

The Republic of Austria before 1938 and after 1945 – Some Thoughts on Continuity

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Whereas the Austrian Government after an initial period of controversies quickly took the position that the Republic of Austria continued to exist throughout the period of Austria's incorporation into Hitlerite Germany, the Allied Powers preferred a pragmatic approach through the Moscow Declaration of 1943 and the Treaty of Vienna of 1955. They allowed the Austrian Government to act on the grounds of the so-called "Occupation Theory", but bound it to international commitments, which followed from an understanding that Austria also shared the responsibility for the acts of warfare by Hitler's Germany. Thus, they combined the elements of theories of discontinuity (fusion/annexation) with the elements of the theory of occupation.

Keywords: Austria, continuity, discontinuity, occupation, annexation, fusion of states, history of the state, Law of Austria 1933–1955.

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1. Historical background of Austria's loss of independent statehood in 1938

Legal historians agree that the development of the Austrian Republic ("I. Austrian Republic") in the period from 1918 to 1938 was not a success story.¹

¹ As introductory literature on this period see *Brauneder, W. Österreichische Verfassungsgeschichte [History of the Austrian Constitution]*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2009, pp. 187–247, with further references on pp. 285 f.

The end of the Austro-Hungarian Monarchy had left a political vacuum in this part of the former monarchy that was finally recognized as the Republic of Austria by the Treaty of St. Germain in 1919.² An agreement could be achieved on a republican constitution organizing Austria as a multi-party democracy and a federal state with a two-chamber parliament, the B-VG 1920 (Constitution of 1920),³ which formed the basis for creating the respective bodies. The economic disaster of the First World War, the impacts of the world economic crisis of 1929 on Austria,⁴ mass-unemployment, poverty and rival ideologies, however, led to conditions resembling civil war and the *de facto* abolishment of the constitutional setup as revised by the constitutional reforms of 1925,⁵ and 1929⁶, in 1933.

From the beginning of this period, the self-understanding of the Austrian nation as a German (speaking) nation and the relationship with Germany was a key issue. The name of the state “*Republik Deutschösterreich*” (Republic of German Austria), which had been chosen following the decision of the Provisional National Assembly on 20 October 1918,⁷ was abolished by the Treaty of St. Germain (Art. 88), since there was the aim to consider the Republic as a part of the German Empire. The Geneva Protocol of 4 October 1922, concluded with Great Britain, France, Italy and the Czechoslovak Republic,⁸ and the Austrian or Lausanne Protocol of 15 July 1932, entered into with Great Britain, France and Italy,⁹ reinforced the obligation of Austria to remain independent from Germany. The Geneva Protocol formed the legal basis for the Permanent Court of International Justice to consider a customs and economic union between Germany and Austria, which had been negotiated by the two foreign ministers (Schober and Curtius) in 1931 as illegal.¹⁰

In this period, on the level of a federal entity of Austria (*Land*), Styria, a putsch led to the effort of usurpation of the power under breach of the Constitution by one of the two major (and militarized) parties, the *Heimwehr* (Christian-socially-oriented), which was opposed to the party of social-democratic orientation *Republikanischer Schutzbund*, a confrontation, which escalated into an armed conflict in February 1934.¹¹ After the failure of its putsch, the Styrian *Heimwehr* joined the National Socialist German Workers Party (“NSDAP”). Within the same period, the NSDAP, which took the power in Germany in 1933, became stronger in Austria from elections to elections on local and provincial (*Länder*) level. For example, in the local elections of 1933 in Innsbruck, the capital of Tyrol, one

² *Staatsgesetzblatt* [State Law Gazette] StGBL. 1920/303.

³ *Bundesgesetzblatt* [Federal Law Gazette] BGBl. 1920/1.

⁴ In 1931, the largest Austrian bank (Credit-Anstalt für Handel und Gewerbe (CA)) had to be saved by the Austrian state by de-facto nationalization of debts amounting to half of the state budget for 1932. See *Suppan, A.* Von Saint-Germain zum Belvedere. Österreich und Europa 1919–1945 (From Saint-Germain to Belvedere. Austria and Europe 1919–1945). In: *Koch, K., Rauscher, W., Suppan, A., Vyslonzil, E. (eds.)*. Von Saint Germain zum Belvedere. Österreich und Europa 1919–1955 (From Saint Germain to Belvedere. Austria and Europe 1919–1955). München: Oldenbourg Wissenschaftsverlag, 2007, pp. 25–43 (32 f.).

⁵ BGBl. 1925/268.

⁶ BGBl. 1929/329.

⁷ StGBL. 1918/1.

⁸ BGBl. 1922/842.

⁹ BGBl. 1933/12.

¹⁰ Advisory Opinion of 5 September 1931, Series AB 41.

¹¹ *Brauneder, W.* (fn. 1), pp. 231 f.

of the Austrian federal entities, the NSDAP gained 41% of the votes cast.¹² Two fundamental gaps split the Austrian society since the end of the monarchy: the rivalry between German nationals and Austrian independents on the one hand, and between democrats and anti-parliamentarian forces on the other hand.¹³

On 4 March 1933, all three presidents of the Austrian National Council (*Nationalrat*), one of the two chambers of the Austrian Parliament, withdrew from their functions. The Austrian federal government used this occasion to declare the self-dissolution of the National Council, which opened the path towards establishing an authoritarian rule by the then federal chancellor Engelbert Dollfuß. He used a law that had been adopted prior to the end of the First World War in connection with warfare and war economy, and which was incorporated into the post-monarchy and post-war legal order of the Austrian Republic (*Kriegswirtschaftliches Ermächtigungsgesetz*).¹⁴ The Chancellor and Government, in particular, by *de facto* abolishing the second chamber of the Austrian Parliament (*Bundesrat*), by contributing to the self-dissolution of the Austrian Constitutional Court and by prohibiting or even dissolving the political parties went well beyond the borders of application and interpretation of this law. Politically, the Federal Chancellor Dollfuß with these measures tried to counteract the growing movements of national socialism and pan-Germanism. As to the international support, he oriented toward fascism in Italy and the Italian leader Mussolini.

