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Towards a legally plausible theory of judicialization in the European Union

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ABSTRACT

This article examines the development of judicialization literature in the EU arguing that – in spite of the obvious advantages of inter-disciplinary collaboration – scholarship on judicialization in law and political science is drafting apart in the 21st Century. While early political science research on the European Courts found theoretical inspiration in legal research, law and political science have increasingly diverging epistemological and methodological starting points. As the article argues, using prominent papers, this results in both disciplines producing partial accounts of judicial change with limited external validity. The article concludes by offering routes to improving the inter-disciplinary foundations of judicialization research.

KEYWORDS

Judicialization; interdisciplinarity; EU law; EU studies; law and politics

1. Introduction

From the beginning of the EU, judicial actors have played a crucial part in building the integration project. Today, this role is recognized across disciplines, with lawyers (Adams et al. 2013; Arnull 2006) and political scientists (Blauberger and Schmidt 2017; Schmidt 2018; Vauchez 2015) alike focusing their attention on the impact of the Court of Justice of the European Union (CJEU) and high national Courts on European politics. Several pioneering scholars have gone further, developing inter-disciplinary work that joins together scholarship in law, political science and sociology on EU judicialization (Derlén and Lindholm 2018; Saurugger and Terpan 2017; Slaughter, Stone Sweet and Weiler 1998).

While the potential for interdisciplinary collaboration seems high, to what extent have disciplinary barriers been overcome? As this article will argue, accounts of judicialization have largely been developed in disciplinary isolation in the 21st century. Legal scholarship has mostly remained insulated from the methodology of empirical social science. Despite the development of hybrid strands of research such as empirical legal studies or law in context, mainstream legal scholarship remains focused on interpreting norms, mostly overlooking extra-legal considerations (e.g. contextual factors such as the redistributive stakes or social properties of the various agents of judicialization). At the same time,

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political scientists and sociologists remain focused on the actors impacted or involved in the legal process, giving little importance to the normative structure of the EU legal order.

These different disciplinary accounts offer separately interesting and important insights about the CJEU. Yet the self-referential tendency affecting each discipline results in partial accounts of the role of judges and various stakeholders using the 'judicial route' to alter EU politics and policies. This piece will focus on the shortcomings of this approach, stressing the importance of *genuine* interdisciplinary work in providing more accurate explanations of judicial behavior in the EU. Section 2 will investigate the extent of interdisciplinary accounts by showing quantitatively that scholarship in law and political science continue to cite each other sparsely. Section 3 will examine three recent major judicialization papers qualitatively, demonstrating how the absence of attention to legal and normative factors weakens the empirical and explanatory rigor of political science research on the CJEU. Section 4 will explore the reasons behind this absence of interdisciplinary dialogue, arguing that legal scholars and political scientists have diverging ontological, epistemological and methodological purposes. Section 5 will finally develop some alternatives that could lead to a plausible approach to judicialization that keeps 'actorness' at the center of the analysis while giving sufficient account of the normative structure of EU law. The key to overcoming disciplinary boundaries is to develop methodological tools which take the concepts and language of both disciplines seriously (without understanding them solely through the categories of the 'home' discipline).

2. A persisting disciplinary divide

Unsurprisingly, EU legal scholarship was the first in studying the CJEU. Until Stein's seminal piece on the Court in the early 1980s (Stein 1981), the case law of the Court remained the preoccupation of a few legal experts – often combining academic positions with legal practice (Vauchez 2015, 103–8). These actors predominantly published in journals whose editors remained in close contact with the professionals working at the Court in Luxembourg (Byberg 2017).

The 1980s saw the development of legal accounts that stressed the active promotion of European integration through judicial means (Cappelletti, Seccombe and Weiler 1986; Rasmussen 1986; Stein 1981; Weiler 1991). These legal scholars described EU law not only as an object of doctrinal analysis but as a resource mobilized by several actors – including judges – to bypass the European Economic Community's then gridlock. Doctrine was accompanied by theories such as 'integration-through-law', the European 'equilibrium' thesis and even the first mentions of 'judicial activism'.

This epistemological openness towards contextual and actor-based explanations opened the path for political scientists to 'take courts more seriously' (Mattli and Slaughter 1998, 206). Political science scholarship thus reexplored the integration paradigms of neofunctionalism and intergovernmentalism in light of the Court's case law (Burley and Mattli 1993; Garrett, Kelemen, and Schulz 1998). Studies of the Court also propelled a move away from the international relations paradigms to comparative political studies in the EU, found especially in the works of Alter (1998, 2001, 2009) and Stone Sweet (2000, 2004). Political scientists had finally 'discovered the European Court of Justice' (Mattli and Slaughter 1998, 177).

They did so, however, by finding theoretical inspirations in *legal* scholarship, not least in the academic work of CJEU judges themselves (such as Lenaerts, Mancini and Pescatore). These pioneers were acquainted with discussions found in other disciplines, using them to cement their arguments. As such, they propelled true interdisciplinary accounts of judicialization in the EU (see especially Slaughter et al. 1998). The specialization of a handful of political scientists could not outweigh the amount of research produced by legal scholarship about the Court, leading judicialization scholars to seek theoretical inspirations in law.

Legal scholarship would also take a multidisciplinary turn. The leading arguments of Joseph Weiler (1991, 1994) showed that factors beyond legal reasoning shaped the content of rulings. Weiler explicitly took inspiration from international relations scholarship, understanding the CJEU largely in terms of its relationship to political actors/litigants at the national and EU levels. His work, along with other European University Institute colleagues, such as Frances Snyder, propelled a greater understanding of EU law in light of contextual factors (e.g. how distributive questions, or media debates, framed jurisprudence), with the 90s seeing the establishment of the European Law Journal as a home for 'law in context' research. The scope for interdisciplinarity seemed high.

This article is interested in the period that followed this pioneering early work. While one might expect 'judicial politics' to develop as a shared field of interest between lawyers and political scientists, there are also of course factors pulling in the opposite direction. The alternative hypothesis – that of increasing academic autopoiesis – is also conceivable. Pioneering *inter-disciplinary* scholarship, in so far as it draws attention to a particular topic *within disciplines* potentially sows the seeds of its own demise. In so far as a greater number of scholars are drawn to a topic, that topic is easily re-absorbed into the classic epistemological tenets and methods of the 'home' discipline, laying the groundwork for divergence rather than convergence between fields. Once the groundwork was laid out by the first generation of EU judicial politics scholars, the newer class would no longer have to leave the safety net provided by disciplinary isolation.They would already possess theoretical sources about the EU Courts within their respective disciplines, allowing for more self-referentiality.

