meetings between CJEU and ECtHR judges where they discuss doctrine); practices surrounding the training and socialization of new judges; and a wide body of extra-judicial activities (such as teaching courses, presenting at conferences, and publishing scholarly papers).

Another set of practices more directly relates to the litigation process. A partial list includes practices regarding the language of deliberations (CJEU judges deliberate in French, while ECtHR judges deliberate in French or English, practices which differently empower or disempower certain actors); practices concerning written pleadings (including their structure, format, length, and sequencing); practices concerning oral pleadings (including their length and format); evidentiary practices (admissibility, burdens and standards of proof); and practices regarding judicial deliberation (by consensus or majority vote), and opinion-writing (including the roles of a judge rapporteur, law clerks, or registry officials in opinion drafting). This cursory and incomplete listing of judicial practices only hints at the breadth and diversity of practices that international judges engage in.

We note that some practices are highly stable. For example, as discussed further below, the two European courts have very different approaches to opinion writing practices, including the use of separate opinions, which have not changed for decades. Others are more variable. For example, CJEU judges have traditionally not engaged in extensive efforts intended to explain the court and its workings to the general public. Koen Lenaerts, the current CJEU President, has built collegial support to change this long-standing practice. Under Lenaerts, the Court has become much more transparent, including live streaming proceedings, becoming more active on social media, proactively interacting with press and other media, and even sitting for podcast interviews.⁶ Of course, such off-the-bench activities, like more traditional judicial practices, can be performed more or less competently, and extra-judicial activities have at times attracted criticism.⁷

⁶ K. Linos, M. Pollack, *Interview with President Koen Lenaerts. Borderlines podcast*, 1 November 2024, <https://www.law.berkeley.edu/podcast-episode/european-union-court-of-justice-series-interview-with-president-koen-lenaerts> [accessed: 24.04.2025].

⁷ See, for example: H. Keller, "How to Improve Independence and Impartiality of Judges of the European Court of Human Rights," *European Convention on Human Rights Law Review* 2023, vol. 4, no. 3, p. 259.

Finally, and significantly, there is notable variation across courts in the specific content of their practices. We think this variation in judicial practices, in turn, can be the source of important insights into the workings of international courts, as we attempt to illustrate below.

2. Opinion writing practices at the European courts

An international court's most distinctive work product is its written judgments. The judgment is itself a highly stylized judicial practice, one that rests on background knowledge and can be performed more or less competently. One aspect of this practice is the form of judgment. At the CJEU, all judgments take the form of *per curiam* judgments without separate opinions by individual judges. In striking contrast, at the ECtHR, judgments are frequently accompanied by separate concurrences or dissents. What explains these different practices, and what are their consequences?

2.1. Origins

Primary legal materials are of limited utility. The precursor to today's CJEU was created as part of the European Coal and Steel Community (ECSC), which was intended to put the coal and steel industries of ECSC members under the control of a supranational "High Authority." Negotiators intended that the Authority's decisions could be appealed, requiring a court closer to a domestic administrative court than a court, such as the ICJ, that resolves inter-state disputes. The first Court of Justice was designed much like an administrative court in the French civil law tradition, where dissents were not used. Relevant treaty language provides for the secrecy of deliberations, and does not address the possibility of dissent. The legal texts creating new communities, and eventually the European Union, greatly expanded the court's jurisdiction, but did not lead to a change in the relevant language, and in particular did not lead to language authorizing dissent.

The founding generation of judges took the position that statutory silence precluded the issuance of separate opinions. We find this unpersuasive; the statutes of many courts, including the ICJ and ECtHR, also include provisions preserving the secrecy of deliberations; yet judges at these courts have found this language not to preclude the issuance of dissents. Instead, the ECJ judges adopted a permissible, but hardly inevitable, reading of the statute, no doubt informed by the civil law practices of continental Europe at the founding of the communities, and later entrenched by over seven decades of subsequent practice.

The ECtHR's founders, in contrast, viewed their court as a traditional international court, in the sense that it reviewed state actions for conformity with treaty norms. The Court's statute was modeled on the ICJ's, including a provision authorizing separate opinions drawn verbatim from the ICJ statute: "If the judgment does not represent (...)

the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.” The first rules of court likewise permitted separate opinions. From its first decisions, ECtHR judges have issued frequent and often vigorous dissenting opinions, a practice that continues to the present day.