In 1934, a new and authoritarian constitution was adopted¹⁵ and by a constitutional act, which entered into force on the same day, a single state political party *Vaterländische Front* was created as an assembly of all Austrian citizens.¹⁶

All these measures of the Federal Government were answered by an increasing national socialist terror all over Austria. Federal Chancellor Dollfuß himself was killed in a failed effort of putsch on 25 July 1934. His successor Kurt Schuschnigg came under direct German pressure by means of the so-called July-Agreement of 1936,¹⁷ where Germany committed to respect the independence of Austria and not to interfere into Austria's domestic matters. In exchange, Austria pledged to a policy to the effect that Austria was a second German state. Austria accepted consultations with Germany in foreign policy matters, the Austrian Federal Government was

¹² *Hagspiel, H.* Die Ostmark. Österreich im Großdeutschen Reich 1938 bis 1945 (The Ostmark. Austria in the German Reich 1938–1945): Wilhelm Braumüller Universitäts-Verlagsbuchhandlung Ges.m.b.H., 1995, p. 9.

¹³ *Hagspiel, H.* (fn. 12), p. 10. In the first elections after the end of the Austro-Hungarian monarchy, on 16 February 1919, the social-democrats, the strongest supporters of a republic, had become the largest party (40.76%), whereas the Christiansocialists, who offered home to many monarchists, became the second, achieving 35.93% of the votes cast. They held different opinions about the procedure of incorporation into Germany, respectively, simply as a part of Germany or as a part of a union including Germany. See, e.g., *Rauscher, W.* Die Republikgründungen 1918 und 1945 (The creations of the Republics in 1918 and 1945). In: *Koch, K., Rauscher, W., Suppan, A., Vyslonzil, E.* (fn. 4), pp. 9–24 (pp. 15–17).

¹⁴ For further details, see *Brauneder, W.* (fn. 1), p. 232.

¹⁵ BGBl. 1934-I/239 and 1934-II/1.

¹⁶ BGBl. 1934-II/4; *Brauneder, W.* (fn. 1), pp. 233 f. For the functioning of the constitutional and political system in the period 1933–1938, see *Tálos, E.* Das austrofaschistische Herrschaftssystem. Österreich 1933–1938 [The Austro-fascist System of Domination. Austria 1933–1938]. Wien, Berlin: LIT Verlag, 2013.

¹⁷ Published in the *Wiener Zeitung* of 12 July 1936. Parts of the agreement, however, were kept secret. For Chancellor Schuschnigg's motivations see, e.g., *Walter, F.* Österreichische Verfassungs- und Verwaltungsgeschichte von 1500–1955 [History of the Austrian Constitution and Administration 1500–1955]. Wien, Köln, Graz: Verlag Hermann Böhlaus NachF, 1972, pp. 294–298.

supplemented by representatives of the “national opposition”, forbidden German newspapers became readmitted and national socialists that had been found to have committed crimes, fell under an amnesty.¹⁸ Upon an order of Hitler’s person in charge for the Four Years’ Plan, Hermann Göring, the persons at the top of the NDSAP in Austria were changed at the end of 1937. The aim of the new command was to implement gradual Germanization of Austria from within until it would be ready to become incorporated into Hitler’s Germany.¹⁹

On 12 February 1938, Hitler met Schuschnigg on Obersalzberg close to Berchtesgaden in Germany, and both signed an agreement, which *de facto* was dictated by Hitler and Germany. Germany confirmed its obligations according to the July Agreement of 1936. On the other hand, Austria agreed to follow the German foreign policy, to have the national socialist attorney Arthur Seyss-Inquart assigned as the Minister of the Interior in the Austrian Federal Government, to permit the national socialists in Austria to declare themselves publicly and to act freely within the monopolistic party *Vaterländische Front*, to release all national socialist prisoners, to exchange the Austrian and the German armies up to 100 officers and to intensify the economic cooperation.²⁰

This agreement was celebrated in Austria as a success of the Austrian NSDAP, and led to numerous manifestations in favor of accession of Austria to Germany. The Austrian Federal Chancellor Schuschnigg made a final effort to torpedo such movement and on 9 March 1938 set the date for a plebiscite on the independence of Austria for 13 March 1938. The question to be answered by the people was such as to make everybody that would vote against to commit the crime of high treason. Besides, there was no constitutional basis for such plebiscite, the register of electorate was not correct and the procedure of voting would not have been secret.²¹ It was expected that 55–75% of the electorate would vote in favor of independence.²²

Germany considered Chancellor Schuschnigg’s initiative to be a violation of the Berchtesgaden agreement, and on 11 March 1938 formally asked the Austrian government to postpone the plebiscite. A deadline of five hours was set on this day to issue postponement. If the deadline was missed, Germany would consider this a breach of the Berchtesgaden agreement and would feel free to act accordingly. The deliberations on this ultimatum in the Austrian government were overshadowed by mass demonstrations and the threat of the national socialist members of the government to withdraw. Nearly three hours after the deadline, Chancellor Schuschnigg finally postponed the referendum without announcing a new date. At that moment, Hitler had already issued Order N° 1 as to mobilizing the part of the German army, which was assigned to invade Austria. Besides, the national socialist ministers of the Schuschnigg government were advised to withdraw, and this act led to the withdrawal of Schuschnigg himself two hours later. The Austrian national socialists asked the Austrian Federal President Wilhelm Miklas to entrust Seyss-Inquart with the function of federal chancellor. Miklas, however, irrespective of a further German ultimatum asked three other persons to take this office. All of them declined. Seyss-Inquart, on the other hand, abstained from usurping this function, disregarding a respective order of Göring. While no decisions were taken at the top

¹⁸ Hagspiel, H. (fn. 12), pp. 10 f.

