

THE IMPACT OF MULTILINGUALISM ON THE DEMOCRATIC  
LEGITIMACY OF THE EUROPEAN UNION:  
IS CREATING A SOLIDLY DEFINED EUROPEAN DEMOS THE  
ANSWER TO THE EU'S LANGUAGE PROBLEM?

ERIN O'LEARY

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## **DECLARATION**

This thesis is entirely my own work and has not been submitted in full or in part for the award of a higher degree at any other educational institute.

No sections of this thesis have been published.

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## ABSTRACT

Examining the case law of the ECJ reveals that the multilingual nature of the EU presents numerous problems, such as the relative rather than absolute equality of languages, and translation errors that lead to non-uniform law due to the impossibility of perfect translation. This directly limits the application of the legal certainty aspect of the Rule of Law, thus putting into question the EU's democratic viability.

Democracy is dependent on communication opportunity, something which the Union is lacking due to its multilingual nature. To solve these legitimacy problems created by the EU's multilingual nature, it is necessary to understand the force of language as a concept in its own right.

Western linguistic theory tells us that each language encodes a particular experience of the world and that its use might predispose its speakers to see the world according to the experience encoded in it. Not only this, but that language holds such power due to the significant role of a common language collective identity formation.

In order to solve, or at least mitigate the democratic legitimacy issues which arise due to the EU's multilingual nature, we must forge a European identity which is not dependant on the feature of a common language. Accepted beliefs and archetypes of identity are deconstructed and then reconstructed in a way which uses alternate features which allow for democratic participation without the precondition of a common language.

Rather than trying to solve the language problem with a language solution (as has been done before), this thus provides new and original theoretical solutions to a practical language problem by suggesting that it can be overcome if we redefine our accepted notions of identity in the post-national sense and look at the problem through a wider lens.

## INTRODUCTION

In his 2008 seminal book *A Union of Diversity: Language, Identity and Polity Building in Europe*, Peter Kraus reasons that the European Union's democratic deficit is not merely due to the governance of the Union's institutions lacking procedural democratic legitimacy, but rather is caused by the lacking existence of a European people or demos. Citing Dieter Grimm's 1995 essay 'Does Europe Need a Constitution', Kraus writes:

According to Grimm, plans elaborated with the intention of enhancing the democratic integration of the EU are bound to remain irrelevant as long as there are no real opportunities for cultural integration across national borders. The constitutional lawyer is particularly sceptical about the chances of establishing a European community of participation without first creating a European community of communication. He uses a straightforward line of argument to stress this point: there can be no European public sphere because there is no European people (in the sense of a demos possessing a collective identity that would serve as a frame for political unity); **and there can be no European people because there is no common European language.**<sup>1</sup> (my emphasis)

It was the ultimate statement of this quote that prompted the line of research and search for answers that constitute this thesis. Initially I had begun by looking into the language situation of the European Union: how it practically worked on a day-to-day basis; whether there were any serious issues in law created by the multilingual nature of the EU; and how the EU dealt with these. I had the intention of looking at the multilingual legal situation through the eyes of a linguist, given that my background is in languages and linguistic theory (in an English Literature context). When I came across Grimm's assertion highlighted above, I began to look into the reasons why he might suggest that

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<sup>1</sup> P. A. Kraus, *A union of diversity: language, identity and polity-building in Europe*, Cambridge University Press, 2008.

there can be no European people without a common language. And also why is it that both Kraus and Grimm reason this to be the cause of the EU's democratic deficit. After reading Grimm's 1995 essay the force of his argument became clear: for Grimm, democracy is dependent on communication opportunity, something which the Union is explicitly lacking due to the inexistence of a common language.

After reading both Kraus and Grimm, I was left with this problem: I was fervently convinced by their arguments that the reason for the democratic deficit in the EU was due to the inexistence of a true collective demos, which in itself was due to the lack of communication opportunities resulting from the lack of a common language across the states of the European Union. However I still had not been presented with an adequate explanation as to why it was that language stood in the way of a European demos, and I also had not been presented with any clear solution to this vast and confusing problem. Grimm had considered whether the creation of a European constitution would lead to a sense of belonging and thus forge a demos amongst the European people by circumventing the barrier created by the lack of a common language; constructing communication opportunities through constitutionalism. However, I was not strongly enough convinced by his argument that a demos could form a strong collective attachment around such emotionally detached political and legal concepts and initiatives (as discussed in *Chapter Five* of this thesis). What is more, 20 years on from when Grimm wrote his essay, it could most certainly be argued that the attempt to create a European constitution was not met with the greatest amount of support from all citizens of the EU;

which in my opinion was partly due to the fact that the people themselves did not feel like a collective people and thus were hesitant of constitutionalism. The feeling of being a collective must come before such processes if they are to succeed.

If I were to understand why the lack of a common language was hindering the creation of a demos and subsequently causing a communicative democratic deficit, the first thing I needed to do was to get a full understanding of the language situation of the EU. Practically, were/are any accepted democratic procedures being blocked by the multilingual situation of the EU? Answering this question involved looking at the legal status of the 24 treaty languages within the Union, as well as that of minority languages. It also involved looking at the procedural role of certain dominant languages and looking at case law where translation errors and impossibilities had caused the law of the European Union to be confused. Not only that but, as evidenced in ECJ case law, the complications arising from multilingualism can diminish legal certainty, the equal enforcement of the law and the equality of all language versions, thus negating the accessibility and foreseeability criteria of the Rule of Law; a critical feature that must be present if the EU is to function as a democratic entity. In demonstrating that the lack of a common language is undeniably causing not only a barrier to communication opportunities between the citizen and the institutions of the EU, but also that the consequence of this was a hindrance to the democratic viability of the EU as a whole I had discovered the problem I wished to solve: ***Is creating a solidly defined European demos the answer to the EU's language problem?***

Whether or not the European Union is moving towards, or even desires to move towards a more 'nation-state' type role is of little consequence. The fact is that one of the founding principles of the EU is respect for democracy and the Rule of Law, and so in order to uphold these principles the EU must establish greater and more equal communicative participation possibilities for the speakers of *all* 24 official languages within its borders. But, for this to be possible, there must be defined European demos. So, what does this mean? By demos, I mean a people or a public, connected by a subconscious sense of belonging between them. Or, 'a group of people, the vast majority of which feels sufficiently attached to each other to be willing to engage in democratic discourse and binding decision-making'.<sup>2</sup> Joseph Weiler named this the 'subjective manifestation of peoplehood', consisting of 'a sense of social cohesion, shared destiny, and collective self-identity which, in-turn, result in and deserve loyalty'.<sup>3</sup> This demos of which I speak must be distinguished from 'citizenry', which is more of a 'legal people'. Citizenry 'can be created from the top via the formation of institutions, including rights and citizenship'.<sup>4</sup> A demos in comparison, is a form of social people, created from the ground by the people and their subconscious attachment to one another, generated by a number of factors such as a shared history, a common language and common myths, all of which combine to create 'subjective emotional elements such as solidarity and identity'.<sup>5</sup>

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<sup>2</sup> L. E Cederman, 'Nationalism and Bounded Integration: What it Would Take to Construct a European Demos', *European Journal of International Relations*, Vol. 7, No. 2, 2001, p. 144.

<sup>3</sup> J. H. H. Weiler, U. R. Haltern and F. C. Mayer, 'European Democracy and its Critique', *West European Politics*, Vol. 18. No. 3, 1995, p. 10.

<sup>4</sup> M. Jolly, 'A Demos for the European Union?', *Politics*, Vol. 25, No. 1, 2005, pp. 14-15.

<sup>5</sup> Jolly, 'A Demos for the European Union?', p. 15.

Now that I had my problem, I needed to try and solve it. The next step was to understand the force of language as a means of communication. If I were to consider the possibility that the language problem (as I perceived it to be) of the European Union could be overcome in order to create a community of participation without the condition of a common language, then understanding the nature of the beast was necessary. It was at this point that I began to see Grimm's reasoning behind linking the lack of communication opportunity to the lack of a European demos and why these two, for Grimm at least, are one in the same problem.

Whilst vastly oversimplifying the field of study, Western linguistic theory tells us that each language encodes a particular experience of the world and that its use might predispose its speakers to see the world according to the experience encoded in it. In doing so, a common language becomes the founding building block of what we, as individuals, feel to be our identity in the collective sense. Our sense of belonging as a collective demos within a defined state-like entity has largely been determined by the language that we speak to others within that demos. Returning to Grimm's line of thought: "there can be no European public sphere because there is no European people (in the sense of a demos possessing a collective identity that would serve as a frame for political unity); and there can be no European people because there is no common European language". If the reason why there is not currently true democratic participation is because there is no true or defined European demos, then surely the solution lies in creating that demos in a way that it is dissociated from the pre-condition of a common language. Grimm's argument is based on the

idea that for a European public sphere to exist, a European people is necessary. His flaw was not seeing the possibility of a “people” without the pre-requisite of a common language. His thinking is too rooted in the idea of demos (or collective identity) that we have commonly accepted in our Western, post-Enlightenment, nationalistic way of thinking. However the fact is that this idea of collective identity is an artificial construction that we have come to accept. Therefore it should logically follow that it should be possible to deconstruct this idea in order to then re-construct new artificial components of identity formation to form a supra-national demos. By removing language’s position as the most significant marker in collective identity formation, it could be possible to form a collective demos at the European level which allows for democratic participation.

In order to consider how this might be done it was necessary for me to look at the role language has played, along with other staple archetypes such as flags, anthems etc., in the forming of national identities. Only through understanding how identity at the national level (post-Enlightenment) has been constructed could I hope to understand how a European demos without the common language factor could be shaped. That being said, the task does not only involve creating an idea for a defined European people or demos at the collective identity level, but also considering the need for a more solidly comprehensible definition of the Union itself. In its current ill-defined, “supranational” state the lack of a concrete definition is a further hindrance to citizens’ identification with the Union.

Through exploring and understanding the reasons for the lack of a true European demos, this thesis culminates by making suggestions on how to move forward and potentially manoeuvre the barrier created by the lack of a common language to form a demos that isn't reliant on it as a factor; which would hopefully go some way in improving the EU's democratic legitimacy problem. The European Union itself needs to be defined in a way that its citizens understand its nature. The competences of the Union have been continually advancing since its naissance; growing from a simple economic union, to a political, legal and social union over its lifetime. As an entity, it is not like anything which has existed before; it is neither a federation nor a confederation; not a nation nor simply an international organisation. We tend to describe it as a supranational entity, a definition which goes no way in helping the citizen understand the relationship between the citizen and the EU. I argue that in order to begin this process the EU needs to have geographically defined borders. This links to the theory that in order for a people to define themselves, there must be an "Other" against which they can project an idea of what they are not. If the EU does not set a limit on future accessions, then the European people will not know what they are as what they are not may one day become what they are. I also suggest that it is necessary to define the European Union in terms that do not evoke connotations of the nation. As if we wish to form a solid collective identity at the European level, it must not in any way conflict with, or even appear in name to conflict with our pre-existing national identities.

The other half of the battle concerns re-working our idea of collective identity in order to hypothesise about how a post-national European identity could be forged and thus create a European demos that feels able to actively democratically participate without having a common European language. This involves continuing discussion on the idea of “the other” as well as considering more positive archetypes that could be reinforced, such as the use of an identity formed around a future ideology rather than past myths (as with national identity).

By moving away from traditional thought, a diverse, multilingual polity which includes the democratic participation of the European demos is actually possible for the EU. This approach evidently directly concerns my original contribution to the field of research. The novelty of my research is evident in two ways.

- Firstly, to my knowledge, no attempt has been made to resolve the EU’s language problem, which is essentially a legal and political democratic legitimacy problem, by suggesting that it can be overcome if we redefine our accepted notions of identity in the post-national sense. Rather than trying to solve the language problem with a language solution, I have used an approach which takes into account language as a concept in its own right, rather than just language and the law. By doing so, I have been able to consider solutions that legal scholars would not, solutions which are also novel in their own right. In the final chapter of this thesis I suggest that in order to form a European demos which does not conflict with pre-existing national identities, yet is also able to overcome the pre-condition of a

common language, we should form European collective identity using the format but not the content of national identity.

- Secondly, throughout the final chapters of the thesis I am critical of the approach the EU has thus far taken in its attempts to forge a European identity, that is to say, its decision to emulate markers of national identity. However, this criticism lead me to the idea that if European identity is to have the same strength as national identity, yet not come into conflict with it, we should follow the format of national identity formation, but not in any way try to emulate its content (see *Chapter 5, Sections 3.a and 3.b*). As was stated above, the European public sphere must be truly defined and re-created, given that the communication between political authority and people is an important source of legitimacy in Western democracies.