In both instances, statutes and rules were underdetermining. In the ECSC/EC/EU context, judges decided to read silence as precluding separate opinions, although alternative readings were available. And at the ECtHR, the statute and rules permit, but do not require, separate opinions. ECtHR judges could have followed the lead of other domestic and international courts, such as the German Constitutional Court, and adopted norms and practices of infrequent dissent reserved only for serious reservations to the majority judgment; instead, ECtHR judges issue frequent dissents and concurrences, in about two-thirds of all cases, and often on relatively minor as well as major legal questions. To understand dissent practices at both courts, it is necessary to move beyond relevant legal texts to identify the intersubjective norms that undergird and help to reproduce each court’s decades-long practices, and the subjective perceptions and motivations of the judges. While space limitations preclude a comprehensive account, we highlight several of our most important research findings.

2.2. Legitimacy

Judges at both courts believe that their (diametrically opposed) dissent practices enhance judicial legitimacy. Current and past CJEU judges believe that *per curiam* opinions enhance legitimacy because tribunals enjoy the greatest public legitimacy when they speak with one voice. Conversely, they believe that issuing judgments accompanied by separate opinions would undermine the persuasiveness of judgments, which in turn might reduce the Court’s legitimacy among national governments, domestic courts, and public opinion.

ECtHR judges, in contrast, believe that issuing separate opinions enhances judicial legitimacy. These opinions increase the Court’s transparency, and let losing parties know that their arguments were fully considered. Separate opinions permit judges to state the reasons for their vote, addressing potential concerns of politicized or biased decision-making.

It is, of course, possible that both sets of judges are correct: that there are multiple routes to legitimacy, the one through unity and the other through transparency. However, given that judges at both courts believe that their practices are most conducive to legitimacy, we cannot say that the demands of legitimacy explain judicial choices in any causal sense, but rather that judicial practices at both courts are deeply entrenched and intersubjectively shared within the shared background knowledge at each court.

2.3. Judicial independence

Judges at both courts likewise believe that their dissent practices support judicial independence. CJEU judges, who are appointed for six-year, renewable terms, believe that issuing per curiam opinions helps preserve judicial independence. The logic is that if states cannot identify a judge's positions, they cannot punish that judge in reappointment processes for acting against that state's interests. Separate opinions, in contrast, permit states to identify a judge's positions, and potentially retaliate against that judge when considering reappointment.

For most of its history, ECtHR judges also served for limited, renewable terms, initially set at nine years and then shortened to six years by Protocol 11 in 1998. In this context, the decision by Strasbourg judges to dissent openly left them open to retaliation from member governments which could refuse or oppose renomination. Indeed, by the late 1990s states began not re-nominating judges who had delivered adverse judgments or separate opinions. In response to concerns that this behavior threatened judicial independence, the Member States agreed in Protocol 14 to change from six-year renewable terms to nine-year, non-renewable terms. Our interviews confirm that ECtHR judges believe that pre-Protocol 14 judges were potentially subject to pressures from home states, and many are pleased that they will not face reappointment pressures as their term nears its end.⁸

2.4. Legal doctrine

Some CJEU observers claim that fractured opinions produce confusion for parties and other judges, and unanimity provides clarity for national judges in Member States. This, in turn, helps those judges apply CJEU rulings uniformly across many different legal traditions. That said, many view per curiam judgments as imposing certain costs. First, the pressure to reach consensus results in judgments that are thinly reasoned as judges coalesce around the "lowest common denominator." Former ECJ Judge David Edward famously observed that "a disadvantage of the collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels."⁹ That said, criticisms of the clarity of CJEU individual judgments are not

⁸ Interestingly, however, judges at each court are dubious about the narratives of judicial independence at the other. See, for example, the comments of CJEU President Lenaerts, who disputes the benefits of a single, nine-year term of office: "What is in your view the more independent position? A mandate of six years, which is renewable, but combined with secrecy of deliberations and an absence of dissenting opinions, and 90 percent of the member states automatically renew the mandate when the judge is working. That's our system. Or a system, Strasbourg, of nine years, where in the last three years of the mandate, the judge starts negotiating with the government for the fall-back position when she or he returns because she or he has been appointed at 42 years of age and has done the nine years at 51 years of age and aspires to become the president of the constitutional court or the ambassador of the member state." Quoted in: K. Linos, M. Pollack, *Interview with President Koen Lenaerts*...

⁹ D. Edward, "How the Court of Justice Works," *European Law Review* 1995, vol. 20, no. 3, p. 539.

equivalent to critique of the Court's development of doctrine. Even if some judgments are less clear than they might be, the Court engages in dialogue with a variety of actors, including advocates general, litigants, the Commission, and national courts, and has generated a dynamic body of jurisprudence. Indeed, the CJEU's performance over time demonstrates that the lack of separate opinions does not necessarily impoverish the development of doctrine.

