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# Moral Political Dissent in German-Czech Relations\*

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**Abstract:** Since 1989, the German-Czech relationship has been burdened by the problem of a just assessment of World War II and the following forced transfer of the Sudeten Germans. Why are democrats on both sides, who acknowledge the same values and principles, unable to reach an agreement about crucial events in the past? The political and legal differences imply a moral dissent which is not being discussed systematically. The article tries to investigate the deficits of the moral arguments on both sides.

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## 1. Problems with the Recognition Controversy

When in 1989/1990 Václav Havel publicly expressed a moral apology for the expulsion of Germans from post-war Czechoslovakia, he hardly suspected that the very foundations of *détente* policy – which had been interpreted by East Europeans as a German step towards reconciliation, based on their acknowledgement of the political status quo resulting from World War II – could ever be questioned. German unification was seen as the *sine qua non* of peaceful European integration and was consequently welcomed with something approaching euphoria. It was not only because of the East German and Czech (Czechoslovakian) revolutions of November 1989 that Václav Havel selected Munich and Berlin as the destinations for his first foreign trips. His apology was intended as a gesture which would contribute to overcoming the burdens of the past and reflected the policy later advocated by the Czech government, i.e. making a clean break with the past, at least on a political and legal level.

If the only reactions to Havel's apology had been the amiable reply of then German Federal President Weizsäcker and the prompt signing of a new friendship treaty between the two neighbours, many of the tensions which later arose would have been avoided. But the Sudeten Germans, the audience which Havel was in fact addressing, were – at least as far as their strongest public voice, the *Sudetendeutsche Landsmannschaft* (SL), was concerned – incapable of a similarly generous gesture. Instead, Havel's words were interpreted as a Czech “admission of guilt”, which must be followed by practical steps

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\*) Due to lack of space, part of the original text of this article was excluded. This part described and assessed the typology of moral discourses (e.g. the Christian ethic of forgiving, the 'ius talionis' ethic, discourse from the point of view of the victim, the sceptical use of morality and war as the end of morality, empathetic discourse on morality), which are found in many studies and articles on German-Czech relations. This text is based on a study entitled *Moralischer Diskurs und die Deutsch-tschechischen Beziehungen* carried out at the Forschungsstelle Osteuropa an der Universität Bremen (Research Institute for Eastern Europe at the University of Bremen). A German version (*Moralisch-politischer Dissens in den deutsch-tschechischen Beziehungen*) was published in *WeltTrends* 19, Sommer 1998, pp. 67-68.

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towards the legal and material compensation of the Sudeten Germans. The SL demanded compensation amounting to hundreds of billions of German marks and their spokesperson declared that they would not be "bought off" with a mere moral apology. The Sudeten German organisation, vigorously supported by its patron, the Bavarian government, issued threats in the event of the Czech government not entering into a 'dialogue' with the 'Sudeten Germans'. For example, co-operation in constructing a oil pipeline from Ingolstadt, which was intended to reduce the one-sided dependence of the Czech Republic on Soviet, later Russian, crude oil imports, was linked to Czech willingness to begin negotiations. Moreover, the Czechs were reminded of their dependence on German support for their bid to join the EU. The Sudeten Germans also called for the annulment of the so-called Beneš decrees, i.e. for the legal revision of the Czech internal policy regarding 'expulsion' (*Vertreibung*). The SL continues to insist on its "right to a homeland", even though such a right is neither upheld by current German jurisprudence, nor by international law, and despite the fact that it is unclear what legal rights and consequences would result from such a right. When, eventually, doubts were cast on the very integrity of a moral apology to the victims of violence and compulsory expulsion, on grounds that moral condemnation was only convincing if it was followed by appropriate legal measures, one might have easily been left with the impression that these arguments could not have originated in a country where no Nazi judges have ever been convicted, and where up until now the courts have turned down every individual legal claim filed by foreign victims of Nazis terror or of forced labour. And all this occurred while German pensions were still being paid to SS veterans who are citizens of countries other than Germany.

