The History of Private Law as Imperial History. New Approaches to the Legal History of the Habsburg Empire

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What does it mean to look at the Habsburg Empire as a subject of imperial history and to analyze it historically? This question has been the topic of lively research debates in history and cultural studies for several years. The construction and government of difference and plurality in the Habsburg Empire is repeatedly referred to as a common point of reference, whether it be between different ethnic groups, nationalities, religions, race, or on a horizontal or vertical level. The integration of this diversity into state institutions is discussed in particular with regard to current social, international and supranational challenges. However, most of these histories of the Habsburg Empire leave an important gap in research: while studies in constitutional and administrative law have already been included in these discussions, private law and its history have not yet played a significant role in the discourse. Therefore, this essay seeks to explore the possibilities of imperial history approaches for the history of private law, but also those of the history of private law for the history of empires. The legal institution of the colonate, which existed in the southern and eastern European lands of the Habsburg monarchy, and the introduction of international private law in the Habsburg Empire will be used to examine two test cases from the late 19th century. They are intended to demonstrate that an interdisciplinary exchange provides important impulses and new approaches both to Austrian legal history and the history of the Habsburg Empire.

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Paper Title:

Accusations of "Judicial Activism" against the First Austrian Constitutional Court (1918 – 1930) – Lessons from the First Republic for the Present

Abstract:

The Austrian Constitutional Court (Verfassungsgerichtshof) was not the first centralized organ of judicial review in the interwar period, but its active jurisprudence rendered it more significant than the Czechoslovak Constitutional Court introduced in February 1920. The Court's history, particularly during the tenure of Hans Kelsen, is instructive for understanding how accusations of "judicial activism" shaped its trajectory, even before its "depoliticization" (1929) and "disempowerment" (1933).

In the early 1920s, Social Democrats criticized the Court for exceeding its competencies and displaying a "disdain for democracy" after the annulment of a Viennese Provincial Law. Later, Christian Social politicians targeted the Court, particularly in relation to controversial rulings on marriage law.

My lecture will explore selected rulings of the Austrian Constitutional Court that sparked political and scholarly debates in the interwar period. Particular attention will be given to Hans Kelsen's role as a constitutional judge, as he prepared many of these rulings as rapporteur. Drawing on archival materials documenting internal deliberations, I will show how Kelsen highlighted the "law-creating" nature of judicial review. He also defended this position in his theoretical writings, effectively countering accusations of "judicial activism" by emphasizing the inherent political dimensions of all legal interpretation (this is the concept of "Alternativermächtigung").

Therefore, my lecture will:

- examine the historical and legal consequences of accusations of "judicial activism" during the First Republic,
- analyze Kelsen's judicial activities, and
- explore his theoretical responses to the critiques.

This historical-legal analysis offers valuable lessons for contemporary constitutional courts as well, many of which face increasing political pressure and accusations of "judicial activism."

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Interwar nationalities law in Central Europe: The 1930s illiberal re-negotiation of collective national rights and the path towards ethnic sovereignty

Interwar Europe was profoundly marked by the *national minority* question and the diverse attempts at solving it. While the peace treaties had obliged the newly-founded states to respect the rights of their minority citizens, the protection offered by this system was based predominantly on the rights of individuals. Perceiving this as insufficient, national minority activists from Central and Eastern Europe, pushed for more comprehensive solutions founded upon collective rights. A particularly important intellectual space for circulating and promoting these was the European Nationalities Congress (ENC), which brought together representatives of more than thirty minorities from seventeen European states. This paper offers a closer look into the intellectual processes taking place within ENC during the 1930s. In particular, it focuses on the developments of the closely linked, predominantly German-language academic discipline of nationalities law (*Nationalitätenrecht*, *Volksgruppenrecht*), which saw proliferation of both liberal-compatible, as well as pronouncedly illiberal approaches at accommodating group rights. Drawing on the extensive legal knowledge and administrative experience, accumulated during the last decades of the Habsburg Monarchy, as well as theoretical and practical insights from the late Russian Empire, nationalities law was by no means an illiberal endeavor *per se*. The 1930s however saw a re-negotiation along *völkisch* lines and adjustment to the needs of radically nationalist politics. Founded upon an organicist, all-encompassing and essentially political understanding of ethnic nationhood, the new paradigm posed a challenge to both the liberty of individuals and the established international order. Implying a total subordination of individual to the national community, it also entailed the idea of ethno-national groups as the primary carriers and original sources of sovereignty.