1995/03/08 - PL. ÚS 14/94: BENEŠ DECREES

HEADNOTE:

The Decree of the President No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, was not only a legal but also a legitimate act. In view of the fact that this normative act has already accomplished its purposes and for a period of more than four decades has not created any further legal relations, so that it no longer has any constitutive character, in the given situation its inconsistency with constitutional acts or international treaties under Article 10 of the Constitution1) (Article 87 para. 1, letter a2)) of the Constitution of the Czech Republic) cannot be reviewed today, for such a means of proceeding would lack any juridical function whatsoever. To proceed otherwise would be to cast doubt upon the principle of legal certainty, which is one of the basic requirements of contemporary democratic legal systems.

CZECH REPUBLIC

CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court of the Czech Republic, in the matter of the petition of R. D., which petition sought the annulment of the Decree of the President No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, with the Assembly of Deputies of the Czech Republic joined as a party to the proceeding and with the following individuals joined as secondary parties, 1) R. B., and 2) JUDr. J. S., decided, thusly:

The petition is rejected on the merits.

REASONING

With reference to § 74 of Act No. 182/1993 Coll., the petitioner, R. D., submitted a petition to institute a proceeding under § 64 para. 1, letter d) of the cited act in conjunction with a constitutional complaint against the 26 October 1993 decision of the Regional Court in Ústí nad Labem, the Liberec Branch, file number 29 Co 647/93 30. He stated in his petition that, in conflict with both the current constitutional rules and with the constitutional rules in effect in 1945, the Regional Court in Ústí nad Labem declared Decree No. 108/1945 Coll.,3) to be a valid part of "our legal order" and at the same time

declared this decree to be the "legislative act on the basis of which the property was confiscated." Under the 1920 Constitutional Charter, legislative power was vested solely in the National Assembly and its two chambers. During any period when either chamber was dissolved or from the expiry of one electoral term until the chamber was reconvened, and also during any period when its session was adjourned or had expired, a 24 member Executive Committee took urgent measures, even though an Act of Parliament would have otherwise been necessary therefor, and it exercised governing and executive power. This Executive Committee was composed of 16 members of the Assembly of Deputies and 8 members of the Senate. This committee was competent in all matters coming within the legislative authority of the National Assembly, however, it was not authorized either to amend a constitutional act or by its measures to impose permanent financial obligations (on the state) or to transfer state property. Other than the just-mentioned National Assembly and its 24 member Executive Committee, no constitutional body was endowed with legislative powers. Thus, whatever Dr. Edvard Beneš' status was during the decisive period when he was issuing decrees, even if he was President (and according to the legal argument of the petitioner he was not, and could not have been, because on 5 October 1938 he resigned and another President of the Czechoslovak Republic was duly elected after him), not as a private citizen nor even as the President of the Czechoslovak Republic could he be endowed with legislative authority. Thus, to the extent that he issued any sort of act, be they the utmost ministerial acts of governing and executive power, they were not issued in conformity with the constitutional rules then in force and were invalid acts ab initio. Thus, if socialist legal theory, and immediately prior thereto also the legal theory influenced by the so-called "national democratic revolution" supposedly under way in 1945, designated his acts as acts of revolutionary legislation, it must be observed that no revolutionary legislation existed, rather it was only lawless, revolutionary force. Assessed in this way, these acts were, thus, acts of force of the highest order, and not of law. In conflict with all the basic principles of the law-based state, in this instance a single person was recognized as being a legislator and at the same time as holding governing and executive power. Decree No. 108/1945 Coll.,3) which the Regional Court in Ústí nad Labem, the Liberec Branch, applied in the above-cited decision, is not in conformity with Articles 2, 3, 4, 11, and 24 of the Charter of Fundamental Rights and Basic Freedoms, relating to the assertion of state authority and the bounds thereof, the rights of nationalities, limitations upon the fundamental rights and basic freedoms, as well as the right to own property. For all these reasons, the petitioner petitioned the Constitutional Court to declare Decree No. 108/1945 Coll.,3) to have been an act void ab initio. Should the Constitutional Court, in spite of the legal canons of civilized European societies, conclude that it was a legal act, or even a statute, he petitioned it to annul this legal norm.

Acting on behalf of the Assembly of Deputies of the Parliament of the Czech Republic, its Chairman, PhD. Milan Uhde, expressed its view that the head of state had issued Decree of the President No. 108/1945 Coll.,3) fully within the confines of his authority at a time when the National Assembly was not constituted so that it forms a valid part of our legal order. For the period during which the Provisional Constitutional Order was in effect, where such was indispensable, the President issued enactments in the form of decrees (on the government's proposal and countersigned by the Prime Minister and the member of the government responsible for implementing it), which amended, repealed or reissued

acts. His authority for so doing was supplied by Constitutional Decree of the President from 15 October 1940, No. 2 Official Gazette of Czechoslovakia, concerning the Provisional Exercise of Legislative Power, promulgated in the Collection of Laws and Orders of Czechoslovakia under No. 20/1945. In the end, all of the President's decrees were approved by the Provisional National Assembly of the Czechoslovak Republic, namely by means of Constitutional Act No. 57 of 28 March 1946, which Approved the Decrees of the President and Declared them to Be Law. Thus, the presidential decrees were issued in a constitutional manner, were ratified in a constitutional manner, and are a valid component of our legal order.

In its ruling of 27 May 1994, file No. IV ÚS 56/94 15, the Panel of the Constitutional Court which was dealing with R. D.'s constitutional complaint suspended that proceeding pursuant to § 78 para. 1 of Act No. 182/1993 Coll., on the Constitutional Court, and certified his petition seeking the annulment of Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, to the Plenum of the Constitutional Court for its decision under Article 87 para. 1, letter a) of the Constitution.2)

The Plenum of the Constitutional Court dealt first of all with the issue of whether the petitioner satisfied the requirements under § 74 of Act No. 182/1993 Coll., on the Constitutional Court, upon which his petition relied. On this issue, the Plenum of the Constitutional Court came to the conclusion that, in the case under consideration, the petitioner satisfied the conditions relating to standing to submit a petition proposing the annulment of a statute or some other legal enactment.

The first fundamental issue to be considered in the matter at hand is whether the contested decree of the President, that is the decree of 25 October 1945, No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, was issued within the bounds of his legitimately prescribed powers or whether, on the contrary, as the petitioner asserts, the issuance of it conflicted with basic principles of a law-based state, for the authorities of the executive branch issued it in contradiction to the constitution in force at that time. In connection therewith, it must be observed that the foundation upon which the legal order of Czechoslovakia was based was Act No. 11 of 28 October 1918, on the Establishment of an Independent Czechoslovak State. The foundation of Czechoslovak law could not be put into doubt in any respect by the German occupation, not only due to the fact that the rules in Articles 42 56 of the Regulations respecting the Laws and Customs of War on Land, representing an annex to the IV Hague Convention of 18 October 1907, spelled out precise boundaries within which the occupier could excercise governmental power within the territory of the occupied state, but primarily due to the fact that the German Reich, as a totalitarian state governed by the principle expressed in the Rosenberg phrase, "Right is that which serves German honor", exercised governmental power and established a legal order which in essence deviated from the substantive value base of the Czechoslovak legal order. This fact is perhaps best conveyed by two Reich's statutes from 1935, namely the Act on the Protection of German Blood and Honor and the Act on Reich's Citizenship, in which extraordinary emphasis is placed on the purity of German blood, as a requirement for the continued existence of the German people, and in which a Reich's citizen is defined as a subject of German or related blood who by his conduct demonstrates that he is willing and able to faithfully serve the

German nation and Reich. In contrast to that, the constitutional requirement laid down in the 1920 Constitutional Charter that the Czechoslovak state have a democratic character, is rather a concept of a political science character (and which is juristically definable only with difficulty) which, however, does not mean that it is a meta-legal concept, hence not legally binding. On the contrary, the constitutional principle mandating the democratic legitimacy of the governmental system was a basic characteristic feature of the constitutional system which as a result meant that, in the 1920 Constitutional Charter of the Czechoslovak Republic, this principle was ranked above and prior to requirements of formal, legal legitimacy.

