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"Government Contained?"

Explaining Spanish Supreme Court's decisions on EU law

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ABSTRACT: The question of why and when European Law is enforced by national courts may be one of the most important questions that scholars on the European Union seek to answer. Citizens and other social and economic actors turn to courts as an instrument of enforcement when implementation problems of EU law occur in their countries. The main aim of this work is to understand the main mechanisms behind the judicial enforcement of EU law, looking for this purpose at the diverse elements that play a part during the judicial decision-making of the Spanish Supreme Court, which judgments may shape the impact of EU regulation on national policies. The study finds to what extent high courts are concerned about the reaction of the authorities. Moreover, the results show how the courts cite ECJ to support their decisions where the EU law challenges the main principles and prerogatives of the national authorities.

KEYWORDS: ECJ rulings, EU law enforcement, Member States, Supreme Court, judicial policy-making, strategic behavior.

INTRODUCTION

The question of why and how European Law is applied by courts may be one of the most important questions that scholars on the European Union seek to answer. Citizens and other social and economic actors turn to courts as a last resort of enforcement when implementation problems of EU (European Union) law occur in their countries. Citizens and interest groups hold in their hands a powerful weapon to enforce European regulation when courts become involved in the process of implementation of EU law (Slepcevic 2009; Stone Sweet 2004). Therefore, this important role of national courts makes crucial the understanding of the conditions under which national courts enforce EU law to unveil the dynamics of the judicial implementation of EU legislation.

The study of the enforcement of EU law by national courts has usually focused on the most important cases that have resulted in the application of EU law decided by high courts. Moreover, scholars who have sought to systematically explain the compliance with EU law by national courts have mostly looked to the use of preliminary references (Carrubba and Murrah 2005) and the compliance with the European Court of Justice (ECJ) (Ramos Romeu 2006), omitting to determine which factors induce national courts to enforce EU law. The main aim of this work is to understand the main mechanisms behind the enforcement of EU law by national courts (NCs), looking for this purpose at the diverse characteristics and elements that play a part during the judicial decision-making. The analysis explores the judicial responses of national high courts to diverse incentives and constraints present during EU law cases and how these factors determine the enforcement of EU law by courts when they make a decision, studying the case of the Spanish Supreme Court.

The study finds out to what extent national courts are concerned about the reaction of the competent authorities. Second, there is evidence that national courts opt to cite ECJ in those cases where the EU law challenges the main principles and prerogatives of the national authorities of each Member State. These main results empirically corroborate the conclusions of Georges and Takis Tridimas' (2004), Ramos' (2003; 2006) and Obermaier' (2008) on the use of ECJ rulings as political safeguard against governments' non-compliance. This paper seeks to complement these contributions by offering a strategic explanation of the EU law decisions of national high courts, taking into account the position of each litigant in relation to EU law, that is, whether the appellant/respondent is in favor or against EU law enforcement.

The paper is organized as follows: in the next section I briefly describe the pattern of the Spanish Supreme Court in the application of EU law. The second section discusses the different theories given to explain why and how national courts enforce EU law. The third section describes the data, variables, and method used for the analysis. In the following section I use quantitative analysis to test the arguments of the previous sections, closing the paper with the conclusions.

THE ENFORCEMENT OF EU LAW BY THE SPANISH SUPREME COURT (2000-2009): HIGH COURTS AS ALLOCATORS OF EU RIGHTS, BENEFITS AND POLICIES

This research focuses on explaining the application of EU law by the Spanish Supreme Court from 2000 to 2009. This consideration is determined by the structure and function of appellate bodies, such as Supreme Courts, as allocators of gains and losses (Haynie, Songer, Tate, and Sheehan 2005). While in ordinary courts, the resolution of the dispute affects only the parties directly at dispute, for appellate and high courts the judgments serve as statements that shape the relationship of the EU law with the rest of the legal domestic system, at the same time that determines the impact of EU regulation with evident consequences for the development of national policies. Somehow, these decisions create policy precedents that are broadly applicable to other similar situations in which citizens, business, NGOs or the government are involved. Therefore, Supreme courts act as a political body that may determine the future development and implementation of governmental policies when shaping the allocation and enforcement of rights and benefits under EU regulation. The consequences of these judicial choices for EU policy development make necessary the understanding of the factors that influence this judicial policy implementation.