## THESIS OUTLINE <sup>6</sup>

There are 5 chapters in this thesis, plus this *Introduction* and a *Conclusion*. As the introduction has already laid out, the hypothesis that will be tested throughout this thesis is: *Is creating a solidly defined European demos the answer to the EU's language problem?*

*Chapter One* opens the thesis by outlining and discussing what the actual language situation of the European Union is. The chapter discusses several elements of the position of languages within the EU, such as the legislation which is in place to protect linguistic diversity, the treaty prescribed language distinctions, and the ECJ's approaches to linguistic interpretation. *Chapter Two* then moves on to consider the implications that the EU's multilingual situation has on linguistic human rights and the legal certainty aspect of the Rule of Law.

*Chapter Three* then has the role of explaining why a multilingual entity such as the EU will inevitably create such problems by delving into the world of linguistic theory as a means of explaining language both as a tool for communication and as a feature of our subconscious which impacts our thoughts processes and plays a significant role in our collective identity formation, and what this therefore means for multilingual political entities such as the EU. This chapter looks at the EU through the eyes of a linguist to discover

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<sup>6</sup> Structuring my thesis in such a way was a conscious choice given the diverse nature of subjects covered throughout. In view of the fact that the content ranges from EU Law, to linguistic theory, to identity formation, it made logical sense to begin by firstly laying out the language situation of the EU, followed by the resulting problems which present themselves from this, before then offering an explanation as to why these problems occur (using linguistic theory), and then finally presenting potential solutions given the theoretical knowledge gained about language as a concept.

whether theoretical linguistic considerations could point the EU towards a solution for its multilingualism caused problems.

The understanding of language as a concept gained through *Chapter Three* leads to the conclusion that there is no simple language solution to the problems created by multilingualism in the European Union. That in fact, the problems caused by the multilingual nature of the EU stem from language's position as a significant marker of collective identity. As such, *Chapter Four* starts from the position that it is necessary to delve further into language as a marker of collective identity if a solution is to be found which mitigates the day-to-day problems caused by multilingualism and allows for democratic participation without a common language. *Chapter Four* discusses what is meant by "identity" and also what steps have been made to form a European identity. This chapter is rather descriptive and arguably opens more issues than it solves. This is because *Chapters 4 and 5* are two sides of the same coin in their exploration of identity, existing European identity and its downfalls, and how a European identity could and should be forged which could resolve the legitimacy problems caused by the multilingual nature of the European Union. Therefore many issues raised in *Chapter Four* are left unresolved until *Chapter Five*, when they are discussed in relation to a possible solution rather than as an existing problem.

*Chapter Five* is where my original contribution really comes to fruition. It considers how a European collective identity could be formed; firstly based on the path that the EU has thus far followed, and secondly if we were to be able to start from scratch. I explore the existing theories of Constitutional Patriotism

and Deep Diversity in order to demonstrate their weaknesses (and strengths) against my own theory.

The solutions presented are undoubtedly highly theoretical in nature, yet their content can be justified given the detailed consideration of linguistic theory and examination of identity and European identity that came before them. They offer a means of alleviating the practical burden that multilingualism places on the institutions of the European Union, as well as presenting a means of lessening the consequences this multilingualism creates for legal certainty, foreseeability of the law, accessibility of the law and participatory communication possibility between the citizen and the institutions of the EU. Thus, the suggested solutions are borne out of a justified theoretical view that, whether there are practical, linguistic barriers in place or not, democratic participation can be made possible through the forging of a *demos*. That is to say, through the act of making the collective *feel* as though they belong, which consequently makes them feel able to participate and communicate even if the practical barriers remain in place.

## CHAPTER 1.

### MULTILINGUALISM AND THE EUROPEAN UNION: THE SITUATION AT PRESENT

#### INTRODUCTION

'Unity/United in Diversity' is the motto of the European Union, and as it stands today the EU must legislate in the 24 official languages that traverse its 28 Member States, meaning that there are a total of 552 possible language combinations and as such linguistic concerns must be at the forefront of all legislative issues, be they social, political or economic.

This chapter outlines the current linguistic regime of the European Union by discussing the legislation that is in place to protect the linguistic equality of the official languages of the Member States. The Union prescribed distinctions between *treaty languages*, *official languages*, *working languages* and *languages of the case* is discussed as a means of demonstrating the lack of procedural inequality of languages that runs throughout the institutions of the EU in spite of the protective legislation in place. The teleological and literal methods adopted by the European Court of Justice when interpreting unclear legislation is then considered as a means of introducing the idea that the unequal treatment of languages can result in a lack of certainty and predictability in the law. By considering certain prominent cases of the European Court of Justice this chapter reveals that the Union's current situation presents numerous shortcomings such as the relative rather than absolute equality of languages and translation errors that lead to non-uniform law due to the impossibility of perfect translation. Finally, I introduce the discussion on

what this clear and evident linguistic uncertainty means for the existence of the legal certainty aspect of the Rule of Law within the European Union and its democratic legitimacy<sup>7</sup> (a discussion which continues into the next chapter). The alternative option of a lingua franca is contrasted against the current linguistic regime, revealing that this choice would result in the ever-more problematic possibility that citizens would be unable to truly communicate with the political powers that govern them as 'one's language determines the structure of one's thoughts and how one perceives the world'.<sup>8</sup>

I ask you to keep in mind that the aim of this chapter is not to offer a fully comprehensive exploration of the translation, drafting and interpretation services of the European Union but rather to present the facts concerning the language situation of the EU and thus demonstrate a definite problem of unequal applicability and foreseeability of the laws of the EU caused by its multilingual nature. In doing so this chapter establishes the existence of an inherent problem of the EU and brings into question its democratic legitimacy. The inconsistencies highlighted below can be described as practical democratic legitimacy problems which, in reality, cannot be overcome if the

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<sup>7</sup> 'Legitimacy', for the purposes of this thesis, encompasses the ideas purported by such academics as Joseph Weiler, David Robertson, Richard Bellamy and Dario Castiglione. Their works suggest that legitimacy has two components: one formal and one social; or one internal and one external. Formal legitimacy corresponds to legality and thus concerns the democratic institutions and processes of law-making within the European Union. On the other hand, social legitimacy does not take procedures into account, but rather refers to a broad social acceptance of the system. (see: D. Fuchs, H. D. Klingemann, *Cultural Diversity, European Identity and the Legitimacy of the EU*, Edward Elgar Publishing, 2011, pp. 4-5). Based on these ideas of legitimacy, the question of legitimacy when raised in this thesis refers to the relationship between and existence/inexistence of both of these components. There are of course the procedural (formal legitimacy) issues caused by multilingualism which are discussed at length in this chapter and the next. However, to ignore the social legitimacy impact of this would be to narrowly understand the issues at hand. Taking into account this social element, there are academics who are that democratic legitimacy is not possible without a true European demos being created (for example see the works of Alex Warleigh, Dimitris Chrysochoou and Christopher Lord referenced in ch. 4, section 3.c of this thesis). This is why the overarching solution (see ch. 4 and ch. 5) to the formal legitimacy issues raised in this thesis is one which looks to the power of social legitimacy (i.e. demos formation) to mitigate the issues surrounding procedural legitimacy.

<sup>8</sup> P. Trudgill, *Sociolinguistics: an introduction to language and society*, Penguin Publishing, 1983, p. 24.

institutions of the EU are to function on a day-to-day basis. What I believe must be done is discover a theoretical solution to a practical problem. If we cannot overcome the problem itself, we must instead make the citizens of the EU feel as though such problems do not affect their communication possibility, sense of equality and democratic participation with the European Union at large. Therefore, what follows in this chapter lays out the existence and extent of a serious legitimacy problem that I do not believe can be solved through changes in language regime or the implementation of more robust translation, interpretation and drafting services.

## **CHAPTER 1. SECTION 1**

### **WHAT THE TREATIES SAY <sup>9</sup>**

The multilingual nature of the European Union is what distinguishes it from other forms of international organisations. Linguistic concerns are of much greater issue for the European Union than other international organisations given that ‘unlike conventional international law, much of European [Union] law is directly and immediately applicable to individual citizens of its member states’.<sup>10</sup> From its naissance it has been politically, economically, culturally and linguistically intertwined. ‘Unlike international law that is generally transferred into each national system in order to be applied to that country’s citizens, the

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<sup>9</sup> For a comprehensive exploration of the EU’s approach to translation of legal texts and legislation see: ch.9 of *The Ashgate Handbook of Legal Translation*, edited by Professor Le Cheng, Ms Anne Wagner, Dr King Kui Sin; Martina Künnecke, ‘Translation in the EU: Language and the Law in the EU’s Judicial Labyrinth’, *Maastricht Journal* (2013), available at <[http://www.maastrichtjournal.eu/pdf\\_file/its/mj\\_20\\_02\\_0243.pdf](http://www.maastrichtjournal.eu/pdf_file/its/mj_20_02_0243.pdf)>; Susan Šarčević, *Language and Culture in EU Law: Multidisciplinary Perspectives*, Ashgate Publishing, Ltd., 2015

<sup>10</sup> R. Huntington, ‘European Unity and the Tower of Babel’, *Boston University International Law Journal*, vol. 9, 1991, p. 327.

EU passes its own laws. Member states have transferred part of their sovereignty and some of their political power to the Union and, where a dispute arises, EU law takes precedence over national law.’<sup>11</sup> The legal basis of multilingualism in the European Union can be found in 3 places: firstly, Article 342 of the Treaty on the functioning of the European Union; secondly in Article 22 of the Charter of Fundamental Rights (which provides for protection of the linguistic diversity); and finally in Council Regulation no. 1/1958 EEC (which establishes the languages to be used by the then Community). In this first Regulation of the EEC, adopted by the founding Member States of France, Germany, Italy, Belgium, the Netherlands and Luxembourg in 1958, it states that the four languages of Dutch, French, German and Italian would be equally official, that all official EU documents would be written in each of these languages and that each language version was equally authoritative with no version being privileged as “the original”.<sup>12</sup> This is further backed up by Article 1 of the Regulation which determines that ‘The official languages and the working languages of the institutions of the Community shall be Dutch, French, German and Italian’. Successive enlargement has taken the number of official languages afforded this same equal authority up to 24.<sup>13</sup>

REGULATION No 1 determining the languages to be used by the European Economic Community

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY, Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall,

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<sup>11</sup> A. Felici, ‘Translating EU law: legal issues and multiple dynamics’, *Perspectives: Studies in Translatology*, vol. 18, no. 2, June 2010, p. 95.

<sup>12</sup> EEC Regulation 1958/1/EEC determining the languages to be used by the European Economic Community, Article. 4, [1958].

<sup>13</sup> Since 1<sup>st</sup> July 2013 the 24 official languages are: French, German, Italian, Dutch, English, Danish, Irish, Portuguese, Spanish, Greek, Finnish, Swedish, Estonian, Latvian, Czech, Hungarian, Lithuanian, Maltese, Polish, Slovak, Slovene, Bulgarian, Romanian and Croatian.

without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously; Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;  
HAS ADOPTED THIS REGULATION:

*Article 1*

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

*Article 2*

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

*Article 3*

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

*Article 4*

Regulations and other documents of general application shall be drafted in the official languages.

*Article 5*

The *Official Journal of the European Union* shall be published in the official languages.

*Article 6*

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

*Article 7*

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

*Article 8*

If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

This Regulation shall be binding in its entirety and directly applicable in all Member States.<sup>14</sup>

Although the European Union cannot be said to have an official language policy as such the above charter gives faith in the Union's commitment to fostering a multilingual sphere in which the equal authority of official languages is legislatively determined. Successive accession treaties also demonstrate a definite consideration for the equal respect of official languages and maintenance of the linguistic diversity of the Union. Art.53 of The Treaty of Amsterdam 1997 states:

This Treaty, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

Pursuant to the Accession Treaty of 1994, the Finnish and Swedish versions of the Treaty shall also be authentic.<sup>15</sup>

The continued legislative recognition of the importance of multilingualism and the equal authenticity of all official languages is not merely for the internal, institutional workings of the European Union but more importantly perhaps, the ability of the citizen to address the various institutions of the Union also. Originally enshrined in Articles 2 and 3 of Council Regulation 1/58/EEC, 'the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language' has

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<sup>14</sup> EEC Council, Regulation No 1 determining the languages to be used by the European Economic Community, 6 October 1958, Article 4.