Thus, it was not the case that the Czechoslovak legal order would have manifestly preferred the preeminence of the domestic legal order, that its constitution would indisputably espouse the principle of its absolute sovereignty and its independence of any other legal order whatever, which would have made it possible for the Czechoslovak constitutional drafters, if they had merely observed the prescribed procedure for adopting norms, to validly prescribe whatever they wished - irrespective of the requirements, in particular, of international law. For, as was already asserted, the principle of the democratic legitimacy of the governmental system was laid down in the 1920 Constitutional Charter, was a principle which, even in the Preamble to this Charter ("for we desire to affiliate ourselves with the society of nations as a cultivated, peaceable, democratic, progressive member of it"), lays stress on its links to the system of values, which also make up the foundation of the international legal order. The value foundation of the 1920 Constitutional Charter and its openness in relation to international law is documented without any doubt by the catalogue of rights and freedoms, as well as the rules governing the protection of national, religious, and racial minorities. On the other hand, convictions concerning the imperativeness of smashing the Nazi regime and of compensation, or at least mitigation, of the damages caused by that regime and the events of the war, were found in the value orientation which was formed during the Second World War and shortly thereafter. Thus, not even in this respect does Presidential Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, conflict with the "legal canons prevalent among civilized European societies in this century," rather it was a legal act that was a product of its era, supported by international consensus.

Such considerations, among others, provide reasons why, even during the occupation, the Czechoslovak state and its legal order were internationally recognized and also why foreign political leaders adopted positions emphasizing the continuity of Czechoslovak law. As a consequence of coerced behavior on the part of the Czechoslovak state, beginning with Hitler's threats to launch an aggressive war (which was in conflict with the Kellogg-Briand Pact, at that time a valid international obligation and one that was binding even on Germany itself), the conclusion of the Munich Agreement, President Beneš' forced departure, and President Hácha's trip to Berlin, this state lost any credible democratic legitimacy, for its conduct quite clearly deviated from an attitude of constitutional sovereignty, that is, of a people whose desire to live in a democratic state had been manifested by the mobilization in 1938, among other actions. We can see precisely in this fact the reason why none of these disastrous acts could be recognized as legitimate, regardless of whether the constitutional procedures were observed when they were carried out. After the dismemberment of the Czechoslovak Republic and the collapse of its

constitutional foundations, the conditions that prevailed for a number of years made impossible the democratic formation of the people's constitutive power within the territory of the Republic. In this respect, our country did not differ from a number of other European countries, the exiled representatives of which and the legal acts which they issued were, for the above-stated reasons, internationally recognized on a large scale, such being in accord with the generally recognized legal principle that acts brought about by means of duress are considered null and void.

What can otherwise be considered determinative in the matter under consideration is that, during the period when the Provisional Constitutional Order of the Czechoslovak Republic was already established and also internationally recognized (it comprising the President, the government, and the State Council, as laid down in the Constitutional Decrees of the President of the Republic No. 1, No. 2 and in Decree No. 4 of the Official Gazette of Czechoslovakia of 1940), on 3 December 1942, the Czechoslovak government issued a resolution "Concerning the Validity of President of the Republic Edvard Beneš' Continuance in the Office of the Presidency", which reads as follows: "In the meeting of the Council of Ministers, held on 3 December 1942, the Prime Minister, Mngr. Dr. Jan Šrámek announced: the seven-year term of office of Dr. Edvard Beneš, the incumbent President of the Republic, duly elected President of the Republic on 18 December 1935 at a session of the National Assembly, will expire on 18 December 1942. Pres. Edvard Beneš resigned the Presidency on 5 October 1938, however, the Czechoslovak government, in accord with all loyal citizens of Czechoslovakia, never considered this resignation to be valid, for it was unlawfully coerced. Therefore, the President of the Republic, Dr. Edvard Beneš, has remained the head of state of Czechoslovakia without interruption since 18 December 1935, and is recognized as the head of state by the governments of the United Nations, as well as by the governments of other nations. The Prime Minister further declared that, pursuant to § 1 of Act No. 161/1920, the Prime Minister is to convene a session of the National Assembly for the election of the President of the Republic and that, therefore, the act places upon him the duty to take care that the election of the new President is timely held. In view of paragraph 3 of § 58 of the Constitutional Charter and § 2 of Act No. 161/1920, the session of the National Assembly for election of the President should be convened no sooner than four weeks prior to and no later than fourteen days prior to the end of the President's term of office. As, under the prevailing conditions, such a session cannot be convened, the Prime Minister proposed that the government adopt the following resolution: pursuant to paragraph 5 of § 58 of the Constitutional Charter, which provides that '[t]he former President shall remain in office until a new President is elected,' the current President of the Republic, Dr. Edvard Beneš, duly elected by the National Assembly on 18 December 1935, shall continue to hold the Presidency until such time as it is possible to hold an election for the next President. The government adopted that resolution unanimously and at the same time charged the Prime Minister with informing the President of the Republic, the Czechoslovak people, and the State Council, as well as the international public, of its resolution." (Off. Gaz. CS, Vol. III, 1942, p. 17).

To the above-mentioned resolution can be added the fact that the resignation of the President, Dr. Edvard Beneš, occurred during the "period of non-freedom", by which is understood the period from 30 September 1938 until 4 May 1945 (Constitutional Decree of the President from 3 August 1944, No. 11/1944 Official Gazette of Czechoslovakia, an annex to the Interior Minister's Notice No. 30/1945 Coll., Government Order No. 31/1945

Coll.), during the period following the Munich Agreement of 29 September 1938, which Article 1 of the Treaty concerning Mutual Relations between the Czechoslovak Socialist Republic and the Federal Republic of Germany, promulgated by Notice No. 94/1974 Coll., declared to be null and void (the nullity of the Munich Agreement of 29 September 1938 also being confirmed by the Treaty between the Czech and Slovak Federal Republic and the Federal Republic of Germany, on Good Neighborliness and Friendly Cooperation, promulgated under No. 521/1992 Coll., which at the same time recognized the fact that the Czechoslovak state had never since 1918 ceased to exist). The Provisional Constitutional Order of the Czechoslovak Republic, represented by the President, the government, and after 21 July 1940 also by the State Council, besides international recognition, also received support from the resistance, at home and abroad, and universally from the Czechoslovak people. So far as concerns international recognition, first must be mentioned British Foreign Secretary Halifax' 21 July 1940 letter to President Beneš, in which he informed the President that "in response to the request of the Czechoslovak National Committee, the government of his Majesty in the United Kingdom hereby gladly recognizes the provisional Czechoslovak government, established in this country by the Czechoslovak National Committee, and enters into relations with it." (Off. Gaz. CS, Vol. I, No. 10, p. 4). A. Eden's letter of 18 July 1941, sent to Minister Jan Masaryk, stated that the King had decided to accredit a special envoy to Dr. Beneš, as President of the Czechoslovak Republic, and that the British government considered the President and the government of the Czechoslovak Republic to have the same legal status as that of the allied heads of state and governments. In Franklin D. Roosevelt's 30 June 1941 letter to Dr. Beneš, "Dr. Edvard Beneš, President of the provisional government of Czechoslovakia" is given as the addressee. On 26 October 1942, the United States of America officially notified Minister Jan Masaryk that the recognition of the United States must be considered under international law as complete and definitive. The Soviet Union also fully recognized the Czechoslovak provisional government in July, 1941. Apart from recognition by Great Britain, 27 countries recognized the Czechoslovak Republic, represented de jure by the provisional government in London,, either in the form of an explicit recognition or by the establishment of diplomatic relations. Even though its authorities could not exercise governmental power within the occupied territory, the Czechoslovak Republic had its own foreign troops, declared war on the Axis powers, and became one of the founders of the United Nations.