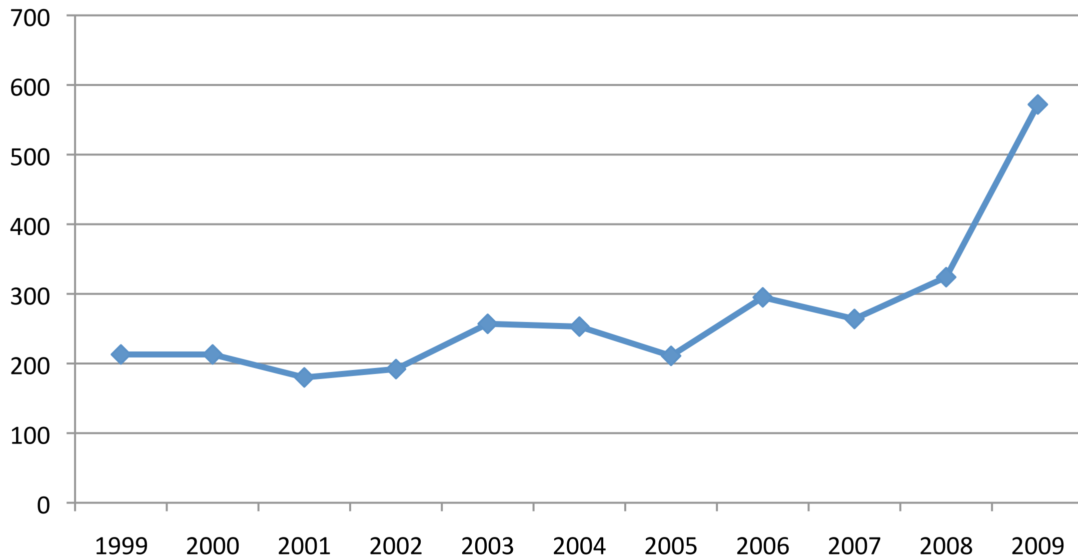
Its definition as high court does not make it free from political or interest groups pressures. On the contrary, despite being one the highest institution in the hierarchy of the judicial system and main enforcer of law in Spain, its decisions are still under the judicial review of the Spanish Constitutional Court in case they make a decision enforcing EU law against the national constitution. Second, political institutions such as government and administration still retain faculty to react to its decisions. This means that administration and governments have the capacity to avoid judicial decisions misapplying, obstructing or non-applying EU law courts' judgments. Another alternative for governments and parliament is the override of national courts' rulings by the legislature passing new

legislation (Bednar, Jr., and Ferejohn 2001; Carrubba 2009; Ferejohn and Shipan 1990; Ferejohn and Weingast 1992; Rogers 2001; Staton and Vanberg 2008).

Regarding its structure, the selection of the magistrates of the Supreme Court may be determined by factors related to the political attachment or compliance of judges with politics, apart from their acknowledged experience in legal fields. For example, in most cases, the nomination of the new magistrates is determined by a system of quotas and bargaining that is linked to the different political factions in the Judicial Council. Moreover, their careers are controlled by the Spanish Judicial Council *(Consejo General del Poder Judicial)*, linked to political interests in its nomination and operation as well. Hence, the role that political interest performs in the selection and career of judges of the Supreme Court, some of whom may become judges more responsive for their decisions against political interest, and, specially the government. These considerations underline the fact that, as a judicial and political body, it is subject not only to legal factors but also several political ones which may, to some extent, influence the application of EU law in some important policy issues. National courts anticipating these ex-ante (selection and monitoring) and ex-post (non-compliance) threats may attenuate their decisions securing at least the compliance by national competent institutions. They can do it, for example, enforcing national law compliance according to governments' policy preferences.

Since the Spanish accession to the European Community, the Spanish Supreme Court has received around 5200 cases concerning EU law. As we observe in figure 1, in the period of interest more than half of these EU law cases have been filed (n=3146). This rise in EU law cases filed in the Supreme Court stresses the increasing importance of this court for the enforcement of the EU regulations as the integration has deepened in several policy issues.

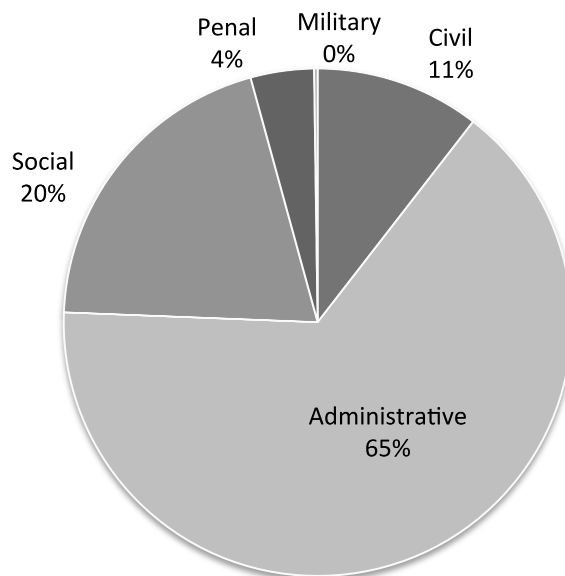
Figure 1: EU law cases filed in the Spanish Supreme Court (1999-2009)



Source: CENDOJ database of the Spanish Supreme Court: www. http://www.poderjudicial.es/search/index.jsp

Observing the distribution of EU law cases within the Supreme Court, we realize a more relevant detail, which is the importance of this appellative body for the implementation of EU law by governmental and public bodies. More than a half of the cases (65% of EU law cases) are judged in administrative courts concerning decisions and acts taken by the administration, government or any public body. It means that most of the decisions taken in this courtroom of the Supreme Court as regards EU law may have a significant impact on the behavior of political institutions and policies, especially, after a judgment allowing an appeal against acts or regulations passed by the government or administration.

