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and the European Union**

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Kelsen's Concept of Legal Community and the European Union

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Abstract

Hans Kelsen developed his theory of the state against the background of a heterogeneous political community, that of the late Habsburg Empire. As this community was characterised by ethnic, linguistic, cultural and religious diversity, a modern theoretical concept of the state was needed, one which dispensed with the ideologically and culturally charged notion of the nation-state prevailing at the end of the nineteenth century. Consequently, Kelsen refrained from operating with metaphysical components and based his concept on legal theory alone. His approach is highly topical, given the challenge posed to traditional national communities by the process of European integration. In particular, the formulation of EU citizenship is making it possible to perceive the union as a political and legal community (*Rechtsgemeinschaft*), for citizenship in Kelsen's work is not based on identity but on the fact of being subject to the legal order. Thus, whosoever is subject to a community's law is a member of that community, hence a citizen.

*Quid est enim civitas nisi
iuris societas civium?*
Cicero, De re publica¹

I. Introduction

Both the ontology and epistemology of the European Union² are hotly debated. Questions about the very existence of the EU and the proper way of understanding it are frequently not really considered in a philosophical or scientific way.

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¹ Engl.: 'For what is a republic but an association of rights?'

² To mention but two contributions to that debate, a first account of the problem under consideration can be found in Cerutti and Rudolph, *A Soul for Europe*; and Broekman, *A Philosophy of EU Law*.

Rather, they are formulated and passionately discussed at a completely different level of society to that of the academic communities who are de facto involved in the respective debates. Think of the impact of the opportunities, challenges and also threats of European integration on the lives of the countless individuals who are experiencing these tremendous social, political and economic upheavals and developments. Think of politicians, the representatives of these people, struggling and bargaining for a balance of interests at the very top of the political institutions meant to guide the integration process³. And, as well as thinking of many other sectors of society with axes to grind, think of the aforementioned researchers and their circles, creating and debating theories which illuminate the European integration process from different angles and points of view. These specialists have the advantage that science can (ideally) distance itself from day-to-day social or political affairs and the driving forces behind them and look at their subjects in a less emotional way. This possibility within, and at the same time function for, the affected society or societies (to use the European plural) gives rise to a number of different scientific theories that will more or less satisfactorily structure, explain and thus help us to understand the complexities of – in our case – European integration.

The urgent need for legal and political theories which will help us understand the integration process is matched by the wide variety of explanations offered by the various relevant disciplines and sub-disciplines. For many generations of researchers, when scientific explanations of political communities were needed, the focus or paradigm of analysis was the state or – to be even more precise – the nation state⁴. This is due to the fact that the centralisation of political power and decision-making led to and finally (almost) exclusively took place within the sovereign political entities of nation states. As far as the scientific consideration of the European integration process is concerned, this means that specialists still tend to think of the nation state as the lens through which to view developments in the EU.

But modelling the EU polity and analysing European constitutionalism on the basis of ideas and patterns derived from the nineteenth-century process of national

³ See for example the European Commission's 'Reflection Group on the Spiritual and Cultural Dimension of Europe', an initiative of the former EC president Romano Prodi, dealing with questions of European identity [http://ec.europa.eu/research/social-sciences/links/article_3336_en.htm (15. 08. 2008)]; the outcomes are published in: *Transit – Europäische Revue*, issues 26, 27, and 28 [http://www.iwm.at/index.php?option=com_content&task=view&id=63&Itemid=273 (15. 08. 2008)] and in Michalski, *European Solidarity*.

⁴ One prominent example of the persistence of the state paradigm in contemporary constitutional jurisprudence is the etatist school, represented by Böckenförde, Isensee, Kirchhof, di Fabio and others.

community formation proves disappointing. To be sure, many attempts to escape the 'national dilemma' in categorising the EU have been made, most concisely summed up by Federico Mancini who identifies the root of the problem as 'the inability to conceive of statehood in any terms other than nation statehood, or, in a nutshell, to divorce the state from the nation.'⁵ This implies the search for or the construction of a European nation on the basis of which European statehood could be built. As our common concept of 'nation' in its nineteenth-century, Romantic guise⁶ (as propounded by Johann Gottfried Herder and Johann Gottlieb Fichte) involves a shared history, a common culture, and sometimes a common language and even ethnicity, hence a high degree of homogeneity, some sort of pre-political organic identity, basing European statehood and even any other – less homogeneous – idea of a European political community on such an exclusive concept is highly contentious.

In the course of the many attempts to find a proper description of the EU as a political community, one approach has so far been largely overlooked: Hans Kelsen's general theory of law and state and his concept of *Rechtsgemeinschaft* (legal community). This article seeks to throw some light on the methodological and theoretical feasibility and usefulness of applying the Kelsenian concept as an analytical instrument and appropriate epistemological tool in order to describe the (legal) ontology of the EU.⁷

Two major methodological assumptions underlie our approach: first, making use of Kelsen's concept does not imply an uncritical acceptance of his doctrine. On the contrary, we will try to explain why it is necessary to consign some aspects of Kelsen's general theory of law and state to the realm of history when it comes to applying it to make sense of the European Union. But, at the same time, aspects of his theory seem to be better fitted to uncover the essence of the EU as a political community than traditional approaches and also some of the more recent attempts in the fields of legal and political science to locate the EU somewhere in between the classic notions of state and international organisation. Even the ECJ's own definition of a 'community sui generis'⁸ is of no further help. It only

⁵ Mancini, Europe: The Case for Statehood, 55.

⁶ Our common notion of 'nation' with implications of exclusiveness and chauvinism derives from the nineteenth century. But the Enlightenment and the French Revolution, in the shape of Jean-Jacques Rousseau and Immanuel Kant, knew another, not yet substantialised meaning: the nation as the legal community (see Maus, Volk und Nation and Maus, Nationalstaatliche Grenzen), which was revived by Hans Kelsen. For details see chapter III.

⁷ This will also be the topic of a pending research proposal where the authors will have the opportunity to develop the ideas under discussion further. We therefore welcome any advice.

⁸ ECJ, Case 6/64, Costa v ENEL [1964] ECR 585. See also Joerges, Recht im Prozeß der europäischen Integration, 81 et seq.

states that it is neither one nor the other but fails (or better: does not intend) to go any further and to contribute a workable definition.