¹⁹ Hagspiel, H. (fn. 12), p. 11.

²⁰ Hagspiel, H. (fn. 12), p. 12.

²¹ Brauneder, W. (fn. 1), p. 237.

²² Hagspiel, H. (fn. 12), pp. 13 f.

of the state, national socialist persons in the federal chancellery started to advise their fellows in the provinces (*Länder*) to take over the power from the previous governors. The governors' offices were occupied and the usurpers from the national socialist underground formally confirmed on the basis of the Constitution of 1934 on 12 March 1938.²³

Seyss-Inquart also failed to obey the further order of Göring issued on the same evening to send a telegram to Berlin asking for invasion of Austria by German troops. Göring, most presumably, was informed at 9.40 pm on this evening about the oral agreement with the contents of such telegram drafted in Berlin, however, obviously without the approval of Seyss-Inquart, who only near to midnight was finally entrusted with the function of federal chancellor by President Miklas.²⁴ During that night, extensive national socialist manifestations could be witnessed all over Austria, and when the new government of Seyss-Inquart was publicly presented on the next morning, the transfer of power to the representatives of the Austrian NSDAP had already taken place.

Hitler, knowing that the Austrian army had by now been advised by Chancellor Schuschnigg not to fight a German invasion, but to remain in their barracks, ordered, irrespective of the internal success of the Austrian NSDAP, the German army to invade Austria. Hitler may well have ordered such invasion also envisaging military resistance. The invasion started in the morning of 12 March 1938.²⁵ The German troops and Hitler himself were welcomed triumphantly. On 13 March 1938, the Austrian Government adopted the Constitutional Act on the Reunification with Germany, signed by Seyss-Inquart also on behalf of the Austrian President, once Miklas had transferred his power to the new Federal Chancellor.²⁶ The German Government adopted an analogous act and Austria on the same day became a German province.²⁷

There are several reasons to provide an explanation from the legal perspective, as to why the Austrian Constitutional Act on the Reunification with Germany cannot be considered as having legally entered into force. It may be held that the provisions in the Austrian Constitution of 1934, ruling on the documentary authentication of such act have not been applied properly.²⁸ However, an analysis of the whole practice of adoption of federal laws in the period from 1934 to 1938 shows, in addition that the majority of federal laws – and this may well be argued also for the Reunification Act – have not been adopted following the provisions of the 1934 Constitution, but were simply based directly on the Constitutional Act on Extraordinary Measures

²³ Hagspiel, H. (fn. 12), pp. 17–21.

²⁴ Hagspiel, H. (fn. 12), p. 21 and p. 347 fn. 22.

²⁵ Hagspiel, H. (fn. 12), p. 22.

²⁶ BGBl. 1938/75; Hagspiel (fn. 12), pp. 23f; Brauneder (fn. 1), p. 248.

²⁷ Reichsgesetzblatt (RGBl.) 1938 I, S. 237; Hagspiel, H. (fn. 12), p. 24.

²⁸ Brauneder, W. (fn. 1), p. 248; Merkl, A. J. Österreichs Rechtslage 1938–1945 und ihre Behandlung in der österreichischen Rechtswissenschaft [The Legal Status of Austria 1938–1945 and Its Analysis by the Austrian Legal Doctrine]. In: Archiv des öffentlichen Rechts (AÖR), 1957, Vol. 82 or 43 NF), pp. 480–490 (484 f.). Art. 66 of the 1934 Constitution reads, as follows: “(1) The constitutional adoption of federal laws is authenticated by the signature of the Federal President. (2) The proposal for documentary authentication is submitted by the Federal Chancellor. (3) The documentary authentication has to be counter-signed by the Federal Chancellor and the competent Federal Ministers.”

in the Area of the Constitution of 30 April 1934.²⁹ According to this constitutional act, all powers of the National Council and Federal Council were transferred to the Federal Government. Even if this was intended as the case only until the Chapter IV of the new Constitution adopted a month later would enter into force, it did not lose its legal force, because, even when Chapter IV entered into force on 1 November 1934, the Constitutional Act did not cease to be effective, since the Federal Cultural Council (*Bundeskulturrat*) and the Federal Economic Council (*Bundeswirtschaftsrat*) continued to be manned only provisionally.³⁰ If one considers the Reunification Act to be based on this Constitutional Act, its constitutionality and legality as such suffers from the lack of constitutionality and legality of its constitutional basis itself. W. Putschek shows that from a total of 45 constitutional acts adopted within the abovementioned period only in 7 cases the procedure set down in the Constitution of 1934 was followed.³¹

The accession of Austria to Germany (“reunification”), which *de facto* and *de jure* already had taken place, judging by the facts and procedure described above, was submitted to a plebiscite, which was conducted on 10 April 1938. The plebiscite was prepared by a massive public campaign.³² It resulted in the participation of 99.7% of the electorate, of which 99.73% answered the question “Do you agree to the reunification of Austria with the German Reich which was accomplished on 13 March 1938 and do you support the list of our leader Adolf Hitler?” in affirmative. The second part of the question referred to the elections to the German Parliament in Berlin (*Reichstag*), which took place on the same day and where the Austrians could participate for the first time. In numbers, only 11 343 Austrians voted against the accession of Austria to the German Reich.³³

2. Legal conclusions drawn from the above facts in legal theory

2.1. Theories of discontinuity including the theory of annexation

Austrian public international and constitutional lawyers are used to summarize the conclusions theoreticians have drawn from the facts described above by opposing a theory of annexation (*Annexionstheorie*) to a theory of occupation (*Okkupationstheorie*).³⁴ This contrast has been established by Stephan Verosta, a leading Austrian public international lawyer of the post-war period. S. Verosta, in 1947, focused on the withdrawal of the Federal Chancellor Schuschnigg and later on that day of Federal President Miklas under a threat to use force and, on some

²⁹ BGBl. 1934 I/255. As for the analysis, see *Putschek, W.* Ständische Verfassung und autoritäre Verfassungspraxis in Österreich 1933–1938 mit Dokumentenanhang [Curial Constitution and Authoritarian Constitutional Practice in Austria 1933–1938 with Documentary Annex]. Frankfurt/Main: Peter Lang, 1993, pp. 190–198.