Although the Bonn government signed a new friendship treaty with the Czech Republic in 1993, the treaty expressly left open the question of eventual material claims arising as a result of the expropriation of the Sudeten Germans' property. This was the consequence of German law, according to which the Federal Government of Germany becomes responsible for fulfilling the compensation claims of its citizens, if it publicly renounces the private legal claims of its citizens against any second country. This well-known provision of German law – which some lawyers have interpreted to mean that 'only' the level of compensation paid thus far to German citizens by the German government might be open to re-negotiation – and the potentially incalculable financial risks which it opened up were the cause of the Federal Government's cautious position. Although this is in essence a non-political legal ruling which would also apply to the Czech government under the conditions of the rule of law, it has been perceived by the Czech public as a indication that in the future the German government could, if a favourable situation arose, again open negotiations on this issue. Czech politicians and the Czech public lost sight of the fact that the German Federal Government had good reasons for preventing renewed bilateral negotiations on the issue of individual compensation claims. Such Czech-German negotiations would have meant that the question of war reparations to the countries of Central, Eastern and South-Eastern Europe would come up at the international negotiating table, as provided in the London treaty on debts of 1953. In view of the enormous number of war victims and the enormity of material losses in this region, the German government, as the legal successor to the German Reich, would have then faced costs far exceeding other financial risks calculated in this context. Ex-Foreign Minister Kinkel's soothing words to the associations of displaced Germans (*Vertriebenenverbände*) to the effect that "the time is not yet ripe for your claims", the often hasty, morally motivated demands of several German politicians calling for the cancella-

tion of the Beneš decrees, and the active demands of the SL for restitution and compensation, which no representative of German politics contradicted, all served to cause agitation in Prague and in the border regions.

The Czech government's trust in the German interpretation of the legal situation was hardly strengthened by the fact that the Federal Government explicitly refused, from the point of view of international rights, to acknowledge the Potsdam Agreement of 1945; it declared, on the one hand, the Munich Agreement to be "legally binding", but, on the other, refused to accept the analogous argument in relation to Potsdam. Likewise, the trust of the Czech side was not reinforced by the fact that the Federal Government and German Constitutional Court confirmed the validity of compulsory expropriation in the former GDR at the end of the war but refused to acknowledge compulsory expropriation in post-war Czechoslovakia as a valid and irreversible outcome of World War II. Suspicions grew that the international legality of the transfer (Potsdam) might first be negated and then – on the basis of 'Czech guilt' – doubts cast on the internal legal basis (the Beneš decrees). This would have opened the way for Sudeten German demands. An avalanche of Sudeten German restitution lawsuits at a time when the legal system was in danger of collapsing would have blocked the process of privatisation and contributed to tension in the country. In connection with Bonn's demand that the SL be involved in bilateral talks with the Prague government, the Czech side was left with the impression that the now sovereign Germany was systematically attempting to revise the outcome of World War II. Thanks to the special treatment of Poland, the Czech Republic increasingly perceived its position as that of the 'weakest link' within the former East European community. The simultaneous division of Czechoslovakia and reunification of Germany, together with Austria's entry into the European Community, revived old, historically well-founded fears of a new and powerful Greater Germany in Prague. The word injustice (*Unrecht*) itself, which German politicians of all persuasions use in connection with expulsion, suddenly took on a double meaning: besides meaning injustice in the moral sense, it might also mean – without any legal basis whatsoever.

In the Czech Republic, this suspicion was not only prevalent among nationalists and communists, but gradually pervaded democratic political groups as well. Increasing mistrust in the long-term aims of German politics among the Czech public was, in itself, the really disturbing development. In view of the fact that the Bonn government actually neither intended to unilaterally revise the post-war order in Europe, nor aimed to launch an offensive on the compensation question – which would have been absurd, not only from the German point of view – leads one to ask why their real intentions were so difficult to decipher and how such an impression could ever arise in the Czech Republic. The whole situation is all the more puzzling if one recalls that the Federal Republic is a reliable partner and supporter of Czech integration into the West.

Czech politics reacted by 'consolidating' its own legal and political positions, with the intention of warding off what were presumed to be Bonn's attempts at revision. The first step was the Czech Parliament's background report on the German-Czech Treaty of 1992. The second step, of much greater significance than this political statement by Parliament, was the decision of the Constitutional Court of the Czech Republic (1995) upholding the "legality" and "legitimacy" of the so-called Beneš decrees and confirming their legal validity, at the same time it denied their present-day applicability. The Czech government subsequently requested the opinions of the former Allied powers on the issue

of the validity and international legal status of the Potsdam Agreement in 1996 and received replies from those countries, ambassadors which met with Prague's expectations.