Second, we do not want to turn back at the frontiers of legal theory and of theory in general. Just as Kelsen himself crossed borders between disciplines that seemed promising to him in his quest for a better grasp of a point at issue, we too have to face up to the consequences of our theoretical insights and the possible solutions they offer at a political level. We therefore conclude our article by looking at the possible consequences of regarding the EU as a Kelsenian *Rechtsgemeinschaft* for the concept of a 'European nation' and union citizenship. While foregrounding political theory in our argumentation, we shall also try to establish a link between our legal and theoretical part and ordinary people's day-to-day experience of European integration.

II. Kelsen's concept of constitution, federal state and legal community

Kelsen himself never dealt with questions of European integration in general or the European Communities in particular.⁹ European integration and its institutions were not a high priority for legal science in the early days of its existence¹⁰, especially not in the US, where Kelsen spent his last years. Moreover, in the 1960s, the Communities were still commonly and correctly perceived as being an international organisation, not so very different from others. We therefore have to go back to another multi-national polity, better known to Kelsen: starting in 1910¹¹, Hans Kelsen developed his general theory of the state against the background of a heterogeneous political community, that of the late Habsburg Empire¹². This

⁹ Only one contribution to the volume 'Law, State, and International Legal Order. Essays in Honor of Hans Kelsen' of 1964, marking the 30th anniversary of the first edition of his Pure Theory of Law in 1934 deals with 'The Contribution of the Court of Justice of the European Communities to European Integration'. This could be seen as the only loose direct connection between Kelsen and questions of European Integration (see Schwarzenberger, The Contribution of the Court of Justice).

¹⁰ Hans Kelsen died in 1973 and stopped working 1-2 years before that.

¹¹ Year of publication of his 'Hauptprobleme der Staatsrechtslehre' [Main Topics of the General Theory of Law and State], being his *Habilitationsschrift* (professorial dissertation or postdoctoral lecture qualification) at the University of Vienna. Such a thesis is necessary to become university lecturer after having obtained the doctorate; the system is still in place in today's Germany and Austria; see Kelsen, Hauptprobleme.

¹² Kelsen was himself involved in what in German could be called the *Nachlassverwaltung* (administration of an estate) of the empire, serving as a captain in the army and being in charge of constitutional reform in the cabinet of the last minister of defence of the Austro-Hungarian Empire, Rudolf von Stöger-Steiner, during the First World War. Before that, he was a lecturer and associate professor for constitutional law at the Foreign Trade College in Vienna (which later became the University of Economics and Business Administration), mainly lecturing on comparative constitutional law of the Balkans – hence again dealing with a situation of ethnic and cultural diversity.

community was characterised by a high degree of ethnic, linguistic, cultural and religious diversity¹³ and required a modern theoretical concept of the state far removed from the classic notion of the nation state. Incidentally, another source of inspiration for Kelsen's pluralistic approach can be seen in his family biography, hence in his own self-image: both his parents were of Jewish origin, his father coming from a traditional Jewish family in Brody in Galicia (today's Ukraine), then the easternmost part of the Habsburg empire. Kelsen's father moved first to Vienna and later to Prague to run various manufacturing businesses. As his family climbed the social ladder¹⁴ it relinquished parts of its initial identity and acquired an understanding of itself determined more by solidarity towards a particular social class or life-style than by collective cultural or religious ties. Consequently, Kelsen steered clear of notions like cultural uniformity or 'natural' entities and based his concept of the state on the idea of plurality and on formal legal theory.

Kelsen's approach seems to be highly topical given the challenge posed to the concept of traditional national communities by the process of European integration. In particular, the step-by-step formulation of European citizenship, circumscribing a European *demos* (or multiple *demos*¹⁵) with political rights at community level ('constitutionalism beyond the state'), paves the way to perceiving the EU as being a political and legal community of its citizens – for citizenship in Kelsen's work is not based on ethnic, cultural or linguistic identity, but merely on the fact of being subject to a given legal order. Whosoever stands under the rule of the legal system of a particular political community and is subject to its norms is a citizen. State (as the entirety of a legal system and thus identical to law) and nation (as a cultural-ethnic imagined community) are strictly separated by Kelsen in epistemological terms, de-mythologised, deconstructed and then brought together in an equation of *Rechtsgemeinschaft* (legal community) and *Volksge-*

These and other lesser known details of his biography are the subject of a current Austrian Science Fund (FWF, project no. P19287) research project under the auspices of the Hans-Kelsen-Institute in Vienna and under direction of Prof. Thomas Olechowski (University of Vienna, Department for Legal History), running since September 2006). The project is aiming at a first complete scientific biography of Hans Kelsen. It was no coincidence that Kelsen's first biographer, Rudolf A. Metall, also mentioned the Habsburg Empire as the essential historical context for the Pure Theory of Law and Kelsen's general theory of law and state.

¹³ Still two of the best accounts of the ethnic struggles of the late Habsburg Empire in English are Kann, *The Multinational Empire*; and Sked, *Decline and Fall of the Habsburg Empire*.

¹⁴ Hans Kelsen's father got married to a woman from a well-off assimilated Jewish bourgeois family in Vienna and his parents sent him to a private Protestant (!) church-owned primary school in Vienna. For more detailed information on Kelsen's family see Olechowski (forthcoming 2008).

¹⁵ For the concept of 'multiple demos' see Nicolaidis, *The New Constitution*; and Besson, *Europe as demoi-cratic Polity*.

meinschaft (national community, citizenry), taking up again an Enlightenment idea. This notion could be applied to the EU, which accounts for the topicality of Kelsen's general theory of law and state.

In a recent article discussing the unity of international, EU- and state law from the perspective of Kelsen's monist theory, Theo Öhlinger concludes that following up the question of the primacy of EU or state law ultimately leads to the question as to whether the union is a state itself. But this, according to Öhlinger, is a question located outside the concepts of the pure theory of law unless one deduces the state character of the EU from the identity of state and law, which is again an element of pure theory distinct from the monism debate and hence not discussed any further.¹⁶ The question raised in Öhlinger's article goes to the heart of what shall be discussed in our article.