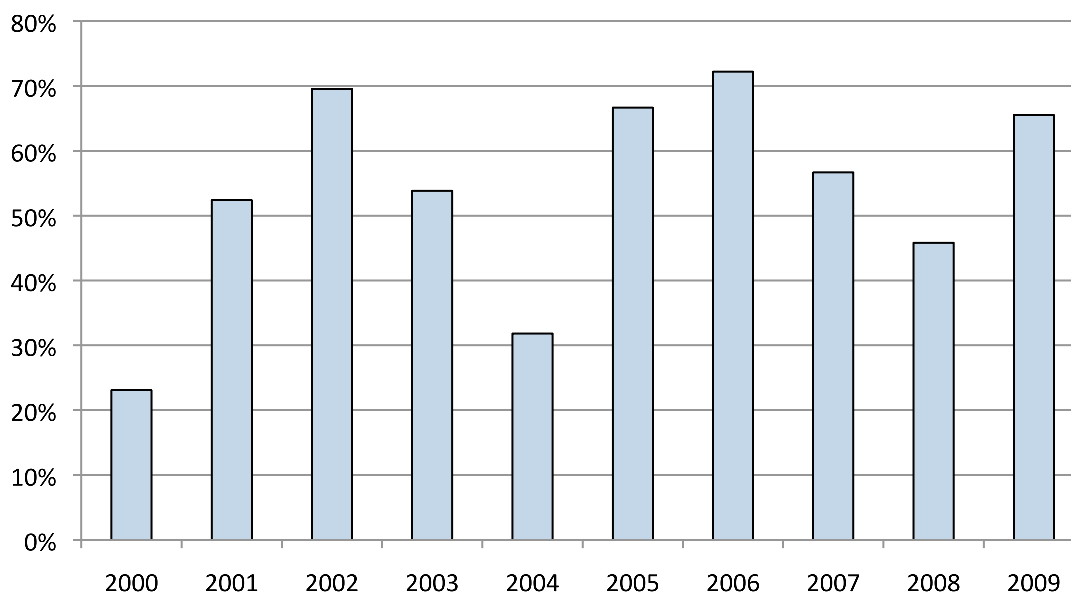
Figure 2: Distribution of EU law cases in the Supreme Court by jurisdiction



Source: CENDOJ database of the Spanish Supreme Court: www. http://www.poderjudicial.es/search/index.jsp

Concerning to the enforcement of EU law, figure 3 shows the diversity in the response of the Supreme Court when the litigants invoked EU law enforcement:

Figure 3: Success Rate on the enforcement of EU law (2000-2009)



Source: Caselex database

The explanations of these differences on the enforcement are used to be limit to the consideration of legal rules that guide the application of law. However, the logic of law is only one more constraint within the judicial-decision making process. There are other institutional factors, such as interest groups or governments, which may affect the judicial enforcement of EU law. From my point of view, for the explanation of this variance scholars must also take account of the institutional context, preferences and strategies of national judges as regards other actors in the domestic system that can influence or place constraints upon the NCs' decisions. For that reason I will base my analysis on the strategic decision-making of national courts, disentangling the incentives and constraints of national judges in enforcing EU law.

EXPLAINING THE ENFORCEMENT OF EU LAW BY NATIONAL COURTS: ECJ RULINGS AS A 'POLITICAL SAFEGUARD'

There are several accounts in the literature that explain the application of EU law based on different theories of judicial behavior: legal, realist/inter-governmentalist and empowerment/neo-functionalist theories. One of the goals of this paper is to test empirically these three explanations that one can find in the literature of European Judicial Politics for the enforcement of EU law. Firstly, legal explanations posit that national court

want to maximize the correct application of EU law in their decisions, using the variations in national legal cultures and doctrines as an explanation (Chalmers 2001; Stone Sweet and Brunell 1998). This model assumes that the behavior of judges is determined by the rules (substantive and procedural rules), and legal traditions (e.g. monism/dualism) that regulate the application of EU law despite the constraints that other actors can bring to courts.[1]

The second theory to consider is the *realist or inter-governmentalist* (Garrett 1995; Garrett, Kelemen, and Schulz 1998). National courts still interested on maximize the correct interpretation of EU law, care about the implementation of the compliance of their rulings by national authorities. Meanwhile, national authorities such as the government and the administration will try to maximize their own policy preferences neglecting or containing the application of EU law when it is invoked against their most preferred regulations and policies.

Assuming these divergences in the preferences between institutions, governments may try deliberately to contain the enforcement EU law by national courts if they run counter to their policy interest or power (Conant 2002). Therefore, we can expect that European law enforcement by courts will be less if the European provisions to be implemented are opposed by the competent authorities supporting national provisions by means of the *ex-ante* and *ex-post* controls and political threats that Member States can put to NC (see page 2-3 above). Scholars have argued that these threats can influence judicial decision-making. Courts, by modifying or adapting their rulings in anticipation of a possible non-compliance by the competent authorities, may secure better outcomes than if they act myopically enforcing their most preferred EU legal or policy interpretation (Carrubba, Gabel, and Hankla 2008; Ferejohn, Rosenbluth, and Shipan 2007; Ferejohn and Shipan 1990). Moreover, non-compliance can also undermine a court's public legitimacy, and thereby reduce its future influence on policy and, to some extent, provoke removals from some justices of the court (Carrubba 2009; Carrubba, Gabel, and Hankla 2008; Staton and Vanberg 2008). Either way, as long as courts care about implementing their judgments, they have an incentive to anticipate public institutions reactions when making their rulings concerning EU law.

[1] A more sophisticated explanation of the legal model, the team model, was developed by Kornhauser (1992) and tested by Ramos Romeu to understand adjudicatory practices in European courts. "It draws from the institutional position of judges to posit that they share the common goal of maximizing the number of correct decisions given their resource constraints. The model says that courts in different levels of the hierarchy have different functions and most of the problems of courts consist of designing adequate adjudicatory strategies given the cases they hear" Ramos Romeu, Francisco. 2002. "Judicial Cooperation in the European Courts. Testing Three Models of Judicial Behavior." *Global Jurist Frontiers* 2.