³⁰ *Putschek, W.* (fn. 29), p. 191.

³¹ *Putschek, W.* (fn. 29), p. 193.

³² For details see e.g. *Hagspiel, H.* (fn. 12), pp. 35–43.

³³ *Hagspiel, H.* (fn. 12), pp. 43 f.

³⁴ See for others, e.g., *Hummer, W.* Der internationale Status und die völkerrechtliche Stellung Österreichs seit 1918 [The International Status of Austria Since 1918]. In: *Reinisch, A.* (ed.). Österreichisches Handbuch des Völkerrechts [Austrian Manual of Public International Law]. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2013, I, pp. 684–737 (690–692) with further references.

events, of military clashes along the Austrian-German border in the night from 11 to 12 March 1938, to argue that Austria had been occupied by Germany.³⁵

To some extent, it could be forgotten that the theory of annexation in fact summarized four different approaches, which could have been better called theories of discontinuity of Austria, and were based either on the assumption that an annexation or a fusion had taken place in 1938. Under both assumptions, either an original or a derivative new creation of Austria in 1945 was found as having happened.³⁶ However, all these four theories shared the understanding that Austria lost its statehood in 1938 and disappeared as a subject of public international law, and it led to the necessity to construct a new Austria in 1945. A no less prominent adherent of such approach was the author of the Austrian Constitution 1920, Hans Kelsen. He, like other authors, who held such view prior to the end of the Second World War, was afraid that restoring of Austria after the end of the war would necessarily lead to restoring a fascist Austria, as this state was, in fact, in existence immediately prior to incorporation into Germany.³⁷ Kelsen considered the assumption that Austria has never ceased to exist as an independent state a political fiction.³⁸

State practice in the phase of appeasement policy apart from the initial protests widely supported the assumption of discontinuity.³⁹ Germany, itself, in a dispute, which lasted from 1951–1956 concerning the fate of the German citizenship acquired between 1938 and 1945, did not want to accept its automatic loss and replacement by a reinstated Austrian citizenship in 1945. Germany, supported by doctrine and national jurisprudence, argued that Austria had ceased in 1938.⁴⁰

Finally, political interests made a part of the Austrian politicians after the end of the warfare and prior to concluding the Treaty of Vienna of 1955, which formally reestablished Austria as an independent state, argue in favor of discontinuity. Thus, the representatives of the social democrats relied on the assumption of discontinuity, when they fought against the further legal effect and application of the concordat, which had been concluded between Austria and the Holy See in 1934, and other international treaties.⁴¹

2.2. Theory of occupation

Even if the Austrian people had welcomed and supported the situation whereby Austria had become a part of Germany, called *Ostmark*, and irrespective of the

³⁵ Verosta, S. Die internationale Stellung Österreichs 1938 bis 1947 [The International Status of Austria 1938–1947]. Wien: Manzsche Verlagsbuchhandlung, 1947, pp. 1 f., 24 f.

³⁶ Jakusch, W. Okkupationstheorie, Annexionstheorie und das ius postliminii [Theory of Occupation, Theory of Annexation and the Ius Postliminii]. In: *Österreichische Juristen Zeitung (ÖJZ)*, 1970. Vol. 45(10), pp. 258–263 (261 f.).

³⁷ See, e.g., Kelsen, H. The International Legal Status of Germany to Be Established Immediately upon Termination of the War. In: *American Journal of International Law*, 1944. Vol. 38, pp. 689–694. For the functioning of Austria's legal system immediately prior to the incorporation into Germany see, e.g., Holtmann, E. Autoritätsprinzip und Maßnahmegesetz [The Principle of Authority and Political Legislation]. In: *Die österreichische Verfassung von 1918–1938* [The Austrian Constitution from 1918 until 1938]. Wien: Verlag für Geschichte und Politik, 1980, pp. 210–222. For other representatives of the theories of discontinuities (including annexation) see Jakusch, W. (fn. 36), p. 259.

³⁸ Kelsen, H. (fn. 37), p. 690.

³⁹ See Jakusch, W. (fn. 36), p. 258; Clute, R. E. The International Legal Status of Austria 1938–1955. The Hague: Martinus Nijhoff, 1962, pp. 43–47; for initial protests see Verosta, S. (fn. 35), pp. 25–41.

⁴⁰ See Jakusch, W. (fn. 36), pp. 259 f. with further references.

⁴¹ See Jakusch, W. (fn. 36), p. 259.

fact that the ideas of a “large German solution”⁴² and of a “thousand year old empire” have been well-spread in Austria at the moment of the decline faced by the Austro-Hungarian Monarchy and thereafter, a majority of theoreticians used the constitutional and legal deficiencies of the procedure, which led to the accession, as well as arguments emanating from general public international law for qualifying it as an act of occupation of Austria. Consequently, Austria had not lost its personality and status as a subject of public international law while having been a part of Hitler’s German Reich (1938–1945), but lost its ability to act as such subject. This theory, which can be considered dominant over the years and at present, is called “Occupation theory”.