<sup>15</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1, Article. 53.

been preserved in successive treaty articles.<sup>16</sup> The Union's consideration for the need for national courts and citizens to understand the laws that are binding upon them is further laid out in the 'Translating for a Multilingual Community' booklet prepared by the Directorate General for Translation of the European Commission:

The Commission serves the European Union and its citizens, a community quite different from that served by traditional intergovernmental organisations. Its legislation has to be published in the official languages of all the Member States because it becomes their national law as well and thus directly binding on all their citizens. *So these citizens — and their national courts — must be able to read and understand it in their own languages.* But well before that point, proposals must be aired for the widest possible debate at all levels — European, national and local — *in forms accessible to non-linguists and non-diplomats.* Everyone in the Union is entitled to contribute to the discussion in the official language of his or her choice. *It is a question of transparency and democracy.* This is why, right from the outset of that European project that evolved into the European Community and now the European Union, it was decided that the official languages would be those (initially four in number) of the Member States. This principle is enshrined in Regulation No 1 of 1958, which is amended each time a new country joins the EU to include its language or languages. But legislation is not the whole story. *The European Union institutions have to be as accessible and open as possible, to the general public as well as to government departments and official and unofficial interest groups of all kinds.* The Commission sees it as *its duty to foster a democratic culture* in which individual, local, regional and national characteristics are respected and safeguarded.<sup>17</sup> *(My italics)*

From this document we can see that the fostering of a democratic culture is viewed as being maintained by the equal respect for every Member State language.<sup>18</sup> And by translating legislation into all official languages of the Union is ensuring literal accessibility to the law for the citizens. However I would

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<sup>16</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01, Article. 34(b)2(d).

<sup>17</sup> Directorate-General for Translation, 'Translating for a Multilingual Community', European Commission [pdf], 4 March 2007, available at <<http://www.lu.lv/materiali/biblioteka/es/pilnieteksti/dazada/Translating%20for%20a%20Multilingual%20Community.pdf>>, accessed 9 October 2013.

<sup>18</sup> See also: European Commission, *White Paper on European Governance*, 2001, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l10109&from=EN>> which is concerned with democratic legitimacy, participation, transparency and the role of the Commission.

suggest that to advocate that merely ensuring legislation is translated into and published in every official language is not sufficient to stake the claim that official languages have the same equal status throughout the institutions of the European Union, and also that this by no means denotes that the law is accessible to all citizens.

What follows is a discussion on how different 'levels' of language are distinguished within legislation and the procedural workings of the Union. This is followed by a brief consideration of the position of minority languages and how their linguistic status enhances the assertion that languages are not treated equally under EU law.

## **CHAPTER 1. SECTION 2**

### **LANGUAGE DISTINCTIONS OF THE EUROPEAN UNION <sup>19</sup>**

In spite of the language regulations outlined above, each language spoken within the borders of every Member State of the Union does not have equal authenticity. The linguistic regime of the European Union distinguishes languages into separate categories: *treaty languages*, *official languages*, *working languages* and *languages of the case*. 'The Founding Treaties, the Consolidated Versions and the Accession Treaties are written in the *treaty languages*. Article 358 TFEU (ex-Article 314 TEC) in conjunction with Article 55 TEU says that the wording of every language version is equally authentic in the

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<sup>19</sup> Given that currently the 24 official and working languages of the EU are the same as the 24 Treaty languages, for the purposes of this thesis I will simply refer to the languages as *official languages* unless technical distinction between the categories of the languages is deemed necessary in the context of discussion.

EU Member States.’<sup>20</sup> As preserved in Article 1 of Council Regulation 1 the *treaty languages* also operate as *official languages* of the Union. Furthermore, Article 1 of Council Regulation (EC) no 920/2005 of June 13, 2005 amending Regulation no 1 of April 15, 1958 uses both *official* and *working* without distinction. Although *working languages* technically refers to the languages of internal correspondence between institutions of the EU, literature concerning EU languages often uses the terms synonymously and interchangeably.<sup>21</sup> Urrutia and Lasagabaster note that there is a distinction between what we refer to as *treaty languages*, and *official working languages*. They describe them as operating on a different plane as in matters concerning the use of official languages it is by a unanimous decision of the Council that the language framework of the EU may be established and modified (Article 290 of the EC Treaty).<sup>22</sup>

As mentioned above, *working languages* quite distinctly also refer to the otherwise known as *procedural languages* of the institutions of the EU. The European Commission formulates the majority of its primary texts in English, a practice which stands in stark contrast to the officially proclaimed multilingualism of the above Treaty Articles.<sup>23</sup> Further to this, its day to day procedural work is carried out in French and English, and to a lesser extent, German, a linguistically biased practice which is passed on to both the

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<sup>20</sup> K. Luttermann, ‘Cultures in Dialogue. Institutional and Individual Challenges for EU Institutions and EU Citizens from the Perspective of Legal Linguistics’, *Journal of Language and Communication Studies*, no. 46, 2011, p. 26.

<sup>21</sup> J. Fidrmuc, V. Ginsburgh and S. Weber, ‘Ever Closer Union or Babylonian Discord? The Official-language Problem in the European Union’, 2007, Appendix. 1, p. 41, available at <<http://www.fidrmuc.net/research/FGW2.pdf>>

<sup>22</sup> I. Urrutia and I. Lasagabaster, ‘Language Rights as a General Principle of Community Law’, *German Law Journal*, vol. 8, 2007, p. 481.

<sup>23</sup> S. Glanert, ‘Speaking Language to Law: The Case of Europe’, *Legal Studies*, Vol. 28, No. 2, June 2008, p.161.

Parliament and the Council. The Parliament could also be said to demonstrate a bias towards the English language with regards to its preparatory work in an effort to speed up communication and so as not to burden an already stretched translation and interpretation service. Due to time and budgetary constraints, relatively few working documents are translated into all languages. The European Commission employs English, French and German in general as procedural languages, whereas the European Parliament provides translation into different languages according to the needs of its Members.<sup>24</sup>

*Languages of the case* concern the procedural role within the institution of the European Court of Justice. As stated in Articles 342 TFEU (ex. Article 290 TEC) and Article 7 of Council Regulation No. 1, language use within the ECJ is governed by Articles 36-42 of the European Court of Justice Rules of Procedure.<sup>25</sup> This states that the proceedings must be conducted in one of the official languages of the European Union which is chosen by the applicant, although where the defendant is a Member State or a national of a member state the applicant must choose an official language of that Member State. Be that as it may, this does not speak for the *working language* of the ECJ in the sense that all deliberations, pleadings and draft judgments are discussed and prepared in French, unofficial as it may be. Even the website of the English Parliament notes the use of unofficial translations and unofficial discussions within the procedural workings of the ECJ as being conducted solely in the

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<sup>24</sup> European Commission, Languages, 'Official EU Languages', European Commission [webpage], 5 July 2013, <[http://ec.europa.eu/languages/languages-of-europe/eu-languages\\_en.htm](http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm)>, accessed 3 October 2013.

<sup>25</sup> European Court of Justice, *Rules of Procedure of the Court of Justice*, 25 September 2012, available at <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf)> (accessed 16 October 2012).

French language.<sup>26</sup> (Section 4 below discusses the linguistic workings of the ECJ in much more detail).

### CHAPTER 1. SECTION 3

#### LINGUISTIC INEQUALITY AND THE CASE OF MINORITY AND REGIONAL LANGUAGES

There is undeniably a vast chasm between the limited linguistic diversity in the procedural workings of each institution and the Regulations cited above which portray an idyllic language regime under which the equal authority of languages could not possibly be compromised. As the *Kik* affair demonstrated,<sup>27</sup> ‘there is no constitutional principle of equality of languages that is binding on EU legislators in regulating the framework for internal use of languages at EU agencies, to the extent that the right of use of languages recognized in [ex] Article 21 of the EC Treaty is only applied at the institutions cited in the wording of the article, and not the rest’.<sup>28</sup>

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<sup>26</sup> Parliamentary Business, Publications and Records, 2007. The Workload of the Court of Justice of the European Union - European Union Committee [Contents](#): APPENDIX 5: WRITTEN EVIDENCE OF ADVOCATE GENERAL SHARPSTON, [webpage]. Available at <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldcom/128/12816.htm>, accessed: 15 October 2013.

<sup>27</sup> See Judgement of C-361/01-P *Kik v. OHIM* [2001] ECLI:EU:C:2003:434 which states at point. 16 that: “Secondly, ruling on the substance, the Court of First Instance first considered whether there was a principle in Community law of non-discrimination as between the official languages of the European Communities. At paragraphs 58 and 59 of the contested judgment, it held as follows: In that regard, it must first be pointed out that Regulation No 1 is merely an act of secondary law, whose legal base is Article 217 of the Treaty. To claim, as the applicant does, that Regulation No 1 sets out a specific Community law principle of equality between languages, which may not be derogated from even by a subsequent regulation of the Council, is tantamount to disregarding its character as secondary law. Secondly, the Member States did not lay down rules governing languages in the Treaty for the institutions and bodies of the Community; rather, Article 217 of the Treaty enables the Council, acting unanimously, to define and amend the rules governing the languages of the institutions and to establish different language rules. That Article does not provide that once the Council has established such rules they cannot subsequently be altered. It follows that the rules governing languages laid down by Regulation No 1 cannot be deemed to amount to a principle of Community law.” Available at <http://curia.europa.eu/juris/document/document.jsf?docid=48555&doclang=EN>.

<sup>28</sup> Urrutia and Lasagabaster, ‘Language Rights as a General Principle of Community Law’, p. 482.

In spite of the legislative claim that the institutions are working under the ethos that the 24 official languages are equally authoritative, in reality it could be argued that the EU has almost completely failed to truly recognise the equality of languages and thus neglected to carry out their duties under this ethos. Practically speaking there is justification for such a failure. In order to avoid such an arduous, drawn-out process of communication, most Council, Commission and Parliamentary issues are discussed in either French or English, or occasionally German. 'Approximately 95% of legal texts adopted in co-decision procedures are drafted, scrutinised and revised in English. For practical reasons English has become a primary language used in the daily work of the institutions, except the CJEU, where for the same reasons French dominates.'<sup>29</sup> With the initial drafting, consultation and re-drafting of legislation being carried out in just one or two languages by both native and non-native speakers, the equality of communication rights is actively being dismissed. Members of the European Parliament from Scandinavia (and doubtless others) are convinced that this gives native speakers of French and English an edge when it comes to setting agendas.<sup>30</sup> When it comes to the European Court of Justice the procedural linguistic superiority of the French language is evident. It would simply be untruthful not to admit that the factual relevance of the French language within proceedings before the Court of Justice does not have an influence on the interpretation of the law.<sup>31</sup> Furthermore, the EU's official website appears to have no qualms in admitting that the procedural actions

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<sup>29</sup> O. Łachacz, and R. Mańko, 'Multilingualism at the Court of Justice of the European Union: theoretical and practical aspects', *Studies in Logic, Grammar and Rhetoric*, vol. 34, no. 1, 2013, p. 80.

<sup>30</sup> R. Phillipson, *English Only Europe? Challenging Language Policy*, Ch. 4: *Languages in EU Institutions*, Routledge, 2003.

<sup>31</sup> S. A Dickschat, 'Problems d'Interpretation des Traités Europeens Resultant de Leur Plurilinguisme', *Revue Belge de Droit International*, vol. 4, 1968, p. 48, 57.

carried out by the Commission are done so almost exclusively in English, French or German and that the European Parliament only provides translation into different languages according to the needs of its Members, citing budgetary constraints as justification enough for this practice.<sup>32</sup> It would not then be too much of a jump to describe the language regime of the European Union as relative and subject to the perceived necessity of translation by ‘Eurocrats’ who undoubtedly speak at least one of these procedural languages with a high level of proficiency.