In his speech delivered on 24 July 1940, that is three days after the British government's recognition of the Czechoslovak provisional government, Dr. Beneš expressed the intention to maintain the legal continuity of the Czechoslovak legal order by explicitly stating: "Refusing to recognize Munich and all that it brought in its wake, we have upheld and we continue to uphold the principle that the Czechoslovak Republic, Masaryk's republic, continues to live and exist even after Munich. Therefore, our entire legal system, internationally, legally, and politically, went on; for us my departure from office and from our homeland was not legal; for us the Republic was not dismembered; for us nothing exists politically and legally if it was carried out in our country by violent nazism after 15 March 1939. I solemnly declare these to be our political and legal principles, and I stress that they apply to us all, to subjects of our state and of our nation, to Czechs, Slovaks, Germans, and Sub-Carpathian Ruthenians, and others in our homeland. I further declare to be non-existent and unlawful everything which has been forced upon us illegally and unconstitutionally since Munich."

This declaration by Beneš is entirely in accord with Constitutional Decree of the President from 21 July 1940, concerning the Establishment of the State Council, as the Advisory Body of the Provisional Constitutional Order of the Czechoslovak Republic No. 1, Official Gazette of Czechoslovakia from 4 December 1940, as it is with Constitutional Decree of 15 October 1940, No. 2, Official Gazette of Czechoslovakia, concerning the Provisional Exercise of Legislative Power (promulgated under No. 20/1945 Coll.), § 1 of which declares the technical impossibility of observing the norm-creating procedure under the Second Chapter of the Constitutional Charter ("Until it is possible to proceed in accordance with the provisions of the Second Chapter of the Constitutional Charter of 29 February 1920, concerning Legislative Power, those powers assigned to the President of the Republic under Article 64, No. 1 and No. 3 of the Constitutional Charter which require for their validity the consent of the National Assembly, shall be exercised by him with the consent of the government instead"), and § 2 of which at the same time declares that enactments which amend, repeal, or newly issue acts shall, in imperative cases and only for the period during which the Provisional Constitutional Order remains in effect, be issued in the form of decrees by the President on the proposal of the government, each such decree to be countersigned by the Prime Minister and the member of the government charged with implementing it. This document testifies to the clear intention, as concerns the legislative process, to resume as soon as possible the procedure set down in the 1920 Constitutional Charter and, thus, proceeds on the basis of the continued validity of the 1920 Constitutional Charter, considering that legislative power under that Constitutional Charter shall, after the liberation of the Republic, be formed in accordance with the provisions of this Second Chapter. Constitutional Decree of the President from 22 February 1945, No. 3/1945 Official Gazette of Czechoslovakia, concerning the Exercise of Legislative Power during the Transitional Period, extended the validity of § 2 of Constitutional Decree of the President from 15 October 1940, No. 2 Official Gazette of Czechoslovakia, concerning the Provisional Exercise of Legislative Power, until such time as the Provisional Legislative Committee of the Czechoslovak Republic would be established.

As concerns the actual legislative process relating to presidential decrees, it must be said that decrees were drafted by the government and, as a rule, were also discussed by the State Council. Pursuant to Article 3 of Constitutional Decree from 27 October 1942, No. 12/1942 Off. Gaz. CS, in exercising legislative power, the President was obliged, within the context of preparing an appropriate proposal, "to request an advisory report from the State Council, if the government had not already done so". After the State Council was dissolved on 4 April 1945 (Prime Minister's Notice from 4 April 1945, No. 2/1945 Coll.), the decrees were also discussed in the Slovak National Council, depending on the nature of the matters in the decree and the their territorial reach. In accordance with these rules, decrees always included a reference to the fact that they were issued "on the government's proposal", "after consulting the State Council", or "following the agreement of the Slovak National Council". Just as with statutes, each was likewise countersigned by the Prime Minister and the member of the government charged with implementing it and, in the case of constitutional decrees, by all members of the government (§ 2 of Constitutional Decree No. 2/1940 Off. Gaz. CS, on the Provisional Exercise of Legislative Power). The particular character of the decrees was merely due to the extraordinary situation which resulted from the Nazi occupation and which prevented the exercise of any governmental power at all, including legislative power. So in the given historical situation and context, the decrees represented the single possibility of adopting decisions having legal force and the

force of a statute. During the period of Nazi occupation, other occupied countries also dealt with the issue of legislative procedure in a similar fashion. It is not pointless to make reference at this juncture to Act No. 11 from 28 October 1918, on the Establishment of an Independent Czechoslovak State, which was issued by the National Committee but which, nonetheless, became the foundation of the legal order of the Czechoslovak Republic.

This intention to resume use of the legislative procedure under the Second Chapter of the Constitutional Charter is also clearly expressed in § 1 of Presidential Decree from 26 October 1940, No. 4 Official Gazette of Czechoslovakia, on Regulating the Public Pronouncement of Legal Provisions Newly Issued by the Czechoslovak Government, which, in addition to the Collection of Laws, designated the Official Gazette of Czechoslovakia for the purpose of the public pronouncement of legal provisions newly issued by the Czechoslovak Government, until the normal functioning of the constitutional life of the Czechoslovak Republic would be restored. The principle of formal legal continuity with the pre-Munich legal order was even demonstrated by the President's Declaration, under § 64 para. 1, No. 3 of the Constitutional Charter, of a State of War between the Czechoslovak Republic and the states which were at war with Great Britain, the Union of Soviet Socialist Republics, and the United States of America (Off. Gaz. CS, Vol. III, No. 1, p. 7), just as by the grants of amnesty and pardons which the President made on 24 December 1941 by virtue of the power vested in him in the field of the military judiciary and military punitive and disciplinary proceedings or in the field of military penal law by § 64 para. 1, No. 11 of the Constitutional Charter (see, likewise, Off. Gaz. CS, Vol. III, No. 1, pp. 7 8). A clear element of continuity can also be noted in the already-mentioned government resolution from 3 December 1942 concerning the problems brought on by the expiration, on 18 December 1942, of the seven-year presidential term of office. In this resolution, which confirmed Dr. Edvard Beneš as the head of state until such time as it would be possible, pursuant to the Constitution and to Act No. 161/1920 Coll., to hold an election for the next President, there is a reference to § 58 para. 5 of the Constitutional Charter, which governs this exact situation. From the perspective of formal legal continuity, that is a connection to the pre-Munich legal order, the Constitutional Decree from 3 August 1944, No. 11 Official Gazette of Czechoslovakia (promulgated under No. 30/1945 Coll.), on the Restoration of the Legal Order, is also of fundamental significance. This decree related in part to "domestic enactments" and in part to "enactments of the foreign constitutional order". This decree distinguished three types of legal enactments, that is, constitutional and other Czechoslovak legal enactments issued prior to 29 September 1938 (pre-Munich law), further enactments issued within the domain of the Czechoslovak legal order (that is, within the territory of the Czechoslovak Republic) during the period of non-freedom (that is, from 30 September 1938 until 4 May 1945) by authorities of the Second Republic, the German Reich, the Protectorate and the Slovak Republic (law from the era of non-freedom), and finally enactments issued in the form of presidential decrees pursuant to the London Constitution (the law of the foreign constitutional order). While Article 1 para. 1 of the above-cited decree declares that enactments issued before 29 September 1938 were expressions of the Czechoslovak people's free will, so that they comprise the Czechoslovak legal order, Article 2 of the Decree states that enactments issued during the era of non-freedom do not form a part of the Czechoslovak legal order; however, that even they must be applied in the future "on an entirely transitional basis", with the exceptions set down in Article 2 para. 1. A court or an administrative agency applying the act (Article 3) decided whether the case involved