According to these factors, I hypothesize that:

*h_1: **Government Deference:** The Spanish Supreme Court is less likely to enforce EU law when government preferences are opposed to EU law enforcement.*

The third theory, the empowerment or neo-functionalist model, stresses the importance of the cooperation supranational judicial institutions in the process of judicial enforcement. NCs, as strategic actors as regards national institutions eager to protect their power control over national policies, will empower themselves against those institutions to secure their interests, competences and policy preferences within their own national legal and political context. According to empowerment explanations, NCs may enforce the compliance of the EU law through preliminary references (PR) and ECJ rulings to avoid the risk of a reversal of their domestic rulings (Conant 2002). Hence, the national judiciary will refer to the ECJ as a 'sword' to foster integration and to force change on reluctant governments (Obermaier 2008; Stone Sweet 2004). In words, of Ramos (2006: 400), "judges are strategic towards other political actors and invoke precedent to legitimize their exercise of power in the domestic context and divert criticism".[2]

EU legal system is organized to deal with non-compliance of Member States, especially when national courts enforce EU law complying with ECJ precedent. As Stone Sweet and Brunell (2010: 9): "Member State (…) non-compliance with any important ECJ ruling will generate new litigation, and new findings of non-compliance." Therefore, NC referring cases and applying the ECJ rulings may force the administration and governments to consider implementing the rulings under the threat of receiving multiple lawsuits, infringement procedures or penalties against their non-compliance.

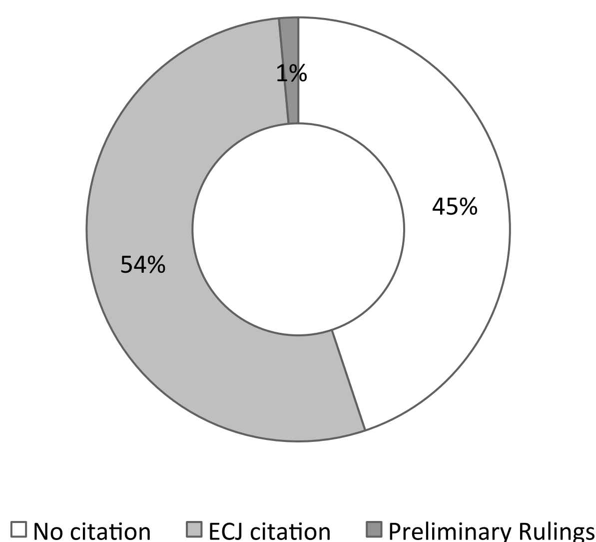
Judges can decide the way in which they deal with EU law cases, such as their application of EU law, or take into consideration the opinion of other courts, that is, adjudicatory practice (Tridimas and Tridimas 2004). European courts rely on two types of adjudicatory practices: the use of PRs and the citation of cases previously decided by the ECJ. Concerning the use of PRs, NCs request ECJ rulings in order to provide an interpretation of an EU law provision or to declare the validity of an EU act. While PRs imply the request by NCs of an ECJ decision for clarification of a certain case at the

[2] Empowerment explanations are not restricted to the competition between NCs and the political and administrative institutions. As Alter points out, lower and higher courts have different institutional incentives. Lower courts tried to empower themselves through the PRs procedure, playing the higher courts and the ECJ off against each other so as to influence legal developments in the direction their prefer Alter, K. J. 1996. "The European Court's Political Power." *West European Politics* 19:458-87, —. 2001. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe.* Oxford; New York: Oxford University Press.. However, these assumptions are not tested in this paper due to I only consider high court's decisions.

national level, the rule of *stare decisis* requires that an earlier decision provides a reason for deciding a subsequent similar case in the same way (Kornhauser 1992). Among the cases already decided by the ECJ, national courts will be able to find an answer to the issues it faces supporting the enforcement of EU law.

National courts can make use of these adjudicatory practices for avoiding criticism and legitimating their decisions against the menace of reversal of the government or other courts (Ramos Romeu 2006). Hence, in the same vein PR, citing the ECJ, may increase the likelihood that the government complies with the national court's ruling in fields that are problematic for the reason that they run counter to government's interest. In the sample used for this study, we observe (see figure 4) how the Spanish Supreme Court made recurrent use of adjudicatory practices to support its opinions:

Figure 4: Adjudicatory practices of the Spanish Supreme Court (2000-2009)



The percentages indicate some preference of national courts for the use of ECJ citation instead of an ECJ ruling directly related to the case in hand. However, the citation of an ECJ previous ruling has it own risk. First of all, the empowerment of the national judgment is less due to the fact that the ECJ is not directly involved in the judicial process. Once a national court has received an ECJ ruling, the ECJ asks for a report expecting that the national judges have implemented its decisions at the national level. So, the threat of the reaction of the ECJ against non-compliance with its decisions has the power to legitimize national rulings taken by the national court against governments. Nevertheless, this supranational judicial control is missing in the case of ECJ citations, reducing the persuasiveness of the precedent against EU law opponents. Second, precedential practices are intrinsically submitted under a set of equivalence criteria that determine when two cases

are alike. Having a limited set of judgments made by the ECJ related with certain issues, national courts will find out those ECJ citations only partially fulfilled their policy expectations, or that they have a limited application to the case at hand. As a solution they should refer to the ECJ, to wait for a ruling that enforces their most preferred policy or legal interpretation.