This last hypothesis will be further explored in sections 3 and 4. Our starting point, however, is to assess the disciplinary divide on the study of the EU judiciary quantitatively. In order to grasp the scope of interdisciplinarity in EU judicial politics, we analyzed the citations of 2 major EU studies journals – the *Journal of Common Market Studies* (JCMS) and the *Journal of European Public Policy* (JEPP) – that published articles on the CJEU.[1] We selected 72 articles which referred to 3084 bibliographical references in order to test the hypotheses of increased interdisciplinarity and academic autopoiesis. We examined these two journals at 5 different data points.

As seen in the Figure 1 below, the results inform however both postulates. There is no general pattern that would lean towards one path or the other.

The sample may be skewed by particular authors. Some legal scholars such as Jo Shaw have developed accounts in these journals that refer heavily to EU legal scholarship. Others treated judicialization as a pure political-scientific object and referred exclusively to other theoretical sources. The sample may also be skewed depending on the specific issue studied. The 10th issue of JEPP's 2018 Volume focused on the changes brought by the Court in the free movement regime, which propelled an unusual overrepresentation

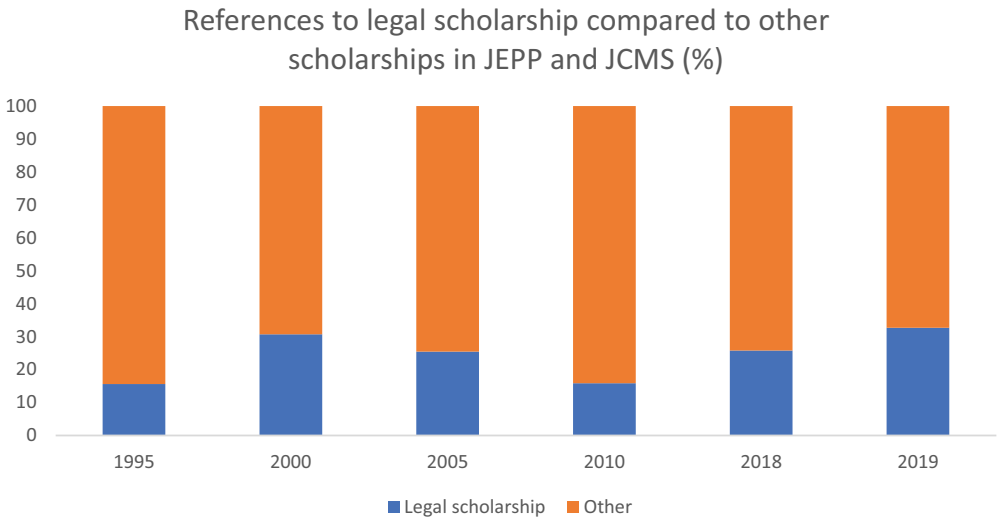

Figure 1. References to legal scholarship (in % of the whole citations) in articles related to the court of justice of the European Union and published in the journal of European public policy and the journal of common market studies (Graph: authors). The criteria for inclusion in the analysis are laid out in Annex 2.

of legal scholars in this issue. On the aggregate, the part of citations of legal scholarship ranges from 15 to 33%. The results refute a general quantitative and chronological trend either towards or against interdisciplinarity in EU judicial politics. Arguments developed in legal studies complemented but never replaced or competed with the 'other' sources, which pertain to political science and international relations. At the same time, the consolidation of judicial politics as a self-standing field of research did not lead to the exclusion of legal sources as relevant citations. In the last year studied in the sample (2019), almost one third of references came from legal scholarship.

The lack of a pattern is the clearest finding. The absence of regularity shows that a quantitative overview of references does not suffice to understand the development of the judicialization literature across time. Even if scientometrics could give an illustration of broad trends in scholarly developments, it does not allow us to grasp the concrete use of these references. A lack of citations from law in a 'political science' piece does not exclude the possibility that legal arguments may be employed or developed by the author. In the same vein, the heavy use of references from legal scholarship does not necessarily imply a genuine engagement with the tenets and theories of legal scholarship (where these articles are included passingly or as context, without relying on their content to influence research design or interpret findings). Only a qualitative exploration of articles found in the sample may give us further indication about the lack or presence of interdisciplinary dialogue in contemporary EU studies about the role of the CJEU.

In the following section, we conduct such a qualitative exploration by examining in greater detail three judicialization papers within the sample. The selection of articles to be analyzed will follow a most-likely case research design (Gerring 2012). We picked three articles in our sample that address the role of the CJEU focused on policies rather than on the actorness of the Court (since we argue that this remains a blind spot in legal

scholarship). The selected policies must involve strong judicial and political salience in order to increase our chances of finding literature in all strands of scholarship analyzed here. We thus chose to analyse articles across three distinct areas of EU policy: one on the change brought to the citizenship regime in the EU during the 2010s (Blauberger et al. 2018), another on the relationship between counter-terrorism measures and fundamental rights (Harsch and Maksimov 2019) and another on the role of the CJEU and legal institutions during the Eurozone debt crisis (Scicluna 2018). What do these pieces tell us about current judicialization scholarship?

3. Beyond correlation: the blind spots of mono-disciplinarity

In political science journals, causality in large-N studies is justified in the theoretical section. The quantitative evidence, however, presented in descriptive or inferential fashion, nonetheless displays correlations. Theories of judicial behavior must therefore be thick and exhaust the literature if they want to develop a causal mechanism that excludes or at least bests alternative explanations. The disciplinary isolation discussed above bars many political science theories from such a comprehensive review of alternative explanations. Approaches that stress that courts must always – independently of the preferences of judges sitting on the bench – be translated into legal considerations are commonplace in legal scholarship but are frequently ignored in political science. Political scientists tend therefore to overemphasize the importance of socio-economic and contextual factors just as lawyers may exaggerate the importance of legal reasoning, leading both camps to provide partial explanations.

Blauberger et al. (2018) for example, argued that the citizenship turn in the case-law of the Court was caused by changes in the public discourse about intra-EU migration as reflected in national newspapers. The authors submit that judges follow such debates and react in consequence. Harsch and Maksimov (2019) argue in the same vein that judges follow public opinion as measured in opinion polls and decide cases on that basis, *Kadi*[2] in this case. The arguments are interesting but do not exclude alternative explanations, even where such plausible alternatives are provided via legal scholarship.