ECtHR judges believe that separate opinions improve and clarify judgments in several ways. First, judgments are sharper, as the majority is motivated to address the strong arguments from the minority. Second, separate opinions can also serve to clarify or limit a majority's holding. Third, they can signal to litigants and others that alternative arguments are available in future cases. Finally, in rare instances, the logic of a dissent can be adopted by a future majority, as in the Court's decisions on transsexualism. Here again, the issuing of separate opinions by Strasbourg judges is neither simply a procedural rule nor a judicial behavior, but a collective practice understood by normative beliefs and collective background knowledge.

2.5. Lessons learned

This short analysis reveals not only diametrically opposed material practices regarding the use of separate opinions at the European courts, but also sharply differing understandings of the meaning and impact of these practices. CJEU judges strongly endorse their long-standing norm of consensus decision-making, and pride themselves on deliberating and reasoning collectively rather than breaking apart to compose separate opinions. They also believe that their de facto ban on public dissent increases judicial collegiality, legitimacy, and, above all, independence, although some concede that the search for consensus can sometimes compromise the clarity of the Court's legal reasoning. ECtHR judges, in contrast, hold inter-subjectively shared norms that are highly permissive and even encouraging of dissent. They believe that the practice of frequent dissent increases the legitimacy of the court and the quality of its case law, without endangering judicial collegiality or independence.

A practice-oriented approach reveals that the obvious differences in opinion-writing practice between the European courts are not simply behavioral but also normative and ideational. Judges at both courts have carefully considered the impact of their dissent practices on important values, such as legitimacy and independence, and have crafted their practices accordingly. These different practices are reproduced over time through a combination of formal rules and informal norms into which new judges are socialized.

3. Conclusions

Our goal is to introduce readers to international judicial practices, and to argue that they deserve greater scholarly attention. A focus on practices lets us peer inside the black box of courts to better understand how they actually function. It enables us to identify judges' inter-subjective understandings, and see how judges construct and deploy social meaning. The turn to practices also permits us to isolate and study causal processes that influence judicial opinions. Thus, for each practice, we can ask about causes and consequences: What motivated judges at different courts to adopt different practices? And with what effects?

A turn to practice can help to bridge the gap between scholars from different disciplines and different methodological orientations, as we can personally attest. Moreover, the practice turn can help bridge the even larger gap between academic researchers who know much legal theory but less about how courts actually function, and practitioners who know judicial practices intimately, but are less familiar with theoretical research concerning courts. Finally, judicial practices are one important tool for advancing larger debates over the effectiveness and legitimacy of international courts. For all of these reasons, we urge those who seek richer understandings of international courts to study international judicial practices.

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Summary

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Understanding the European Courts

We seek to open the black box of the courts, to study what judges do and how they do it. To do so, we examine the everyday practices of international judges, with particular focus on practices associated with judicial decision making. This practice turn can enrich our understanding of judicial decision-making practices, including processes of deliberation, collective decision-making, and opinion drafting, that in turn shape the meaning and significance of legal outcomes. To spark interest in practice-oriented research, this article introduces practice theory, a sociological approach that has been influential across the social sciences, as well as our conception of international judicial practices. We then demonstrate how practice theory can be applied to judicial practices by analyzing one of the most striking differences in judicial practices between the European courts, namely the use (or non-use) of separate opinions.

Keywords: international courts, international tribunals, practice theory, international judicial practices, separate opinions.

Streszczenie

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Starając się zrozumieć sądy europejskie

W artykule autorzy postanowili otworzyć „czarną skrzynkę” sądów, aby zbadać, co robią sędziowie i jak to robią. W tym celu analizie poddano codzienne praktyki sędziów międzynarodowych, ze szczególnym uwzględnieniem praktyk związanych z wydawaniem orzeczeń sądowych. Ten

„zwrot ku praktyce” może wzbogacić nasze rozumienie sądowego procesu orzeczniczego, w tym narady sędziowskiej, elementu kolektywnego w procesie przygotowania i wydawania orzeczenia, co z kolei kształtuje znaczenie i wagę rezultatów, do których prowadzi proces orzeczniczy. W tym celu w opracowaniu przedstawiono „teorię praktyki” opartą na podejściu socjologicznym, które wywarło wpływ na wszystkie nauki społeczne, a także na zaprezentowaną przez autorów koncepcję „międzynarodowych praktyk sądowych”. „Teoria praktyki” może znaleźć zastosowanie do procesów orzecznich poprzez poddanie analizie jednej z najbardziej uderzających różnic w praktyce orzecniczej sądów europejskich w postaci korzystania (lub niekorzystania) z instytucji zdań odrębnych.

Słowa kluczowe: sądy międzynarodowe, teoria praktyki, międzynarodowe praktyki sądowe, zdania odrębne.