By the contrary, an ECJ ruling has its own disadvantages as well. First, there is the risk that the ECJ does not give a response to the case at hand due to the fact that the Court considers that the issue was already discussed in a previous filed case. This situation limits the possibility of searching for new ECJ rulings that could satisfy national courts' preferences. Secondly, the ECJ takes decisions that sometimes do not meet the expectations of national courts (Nyikos 2003; Nyikos 2006). Apart from the delay in the proceedings, the discretion of interpretation of the ECJ could sometimes generate rulings against the interest of the national courts. If that is the case, judges should assume several costs depending on how they react to the decision of the ECJ. On one hand, one of these costs is the effort that would be invested in non-enforcing, re-referring or reformulating the ECJ ruling in the case that they find the ruling objectionable. Moreover, rulings disregarding ECJ ruling could carry new costs in terms of the reputation of national judges if litigants appeal the application in another court. On the other hand, courts resigned to accept non-preferred rulings also incur a loss in that it diminishes the utility extracted from this ECJ's decision. Hence, having these advantages and disadvantages, national courts will be determined in their choice between ECJ precedents or preliminary references depending on three key factors, among others: how they value their most preferred policy, the closeness of the previous decisions taken by the ECJ to the policy preferences, and their risk aversion to non-satisfactory ECJ rulings.[3]

Once I have identified the reasons that influence the decision of using ECJ precedent to support its judgments in comparison with preliminary references, I will test whether the Supreme Court use them to avoid criticism in the application of EU law against public institutions. Hence, I hypothesize that:

h_2: ***Government Challenge:*** *The Spanish Supreme Court is more likely to enforce EU law against public institutions when it can support its opinion citing an ECJ ruling.*

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[3] Other factors must be taking into account to assess why national courts cite ECJ rulings. These elements have been already mentioned in Tridimas & Tridimas Tridimas, Georges and Takis Tridimas. 2004. "National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure." *International Review of Law and Economics* 24:125-145.; and Ramos' research Ramos Romeu, Francisco. 2003. "Adjudicatory Practices in the European Courts: A Theoretical and Empirical Analysis." School of Law, New York University, New York City.

DATA, VARIABLES AND METHOD

To assess the enforcement of EU law by the Spanish Supreme Court, the study comprises a dataset on EU law cases that contains information on particular aspects of the judgments that allows an analysis of the two hypotheses presented before.

a) *Dependent variable: EU law enforcement.*

The dataset was gathered from the CASELEX database that contains EU law cases decided by European higher courts. For this study I took the all the cases decided by the Spanish Supreme Court included in the database (n=205)[4]. At this point, I codified the treatment that the court gave when considering whether to enforce EU law in the case at hand[5]. To do this I used the following criteria taken from Ramos (2003) to classify EU law enforcement:

0. *The Supreme Court does not enforce EU law because:*
   - 0.1. It is not temporally applicable to the case at hand
   - 0.2. It is not substantially or subjectively applicable to the case
   - 0.3. It does not have direct effect.
   - 0.4. National law is in compliance with the EU law
   - 0.5. It applies international law
   - 0.6. It is not superior to national law
   - 0.7. There is no EU law applicable to the case at hand.
1. *The Supreme Court enforce EU law:*
   - 1.1. In conjunction with national law
   - 1.2. In conjunction with international law
   - 1.3. In spite of national law
   - 1.4. In spite of international law
   - 1.5. In support of national law

The dependent variable adopts the value 1 whenever the Supreme Court enforces EU law and 0 otherwise. Within the dataset there are 112 out of 205 cases that enforce EU law (54.63% of the cases).

b) *Main explanatory Variables:*

- *Against State or public institutions:* The variable adopts the value 1 if the government (national or regional), administration or public body is against the enforcement of EU law either because they argue that EU law is not applicable to the case at hand or because their

[4] In the cases that the Supreme Court has solved more than one important question regarding the application of EU law, each question has been considered as different case law. Nine cases has been doubled coded distinguishing the particular aspects of each question such as, position of the appellant regarding EU law application, the use of ECJ citation, the position of the government, etc. This coding scheme allows to accurately depicting the court's ruling when, in the same case, its ruling favors one litigant on one set of issues but the other litigant on other issues. Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102:435-452..

[5] The codification of the law cases was based on my subjective evaluation.

act or national law was already implemented according EU law, and 0 otherwise. According to the main argument of the paper, I expect the Supreme Court to apply EU law less when the government or administrative body is against its enforcement.

- *ECJ citation:* The variable codes 1 if the Supreme Court has cited an ECJ ruling and 0 otherwise. As I mentioned before, I expect a positive effect on the use of ECJ citations when national courts wants to apply EU law with the intention to reinforce their opinion against public institutions. To test this argument I will interact this variable with 'Against state or public institutions' variable.

c) Control Variables:

- *Type of EU law invoker:* This variable adopts the value of 0 if an individual is invoking EU law enforcement against the defendant, 1 if it is a firm, 2 if it is an ONG, environmental association or trade union, and 3 in the case of the government, administration or public body. From the party capability theory (Galanter 1974; Songer, Sheehan, and Haire 1999) the resources and litigation experience of litigants affects their chances of success. Governments, administration, business and interest groups are accustomed to acting as repeat players in the courts, increasing their experience of how to deal with these issues thus achieving success. Moreover, administration, as well as big firms, has more resources (e.g. money and time) to expend on these cases if we compare them with mere individuals, such as workers. Therefore, I expect a lower application of EU law when it is invoked by individuals than for the rest of actors due to their lesser organizational power and experience (Slepcevic 2009).

- *National court citation*: The variable codes 1 if the Supreme Court has cited a previous national ruling, e.g. coming from the Supreme, Constitutional or regional courts; and 0 otherwise. In this case there is not a straightforward hypothesis. On one hand, the Supreme Court may use national precedents to support EU law application against the government for the same reason that they use ECJ citations. On the other hand, the court can interpret and quote national court precedent as a reinforcing signal against the application of EU law.