This inequality can be further demonstrated given that not all official national languages are afforded the status of official languages of the European Union. Luxembourgish (an official language of Luxembourg) and Turkish (an official language of Cyprus), despite being officially recognised national languages of their respective Member State nations, are not given such recognition by the EU. This could potentially be justifiably explained given their relatively small numbers of speakers (Luxembourgish approx. 390,000<sup>33</sup> and only approx. 1,400 speakers of Turkish in Cyprus) and given that neither are the majority national language within their respective nation states. However, that argument can be immediately dispelled by looking at certain minority languages that may have official political recognition within the Member States themselves. ‘A lack of flexibility in the development of the Community’s language framework has resulted in the radical exclusion from all types of official use of non-state

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<sup>32</sup> European Commission, Languages, ‘Official EU Languages’, European Commission [webpage], 5 July 2013, <[http://ec.europa.eu/languages/languages-of-europe/eu-languages\\_en.htm](http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm)>, accessed 3 October 2013.

<sup>33</sup> F. Fehlen and P. Gilles, Laboratoire de linguistique et Unesco, *Communiqué de presse: Le nombre de locuteurs du luxembourgeois revu à la hausse*, Luxembourg, 24 February 2009, <<http://infolux.uni.lu/wp-content/uploads/2012/02/Presse-UNESCO-2010-2009.pdf>>, accessed 10 October 2013.

languages regardless of their internal status.’<sup>34</sup> The unsound logic can be demonstrated by comparing the number of native speakers of Catalan (11.5 million and yet it is not afforded the status of being an official language by the EU as is it not a “State” language), with that of native speakers of Maltese (a mere 400,000 and yet given official status due to its position as a “State” language in Malta). Urrutia and Lasagabaster argue that ‘this is an anachronistic situation that needs to be corrected by going further into the principles of democracy, human rights and linguistic pluralism’<sup>35</sup> and I am inclined to agree. That being said, the Council of Europe however has undoubtedly taken steps to offer certain levels of recognition to regional and minority languages. Article 7 of the European Charter for Regional or Minority Languages 1992 states:

1. In respect of regional or minority languages, within the territories in which such languages are used and according to the situation of each language, the Parties shall base their policies, legislation and practice on the following objectives and principles:
  - a. the recognition of the regional or minority languages as an expression of cultural wealth;
  - b. the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question;
  - c. the need for resolute action to promote regional or minority languages in order to safeguard them;
  - d. the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life.

Further to this, with respect to the regional languages of the autonomous regions of Spain the Union has taken progressive steps to further their level of recognition. In 2005 the then President of the Committee of the Regions signed

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<sup>34</sup> Urrutia and Lasagabaster , ‘Language Rights as a General Principle of Community Law’, p. 483.

<sup>35</sup> *ibid.*

an agreement approving the use of Spanish regional languages in an EU institution<sup>36</sup> and then in 2006 the European Parliament's Bureau approved a proposal by the Spanish State to allow citizens to address the European Parliament in Basque, Catalan and Galician.<sup>37</sup> Positive as these steps may be they still highlight the inexistence of true equality of languages within the borders of the EU, the implications of which will be discussed throughout this thesis.<sup>38</sup>

The effects of not including some languages in the set of the official ones go beyond restricting access to information. Citizens prevented from communicating in the language of their choice may be unwilling or unable to fully participate in the political process. Furthermore, given that EU law takes precedence over national legislation, the citizens' ability to receive information and to communicate in their own language has profound and direct implications for the economic and social fabric of the society and individual well-being. In an extreme case, linguistic disenfranchisement may even threaten the long-term of survival of some languages.<sup>39</sup>

So, just how far does this procedural inequality go? How can there be unity in diversity if that unity is based on an unequal recognition of languages and differing levels of legal certainty based on the inadequacy of language? These questions must be answered if we wish to avoid the conclusion that unity and diversity, rather than complementing one another, in fact undermine the other's role. What follows is an overview of case law dealt with by the European Court of Justice in which it has been called upon the ECJ to deal with the issue of language and either interpret articles, provisions or directives due

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<sup>36</sup> Europa Press Releases Database, 'Committee of the Regions set to be first EU body to use regional languages at Plenary Session (16-17 November)', European Commission [webpage], 15 November 2005, <[http://europa.eu/rapid/press-release\\_COR-05-119\\_en.htm](http://europa.eu/rapid/press-release_COR-05-119_en.htm)>, accessed 20 September 2013.

<sup>37</sup> Barcelona Reporter, 'Catalan Government Welcomes European Parliament Language Move', [webpage], 29 June 2012, <<http://archive.is/0Lxm>>, accessed 10 October 2013.

<sup>38</sup> The discussion of minority languages however would form a thesis in itself and in not being the aim of this thesis will only be referred to as a supporting argument rather than offered as a direction of critical analysis or given in depth consideration.

<sup>39</sup> Fidrmuc et. al, 'Ever Closer Union or Babylonian Discord?', *The Official-language Problem in the European Union*, June 2007, pp. 3-4.

to translation inconsistencies between language versions of the law, or in some cases outright declare that certain language versions do not convey the law correctly. This will give a more critical view of the actual language situation in the European Union in that how the language regime is practically applied is discussed.

## CHAPTER 1. SECTION 4

### LANGUAGES AT THE EUROPEAN COURT OF JUSTICE <sup>40</sup>

#### SECTION 4.a : THE ECJ'S APPROACH TO INTERPRETATION <sup>41 42</sup>

Article 19 para. 1 TEU (ex. Article 220 TEC) requires the Court to ensure that the law is observed in the interpretation and application of the Treaty,<sup>43</sup> meaning

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<sup>40</sup> For a comprehensive discussion on the translation services of the European Union, see: Enlargement at the European Court of Justice: Law, Language and Translation, particularly pp. 806-812 on the pivot system. For a critical discussion on the ECJ's approach to multilingual interpretation, see: M. Derlén, 'Multilingual interpretation of CJEU case law: rule and reality', *European Law Review*, 2014; and, E. Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*, Ashgate Publishing, Ltd., 2013; and L. M. Solan, 'The Interpretation of Multilingual Statutes by the European Court of Justice', *Brook. Journal of International Law.*, 2008. For an in-depth discussion on how the ECJ's multilingual jurisprudence is produced and the implications of the process of such production on the EU legal landscape, see: Karen McAuliffe, 'The Limitations of a Multilingual Legal System', *International Journal for the Semiotics of Law*, vol. 26, no. 4, 2013.

<sup>41</sup> "The rules governing language use at the Court of Justice and the Court of First Instance are set out in their respective Rules of Procedure. For every action before the Court of Justice and Court of First Instance there is a language of procedure which must be used in written pleadings or observations submitted and for all oral pleadings in the action. Any of the 24 official languages of the European Union may be used as the language of procedure in a case. The language of procedure of the case must also be used by the Court in any correspondence, report or decision addressed to the parties in the case. Only the texts in the language of procedure are 'authentic' (i.e. legally binding)." See: K. McAuliffe, 'Language and the institutional dynamics of the Court of Justice of the European Communities: lawyer-linguists and the production of a multilingual jurisprudence', in Gueldry M (eds) *How Globalizing Professions Deal With National Languages: Studies in Cultural Conflict and Cooperation*, Lewiston, Queenstown, Lampeter: The Edwin Mellen Press, 2010, pp. 239-263.

<sup>42</sup> Legislative interpretation at the ECJ, as with legislative interpretation in national judicial systems, takes place as a matter of course and is not only due to translation errors and the multilingual nature of EU law. However, given the intent behind this thesis I will be focusing discussion on the ECJ's interpretation when it is the multilingual nature of law that has caused inconsistency or ambiguity between language versions.

<sup>43</sup> European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: <<http://www.refworld.org/docid/3ae6b39218.html>>, accessed 15 February 2016, art. 19, para. 1.

that the main goal of the ECJ when applying Union law is to interpret the legislation at hand in a manner which considers the intent of the legislature and to further the goals of the enacted directive or regulation.<sup>44</sup> This goal is of upmost importance as ‘a presumption of uniformity is necessary for the ECJ to claim authoritative status within the EU legal order’.<sup>45</sup>

The Court of Justice aims to produce statements of law that mean exactly the same thing in every language in which they are published and through such statements to ensure the uniform application of EU law. ‘The law’ is an overwhelmingly linguistic institution. EU law, and in particular the jurisprudence of the Court of Justice, is coded in language, and the concepts used to construct that law are accessible only through language. Thus, the role of language and translation in the production of the Court’s jurisprudence is of primary importance.<sup>46</sup>

This tasks the ECJ with quite an exclusive competence in the interpretation of Union law, and the principle of equal authenticity obliges them to compare every language version in order to ascertain whether there are any differences in meaning present. Interpretation is necessary as discrepancies between different language versions of the same law do often present themselves, and such discrepancies can impede the interpretation process. This may be because, as all language versions are “equally authentic” and must be given “the same weight” (as prescribed in *CILFIT* and *EMU Tabac* respectively) it proves difficult to uphold such a pledge if the interpretive outcome is to be rational and reasoned. And if the language versions differ from one another,

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<sup>44</sup> L. M. Solan, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, *Brooklyn Journal of International Law*, vol. 34, no. 2, 2009, p. 279.

<sup>45</sup> K. McAuliffe, ‘Precedent at the Court of Justice of the European Union: The Linguistic Aspect’, *Law and Language. Current Legal Issues*, vol. 15, 2013, p. 485.

<sup>46</sup> K. McAuliffe, ‘Language and the institutional dynamics of the Court of Justice of the European Communities: lawyer-linguists and the production of a multilingual jurisprudence’, in Gueldry M (eds) *How Globalizing Professions Deal With National Languages: Studies in Cultural Conflict and Cooperation*, Lewiston, Queenstown, Lampeter: The Edwin Mellen Press, 2010, 239-263, p. 3, fn. 6.

then surely interpretation of the reasoning behind the legislation will also differ depending on which language version is being considered.<sup>47</sup>

Having such a high degree of legal, political and linguistic pluralism throughout the Union means that the ECJ must focus on specific methods of interpretation in order to attempt to maintain a semblance of consistency across language versions. To truly understand what interpretation methods are employed by the ECJ, the types of legal arguments it used, its techniques of exegesis, and its rules of logic that make of legal reasoning a form of practical reasoning must be considered.<sup>48</sup> Firstly, the ECJ utilises literal interpretation whereby the literal meaning of the words of the provision are considered. This approach considers the text, context and purpose of the legislation in question. The Court coordinates different versions of texts in the official languages and if the legal provision is clear it is unusual for the Court to depart from this meaning. It has been suggested however that an approach such as this, which is focused on the interpretation of the grammatical context and the analysis of common parlance within (autonomous) EU law must necessarily be limited.<sup>49</sup> Limited as this approach is the ECJ often employs teleological interpretation, a justified practice laid out in the *CILFIT* case: 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of E.C. law as a whole, regard being had to the objectives thereof and to its state of evolution

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<sup>47</sup> For further, in depth discussion on this see: Cornelis J. W. Baaij, Fifty Years of Multilingual Interpretation in the European Union. In: Peter Tiersman and Lawrence Solan eds. 2012. *The Oxford Handbook of Language and Law*, Oxford University Press, 2012, Ch. 15, p. 218.

<sup>48</sup> M. P. Maduro, 'Interpreting European Law-Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, vol. 1, no. 2, 2008, p. 2.

<sup>49</sup> H. Rösler, 'Interpretation of EU law', *Max Planck Encyclopaedia of European Private Law*, vol. 2, 2012, p. 979.

at the date on which the provision in question is to be applied'.<sup>50</sup> As the *CILFIT* case ruling suggests, teleological interpretation considers legislative provisions in the light of the purpose, values, legal, social and economic goals they aim to achieve. According to General Advocate Miguel Poiares Maduro: 'Teleological interpretation in EU law does not refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules'.<sup>51</sup> This means that a particular systemic understanding of the EU legal order is needed in order to ascertain purpose at this level and as such the broader aims of the EU as an institution must also be considered when interpreting purpose and eventual meaning.

Not only must the ECJ consider the broader aims of the EU as an institution, but also consideration of the equal authenticity rule is paramount given that each language version should have equal weight in the interpretation process. In *Van der Vecht* the Court stated that 'passage[s] should not be considered in isolation, but that, in cases of doubt, it should be interpreted and applied in the light of the versions existing in the other [...] languages'.<sup>52</sup> Given that the number of official languages now stands at 24 it could be suggested that the judges of the ECJ have too great a discretion in the decision making and that their *interpretation* may lean too far in the direction of law-making. 'This is not only problematic with regard to the division of power, but also with regard to

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<sup>50</sup> ECJ, C-283/ 81 (Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health) 06/10/1982, para. 18.

<sup>51</sup> O. Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint', *German Law Journal*, vol. 5 no. 3, 2004, p. 289, available at <<http://www.germanlawjournal.com/index.php?pageID=11&artID=402>>, accessed: 15 November 2012.