For example, Carter and Jesse (2018) see the 'citizenship turn' as a natural consequence of the entry into force and the gradual implementation at the national level of the Citizenship directive.[3] The *Förster* case[4] handed down in 2008 was the first restrictive interpretation of EU citizenship law and followed the expiration of the Citizenship Directive's transposition deadline. While *Dano* is certainly a landmark case in that it is unusually clear and prescriptive, it did not, however, establish a new trend regarding residence rights in the EU. Blauberger and al. mention *Förster* as an element of background, but do not discuss the hypothesis according to which change occurred before 2014 (instead focusing on media coverage during that year). In this sense, legal literature carries its own explanation for the citizenship turn, grounded in changes to the relevant legislative rules, that must be considered alongside any notion that legal change is triggered by responsiveness to political factors.

Harsch and Maksimov also exclude alternative hypotheses when explaining the different course taken by the General Court (GC) and the European Court of Justice (ECJ) in *Kadi*. While indeed, the ECJ decided to overturn the GC's judgment, they could have done so for purely legal rather than political reasons i.e. overturning a judgment need not relate to

a change in the political context but rather to the view that an earlier judgment was simply *wrongly decided in legal terms*. *Kadi* was a difficult case, concerning a triad of complicated legal issues – the competence of the Council to adopt the contested measure, the proper relationship between EU and international law, and the balancing of fundamental rights and collective interests such as security. Legal scholarship exhibits robust debates on all of these questions (on autonomy, see Kochenov 2015 on competence, see Garben 2019). The ECJ and GC also display some differences, that are discussed in the legal literature. The ECJ is therefore commonly seen in legal scholarship as more willing to interpret norms in a teleological manner (Weiler 1994; Beck 2013) (compared to the GC which – as a first instance Court – may be more inclined to interpret norms textually and to follow prior jurisprudence). While therefore the GC in *Kadi* relied upon the wording of the UN Charter to conclude that decisions of the Security Council took precedence over EU law, the ECJ insisted that international agreements had to be seen in light of general principles of EU law such as fundamental rights and the rule of law, which would preclude any act of the United Nations breaching basic human rights standards.

The GC judgement was rendered in 2005, while the ECJ decided in late 2008 (in a Grand Chamber formation and with the publication of an Advocate-General Opinion criticizing aspects of the GC judgment in between). Between this period, an important legal change occurred, namely the Lisbon Treaty was drafted, signed in 2007 and expected to enter into force soon after, shifting the EU's Charter of Fundamental Rights from non-binding to part of the EU's primary law. While this was an appeal, and therefore based on prior legal norms, the Charter features prominently in the ECJ's judgement, reflecting the desire of judges to recognize the growing important of fundamental rights in structuring EU law observed by legal scholars throughout this period (Di Federico 2010). It is surely not beyond the realm of plausibility that the judges of the ECJ and GC did not act 'counter-intuitively', as Harsch and Maksimov put it, but had different views on the relevant legal questions than the judges of the GC, and acted accordingly.

The third article we analyse, regarding the Economic and Monetary Union (EMU) in the aftermath of the debt crisis, displays more *qualitative* (if not quantitative) openness in terms of interdisciplinarity. While Scicluna (2018) still favored a theoretical apparatus that mostly relied on extra-legal scholarship (12 legal references against 19 from social science scholarship), she nonetheless integrates insights from legal scholars while emphasising the contextual – read crisis-laden – factors that changed the landscape of economic governance. Scicluna posits EMU as an area of EU governance departing from the traditional model of integration through law dominant in the single market. Drawing from legal literature, Scicluna observes that while EMU is embedded in a legal infrastructure, it is based on different mechanisms of enforcement namely market discipline and political oversight (rather than individual litigation) (Scicluna 2018: 1878). This insight is used to explain institutional behaviour during the Euro crisis i.e. the ability of the ECB to expand its mandate and the inability of an otherwise 'activist' Court to review ECB activity in this area. The article thus uses legal literature to explore and unpack what is a puzzle in the terms of political science, namely the strong empowerment of a non-majoritarian institution, the ECB, in a time of strong inter-governmental control, where integration was facing a post-functionalist backlash (and in the presence of a seemingly limiting legal framework).

Scicluna's piece carries some factors in common with the other two articles. Most significantly, she also advances a political explanation (Scicluna 2018: 1882) for the Court's decisions in *Pringle* and *Gauweiler*, assuming that the Court's unwillingness to fully review and intervene in crisis measures, such as the establishment of the European Stability Mechanism (ESM) and the Outright Monetary Transactions programme (OMT) stems from fear of the likely disastrous political and economic consequences. This conclusion, however, is drawn having considered the legal context, in particular whether the applicable legal norms provided a convincing explanation for the outcome of those cases in and of themselves. Noting disagreement in the legal literature and the unprecedented nature of the measures being reviewed (e.g the adoption of the ESM outside the EU legal order), Scicluna advances a political explanation for judicial behaviour having first surveyed and assessed legal explanations.

While the correlations developed in the first two articles mentioned above still stand, therefore, the theoretical explanations rely on assumptions developed for political actors. Commonly, the authors assume that public opinion or media coverage necessarily play a role in adjudication (since they would do so for politicians): an idea that explicitly clashes with the self-understanding of the legal profession. Harsch and Maksimov thus attempt to explain variations across courts in Kadi by referring to the 'privately held beliefs' (Harsch and Maksimov 2019, 1101) that judges would try to promote when interpreting EU law. The essence of such beliefs refers to incentives judges would have in promoting European integration (or in this case independence vis-à-vis international law). Judges would therefore try to interpret EU law in ways that maximize integration and by extension their own prerogatives. Interpretation would result from a balancing exercise between the interests of other actors such as national governments or public opinion.

Legal scholars, however, see the act of legal interpretation differently – it is not a question of balancing interests but balancing *norms*. Diverging techniques of interpretation such as textualism, consequentialism or teleology allow judges to come to different conclusions when faced with similar cases. These differences are not, however, driven by extra-legal considerations, such as deference to governments or public opinion, but by different views of how to decide cases and what is the 'proper' judicial role: should, for example, judges stick closely to the legal text to better respect the legislative will or understand the Treaty considering overriding goals and principles (such as in *Kadi*, respect for fundamental rights)? Rather than see such legal distinctions as a proxy for a change in the political views of judges, the quest for ruling out alternative explanations would demand that political scientists take legal discourse seriously as another way of explaining shifts in judicial opinion (a bar that only Scicluna's article in this sample seemingly meets).

Overlooking alternative explanations is unfortunately also a frequent blindspot in legal scholarship. Accounts that go beyond legal merit to explain judicial outcomes – such as the 'deservingness' of litigants (Davies 2018) – are welcome since legal scholarship often has a hard time to explain inconsistencies across areas of EU law, i.e. the choice to defer to the choices of the legislator in one area versus interpreting the treaties directly in another. Cases such as *Zambrano* or *Chen* may have been decided in favor of the plaintiff because judges were shocked by the dramatic situation of migrants who tried to protect themselves from serious distress. The limited ability of legal scholarship, however, to understand actors (such as litigants) blinds it to such considerations (leading to puzzlement, as

evidenced by the extensive legal criticism following the two judgments (Hailbronner and Thym 2011).