such an exception. For the purposes of the case under consideration, however, what is significant is what Article 2 of that decree provides concerning enactments of the "foreign constitutional order": to the extent that these enactments have the force of statutes, they form a part of the Czechoslovak legal order, subject however to subsequent ratification, that is, approval by the competent constitutional authorities. Even the constitutional decrees forming the London Constitution were themselves subject to subsequent ratification (Nos. 1 and 2 of the Official Gazette of Czechoslovakia). For other decrees issued in accordance with this constitution (that is, pursuant to § 2 of Constitutional Decree No. 2/1940 Official Gazette of Czechoslovakia), it was said that they would lose validity six months following the day the National Assembly would meet, unless they were newly adopted and proclaimed as law (Article 5 para. 2 of the decree), and even presidential decrees designated as constitutional could be repealed or amended by means of a mere law. However, Article I of the Act, Introducing the Constitutional Charter, No. 121/1920, was not to be in any way affected by this enactment, so far as concerns constitutional acts issued prior to 29 September 1938 (Article 5 para. 3 of the decree). Constitutional Decree of the President from 23 June 1945, promulgated under No. 22/1945 Coll., concerning the Promulgation of Legal Enactments Issued outside the Territory of the Czechoslovak Republic, attests to the fact that the President and the government were constantly endeavoring to follow the principle of legal continuity with pre-Munich law. § 1 of this decree empowered the government to determine which of the constitutional decrees of the President (excepting Constitutional Decree from 15 October 1940, No. 2, Off. Gaz. CS, on the Provisional Exercise of Legislative Power, and Constitutional Decree from 22 February 1945, No. 3, Off. Gaz. CS, on the Exercise of Legislative Power during the Transitional Period) and which of the ordinary decrees of the President, government orders and other legal enactments which were promulgated in the Official Gazette of Czechoslovakia would remain in effect, empowered it to modify the date they would go into effect and their territorial reach, and empowered it to have them promulgated in the Collection of Laws and Orders. What is essential, however, is that Constitutional Decree of the President from 3 August 1944, No. 11, Official Gazette of Czechoslovakia, made even the constitutional decrees which established the "London Constitution" subject to ratification, which meant in consequence that, even following the issuance of this decree, Act No. 11 from 28 October 1918, as well as the Constitution from 1920, remained the foundation of the Czechoslovak legal order. This conclusion follows as well from the government's explanatory report to the draft of the above-mentioned decree, which stated that subsequent ratification by the domestic legislature of the legislation adopted abroad would make a reality of the legal principle upon which the struggle for liberation of the Czechoslovak state rested, that is, the principle of legal continuity.

In addition, the Constitutional Decree of the President from 4 December 1944, No. 18 Official Gazette of Czechoslovakia, on National Committees and the Provisional National Assembly, promulgated under No. 43/1945 Coll., in its introductory declaration cites the then in force Constitutional Charter of the Czechoslovak Republic and contained the following statement in its Article 2: "The Provisional National Assembly was formed as the result of elections by the national committees to be the interim legislative body to which the government will be responsible. It's composition, the manner in which it is to be created, and its competencies shall be provided for by a special constitutional decree." The same occurred as well as a result of Constitutional Decree of the President

from 25 August 1945, on the Provisional National Assembly, promulgated under No. 47/1945 Coll., which in relation to the 1920 Constitutional Charter created a legislative body not provided for under the Charter and endowed with the powers which the Charter and other acts assigned to the National Assembly, including the authority to amend the Constitution, however, with the proviso that this Assembly could take such measures only "insofar as such is strictly necessary" (Article 2, No. 2 of the decree). The crucial thing is that even this decree, in its content and substantive purpose, respects the basis of continuity. For Constitutional Decree No. 47/1945 Coll. reflects the fact that, on the one hand, due to the post-war situation and the changing economic and social conditions, ratification of the legislation adopted by the foreign constitutional order could not be fully accomplished on the basis of the 1920 Constitutional Charter, but that, on the other hand, from the perspective of this Charter which placed, as has been said, extraordinary emphasis on the principle of democratic legitimacy, it in no way introduced a foreign element into the Charter. This fact is also evidenced by Article 2, No. 1 of this decree, empowering the Provisional National Assembly to confirm the President in office until the next presidential election would be held, which was done by means of the Provisional National Assembly's unanimous resolution from 28 October 1945. It was President Beneš himself who, in the graduation address he delivered on 15 December 1945, made reference to the great emphasis our foreign political leadership always placed on the continuity of Czechoslovak law. However, such was also confirmed by Act No. 12/1946 Coll., which Adopted, Supplemented, and Amended the Enactments concerning the Restoration of the Legal Order and in which the Provisional National Assembly adopted and re-introduced as a statute Presidential Decree from 3 August 1944, No. 11 Off. Gaz. CS, on the Restoration of the Legal Order, with the amendments and additions introduced in this act. Constitutional Act No. 57/1946 Coll., which Ratified the Presidential Decrees and Declared them to Have Force as Law, represents the final word so far as presidential decrees are concerned. Under Article I para. 1 of this constitutional act, the Provisional National Assembly ratified and declared to have force as law, if such had not already occurred, those constitutional decrees and decrees of the President that were issued on the basis of § 2 of Constitutional Decree of the President from 15 October 1940, No. 2, Off. Gaz. CS, (No. 20/1945 Coll.), on the Provisional Exercise of Legislative Power, which general ratification also encompassed this just-mentioned constitutional decree. As is further stated in Article I para. 2 of the above-cited constitutional act, all presidential decrees had to be considered from their inception as legal acts, constitutional decrees as constitutional acts. Even though at that point it was not possible to ratify them under Article 5 para. 1 of Constitutional Decree of the President from 3 August 1944, No. 11 Off. Gaz. CS, because the "constitutional official" as called for in that decree was the National Assembly under the 1920 Constitutional Charter, so far as concerns presidential decrees, the requirement of legal continuity was met by the fact that it was made possible to effect the ratification of them and the declaration that they possess force as law, with the restrictions set out in Article 5 para. 2 of Constitutional Decree of the President from 3 August 1944, No. 11, Off. Gaz. CS, which limited in time the legal effect of the presidential decrees. In addition, Article I para. 1 of Constitutional Act No. 57/1946 Coll., even made reference to the very Constitutional Decree of the President from 15 October 1940, No. 2, Off. Gaz. CS, and para. 2 of this Article emphasized that, from their very inception, all presidential decrees were valid. To this must be added that, as a result of Article 112 para. 1 and para. 3 of the Constitution of the Czech Republic, the cited

constitutional acts in force in the Czech Republic on the day the Constitution came into effect, now have merely the legal force of a statute.

The continuity of the legal enactments contained in the presidential decrees with the pre-Munich legal order is, however, evidenced especially by a factor which represented one of the fundamental conditions for this continuity, that is the consensus of the Czech nation with its links, legally and in terms of values, to Masaryk's republic. While Nazi Germany endeavored to violate and destroy the basic principles of the Czechoslovak legal and political order, our resistance, both at home and abroad, feeling a sense of continuity with the legacy of the Czech legion in the First World War, just as the resistance to the occupiers put up by our whole nation, with the exception of groups of traitors and collaborators, confirmed that our people wished to live in a democratic, law-based state, for which the pre-Munich republic represented a significant developmental stage. This attitude included the consciousness that democratic values maintain their character and quality only on the basis of continuity, on the basis of some sort of common language, and general agreement with these values and principles. It is true that the principles of the rule of law were accepted by the Czech nation on the basis of general consensus, and it was also true that they could be abandoned and replaced by others only on the basis of a prevailing societal consensus, not by means of force and terror.