Robert E. Clute, a political scientist of the University of Georgia, United States of America, held that Germany failed in having tried to convince the world that the accession “was the result, not of force, but of a mutual desire on the part of the inhabitants of both countries.”⁴³ He stated that the right to self-determination was not a legal right under international law and that the accession of Austria to Germany without consent of the Council of League of Nations was forbidden by treaty provisions. R. E. Clute indicated the murder of Chancellor Dollfuß in 1934, as the first piece of evidence demonstrating that Austria’s accession was carried out by force on the part of Germany. According to him, this murder was brought about “by German nationals under the direction of Nazi officials in Germany,”⁴⁴ and adduced the pressure on Chancellor Schuschnigg in Berchtesgaden, further indicators included the fact that Germany massed troops and materiel in Southern Germany in that period, the German fear of the plebiscite announced and later called off by Chancellor Schuschnigg, the pressure exercised on Chancellor Schuschnigg and President Miklas, leading to their withdrawal from functions, the falsification of a telegram arguably having been sent by Seyss-Inquart requesting German troops to restore order in Austria, but which, according to the finding of the International Nuremberg Tribunal in its Judgment of 1 April 1946,⁴⁵ had neither been sent, nor agreed to orally by Seyss-Inquart, and, finally, the marching of the German army into Austria before the Constitutional Act on Reunification had been adopted.⁴⁶

Adolf Julius Merkl, one of the most prominent theoreticians of Austrian constitutional and administrative law, held that the lack of authentication of the Constitutional Act on Reunification with Germany not respecting the requirements of the Austrian Constitution of 1934 had the consequence of making the act itself null and void, and consequently, neither an incorporation of Austria into Germany by means of two corresponding legal (constitutional) acts nor by means of a treaty took place. Thus, none of the two legitimate possibilities of fusion of two states under public international law was accomplished. Germany exercised its rule on Austria as a foreign regime.⁴⁷ Besides, the German army had invaded Austria prior

⁴² This goes also for Chancellor Schuschnigg, himself, see *Kreissler, F.* *Der Österreicher und seine Nation* (The Austrian and His Nation). Wien, Köln, Graz: Hermann Böhlau Nachf., 1984, pp. 31–34.

⁴³ *Clute, R. E.* (fn. 39), p. 5.

⁴⁴ *Clute, R. E.* (fn. 39), p. 6.

⁴⁵ Available: http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf [last viewed 12.02.2016]. See, in particular, on pp. 30 f. For a German translation, see *Verosta, S.* (fn. 35), pp. 16–24 (22).

⁴⁶ *Clute, R. E.* (fn. 39), pp. 5–8.

⁴⁷ *Merkl, A. J.* (fn. 28), pp. 482–486. See also *Jedlicka, L.* *Verfassungs- und Verwaltungsprobleme 1938–1955* [Problems of Constitution and Administration 1938–1955]. In: *Die Entwicklung der Verfassung Österreichs* [The Development of the Constitution of Austria]. Graz, Wien: Stiasny Verlag, 1963, pp. 120–144 (120–123).

to the adoption of such fake constitutional act and the German police apparatus, too, had begun to start the acts of persecution of “unreliable” persons prior to the end of the fake fusion procedure. These acts of persecution created fear in many Austrians and, accordingly, arguably had an influence on the results of the plebiscite of 10 April 1938.⁴⁸

3. Standpoint of the Moscow Declaration, 1943

On 30 October 1943, the governments of the United Kingdom, the Soviet Union and the United States of America based on a British proposal⁴⁹ signed the Moscow Declaration, which should become decisive for the post-war order. The German translation of the authentic English and Russian texts of the Moscow Declaration as related to Austria uses the word *Besetzung* (= “occupation”) for the term “annexation” used in English and *prisoedinenie* (= “reunification”) used in the Russian text.⁵⁰ The English text reads, as follows:

“DECLARATION ON AUSTRIA

The Governments of the United Kingdom, the Union of Soviet Socialist Republics and the United States have agreed that Austria, the first free country to fall a victim to Nazi aggression, shall be liberated from German domination.

They regard the annexation imposed upon Austria by Germany's penetration of March 15, 1938, as null and void. They consider themselves in as no way bound by any changes effected in Austria since that date. They declare they wish to see re-established a free and independent Austria, and thereby to open the way for the Austrian people themselves as well as those neighbouring states which will be faced with similar problems, to find that political and economic security which is the only basis for lasting peace.

Austria is reminded however that she has a responsibility, which she cannot evade for participation in the war on the side of Hitlerite

⁴⁸ Merkl, A. J. (fn. 28), pp. 486 f.

⁴⁹ See the wording of the British proposal at *Fellner, F.* Die außenpolitische und völkerrechtliche Situation Österreichs 1938. Österreichs Wiederherstellung als Kriegsziel der Alliierten [The Situation of Austria 1938 from the Perspective of Foreign Policy and Public International Law. The Reestablishment of Austria as War Aim of the Allied Powers]. In: *Weinzierl, E., Skalik, K. (eds.)*. Österreich. Die Zweite Republik [Austria. The Second Republic]. Graz, Wien, Köln: Verlag Styria, 1972, I, pp. 53–90 (68).

⁵⁰ “Erklärung zu Österreich

*Die Regierungen des Vereinigten Königreiches, der Sowjetunion und der Vereinigten Staaten sind darin einer Meinung, dass Österreich, das erste freie Land, das der typischen Angriffspolitik Hitlers zum Opfer fallen sollte, von deutscher Herrschaft befreit werden soll. Sie betrachten die Besetzung Österreichs durch Deutschland am 15. [richtig: 12.] März 1938 als null und nichtig. Sie betrachten sich durch keinerlei Änderungen, die in Österreich seit diesem Zeitpunkt durchgeführt wurden, irgendwie gebunden. Sie erklären, dass sie wünschen, ein freies, unabhängiges Österreich wiederhergestellt zu sehen und dadurch ebenso sehr den Österreichern selbst wie den Nachbarstaaten, die sich ebensolchen Problemen gegenübergestellt sehen werden, die Bahn ebnen, auf der sie politische und wirtschaftliche Sicherheit finden können, die die einzige Grundlage für den dauerhaften Frieden ist. Österreich wird aber auch daran erinnert, dass es für die Teilnahme am Krieg an der Seite Hitler-Deutschlands eine Verantwortung trägt, der es nicht entinnen kann, und dass sich anlässlich der endgültigen Abrechnung Bedachtnahme darauf, wieviel es selbst zu seiner Befreiung beigetragen haben wird, unvermeidlich sein wird.” See *Hagspiel, H.* (fn. 12) pp. 80 f. with further reference.*

*Germany and that in the final settlement account will inevitably be taken of her own contribution to her liberation.*⁵¹

The Russian text reads, as follows:

“DEKLARACIJA OB AVSTRII

Pravitel'stva Soedinennogo Korolevstva, Sovetskogo Soyuza i Soedinyonnykh Shtatov Ameriki soglasilis', chto Avstriya, pervaya svobodnaya strana, pavshaya zhertvoy gitlerovskoy agressii, dolzhna byt' osvobozhdena ot germanskogo gospodstva.