As already mentioned, Kelsen initiated his reflections on the general theory of law and state in 1910 with the 'Hauptprobleme der Staatsrechtlehre'¹⁷, pursued them in 'Allgemeine Staatslehre' (General Theory of Law and State, 1925) and first implemented and summarised them in the 'Pure Theory of Law' (1934)¹⁸. This is not the place to discuss at length Kelsen's general theory of law and state nor how some aspects might differ from one to another¹⁹ of these major accounts of his legal concept of the state. But let us recall some basic elements crucial for any further discussion of the usefulness of applying Kelsen's ideas to the European Union. The three elements of his general theory of law and state that are of interest for the purpose of this article are constitution (Does the EU have a constitution?), federal state (Is the EU a federation?), and legal community (What is the core characteristic of a political community?). As we briefly introduce these three elements, we can also sum up Kelsen's basic ideas of the characteristics of a state at the same time.

Notwithstanding the complex and slightly differing distinction between constitution in a material²⁰ and in a formal²¹ sense, the core of Kelsen's notion of constitution is as follows: the constitution represents the highest level of (positive)

¹⁶ Öhlinger, *Die Einheit des Rechts*, 172.

¹⁷ Kelsen, *Hauptprobleme*.

¹⁸ 2nd revised and enlarged edition of 1960.

¹⁹ A key to the different periods and philosophical influences can be found in Stanley Paulson, Introduction. According to this, the 1910 publication falls within the period of critical constructivism, whereas the 1925 book expresses a more Neo-Kantian approach.

²⁰ Norms regulating the creation of general legal norms. Kelsen, *Pure Theory*, at 222.

²¹ A document called constitution which may contain not only norms regulating the creation of general norms, but also norms concerning other politically important subjects. Kelsen, *Pure Theory*, at 222.

law²². It contains norms regulating the creation of general legal norms, this being the essence of his concept of constitution. In other words, for Kelsen the essence of a constitution is that it regulates the creation of general legal norms (and nothing else).²³ Anything else (any other norms contained in constitutions concerning other important subjects) comes second.²⁴ What is more, Kelsen abstracts from the necessity for these kinds of regulations to be of the highest rank (within the hierarchy of positive law) and also from the necessity of their being positive norms: constitution is the regulation of the creation of general legal norms. This high level of abstraction leads us from the notion of constitution in a positive legal sense to that of constitution in a transcendental-logical sense, the famous basic norm (*Grundnorm*)²⁵.

If we suppose that a useful legal concept of constitution has – as a minimum requirement – to contain at least this essential characteristic so acutely defined by Kelsen, we can also apply it to the question of whether or not the European Union has a constitution. It is now only a small step to recognising the constitutional nature of (primary) EU law²⁶, both in Kelsen's material sense (regulating the creation of general norms of a legal framework but not prescribing a given material content) and the formal (a document entailing the respective setting of norms and other important subjects such as the institutional set-up, etc.).²⁷ It is hence unproblematic to presuppose a basic norm for the EU, making it possible to describe the positive law of the EU as being objectively valid and thereby also applying the definition of a transcendental-logical constitution²⁸. Consequently, from the perspective of the Pure Theory of Law, the assumption of the existence of a constitution of the EU²⁹ in a legal sense (without doubt in a material, but arguably also in a formal sense) can be upheld.

²² In a later article, Kelsen dispensed with the attribute 'positive' and included any norm in his concept of constitution, hence reaching the highest level of abstraction possible in defining 'constitution': a constitution is pure empowerment (or regulation of the creation of law of inferior rank). Compare Kelsen, *Pure Theory*, at 222 and Kelsen, *Die Funktion der Verfassung*. For a detailed discussion see Alexy, *Kelsens Begriff der Verfassung*, at 338 et seq. and 341 et seq.

²³ Accurately referred to as '*Recht-Fertigungs-Recht*' (law-producing law) by Rudolf Wiethölter, *Recht-Fertigungen eines Gesellschafts-Rechts*.

²⁴ This summary follows Alexy, *Kelsens Begriff der Verfassung*, at 341 et seq.

²⁵ The transcendental-logical pre-condition of describing a positive legal order as objectively valid. Kelsen, *Pure Theory*, at 217 et seq.

²⁶ Cf. Bogdandy (ed.), *Europäisches Verfassungsrecht*.

²⁷ For a detailed and critical discussion see Pfersmann, *Revision of the Old Constitution*.

²⁸ For a more detailed discussion see Mayer, *Reine Rechtslehre und Gemeinschaftsrecht*, at 127 et seq.

²⁹ In its most recent consolidated version according to the amendments by the Treaty of Lisbon signed in December 2007 and meant to introduce the central material ele-

A second element of the Pure Theory of Law or Kelsen's general theory of law and state which is of interest for analysing current debates about a proper designation for the EU is the concept of federal state. Again, there is not really a single and consistently upheld theory of the federal state in Kelsen's work. But there is a development leading to the complex three-circle theory of the federal state.³⁰ Kelsen starts out from the problem of reconciling the impossibility of understanding a bipolar relation as hierarchy and equality at the same time with the existence of subordinating and coordinating elements in a federal state. To escape this dilemma, he abandons the classical dualism of federation and component states in favour of a three-fold model encompassing multiple relations on different levels. With the introduction of the regional, the federal and, in addition, the *Gesamtstaat*-level³¹ and its constitution he succeeds in reconciling the inalienability of state sovereignty with the idea of equality between the federation and the individual states. In its essence, Kelsen's theory therefore states that this kind of impartiality can only be achieved under a common roof. In order to understand the federation and its entities as being coordinated, a third level establishing equality between them has to be presupposed. This 'third order' is described as being the federal state (*Gesamtstaat*, *total legal community*, composed of the federation and the component states) and the constitution of the federal state (*Gesamtverfassung*) and puts the other two circles into a relationship of equality. In doing so, the third circle, the imagined union of the other two elements of the federal state, can only be understood as being super-ordinated (whereas the other two are coordinated). Consequently, the union (the federal state) is sovereign, not the federation or its component states. These – federation and states – are bound together into a single state by the constitution of the union (federal state). What seems to be interesting is that Kelsen never claimed statehood for the third circle, this only being the presumed constitutional level at which a federal state can be understood as a coordinated political community. Hence he also avoids (in his German writings) calling the totality of his three-circle-theory a federation itself but only uses the notion of 'constitution of federal state' (describing it as a constituted entity on a meta-level). Sometimes he even avoids 'constitution' and introduces the notion of *Gesamtgemeinschaft* (total legal community of the federal state).³² Although this is a theory of the state constituted as federal state, this last step of abstraction again paves the way to ap-

ments of the failed 'Treaty establishing a Constitution for Europe' into the constitutional setting of the EU.