<sup>52</sup> Case C-19/67, *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht*, [1967] Reference for a preliminary ruling: Centrale Raad van Beroep - Netherlands

the demand for legal certainty for the individual citizen.’<sup>53</sup> Lawrence Solan explains that the linguistic practices of the ECJ should meet three goals: fidelity to the legislative purpose and intent of the drafters, equality of the official languages of the Member States, and efficiency.<sup>54</sup> However, within a Union of 24 languages it would seem obvious to state that the fidelity criterion is almost impossible to uphold as, as is demonstrated in Section 4.b, differing linguistic versions produce different nuances and so the judiciary will never be able to be faithful to every language version of the law. This also raises questions about whether the equality criterion can be met as when interpreting legislation that is available in 24 languages, the judiciary will necessarily privilege the language version that they deem to be in accordance with their perception of the legislative intent of the drafters, thereby affording certain language versions a higher status than others. Initial questions arise given that there is no logical or coherent explanation behind the interpretive method chosen by the ECJ when considering different language versions, and when or why it chooses to employ either the literal or teleological approach. This consequently partially negates the predictability of laws given that uncertainty about what method of interpretation may be employed creates uncertainty about what the interpretation could potentially be. ‘There is no certainty in predicting what the ECJ will do next. Since the deliberations or the personal opinions of individual judges are not publicly available, a look at the ECJ’s past legal reasoning is about

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<sup>53</sup> Luttermann, ‘Cultures in Dialogue’, p. 30.

<sup>54</sup> Solan, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, p. 279.

all that the legal community has to work with.<sup>55</sup> And thus, such a lack of legal predictability affects legal certainty within the ECJ as an institution.

#### **SECTION 4.b : LIMITED LEGAL CERTAINTY IN CASE LAW**

Examples throughout ECJ case law demonstrate the recurring issue of a lack of legal certainty caused by translation errors in legal documents. In fact, the ECJ has continually been faced with cases concerning linguistic discrepancies between different language versions of European law since its naissance.<sup>56</sup> In the case *Commission of the EU v. United Kingdom*<sup>57</sup> the ECJ found it necessary to compare the English, French, German, Italian, Portuguese, Spanish and Dutch versions of EU Directive 93/104 which concerned the minimum rest periods of workers. The equal authenticity of all language versions proved ineffective with the ECJ ruling, and after consideration of many language versions, the ECJ ruled that the English version of the Directive had been interpreted too narrowly to include mandatory time-off, whereas other language versions merely stated the minimum rest requirements within the working week of any employee within the Union.

The case of *Lubella v Hauptzollamt Cottbus*<sup>58</sup> demonstrates the possibility for completely inaccurate translation and the consequences of such. The case

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<sup>55</sup> Baaij, 'Fifty Years of Multilingual Interpretation in the European Union'. In: Tiersman and Solan eds. 2012. *The Oxford Handbook of Language and Law*, Ch. 15, p. 231.

<sup>56</sup> N. Urban, 'One legal language and the maintenance of cultural and linguistic diversity?', *European Review of Private Law*, 2000, p. 54.

<sup>57</sup> Case C-100/84, *Commission v. United Kingdom of Great Britain and Northern Ireland*, [1985] E.C.R. 11169.

<sup>58</sup> Case C-64/95, *Konservenfabrik Lubella Friedrich Buker GmbH & Co. KG v. Hauptzollamt Cottbus*, [1996] E.C.R. I-05105.

concerned the import of cherries within the Union, more specifically the import of “sour cherries”. Although almost all language versions of the regulation specified “sour cherries”, the German version had been mistranslated and instead referred to “sweet cherries”. In this instance there was no need for the ECJ to carry out its interpretive role as the error lay purely in the mistranslation as the German version was deemed to be inaccurate in its wording.

The given case examples would suggest that the ECJ, in not being able to fulfil the judicial function of uniformly applying the law due to the language issues of the European Union, has dealt with the problem of multilingualism in a rather unsatisfactory way. It could perhaps be suggested that in its attempt to ensure adherence to the principle of linguistic equality, the ECJ has sacrificed true legal uniformity.<sup>59</sup> The case law demonstrates that whether it be through the need for comparison across numerous language versions, or whether it be due to translation inaccuracies, the result is the same: the ability of the citizen to rely on their own native language version of a regulation, directive or article can never be assured and as such, neither can the legal certainty of Union legislation. The case judgement of *North Kerry Milk Products Ltd. v. Minister for Agricultural Fisheries* says it all:

The elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved.<sup>60</sup>

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<sup>59</sup> Urban, ‘One legal language and the maintenance of cultural and linguistic diversity?’, p. 55.

<sup>60</sup> Case C-80/76, *North Kerry Milk Products Ltd. v. Minister for Agricultural Fisheries*, [1977] E.C.R. 425, 2 C.M.L.R. 769 at 781

If the Court itself is admitting that the written word does not necessarily mean what it would normally mean, how can the Union's key value of the citizen having access to the law be served?

*{The table below serves to demonstrate that the frequency of cases in which linguistic issues have caused ambiguity has increased as the Union has enlarged. The concern of linguistic continuity has therefore never been more pertinent.}*<sup>61</sup>

Case Number	Case Name	Year
C-26/62	van Gend en Loos v. Nederlandse Administratie der Belastingen	1963
C-19/67	Soziale Verzekeringsbank v Van Der Vecht	1967
C-29/69	Erich Stauder v. City of Ulm	1969
C-6/74	Moulijn	1974
C-80/76	North Kerry Milk Products Ltd. v. Minister for Agricultural Fisheries	1977
C-30/77	Regina v. Bouchereau	1977
C-131/79	R v Secretary of State for Home Affairs, ex parte Santillo	1980
C-283/81	Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health	1982
1. E.C.R. 1193	Commission v. Kingdom of the Netherlands	1983
C-45/83	Ludwig-Maximilians-Universität München v Hauptzollamt München-West	1984
C-135/83	Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie	1985
C-19/83	Wendelboe v. L.J. Music APS	1985
C-90/83	Paterson v. Weddell and Co Ltd	1984
C-424/85	Frico v Voedselvoorzienings In- en Verkoopbureau	1987
C-100/84	Commission v. United Kingdom of Great Britain and Northern Ireland	1985
C-349/85	Denmark v. Commission	1988
7. E.C.R. 3921	Commission v. United Kingdom of Great Britain and Northern Ireland	1988
C-298/94	Annette Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken	1996
C-177/95	Ebony Maritime and Loten Navigation	1997
Joined Cases C-267/95, C-268/95	Merck v. Primecrown	1996
C-64/95	Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v. Hauptzollamt Cottbus	1996
C-13/95	Suzen v. Sehnacker Gabaudereinigung GmbH Krankenhausservice	1997

<sup>61</sup> This list is by no means exhaustive. Inconsistencies in translation and interpretive difficulties due to the multilingual nature of EU law is likely to take place at a much higher rate than demonstrated by this table. However it is difficult to assess at what level as it is only the most severe cases which are discussed in other academic research. What's more, as mentioned in footnote 42, legislative interpretation at the ECJ is not always due to EU law's multilingual nature.

C-296/95	The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac and Others	1998
T-60/96	Merck and Others v Commission	1997
C-236/97	Skatteministeriet v Aktieselskabet Forsikringsselskabet Codan	1998
C253/99	Bacardi GmbH v Hauptzollamt Bremerhaven	2001
C-257/00	Nani Givane and Others v Secretary of State for the Home Department	2003
C-152/01	Kyocera Electronics Europe GmbH v Hauptzollamt Krefeld	2003
C-428/02	Fonden Marselisborg Lystbadehavn v. Skatteministeriet	2005
C-28/03	Epikouriko Kefalaio v. Ipourgios Anaptixis	2004
C-135/03	Commission v. Spain	2005
C-250/03	Schulte v. Deutsche Bausparkasse Bardenia AG	2005
C-265/03	Simutenkov v. Ministerio de Educación y Cultura	2005
C-336/03	easyCar (UK) Ltd v. Office of Fair Trading	2005
C-341/04	Eurofood IFSC Ltd	2006
C-353/04	Nowaco Germany	2006
C-484/04	Commission of the European Communities v. United Kingdom	2006
C-5/05	Staatssecretaris van Financiën v B. F. Joustra	2006
C-13/05	Sonia Chacon Navas v. Eurest Colectividades SA	2006
C-63/06	UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos	2007
C-275/06	Productores de Musica de España (Promusica) v. Telefonica de España SAU	2008
C-54/07	Centrum voor Gelijkheid van Kansen en voor Racisme-bestrijding v. Firma Feryn NV	2008
C-375/07	Heuschen & Schrouff Oriental Foods Trading	2008
C-340/08	M and Others v. Her Majesty's Treasury	2010
C-131/12	Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González <sup>62</sup>	2014

Further demonstrating this point about lack of legal certainty raised above is the case of *Denmark v. Commission*<sup>63</sup> in which linguistic ambiguity surrounding the definitions of the words ‘meat’ and ‘fat’ arose with reference to Commission Regulation 187/80/EC. The ECJ stated that:

[t]here is no definition in Community law of the terms ‘meat’ and ‘fat’. Under those circumstances, the significance of those terms must be

<sup>62</sup> The aspect of inaccurate translation was not a feature of the case itself, but rather a feature of the judgement in that numerous inconsistencies were discovered in the Italian translation of the judgement which undermines its meaning.

<sup>63</sup> Case C-349/85, *Denmark v. Commission* [1988] E.C.R. 169.

determined by considering the general context in which they are used and their meaning in everyday language.<sup>64</sup>

It is this reference by the ECJ to 'meaning in everyday language' or 'ordinary, everyday use' that I believe creates the greatest linguistic ambiguity when comparing official language versions in order to discover legal intent. 'Language is not simply a reflection of reality, it is a conceptual filter through which we constitute reality and see the world',<sup>65</sup> therefore how is it possible for 'the ordinary meaning' of a text or the 'everyday use' of a word be the same across speakers of different languages in each and every member state? Each language reflects a unique world-view and culture complex, mirroring the manner in which a speech community has resolved its problems in dealing with the world, and has formulated its thinking, its system of philosophy and understanding of the world around it.<sup>66</sup> Hence, words will inevitably evoke the concept of a reality that a particular linguistic sphere has shaped, thus meaning that legal certainty within the European Union is potentially an impossible aspiration. 'If the laws mean very different things to the various members, whether because of legal, cultural or other differences among them, the project cannot succeed, since there will be no Rule of Law for the members to follow.'<sup>67</sup>

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<sup>64</sup> Case C-349/85, *Denmark v. Commission* [1988] E.C.R. 169, para 9.

<sup>65</sup> Phillipson, *English Only Europe? Challenging Language Policy*, p. 126.

<sup>66</sup> S. A. Wurm, 'Atlas of the World's Languages in Danger of Disappearing', Unesco [pdf], 2001, <<http://unesdoc.unesco.org/images/0012/001236/123609e.pdf>>, accessed 10 October 2013, p. 12.

<sup>67</sup> Solan, 'The Interpretation of Multilingual Statutes by the European Court of Justice', p. 279.

## CHAPTER 1. SECTION 5

### WHAT DOES THIS MEAN FOR THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION?

In his article 'The Interpretation of Multilingual Statutes by the European Court of Justice', Lawrence Solan argues that the ECJ's ability to compare different language versions brings out nuances that can help the investigator gain additional insight into the thoughts of the original drafter and for this reason predicts that the proliferation of languages in the EU actually aids the task of statutory interpretation, making it more likely that the court will come upon the intended goals of the legislation before issuing a ruling.<sup>68</sup> Aside from the argument that this practice may reveal more about the thoughts of the translator rather than the drafter, I would argue that the simple fact that linguistic versions can differ undermines the legal certainty aspects of predictability and the foreseeability of judicial outcomes.<sup>69</sup> As discussion in the chapters which follow will demonstrate at great length we must always keep in mind that any official drafter, translator or interpreter of EU law is bound by the linguistic sphere of their mother tongue, meaning that they will only be able to draft, translate or interpret European law within the cognitive limits allowed by their language. Moving between languages not only involves linguistic knowledge and understanding of each language, but also a knowledge of the diverse plethora of cultural traditions and histories experienced within the country of each language being translated from and into. And the problem with

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<sup>68</sup> Ibid. p. 293.