Oni rassmatrivayut prisoedinenie, navyazannoe Avstriei Germaniyei 15 marta 1938 goda, kak nesushchestvuyushchee i nedeystvitel'noe. Oni ne shchitayut sebya nikoim obrazom svyazannymi kakimi-libo peremenami, proizvedennymi v Avstriei posle etoy daty. Oni zayavlyayut o tom, chto oni zhelayut videt' vosstanovlennoy svobodnuyu i nezavisimuyu Avstriyu i tem samym dat' vozmozhnost' samomu avstriyskomu narodu, kak i drugim sosednim gosudarstvam, pered kotorymi vstanut podobnye zhe problemy, najti tu politicheskuyu i ekonomicheskuyu bezopasnost', kotoraya yavlyaetsja edinstvennoy osnovoy prochnogo mira.

*Odnako, obrashchaetsya vnimanie Avstriei na to, chto ona neset otvetstvennost', kotoroy ne mozhet izbezhat', za uchastie v voyne na storone gitlerovskoy Germanii, i chto pri okonchatel'nom uregulirovanii neizbezhno budet prinyat vo vnimanie ee sobstvennyy vklad v delo ee osvobozhdeniya.*⁵²

The English, as well as the Russian text of the Moscow Declaration of 1943 show a politically pragmatic way of approaching the continuity or discontinuity of Austria during Hitlerite regime, rather than supporting one of the various theories. The Russian text even uses the German terminology of “reunification”, however, considers this as “imposed” on Austria. The term “annexation” used in the English text could be understood technically as “annexation” under public international law, which would mean a difference to “occupation”. Austria would have been incorporated into Germany by use of force and with the intention to appropriate it permanently. However, it seems to be more convincing that the term “annexation” has been used for reflecting the German term *Anschluss*.⁵³ This understanding is supported by the use of the other word, “penetration”, which perfectly describes the method how Germany acquired “domination” over Austria. If “annexation” was to be understood in the sense of public international law, it would have been adequate to use the term “invasion” instead of “penetration” in order to underline the element of “use of force” in the given context.

The Moscow Declaration of 1943 does not leave any doubt that before the “annexation”/prisoedinenie existed a free and independent state of Austria, and that this is the state to be re-established. Further to that, the will of the Austrian people

⁵¹ See the text in, e.g., United Nations Documents, 1941–1945, The Royal Institute of International Affairs. London. Available: http://archive.org/stream/unitednationsdoc031889mbp/unitednationsdoc-031889mbp_djvutxt [last viewed 12.02.2016].

⁵² Text in: Vneshnaya politika Sovetskogo Soyuza v period Otechestvennoy Voyny. Dokumenty i materialy [The Foreign Policy of the Soviet Union in the Period of World War II. Documents and Materials]. Moskva: OGIZ. Gosudarstvennoe izdatel'stvo politicheskoy literatury, 1944, pp. 362 f.

⁵³ Similarly, Verosta, S. (fn. 35), p. 53 fn. 1.

shall be decisive in choosing the methods to finding political and economic security for such independent existence.

By underlining the responsibility of Austria for having participated in the warfare of Hitlerite Germany, the Moscow Declaration of 1943 contradicts a mere “occupation”, because this would mean that Austria had lost its capacity to act. Not having been able to act could not result in responsibility. Without any doubt, the approach of the declaration, however, corresponded to the historical truth. The Austrian army had been incorporated into the German army in the mid-March of 1938. Only 126 from 50.000 soldiers of the Austrian army denied taking an oath to Hitler. All of those denying an oath were driven out of service. 61 Austrian officers lost their function. Austrians served at all fronts and, unfortunately, had their share in war crimes committed by the Hitlerite units. Altogether 1.2 millions of Austrians were conscripted to the German army and 247 000 of them lost their lives, around 600 000 ended up as war prisoners.⁵⁴ From the perspective of an underlying theory, the shared responsibility statement of the Moscow Declaration of 1943 rather points to having accepted a fusion of two states than to occupation.⁵⁵

Considering the contents of the Moscow Declaration of 1943 as a whole, Werner Jakusch, relying on an analogy to *ius postliminii* for a Roman citizen who became a war prisoner and in case of returning back home was treated as if he never had been a war prisoner, while his status as Roman citizen meanwhile was considered as pending, proposed the understanding of Austria having continued its personality under public international law from 1938 to 1945, thereby leaving open the issue, whether the personality was lost or upheld without a capacity to act in the period between 1938 and 1945.⁵⁶

4. Measures taken on Austrian side after 1945, realizing the assumption of occupation

The date of the reinstatement of Austria as a republic (the so-called second Republic of Austria)⁵⁷ is usually set at 27 April 1945, when the Social Democratic (Socialist) Party, the Christian Socialist Party (Austria’s People’s Party) and the Communist Party of Austria referring to the Moscow Declaration of 1943 proclaimed the independence of Austria.⁵⁸ This proclamation used both terms and considered Austria as having been militarily occupied, as well as annexed by Germany. Up to a certain degree, the document, thereby reflects the difficult situation of the persons having signed it. This goes, in particular, for the State Chancellor Dr. Renner, who co-signed on behalf of the Socialist Party of Austria. He had already been State Chancellor and co-founder of the First Republic of Austria and had expressly supported the incorporation of Austria into Germany in 1938.⁵⁹ The proclamation declared the democratic Republic of Austria as re-established and

⁵⁴ See Hagspiel, H. (fn. 12), pp. 327–329.

