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Constitutionality of the Basic Treaty (July 31, 1973)

The Federal Constitutional Court rejected a suit filed by the state of Bavaria, which had obtained a temporary injunction to keep the Basic Treaty from going into effect. Even so, the court expressly underscored both the existing imperative of reunification and the special nature of the treaty.

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### Decision of the Federal Constitutional Court

1. Basic Law Art. 59 Sec. 2, 23, 16 (*Constitutionality of the Basic Treaty*)

a) Art 59 Sec. 2 of the Basic Law requires parliamentary control in the form of a consent law for all treaties that regulate the political relations of the Federal Republic or relate to subjects of federal legislation, regardless of whether or not the country serving as the contractual partner is a foreign country according to the Basic Law.

b) The principle of judicial self-restraint aims to leave open the space for free political formation for the other constitutional organs as guaranteed by the constitution.

c) It is incompatible with the Basic Law's decision for comprehensive constitutional jurisdiction for the executive to override a procedure pending in the Federal Constitutional Court.

If an exceptional situation arises, as in this case, in which according to the interpretation of the executive, it is irrefutably necessary for the treaty to come into force prior to the conclusion of the proceedings at the constitutional court, then the competent constitutional organs must vouch for any repercussions that might ensue.

d) From the reunification imperative it follows that: No constitutional organ of the Federal Republic of Germany may abandon the political goal of reestablishing the political unity. All constitutional organs are obliged to work toward achieving this goal in their policies. This includes the imperative to keep the aim of reunification alive domestically and to pursue it tenaciously outwardly, and to refrain from doing anything that would thwart the reunification.

e) The constitution prohibits the Federal Republic of Germany from renouncing a legal title from the Basic Law with which it can work toward implementing reunification and self-determination, or from creating a legal title that is irreconcilable with the Basic Law, or from contributing to the grounds of such a legal title that can challenge the Federal Republic in its efforts toward this aim.

f) The treaty serves a dual function. Based on its type it is a treaty under international law, and based on its specific contents it is a treaty that regulates especially inter se relations.

g) Art. 23 (Basic Law) prohibits the government of the Federal Republic from signing a treaty that would create a dependency, in which it could no longer implement the incorporation of other parts of Germany on its own, but only with the consent of the contractual party.

h) Art. 16 (Basic Law) assumes that "German citizenship," which is also referred to in Art. 116, Sec. 1 (Basic Law), is identical with citizenship of the Federal Republic of Germany. German citizens in the sense of the Basic Law are thus not only the nationals of the Federal Republic of Germany.

i) Any German, whenever reaching the protective area of the state order of the Federal Republic of Germany, is entitled to the full protection of the courts of the Federal Republic of Germany and all basic rights guaranteed in the Basic Law.

Source: Federal Constitutional Court, Decision of July 31, 1973 – 2 BvF 1/73

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