<sup>69</sup> E. Paunio and S. Lindroos-Hovinneimo also make this argument in, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and its Implication in EU Law', *European Law Journal*, vol. 16, no. 4, 2010, p. 410.

this is thus: ‘assuming that each national epistemic community of lawyers will understand the CJEU’s judgments in a different way, their uniform application across the Union could be seriously hampered’.<sup>70</sup> The lack of uniform application directly affects the ECJ’s authority as a supra-national judicial system and thus questions its legitimacy both practically speaking and democratically.<sup>71</sup> ‘As long as distinct European nations exist as socio-cultural realities, the legal languages of Europe will continue to reflect different socio-cultural backgrounds’ and thus never be truly uniform in nature.<sup>72</sup>

What is occurring is a situation in which legal certainty is trying to be created out of a system entrenched with linguistic uncertainty. This inevitably has consequences beyond the mere wording of the legislation in question. Legal certainty is an accepted necessary factor in the maintenance of the Rule of Law.

The *Secretary-General of the United Nations* defines the Rule of Law as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, ***equally enforced*** and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, ***equality before the law***, accountability to the law, fairness in the application of the law,

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<sup>70</sup> Łachacz and Mańko, ‘Multilingualism at the Court of Justice of the European Union: theoretical and practical aspects’, p. 84.

<sup>71</sup> In order to be democratically legitimate, the ECJ must guarantee access to judicial remedies on the basis of equality. See document on the fundamentals of democracy as outlined in: Inter-Parliamentary Union, *Democracy: Its Principles and Achievements*, Inter-Parliamentary Union, 1998, Geneva, available at <[http://www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf)> which states at point. 17:

“Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded. In order for these institutions and mechanisms fully to ensure respect for the rules, improve the fairness of the processes and redress injustices, there must be ***access by all to administrative and judicial remedies on the basis of equality*** as well as respect for administrative and judicial decisions both by the organs of the State and representatives of public authority and by each member of society.”, p. 6.

Further to this, the United Nations confirms the need for access and inclusiveness in democratically legitimate governance: “Freedom of expression and ***access*** to information by strengthening legislation and media capacities” and “People have a say in decisions that affect their lives and can hold decision-makers to account, based on ***inclusive*** and fair rules”. See United Nations, ‘Global Issues: Democracy and the United Nations’, *United Nations* [webpage], available at <[http://www.un.org/en/globalissues/democracy/democracy\\_and\\_un.shtml](http://www.un.org/en/globalissues/democracy/democracy_and_un.shtml)>, accessed 23 March 2016.

<sup>72</sup> Ibid. p. 85.

separation of powers, participation in decision-making, **legal certainty**, avoidance of arbitrariness and procedural and legal transparency. (my formatting)<sup>73</sup>

Given that the above case examples demonstrate that the complications arising from multilingualism when interpreting legislation diminish legal certainty, the equal enforcement of the law *and* the equality of all language versions, it could be argued that this central aspect of the Rule of Law is not upheld by the European Union.

Referring to Art.6(2) of the EU Treaty which affords respect of fundamental rights as guaranteed by the European Convention on Human Rights, Schilling outlines the requirements the Rule of Law posits for European legislation. Accessibility and foreseeability of the law are paramount to the Rule of Law being adhered to in that without open publication of the law, and without the effects of the law being sufficiently clear, the citizen is unable to see and foresee the consequence of the law that they must adhere to:

by choosing uniform interpretation, the ECJ necessarily privileges some language versions of laws over others. [...] [T]his jurisprudence fail to fulfil the corresponding promise made to the citizens, and, as concerns the language versions which do not contribute to the interpretation finally maintained, is apt to interfere with the principle of foreseeability of legal consequences, inasmuch as the citizen is entitled to rely on his or her own language version of the law interpreted.<sup>74</sup>

If the ECJ is referring to different language versions in its interpretation of the law, does that mean it is expecting citizens to do the same in order to ensure compliance with the law? Surely not, as such a necessity significantly restricts the citizens' access to said law and thus the accessibility requirement of the Rule of Law is inevitably lost. Schilling attempts to counter the lack of

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<sup>73</sup> United Nations Rule of Law, 'What is the Rule of Law?', *United Nations* [webpage], <[http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3)>, accessed 3 December 2012.

<sup>74</sup> Schilling, 'Language Rights in the European Union', p. 55.

foreseeability created by the multiplicity of legal languages by suggesting that any solution providing for only one authentic version of Community law would make that law more accessible than it is under the present state of the law.<sup>75</sup> It is here that my opinion diverges from that of Schilling as although I can see the how this would significantly enhance accessibility and foreseeability in that the citizen would only be required to look in one other version of the law than that in his/her native language, even being fluent in the language of the official text (given the linguistic arguments I discuss chapter 3 of this thesis), the citizen would not be able to truly understand the nuances and concepts evoked from a law in a language that is not his/her native language.

Schilling is not arguing for a Union-wide lingua franca, but suggesting one authentic version provokes similar arguments to those contesting the option of a lingua franca:

The language policy in the European Union is both ineffective and hypocritical, and its ideas of linguistic equality and multilingualism are costly and cumbersome illusions. Why have these illusions been kept up for so long? First, because the French cannot accept the decline of their own linguistic power. Second, because the politically correct ideologies of some sociolinguists constantly fuel opposition against the idea of English as a European lingua franca. And third, because powerful translators' lobbies fight for their *raison d'être*.<sup>76</sup>

However, despite the clear and evident problems caused by the multilingualism of the EU, the alternative of a lingua franca is even more problematic. If a lingua franca was chosen in order to avoid translation errors and the misinterpretation of law, the accessibility and foreseeability of the law would be even further restricted. Even with an understanding of the lingua franca

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<sup>75</sup> Ibid. p. 65.

<sup>76</sup> 'A Stateless Language that Europe must Embrace', The Guardian Weekly [webpage], 19 April 2001, <<http://www.guardian.co.uk/education/2001/apr/19/languages.highereducation>>, accessed 17 December 2012.

language, the citizen would not be able to truly evoke the same understanding of a word. Simone Galnert explains this idea very succinctly:

The interpreter's understanding of any rule is realised through her 'pre-understanding', ie via an anticipatory apprehension of meaning. Access to the text and to the question arising from it is already, perhaps, unconsciously, fashioned according to the historical tradition to which the interpreter belongs. [The law cannot be accessed] in any other way than through the prism of language, which is not an external and neutral tool, but the medium of interpretive traditions'.<sup>77</sup>

There is a generally accepted world-view that culture, history and tradition are implicit in a language. In the case of English, for example, it may be argued that language carries cultural baggage, and promotes the social, economic and political values of the UK.<sup>78</sup>

Comme la langue, le droit a dans ses origines, son développement et sa structure, un caractère foncièrement populaire et indigène qui manifeste le particularisme historique, culturel et national de chaque peuple. 'La langue et le droit ont une histoire, c'est-à-dire qu'il y a en eux un lien qui réunit le passé au présent, la nécessité à la liberté' écrit Grimm;<sup>79</sup> 'Le droit positif d'un peuple est partie intégrante de sa langue et comme celle-ci, prend naissance et se développe de manière organique', écrit quant à lui Gustave Hugo.<sup>80\_81\_82</sup>

Following on from this view of how the law and language work together we can see that equal integration of all linguistic groups would not be possible with a lingua franca. It would lead to a communication impossibility between the citizen and the governing political powers as the citizen would not be able to

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<sup>77</sup> Galnert, 'Speaking Language to Law: The case of Europe', p. 166.

<sup>78</sup> C. Longman, 'English as a Lingua Franca : A Challenge to the Doctrine of Multilingualism', *The Language Question in Europe and Diverse Societies*, Hart Publishing, 2007, p. 196.

<sup>79</sup> Leçon inaugurale prononcée par J. Grimm à l'Université de Berlin en 1841 : 'Über die Alterthümer des deutschen Rechts,' in VI. Schr., Bd 8, p. 547, cité par A. Dufour (1974) 164.

<sup>80</sup> G. Hugo, 'Les lois ne forment pas la seule source des vérités juridiques,' 4 (1815 :4) *Civilistisches Magazin* 117.

<sup>81</sup> Marie-Jeanne Campana, 'Vers un langage juridique commun en Europe?', *European Review of Private Law*, vol. 1, 2000, p. 35.

<sup>82</sup> English Translation: *As with language, the law, in its origins, development and structure has a fundamentally common and local nature which expresses the distinctive historical, cultural and national identity of each nation. Language and the law have a history, that is to say, that there is a link which reunites the past with the present, need with freedom. The substantive law of a nation is an integral part of its language and as such, comes into being and grows in an organic way.*

truly express their world view of a particular issue if they were forced to do so in a foreign language. This would inevitably lead to a linguistic hierarchy whereby native speakers of the lingua franca would have more effective communication possibilities with governing powers and potentially more means by which to influence the laws that govern them:

Democratic politics is politics in the vernacular. The average citizen feels at ease only when he discusses political questions in his own language. As a general rule, only elites are fluent in more than one language and have the chance to maintain and develop their linguistic skills continuously and feel at ease discussing political questions in different languages in a multilingual atmosphere.<sup>83</sup>

It would surely be an infringement on the Human Rights of every citizen if their access to laws by way of lack of understanding was not guaranteed. And surely such a right as freedom of speech would be infringed if that 'speech' had to be in a language other than your mother tongue.

The main linguistic problem for the EU lies with the fact that perfect translations are, strictly speaking, impossible because they require finding exact equivalents where none exist.<sup>84</sup> The problem does not always lie with finding an exact linguistic translation, but more with finding one which is functional, practical and teleological. We cannot have a single legal language across the EU because there is no single culture, history or language of communication across the EU. It therefore could be argued that the only possible hope to have any sort of political and cultural homogeneity in a political entity is through a common, *native*, language. Practically speaking, without this possibility in the supranational entity of the European Union we

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<sup>83</sup> W. Kymlicka, *Politics in the Vernacular*, Oxford, Oxford University Press, 2001, p. 214.

<sup>84</sup> Robert Huntington, 'European Unity and the Tower of Babel', p. 328.

must make our choice from the lesser of two evils: we either accept that, with the equality of all official, working languages comes the fact that the legal and linguistic certainty of European law cannot be guaranteed, and so the existence of accessibility and foreseeability aspects of the Rule of Law with the sphere of the European Union is therefore questionable, as well as the fact that the multilingual nature of the EU is an obstacle to creating closer ties between its citizens and potentially the development of further political or even economic activity. Or, we decide upon a lingua franca which would most certainly alienate citizens from having a true political voice which demonstrates the world view encoded in their native language. That being said, there are most definitely solutions to the language problems of the EU that lie outside the realm of practical linguistic solutions. Rather than solve the problem practically it would serve better to delve further into the deeper problems multilingualism causes by understanding the democratic implications of multilingualism at the EU level. By doing so, and by understanding language as a concept we can unearth the reasons why language plurality causes such issues and thus resolve it in a more conceptual way instead of putting a short term solution in place. Given this conclusion the following chapter explores the wider democratic implications of the problems caused by multilingualism at an institutional level discussed in this chapter (in particular the implications for legal certainty (as a significant feature in formal definitions of the Rule of Law) and minority language rights will be discussed). This is followed by an exploration of language as a concept by exploring Western linguistic theories on language as a means of then exploring a more conceptual and philosophical solution to the problems created by multilingualism in the EU.

## **CHAPTER 2.**

### **MULTILINGUALISM IN THE EUROPEAN UNION: THE IMPLICATIONS FOR LINGUISTIC HUMAN RIGHTS AND ADHERENCE TO CERTAIN ASPECTS OF THE RULE OF LAW**

#### **INTRODUCTION**

The previous chapter introduced the idea that the multilingual situation of the European Union can pose some serious questions regarding the legal certainty aspect of the Rule of Law, and also regarding the required need for foreseeability and accessibility of the law. Such procedural, formal features of the Rule of Law must be observed given that adhering to the Rule of Law is necessary for any democratic “state-like” entity. Instances such as the case examples previously discussed in *Chapter One* demonstrate how complications arising from multilingualism can diminish legal certainty, the equal enforcement of the law *and* the equality of all language versions. In fact, accessibility and foreseeability of the law are referred to in Article 6(2) of the EU Treaty which affords respect of fundamental rights as guaranteed by the European Convention on Human Rights, referring to them as paramount aspects of the Rule of Law that must be adhered to given that without open publication of the law, and without the effects of the law being sufficiently clear, the citizen is unable to see and foresee the consequence of the law that they must adhere to. Thus, the practice of the European Courts of Justice in referring to different language versions of the law in order to determine intent and meaning notably restricts the citizens’ access to said law, and hence the formal accessibility requirement of the Rule of Law is inevitably lost. The consequence of such is

surely an infringement on the human rights of every citizen if their access to laws by way of lack of understanding cannot be guaranteed. And, as mentioned in the previous chapter, surely such a right as freedom of speech would be infringed if that 'speech' had to be in a language other than your mother tongue unless, of course, we completely redefine the meaning of 'freedom'. If both the EU's ability to uphold human rights and its ability to uphold certain features of the Rule of Law are put into question, the democratic legitimacy of the EU at large becomes uncertain given that both must be present for a democracy to legitimately exist.