⁵⁵ Fellner, F. (fn. 49), p. 74, provides an additional argument obtained by comparing the position of the three powers with regard to Austria to their position concerning Poland, Czechoslovakia, the Netherlands, Belgium, Norway, and Yugoslavia, where it was only spoken of “liberation”, but not of “reestablishment”.

⁵⁶ Jakusch, W. (fn. 36), p. 262.

⁵⁷ Brauneder, W. (fn. 1), p. 262 correctly points out the wrong use of this term, if one follows – as does the vast majority of lawyers in Austria – the theory of occupation.

⁵⁸ The German text of the Proclamation of the Independence of Austria of 27 April 1945 can be found at Verosta, S. (fn. 35), pp. 59–62.

⁵⁹ See the confession of the error committed and justification at Rauscher, W. (fn. 13), pp. 18 f.

“to be installed in the sense of the Constitution of 1920” (Art. I), the incorporation into Germany imposed on the Austrian people in 1938 as null and void (Art. II), the establishment of a Provisional State Government, notwithstanding the rights of the Occupying Powers (Art. III), the nullity of all oaths having been taken by Austrians with regard to the German Empire (Art. IV) and the revival of all duties emanating from Austrian citizens with regard to Austria (Art. V).⁶⁰ The Provisional Government was accepted by the Allied (Occupying) Powers by the summer of 1945 and it organized the first elections on 25 November 1945.⁶¹ The Allied (Occupying) Powers themselves agreed on their mutual powers and how to exercise their control over Austria through an Allied Council on 4 July 1945.⁶² On 20 October 1945, by a Memorandum, the Allied Council formally recognized the Provisional Government.⁶³ On 28 June 1946, the First Control Agreement between the Allied (Occupying) Powers was replaced by a Second Control Agreement, which expanded the authority of action for the Austrian Government, which had emanated from the elections of 25 November 1945.⁶⁴

The Provisional Government started to implement its reading of the Moscow Declaration of 1943 as occupation of Austria by Hitlerite Germany in 1938–1945, by adopting the first “Constitution-Transition-Act” of 1945, which set the Constitution of 1920 as in effect by amendment of 1929, as well as all other constitutional laws in force on 5 March 1933.⁶⁵ The Constitution of 1934 and all constitutional laws (acts) entering into force after March 5, 1933, including the Constitutional Act on Reunification with Germany, were abolished. The Act on Transition of the Law, 1945, confirmed the further existence of the law of the German Reich as far as not in contradiction with the existence of a free and independent state of Austria, and the principles of a true democracy and the legal conscience of the Austrian people and as far as not reflecting a typical way of thinking of national socialism.⁶⁶ Finally, the Act on Transition of Authorities re-established the Austrian authorities more or less as in 13 March 1938, and abolished the authorities of the German Reich.⁶⁷ Since a number of (essential) provisions of the Constitution of 1920 as amended in 1929 were not applicable due to the changes since 5 March 1933, a Provisional Constitution entered into force on 1 May 1945.⁶⁸ It was amended on 12 October 1945 and became repealed with the full entry into force of the Constitution of 1920 as amended in 1929 on 20 December 1945. This transition was ruled by the “Second Constitution Transition Act” of 1945.⁶⁹

⁶⁰ StGBL 1945/1 and Publication on the Establishment of a Provisional Government, StGBL 1945/2. See also Verosta, S. (fn. 35), pp. 61 f.

⁶¹ Suppan, A. (fn. 4), p. 37.

⁶² A German translation of the text of this agreement (*Erstes Kontrollabkommen*) can be found at Verosta, S. (fn. 35), pp. 66–71.

⁶³ German text of the Memorandum at Verosta, S. (fn. 35), pp. 97 f.

⁶⁴ German text at Verosta, S. (fn. 35), pp. 104–113.

⁶⁵ “Verfassungs-Überleitungsgesetz 1945”, StGBL 1945/4. For details as to the constitutional development of Austria in the period 1945–1950 see Adamovich, L. Die Entwicklung des österreichischen Verfassungsrechts seit 27. April 1945 [The Development of the Austrian Constitutional Law since 27 April 1945]. In: *Jahrbuch des öffentlichen Rechts. Tübingen* 1953. Vol. 2, NF, pp. 179–216, including the German text of the major constitutional acts of that period.

⁶⁶ Rechts-Überleitungsgesetz 1945, StGBL 1945/6 and Brauneder, W. (fn. 1), p. 259.

⁶⁷ Behörden-Überleitungsgesetz 1945, StGBL 1945/94.

⁶⁸ StGBL 1945/5 and Brauneder, W. (fn. 1), 261 as well as Lehner, O. Österreichische Verfassungs- und Verwaltungsgeschichte [History of the Austrian Constitution and Administration]. Linz: Universitätsverlag Rudolf Trauner, 1994, pp. 349–354.

⁶⁹ StGBL 1945/232.

5. Final decision taken by the Treaty of Vienna, 1955

However, a true re-establishment of Austria by the Austrian Government could not be achieved without ending the occupation regime of the Allied Powers resulting from the Second World War. This regime was ended only after the death of Stalin by conclusion of the Treaty of Vienna in 1955.⁷⁰

The Treaty of Vienna formally ended the occupation period of Austria. Since in the last phase of the negotiations the Austrian delegation managed to exclude a provision stating that Austria bears a responsibility for the Second World War, in Austria it is not considered to be technically a Peace Treaty.⁷¹ Besides, Art. 21 of the Treaty of Vienna expressly states that there are no reparations required from Austria. The United States explained the necessity of the Treaty of Vienna by Hitler's annexation of Austria, "by which Hitler had reduced Austria to a province of Greater Germany" and which "had never been condoned by the United States or accepted by it as having legally extinguished the Austrian State. Because the United States, therefore, was not at war with Austria, the post-war problem was to conclude, not a treaty of peace, but rather a treaty which would regularize the status of the country ..".⁷²

The terms used in this explanation by US side are also the terms used by the Treaty of Vienna itself. In the Preamble, it is stated: "Whereas on 13th March, 1938, Hitlerite Germany annexed Austria by force and incorporated its territory into the German Reich ..". This statement is followed by a reference to the Moscow Declaration where the terms "annexation", "re-establishment of a free and independent Austria" and liberation from the "domination" of Hitlerite Germany are simply repeated. In the Russian version, instead of the previous "*prisoedinenie*" the word "annexation" has now been used. At the same time, the Preamble speaks from the necessity for "restoration and democratic reconstruction of" Austria.

