RESISTING THE EUROPEAN COURT OF JUSTICE

The European Union’s (EU’s) powerful legal framework drives the process of European integration. The European Court of Justice (ECJ) has established a uniquely effective supranational legal order, beyond the original wording of the Treaties of Rome and transforming our traditional understanding of international law. This work investigates how these fundamental transformations in the European legal system were received in one of the most important member states, Germany. On the one hand, Germany has been highly supportive of political and economic integration; yet, on the other, a fundamental pillar of the postwar German identity was the integrity of its constitutional order. How did a state whose constitution was so essential to its self-understanding subscribe to the constitutional practice of EU law, which challenged precisely this aspect of its identity? How did a country that could not say “no” to Europe become the member state most reluctant to accept the new power of the ECJ?

Bill Davies is a legal historian focusing on the development of a constitutional practice of law in the European Union. He holds a PhD from King’s College London and currently works as an Assistant Professor in Justice, Law, and Society in the School of Public Affairs at American University in Washington, DC. He has published on the German role in the formation of the European legal system in the Journal of European Integration History and the Contemporary European History Journal.
Resisting the European Court of Justice

WEST GERMANY’S CONFRONTATION WITH EUROPEAN LAW, 1949–1979

BILL DAVIES
American University
For Eunice and Amelie
Contents

Preface page ix
Acknowledgments xi
List of Abbreviations xiii
List of Archives Consulted xv
List of Cases xvii
Texts of Often Mentioned Constitutional Articles xix

1. Between Sovereignty and Integration: West Germany, European Integration, and the Constitutionalization of European Law 1
   Between Sovereignty and Integration: West Germany and Europe 7
   Explaining the ECJ’s Success? The Integration through Law Paradigm 19
   The Constitutional Narrative: The ECJ and FCC in Judicial Dialogue 21
   Resisting the ECJ: The Plan of the Book 40

2. Conditional Acceptance or Accepted Condition? West German Legal Academia and the Constitutionalization of European Law, 1949–1979 46
   Introduction 46
   The Bensheim Era, 1963–1969: Competing Visions – Supranationalists versus the Mainstream 64
   Summary 88
## Contents

   - Introduction 92
   - Public Opinion, Europe, and West Germany 93
   - The West German Mediascape 97
   - Crestfallen, 1949–1963: Dashed Hopes for a United Europe 100
   - Coming to Terms, 1963–1969: The Success and Failings of the ECJ 110
   - Summary 134

   - Foundations, 1949–1963: Locking in European Integration 138
   - Distraction and Division, 1969–1974: Brandt, Schmidt, and Solange 159
   - Summary 169

5. Dealing with the Fallout: German and European Responses to the Solange Decision
   - Revisiting the Academic and Media Response, 1974–1976 180
   - The Solange Standoff Part One: Government against the Commission 185
   - The Solange Standoff Part Two: Government against the FCC 190
   - The Reischl Compromise: The 1977 Joint Declaration and Beyond 192
   - Epilogue: To Accede or Not to Accede? 199
   - Conclusion: Legal Integration in Europe, the United States, and Beyond 201

**Bibliography** 225

**Index** 239
Preface

The European Union’s (EU’s) powerful legal framework has proven to be the vanguard moment in the process of European integration. Through the doctrines of direct effect (1963) and primacy (1964), the European Court of Justice (ECJ) sought to establish an effective and powerful supranational legal order, far beyond the original wording of the Treaties of Rome. Whereas scholars have analyzed the evolution of EU law and built models to explain the ECJ’s success, none has examined how the member states received this process at a time when the then–European Community was undergoing a number of difficult political and economic crises through the historian’s lens.