- *Treaty enforcement:* The variable codes 1 if the case involves the application or interpretation of a Treaty or primary law, 0 otherwise. National courts may be more persuadable in the application of EU law when the litigants invoke EU primary or constitutional legislation against national law.

- *National constitution enforcement:* The variable codes 1 if constitutional provisions are alleged against EU law and 0 otherwise. National courts will not enforce EU law when core national provisions are alleged against EU regulations.

- *Legal experience in EU law*: The variable measures the number of EU law cases filed in the Supreme Court. The number of cases has been distinguished by jurisdiction: Penal, Social, Military, Civil and Administrative. Judges, case after case, become acquainted with EU law and discriminate as to whether EU law is enforceable or not. Hence, EU enforcement is more likely when NC have more experience in EU law cases.

- *EU support:* The variable codes the results of the Eurobarometer for Spain on the question of whether citizens think that EU membership is a 'good thing'. Burley and Mattli claim that judges cannot deviate from the political preferences of the public opinion regarding European Union (Burley and Mattli 1993; Carrubba and Murrah 2005). Courts are worried about the judgment of public opinion on Europe. The more public opinion is against EU, the greater the cost to the national court's legitimacy if it chooses to apply EU law. Hence, national courts are more likely to enforce EU law when the national political environment is favorable to European integration.

- *Years until election:* The variable codes the years that left until the next election when the EU law decision was taken. On should think that national governments will try to preserve their core national regulations from EU law, especially when these policies are meant to benefit their own constituency and produce electoral returns. National courts may challenge these policies when national elections are closer, affecting their electoral returns. Due to the margin of political reaction of the government to judge's decisions is reduced in the parliamentarian, governmental or administrative arena as the elections are closer, national governments may make an effort for opposing EU law.

- *Type of Policy:* The variable is coded as 1 if the case concerns the field of employment, free movement of workers, environment, and health and consumer protection, and 0 otherwise.

- *Type of Government:* The variable adopts the value 1 during the months that the socialist party was in office, and 0 in the months when the conservative party was. This variable interacts in an interesting way with the 'type of policy' variable, testing if courts apply EU law less in policy issues supported by the party in government. For example, the application of EU law on social issues (e.g. employment) preferred by the socialist party. Hence, the likelihood that a national court applies EU law will be lesser when it is enforced against the ideology of the government.

Method: For the analysis of the dependent variable I estimate a probit model that is adequate for dummy variables.[6] Moreover, there is the possibility of finding a correlation or interdependence between rulings on legal issues from the same case decided, which would artificially deflate standard errors. To control for this situation I introduce standard errors clustered by case, making more flexible the assumption that observations are independent.

EMPIRICAL FINDINGS

In this section I test the factors of EU law enforcement by the Supreme Court, trying to assess whether the court is constrained by the government in its application and under which conditions. The variables used in the analysis are summarized in the following table:

Table 1: Descriptive Statistics

Variable	N	Mean	Std. Dev.	Min	Max
EU law enforcement	205	.5463415	.4990666	0	1
Individual invokes EU law	205	.2243902	.4182014	0	1
Business invokes EU law	205	.4585366	.4994976	0	1
Other interest groups invoke EU law	205	.1121951	.316379	0	1
Against State or public institution	205	.5560976	.4980594	0	1
ECJ citation	205	.5512195	.4985872	0	1
Against State*ECJ citation	205	.3121951	.4645233	0	1
National court citation	205	.4878049	.5010749	0	1
Treaty enforcement	205	.2292683	.4213912	0	1
National constitution enforcement	205	.0390244	.1941271	0	1
Legal experience in EU law	205	6.842828	1.231789	0	8.05
EU support	205	65.2	4.641459	57	73
Years until next election	205	1.517073	1.198836	0	3
Type of policy	205	.4195122	.4946872	0	1
Type of government	205	.6487805	.47852	0	1
Type of policy*government	205	.1560976	.3638363	0	1

In the empirical results showed in table 2, one of the most remarkable outcomes is related to the presence of a government or administrative institution against EU law enforcement. Among the full models represented in the specifications 2 and 3 showed below, we observe at the 0.01 level of significance the likelihood that the Supreme Court enforces EU law is reduced when this application goes against national policies defended by public institutions. Therefore, the Supreme Court applies EU law less when the governments threat with its opposition to EU law with non-compliance or other political

[6] A probit model assumes that the effect of the independent variables adopts the shape of a standard cumulative normal probability distribution, which is an S-shape, instead of a linear or logarithmic shape.

threat. In contrast, the table does not show other important effect as regards the type of EU law invoker. Moreover, there is not any impact on EU law enforcement when courts are considering policy issues supported by the party in government. In conclusion, these results show how difficult it is for a Supreme Court to challenge the policies and acts of the government and public institutions, despite the who is invoking EU law enforcement and the kind of policy that they judging.