The Czech government also contributed to the clouding of Czech-German relations. One must merely recall the obvious discrepancy between the Czech offer of dual nationality for Sudeten Germans made in 1990/91 and the current rejection of a dialogue with representatives of the SL. In the meantime, the Prague government offered to enter into a dialogue after the traditional Whitsuntide meeting of the SL in 1993, despite sharp and demanding tones voiced there, and retracted this offer three days later, arguing that the speeches of SL representatives had rendered dialogue impossible. All of this was little help in clarifying Czech policy. The fact that the Speaker of the Czech Parliament, Milan Uhde, rejected a inter-parliamentary dialogue during a visit to Bonn in the same year contributed to producing the most significant shortcoming of the Joint Declaration on Conciliation later agreed upon – its insufficient political legitimacy. It was this lack of dialogue, which became strikingly obvious in existing political, legal, and normative evaluations of the Czech-German common past, which finally led to the Czech idea of a Joint Declaration of Reconciliation. Two years of secret diplomacy and hard work on the part of the Deputy Foreign Ministers of both countries were necessary before in 1997 this platform for "international understanding" was created in the form of a rational text which contributed to improving mutual relationships. Czech hopes for a legal end to the demands for compensation went unfulfilled, for well-known reasons. The German Federal Government acknowledged what had been common knowledge before the declaration, namely, that the past would not be a hindrance on the Czech Republic's path into the EU and NATO. Finally, despite the convergence of standpoints, considerable differences remained with respect to the respective historical, political and normative assessments of the two countries' common past. These differences manifested themselves in statements on the "divergent legal views" of both sides, and in legitimate criticism from the Czech Jewish community regarding the inadequate recognition of the effects of the Holocaust on Czech Jews in the declaration. Furthermore, no agreement was reached on appointments to positions in the German-Czech Future Fund or on the definition of the fund's future tasks. Disagreements were also manifested in another, scandalous case i.e. the initial blockage of payments from this fund to the last surviving victims of Nazi terror in the Czech Republic, where it was decided that their legitimate compensation claims, in contrast to the claims of SL members, were not to be transferred to succeeding generations.

There are a number of factors underlying the ongoing difficulties which plague the process of Czech-German rapprochement. Of course, nationalistic and ethno-nationalistic stances exist on both sides of the Bavarian-Bohemian forest right up to the present day, but these positions represent a political, rather than an intellectual challenge. At the core of the communication problems on both sides are neither fear of renewed property losses in the former Sudeten German regions, nor a real or supposed repression of history in the Czech Republic, nor the complex muddle of political, material, legal and moral aspects which complicate the clarification of opposing standpoints. The key to the problem lies rather in the fact that democratic politicians on both sides differ substantially in their moral and normative assessments of World War II and its consequences. At the centre of this issue is the question why politicians, journalists, historians and representatives of the generation of first-hand witnesses who have the will to understand and who all appeal to the same laws and norms fail to reach a consensus in their assessment of the main historical processes. One of the most difficult questions in this context refers to the evaluation

of individual guilt and responsibility for large-scale crimes committed collectively during this 'total war' under conditions of total dictatorship, during which almost all remaining civil and private autonomy was suspended, and, along with it, the prerequisites for the perception and assessment of individual responsibility [Schwan 1997: 14ff]. Reflecting this dilemma are concepts requiring clarification, such as collective responsibilities, collective guilt or the collective liability of citizens; these concepts are juxtaposed with arguments connected with the issue of appropriate punishment for the crimes committed during World War II. Discussions of these issues always imply moral judgements on one's own actions or the actions of others, but such judgements rarely become the subject of systematic consideration. The difficult moral discourse on the war, transfer and expulsion is not only complicated by the collision of contradictory positions from earlier conflicts, divergent experiences of suffering, and the divergent memories of those who experienced the war and post-war period first-hand; it is also burdened with attempts to link historical and contemporary moral horizons.

## 2. Differences in German-Czech Moral Discourse

It is not surprising that, within the current German-Czech dialogue advocates of the same values and principles arrive at different interpretations regarding the sphere of their applicability, interpretations which are sometimes directly opposed. For example, despite their similar political ideals and close personal relationship, the former German Federal President, Richard von Weizsäcker, and Václav Havel, when evaluating key points of German-Czech history, come to different conclusions. This was stressed by von Weizsäcker in his Prague speech at Charles University in December 1995: "Expulsion is a serious injustice (...) The expulsion of Germans from Czechoslovakia was the result of the capitulation of democracies in the face of dictatorship in Munich in 1938 and a result of the forced occupation of your country in March 1939 (...) However none of this means that expulsion and the expropriation decrees of 1945 and their cruel implementation become in any way acceptable. They were immoral, because they assumed the collective guilt of an entire group of people; guilt, however, like innocence, is always individual, never collective. The decrees were not legal acts, but were acts of war after the fact (...) That is why this year's decision by the Brno High Court alarmed us to such an extent, because it was based, fifty years later, on an alleged collective responsibility and because it legitimates, on the basis of criminal law, earlier acts of injustice."<sup>1</sup>

Václav Havel, who underlined the Czech decision to forego claims against Germany for the injustices suffered by Czechs during World War II, rejected all demands for compensation for "post-war resettlement" on the part of the *Vertriebenenverbände*, as well as calls for a revision of the Beneš decrees: "We too have attempted to give an account of our share of the responsibility for the offences which happened after the war, but we also haven't the slightest intention of turning back history and repealing (...) our legal acts, which were long ago legitimately adopted by Parliament."<sup>2</sup>

The diverging assessments of central issues in German-Czech relations in these two speeches are obvious. Although on the German side, some self-critical voices do acknowledge the relationship between cause and effect, several influential spokespersons call for an unconditional moral condemnation of expulsion (P. Glotz). The moral assess-

<sup>1</sup>) *Frankfurter Rundschau*, 3 January 1996.