The importance of inter-disciplinary to law relates to the unusual nature of judges aspolitical actors – they are part of the political system but also may not totally free themselves from the constraints of legal reasoning (Beck 2013; Conway 2012). Turning social phenomena into legal facts supposes a work of 'structural coupling' (Luhmann 2008) that allows judges to exercise their craft. In other words, social change must be mediated into law to be seized by the judicial branch of government, even if extra-legal considerations play a role. This work of translation or coupling precisely distinguishes judges from policymakers, or at least makes judges a class of policymakers with very specific standards. To return to the example of *Zambrano*, the CJEU therefore implicitly recognized the difficulty of squaring the judgment with the applicable legal norms by tempering its effect in subsequent rulings (such as the *Dereci* and *McCarthy* cases). This was termed by the President of the Court a 'stone by stone approach' (Lenaerts 2015). Judges therefore engaged in a different form of balancing law and social expectations – both responding to the need of the litigants and trying to reconcile this change with the wider norms of the legal order. Lawyers simply operate in a different professional and institutional context than politicians and officials, implying a more gradual and legally mediated form of change.

The development of judicialization studies increased the number of potential alternative explanations to judicial behavior, capturing the nature of the CJEU as an institution 'between law and politics' (Saurugger and Terpan 2017). These explanations, however, have left broad epistemological divides between legal and social science scholarship. The explanations provided by new judicialization literature often remain partial, falling short of providing causal arguments able to refute parallel understandings of adjudication.

4. Why is there so little interdisciplinarity in the study of judicialization?

The lack of interdisciplinary dialogue about judicialization in the EU is not surprising, however. Disciplines such as political science and law are meant to accompany students in their eventual professional endeavors, and not solely to facilitate academic research. While – in academic systems such as the US – it is common for law professors to carry training in the social sciences prior to taking up a law school position, European academics in law are likely to be educationally mono-disciplinarily (Samuel 2004). Equally, in the social sciences, the increasing demand that social scientists carry advanced methodological training suggests more attention to developments within their respective discipline than outside of it.

The scientific objectives of lawyers and political scientists therefore increasingly differ. Political scientists increasingly seek to provide empirically informed accounts of society, with a clear focus on causality (Gerring 2012; King, Keohane and Verba 1994). They will articulate their research design and pick the methods suited to prove that one or more empirical phenomena ('cause') have a necessary and sufficient effect on another empirical phenomenon ('effect'). While legal academia shows increasing interest in borrowing empirical methods, it continues to carry a strong *normative* component. The mainstay of legal research remains the norms of the legal order and how unclear, conflicting or evolving norms ought to be interpreted. In the EU context, legal scholars thus mostly seek

to provide normative interpretations of the acquis: their message is at least as much about what the EU should be, and how to make normative sense of EU law's key principles, as it is about how the EU 'actually works'.[5]

This leaves deep ontological divides between law and political science. For lawyers, norms are and ought to be decisive in shaping judicial conduct, which means that judicial actors ought to interpret these norms independently and according to a hierarchy of norms and institutions (Lenaerts and Gutierrez-Fons 2013). Norms are therefore the logical point of departure of any enquiry, constituting the benchmark against which behavior is (normatively) assessed. Therefore, accusations of activism or restraint flow from rule indeterminacy and the choice of judges among plausible[6] alternatives (Beck 2013; Conway 2012).

Political scientists rather focus on behavior, including institutions (such as norms) as opportunities and/or constraints in their models. Norms would not decisively shape action: they would either be a link in the causal mechanism or be simply overlooked in the explanation. Behavior is thus often theorized in a strategic fashion, meaning that the rationality of lawyers and judges would be similar to those of public officials or politicians. Here activism and restraint take-on a different connotation. Activism would characterize an outcome that led the Court to increase its 'power' broadly speaking while restraint would result from a perceived risk of oversight if not override from political authorities (Larsson and Naurin 2016) or from citizens (Harsch and Maksimov 2019; Kelemen 2011). The same concepts are reappropriated by both disciplines, pointing to some overlapping results, but with significantly different explanations.

Disciplinary divides are of course to be expected. Political scientists and legal scholars often pursue different objectives, and their respective conceptual apparatuses are often sufficient to provide plausible answers to the research questions they pose. Yet this divide has become an issue when studying judicialization. The CJEU is a judicial institution located in the interstitial space between law and politics (Saurugger and Terpan 2017). As the supreme court of the polity, it must necessarily act in ways that are political in nature, i.e. adopting choices that cannot be exclusively resolved by recourse to the hierarchy of norms (Stone Sweet 2000). Extra-legal considerations or 'steadying factors' (Beck 2013; Dawson 2014) are added to and sometimes replace classic reasoning techniques. Studying actorness or contexts is thus relevant.

At the same time, judges and lawyers in general are atypical powerholders. In a socially differentiated society where the law has become an autonomous 'system' (Luhmann 2008) or 'field' (Bourdieu 1987), lawyers possess ideas, interests and institutions that are specifically carved to their craft. Empirical accounts of judicial politics must 'take the law seriously' because the actors under study – lawyers – have a vision, a 'habitus' (Bourdieu 1984), that lead them to reexamine reality on their own terms. Judicialization theories that either assume that norm interpretation works in a vacuum, or on the contrary that only extra-legal factors shape judicial behavior, can thus only provide partial accounts of judicial politics.

The disciplinary divide thus establishes blind spots in both disciplines. For example, among legal scholars, there remains an active debate about the 'activism' of the CJEU. Alongside normative questions about the proper judicial role, the debate is informed by a deeply uneven empirical picture – while in some fields, such as rule of law protection and citizenship, legal scholars have observed an increasing willingness of the Court to

extend EU law's reach and scope, in other fields, like EMU and asylum, the Court has often been seen as overly passive (Goldner-Lang 2023). Legal scholars have struggled to explain this variation legally. To give an example, the lack of explicit Treaty rules on domestic judiciaries did not prevent the Court from building an extensive jurisprudence on judicial independence based on Art. 19(1) TEU. At the same time, the Court was extensively criticized by the German Constitutional Court for failing to curb the effects of the ECB's quantitative easing programme in spite of carrying full jurisdiction in this area and the presence of a number of Treaty norms limiting ECB activity (such as Art. 123 and 125 TFEU).

