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978-1-107-02453-3 — Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979

Bill Davies

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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*.

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

BILL DAVIES

American University



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For Eunice and Amelie

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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.

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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

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- Case 01/58 *Stork v. High Authority* [1959] European Court Report 17
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- 2 BvL 29/63 – *Tax on Malt Barley*, 5 July 1967 – BVerfGE 22, 134
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- 7 March 1964, n. 14, *Costa/ENEL*, in *Giur. Cost.*, 129
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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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