³⁰ Herein, we follow Wiederin, Kelsens Begriffe des Bundesstaats.

³¹ Translated as 'total legal community', being the 'federation' or also the 'central legal community'; see Kelsen, *General Theory*, at 317 f.

³² Wiederin, Kelsens Begriffe des Bundesstaats, at 246.

plying the community concept to supranational political entities. We will see below how this fits in with avoiding the notion of state while applying Kelsen's concept of *Rechtsgemeinschaft* to the EU.

We can now start to have a closer look at Kelsen's concept of legal communities themselves. Starting from a critique of the will-determining ideological function of the classical dualism of law and state to be found in traditional theory of law and state (the state being represented as a personal being different from law, in order that the law can justify the state which creates and submits itself to that law)³³, he arrives at a formal, thus neutral cognition of the state as being identical with the legal order, characterising the legal community thus,

'The State as a legal community is not something apart from its legal order ... A number of individuals form a community only because a normative order regulates their mutual behaviour. The community ... consists in nothing but the normative order regulating the mutual behaviour of the individuals.'³⁴

The core of the argument for defining the state as nothing other than a legal order lies in the idea that the social structure perceived as state can be comprehended as an order of human behaviour. If a state is characterised as being a political organisation, its qualification as a coercive order is expressed. As a political organisation, the state is necessarily a legal order.³⁵ As a matter of logical consequence, also the three traditional elements of a state (as argued mainly by Georg Jellinek³⁶ – and called into question by Kelsen), its people, territory and power exercised by an independent government³⁷ cannot be satisfactorily determined except in a legal sense, that is to say they can be 'comprehended only as the validity and the spheres of validity of a legal order'³⁸. The state understood as a social community can only be constituted by a normative order, hence it is identical with this order.³⁹

Kelsen's answer to the question 'What holds a nation together?' is therefore the mere fact of being part of (or subject to) the respective legal community. On the

³³ Kelsen, *Pure Theory*, at 284 et seq.; see further Kelsen, *Problem der Souveränität*, 22 and Kelsen, *General Theory*, XV, where he rephrases the program of his critique of traditional dualist state concepts, 'Just as the pure theory of law eliminates the dualism of law and justice and the dualism of objective and subjective law, so it abolishes the dualism of law and State. By doing so it establishes a theory of the State as an intrinsic part of the theory of law...'

³⁴ Kelsen, *General Theory*, at 182.

³⁵ Kelsen, *Pure Theory*, at 286.

³⁶ Jellinek, *Allgemeine Staatslehre*, at 396 et seq.

³⁷ For the argument that these distinctive features of a state are also already realized in the present state of the EU, see van Gerven, *The European Union*.

³⁸ Kelsen, *Pure Theory*, at 287.

³⁹ *Ibid.*

level of the individual person, Kelsen asks why an individual together with other individuals belongs to a certain state and, as he assumes the identity of the community with its legal order, he gives the answer that no other criterion can be found than that the individual concerned and the others are subject to a certain, relatively centralised, coercive order, 'All attempts to find another bond that holds together and unites in one unit individuals differing in language, race, religion, world view, and separated by conflicts of interest, is doomed to failure'⁴⁰. For Kelsen, it is particularly impossible to demonstrate the existence of some sort of mental interaction which can unite the individuals belonging to a state and which distinguishes them from individuals belonging to another such state without and independent of any legal bond.⁴¹ The shared legal community identical to the political community is the decisive feature of belonging.

These remarks shall suffice as a review of Kelsen's basic insights into elements of a general theory of law and state and his notion of *Rechtsgemeinschaft*, both of which are central to our further discussion and crucially important.

III. The concept of legal community in legal and political theory

The attempt to describe the European Union as a *Rechtsgemeinschaft* is not entirely new. On the contrary, we can trace this idea back to the early days of European integration. Walter Hallstein, the first president of the EEC Commission, characterised the then European Communities and the integration process as being the creation of law. The Communities are described as a legal community in the sense of being a community of peace, unity, equality, freedom and solidarity realized by the means of law.⁴² And even the controversial Maastricht judgement of the German Constitutional Court used the term *Rechtsverbund* (legal compound) to describe the specific nature of the European Union.⁴³

But before the concept of *Rechtsgemeinschaft* could be applied to European integration it had to be elaborated, and modern legal and political science have indeed done this. Kelsen's contemporary, the Dutch legal expert Hugo Krabbe, spoke of the state as being identical to the legal community⁴⁴, thereby returning to Immanuel Kant's 'Metaphysics of Morals' (1797)⁴⁵ where he stated in para-

⁴⁰ Ibid.

⁴¹ Ibid., at 287 et seq.

⁴² Hallstein, *Der unvollendete Bundesstaat*, at 39 et seq. and Hallstein, *Europäische Gemeinschaft*, at 51 et seq; for a discussion see Somek, Walter Hallstein.

⁴³ For a further discussion in the light of constitutional etatism see Busch, *Existiert Europa?*

⁴⁴ Krabbe, *Die moderne Staatsidee*, at 250.

⁴⁵ Kant had already pre-formulated this idea in his 'Science of Right' (1790).

graph 45 that 'A state (civitas) is the union of a number of men under juridical laws.' Kelsen, a neo-Kantian himself, had recourse to such writings as 'Anthropology from a Pragmatic Point of View' (1798) where Kant wrote, 'The sovereign basis of the law constitutes a community'. Moreover, Kelsen had profound knowledge of and appreciation for Jean-Jacques Rousseau's works, above all 'The Social Contract, Or Principles of Political Right' (1762). In book II, in the chapter on the *legislateur*, Rousseau formulated a purely legal concept of the nation and the state. Rousseau's nation is an exclusively constitutional idea, separate from all ethnic, cultural or sociological elements; he even dispenses with the necessity for a national territory.