Where legal explanations run out, political science approaches can provide important answers. A new generation of scholarship has thus begun work on precisely why the Court might show variation in its degree of activism or restraint across different fields (incorporating important factors such as politicization and issue salience (Sadl and Hermansen 2023), the practices of referring domestic judges (Mayoral 2019; Pavone 2018) or the behaviour of litigants (Hoevenaars 2022)). This variety of 'law in context' research, and new homes for its dissemination (such as European Law Open, a journal founded by ex-members of the European Law Journal in 2022), offers promise in addressing the limitation of doctrinal EU law research.

Political science explanations of judicialization that exclusively focus on behavioral and contextual elements equally, however, risk overlooking legal explanations as potential triggering mechanisms. Since these do not pay sufficient tribute to the specific logics of the judicial system or field (and instead superimpose rationalities developed about politicians or officials to the judicial world), they unfortunately fall short of their academic gold standard: causality. Explanations concerning judges reading the 'morning newspapers' (Blauberger et al. 2018 about *Dano*), surveying shifts in public opinion to orient changes in legal interpretation (Harsch and Maksimov 2019 about *Kadi*) or simply counting the number of member state observations to calculate threats of override (Larsson and Naurin 2016) are only based on correlations or justify causality at the theoretical level without being able to demonstrate it in the findings, which may lead to debatable conclusions. For example, the yearly media-coverage analysis of free movement issues in national papers in Blauberger's and al. analysis does not tell us if the intensity of this coverage caused the outcome of the *Dano* case (the end of 'social tourism') or on the contrary if the judgement precisely triggered the interest of newspapers about the judicially approved restrictions on free movement.

While it is likely that the Court of the 21st century is no longer as 'tucked away' as it once was in Luxembourg (Stein 1981), the classic judicialization literature mentioned above still argued that the Court generally started a policy movement that was then embraced by other actors (e.g. the Commission after *Cassis de Dijon*: Alter and Meunier-Aitsahalia 1994) rather than reacting to external pressures. More importantly, recent judicialization accounts in political science cannot discard alternative hypotheses already developed in legal scholarship about norm indeterminacy or the choice of one interpretative logic over another (what MacCormick termed first vs second order justifications, or Conway, purposive, literal or contextual interpretations), even when legal factors may sometimes provide more convincing explanations. There is therefore a need to bridge the divide – to encourage novel political science research on legal institutions while doing justice to the unique properties of the legal system. How might this be attempted?

5. A way forward: developing tools for plausible interdisciplinary research on judicialization

Our purpose in identifying a new path forward is not to provide a comprehensive theory of judicialization that could pay sufficient tribute to both strands of scholarships (see e.g. Pavone et al. 2022; Bois et al. 2022), but rather to stress some general elements that could contribute to more genuine dialogue between disciplines.

This dialogue requires firstly upping the bar for what constitutes 'inter-disciplinarity'. The mere study by political scientists of legal institutions or of political discourse by lawyers does not make the resulting research 'inter-disciplinary'. To put it differently, inter-disciplinarity requires engaging not merely with the institutions or 'field' but with the discourse and methods of the opposing discipline. For empirical social scientists, this would require for example a deeper grasp of legal institutions and scholarship. While the plea is not to ask political scientists to read every doctrinal development, it asks for a deeper acquaintance of the arguments developed by legal scholars. This is found already in some publications (e.g. Schmidt 2018; Martinsen 2015), and has been particularly developed by political theorists and sociologists (see e.g. Vauchez 2015). For legal scholars, this would entail questioning the belief that the Kelsenian legal system necessarily provides an answer to any legal question. The works of the political sociologists mentioned above (see also Pavone 2022) shows that even the canonic doctrines of EU law – namely supremacy and direct effect – were the product of intense rhetorical struggles between legal experts who were uncertain about the consequences of their interpretation. Awareness of social science research would aid the legal discipline in understanding the individuals and institutions which shape norms.

Importantly, this inter-disciplinarity should not occur for its own sake (or to secure research funding) but because of its genuine utility in achieving the academic goals social scientists set for themselves. If political science is genuinely engaged in the study of causality, it needs to engage with (or alternatively disprove) a wide range of possible hypotheses. While some of these may be provided by existing theories in political science, at least when studying Courts, many credible accounts for understanding judicialization and legal change lie in legal discourse and in the normative discourse of lawyers themselves. For lawyers, while law remains normative, it often touches on empirical questions, the answers to which lawyers tend to assert rather than prove (such as, for example, the effects of market restrictions, or the necessity of policies, like the ECB's quantitative easing programme, to fulfill institutional mandates). In this sense, the focus of descriptive social science is of immense help to lawyers in proving or disputing legal claims (see e.g. Sadl and Madsen 2016).

A second way forward in improving inter-disciplinary dialogue concerns developing research questions and hypothesis that are plausible in both disciplines (in the sense of being comprehensible within both disciplinary lenses). This requires a research design that takes core features of both disciplines seriously i.e. both the concern of political science for 'actorness' and the role of norms in structuring legal institutions (Bois and Dawson. 2022). In the case of political science, this requires for example refining models which examine judicialization to take into account at least three distinctive features of legal institutions.

The first – frequently discussed already – is the role of norms in structuring legal institutions. While many legal questions are uncertain, they always take one feature as their point of departure – the legal norm in question, which constrains judges in how they act. While, in many cases, legal change might constitute a 'puzzle' in need of explanation through empirical research, in others it might simply be explained by changes in the relevant norms (or whether judges see one norm as hierarchically ranking 'above' another). An important starting point for research on judicialization is therefore whether there is a consensus in legal scholarship that judicialization can be attributed to a particular normative factor (such as the effect of a particular legal doctrine, or the introduction of a new piece of legislation or general principle of law) or whether in fact legal scholarship cannot convincingly explain why a Court acted in the way it did. Plausible inter-disciplinary research would therefore use norms to structure the research questions social scientists ask and answer regarding judicialization.

The second important feature is the nature of the legal profession and its autonomy from ordinary politics. As indicated above, political science research often assumes responsiveness of Courts to political opinion (to various degrees). The level of judicial independence of Courts varies but the CJEU is particularly independent by the standards of international Courts (Dunoff and Pollack 2017). More importantly, even in circumstances where judges may consider themselves bound to respond to the views of the public or their appointing governments, they must do so in a professional context where judicial independence from political control is a core, if not *the core*, institutional value. At the time of writing, the CJEU is still engaged in a tense stand-off with the Polish Constitutional Tribunal (with enormous potential risks) regarding precisely this value.