<sup>2</sup>) *Lidové noviny* 18. 2. 1995, extract in *Prager Zeitung* 23. 2. 1995.

ment thus is as follows: the terrible 'injustice' suffered by the Czechs at the hands of the Germans was followed by the 'injustice' of 'transfer'. In this view, the wild, pogrom-like expulsions, the 'transfer decisions' reached in Potsdam and the Beneš decrees form a unit, because they are all reflections of a mistaken principle, that of collective guilt. In keeping with this line of thought, superficial comparisons, equating the Holocaust = expulsion = present-day ethnic cleansing are often put forward [Glötz 1995].

The Czech side considered such equations inadequate and therefore insisted on a more rigorous relationship between cause and effect in the joint German-Czech declarations. The then Czech Prime Minister, Václav Klaus, referred to this point repeatedly and emphatically. He thus criticised the March 1995 joint declaration of German and Czech bishops because it constructed a "symmetry" with respect to the question of the guilt of both nations and lacked adequate recognition of chronology and causality: "We are not talking here of autonomous, mutually unconnected cases of failure and guilt" [Klaus 1997: 373]. The Czech historian Václav Kural expressed the same thought thus: "The initiative and the primary guilt for the catastrophic change does not rest with the Czech side" [Handl and Kural 1994: 18]. That this emphasis on the causality of historical events was not exaggerated is demonstrated by the numerous attempts, above all on the part of the Sudeten Germans, to extract the problem of transfer from an international context and to completely disregard the relationship between cause and effect. This position was taken by one of the most active spokespersons for Sudeten German demands, R. Hilf: "Who started it is perhaps as interesting a question as which came first, the chicken or the egg" [Hilf 1996: 34]. This relatively widespread opinion provoked an ironic observation by the well-known television commentator F. Küppersbusch: "If the Czechs had not expelled the Sudeten Germans in 1945, Hitler would not have occupied Czechoslovakia in 1939. Right?"<sup>3</sup>

From the moral point of view – as can often be heard on the Czech side – it is argued that many of those displaced experienced 'injustice, but' – but these measures can only be understood within the specific historical context and were necessary and legitimate. The 'transfer' allegedly took place in agreement with the Allies. In his speeches, Václav Havel, repeatedly mentioned and condemned the moral repugnance of revenge as a motive in connection with forced resettlement and expulsion. However, he also speaks of the "legitimate" decision of Parliament when referring to the expropriation and expulsion decrees. On the cause and effect relationship he says: "We can entertain various opinions regarding the post-war transfer – and my critical standpoint is well-known – however, we may never separate it from the historical context and all those horrors which preceded and led to it ... The transfer (*odsun*) no doubt represented the end of co-existence within a collective state. But the deadly blow which caused this was something else: the fatal failure of the majority of our inhabitants of German descent who gave priority to dictatorship, confrontation and violence – which Hitler's National Socialism embodied – over democracy, dialogue and tolerance, and who, by claiming a right to their homeland, in fact renounced their homeland."<sup>4</sup>

The former Czech Foreign Minister, Jiří Dienstbier, speaks of the application of the idea of collective guilt in post-war Czechoslovakia and also uses the term ethnic cleans-

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<sup>3</sup>) ARD, 2. 6. 1996.

<sup>4</sup>) *Lidové noviny* 18. 2. 1995.

ing in this context, but at the same time rejects any discussion of a possible repeal of the decrees.<sup>5</sup>

Obviously, the question of motives is not irrelevant in making moral judgements, nor is the question of who started things; in fact, such issues have a high priority in the moral assessment of actions. It would seem that Kant's analogy is clearly valid, according to which the standards used to gauge conduct between two nations should be the same as those used for relations between two private individuals. The Czech standpoint insists on the difference between the activity of one person (or a nation or ethnic group) who acts with criminal intent and another who becomes involved in crime as a victim and then acts unjustly. In his polemic attack on Tolstoy's pacifism, T. G. Masaryk insisted on the fundamental difference between the assailant and the victim. The first is situated, in his opinion, "in a wholly different mental condition than the one who defends himself". It is exactly this difference which morally justifies the use of violence by the victim and leads to condemnation of violence perpetrated by the aggressor [Ludwig 1937: 100].