All these facts and considerations have led the Constitutional Court to the conclusion that, since the enemy occupation of the Czechoslovak territory by the armed forces of the Reich had made it impossible to assert the sovereign state power which sprang from the Constitutional Charter of the Czechoslovak Republic, introduced by Constitutional Act No. 121/1920 Coll., as well as from the whole Czechoslovak legal order, the Provisional Constitutional Order of the Czechoslovak Republic, set up in Great Britain, must be looked upon as the internationally recognized legitimate constitutional authority of the Czechoslovak state. In consequence thereof and as a result of the ratification of them in the Provisional National Assembly by Constitutional Act No. 57/1946 Coll., from 28 March 1946, all normative acts of the Provisional Constitutional Order of the Czechoslovak Republic, therefore even Decree of the President No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, are expressions of legal Czechoslovak (Czech) legislative power, so that as a result thereof the striving of the nations of Czechoslovakia to restore the constitutional and legal order of the Republic was achieved. Thus, it is quite absurd, so far as concerns the legislative process, to insist unconditionally upon observance of the 1920 Constitutional Charter for a period when a part of the Czechoslovak state was first forcibly lopped off and then the rest of the state was entirely occupied, all the while gradually losing its political representation. The consequence of such a conclusion would be to deny a subjugated nation its natural right to resist occupying aggressors, including by force of arms. With regard to that which the occupying aggressor managed to carry out or that which it was contemplating, it more than suffices to mention the occupation by the German Reich’s armed forces of the rest of the Czechoslovak state in the form of the Protectorate of Bohemia and Moravia, the closing down of Czech Universities, and the planned future "Endlösung" of the Czech nation. Also, the action by which Lidice was wiped off the face of the earth and other acts of violence more than sufficed to make perfectly clear that, in spite of "all legal canons prevalent among civilized European societies in this century", what was placed before the Czech and

Slovak nations was the grave issue of the very physical existence, not just of the Czechoslovak state, but also of its individual nations.

The petitioner has made the further assertion that Decree No. 108/1945 Coll.,3) just as other decrees issued by Dr. Edvard Beneš, violated the legal canons of civilized European societies and that, therefore, they must be considered not as acts of law but of force, that is to say, that they lack any legal character whatsoever. In response to this assertion, it is necessary to emphasize, even in a general sense, a basic consideration that is relevant to any sort of evaluation of the past: while it is true in principle that that which emerges from the past must, face to face with the present, pass muster in respect to values; nevertheless, this assessment of the past may not be merely the present passing judgment upon the past. In other words, the present order, which has been enlightened by subsequent events, draws upon those experiences, and looks upon and assesses a great many phenomena with the advantage of hindsight, may not sit in judgment upon the order which prevailed in the past. This must be kept in mind when assessing the Decree from 25 October 1945, No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, and the matter must be viewed in the context of all the circumstances and occurrences of the era of Nazi occupation and the period immediately following thereupon. This decree was issued in that historical situation and on the basis of the legal order then in force and was nothing other than a measure in reaction to the provocation represented by the elimination of state sovereignty, independence, territorial integrity, and the Czechoslovak Republic's democratic-republican form of government and to the elimination of the principles of the democratic, law-based state embodied in the 1920 Constitutional Charter of the Czechoslovak Republic. All of this was perpetrated by the Nazi regime, one of the most destructive totalitarian systems in the history of mankind, whose ideology of world domination by the master race and the terror inextricably bound up therewith laid millions of human lives to waste. Therefore, it must be considered quite logically consistent and legitimate that, as T.G. Masaryk had already emphasized, each democratic political system not only has the need, but also has the duty, to protect the foundations upon which it is erected, as actually came to pass in the pre-Munich Czechoslovakia, for example, with the adoption of Act No. 50/1923 Coll., on the Protection of the Republic, and a whole series of other measures, among which should be counted the mobilization of the armed forces in 1938. Considering the wording of § 1 para. 1 of Decree No. 108/1945 Coll.,4) there is no doubt that this decree was intended to strengthen the fundamental democratic and legal principles referred to above, for it was meant to affect precisely those hostile to them. Such a determination to safeguard and develop the Czech Republic is otherwise explicitly expressed in the Preamble to the Constitution of the Czech Republic, thus maintaining and furthering an important element of continuity even in this field.

Another basic issue which arises at this point is whether there exists the necessary functional, mutually conditional relation between this end, that is the building of a democratic law-based state, and the means employed, in this case the confiscation of enemy property, in other words, whether the means employed correspond to the end pursued or, on the contrary, whether there is such a disparity between them that the means employed turn out to be incommensurate to the end. The issue of the proportionality of the chosen means is a question of the boundary which no means in a means-end relationship can exceed, if the end itself is not to be called into doubt. In

order to maintain the functional relationship of end to means, it is, therefore, indispensable for the means employed to be of the same kind or genus as the end, in other words, that they enable progress toward the end, in this case toward democracy. Viewed from this perspective, therefore, the Decree of the President No. 108/1945 Coll.,3) as a normative legal act, can only pass muster if, at its core, it does not go against the aims of the democratic, law-based state.

As concerns the issue raised above, it is necessary to emphasize what the title of Decree No. 108/1945 Coll.,3) (. . . on the Confiscation of Enemy Property) itself suggests, that the underlying criteria employed in defining those persons subject to property confiscation was their enmity to the Czechoslovak Republic or to the Czech or Slovak nation. Such enmity was irrebuttably presumed in the case of legal subjects listed in § 1 para. 1, no. 1 of the Decree,4) that is the German Reich, the Kingdom of Hungary, public law persons under German or Hungarian law, the German Nazi Party, Hungarian political parties, as well as other units, organizations, enterprises, institutions, associations of persons, funds and foundations belonging to these regimes or connected therewith, as well as other German or Hungarian legal persons, whereas it was rebuttably presumed in the case of the legal subjects listed in § 1 para. 1, no. 2 of the Decree, that is natural persons of German or Hungarian nationality, rebuttably in the sense that the property of these persons was not confiscated if they demonstrated that they remained loyal to the Czechoslovak Republic, that they never wronged the Czech or Slovak nation, and that they either actively took part in the fight for the Republic's liberation or suffered under Nazi or fascist terror. At the same time, pursuant to § 1 para. 1, no. 3 of the decree and without regard to nationality, property was confiscated from those natural and legal persons who engaged in actions directed against state sovereignty, independence, territorial integrity, the democratic-republican form of government, or the security and defense of the Czechoslovak Republic, who incited or sought to draw other persons into such activities, who intentionally supported in any manner whatsoever the German or Hungarian occupiers or who during the period of the heightened threat to the Republic (§ 18 of Decree of the President from 19 June 1945, No. 16 Coll., on the Punishment of Nazi Criminals, Traitors and their Accomplices and concerning Extraordinary People's Courts), favored germanization or magyarization within the territory of the Czechoslovak Republic, or who acted hostilely, whether toward the Czechoslovak Republic or the Czech or Slovak nation, as well as those natural or legal persons who tolerated such actions from persons managing their property (§ 1 para. 1, no. 3 of Decree No. 108/1945 Coll., as amended by Act No. 84/1949 Coll.). Thus, the relation of enmity in Decree No. 108/1945 Coll., was not conceived on the basis of nationality, because it was first and foremost the Nazi or fascist system which was deemed the enemy (irrebuttably, as has already been stated), and the object that the decree was intended to protect was above all the democratic-republican form of government. Thus, even though the decree speaks in terms primarily of the German Reich and persons of German nationality, in actuality this decree has a more general scope and can be considered as one of the documents reflecting the age-old conflict between democracy and totalitarianism. The dividing line was drawn according to which side of the conflict a person chose to support: therefore, a person was not considered an enemy, be he, for example, of German nationality, if he actively stood up in the defense of democracy or if he suffered under the totalitarian regime, whereas on the other side, one qualified as an enemy if, without regard to his nationality, he actively stood up against democracy.

In this connection, it is further necessary to judge whether the decree's alleged conflict with "the legal canons of civilized European societies," consists in the fact that Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, is clearly based on the presumption of responsibility on the part of persons of German (and also Hungarian) nationality while, in the case of persons of other nationalities, the burden of proof is placed on the body deciding whether the conditions for the confiscation of their property are met or not. From the start, emphasis must be placed upon the fact that no presumption of "guilt" is concerned, not even for persons of German nationality; rather it is a presumption of "responsibility". For it is quite evident that the category of "responsibility" is a much broader concept than that of "guilt", so that in this respect it has a far more extensive value, social, historical, as well as legal, dimension. The determinative factor for defining the category of responsibility is the consciousness of the individual that he himself is answerable for his orientation in life, for his social and value decisions, and that nobody can ever take on this responsibility in his place, neither the society itself nor history. It is mankind's fate that human beings are placed into power relations, and this situation gives rise to their responsibility to champion the forces which will make human rights a reality. The grounds for social, political, moral, and in some cases even legal, responsibility is thus precisely the person's neglect to make a contribution in the structuring of power relations, his failure, during the struggle for power, to act in the service of right. For this reason, also in a democracy the political system is founded on the notion, institutionally concretized, that all people bear common responsibility for the fate of the whole human society, so that this feature of responsibility pervades to a greater or lesser extent all areas of life, the personal life of the individual, as well as the legal and political spheres. An inherent feature of the order of duty and responsibility in democracy is not only its general character, but also its inner securing, which result from the internal attitude the person takes in relation to social behavior and the consequences thereof. An individual can only feel responsible for norms in the true sense of the word if he has contributed the spontaneity of his thoughts and actions to forming them. In contrast to that, in a totalitarian system, such as Nazi Germany, responsibility was institutionally transferred to the governing elite, even though in reality that elite felt itself stripped of any sort of responsibility.