While this does not preclude responsiveness on the part of Courts to political pressure, it means that political change must happen through the distinct categories and discourse of law. If indeed the *Dano* case, for example, represented some effort to accommodate political opinion, this responsiveness did not manifest itself in a one-off attempt to defer to political preferences in the face of possible 'override' but rather through subtle and gradual changes to the relevant legal norms (such as the gradual attempt observed from *Förster* of reconciling Treaty-based rights to non-discrimination with the text of the Citizenship Directive). Plausible inter-disciplinary research must therefore recognize the gradual and subtle ways in which political influence is manifested in legal categories. To put the point bluntly, if the CJEU did in fact act the way expected to in some political science models, the CJEU, and not just the Polish Tribunal, may warrant investigation regarding 'rule of law backsliding'.

The third important feature to developing credible accounts of judicialization concerns recognizing the role of Courts as dispute resolution bodies. Much of the political science literature (even that strand of it that emphasizes judicial independence from political control), sees Courts as self-interested actors, who seek their own empowerment. This thesis of an 'integrationist' CJEU also of course finds its echo in legal research. While this thesis may be true, the CJEU does not choose its cases, and like any Court, has to respond to the parties before it, resolving their dispute. It also means that the judicial path to the CJEU must be activated, either by national judges, litigants or 'ghostwriters' of EU law (Pavone 2022). The specific features of the parties and the legal questions they raise therefore also have an important bearing on how the CJEU decides. In simple terms, cases

are not only (or even primarily) decided with a view to their broader political implications but are decided in terms of how a specific dispute can be legally resolved.

It is therefore not an accident that some of the most prominent examples of inter-disciplinary research on judicialization often focus on litigants and how they politically mobilise via litigation (Cichowski 2007). This line of research joins political science and law in a common point of contact – how judicial procedure can be utilized to deliver individual and collective justice. Plausible inter-disciplinary research on judicialization therefore also involves recognition of the janus-faced nature of the CJEU: at once an important policy player whose rulings have horizontal implications *and* as a dispute-resolution body that must deliver justice in individual cases.

Collectively, recognition of these features could increase the scope for common inter-disciplinary research by including within social science models features which lawyers see as necessary features of their profession and/or discipline. Some hybrid streams of research like 'Law-in-context' encompass a willingness to integrate this understanding into their analysis. While law in context research understands the connection between law, politics and society at a theoretical level, it rarely includes empirical verification of its claims. For example, arguing that the Court takes into account socio-economic context when solving cases would imply a verification of the contacts made by judges in that regard, e.g. via tracing the process by which extra-legal considerations find their way into rulings or, for example, examining the personal background or political ideas which influence judges. This missing empirical component (which would lead to a greater focus on the everyday lived practice of EU law) is understandable considering the general training of legal scholars, which for the most part does not include knowledge on how to empirically check theoretical claims. The under-developed link between law and the 'outside' would, however, be enhanced by the inclusion in legal-scientific training of techniques of claim-checking. Such an engagement does not necessarily require researchers to conduct their own empirical investigation, or an entire reconfiguration of legal academia as a whole. Rather, it requires of lawyers what we also above demanded of political science, namely incorporating references to empirical social-scientific publications or policy briefs that often raise the same set of contextual questions (e.g. about how politics and society influence law and legal debates) in parallel.

Raising the bar of inter-disciplinarity thus implies change in legal academia as well. As discussed in sociological literature, lawyers have succeeded in establishing a profession with a highly specialized but at the same time exclusionary discourse. This self-closure has had inevitable effects on academic discourse with the result that legal academia – at least its mainstream – tends to ignore the links between legal systems and their 'outside'. In the case of EU law, this conflicts with the changing nature of the norms which EU law is producing. EU law increasingly regulates complex policy areas like digital, environmental and monetary policy where detailed rules become quickly obsolete, where law must interact with changing scientific knowledge, and which sets quantitative benchmarks for policy-makers. There is simply no way of understanding such rules without understanding the technical and political discourse underlying them. The changing nature of EU policy thus creates new opportunities for inter-disciplinarity. In an ideal world, a more legally plausible line of political science research on judicialization would meet legal academia half-way.

6. Conclusion

In the study of judicialization in the EU, European studies has a potentially fruitful common project. Judicial politics in the EU is likely to become increasingly relevant given the role of the CJEU as a major actor shaping the many crises affecting the EU in the last decade. The latest of these is the rule of law crisis, where the Court's power to shape and be shaped by political discourse has been the subject of fierce debate. The ability of judicialization to become a common research project able to understand the Court's influence, however, requires more than a common object of analysis but a shared research field. While lawyers and political scientists need not become each other, they at least require a solid understanding of the methods and starting points of discussions on Courts carried out in other fields. The increasing specialization of the disciplines of law and political science – and need to appeal to the methodological priorities of a 'home' research field – continues to frustrate this goal, as the empirical overview provided in this paper illustrates.

This article pleads for an association of both strands of scholarships that raises the bar for 'inter-disciplinarity'. The goal of such a scholarship would be to grasp the politics of judicial reasoning and the agency of legal institutions while ensuring that the law is 'taken seriously' (Joerges 1996) in empirical research design. This requires adjustment on both sides: for lawyers, greater appreciation of how contextual factors shape rules and institutions, and for political scientists, a recognition of three basic features of legal systems: the role of norms in structuring legal behavior, the professional independence of judges and the dispute resolution function of Courts. Absent such 'common ground', judicialization research is likely to become increasingly implausible from a legal perspective: a missed opportunity for those interested in understanding the role of the CJEU in contemporary EU politics.

Notes

1. We chose to analyze the publications from 1995, 2000, 2005, 2010, 2018 and 2019 in order to assess whether there was an evolution over time or not. The last 2 years are the most recent and will be detailed qualitatively further below. See Annex 1 for all the results per year and per author. See Annex 2 for the precise code book.
2. Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat v Council and Commission.
3. Directive 2004/38/EC.
4. C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep.
5. These are obviously trends and not absolute truths. There are political scientists adopting normative propositions and legal scholars incorporating empirical elements in their design.
6. Plausibility remains an essential feature, otherwise judges would act *contra legem* and thus undoubtedly be activists, independently of the disciplinary perspective.

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References

Adams, M., de Waele, H., Meeusen, J., Straetmans, G. 2013. *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*. Oxford: Hart Publishing.

Alter, K.J. 1998. "Who are the "Masters of the Treaty"? European Governments and the European Court of Justice." *International Organization* 52 (1): 121–147. doi:10.1162/002081898550572.

Alter, K.J. 2001. *Establishing the Supremacy of European Law*. New York: Oxford University Press.

Alter, K.J. 2009. *The European Court's Political Power*. New York: Oxford University Press.

Alter, K.J., and S. Meunier-Aitsahalia. 1994. "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision." *Comparative Political Studies* 26 (4): 535–561. doi:10.1177/0010414094026004007.

Arnull, A. 2006. *The European Union and Its Court of Justice*. Oxford: Oxford University Press.