This book investigates how these fundamental transformations in the European legal system were received at the national level, specifically, in one of the European Union’s most important member states, the Federal Republic of Germany. This case provides the opportunity to examine a fascinating paradox: On the one hand, Germany has been regarded as highly supportive of political and economic integration; yet, on the other, a fundamental pillar of the postwar German identity was the integrity of its national constitutional order. How did a state whose constitution was so essential to its political and cultural self-understanding subscribe to the constitutionalization of European Community law, which challenged precisely this aspect of its identity?

Through close documentation of the reception process in West Germany, this book shows for the first time how the resistance offered by the highest echelons of the German judiciary had its origins in broader social discourse, with academic and public opinion in particular opposed to the constitutional practice. It demonstrates that, while supportive of other aspects of integration, West Germans were highly critical of the apparent danger posed by the ECJ’s doctrines to the national constitution. As government policy toward the ECJ remained unchanged, the Federal Constitutional Court became the only means of articulating dissent to legal integration. Most important, this resistance mattered far beyond expectations, affecting several critically important changes in European governance at the end of the 1970s.
Acknowledgments

This book could not have been completed without the financial and academic support of the Departments of German and of European Studies and the School of Humanities at King’s College London, the School of Public Affairs at American University, and the American Consortium on European Studies (ACES) in Washington, DC. I hope that this work provides you with some reward for the assistance and encouragement you have so generously given. I would like specifically to thank Chris Thornhill, Robert Weninger, Michelle Egan, Josh Barkan, Fernanda Nicola, Jon Gould, and Mana Zarinejad for their effort in providing advice, commentaries, and encouragement over the past years. Chana Barron is, in addition, a truly remarkable colleague and friend, who has been tireless in her support of this work.

I thank Karen Alter and Piers Ludlow for working hard to read and improve this manuscript. You gave me one of the most terrifying and most fulfilling experiences one might ask for as a scholar during my defense of the groundwork for this book. Thank you to my other colleagues, most especially Morten Rasmussen, Peter Lindseth, and Anne Boerger, for the opportunity to discuss much of this work with you.

I owe a huge debt of gratitude to the Studienstiftung des Berliner Abgeordnetenhauses for the generous scholarship and housing they provided, making the time spent in German archives so much easier and more pleasant. In particular, I would like to thank Petra Fritsche, Manuela Ebel, and Professors Ingolf Pernice and Gert-Joachim Glaßner for their invaluable assistance during my time in Berlin. The Walter-Hallstein-Institut in Berlin provided much help and support during my frequent trips to the German capital.

Many thanks for the invaluable work of the many archivists and numerous support staff at the Politisches Archiv des Auswärtiges Amt, Bundesarchiv, Historical Archives of the European Commission, Konrad-Adenauer-Stiftung, Friedrich-Ebert-Stiftung, and the Press and Information Office of the German Federal Government.
Acknowledgments

Thank you to my friends, who have listened and read beyond the call of duty and encouraged and strengthened me constantly. Numbered in that group is my doctoral supervisor, Dr Jan Palmowski. His patience, support, and belief in my work have been beyond value. I will genuinely be eternally thankful.

Finally to my family: Nothing would be possible without you.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>ASEL</td>
<td>Academic Society for European Law</td>
</tr>
<tr>
<td>BL</td>
<td>Basic Law (Grundgesetz)</td>
</tr>
<tr>
<td>CDU</td>
<td>Christian Democratic Union of Germany</td>
</tr>
<tr>
<td>DGB</td>
<td>The Confederation of German Trade Unions (Deutscher Gewerkschaftsbund)</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
</tr>
<tr>
<td>EDC</td>
<td>European Defence Community</td>
</tr>
<tr>
<td>EPC</td>
<td>European Political Community</td>
</tr>
<tr>
<td>FAC</td>
<td>Frankfurt Administrative Court</td>
</tr>
<tr>
<td>FAZ</td>
<td>Frankfurter Allgemeine Zeitung</td>
</tr>
<tr>
<td>FCC</td>
<td>Federal Constitutional Court of West Germany (Bundesverfassungsgericht)</td>
</tr>
<tr>
<td>FPD</td>
<td>Free Democratic Party of Germany</td>
</tr>
<tr>
<td>FRG</td>
<td>Federal Republic of Germany (Bundesrepublik Deutschland)</td>
</tr>
<tr>
<td>ITL</td>
<td>Integration through Law</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>RTC</td>
<td>Rhineland Tax Court</td>
</tr>
<tr>
<td>SPD</td>
<td>Social Democratic Party of Germany</td>
</tr>
<tr>
<td>VVDStRL</td>
<td>Publication of the Association of German Public Law Teachers</td>
</tr>
</tbody>
</table>
Archives Consulted