Both these lines of argument are incomplete. The equation frequently found in the speeches of German politicians – i.e. that one 'injustice' was followed by another – obliterates too many moral differences. In this equation, many people were in fact 'more equal' than others. Thus it is only proper that the text of the Czech-German Declaration, as a product of laborious negotiation, states that the brutal Nazi regime laid the groundwork for later expulsion and forced eviction.<sup>6</sup> Nevertheless, this statement fails to do justice to the special character of the occupying regime during this period of 'total war' and the implementation of Nazi *Umwölkungspolitik* ('repopulation policy').

Two aspects of the Czech position are noteworthy: first, the gap between legal justification and moral condemnation and second, the way in which this position illustrates the limits of the Kantian analogy between personal and collective action. In contrast to the deeds of individuals, it is impossible in the case of collectively perpetrated reprisals to determine unambiguously whether an injustice was committed as a result of the exaggerated reactions of traumatised victims, or whether planned crimes were committed deliberately by groups; in the latter case, perpetrators would not be able to claim extenuating circumstances in individual court proceedings. In cases of group violence, it is impossible to unambiguously determine the aggressor and victim.

Furthermore, it is striking that the – in my opinion – legitimate rejection of one-sided Sudeten German claims to property restitution via revision of the so-called Beneš decrees led to a morally problematic defence of their 'legality' and 'legitimacy'. They were 'legal' in the sense that they were in a legal form. And they were 'legitimate', in the sense that they were passed by a parliament legitimised by a sovereign people. Were they also 'legitimate' in a moral sense? Václav Havel's clear condemnation of the revenge motive demonstrates that this was not the case. Nonetheless, it is obvious that the justification of these Czech measures at the end of World War II, as quoted in Havel's speech above, remains confined to the level of reasons of state, which – in my opinion – does not stand up to moral judgement. This position results from the fact that, to date, the Czech side has failed to conduct an assessment of the normative and legal implications of its historical actions and legal acts in the years 1945/46 from the perspective of today's gen-

<sup>5</sup>) Interview in *Svobodné slovo* 10. 2. 1996, *Práce* 26. 2. 1996.

<sup>6</sup>) Compare article 2 of the declaration. *Frankfurter Allgemeine Zeitung* 11. 12. 1996.

erally accepted human rights and moral standards. Must one today defend the forced transfer as a legal act in order to maintain trust in the legal system? Would it not be more appropriate to acknowledge the legally binding character of the decrees and at the same time morally distance ourselves from them and clearly state that, from the perspective of today's legal standards, the decrees are not – despite the clauses with exceptions for German anti-fascists – compatible with the human rights guaranteed in the Czech constitution? The classification of past legal acts, treaties or agreements, which are today considered illegitimate, as legally binding by no means necessarily implies – as demonstrated by the legal handling of the Munich Agreement of 1938 in the Federal Republic – a chain of further revisionist legal steps (for instance, restitution etc.). Such a position avoids the formula of 'legal validity' – as employed in the decision of the Czech Constitutional Court – and its negative consequences for today's jurisprudence.

Every retrospective discussion about values is simultaneously an attempt to reach a moral self-understanding with respect to the past. Does an understanding of the historical context mean the legitimisation of past actions? Is it at all possible to generalise conclusions? The question remains: how can war, expulsion, transfer and their perpetrators be fairly judged from today's perspective?

It is a striking phenomenon that one significant point that was clearly seen by the protagonists at the time is hardly recognised on both sides of the current German-Czech discussions, at least on the level of official policy. Curiously, it is precisely the sole dimension of the historic conflict that could provide something like a partial justification for the decision to implement expulsion (which is expressed in the phrase 'historically understandable'): this was the character of World War II. This was not a war against states, but against peoples, ethnic groups (M. Walzer). World War II was not a classic national war of revision, but rather a war of conquest and a race war, which obliterated every law, convention and norm recognised at the time, and exceeded in its consequences all of the known dimensions of mass crime up to that period.<sup>7</sup>

With regard to the German-Czech dialogue and given the singular quality of this racist war of extermination, one must acknowledge that the very concept of peaceful co-existence of both peoples in a common state after the end of World War II was rather utopian. Taking into account the fact that in this 'total war' all moral boundaries fell, taking into account the systematic elimination of the democratic elites, the extraordinary and long-lasting suffering of the civilian population, and also the far-reaching institutional and legal vacuum after the fall of the occupying regime, it was hardly possible to prevent acts of revenge in the form of expulsions and the decisions regarding forced transfer. This singular conflict formation, in which the terror regime of the protectorate manifested itself as an expression of genuine Greater German hegemonic goals, led the Czech side to collectively accuse all Germans and especially Sudeten Germans. The Sudeten Germans were held chiefly responsible for the destruction of the Czech democracy and the subjection of the Czechs to Nazi dictatorship. All Sudeten Germans, including those who were not obvious lackeys of the Nazi regime and even those who opposed it, were affected by the post-war policies and the ensuing violence to the same extent as the Nazi perpetrators. The political regulation of radicalised nationalist conflict is never