At this particular juncture, it is necessary to raise the following question: to what extent and in what sense were the representatives of the Nazi movement alone responsible for the gas chambers, concentration camps, mass extermination, degradation, butchery and dehumanization of millions, or along with them does everyone who profited in silence from this movement, who carried out its orders, and who put up no resistance to them also bear joint responsibility for these phenomena. It can hardly be seen as a black-and-white issue in which the representatives of Nazism are assigned exclusive responsibility and all others lack any responsibility at all. So just as other European states and their governments, which from the start of the Nazi expansion were unable and unwilling to offer resistance, bore their share of responsibility for the origin and evolution of Nazism, the German nation itself bears primary responsibility for those events, even if among their ranks could be found no small number of those who actively and bravely stood up to the Nazis. Nevertheless, there does seem to exist after all a fundamental difference between the responsibility of the "rest of the world" and that of the German nation, between the silence and passivity of some and the silence and the active role played by others, a difference which has some significance for the burden of proof. For it was a considerable

portion of the German nation which in myriad respects directly and consciously participated in the creation of the power structure in Nazi Germany, in the expansion of Nazi Germany into Czechoslovakia, and generally in Nazi aims and actions, leading to the point where the fate of the entire world was at stake. For not even life in political darkness justifies total social resignation and apathy: if a certain society is dominated by tyranny, it is most often due to the fact that it does not possess the courage or the capability to put the situation right itself. A humane world can be preserved only if everyone in it bears his share of the responsibility, a burden which nobody else can take on in place of him. In the 1930's, a fateful decade for the Czechoslovak Republic, each of its citizens could have realized, or rather should have realized,that right here, under the veil of propaganda and lies on the part of Nazi Germany, one of the crucial historical clashes between democracy and totalitarianism was taking place, a clash in which everyone bore responsibility together for the position they adopted and the social and political role they undertook, that is, the role of a defender of democracy or an agent of its destruction. As Emerson so aptly observed: "[I]t is true that a man would be quite dazzled, or even blinded, by the sunny glow of truth, nevertheless he can avoid its light to such an extent that he no longer sees at all." This applies as well to the German citizens in pre-war Czechoslovakia, and to them in particular, for the conflagration which Nazism unleashed was in large part the work of their nation and its leaders. All the more so should they have manifested their fidelity to the Czechoslovak Republic whose citizens they were, fidelity to perhaps the last democratic system in Central Europe and given to this fidelity the status of a fundamental political principle.

What was in fact the case? It must be emphasized at this point that it is not the Constitutional Court's duty to review and evaluate Czech-German relations, how they began, took shape, and changed over the centuries. The issues of which the Constitutional Court have cognizance are the following: what position did the Czechoslovak citizens of German nationality take in the crisis years of the 1930's, and did Presidential Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, represent an appropriate and justifiable reaction, as regards constitutional law and values, to this position, appropriate in so far as it passes muster even in relation to the legal canons recognized by civilized nations in that period. It should be emphasized here that the Czech-German conflict, which at that time involved a conflict between democracy and totalitarianism, ended catastrophically for the Czechoslovak Republic with the Munich Agreement, the result of which was, among other things, the forced departure of roughly half a million Czechs from the border regions to what remained of the Republic. If the Czechoslovak Republic was the mere object of this agreement, the same cannot be said about Czechoslovak citizens of German nationality who played an important role, when the border regions were being torn from Czechoslovakia and incorporated into the German Reich, significant because their political stance provided Hitler with arguments acceptable to the West as to why it was necessary to lop off a piece of Czechoslovakia. Even at that critical point in time, there could be no question concerning the democratic tradition of the Czechoslovak Republic. However much our many citizens of German nationality might still have been viewed as a foreign element during that time period, the structure of our political system accorded them ample and effective constitutional leeway to permit them to reject their leaders and distinctly express a view dissenting from their leaders' program, namely that, precisely due to its already overt totalitarian character, marked by violence and brutality, they did not want to join the German Reich and did not wish to be annexed

to it. However, developments after 1938 went in a different direction. While in the one-time border regions the local German inhabitants exhibited absolute loyalty to Nazi Germany, persecution and terror reigned in the Protectorate of Bohemia and Moravia. K.H. Frank, who held the office of State Minister for the whole occupied territory, contributed in no small measure to this state of affairs, and his name is also linked to the tragedies of Lidice and Ležáky and the reprisals which followed upon the assassination of Heydrich.

The establishment of a totalitarian system always represents a massive assault on mankind and on history itself. In the matter under review, this attacker was Germany and the prevailing majority of its people (without the wide support of the overwhelming majority of the German people, which he received, Hitler and his Nazi Party would never have been more than a mere fringe phenomena). Its extraordinarily dangerous nature, the fact that it became a social phenomena threatening "the fate of all life on earth" (Preamble to the Charter of Fundamental Rights and Basic Freedoms), also presents reasons as to why the attempt to eradicate all sources of totalitarianism demanded extraordinary legislative measures. In other words, in such situations it is always a matter of eliminating the causes leading to the birth of totalitarianism, of doing away with the sources which could bring on a recurrence of it with all of its horrible features. Naturally, these extraordinary legislative measures had to make the distinction between "guilt" and "responsibility": in the Czechoslovak legislation, this was made by distinguishing retributive decrees, requiring evidence of individual guilt, from confiscatory decrees, consisting, where natural persons were concerned, in the rebuttable presumption of individual responsibility. Thus, in view of the facts just set down, the fact that Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, is based on the presumption of responsibility of persons having German nationality does not mean that it has a discriminatory nature; it does not represent a form of nationalistic revenge, rather it is merely a proportionate response to the aggression of Nazi Germany, a response which set as its political and economic aim at least to alleviate the consequences of the occupation, to forestall any possible return of totalitarianism, and to strengthen societal and moral consciousness by confirmation of the principle that a sanction should always be tied to the violation of any sort of obligation. The use of the term "German nationality" in Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, must be seen in relation to the post-war situation, when the defeated Germany was under the administration of the victorious powers and was later divided into zones, at a time when the use of the term "German citizenship" was problematic because no German state existed. Thus, the choice of the term "German nationality" in the decree was not a type of "genetic" condemnation, rather an adjustment to the post-war situation, particularly to the problematic nature of German citizenship. Precisely for this reason, the decree cannot be looked upon as some sort of genocidal norm, for it was meant to affect those whose behavior, whatever form it took, supported the Nazi state. As far as the presumption of responsibility on the part of persons of German nationality is concerned, the apparent inequality between "Czechs" and "Germans" disappears by switching the perspective of the decree from that of nationality to that of citizenship. It remains crucial that the Germans' duty to assist the aims of the totalitarian state resulted alone from their citizenship, which demanded such unconditionally loyal behavior towards the German Reich, while if Czechs and members of other nationalities, who were constitutionally bound in loyalty to democracy, chose to act against Czechoslovak statehood and democracy, they had to do so

entirely of their own free will. For that matter, this rebuttable presumption of responsibility is not an element foreign to law, because it is found as well in other fields that are certainly scarcely comparable with the political field, retaining, however, certain common characteristics in that the source of a certain type of especially serious danger arises therefrom (the rebuttable presumption of responsibility is found in both international and municipal law, for example, in the area governing liability for specific types of damage). If the presumption of responsibility exists even in such areas, it is all the more appropriate when the fate of mankind, socially and historically, is at stake. Thus, however much we are dealing with scarcely comparable subjects, it cannot be doubted that the inner logic of the law allows for a presumption of responsibility in such extraordinary cases.

