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TELNO 160

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INFO IMMEDIATE WASHINGTON, PARIS, EAST BERLIN, BMG BERLIN

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*Teftschke read
me today that
Article 23 would
almost certainly be
used*

OUR TELNO 137 : GERMAN QUESTION : CONSTITUTIONAL PROVISIONS

SUMMARY

1. MUCH CLOSER ATTENTION NOW BEING GIVEN TO THE MODALITIES OF UNIFICATION, WITH ARTICLE 23 OF THE BASIC LAW THE SUBJECT OF PARTICULAR INTEREST. IMPLICATIONS FOR THE ALLIES.

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DETAIL

2. PARA 9 OF TUR REPORTED THE REMARK OF KASTRUP (FRG POLITICAL DIRECTOR) THAT UNIFICATION COULD COME ABOUT EITHER BY ACCESSION OF THE EASTERN LAENDER OR BY A CONSTITUTIONAL CONFERENCE (ARTICLE 23 OR 146 OF THE BASIC LAW). ARTICLE 23 WAS ALSO TOUCHED ON BY DOBIEY OF THE INNER-GERMAN MINISTRY WHEN HE CALLED ON RATFORD ON 1 FEBRUARY. HOW GERMAN UNIFICATION MIGHT BE EFFECTED UNDER THE BASIC LAW IS NOW NOW BEING ACTIVELY CONSIDERED BY FEDERAL MINISTRIES AND POLITICAL PARTIES. THE KEY PROVISIONS ARE:

- (1) ARTICLE 23, SECOND SENTENCE. "IN OTHER PARTS OF GERMANY IT (THE BASIC LAW) SHALL BE PUT INTO FORCE ON THEIR ACCESSION."
- (2) ARTICLE 146: "THIS BASIC LAW SHALL CEASE TO BE IN FORCE ON THE DAY ON WHICH A CONSTITUTION, ADOPTED BY A FREE DECISION OF THE GERMAN PEOPLE COMES INTO FORCE."

3. WE DISCUSSED THESE PROVISIONS ON 7 FEBRUARY WITH THE ADVISER ON CONSTITUTIONAL LAW IN THE INNER GERMAN MINISTRY. HE MADE THE FOLLOWING POINTS:

- (A) ARTICLE 23 (SECOND SENTENCE) HAD BY THE EARLY 1970S BEEN REGARDED AS MORIBUND, BUT THE FEDERAL CONSTITUTIONAL COURT (1973 DECISION ON THE FRG/GDR BASIS OF RELATIONS TREATY) HAD SINCE CONFIRMED ITS VALIDITY.
- (B) THIS PROVISION COULD THUS NOW BE USED EITHER BY THE GDR AS A WHOLE OR BY INDIVIDUAL 'LAENDER' TO ACCEDE TO THE FEDERAL REPUBLIC.

- (C) ALL THAT WAS NECESSARY ON THE GDR SIDE WAS A DECISION TO ACCEDE WHICH COMPLIED WITH THE CONSTITUTION OF THE GDR OR WITH THOSE OF THE 'LAENDER' CONCERNED. THIS WOULD NOT BE POSSIBLE BEFORE A DEMOCRATIC GOVERNMENT HAD BEEN FORMED IN THE GDR AFTER 18 MARCH.
- (D) ON THE FRG SIDE, A LAW INCORPORATING THE GDR OR THE 'LAENDER' INTO THE FEDERATION (EINGLIEDERUNGSGESETZ) WOULD HAVE TO BE PASSED BY THE BUNDESTAG AND BUNDESRAT (AS WITH THE SAARLAND IN 1956). THIS WOULD BE VIRTUALLY A FORMALITY. NO PLEBISCITE WAS REQUIRED. IT WAS THE WIDELY HELD VIEW OF GERMAN CONSTITUTIONAL EXPERTS THAT THE ADOPTION OF THE BASIC LAW IN 1949 (INCORPORATING THE FRG'S COMMITMENT TO UNIFICATION) WAS A SUFFICIENT ACT OF SELF DETERMINATION.
- (E) IF THE SAARLAND FRAMEWORK WAS FOLLOWED, THERE WOULD ALSO BE OTHER PRIMARY AND SUBORDINATE LEGISLATION DEALING WITH DETAILED ECONOMIC, SOCIAL AND LEGAL MATTERS.
- (F) THE FEDERAL GOVERNMENT COULD NOT BY TREATY RESTRICT TO THWART THE RIGHT OF 'OTHER PARTS OF GERMANY' TO ACCEDE UNDER ARTICLE 23. THE 1973 DECISION DID HOWEVER ALLOW THE FEDERAL GOVERNMENT SOME FLEXIBILITY ON THE POLITICAL MEANS USED TO ACHIEVE REUNIFICATION.
- (G) IF ARTICLE 23 WERE USED, THE GDR OR THE 'LAENDER' WOULD IN LAW BECOME PART OF THE FEDERAL REPUBLIC AND THE BASIC LAW WOULD THUS IN PRINCIPLE APPLY IN THE TERRITORIES WHICH HAD ACCEDED (BUT SEE BELOW)
- (H) ARTICLE 146 COULD BE USED EITHER AFTER ACCESSION UNDER ARTICLE 23 OR EFFECTIVELY INSTEAD OF IT. EVEN IF THE GDR 'LAENDER' ACCEDED UNDER ARTICLE 23, IT MIGHT STILL BE THOUGHT NECESSARY TO HAVE A NEW CONSTITUTION AND ARTICLE 146 COULD THUS BE BROUGHT INTO PLAY. AN ALTERNATIVE WAS FOR THERE TO BE NO FORMAL ACCESSION UNDER ARTICLE 23, BUT A CONSTITUTIONAL CONFERENCE WHICH WOULD PROVIDE TOGETHER FOR ACCESSION AND A NEW CONSTITUTION.
- (I) ARTICLE 23 COULD BE USED AS A RELATIVELY SIMPLE MEANS OF EFFECTING UNIFICATION WITHIN A SHORT TIME. THE INNER GERMAN MINISTRY WERE DISQUIETED BY THIS, BUT THAT WAS CONSTITUTIONAL POSITIONS.