This chapter explores the extent of the human rights issues this linguistic inadequacy provokes with a means of revealing whether the EU's current linguistic regime could be said to infringe the linguistic human rights of its citizens. This will then lead into discussion on how any potential human rights issues resulting from the Union's current multilingual linguistic regime could possibly affect the standing of the Rule of Law in the political structure of the EU as a whole.

The chapter firstly considers the key international instruments on human rights in order to better understand the extent of linguistic human rights within the international community so that following discussion can debate whether or not the EU, as an intergovernmental organisation, can be said to be either legally or morally in breach of linguistic human rights. This is because as an Intergovernmental Organisation, the EU is bound by customary international law and thus has indirect obligations arising from member state agreement and

accession to certain international human rights instruments.<sup>85</sup>

An in-depth discussion on the extent of linguistic rights within certain, specific international and European treaties and conventions reveals that language rights are ill-defined across all international instruments and that the minimal protection they are in fact granted is not done so through specific language rights, but through general human rights that have an implied linguistic dimension. Discussion then moves on to the implications the Union's multilingual situation at large has on the EU's ability to truly uphold the Rule of Law, as well as considering the implications poorly defined and implemented language rights has on the Rule of Law's position at EU level.

The aim of this chapter is not to offer in depth discussion on the law relating to linguistic and minority language rights, however it is necessary to consider and critically discuss the legislation and subsequent literature on minority language rights given that this demonstrates positive action in the field of international linguistic rights.<sup>86</sup> Rather, the aim is to look at the international and EU specific linguistic legislation and obligations that the EU is bound by in order to ascertain whether or not the Union, in its current linguistic regime and approach to multilingualism, is in fact breaching the human rights of its citizens by not guaranteeing true legislative and practical equality to all of the languages

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<sup>85</sup> T. Ahmed and I. de J. Butler, 'The European Union and Human Rights: An International Law Perspective', *The European Journal of International Law*, vol. 17, no. 4, 2006, p. 771.

<sup>86</sup> There is a wealth of international law materials on the rights of minorities. For example, see: P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford 1991; P. Macklem, 'Minority rights in international law', *International Journal of Constitutional Law*, vol. 6, no. 3-4, 2008, pp. 531-552; G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, Dordrecht, Martinus Nijhoff, 2009; T., Li-ann, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century*, Dordrecht, Martinus Nijhoff, 2005; M. Weller, ed. *Universal Minority Rights: A Commentary on the Jurisprudence of the International Courts and Treaty Bodies*, Oxford, Oxford University Press, 2007.

spoken within its borders. The chapter also aims to demonstrate a lack of adherence to the Rule of Law in a “thin”, procedural sense by exemplifying that certain procedural features of the Rule of Law, notably those of foreseeability and accessibility of the law, cannot be adhered to given the multilingual nature of the European Union. As such, the above considerations will serve to highlight deeper, more democratically significant issues about the EU than the practical problems discussed in the previous chapter given that in order to be deemed as democratically legitimate, the EU must adhere to upholding the Rule of Law and protecting human rights. By exploring the language situation of the EU at this depth, I aim to gain a deeper understanding of the democratic implications of multilingualism in order to be one step closer to discovering a viable democratically conceptual solution to the practical problems of multilingualism.

## **CHAPTER 2. SECTION 1**

### **THE EXTENT OF LINGUISTIC HUMAN RIGHTS IN INTERNATIONAL LAW**

In order to understand exactly how the linguistic human rights of the citizens of the European Union are negatively affected by the problems arising from multilingualism we must first understand the exact nature and meaning of these rights that are potentially being infringed and where they come from. In doing so I aim to firstly ascertain whether the European Union is in fact bound to protect these rights at all, and secondly demonstrate how the multilingual nature of the EU not only causes practical problems but also leads to democratically significant problems. Given that competence on linguistic diversity and minority rights remains with the individual member states rather

than with the intergovernmental organisation of the EU, when considering issues relating to the potential infringement of human rights by the European Union it is necessary to highlight and discuss international human rights law as the member states of the European Union have agreed to certain international declarations and are thus bound by them which directly affects the position and legislative boundaries of the EU in this matter. 'As an intergovernmental organization and subject to international law, the EU can be said to be bound by customary international law (binding on all nations without the need for formal treaty obligations), treaties to which it is a party, and human rights treaties entered into individually by Member States through the principle of succession or substitution.'<sup>87</sup> International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.<sup>88</sup>

The legal bases upon which human rights are applicable to all UN activities can be derived first of all from the inherent nature of human rights. Human rights are part of being a human being and therefore such rights are automatically part of the legal framework applicable to those with power to affect the enjoyment of those rights. Secondly, there is a delegation by member states to the UN of their responsibilities under human rights law. States cannot set up an autonomous international actor that can obviate human rights standards that the states themselves are bound by.<sup>89</sup>

Hence, discussing key international instruments is of indubitable relevance given that they impose a certain obligation on the EU as an international organisation made up of member states that are signatories to such

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<sup>87</sup> T. Ahmed and I. de J. Butler, 'The European Union and Human Rights: An International Law Perspective', p. 771.

<sup>88</sup> International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980, ICJ Rep 73, pp. 89-90.

<sup>89</sup> White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations', in N. White and D. Klaasen (eds), *The UN, Human Rights and Post Conflict Situations*, 2005, p. 463, 464.

international instruments.

## **SECTION 1.a : KEY HUMAN RIGHTS INSTRUMENTS INFLUENCING THE EUROPEAN UNION'S APPROACH TO HUMAN RIGHTS**

The key international and European instruments regarding language rights tend to be those specifically concerning the protection of minority languages and cultures. Key United Nations instruments include; Article 27 of the<sup>90</sup> International Covenant on Civil and Political Rights, which affords minority rights protection to minorities in all signatory states; the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities 1992<sup>91</sup>; and the International Convention on the Elimination of Racial Discrimination 1965<sup>92</sup>. In an exclusively European context, the Council of Europe enacted the European Charter for Regional or Minority Languages (ECRML) 1992<sup>93</sup> and the Framework Convention for the Protection of National Minorities (FCNM) 1995<sup>94</sup>. However the most generally applicable and yet most important documents in the field of human rights are, internationally speaking the Universal Declaration of Human Rights<sup>95</sup>, adopted

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<sup>90</sup> Article 27, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171,

<<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>, accessed 2 November 2013.

<sup>91</sup> UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135,

<<http://www.un.org/documents/ga/res/47/a47r135.htm>>, accessed 2 November 2013.

<sup>92</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195,

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>, accessed 2 November 2013.

<sup>93</sup> Council of Europe: Committee of Ministers, *European Charter for Regional or Minority Languages: Application of the Charter in Denmark, 2nd Monitoring Cycle*, 26 September 2007, ECRML (2007) 6, <[http://www.coe.int/t/dg4/education/minlang/report/EvaluationReports/DenmarkECRML3\\_en.pdf](http://www.coe.int/t/dg4/education/minlang/report/EvaluationReports/DenmarkECRML3_en.pdf)>, accessed 2 November 2013.

<sup>94</sup> Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157, : <<http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>>, accessed 2 November 2013.

<sup>95</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at <<http://www.un.org/en/documents/udhr/>>, accessed 2 November 2013.

and proclaimed by the General Assembly of the United Nations in 1948, and in a distinctively European context, the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR)<sup>96</sup>.

Yet, before considering exactly what rights these instruments provide for the citizens of the European Union in respect to language, it is fundamental to highlight the fact that the EU is not bound by either the European Convention on Human Rights or the case law and judgements of the European Court of Human Rights, despite the Lisbon treaty outlining that this should happen by 2012.<sup>97</sup> This means that in order to receive protection from the European Court of Justice, the human right in question must first be accepted as a 'Community' human right, i.e. have recognition within the Union's legal order, which the articles of the ECHR do not necessarily or automatically have. International (and domestic) law is relevant to the law of the European Union only in the sense that it provides guidance or inspiration for the substantive content of the 'general principles'.<sup>98</sup>

The special significance given to the ECHR<sup>99</sup> is a positive step in the EU's

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<sup>96</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, <[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)>, accessed 2 November 2013.

<sup>97</sup> See: H. Brady, 'The EU and human rights: a new era under the Lisbon treaty?', Centre for European Reform, for OSI under the Open Society Initiative for Europe (OSIFE) [pdf], May 2010, <[http://www.eepa.be/wcm/dmdocuments/OSI\\_Lisbon\\_Treaty\\_Implications\\_2010-06.pdf](http://www.eepa.be/wcm/dmdocuments/OSI_Lisbon_Treaty_Implications_2010-06.pdf)>, p. 3, accessed 5 November 2013. For more current discussion on the ECJ's decision to block EU adherence to the ECHR, see: A. Duff, 'EU in deep trouble with top court', *EurActiv* [webpage], 8 January 2015, <<http://www.euractiv.com/sections/justice-home-affairs/eu-deep-trouble-top-court-311090>>, accessed 3 March 2015; and Peers, Steve, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection', *EU Law Analysis* [webpage], 18 December 2014, <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>>, accessed 6 March 2015.

<sup>98</sup> Case 29/69, *Stauder v. Ulm* [1969] ECR 4119; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhrund Vorratsstelle Getreide* [1970] ECR 1125; Case 4/73, *Nold v. Commission* [1974] ECR 491; Case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v. Germany* [1989] ECR 2609; Case C-13/94, *P v. S and Cornwall CC* [1996] ECR I-2143; Case C-36/02, *Omega* [2004] ECR I-9609. For further reading on general principles and human rights, see P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (3rd edn., 2003), chs 8-9; T. Tridimas, *The General Principles of EC law* (1999); J. Usher, *General Principles of EC Law* (1998).

<sup>99</sup> See, e.g., Case C-94/2000, *Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes (Commission of The European Communities, Third party)*

recognition of the relevance of human rights principles outside the Community system to developments within the Community system. However, as mentioned, the EU is not bound to comply with the letter of the ECHR or case law of the European Court of Human Rights (ECtHR). [...] The ECJ does refer to other international human rights instruments when considering the content of fundamental rights in EU law. [...] However, it seems that Advocates General will not generally rely on the International Covenant on Civil and Political Rights without good reason,<sup>100</sup> and although the ECJ occasionally acknowledges the existence of the ICCPR, it is difficult to find an example where it has actually relied on its provisions.<sup>101</sup> From the ECJ's perspective, then, it is apparent that, apart from the ECHR, other international human rights treaties are not given a great deal of weight. Moreover, human rights treaties are considered only as useful guides to human rights protection within the EU. They are not directly legally binding upon the institutions.<sup>102</sup>

As we know, the principle of supremacy dictates that in a conflict of laws between EU law and national, domestic law, EU law is supreme. However, with respect to individual domestic laws regarding the protection of human rights, the ECJ has expressly noted that Union law should not threaten the protection of human rights, despite not being directly bound by the provisions of the ECHR.

## **SECTION 1.b : HOW ARE LANGUAGE RIGHTS DEFINED?**

Given this standpoint and the apprehension that, in spite of a lack of legal

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[2004] ICR 66, para.23; Cases 46/87 & 227/88, *Hoechst AG v Commission* [1989] ECR 2859, para. 13.

<sup>100</sup> E.g., Case C-168/91, *Konstantinidis v. Stadt-Altensteig* [1993] ECR I-1191, where AG Jacobs referred to the ICCPR because the ECHR had no specific rule on name changes (see para. 35 of the AG's Opinion). In Case C-337/91, *Van Gemert-Derks* [1993] ECR I-5435, AG Darmon considered the ICCPR because it was expressly raised by the national court questioning its request for a preliminary ruling (see para.2 of AG's Opinion). This attitude towards the ICCPR as a treaty of second resort by the AGs may be changing. See, e.g., Opinion of AG Tizzano, para. 95, in Case C-397/03, *Archer Daniels Midland Company and Archer Daniels Midlands Ingredients Ltd v. Commission*, 7 June 2005, referring to ICCPR Art. 14(7); Opinion of AG Kokott, para. 41, in Case C-105/03, *Criminal proceedings against Maria Pupino* 11 Nov. 2004.