Art. 1 of the Treaty of Vienna "re-establishes" Austria as a sovereign, independent and democratic state. Art. 4 prohibits a political or economic union with Germany in any form whatsoever. Art. 5 determines that the frontiers of Austria "shall be those existing on 1st January, 1938." Art. 9 obliges Austria to destroy the National Socialist Party and dissolve all Fascist-type organizations. Art. 12 prohibits to have Austrian nationals who had been German nationals at any time before 13 March

⁷⁰ The negotiations for such treaty had started in 1947, but were stopped in October 1949 by Stalin referring to the German and Triest questions, but also as a consequence of the clear foreign policy orientation of the Austrian Government towards the West. See *Suppan, A.* (fn. 4), p. 39; *Müller, W. L., Leidinger, H.* Tiefes Misstrauen – begrenztes Interesse: Die Österreichisch-sowjetischen Beziehungen 1918 bis 1955 [Deep Distrust – Limited Interests: The Austrian-Soviet Relations 1918–1955]. In: *Koch, K., Rauscher, W., Suppan, A., Vyslonzil, E.* (fn. 4), pp. 70–114 (99 f.). The West-orientation of the Austrian foreign policy was, however, already clearly visible in 1947, see *Gehler, M.* Österreichs Außenpolitik der Zweiten Republik [Austria's Foreign Policy of the Second Republic]. Innsbruck, Wien, Bozen: Studien Verlag, 2005, pp. 51–63. For the details of the negotiations, see *Stourzh, G.* Der Weg zum Staatsvertrag und zur immerwährenden Neutralität [The Path towards the State Treaty and the Permanent Neutrality], who differentiates seven preparatory phases, the decisive one starting in February 1955. In: *Weinzierl, E., Skalnik, K.* (eds.) (fn. 49), pp. 203–263; *Stourzh, G.* Kleine Geschichte des österreichischen Staatsvertrages [A Small History of the Austrian State Treaty]. Graz, Wien, Köln: Verlag Styria, 1975, which includes the German text of the State Treaty as published in BGBl. 1955/152, and compares it to the first draft dating from 24 April 1947.

⁷¹ See, e.g., *Rotter, M.* Der Staatsvertrag [The State Treaty]. In: *Sieder, R., Steinert, H., Tólos, E.* (eds.). Österreich 1945–1995 [Austria 1945–1995]. Wien: Verlag für Gesellschaftskritik, 1996², pp. 122–132 (126 f.).

⁷² Quoted from *Clute, R. E.* (fn. 39), p. 106.

1938 or Austrian nationals who served in certain ranks in the German Armed Forces in the period 13 March 1938 – 8 May 1945 to be accepted for the service in the Austrian army. Art. 18 of the Treaty of Vienna provides for repatriation of Austrian prisoners of war and determines further conditions.

Only these few examples of treaty provisions show that the Treaty of Vienna, just like the Moscow Declaration before that chose a pragmatic solution for outstanding issues without fully supporting the “Occupation theory” or one of the “Discontinuity theories”. The treaty left space for the Austrian Government to act as it did, but bound it to commitments, which were linked to either fusion or annexation, and went well beyond the concept of occupation. The fact that Austria continued bilateral and other multilateral treaties from the pre-war period and it was accepted by its treaty partners⁷³ cannot change this result. It was not Austria’s decision, but that of the Allied Powers, negotiations resulting in Austria’s “establishment” by means of the Treaty of Vienna, 1955.

Summary

1. The Austrian Constitutional Act on the Reunification with Germany cannot be considered as having legally entered into force.
2. The accession of Austria to Germany (“reunification”), which *de facto* and *de jure* already had taken place at that moment, was subsequently submitted to a plebiscite which took place on 10 April 1938. The plebiscite was prepared by a massive public campaign.
3. Austrian public international and constitutional lawyers are used to summarize the conclusions theoreticians drew from these facts by opposing a theory of annexation (*Annexionstheorie*) to a theory of occupation (*Okkupationstheorie*).
4. The Moscow Declaration 1943 does not leave any doubt that before the “annexation”/“*prisodinenie*” existed a free and independent state of Austria, and that such state shall be re-established. Further to that, the will of the Austrian people how to find political and economic security for such independent existence shall be decisive.
5. By underlining the responsibility of Austria for having taken part at the warfare of Hitlerite Germany, the Moscow Declaration of 1943 contradicts a mere “occupation”, because this would have meant that Austria had lost its capacity to act.
6. After 1945, Austria adopted a couple of measures realizing the assumption of occupation, e.g., by the Constitution Transition Act 1945.
7. The period of occupation of Austria was formally ended by the Treaty of Vienna, 1955. Since in the last phase of the negotiations the Austrian delegation managed to exclude a provision stating that Austria bears a responsibility for the Second World War, it is technically not considered in Austria to be a Peace Treaty.
8. This treaty, like the Moscow Declaration before chose a pragmatic solution for outstanding issues without fully supporting the “Occupation theory” or one of the “Discontinuity theories”. The treaty left space for the Austrian Government to act as it did, but bound it to the commitments, which were linked to either fusion or annexation and went well beyond the concept of occupation.

⁷³ See Clute, R. E. (fn. 39), pp. 106–111.

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