(J) IT WAS UNLIKELY THAT THERE WOULD BE CONFLICT BETWEEN THE BASIC LAW AND THE FRG'S INTERNATIONAL OBLIGATIONS. UNDER ARTICLE 7 OF THE RELATIONS CONVENTION THE THREE WESTERN POWERS HAD AGREED WITH THE FRG TO COOPERATE IN ACHIEVING THE COMMON AIM OF A REUNIFIED GERMANY ENJOYING A LIBERAL DEMOCRATIC CONSTITUTION. THE FACT THAT THE GDR 'LAENDER' WOULD HAVE TO COMPLY WITH ARTICLE 28 OF THE BASIC LAW (A REPUBLICAN, DEMOCRATIC AND SOCIAL GOVERNMENT BASED ON THE RULE OF LAW) SHOULD MEAN THAT THE CONDITIONS OF ARTICLE 7 WERE SATISFIED.

COMMENT

4. THE POSSIBILITY OF UNIFICATION VIA THE HALF-FORGOTTEN ARTICLE 23 HAS GAINED MOMENTUM OVER THE LAST WEEK, PARTLY BECAUSE THE SPD HAVE BEEN TAKING A CLOSE LOOK AT IT. WE HAVE A COPY OF AN SPD PAPER OF 6 FEBRUARY WHICH ARGUES THAT THE GDR OR INDIVIDUAL EASTERN LAENDER COULD ACCEDE TO THE FRG ON THE BASIC OF ARTICLE 23, AND THAT THE FRG WOULD HAVE LITTLE ABILITY TO INFLUENCE THE PROCESS.

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5. THE CDU CHAIRMAN OF THE LEGAL COMMITTEE OF THE BUNDESTAG, HELMRICH, WARNED ON 7 FEBRUARY THAT BECAUSE OF ARTICLE 23 THE FRG SHOULD BE PREPARED FOR THE POSSIBILITY THAT UNIFICATION COULD COME MORE QUICKLY THAN EXPECTED.

6. THE RELATIONSHIP BETWEEN ARTICLE 23 AND ALLIED RIGHTS IS NOT STRAIGHTFORWARD. THE ALLIES HAVE MAINTAINED A RESERVATION ON ARTICLE 23 BUT ONLY IN RESPECT OF BERLIN. (USE OF ARTICLE 23 COULD THUS OPEN THE STATUS OF BERLIN AND THE QUADRIPARTITE AGREEMENT TO MORE FUNDAMENTAL RECONSIDERATION THAN HITHERTO). AS SEEN FROM HERE THE ALLIES COULD NOT OBJECT ON LEGAL GROUNDS TO UNIFICATION BEING ACHIEVED THROUGH ARTICLE 23 AND THE EXTENT TO WHICH THEY COULD DELAY IT IS DOUBTFUL. BUT RESERVED RIGHTS IN RESPECT OF REUNIFICATION AND A PEACE SETTLEMENT (ARTICLE 2 OF THE RELATIONS CONVENTION) ENTITLE THE ALLIES TO BE FULLY CONSULTED IN THE PROCESS OF MOVEMENT TOWARDS REUNIFICATION, PARTICULARLY ON ISSUES SUCH AS BORDERS AND SECURITY. AS NECESSARY WE MUST INSIST ON THE EXERCISE OF THESE RIGHTS, THOUGH WE SHOULD BEAR IN MIND THE REQUIREMENTS FOR THE ALLIES IN TURN TO CONSULT THE FEDERAL REPUBLIC ON THEIR EXERCISE (ARTICLE 7(4) OF THE RELATIONS CONVENTION) AND NOT TO INTERPRET THE RIGHTS UNDER ARTICLE 2 AS ALLOWING THEM TO DEROGATE FROM THEIR UNDERTAKINGS TO THE FRG IN THE BONN/PARIS CONVENTIONS (LETTERS OF 26 MAY 1952/23 OCTOBER 1954). IN ARTICLE 7(2) OF THE REALTIONS CONVENTION WE UNDERTOOK TO 'CO-OPERATE TO ACHIEVE... THEIR COMMON AIM OF A

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RE-UNIFIED GERMANY ...''

7. ACCOUNTS IN TODAY'S PRESS APPEAR TO REFLECT BRIEFING FROM THE JUSTICE MINISTRY. THE ANALYSIS IS CLOSE TO PARAGRAPH 3 ABOVE, AND ENGELHARD (JUSTICE MINISTER) IS DESCRIBED AS HAVING THE INTERNATIONAL DIMENSION MUCH IN MIND. WE SHALL CONTINUE TO ENSURE THAT IT IS NOT FORGOTTEN.

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