Table 2: Probit analysis of the application of EU law by the Spanish Supreme Court[7]

	Equation 1	Equation 2	Equation 3
Independent variables	*Dependent Variable: EU law enforcement*		
Individuals invoke EU law enforcement	-0.147 [0.323]	-0.105 [0.325]	-0.036 [0.333]
Business invoke EU law enforcement	-0.143 [0.284]	-0.101 [0.284]	-0.076 [0.298]
Other groups invoke EU law enforcement	-0.005 [0.404]	-0.033 [0.405]	0.034 [0.427]
(Category of reference: Public Institutions invoke EU law enforcement)			
Against State or Public Institution	-0.487** [0.228]	-0.964*** [0.310]	-0.892*** [0.322]
ECJ citation	0.368* [0.193]	-0.121 [0.279]	-0.124 [0.286]
Against State or Public Institution*ECJ citation		0.864** [0.370]	0.806** [0.377]
National Court citation	0.031 [0.184]	0.030 [0.185]	-0.043 [0.192]
Treaty enforcement	-0.055 [0.226]	-0.021 [0.223]	0.066 [0.236]
National Court enforcement	-0.365 [0.488]	-0.465 [0.466]	-0.423 [0.459]
Legal experience in EU law	0.028 [0.090]	0.021 [0.088]	-0.038 [0.102]
EU support			0.030 [0.024]
Years until next election			0.208** [0.082]
Type of policy			-0.326 [0.368]
Type of government			-0.238 [0.280]
Type of policy*Type of government			0.303 [0.422]
Constant	0.108 [0.662]	0.385 [0.663]	-1.334 [1.608]
Observations	205	205	205
Pseudo-R^2	0.0449	0.0643	0.0957

Robust standard errors in brackets
***** p<0.01, ** p<0.05, * p<0.1**

According to the arguments presented above, State institutions have several mechanisms that make them more successful compared with other litigants. Apart of the great amount of economic and experiential resources that they can invest on EU law litigations, the

[7] Logit and time-series analyses have also been estimated showing similar results.

threat of non-compliance may cause a court to implement a ruling according governments' preferences, from what it would choose if it were completely independent. On the other hand, the implication of political interest in the selection and in the career of judges of the Supreme Court makes judges responsive to their decisions against the government. This finding rejects the legal argument that national courts are not constrained by political institutions. The vulnerability of judges to political pressures is reinforced when considering the effect of elections on EU law enforcement. As I expected this control variable shows how national courts are more prone to enforce EU law when the impact of their decisions on national policies are minor for the electoral game.

According to the second hypothesis, the results demonstrate how judges are strategic in the use of ECJ citations as regards national governments: At the 0.05 level of significance, the second main explanatory variable 'Against State or public institution*ECJ citation' shows how the Supreme Court uses ECJ citations to shield its judgments against competent authorities. National courts look upon the cases already decided by the ECJ to find an answer to the issues it faces and support the application of EU law, legitimating their decisions against the menace of non-compliance and other political threats by public institutions. Hence, the possibility of citing the ECJ reduces the likelihood that national courts can be affected by political threats when enforcing EU law in policy fields that run counter to public institutions.[8] In contrast, we observe how the 'ECJ citation' constitutive looses its significant effect when it is interacted.

The effects of the ECJ citations as regards to whom it is used against are reported generating predicted probabilities for different scenarios in table 3:

Table 3: Predicted probabilities of the main explanatory variables

Enforcing EU law	No ECJ citation	ECJ citation
Against public institution	0.2885	0.5496
Against other litigants	0.6307	0.5831

As we see in the table, there are substantial differences in the probability of enforcement between categories. Firstly, the rate of failure on EU law enforcement is 35%

[8] It is not always possible to know if X has a meaningful conditional effect on Y from simply looking at the magnitude and significance of the coefficient on the interaction term. It is nearly always the case that we should go beyond the traditional table of results and report the marginal effect and standard errors of X on Y across different values of Z in order to know how the effect of X on Y changes along some range of Z values Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006. "Understanding Interaction Models: Improving Empirical Analyses." *Political Analysis* 14:63-82. These quantities of interest are reported in appendix 1, showing that the effect of ECJ citations (X) on EU law enforcement (Y) when the government is against EU law enforcement (Z=1) is different from zero and, hence, significant.

lower when the government is involved in the litigation to argue the non-enforcement. However, we observe that this probability increases by 26% when the Supreme Court finds a citation that can apply to the case at hand. Conversely, for the cases in which EU law is applied against 'other actors' the probability of success is reduced by almost 5% when the ECJ is cited. This is why the Supreme Court uses ECJ citations very frequently to argue that ECJ jurisprudence differs or contradicts in a significant way individuals and interest groups' invocation of EU law.[9]

CONCLUSION: CONTENDING GOVERNMENT CONTENTION

In this paper I have tried to give a response to one of the most recurrent question asked by political and law scholars, that is, which factors explain the enforcement of EU law by national courts? This study gives some preliminary answers to this question supported by empirical evidence. Following the arguments offered by the literature on judicial independence and the capacity resource of litigation, I have tested how the Supreme Courts can be constrained in their decisions by public institutions. Among other arguments, the government has within reach some economic, experiential and, most important, institutional resources that can constraint the decisions taken by higher courts concerning EU law.

What is more important, high courts, aware of this political threats, try to avoid these institutional threats empowering themselves by means of ECJ citations to legitimize their decisions vis-à-vis competent authorities. It explains the importance of ECJ citations for the implementation of EU law following the argument of Ramos Romeu (2006), Tridimas & Tridimas (2004) and Obermaier (2008). According to their conclusion on why national courts use ECJ precedent, I extended the argument, comparing the advantages of the precedent mechanism to the benefits of asking for ECJ rulings for national courts. Therefore, national judges usually cite ECJ as a normal strategy, apart of using preliminary rulings, in those cases where the enforcement of EU regulations may be challenged by national institutions.