Beck, G. 2013. *The Legal Reasoning of the Court of Justice of the EU*. Hart: Oxford.

Blauberger, M., A. Heindlmaier, D. Kramer, D S. Martinsen, J. Sampson Thierry, A. Schenk, and B. Werner. 2018. "ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence." *JEPP* 25 (10): 1422–1441. doi:10.1080/13501763.2018.1488880.

Blauberger, M., and S.K. Schmidt. 2017. "The European Court of Justice and Its Political Impact." *West European Politics* 40 (4): 907–918. doi:10.1080/01402382.2017.1281652.

Bois, J., M. Dawson, et al. 2022. "Sociological Institutionalism as a Lens to Study Judicialization: A Bridge Between Legal Scholarship and Political Science." In *The Politics of European Legal Research*, edited by Bartl M., Lawrence, J., 94–108. Cheltenham: Edward Elgar.

Bourdieu, P. 1984. Distinction: a social critique of the judgement of taste. Harvard University Press.

Bourdieu, P. 1987. "The Force of Law: Toward a Sociology of the Juridical Field." *The Hastings Law Journal* 38 (5): 805–853.

Burley, A. M., and W. Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47 (1): 41–76. doi:10.1017/S0020818300004707.

Byberg, R. 2017. "The History of Common Market Law Review 1963–1993. Carving Out an Academic Space for Europe." *European Law Journal* 23 (1–2): 45–64. doi:10.1111/eulj.12201.

Cappelletti, M., Seccombe, M., Weiler, J.H. 1986. "Integration Through Law: Europe and the American Federal Experience." In *Methods, Tools And Institutions*, edited by Mauro Cappelletti, Monica Seccombe, and Joseph Weiler, New York: Walter de Gruyter and Co., 1986.

Carter, D., and M. Jesse. 2018. "The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens"." *European Papers* 3 (3): 1179–1208.

Cichowski, R. 2007. *The European Court and Civil Society*. Cambridge: Cambridge University Press.

Conway, G. 2012. *The Limits of Legal Reasoning and the European Court of Justice*. Cambridge: Cambridge University Press.

Davies, G. 2018. "Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication." *Journal of European Public Policy* 25 (10): 1442–1460. doi:10.1080/13501763.2018.1488881.

Dawson, M. 2014. "How Does the European Court of Justice Reason?" *European Law Journal* 20 (3): 423–435. doi:10.1111/eulj.12089.

Derlén, M., and J. Lindholm, edited by. 2018. *The Court of Justice of the European. Union*: Multidisciplinary Perspectives. Hart.

Di Federico, G., edited by. 2010. *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*. Dordrecht: Springer.
Dunoff, J., and M. Pollack. 2017. "The Judicial Trilemma." *The American Journal of International Law* 111 (2): 225–276. doi:10.1017/ajil.2017.23.
Garben, S. 2019. "Competence Creep Revisited." *JCMS: Journal of Common Market Studies* 57 (2): 205–222. doi:10.1111/jcms.12643.
Garrett, G., R D. Kelemen, and H. Schulz. 1998. "The ECJ, National Governments, and Legal Integration in the European Union." *International Organization* 52 (1): 149–176. al. doi:10.1162/002081898550581.
Gerring, J. 2012. *Social Science Methodology. A Unified Framework*. Cambridge: Cambridge University Press.
Goldner-Lang, I. 2023. "Towards Judicial Passivism in EU Migration and Asylum Law in de Witte, Dawson & Muir." In *Revisiting Judicial Politics at the European Court of Justice*, edited by Bruno De Witte, Dawson Mark, and Muir Elise, (forthcoming), Cheltenham: Edward Elgar.
Hailbronner, K., and D. Thym. 2011. "Case C-34/09, Gerardo Ruiz Zambrano V. Office National de L? emploi (ONEm) Judgment of the Court of Justice (Grand Chamber) of 8 March 2011." *Common Market L Rev* 48 (Issue 4): 1253. doi:10.54648/COLA2011048.
Harsch, M., and V. Maksimov. 2019. "International Courts and Public Opinion: Explaining the Cjeu's Role in Protecting Terror Suspects' Rights." *JCMS* 57 (5): 1091–1110. doi:10.1111/jcms.12874.
Hoevenaars, J. 2022. "EU Law Mobilization: Lessons from a Bottom-Up Approach." In *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness*, edited by Nicola, F., and Madsen, M., 82–104. Cambridge: Cambridge University Press.
Joerges, C. 1996. "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration." *European Law Journal* 2 (2): 105–135. doi:10.1111/j.1468-0386.1996.tb00021.x.
Kelemen, D. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Cambridge (MA): Harvard University Press.
King, G., Keohane, R., Verba, S. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton: Princeton University Press. .
Kochenov, D. 2015. "EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?" *Yearbook of European Law* 34 (1): 74–96. doi:10.1093/yel/yev009.
Larsson, O., and D. Naurin. 2016. "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU." *International Organization* 70 (2): 377–408. doi:10.1017/S0020818316000047.
Lenaerts, K. 2015. "EU Citizenship and the European Court of Justice's 'Stone-By-Stone' Approach." *International Comparative Jurisprudence* 1 (1): 1–10. doi:10.1016/j.icj.2015.10.005.
Lenaerts, K., and J. Gutierrez-Fons. 2013. "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice." *Columbia Journal of European Law* 20 (2): 3–61.
Luhmann, N. 2008. *Law as a Social System*. Oxford: Oxford University Press.
Martinsen, D. 2015. *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union*. Oxford: Oxford University Press.
Mattli, W., and A.M. Slaughter. 1998. "Revisiting the European Court of Justice." *International Organization* 52 (1): 177–209. doi:10.1162/002081898550590.
Mayoral, J. A. 2019. "Judicial Empowerment Expanded: Political Determinants of National courts' Cooperation with the CJEU." *European Law Journal* 25 (4): 374–393. doi:10.1111/eulj.12334.
Pavone, T. 2018. "Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance." *Journal of Law and Courts* 6 (2): 303–331. doi:10.1086/697371.
Pavone, T. 2022. *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe*. Cambridge: Cambridge University Press.
Pavone, T., and J. Mayoral. 2022. Statistics as if Legality Mattered: The Two-Front Politics of Empirical Legal Studies. In Bartl M., Lawrence, J. eds. Statistics as if Legality Mattered: The Two-Front Politics of Empirical Legal Studies , *The Politics of European Legal Research*. Cheltenham: Edward Elgar 78–93
Rasmussen, H. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff.

Sadl, U., and S. Hermansen. 2023. "The Legal Response of the European Court of Justice to Political Divisions Between and Within the Member States." In *Revisiting Judicial Politics in the European Union*. edited by. Dawson, M. and de Witte B., Muir, E., Cheltenham: Edward Elgar.

