



# RESISTING THE EUROPEAN COURT OF JUSTICE

West Germany's Confrontation  
with European Law, 1949–1979

Bill Davies



CAMBRIDGE

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American University



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## 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*.

*For Eunice and Amelie*

## 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.

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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

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

## 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 36-38 and 40/59 *Ruhrkohlenverkaufsgesellschaften v. High Authority* [1960] European Court Report 423
- Case 19/61 *Mannesmann AG v. High Authority of the European Coal and Steel Community* [1962] European Court Report 357
- Case 26/62 *Van Gend v. Nederlandse Administratie der Belastingen* [1963] European Court Report 1
- Case 06/64 *Costa v. ENEL* [1964] European Court Report 585
- Case 58/64 *Grundig-Verkaufs GmbH v. Commission* [1966] European Court Report 299
- Case 29/69 *Stauder v. Ulm* [1969] European Court Report 419
- Case 09/70 *Grad v. Finanzamt Traunstein* [1970] European Court Report 825
- Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getriebe und Futtermittel* [1970] European Court Report 1125
- Case 22/70 *Commission of the European Communities v. Council of the European Communities* [1971] European Court Report 263
- Case 04/73 *Nold v. Commission* [1974] European Court Report 491
- Case 36/75 *Roland Rutili v. Minister of the Interior* [1975] European Court Report 1219
- Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] European Court Report 649
- Case 44/79 *Hauer v. Land Rheinland Pfalz* [1979] European Court Report 321
- Case 294/83 *Parti Ecologiste "Les Verts" v. European Parliament*, [1986] European Court Report 1339

## FEDERAL CONSTITUTIONAL COURT DECISIONS

- 2 BvE 4/52 – *EDC Treaty*, 7 March 1953 – BVerfGE 2, 143
- 2 BvL 29/63 – *Tax on Malt Barley*, 5 July 1967 – BVerfGE 22, 134
- 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 BvL 6/77 – *Perhaps*, 25 July 1979 – BVerfGE 52, 187
- 2 BvR 197/83 – *Solange II*, 22 October 1986 – BVerfGE 73, 339
- 2 BvR 2134, 2159/92 – *Maastricht*, 12 October 1993 – BVerfGE 89, 155
- 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 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
- 30 October 1975, n. 232, *Società industrie chimiche Italia centrale (I.C.I.C.)*, in *Giur. Cost.* 2211

*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)
- Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

*Decisions of the Berlin State Court:*

- Ruckerstattungssache Krüger u.a./Deutsches Reich* – 151/155/157/142 WGK 69/57 und 161/57 (Landgericht Berlin)

## Texts of Often Mentioned Constitutional Articles

### 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.

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## Between Sovereignty and Integration

### *West Germany, European Integration, and the Constitutionalization of European Law*

The European Economic Community is a remarkable legal phenomenon. It is a creation of law; it is a source of law; and it is a legal system.... Previous attempts to unify Europe depended on force or conquest.... The majesty of the law is to achieve what centuries of "blood and iron" could not.

Walter Hallstein, 1972<sup>1</sup>

The establishment of the primacy and direct effectiveness of the law of the European Communities in the early 1960s over and against the law of the Member States is the most radical moment in the European integration project. The European Court of Justice's (ECJ's) now-famous *Van Gend*<sup>2</sup> and *Costa v. E.N.E.L.*<sup>3</sup> decisions laid the foundations for the effective legal framework of the contemporary European Union. At the same time, they represented a massive inroad into the sovereign legal independence of the Member States and boldly positioned the Court as Europe's supreme judicial voice. In fact, in its *Internationale Handelsgesellschaft* ruling in the early 1970s, the ECJ went further still, declaring the primacy of European law unbound even by national constitutions.<sup>4</sup> This "foundational" phase of integration ushered in the "constitutionalization" of European law,<sup>5</sup> and for some contemporaries it seemed as if the ECJ had become Europe's "Super Constitutional Court."<sup>6</sup> These developments are especially intriguing to the historian of European integration because it was in this very same era that

<sup>1</sup> Walter Hallstein, *Europe in the Making* (London: Allen and Unwin, 1972), p 30.