This anti-metaphysical notion of the community as a legal community was adapted and further elaborated by Hans Kelsen and his disciples. One of Kelsen's early disciples, Eric Voegelin, even made the small dialectic step from Kelsen's own legal theory which was indifferent to individual or even collective identity. According to Voegelin law is able to compensate for a lack of collective identity.⁴⁶ Nowadays, legal and political scientists still refer to Kelsen's *Rechtsgemeinschaft*, recently also in describing the European Union. Hauke Brunkhorst for instance states '(T)he Union works quite well as a legal and political community.'⁴⁷

The core of the concept *Rechtsgemeinschaft* is a return to the originally contractual understanding of community (see Rousseau, Kant). This means equating *Volksgemeinschaft* with *Rechtsgemeinschaft*, reviving the idea of the nation (and the state) as developed by the Enlightenment, distancing oneself from any ideology of blood and soil, because the origin of a nation is only 'the act of the general will through which the many persons become one nation'.⁴⁸ This concept points to the *act*, to nation and state as legal acts of volition and as human fabrications, and in doing so rejects any supra-legal, divine, 'natural' or even genetic or organic ideas about the state. It demonstrates the de-mythologising power and secular approach underlying Kelsen's theory⁴⁹, as is shown for instance in the following ironic citation in which Kelsen mocks the 'god of the law' as an example for unenlightened, pre-modern thinking of many constitutional lawyers of Kelsen's time. Kelsen decries at

'primitive man's idea that nature is animated, that behind everything there is a soul, a spirit, a god of this thing: behind a tree, a dryas, behind a river, a nymph, behind the moon, a moon-goddess, behind the sun, a sun-god. Thus,

⁴⁶ Voegelin, *Der autoritäre Staat*, at 4 and 84 et seq.

⁴⁷ Brunkhorst, *A Polity without a state*, at 19. See also Brunkhorst, *Solidarität*.

⁴⁸ Kant, *Perpetual Peace*.

⁴⁹ On this aspect see Somek, *Staatenloses Recht*, calling Kelsen an 'iconoclast' and most recently Ehs, *Hans Kelsen und politische Bildung*, on Kelsen's impact on the modern theory of the state.

we imagine behind the law, its hypostatized personification, the State, the god of the law'.⁵⁰

Kelsen's level-headed, prosaic approach to communities as legal associations pure and simple, without any pre-legal identity or non-normative cohesion, was a radical idea which provoked strong hostile reactions around 1900. A hundred years later it still is. But the emergence of the European Union, and above all the introduction of union citizenship by the Treaty of Maastricht, have a radical potential for challenging the traditional understanding of state and nation. This aspect of the notion of legal community will be further elaborated in section V, where the idea of *Rechtsgemeinschaft* will be applied to the problem of finding a feasible definition of the 'European nation', thereby addressing the question of union citizenship.

IV. Bringing together the paths of legal community theory: Towards a new constitutional theory of the EU?

What can Kelsen's critique of etatist theories of political communities tell us about the EU from the perspective of his general theory of law and state and his concept of legal communities? How can it contribute to overcoming constitutional etatism and what kind of critique of Kelsen's theory do we have to make in order to arrive at new insights concerning the ontology of the European Union? According to Brunkhorst,

'The European Union is not a state and – as far as we can see – is not on an evolutionary track to statehood. *Etatism* is misleading anyway. The argument of the famous Maastricht ruling of the German Constitutional Court that the Union is neither a federal state (*Bundesstaat*) nor a federation of states (*Staatenbund*) but something in between, an association of states (*Staatenverbund*), goes in the wrong direction. The word "state" (*Staat*) is what all these variants of concepts have in common. But the Union is a unique political entity which is not only a post-national but a post-statist entity. Any constitution of Europe therefore has to be a *constitution without a state*.⁵¹

A Kelsenian approach (meaning making use of this epistemological precondition of separation and his value-free definition of political entities as *Rechtsgemeinschaften*) to the legal ontology of the European Union as a political entity based on a highly pluralistic society may offer a way out of the unsatisfactory practice of always locating the EU between the twin poles of state and international organisation⁵².

⁵⁰ Kelsen, *General Theory*, at 191.

⁵¹ Brunkhorst, *A Polity without a state*, at 19.

⁵² See above at FN 4 and 8.

This presupposes, of course, first removing the notion of the state from the Kelsenian concept of legal communities and then transposing this onto the supranational political community of the EU. Kelsen was himself bound by the historical circumstances of the time when he developed the basic elements of his general theory of law and state and did not separate his concepts of constitution, federation and legal community from the state. What he achieved with the above-mentioned high level of abstraction (section II) with regard to the epistemological understanding of these elements of a legal theory of political communities, is nothing more or less than success in providing philosophical proof of the possibility of what Mancini described⁵³ as being impossible: divorcing the state from the nation.

Without doubt, the EU in its present state of development constitutes a pluralistic political community exhibiting a common legal system (even a common constitutional framework) – regardless of any other disputed and vague unifying features. With his general theory of law and state Kelsen offers a formal epistemological tool for describing pluralistic political communities and giving a clear cut definition of their (legal) ontology, free from ideological and at the same time substantialised, exclusive meanings – the Romantic notion – of 'nation'.

What is clear is that the EU can only be described in terms of diversity, plurality and multiculturalism. With his abolition of the dualism of law and state and his assertion that the community and its legal order are identical, Kelsen offers an interesting aid to understanding the European Union as political and legal community. The state (defined as the law) is, from an epistemological point of view, separated from the nineteenth-century idea of nation. Kelsen defines the community of individuals as sharing at least the fact of being subject to and bound by the same legal order. The problem with applying the neutral and hence useful concept of Kelsen's legal community to the EU is that this would mean to describe the EU as a state (although only in the very abstract and formal sense of the Pure Theory of Law): for the general public and also according to expert opinion, the EU is not a state⁵⁴. However, in Kelsen's more general and neutral theory, it clearly is, albeit a highly decentralised one.⁵⁵

Is there any way to escape constitutional etatism and essentialist descriptions of the EU's ontology by applying Kelsen's formal concept of legal community, or do

⁵³ See above at FN 5.

⁵⁴ Notwithstanding the opinion that it has to become one in order to legitimise decision-making on a European level. See first and foremost the theories of constitutional etatism mentioned above in FN 4.