Sadl, U., and M.R. Madsen. 2016. "Did the Financial Crisis Change European Citizenship Law?" *European Law Journal* 22 (1): 40–60. doi:10.1111/eulj.12167.

Samuel, G. 2004. "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences." In *Epistemology and Comparative Law* , edited by van Hoecke M., 35–77. Oxford: Hart.

Saurugger, S., and F. Terpan. 2017. *The Court of Justice of the European Union and the Politics of Law*. Basingstoke: Palgrave Macmillan.

Schmidt, S. K. 2018. *The European Court of Justice and the Policy Process. The Shadow of Case Law*. Oxford: Oxford University Press.

Scicluna, Nicole. 2018. "Integration Through the Disintegration of Law? The ECB and EU Constitutionalism in the Crisis." *Journal of European Public Policy* 25 (12): 1874–1891. doi:10.1080/13501763.2017.1362026.

Slaughter, A.M., Stone Sweet, A., Weiler, J.H. 1998. *The European Court and National Courts. Doctrine and Jurisprudence*. Oxford: Hart Publishing.

Stein, E. 1981. "Lawyers, Judges, and the Making of a Transnational Constitution." *The American Journal of International Law* 75 (1): 1–27. doi:10.2307/2201413.

Stone Sweet, A. 2000. *Governing with Judges. Constitutional Politics in Europe*. New York: Oxford University Press.

Stone Sweet, A. 2004. *The Judicial Construction of Europe*. New York: Oxford University Press.

Vauchez, A. 2015. *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity*. Cambridge: Cambridge University Press.

Weiler, J. H. H. 1991. "The Transformation of Europe." *The Yale Law Journal* 100 (8): 2403–2483. doi:10.2307/796898.

Weiler, J.H.H. 1994. "A Quiet Revolution – the European Court of Justice and Its Interlocutors." *Comparative Political Studies* 26 (4): 510–534. doi:10.1177/0010414094026004006.

Annexes

Annex 1: Detailed scientometrics of JCMS and JEPP articles about the CJEU

	Legal scholarship	Other	Total
	1995		
JEPP			
Wincott	15	17	32
Lovecy	15	23	38
Peterson	0	78	78
Hayes-Renshaw	0	24	24
JCMS			
Wincott	2	16	18
Aspinwall	3	30	33
Sun/Pelkmans	1	10	11
Moravcsik	5	24	29
	2000		
JEPP			
Tallberg	14	21	35
Setter	9	42	51
Doleys	8	88	96
Shaw	62	59	121
	2005		
JEPP			
Beach	14	36	50
De Burca	16	30	46
Auer	6	9	15
McKay	5	36	41
Murphy	9	27	36
Papadopoulos	5	52	57
Bugdahn Dr	29	50	79
Obinger/Liebfried/Castles	0	49	49
Moravcsik	1	63	64
JCMS			
Martinsen	23	40	63
Toggenburg	11	11	22
Mabbett	25	19	44
	2010		
JEPP			
Wasserfallen	8	21	29
Della Sala	3	10	13
Howarth/Sadeh	4	29	33
Kemmerling	3	43	46
Menz	0	23	23
Bellamy	11	47	58
Szarka	1	43	44
JCMS			
Lindstrom	2	29	31

(*Continued*)

(Continued).

	Legal scholarship	Other	Total
Wind	31	21	52
Dobson	7	15	22
Toller	7	58	65
Dougan	8	0	8
Börzel	4	134	138
	2018		
JEPP			
Schimmelfennig	0	21	21
Bellamy/Lacey	9	29	38
Blauberger and al.	15	21	36
Davies	13	15	28
Kramer and al.	9	26	35
Schenk/Schmidt	10	22	32
Hilson	17	5	22
Freudlsperger	12	29	41
Hübner	11	38	49
Scicluna	12	19	31
JCMS			
Niemann/Zaun	3	19	22
Slominski/Trauner	8	41	49
Genschel/Jachtenfuchs	3	48	51
Tatham	1	39	40
Dimitrova/Brkan	20	9	29
Scipioni	7	18	25
Kostakopoulou	19	36	55
Thielemann/Zaun	4	23	27
Cardwell/Snaith	22	35	57
Lavenex	3	32	35
Hix	1	8	9
Kleine/Pollack	1	51	52
Phelan	11	23	34
	2019		
JEPP			
De Wilde	0	49	49
Jaremba/Mayoral	17	36	53
Hooghe/Marks	2	65	67
Steinbach	26	26	52
Martinsen/Werner	2	21	23
JCMS			
Gerbrandy	40	26	66
Chiru/Stoian	0	31	31
Harsch/Maksimov	17	42	59
Daidouji	12	25	37
Mussche/Lens	18	37	55
Van den Brink/Kochenov	22	7	29
Cardwell	31	20	51
TOTALS	**765**	**2319**	**3084**

Annex 2: Code book regarding selection and analysis of judicialization articles

All volumes from JCMS and JEPP from 1995, 2000, 2005, 2010, 2018 and 2019 were systematically analyzed. Each article published in these volumes was subject to a quantitative text analysis, in order to identify mentions of the CJEU.

To make the cut, articles had to include at least 4 separate mentions of the CJEU (separation meaning a mention of the Court in 4 different sentences). The word search consisted of 3 steps: 1) search of "CJEU", 2) "ECJ" and 3) "court". The combination allowed for grasping the diversity of labels under which the CJEU is referred to in the literature. Each analysis was followed by a reading of the spotted section to assess whether the mention truly referred to the CJEU. This was needed for the search of the word "court", which referred to other judiciaries such as the European Court of Human Rights, or the European Court of Auditors.

The selected articles underwent scientometrics research, where the aim was to classify the origin of the publication and order them in 2 categories: "legal scholarship" and "other scholarship". Only academic publications in peer-reviewed journals and academic book publishers were considered. Were thus excluded from the analysis, blog posts, policy briefs and unpublished working papers.

The difficulty was in setting a limit to the realm of legal scholarship. The strategy retained here was a strict coding, that classified as legal scholarship any reference that proved interdisciplinary. The place of publication (not the author) was the decisive criterion for ordering. Were classified as legal scholarship all references that were published in academic journals defining their scope and ambitions as defining exclusively and partially legal questions. Journals welcoming different disciplinary lenses (e.g. *The European Journal of Risk Regulation*) were classified as legal references. For books, the coders had a look at the series in which these were published (e.g. *Modern Studies in European Law*) and classified as legal every interdisciplinary series (e.g. *Studies on International Courts and Tribunals*). All the other references were classified as other scholarships.