[9] Looking for new instruments to distinguish these situations I have created a variable that identifies when the Supreme Court uses ECJ citations to distinguish ECJ jurisprudence from EU law invocation made by litigants. The results show of in the 36% of the EU law cases against 'other actors' the Supreme Court cites the ECJ jurisprudence to contradict the enforcement of EU law, while in the case of government is a 27%. These differences in the percentages for the use of ECJ citations against EU law enforcement can explain these differences in the predicted probabilities.

To sum up, these findings confirm the general statements of the empowerment/ neofunctionalist and inter-govermentalist/realist models, and contradict the legal accounts. There is evidence to reassert Lisa Conant's (2002) argument in her book "Justice Contained" that governments of the member states find many ways around the structure of the EU and the ECJ rulings to evade the full force of the law. Nevertheless, the constitutionalization of EU law and the integration of the national judicial system in the EU system by means of the instrument of cooperation, such as the ECJ rulings and precedents, have developed powerful mechanisms to "contend" the "government contention of justice".

Therefore, contrary to Maduro's (2003: 513) argument on the constitutionalization of the EU legal system, national courts are not (or they do not feel) *responsible* for the effective incorporation of EU law and ECJ jurisprudence into their national legal orders. By the contrary, the study gives some evidence to think that national judges are more *selective* than responsible in their enforcement of EU law and cooperation with the ECJ. The Spanish Supreme Court may prefer to select previous rulings that agree its own policy or legal views to support its decisions against the government rather than taking the risk of asking for a new one. By doing this, the courts avoid the possibility that the ECJ might rule against their legal or policy interpretations. Thus, national judges, aware of the limitations and the advantages of supranational adjudication for judicial enforcement, may decide between, on the one hand, being conservative in their dialogue with the ECJ and applying only precedent, or, on the other hand, being more ambitious, opening a political discussion with the ECJ and the national authorities for the configuration and impact of EU regulation on the national policies.

APPENIX 1: TABLES

Table 4: Marginal effects and Standard errors

Marginal effect of ECJ citations	ME Conditional Beta	Conditional SE	Significance
when enforcing EU law against other actors	-0.1238443	0.2859005	Non-significant
when enforcing EU law against public institutions	0.6826378	0.2601992	0.0098***

APPENDIX 2: BUILGIND A DATASET OF SPANISH SUPREME COURT'S DECISIONS ON EU LAW

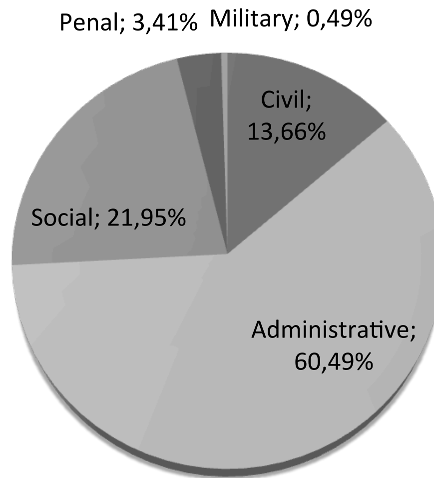
The data was gathered from the CASELEX database that reports the important national case law from National Supreme Courts and last instance courts linked to EU law from 2000 onwards. The subject areas covered are competition law, employment law, company law, intellectual property law, consumer law, competition law, environmental law, freedom of movement law, ICT and media law, private international law, public procurement law, and social security law.

For this paper I codified all the decisions taken by the Spanish Supreme Court until 2009. The resulting dataset is considered as a sample (n=205) of the population of EU law cases filed in the Spanish Supreme Court (n=3146)[10]. Nevertheless, this data makes us to think of one source of selection bias, that is, the likelihood that a case will be included in the Caselex database by the lawyers working on this project. Caselex identifies and selects cases only when: (i) a national court interprets a term mentioned in an EU rule; (ii) a national court says something about the 'values' of a certain EU rule; (iii) a national court de facto applies an EU rule in a new way" (Faro and Nannucci 2008). This study takes advantage of this selection since it helps to identify cases in which Spanish Supreme Court decide on substantive EU issues from procedural decisions or judgments without any implication for the implementation of EU policies. Therefore, Caselex aggregates the most important case law connected with the effective implementation of EU law by national higher courts, leaving out all these cases that are irrelevant to EU law enforcement. In conclusion, this criterion increases the accuracy of our dataset rather than blurs the results, since they already identified the sample of cases with relevant policy implications from the total population.

In addition, these differences are most likely to disappear if we think in terms of jurisdiction. In figure 5 we can see that, according to the sample data, some sections of the Supreme Court hear a lot of cases and others hear few. Curiously the distribution of cases among jurisdiction within the sample fits almost identically with the total distribution of EU law cases filed in each judicial chamber (see figure 2 above). This fact at least supports representativeness by jurisdiction.

[10] The population of cases was determined by searching the Spanish Supreme Court database (www. http://www.poderjudicial.es/search/index.jsp). These cases are also including decisions in which the court did not actually manipulate EU law as part of its reasoning or that was not rendered by the high court. For this reason, I expect that the number of cases in which the Supreme Court decided about the enforcement of EU law should be drastically lesser than the number of cases reported by the search.

Figure 3: Distribution of EU law cases in the sample



Source: Caselex's EU law cases

Finally, the data only contains information on cases in which EU law was applied or not, but not for the cases in which EU law *should* have been applied but was not. Nevertheless, this is the unique approach that is available for political and legal scholars for study and disentangling the factors that determine the enforcement of EU law.

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