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<sup>7</sup>) The German historian Klaus Hildebrandt in a discussion in ZDF: *Hitler eine Bilanz* von Guido Knopp 10. 12. 1995. Cf. also his volume: *Deutsche Aussenpolitik von Bismarck bis Hitler*. Stuttgart 1995, p. 892.

an easy task and such conflicts can reach a stage of escalation which precludes any kind of compromise; in this case, the situation was severely exacerbated by a biologically charged definition of the nation. Moreover, there was no visible anti-Hitler opposition in Germany. German soldiers fought with extreme brutality up to the very end of the war and in spite of the futility of their actions. As a result, the original concept of distinguishing between the German people and Hitler's Germany was abandoned in the final phase of the war by the Western Allies, and all the more readily by those peoples who suffered directly at the hands of the Nazis.

Hannah Arendt commented on this as follows: "Whether someone was a Nazi or anti-Nazi in Germany will only ever be determined by someone who can look into the human heart, into which, as everyone knows, human vision cannot penetrate. (...) Thus, even the most extreme slogan that this war has evoked on our side – that the only good German is a 'dead German' – has a basis in reality; we can only know that someone was truly opposed to the Nazis after they hanged him. We have no other proof." [Arendt 1976: 35]

This led Arendt to the question of how one could face "being confronted with a people for whom the line that divides criminals from normal people, the guilty from the innocent, was so effectively erased, that tomorrow no one in Germany will know whether he is speaking to a secret hero or a former mass-murderer. Neither a definition of who is considered responsible nor the arrest of 'war criminals' can save us from this situation." [Ibid.: 36ff]

At the end of World War II, the practical impossibility of methodically ascertaining – a million times over – the guilt (or share of guilt) of individuals was self-evident; therefore, a substitute was found in moral generalisations.

The thesis of collective guilt rests on the assumption that a person can be accused purely on the basis of membership in a defined group. This assumption is in such fundamental opposition to Western-liberal legal tenets that defending it would lead to a fundamental reassessment of the entire legal system. On the other hand, although the legal system rejects the notion of collectives which act as a unit, history in fact shows that they exist. There were real and effective divisions within national and ethnic collectives, which resulted, internally, in compulsory homogeneity and, seen from the outside, camouflaged all existing individual differences and internal forms of differentiation. The near-complete identity of nation and regime in Nazi Germany, the active collaboration of the German civilian population with the aims and methods of Nazi policy and with the Nazi war of extermination until its bitter end, in effect left the occupied nations no choice but to make political-moral generalisations based on national categories. This dilemma cannot be solved in retrospect. The conflicts of radicalised groups, which are enacted along the distinctions of 'primordial' traits (i.e. either immutable traits such as sex or skin colour or very stable identities such as nationality/ethnicity, native language, religion) create divisions that rule out compromise and produce in the generations involved irreversible ruptures, which the protagonists cannot repair on their own. Conflicts of this kind are often caught up in spiral of increasing tension, are immune to the usual forms of conflict regulation and often end in bloodshed.<sup>8</sup> In extreme situations, any acknowledgement

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<sup>8)</sup> Claus Offe referred to the special role of the conflicts of primordial groups in his lecture "Homogeneity and Democracy" in Bremen on Jan 1, 1996.

of differentiations in the ranks of the opponents is swept away. Recognising that such conflicts, once they have reached a certain level of violence and loss of moral boundaries, to a certain extent resemble natural catastrophes in their dynamics and seeming inevitability can hardly be equated with nationalist partisanship in favour of one conflict party or the other. This recognition depends instead on one's insight into the depth and the consequences of the breach in modern civilisation which Nazi barbarism effected, and is as important for assessing such processes as the rejection and exposure of nationalist arguments.

Those who prepared and carried out population transfer measures in the specific historical context of World War II did not, and did not want to, commit 'genocide' against the Germans, as a significant portion of the Sudeten Germans still believes today. To label population transfer as genocide is to place the motives and moral grounds of those large-scale criminals who planned and carried out genocide on a par with those who attempted to stabilise peace in a ruined region charged with hatred. That such a comparison is not new is illustrated by correspondence between Herbert Marcus and Martin Heidegger in August 1947 and January 1948. Questioned about the reason for his silence about the Holocaust and his support for the Nazi cause in the 1930's, Heidegger equated the behaviour of the Allies with Hitler's Germany, replying that one need only exchange the word 'East Germans' for 'Jews'; the only difference, he noted, was that the Nazis tried to cover up their bloody crimes, while the Allies acted openly. Marcuse replied that the logic of Heidegger's arguments implied that extermination camps such as Buchenwald or Auschwitz should be preserved for 'East Germans' and only then would accounts be settled, and he continues: "If the difference between humanity and inhumanity is reduced to this omission, then this is the fault, within world history, of the Nazi system..." [Farías 1989: 374]

This dispute also points up a fundamental moral distinction. There is an essential difference between the loss of property, which is very painful to the individual, and the loss of life or health, which cannot be remedied whatsoever.

