CHAPTER SEVEN

NATIONAL JUDGES AS EU LAW JUDGES: RECONCILING LEGAL AND SOCIAL PERSPECTIVES

Compliance is at its greatest when personal advantages are highest, organizational sanctions against opposition are certain and severe, and the legitimacy of the issuing authority is acknowledged. Conversely, it will be at its minimum when the individual's utilities all point in the direction of opposition, organization sanctions are lenient and—most important—erratic in application, and the legitimacy of the higher authority is doubtful.

– Samuel Krislov

1. THEORETICAL MODEL OF THE NATIONAL JUDGE AS AN EU LAW JUDGE: A BROADER PERSPECTIVE

It was observed at the outset of this book that the EU legal system has developed a very specific mechanism of EU rights protection, which is operative on two levels. Early on, the Treaties established a centralised, supranational court—the European Court of Justice—which has played a crucial role in advancing the process of European integration. Through its jurisprudence, this centralised Court has caused the EU rule of law to be protected at the decentralised level as well: namely, by the national judiciaries of Member States.

As illustrated in Chapter 2, in order for national courts to effectively fulfill their tasks as decentralised EU courts, the Court of Justice has directly empowered national judges by conferring new competences on them. Gradually, as the process of European integration deepened, the range of duties imposed by EU acquis on national judiciaries broadened. The doctrines of primacy and direct effect of EU law, harmonious interpretation, effectiveness, and the preliminary ruling procedure have become formidable instruments that allow national judges to undertake judicial actions normally not permitted under national law. Consequently, national judges at all levels and of all specialisations have come to adjudicate EU law, and the process of legal integration within the EU and the

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further development of the legal order of the Union have to a large extent become dependent upon national courts. They are the most crucial element of the judicial protection of EU rights, and are the first and very often also the last instance courts to consider EU law issues. The General Court went so far as to call national courts the EU courts of general jurisdiction, and the European Parliament concluded in a recent resolution that national judges are ‘the keystone of the European Union judicial system, who play a central and indispensable role in the establishment of a single European legal order’. The role of a national judge has been elevated ‘to a constitutional mission in the European context’.

The foregoing presents a striking picture of a national judge who is familiar with the sources of EU law and applies them in her daily work. She resorts to and applies EU law ex officio, secures that EU law is observed by national authorities, and conducts a dialogue with the Court of Justice by means of the preliminary ruling procedure. She examines the compatibility of national laws with EU law, gives effect to EU provisions that have direct effect, and disregards national rules that are not compatible with EU law, whereby she possibly acts in contradiction to the national constitution and enforces Union law against her own government. The national judge resorts to and unconditionally applies the jurisprudence of the CJEU, which is for her the highest judicial authority with regard to EU law. She interprets national rules within the context of European Union integration so that they comply with EU law objectives, and she grants damages to individuals whose rights deriving from EU law are infringed upon by Member States. She assures effective judicial review of EU law rights, and ensures that national procedures and remedies do not impede the effet utile of EU law. To achieve all of this, the national judge adopts different methodologies and tools, such as teleological and comparative interpretation methods. Moreover, she reads EU provisions in 23 official languages of the European Union in order to compare them. All of these tasks are undertaken within the context of increasingly

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3 In fact, the vast majority of the rights that individuals derive from EU law can be enforced only in national courts; see Lang (2008), p. 77.