⁵⁵ On the possible range of forms of states from centralised to decentralised see Kelsen, *Pure Theory*, at 313 et seq., also Kelsen, *General Theory*.

we just end up with another form of etatism, this time in the guise of the pure theory of law? The problem may be best rephrased using Kant's notion of the Copernican revolution in philosophy. It does not lead to major new insights and does not carry us much (if at all) further if we remain caught in this dichotomy while trying to analyse the EU in terms of the traditional means of the general theory of law and state (*Staatsrechtslehre*). This theory was developed against the background of the dominance of the nation state. Taking Kelsen's theory as it stands would only mean applying another definition of the state to the EU (albeit one that perhaps better explains its nature as a *compositum mixtum*⁵⁶).

But what if we turn Kelsen upside down? All states are legal communities, but not all legal communities have necessarily to be (or to be described as) states in the Kelsenian sense.⁵⁷ Would it help to leave the concept of state and focus on the concept of legal community and apply it as an analytical tool to the legal system of the EU? We believe that this represents a major step forward. Kelsen's theory accommodates such a step away from the concept of state, if one follows his ideas through to their logical conclusion.

As we have seen in section II, for Kelsen, states are political organisations (taking into account the invalidity of the dualism of law, state and community we reformulate this as political community). As such, the state is a legal order (or a legal community). What Kelsen does not say explicitly, is that, however, this definition also has to hold true the other way round. Perhaps he does not do so because he simply does not need to describe the reality of political communities situated somewhere between states and what he calls 'primitive' legal communities (referring to primitive societies or international organisations). To be a state, the legal order must have the character of an organisation in the sense of establishing organs, and must create and apply the norms constituting the very same legal order, also displaying a certain degree of centralisation⁵⁸.

What we called 'turning Kelsen upside down' extricates us from precisely the trap of seeing the state as the sole ontological entity of the realisation of democracy, legitimacy, fundamental rights, governance and the rule of law. There is an implicit third way between the 'relatively centralised legal order' of states and 'pre-state legal order(s) of primitive society' or 'super- (or inter-) state international legal orders', the latter having the attribute of being somehow primitive – which certainly cannot be contended at the current stage of European integration as the EU has established organs creating and applying the norms constituting its

⁵⁶ Compare with the above-mentioned concept of the federal state including centralised and decentralised (or supranational and intergovernmental) elements.

⁵⁷ Kelsen, *Pure Theory*, at 286.

⁵⁸ *Ibid.*: 'The state is a relatively centralised legal order'.

own legal order and displays a certain degree of centralisation. This third way consists in the logical step, not made explicit in Kelsen's work, that we have to make in order to reach a more satisfactory outcome in the search for a proper epistemological tool to understand the EU's ontology: not every political community can be described as a state, but every political community is, like the state, at the same time a legal community.

Relatively centralised legal orders can be described as legal communities having the specific character of states; but at the same time it has to be possible to describe relatively centralised legal orders⁵⁹ (such as the EU) as legal communities without restricting this concept to the specific form of the state (otherwise it would be impossible to describe states as legal communities⁶⁰). In addition, the EU as a political community can only be constituted by a normative order⁶¹. Kelsen did not go that far (he only distinguishes between states, pre-statal and super-statal primitive legal communities⁶²), and it can again be argued that the reason for this can be found in the lack of a political community that would have required this possible consequence. So, from the perspective of the pure theory of law itself, there is the option of describing the EU as a 'relatively centralised' legal community. Moreover, this option implies that the social structures of the individuals coming under the order of human behaviour of the legal order of the EU can be understood as forming a (legal) community, no matter whether a single *demos* or a plurality of European *demoi* is assumed.

But we need another arch in order to complete this bridge from Kelsen to the European Union: There is a problem with Kelsen's definition of political communities as being characterised by the feature of coercion.⁶³ Crucial for applying Kelsen's concept of legal communities to the EU is the definition of political organisations as coercive orders. It has been argued that the (legal system of the) EU, not being a state, lacks direct forms of coercion; at best we can find only indirect

⁵⁹ The dichotomy of centralisation and decentralisation can be regarded as being a weak point in the *Pure Theory of Law*. Kelsen does not make clear where the one ends and the other one begins. It is therefore not possible to determine the point at which the EU turned from being a 'primitive' international organisation into to a relatively centralized state. It is merely a question of recognizing the EU as being the one or the other and then consequently applying the one or the other concept of legal order to it. The 'third way' proposed in this article is also a suggested way of leaving these diffuse limits aside and approaching the question from another solution offered by the Pure Theory itself.

⁶⁰ Legal communities in the Kelsenian sense can have different qualities/degrees of centralisation. By introducing 'legal community' as a general concept, by definition several sub-categories have to be possible.

⁶¹ See also earlier in Kelsen, *Pure Theory*, at 85 et seq. and 150.

⁶² For the description of international organisations as also being a kind of more primitive legal order see further Kelsen, *Problem der Souveränität*, at 260.

⁶³ Kelsen, *Pure Theory*, at 33 et seq. and later.

forms.⁶⁴ Can community law hence be described as a coercive order? Only then the EU can be understood as a legal community in the Kelsenian sense. Heinz Mayer offers a possible solution based on the fact that, within the pure theory of law, coercion does not necessarily mean the direct use of force by the legal authorities, but also may involve forms of coercion different from direct use of physical measures. Again, we have to abstract from the strong focus on the example of the typical legal orders of the classical state in the pure theory (due to the historical circumstances of the time when Kelsen developed the basics of his theory) and take a closer look: Generally, Kelsen defines the crucial characteristic of a coercive act merely as 'an evil – such as deprivation of life, health, liberty, or economic values'⁶⁵. This kind of 'evil' imposed by the legal order as a sanction against anti-social behaviour can well consist in the loss of a subjective right, of the right to vote, being excluded from taking part in a referendum, exclusion from school or university, or the rejection of an application to an administrative body because of delay to list but a few examples⁶⁶, rather than physical coercion. In this general sense the EU is also a legal system characterised by the use of sanctions. The fact that the mechanisms of sanctions within community law are not in any case as directly oriented towards physical coercion as is the case in typical nation-state legal systems does not pre-empt describing it as coercive order in a more general sense.⁶⁷ Consequently, the definition of a political organisation as an expression of the idea of being a coercive order – for the specifically political element of such an organisation consists in the coercion exercised by man against man, regulated by this order – can also be applied to the European Union.