<sup>2</sup> Case 26/62 *Van Gend vs. Nederlandse Administratie der Belastingen* [1963] European Court Report 1.

<sup>3</sup> Case 06/64 *Costa vs. ENEL* [1964] European Court Report 585.

<sup>4</sup> Case 11/70 *Internationale Handelsgesellschaft vs. Einfuhr- und Vorratsstelle für Getriebe und Futtermittel* [1970] European Court Report 125.

<sup>5</sup> Joseph Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge; New York: Cambridge University Press, 1999).

<sup>6</sup> This description ("*Supervelfassungsgericht*") appeared in an article of the *Frankfurter Allgemeine Zeitung*, a leading German broadsheet, on 8 October 1968.



the political atmosphere in the then-Communities became particularly sour and hostile. With the veto of British accession and the Gaullist boycott of the Council of Ministers institutions in the “Empty Chair Crisis,” the goal of uniting the states of Western Europe seemed to be under an existential threat. Moreover, if we consider the profound difficulties in agreeing to a constitutional document experienced by the contemporary European Union, we must ask ourselves, How then did the ECJ make this happen? Why, if the Member States of the period were prepared to go to the brink politically and to square up so resolutely against the supranational ambitions of the European Commission, was so little resistance manifest in reining in the ECJ’s expansive, constitutional interpretation of the Communities’ foundational documents?

The question as to why the ECJ appeared so successful in driving a federalizing agenda in the legal realm despite the seemingly recalcitrant political atmosphere of the mid-1960s and since, has become recurrent in political and legal sciences ever since. Legal theorists, particularly in the early analyses of the Court’s work, propagated the idea that the expansion of the ECJ’s power represented a wholly natural legal interpretation of the Treaties of Rome. Its articulation in the ECJ’s jurisprudence had saved the process of integration from its political opponents and the vagaries of economic cycles.<sup>7</sup> Others highlighted how the ECJ’s activism had led the court too far astray from its original purpose, imagining a role for itself beyond any legal or political mandate.<sup>8</sup> Merging the lines between legal theory and political science, scholars during the 1980s and 1990s frequently made mention of a “constitutionalization” paradigm,<sup>9</sup> describing the functioning of EU and national law as akin to that of a federal constitutional order and explainable only through an understanding of the broader political context. Such models – usually grouped together under the heading of “Integration through Law” (ITL) theories<sup>10</sup> – made assertions about the strategic nature of the ECJ’s choices,<sup>11</sup> or the influence of empowered

<sup>7</sup> Eric Stein, “Lawyers, Judges and the Making of a Transnational Constitution,” *American Journal of International Law* 75.1 (1981); Pierre Pescatore, “Aspects of the the Court of Justice of the European Communities of Interest from the Point of View of International Law,” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1972).

<sup>8</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht; Boston; Lancaster: Martinus Nijhoff Publishers, 1986).

<sup>9</sup> JHH Weiler, *The Constitution of Europe – “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999).

<sup>10</sup> Mauro Cappelletti, Monica Seccombe and Joseph Weiler, *Integration through Law: Europe and the American Federal Experience*, Series a, Law/European University Institute = Series a, Droit/Institut Universitaire Européen (Berlin; New York: W de Gruyter, 1985).

<sup>11</sup> Geoffrey Garrett, “The Politics of Legal Integration in the European Union,” *International Organisation* 49.1995 (1995); Geoffrey Garrett, Daniel R Keleman and Heiner Schulz, “The European Court of Justice, National Governments and Legal Integration in the European Union,” *International Organisation* 52.1 (1998); Andrew Moravcsik, *The Choice for Europe: Social Purpose and the State Power from Messina to Maastricht* (London: UCL Press, 1998).