The institution of responsibility is always connected with a sanction, as such constitutes a basic condition for it to be able to serve its social function. To have responsibility without a sanction would have such a negative impact upon the existence of the society's consciousness that it would probably represent its destruction, at least in certain areas. Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, is without a doubt just such a sanction: even though on first view it would seem to concern only "property", it also doubtless contains an important social and ethical subtext. In view of the nature of the responsibility analyzed in this case, however, the decree cannot be examined as a criminal norm or a criminal sanction, even though confiscations without compensation occurred pursuant to it. Decree of the President No. 16/1945 Coll., on the Punishment of Nazi Criminals, Traitors, and their Accomplices, and on Extraordinary People's Courts, as amended by later acts (see Minister of Justice Notice No. 9/1947 Coll., on the Full Version of the Decree of the President on the Punishment of Nazi Criminals, Traitors, and their Accomplices and on Extraordinary People's Courts, and Decree of the President on National Courts, Appendix I and II to this Notice), is indisputably just such a criminal norm as it places upon courts the duty to declare, in conjunction with a conviction for one of the crimes listed in that decree, the forfeiture of all the convicted person's property, or a part thereof, in favor of the state (§ 14, letter c). The purpose of this decree was to punish the persons described therein and to attach further unfavorable consequences for convicted persons to a conviction for one of the crimes listed in the decree (for example, the loss of civic honor), while the Decree of the President No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, calls only for the confiscation of this property, a confiscation which was manifestly related to the damage caused the Czechoslovak Republic by the Nazi aggression and occupation (see, the Potsdam Agreement of 2 August 1945, the Agreement on Reparations from Germany, on the Establishment of the Inter-Allied Reparations Authority, and on the Return of Gold Currency, promulgated under No. 150/1947 Coll.).

A further fundamental issue is the following: is it at all possible in principle for such sanctions to infringe the rights and freedoms of persons who themselves have obviously violated those same rights and freedoms and who, thus, bear responsibility themselves for that violation. In other words, can one demand the right to liberty, let us say, if he has himself destroyed it by his conduct? It was the brutality of the Nazi regime and the events of the Second World War, as well as all other experience garnered from this period, which necessitated the response to this question given in Article 30 of the Universal Declaration of Human Rights and in two articles which are linked with and identical to it, namely

Article 5 para. 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights, as well as Article 17 of the Convention on the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 3, 5, and 8, which states: "nothing in this Convention may be construed so as to accord the state, a group, or an individual any right whatsoever to engage in activities or to commit acts aimed at the destruction of or the limitation upon any of the rights and freedoms herein granted to a greater extent than is provided for by this Convention." It is precisely on this plane that it is possible to find the starting point for conclusions of a more general nature, even for the matter under consideration: if onetime Czechoslovak citizens of German nationality contributed to the destruction of the rights and freedoms of the other citizens of the Czechoslovak Republic, then it follows as a natural consequence thereof that in this regard their rights and freedoms could not be fully preserved in the conflict then underway, provided, of course, that the relationship between means and end is maintained, for such social, even destructive, "naivété" would necessarily have catastrophic consequences. The right to impose the necessary sanctions in reaction to an assault on democracy and human rights and freedoms, thus, belongs among the "legal canons prevalent among civilized European societies in this century", to which the petitioner appeals.

To this should be added that property sanctions, such as the confiscation of enemy property located within the Czechoslovak Republic, have a historical foundation primarily in respect of the fact that it was decided in the Potsdam Agreement of 2 August 1945 that the German inhabitants of Poland, Czechoslovakia, and Hungary, or some portion thereof, would be transferred to Germany (Chapter XIII) and, at the same time and as a result of this agreement, decisions were also made concerning German reparations as conceived in the resolution of the Yalta Conference, which provided that Germany would be obliged to pay compensation to the greatest extent possible for the damage and hardship which it caused the Allied Nations and for which the German people could not evade responsibility (Chapter IV). This point of the Potsdam Agreement is echoed in the Agreement on Reparations from Germany, on the Establishment of the Inter-Allied Reparations Authority, and on the Return of Gold Currency (promulgated under No. 150/1947 Coll.), agreed upon in Paris on 21 December 1945 between 18 countries, with Czechoslovakia numbering among them. Part I, Article 6 A of the Paris Agreement provides that "each signatory government shall retain, in the manner which they themselves select, the German enemy property under their jurisdiction or shall deal with it in such a manner that it shall not be returned to German hands or to German control and shall deduct this property from their share of the reparations ...

" Part I, Article 6 D of this Agreement declared that "in implementing [Article 6] A above, property which was owned by a country which was one of the Allied Nations, or one of the subjects thereof (provided he was not a subject of Germany at the time that country was annexed or occupied or entered into the war), shall not be deducted from their reparations . . ." Thus, in the matter under consideration, the confiscation of enemy property had a basis not only in domestic law, in Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal (allowing for a rebuttable presumption of responsibility and moreover, while operating ex lege, doing so only towards those persons with regard to whom it was found in a final, enforceable decision that the conditions for confiscation under this decree were met, § 1 para. 4 of the

decree4)), but was based as well on international consensus, as expressed in the above-cited documents of the Potsdam Conference and the Paris Settlement. So, we are not dealing with the arbitrary deprivation of property, which Article 17 of the Universal Declaration on Human Rights declares to be impermissible. Also, discussions on the mentioned aspect of arbitrariness featured prominently in the deliberations on authorizing the confiscation of enemy property: for it was pointed out in them that the deprivation of property is legitimate in the case that, in addition to meeting further conditions, such an act cannot be viewed as arbitrary. It can scarcely be doubted that, as regards Czechoslovakia in the context of the events of the war and as one of the victorious powers, it was not a matter of such arbitrariness, of the mere clothing in the garb of the common good what was rather in actuality the violation of the basic rights of the individual.

For democracy itself is also unable to manage without the use of force, for force provides it with one of its most significant opportunities, that is, the opportunity to combat "evil", infiltration, and the approach of totalitarian elements and makes it possible finally to eliminate them. After all democracy also represents one form of political government - otherwise it would not be able to function like a political system at all - however, this form is so dissimilar to totalitarianism that the two can hardly be reduced to a common denominator. For democracy is meant to be a government of all, even though this aim will never be attained; its purpose is to make it possible for all sectors of society to have access to positions of power. Making such positions accessible to all groups cannot, however, represent a state of anarchy. If they are to preserve the positive aspects connected with the element of power, those holding governmental power are compelled, even in a democracy, to react to the ambiguity inherent in social processes and to take action legally against behavior and acts by destructive forces which exceed the bounds defined by law. If totalitarianism represents an assault on humanity and history, then it is precisely democracy which is obliged to respond to such an assault in an appropriate manner. The positive character of such a response is dependent above all on the establishment of values about which a certain consensus prevails in society.

Therefore, in the clash of the democratic and totalitarian political systems, of which Czechoslovakia's conflict with Nazi Germany is an example, the government leaders in democratic Czechoslovakia could not have gotten by without a legal measure, such as the decree referred to. During the 20 years of its [pre-war] existence, this democracy had a political process allowing for conflict and social equalization, an institutionally ensured political foundation even for manifestations of the most heterogeneous sort. In principle, this openness manifested itself in relation to citizens of German nationality as well. After the period of the violent occupation by Nazi Germany, and as a consequence of the losses and blows that Czechoslovakia suffered thereby, no other route was left open to the Czechoslovak government leaders than to deal with the consequences of the Nazi occupation and the events of the war, to a certain degree at least. The means by which this was done was entirely in conformity with the value orientation expressed in the Preamble to the 1920 Constitutional Charter ("to secure for future generations the blessings of liberty"), and was also supported by international approval, in particular on the part of the western democracies, unambiguously expressed in the decisions of the Potsdam Conference.