We can finally rephrase Kelsen. As a political organisation (thus a social structure understood as an order of human behaviour), the EU is a legal community.⁶⁸ – What progress has been made towards a proper understanding of the EU as a political community? In the same way as the traditional general theory of law and state devoted itself to the ideological legitimacy of the nation state, constitutional etatism seeks to legitimise and justify the political community by law. In both concepts, the state or the EU (replacing national statehood by European statehood) must be represented as a personal being different from the law in order to justify the state (the EU) by law which it first creates and then submits itself to. According to Kelsen, this justificatory function is only possible if one assumes the

⁶⁴ Among others Schroeder, *Gemeinschaftsrechtssystem*, at 211 et seq.

⁶⁵ Kelsen, *Pure Theory*, at 33.

⁶⁶ Mayer, *Reine Rechtslehre und Gemeinschaftsrecht*, at 130.

⁶⁷ *Ibid.*, at 129 et seq.

⁶⁸ Kelsen, *Pure Theory*, at 286.

legal order to be different from the state (the political community) and opposed to the original nature of the community (being the sheer fact of power) and in this sense right or just.⁶⁹ The state (the EU) is thus transformed from a fact of power to a 'legal institution justifying itself as a community governed by law (*Rechtsstaat*)'.⁷⁰ These theories share the doctrine of the self-obligation of the state, which implies the necessity for a kind of European nation distinct from what only becomes the European *Rechtsstaat* at a certain point after nation formation, for example in a constitutional moment. The personified pre-legal state (the personified pre-legal European Union) fulfills its historical mission by creating the law, then re-establishes itself as a legal order (this is as a legal community) and submits itself to this new quality of community.

We can now see that, when the European Union recently tried to create such a kind of 'constitutional moment' by legitimising its power and functions by creating and submitting itself to a new kind of constitutional order, it got caught in the same trap as the nation state has fallen into. Following Kelsen's critique, the assumption of some kind of pre-political nation is by no means a satisfactory explanation of the distinctive features of political communities, (not even of its mere existence). The same criticism applies to an even greater extent when it comes to legitimising and justifying the European Union by assuming a metaphysical, pre-political European people sharing common values and culture (to say nothing of ethnicity, language, religion ...). The EU's constitutional experience was meant to constitute the union on the basis of those assumptions.

If we compare this development to what has been said in section II about the essence of Kelsen's concept of constitution, we have another example of the explanatory power of the Kelsenian approach to EU constitutionalism: Constitution is about the regulation of legislative power and, in that sense, the European Union already has a Constitution.⁷¹ But the formulation of an EU Constitution, not to mention the non-normative, substantialised evocations in the much-debated preamble, meant establishing some kind of constitutional patriotism or even 'constitutional theology'⁷² as a supra-legal identity and pretended homogeneity as the imagined cultural community of the European people. The European Union was thereby squeezed into the corset of late nineteenth- and twentieth-century concepts of nation, state, constitutional etatism and their corresponding concepts of allegiance⁷³,

⁶⁹ Ibid., at 285.

⁷⁰ Ibid.

⁷¹ That is mainly the much-amended Treaties of Rome, called by the EU itself 'basic constitutional charter' since 1986 at the latest (ECJ, Case 294/83 *Les Verts v European Parliament* [1986], ECR 1339, at 1365).

⁷² Maus, *Volk und Nation*, at 5.

⁷³ For further details on this argument see Ehs (forthcoming 2008).

whereas a Kelsenian approach allows us to understand the EU and its constituting individuals (the citizens as the European nation in the Enlightenment sense) as a (legal) community already established by the fact of the validity and – by and large – efficacy of the legal order⁷⁴. Such an approach enables us to understand the EU as simply a *Rechtsgemeinschaft*, precisely this being its essential feature.

Furthermore, the Kelsenian approach developed in this article offers an opportunity for analysing the concept of union citizenship by taking a look at its radical potential for redefining membership and for redefining community. The following paragraphs are to be regarded as a preliminary account only as they express ideas currently under consideration for a pending research proposal.

V. Ideas for EU Citizenship

Many attempts to theorise the European Union are still shaped by the logic and the language of the classical nation state, although the academy comes up with witty ideas for coining new words to express outdated concepts. Nevertheless, grasping the EU theoretically as a polity is not just a playful occupation for devotees of neologisms ('regulatory regime' – Giandomenico Majone; 'meganational community' – Angela Augustin; 'constitutional compound' – Ingolf Pernice), but rather raises the fundamental questions of its legitimacy and its democratic quality. This is demonstrated by ongoing discussions of how to define the European people, if there is a single European people – and therefore a European *demos* – at all.

As participation is the focus of democratic theory and practice, we need to raise the question of the correlation between lack of legitimacy and lack of having a part to play in EU decision-making, as Winfried Veil has recently done. It is not legitimate simply to analyse the quality of a democracy without analysing the quality of its underlying concept of the *demos*, as Richard Kuper makes clear with his complaint that the 'weakness of the traditional notion of the democratic deficit is its neglect of any notion of citizenship'.⁷⁵ For more than 40 years, the permissive consent of the Europeans was presumed by the promoters of European integration. The output of peace and prosperity was strong enough to neglect the issue of democratic input.⁷⁶ People were not asked because the Communities

⁷⁴ That this is not incommensurate with the fact of 27 nation-state constitutions of the member states could be demonstrated by referring to Kelsen's concept of the federal state, again abstracting from the notion of state as we have done with the concept of legal community in this article. Despite the topicality of this aspect we just give a brief account above, in section II, given that space is limited here.

⁷⁵ Kuper, *Democratic deficits of the European Union*, at 147.

