CHAPTER FIVE

STUDY OF LEGAL CONSCIOUSNESS:
ENGAGEMENT, PASSIVITY, OR RESISTANCE?

1. INTRODUCTION: METHODOLOGICAL CHALLENGES

Chapter 1 indicated that one of the ultimate objectives of the present book is to contribute to the discourse on legal consciousness. To recall, ‘(...) the study of legal consciousness traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meaning’.\(^1\) One of the constitutive theories in this field was established by Ewick and Silbey, who constructed three varieties of legal consciousness. As was mentioned in Chapter 1, these are: *conformity* before the law, *resistance* against the law, and *engagement* with the law.\(^2\)

The original theoretical and at the same time methodological assumption of the present study was to explore and assess the three embodiments of legal consciousness by means of six vignettes that were included in the questionnaire, and were intended to test the particular forms of legal consciousness.\(^3\) In general, the vignettes revolved around the issue of supremacy of EU law. It was assumed that the manner in which the hypothetical issues were approached would allow the judges to be classified as either being *with, before, or against* EU law. Responses to the vignettes delivered absorbing but at the same time puzzling results that went far beyond the initial theoretical assumptions. Explanations regarding the judges’ choices of a specific response showed that multifarious legal and extra-legal factors might have played a role in the way they proceeded with the respective hypothetical case. More importantly, the remarks illustrated that the reasons that prompted a judge to choose a particular answer might be different from those initially presumed. Additionally, the in-depth interviews conducted among Polish civil judges provided further insights into the whole discourse. They also emphasised the complex aspect that partly emerged by way of the vignettes: namely, the interferences between a

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\(^1\) International encyclopedia of social and behavioral sciences (2001), p. 8626.


\(^3\) See Section 2.2 of Chapter 1.
judge's institutional and personal capacity. The latter perspective focuses on an individual judge: her views, attitudes, opinions, and motivations, although they might not necessarily reflect how she would proceed in practice with a specific legal issue. This is because the law and its institutions, rules, and standards—but also the judiciary as an organisation—naturally constitute constraints to judicial behaviour. Thus, it can be observed that ‘in making decisions and engaging in activities, judges will be acting in an institutional, and not a personal capacity’. Therefore, finding a proper balance between these two dimensions proved to be challenging.

In addition, the personal testimonies proved that confining the discourse on the functioning of national judges as EU law judges to answering the question as to whether judges conform to the principle of supremacy of EU law is not a satisfactory approach, either for seeing how national courts function as decentralised EU courts or for assessing the varieties of legal consciousness. The interviews disclosed that knowing whether a judge unconditionally or conditionally conforms to the principle of supremacy of EU law does not suffice to establish how a national judge experiences and constructs the legality of European Union law. The manner in which the vignettes were constructed did not take into consideration the fact that for a national judge there is an entire process of arriving at the point as to whether EU law could be at all relevant to the dispute involved. In the opinion of the author, and in the light of the qualitative data, this process preceding the ultimate application of EU law is decisive regarding the final assessment of the form of legal consciousness. Finally, the significant number of judges who did not take a definite stance regarding the vignettes, and who admitted not knowing how to proceed with EU law issues, again gave room for manifold interpretations that do not easily fit the with—before—against categories. By and large, the analysis of the judges’ responses revealed that the study of legal consciousness is much more nuanced than had been initially anticipated. All of the foregoing implies that the final assessment of accounts of legal consciousness has to be treated with caution and prudence. In general, this study verifies Nielsen, who claims that only an in-depth interview technique makes it possible to capture ‘the more complex and subtle character of legal consciousness’.

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4 On the perspectives on judicial activities, see Bell (2006), pp. 3–6.