Expressed from another perspective, this system of values, which in its historical development was more and more manifested in the understanding and guarantee, first and foremost, of human rights and freedoms, fulfilled such an important social, directive, classificatory, programmatic and oversight function in society, that it qualifies as one of the basic conditions for social life: that is to say, it ensured the continuity of historical and social development and, in this respect, it was society's lone supporting structure. The significance of the social function played by values also offers an explanation as to why one of the knotty points of the conflict between democracy and totalitarianism is found precisely in the field of values and why totalitarian regimes have an unyielding tendency to place such importance on this particular field. If a totalitarian regime aims to gain mastery over the entire society, it cannot achieve this goal without at the same time declaring an inverted value system, striving for pre-eminence not only over history but over human society itself. In this respect, this conflict over values turned out to be a conflict not only over democracy, but over the essence and continuity of humanity. In this battle, German Nazism reached deep into its arsenal, and the destructive urge so brilliantly captured in Plato's phrase, "the thirst for blood", could be seen both in theory and in practice and was gratified not only in the inhumanity of the concentration camps, but also in the savagery of the war of extermination. Concepts such as Führertum, Volkstum, and Volksgemeinschaft represent only some of the hallmarks of the ideology which declares in an overt fashion the Nordic race's right to world dominance. Behind the rituals that were part and parcel of the Nazi "value system" was hidden the propensity to destroy and tear out by the roots all actual values, everything that enables the individual to have self-consciousness and a social orientation, everything which prevents him from becoming a mere object. The destruction of human autonomy can also be pointed to as the goal of and the reason for Nazi propaganda, which created a world of mere illusion, presenting to the international public, for example, the concentration camps into which the victims of Nazism were placed as re-education and labor facilities.

In the system of social values, a crucial position is occupied precisely by liberty, which proves to be at one and the same time a disruptive element and a necessary condition for social development; the lack, or even total absence, of it always results in a retardation or even the complete halt of social advancement. At its inner core, liberty co-creates the awareness of duties and responsibilities: it inspires human beings in attaining their highest aims while letting it be known to them, however, that, primarily within the inner logic of its own principles, it provides for its own self-limitation. It is from this perspective that the Constitutional Court also views the issue of limitations upon human rights and liberties and the preservation of their substance and purpose, as the issue also emerged historically at the time the contested decree was issued. Whatever limitations each democratic society places upon basic rights and freedoms in the matters of "open" social action, in which even a minority is accorded the right to adopt its own political position, this right of the minority cannot be linked to any and every capricious attitude lacking a positive social substratum. Democracy would bring about its own ruin if, in regard to the opinions and actions of a minority, it felt itself unable to respond to measures which contradict its basic value orientation. Thus, not even in this respect is Presidential Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, an arbitrary act, rather it is a sanction aimed at ensuring the function and purpose of human rights and freedoms, their constructive contribution to society, and the deepening of the sense of

responsibility. After the Nazi occupation had ended, it was necessary to restrict the rights of the then Czechoslovak citizens, not due to the fact that they championed a differing position, rather due to the fact that, in its overall context, their position was hostile to the essence of democracy and its system of values, which in consequence represented support for the war of aggression. In this instance, this restriction applied equally to all cases which met the conditions laid down, namely a relation of enmity to the Czechoslovak Republic and the democratic form of government, without regard to membership in a national group. If in exercising their human rights and freedoms, certain social groups place no limits upon themselves and thereby destroy the rights and freedoms of others, no option remains but to sanction such behavior legally and socially. Thus, Decree No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, also pursued the goal of the political and economic stabilization of a democratic land ruined by the war and occupation, the same as the interest in doing away with further possible recurrences of analogous historical situations, as well as the interest in protecting the rights and freedoms of those citizens who did not bring on this burden and whose social and moral consciousness - indispensable for the exercise of these rights- would, in the absence of such sanctions, suffer unforeseeable ruptures; all this despite the fact that the pursuit of this goal in the postwar circumstances had hidden within it the aims and practices of political forces who were endeavoring to install the so-called "people's democracy" as the route to another totalitarian regime.

To what has already been stated can be added the fact, which is determinative in the present case, that the legislation adopted in exile, just as the immediate post-war legislation of the liberated Czechoslovak state, at the present concern what is in essence an already closed circle of problems and issues intimately connected with the wartime events and the economic renewal of the land. In addition, the normative acts from this period accomplished their purposes in the immediate post-war period, so that from a contemporary perspective they no longer have any current significance and already lack any further constitutive character (Article 5 para. 2 of Constitutional Decree of the President from 13 August 1944, Official Gazette of Czechoslovakia, as amended by Act No. 12/1945 Coll., which Approved, Supplemented, and Amended Enactments concerning the Renewal of the Legal Order). Legal relations created on the basis of this act are not only a consequence of the events of the war but, in addition, they resulted from a legal exercise of Czechoslovak (Czech) legislative power, the aim of which was to repair the damage which was caused by the extraordinary conditions of the period of non-freedom, so that these legal relations enjoy the protection that results from being enactments of the Czechoslovak (Czech) legal order.

Thus, on the basis of all the above-ascertained facts and considerations, the Constitutional Court has come to the conclusion that, at the time of its issuance, the Decree of the President No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal, was not only a legal but also a legitimate act. In view of the fact that this normative act has already accomplished its purposes and for a period of more than four decades has not created any further legal relations, so that it no longer has any constitutive character, in the given situation its inconsistency with constitutional acts or international treaties under Article 10 of the Constitution1) (Article 87 para. 1, letter a2)) of the Constitution of the Czech Republic) cannot be reviewed today, for such a means of proceeding would lack any juridical function whatsoever. To proceed otherwise would be

to cast doubt upon the principle of legal certainty, which is one of the basic requirements of contemporary democratic legal systems.

So, on all of the grounds adduced above and pursuant to § 70 para. 2 of Act No. 182/1993 Coll., on the Constitutional Court, the Constitutional Court has rejected on the merits R. D.'s petition seeking the annulment of Decree of the President No. 108/1945 Coll., on the Confiscation of Enemy Property and the Funds of National Renewal.

Pl. US 14/94

Overview of the most important legal regulations

1. Art. 10 of Act no. 1/1993 Coll., the Constitution of the Czech Republic, provides that international treaties concerning human rights and fundamental freedoms which have been duly ratified and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes.

2. Art. 87 par. 1 letter a) of Act no. 1/1993 Coll., the Constitution of the Czech Republic, provides that the Constitutional Court has jurisdiction to annul statutes or individual provisions thereof if they are inconsistent with a constitutional act or an international treaty under Article 10.

3. Decree of the President of the Republic no. 108/1945 Coll., on Confiscation of Enemy Property and the National Renewal Funds

4. § 1 par. 1 of the Decree of the President of the Republic no. 108/1945 Coll., on Confiscation of Enemy Property and the National Renewal Funds, designates confiscated property. Par. 1 provides that immovable and movable property is confiscated without compensation for the Czechoslovak Republic which property, as of the day of the actual ending of the German and Hungarian occupation was or still is owned by: 1. the German Reich, the Hungarian Kingdom, public law entities under German or Hungarian law, and other German or Hungarian legal entities, or 2. natural persons of German of Hungarian nationality, with the exception of person who prove that they remained loyal to the Czechoslovak Republic, never acted against the Czech and Slovak nations and either actively took part in the fight for its liberation, or suffered under the Nazi or fascist terror, or 3. natural persons who conducted activity against the state sovereignty, independence, unity, democratic-republican state form, security and defense of the Czechoslovak Republic, … Par. 2 provides that all property is also subject to confiscation which, in the period after 29 September 1938, belonged to the subjects specified in paragraph 1 and was, in the decisive period under paragraph 1, or still is, owned by persons in whose hands it would not be subject to confiscation, unless subjecting such property to confiscation would not comply with the principles of decency. Par. 3 provides that the relevant district national committee decides whether conditions for confiscation under this decree are met.