⁷⁶ See Abromeit, *Democracy in Europe*.

were still an international organisation; they were the concern of diplomacy not of democracy. But the deepening of the union brought about pressures to legitimise the evolving polity. Suddenly, the people moved into the limelight, and the Treaty of Maastricht established union citizenship – certainly a rather weak, tame, derivative form of citizenship – but with a radical potential to challenge the concepts of state, nation and people which had prevailed for more than 150 years.⁷⁷ Dora Kostakopoulou wrote,

'The radical potential of EU citizenship may be identified in the possibilities for redefining community, rethinking membership, rearticulating citizenship, and enhancing democratic decision making ... This process opens also the way for an alternative conception of community which is based neither on ascriptive membership, that is on thick communal attachments, nor on the liberal principle of consent (i.e. 'communities of shared values', 'communities of shared final ends').'⁷⁸

Political theory and the history of ideas provide interesting analytical patterns for the already mentioned redefinition of community. Particularly Hans Kelsen's concept of *Rechtsgemeinschaft* and his taking up of Kant's and Rousseau's ideas again (see section III) is instrumental for a modern, level-headed, anti-metaphysical comprehension of the European Union. In discussions about the European community we can observe the persistent problem that it is constantly under attack from the purported need for pre-political and pre-legal cohesion. It is thought that the concept of the nation (and therefore of citizenship) must of necessity be based on a substantial cultural community. Here, the 'metaphysical *Volk*' of Herder, Hegel, Puchta and Carl Schmitt has survived. These writers

'viewed the *Volk* as an ontologically independent and permanent conceptual entity with certain attributes, including a sense of right, a will, and character traits ... the concept of *Volk* as a cultural community of individuals who shared a common language, a common law, and a common history (or, more dramatically, a common fate)...'⁷⁹

But legal positivists and relativists like Kelsen rejected this sort of metaphysical thinking. They pointed to the law alone, to the legal community, when describing the nation and the *Volk* that in a true democracy is to be equated with the citizenry. In Kelsen's theory (as in Rousseau's and Kant's) *Volksgemeinschaft* and *Rechtsgemeinschaft* are the same. Kostakopoulou and Preuß took up this idea

⁷⁷ The wording of Art 17 p 1 EC Treaty excludes the replacement of the several national citizenships by one exclusive supranational citizenship of the European Union. In what direction the one derives out from the other is but a formal rather than a material criteria. The weak form of EU citizenship is a mere form of European nation/identity building than having the quality of rethinking nation in a Kelsenian sense of coming to terms of plurality.

⁷⁸ Kostakopoulou, European Union citizenship, at 159 et seq.

⁷⁹ Dubber, The German Jury and the Metaphysical Volk, at 243.

again when analysing the potential of union citizenship, 'Citizenship is thus the catalyst for the formation of identity and community at the European level rather than an institutionalised reflection of pre-existing, pre-political views...'⁸⁰ and 'Citizenship does not presuppose the community ... but creates this very community'.⁸¹

The legal community is the citizenry! Any organic identity (for instance the 'European family of common values'), however, is not the constituting feature of a nation forming a state (or the EU)⁸². Kelsen radically detached the state from blood-and-soil ideology in all its manifestations, and even from 'softer' sorts of metaphysical and organic thinking like cultural community. In doing so, he developed the theory of a modern, future-oriented, open state, where identity does not *exist* but is *created* in ever new acts of democratic legislation and public discourse. As elaborated by Kant, the moment for the determination of identity is the democratic experience of the legal community.

Taking Kelsen's *Rechtsgemeinschaft* as the starting point for applying the philosophical achievements of the Enlightenment to the matter of the European Union, the idea is to transcend the traditional nationality model of citizenship, because as long as union citizenship is not detached from state nationality, it is robbed of its democratic quality⁸³ and does not comply with a modern, pluralistic polity that faces changing borders (enlargement) and changing people (migration). The participation of its people is required to make the European Union a legitimate and democratic polity. Inspired by Kelsen's theory, we can consider residence rather than nationality a criterion for EU citizenship. This means developing and unearthing the radical possibilities of union citizenship by putting into practice Rousseau's and Kant's ideas.

What could be done to put theory into practice? The right to table a citizens' initiative as proposed about 20 years ago and as it was drafted into article I-47 Draft Constitutional Treaty and into article 89b EU Treaty in the version of the Treaty of Lisbon can be seen as a first step, but according to the concept of *Rechtsgemeinschaft* it would have to be extended to all people lawfully residing on the territory of a member state, relating membership to residence and not to nationality. This would be just a first step towards a modern conception of the EU that dispenses with notions like transcendental cultural identity and imagined community. We must dare to redefine community, not a citizenry based on im-

⁸⁰ Kostakopoulou, European Union citizenship, at 160.

⁸¹ Preuß, Citizenship and Identity, at 108.

⁸² Though this form of pre-political identity is claimed by many constitutional lawyers like Böckenförde or by the 'Charta of European Identity'.

⁸³ See dell'Olio, Europeanization of Citizenship.

ages from collective memory but rather a society made up of politically active citizens because, as Kelsen says,

'in a radical democracy ... the tendency to enlarge, as far as possible, the circle of those who possess political rights may have the result of granting these rights – under certain circumstances – to aliens, for instance, if they have their permanent residence within the territory of the State. Then, here, too, the difference between citizens and non-citizens, and hence the importance of citizenship is diminished.'⁸⁴

By questioning the institution of organic citizenship (the 'metaphysical *Volks*' as explained above) he had experienced in classic nation states, Kelsen sets the record straight, 'The existence of the State is dependent upon the existence of individuals that are subject to its legal order, but not upon the existence of "citizens".'⁸⁵ The legal criterion for participation in the European Union would be the right of residence in a member state, which consequently means including third-country nationals lawfully resident in the EU. They contribute to the economic and social life of the EU and – most importantly – above all in the context of this article – they are subject to EU norms; which would mean allowing third-country nationals to vote in European Parliamentary elections. This idea is not so far-fetched: As long ago as 1985, the Commission drafted a report calling for the granting of social and political rights to third-country nationals residing in the EU, and this has been discussed ever since, but is too radical a step for the national governments. Even today, the potential for redefining the political community and its members has not been exploited to the full, and criticism of EU citizenship as a symbolic plaything without serious content is quite well-founded. Another radical step in this direction would be to grant EU citizens at least electoral rights at the national level, which would mean, for instance, that an Austrian living in Belgium would be allowed to cast a ballot there in Belgian parliamentary elections⁸⁶. Why not? She or he is allowed to do a good many other things in Belgium thanks to European integration.

The point of applying Kelsen's concept of *Rechtsgemeinschaft* to discussions on union citizenship would be to encourage a reformulation of community without having recourse to European soul-searching or 'family'-talk or looking for other sorts of pre-political identity. If it is at all possible to conceive of the EU as a polity beyond traditional etatism, it is by utilising a Kelsenian approach that identifies the legal community without any need for supra-legal consensus.)

⁸⁴ Kelsen, *General Theory*, at 241.

⁸⁵ *Ibid.*

⁸⁶ Technically speaking, this could be reached by additional conferral of such a power by the member states on Community/Union level.

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