AdsD  Archive of Social Democracy – Friedrich-Ebert-Stiftung
BA   German Federal Archive in Koblenz
BPA  Press and Information Office of the Federal Government
ECH  European Commission Historical Archive
FES  Friedrich Ebert Foundation
KAS  Archive of Christian Democratic Politics of the Konrad Adenauer Foundation
PAA  Political Archive of the German Foreign Ministry
Cases

EUROPEAN COURT OF JUSTICE DECISIONS

Case 18/57 Firma J. Nold K.G. v. High Authority of the European Coal and Steel Community [1957] European Court Report 121
Case 01/58 Stork v. High Authority [1959] European Court Report 17
Case 19/61 Mannesmann AG v High Authority of the European Coal and Steel Community [1962] European Court Report 357
Case 06/64 Costa v. ENEL [1964] European Court Report 585
Case 09/70 Grad v. Finanzamt Traunstein [1970] European Court Report 825
Case 22/70 Commission of the European Communities v. Council of the European Communities [1971] European Court Report 263
Case 36/75 Roland Rutili v. Minister of the Interior [1975] European Court Report 1219
List of Cases

FEDERAL CONSTITUTIONAL COURT DECISIONS

2 BvE 4/52 – EDC Treaty, 7 March 1953 – BVerfGE 2, 143
1 BvR 248/63 & 216/6 – European Regulations, 18 October 1967 – BVerfGE 22, 293
2 BvR 225/69 – Milk powder, 9 June 1971 – BVerfGE 31, 145
2 BvF 1/73 – Basic Treaty, 31 July 1973 – BVerfGE 36, 1
2 BvL 52/71 – Solange I, 29 May 1974 – BVerfGE 37, 271
2 BvR 197/86 – Solange II, 22 October 1986 – BVerfGE 73, 339
2 BvR 2134, 2139/92 – Maastricht, 12 October 1993 – BVerfGE 89, 155
2 BvE 2/08, 2 BvE 5/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 – Lisbon, 30 June 2009 – BVerfGE 123, 267
2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 – Euro Bailout, 7 September 2011

OTHER DECISIONS:

Decisions of the Italian Constitutional Court:
7 March 1964, n. 14, Costa/ENEL, in Giur. Cost., 129
27 December 1973, n. 183, Frontini e a., in Giur. Cost., 2401

Decisions of the United States Supreme Court:
Marbury v. Madison, 5 U.S. (Cranch 1) 137 (1803)
Dred Scott v. Sandford, 60 U.S. 393 (1857)

Decisions of the Berlin State Court:
Rueckerstattungssache Krüger u.a./Deutsches Reich – 151/155/157/142 WGK 69/57 und 161/57 (Landgericht Berlin)
ARTICLE 24: TRANSFER OF SOVEREIGNTY 
(IN PREAMENDMENT FORM)

(i) The Federation may by a law transfer sovereign powers to international organizations.

(ii) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(iii) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.

ARTICLE 25: INTERNATIONAL LAW AND FEDERAL LAW

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

ARTICLE 79 (III): AMENDMENT OF THE BASIC LAW

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Adapted from official English translation: https://www.btg-bestellservice.de/pdf/80201000.pdf.
Cambridge University Press
978-1-107-02453-3 - Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979
Bill Davies
Frontmatter
More information