The core of the problem in the discourse taking place within the democratic spectrum on both sides rests, in my opinion, on the fact that German policy and discussion, besides pursuing the legitimate goal of pointing out the actual hardships of its civilian population during and after the war, is generally concerned with applying today's moral and legal standards to the conflict constellations which arose in the immediate post-war period. The question which is overlooked in this perspective is whether a realistic alternative to collective punishment existed, given the civilisatory breach caused by the Nazis' racist war of extermination and their occupation and *Umwölkungspolitik*. This question is not answered by distancing oneself from nationalism and lumping together what were obviously war crimes, violent acts of revenge against German civilians at the end of the war, and the decision to implement transfer – which was intended not only as punishment, but also aimed at curbing violence and securing future peace – under the term expulsion and declaring it to be an indisputable injustice. The minimal requirement for moral plausibility in consideration of the special dimensions of Nazi crimes in the countries of Central and Eastern Europe would be that German politics would neither permit legal claims or one-sided revisionist measures against the countries it had formerly invaded, nor give the impression that it intended to lay such claims. Since in fact neither the majority of Germans – including the large majority of Sudeten Germans long since integrated into Federal Germany – nor the majority of the political parties have any interests

in this direction, negotiations to date have suffered under a specific deformation, reflecting the constellation of power in the Bonn coalition and the particular weight of the CSU until September 1998, rather than the general state of consciousness in Germany.

What stands out on the Czech side (at least in the key official statements of politicians and the Constitutional Court), is that by insisting on the relationship between cause and effect and by references to the decisions reached by the victorious Allies, the Czech side neglects the assessment of two important points: first, its own share in the realisation of the transfer measures and second, the actions and laws of the post-war period on the basis of current moral and legal standards proclaimed in the modern Czech constitution.

The readiness to take up such a task, as I have pointed out above, constitutes the essential moral difference between a state which recognises that it is prepared, in an extreme situation, to override norms that it otherwise upholds and a state that will not do so.

This is precisely the point at which a democratic country must prove its interest in not allowing its appropriation of tradition to follow the motto 'my country, right or wrong'. Hannah Arendt, who so compellingly analysed the culpability of the Germans in "total collaboration" with the Nazi regime, remarked in a different context that no state could survive co-operation with a totalitarian state undamaged. The same applies to the state of a population living for a long period under the occupation of a terrorist regime. Referring to this phenomenon is neither tantamount to moralising about history, nor is this a cheap vilification of the actors of that period. On the contrary – only by acknowledging the difficult decisions and dilemmas which politicians and ordinary people faced and how they sometimes failed or suffered the loss of democratic substance, can we find evidence for the renewal of democratic traditions. For all moral judgements about historic processes which are reached today reflect the values and norms which should guide the contemporary political community. To re-fight the moral battles of times past would be absurd. A democrat can be distinguished from a nationalist precisely because he expects, in retrospect, high moral standards not only of his rivals, but also of himself. The recognition that a democratic state, to the extent that it employs the means of an aggressor, loses, in the same measure, its democratic substance, is quite compatible with a fair treatment of the partial failure of one's own democratic elites.

From the point of view of an ongoing development of legal standards and the creation of a higher level of justice for the present and the future, only one conclusion can be reached: There are no just transfers, even if they could be carried out by 'humanitarian means', and even if we can acknowledge that they appeared to be justified to the democratic politicians responsible, in view of the exceptional conditions caused by World War II. President Masaryk also foresaw this long before the monstrous scale of population resettlement during World War II and of forced expulsion resulting from post-war retribution became reality: "The pan-Germans often proposed that significant national minorities be relocated; the example of Zionism and emigration would seem to suggest such a remedy. It is more than doubtful, however, whether it is possible to carry out such an enterprise fairly and without force." [Masaryk 1976: 52]

Masaryk appears to have known that legitimate considerations such as, for example, ensuring peace with the lowest long-term financial and organisational costs, consideration of internal political factors etc., influenced the political decision-making of the political actors who had to make such difficult decisions (and thereby often, of necessity, circumvented the persons who were immediately involved) as much as considerations of

justice. For precisely this reason, decisions which are justified but which reflect interests other than the welfare of those directly affected are not necessarily just for the affected parties. Today, such gaps between conflicting interests are limited by the international commitment to upholding human rights and by increasing pressure to democratically legitimate such decisions.

In Czech politics, the handling of laws pertaining to expropriation, expulsion and amnesty was marked by a defensive position taken up against a threatening avalanche of Sudeten German demands for revision. The many expropriations and transfers of property in former Czechoslovakia between 1938 and 1989 (aryanisation, the nationalisation of large industries by the people's democracy, forced expropriation of property of Germans and Hungarians and of Czech collaborators with the Nazis, total collectivisation under the communists) would have justified a clear discussion by the reinstated people's sovereign after 1989 – i.e., to reject all restitution of property after such a long period. Since this decision was not reached and only communist expropriations after 1948 were declared illegitimate, new legal problems emerged. These manifested themselves, for example, in the fact that Jewish property is not restituted to private individuals, which many Czech politicians consider scandalous because in these cases the return of property is denied due to fear of creating legal precedents that could unleash an avalanche of restitution claims.

The political and moral handling of the decrees is, however, another matter. One of the main pillars of the decrees is an overturning of a basic principle of criminal law – the presumption of innocence. Instead, the accused is charged with proving his innocence. If an analogy comparable to this process in both extent and character is to be found anywhere, it is in the so-called *Spruchkammer* proceedings, which operated during the post-war de-Nazification process in West Germany. These proceedings had a legal basis and their aim was to free Germany from National Socialism. Millions of members of the NSDAP, as well as party officials and functionaries, were divided into five categories according to the seriousness of their complicity. These categories ranged from chief culprits, through party members, down to those acquitted of responsibility.

The advocates of these proceedings countered criticism of the inversion of the assumption of innocence with the argument that Nazi crimes were so evident that there existed a basic (*prima facie*) proof against National Socialism. Anyone who participated in the Nazi regime as a party-member or functionary fell under the likely assumption that he had actively supported National Socialism. While this procedure followed legal form, its initiators were aware that it was a case of combining criminal justice with a political purge. The proceedings focused not on the motivations of and concrete proofs against the accused, but on the deliberate discrimination of a political force that had to suffer the consequences of its self-made fiasco [Friedrich 1994: 137ff]. Here it would be appropriate to ask to what extent the transfer decrees should be primarily regarded not as an instrument of political retaliation through ethnic cleansing in an exceptional situation – in which, as a result of a criminal war and Nazi population policies and the biological radicalisation of pre-existing ethnic conflicts, peaceful co-existence seemed impossible after the war – but rather as a valid, though no longer applicable, element of a democratic legal order based on human rights, as claimed in the Czech Constitutional Court's decision.

It also seems worthwhile to consider the following point: overturning the legal principle of the assumption of innocence is one matter when applied to political movements, which one aims to disband for good reasons, and quite another when applied to an

entire ethnic group. While political groups (parties, movements), despite pressure to adapt under totalitarian conditions, imply the capacity of their members to make a political choice, this is not the case with nationality or ethnicity. The argumentation laid out by the Czech Constitutional Court is hardly adequate for satisfying one's sense of justice: The abandonment of the assumption of innocence for Germans is legitimated with the argument that a German state no longer existed at the end of the war so that the specific status of an individual could only be determined on the basis of national identity. In the very next sentence, the court goes on to construct a correspondence between ethnic group and political convictions, based on the assumption that citizenship in the German Reich implied the obligation to be loyal to the regime [Constitutional... 1995: 91]. In view of recent Czech experiences in an authoritarian state, one might expect Czech citizens to realise that, under the conditions found in a totalitarian state, it is impossible to reach a conclusion about individual behaviour or collective persuasion merely on the basis of an individual's citizenship status. The forays into history found in the Constitutional Court's decision focus on justifying the "legality" and "legitimacy" of the laws on expropriation and forced transfer and hardly send positive signals to the innocent people affected by these measures. Nor do they radiate the spirit of humanist ideals and human rights so often cited in the political culture of the Czech Republic. It is possible to agree with the Constitutional Court that the decrees were not a wanton act with respect to their legal form, and that they were sufficiently legitimated after the fact by Parliament, but it is difficult to agree that they represent a sanction that served to "secure the functions and the spirit of human rights and freedoms" [Ibid.: 96].

These differentiations are not merely verbal skirmishes. Law is not identical to justice, but the two cannot be at odds with each other for long in a democratic state.

The arguments presented here reflect only a small segment of German-Czech relations and, within that segment, deal only with certain aspects of the mutual assessment of the most extreme period of German-Czech history.

The moral dissent described here, if it is to be productive, must be linked on both sides to the understanding that the more rigorous one side is in its moral assessment of the behaviour of the other party, the more demanding the opposing party will be in the moral standards it applies to its behaviour and the responsibility for its consequences.

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