<sup>101</sup> For the most part where the ECJ does consider the ICCPR, it is as a prelude to finding that it is not relevant to the circumstances of the case: Case C-249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621, para. 44 relating to ICCPR, Art. 2(1); Case C-60/92, *Otto BV v. Postbank NV* [1993] ECR I-5683, para. 11 relating to ICCPR, Art. 14; Case 374/87, *Orkem v. Commission* [1989] ECR 3283, para. 31 relating to ICCPR, Art. 14. The CFI has been more ready to rely on the ICCPR in recent cases.

<sup>102</sup> Ahmed and Butler, 'The European Union and Human Rights: An International Law Perspective', 2006, pp. 774-775.

obligation, the institutions of the European Union (more specifically the ECJ) find moral direction from such human rights instruments as the ECHR, and in acknowledging the relevant international and European instruments the questions must then be posed: what exactly are the language rights that these instruments afford and how are they defined? At this point it rather quickly comes to light that although numerous international and domestic instruments have been enacted regarding linguistic rights protection since the United Nations International Declaration of Human Rights in 1948, the exact nature, definition and extent of these rights has not yet been clearly termed, meaning that they grant very limited rights. The right to use whatever language you chose in a public forum/in public life (life that interacts with the state) is not enshrined in any international human rights document. The European Convention on the Protection of Human Rights and Fundamental Freedoms 1950,<sup>103</sup> like its international counterparts, makes no direct mention of a right to freely use any language of one's choosing. In fact, 'the practical meaning of language rights has not yet been established anywhere'.<sup>104</sup> It would seem that the problem with language rights within these instruments is that the protection they are granted is not done so through specific language rights, but through general human rights that have an implied linguistic dimension, such as a right to anti-discrimination measures, freedom of expression, of assembly and association and rights to respect for private and family life.<sup>105</sup> Article 19 of

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<sup>103</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), 4 November, 1950.

<sup>104</sup> D. A. Kibbee, "Presentation: Realism and Idealism in Language Conflicts and Their Resolution", in Douglas A. Kibbee (ed.), *Language Legislation and Linguistic Rights: Selected Proceedings of the Language Legislation and Linguistic Rights Conference, the University of Illinois at Urbana-Champaign, March 1996*, J. Benjamin Publishers, Amsterdam, Philadelphia, 1998.

<sup>105</sup> Schilling, 'Language Rights in the European Union', *German Law Journal*, vol. 9, 2008, p. 1225..

both the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights are both examples of international recognition of expressive rights of peoples.<sup>106</sup>

Freedom of language as a universal right is not territorially circumscribed and everyone is entitled to it, whatever the language s/he speaks. Freedom of language includes the right to use one's mother tongue or any other language, both in speech and in writing. Linguistic intolerance and repression of non-dominant languages is regarded to be inconsistent with fundamental rights. Freedom of language only guarantees the right to freely determine one's linguistic behaviour. Its scope is the private sphere. It does not deal with a particular need of freedom of minorities but a general and abstract freedom: individuals are regarded in their abstract nature, not as members of the majority or the minority.<sup>107</sup>

Despite describing freedom of language as a 'universal right', Xavier Arzoz is quick to qualify this by highlighting that the scope of this universal right remains in the private sphere. The right of freedom of expression and opinion has an implied linguistic dimension as this freedom includes the freedom to choose the language of expression: 'A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice'.<sup>108</sup> Thus meaning that although it is not permissible to discriminate based on a citizen's *private* right to express themselves in the language of their choice, *publicly* the state and therefore the EU as an international organisation is not necessarily obliged to recognise this language and converse/interact with the citizen in the language that they chose. This attitude towards universal language rights is directly reflected in the

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<sup>106</sup> R. K. M. Smith, 'Moving Towards Articulating Linguistic Rights – New Developments in Europe', *MSU-DCL Journal of International Law*, vol. 8, 1999, p. 441.

<sup>107</sup> X. Arzoz, 'Accommodating Linguistic Difference: Five Normative Models of Language Rights', *European Constitutional Law Review*, vol. 6, 2010, p. 107.

<sup>108</sup> United Nations Human Rights Committee, 5 May 1993, Forty-seventh session Communications Nos. 359/1989 and 385/1989, available at <<http://www1.umn.edu/humanrts/undocs/html/359-358-1989.html>>, accessed 16 Nov 2013.

European Union's approach to language equality, in that official languages, regional minority languages and dialects are all afforded differing levels of Union wide recognition (as was discussed in the previous chapter). The linguistic regime of the European Union distinguishes languages into separate categories: 1. *treaty languages*, 2. *official languages*, 3. *working languages* and 4. *languages of the case* leading to an undeniable divergence between the motto of "United in Diversity" and the actual limited linguistic diversity in the procedural workings of each institution.

As was revealed in earlier discussion in this chapter, despite preconceptions, the EU is not technically, legally bound to the letter of the provisions laid out in international human rights instruments. Thus meaning that the question of whether or not it is adhering to customary international law and international human rights documents, and whether a lack of adherence would result in a breach of a citizen's human rights may not be a valid question at all. Does this then mean that the EU is not in fact breaching the human rights of its citizens in not equally recognising all mother tongues that exist within its borders? What then is the EU bound by?

The ICJ has found that the 'rules concerning the basic rights of the human person' in international law are *erga omnes* in nature. That is, they are considered to be 'the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.' Thus, [...] any breach by the EU of human rights in [Customary International Law] CIL, even if it does not necessarily disclose a violation of international law as between the Member States, will amount to a violation of international obligations owed to all other states.<sup>109</sup>

Be that as it may, this does not mean that the EU would be in violation of any

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<sup>109</sup> Ahmed and Butler, 'The European Union and Human Rights: An International Law Perspective', 2006, p. 779.

human rights given that even under Customary International Law there is no legal obligation to actively promote language equality or the even equally recognise all languages in public life. All that the EU would be bound by under CIL is an obligation to respect the right to use any language in private life.

In a strictly European context, Article 342 of the Treaty on the Functioning of the European Union provides that 'The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations'.<sup>110</sup> Although this provides for the equality of the official languages of the Union, there is no provision in any treaty that provides for the equality of *all* languages. The judgement given by the ECJ in the *Kik* affair<sup>111</sup> demonstrates this lack of commitment by the institutions of the European Union to uphold their promise of equality of languages as the ECJ judged that the references to language made in the EC Treaty 'cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances'.<sup>112</sup>

Given the lack of obligation imposed in any international document, along with the ECJ's assertion in the *Kik* judgement that Union treaties do not bind the institutions of the Union to confer the same linguistic rights on each and every citizen within the borders of the EU, it cannot be concluded that the multilingual

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<sup>110</sup> Article 342, European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>>, accessed 5 October 2013.

<sup>111</sup> Case T-120/99, *Cristina Kik v. OHIM* 2001 E.C.R. II-2235, para. 58, upheld on appeal (Case C-361/01 *Cristina Kik v. OHIM* 2003 E.C.R. I-8283, para. 82).

<sup>112</sup> *Kik v. OHIM* 2001 E.C.R. II-2235.

regime of the EU technically breaches the linguistic human rights of any of its citizens. Despite the lack of legal obligations imposed on them, the institutions of the EU have demonstrated a continuous flow of positive action in the area of language promotion. What follows is a brief consideration of such positive actions as a means of assessing whether this action is enough, or whether it is merely a means of keeping the more serious issue at bay. This leads to the question being posed whether the current inequality practised in the linguistic regime of the EU should in fact constitute a technical sanction enforceable breach or not.

#### **SECTION 1.c : POSITIVE ACTION TAKEN BY EU INSTITUTIONS IN THE PROTECTION OF LANGUAGE RIGHTS <sup>113</sup>**

As the linguistic rights are not specifically prescribed for and are rather derived from other, more concrete rights such as freedom of expression, it would not be wrong to describe them as weak, negative rights. No European or international instrument demands that languages (minority or not) be actively promoted or demands governments to enforce positive steps in order to maintain their existence. Surely in a world where it is estimated that over 200 languages have been lost over the last three generations and where it is believed that 90% of the languages currently spoken in the world will be extinct

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<sup>113</sup> Discussion of the European Charter of Fundamental Rights (ECFR) has been omitted given that it makes minimal reference to linguistic or minority rights and thus I chose not to include in in a section which specifically concentrates on **positive action** taken by EU institutions. The only references to linguistic equality in the ECFR appear at Article 21 which states: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited"; and at Article 22 which states: "The Union shall respect cultural, religious and linguistic diversity".

by 2050<sup>114</sup> the airy and weightless wording such as ‘should’ and ‘encourage’ within these international instruments should be replaced by more forceful language imposing enforceable consequences for non-adherence.

The fact that the exact nature, definition and extent of these rights has not yet been clearly termed, and the limited rights this thus grants does not however mean that the EU does not take positive action in the promotion of language and minority linguistic rights within its borders.<sup>115</sup> The ECJ is certainly under an obligation to respect the language right of a citizen in a public forum is that of criminal proceedings. The European Convention on Human Rights provides that anyone facing a criminal charge should be provided with the services of an interpreter, free of charge, if he/she doesn’t understand the language of the trial.<sup>116</sup> But as the ECJ is not necessarily bound by the provisions of the ECHR, this right to a fair trial was safeguarded in the 2010 Directive in the Right to Interpretation and Translation in Criminal Proceedings.<sup>117</sup>

In addition to this, there are a number of Commission initiatives and policies

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<sup>114</sup> D. Ward, ‘Language cull could leave people speechless’, The Guardian [webpage], 25 May 2002, <<http://www.theguardian.com/uk/2002/may/25/research.world>>, accessed 3 November 2013.

<sup>115</sup> Although not an institution of the European Union, the Council of Europe has also taken steps to recognise and promote language and minority language rights. In the field of education, Article 14(1) of The Council of Europe’s Framework Convention for the Protection of National Minorities states that ‘the parties undertake to recognise that every person belonging to a national minority has the rights to learn his or her minority language’, with Article 14(2) proscribing that ‘the Parties shall endeavour to ensure, as far as is possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught in the minority language or for receiving instruction in this language’. The Council of Europe has a number of initiatives in place to promote linguistic diversity and language learning in the field of education which are carried out within the framework of Article 2 of the European Cultural Convention. Once more though, upon reading the wording of both the Framework Convention and the initiatives undertaken by the Council of Europe, there is never any affirmative obligation imposed to compel them to treat languages of any status, official or minority, with any equality. Encouragement and promotion seems to be the order of the day with no mention of ‘must’, ‘obliged’, ‘compelled’, ‘required’ or other such duty imposing language.

<sup>116</sup> Justice: Building a European Area of Justice, ‘Right to Interpretation and Translation’, European Commission [online], Last updated 15 June 2015, <[http://ec.europa.eu/justice/criminal/criminal-rights/right-translation/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-rights/right-translation/index_en.htm)>, accessed 2 November 2013.

<sup>117</sup> Council Directive on the right to interpretation and translation in Criminal Proceedings, 2010/64/EU, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>>, accessed 21 November 2013.

which have the manifest aim of promoting language learning and minority language use across the states of the European Union. To name a few: The European Bureau for Lesser Used Languages, founded in 1982, although now no longer in existence, had financial support provided by the Commission and aimed to strengthen fellowship and collaboration between minority language communities and promote and support diverse communities. The European year of languages 2001 aimed to raise the awareness of the wealth of linguistic diversity within the European Union, encourage multilingualism and to encourage lifelong learning of languages through specific funded initiatives and activities across the member states.<sup>118</sup> In 2004 the European Commission appointed a Commissioner with responsibility for education, training, culture and multilingualism with the direct role of promoting “the peaceful co-existence of people from many different language communities”, and to facilitate the protection of cultural identity and linguistic diversity.<sup>119</sup> And most recently active is the European Commission’s action plan “Promoting Language Learning and Linguistic Diversity” (2004-2006), which aimed to encourage all European citizens to be able to communicate in at least two languages other than their mother tongue.<sup>120</sup>

The maintenance of the cultural heritage of European states is seen as a key aim of the European Union in order to preserve the individual customs and

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<sup>118</sup> Europa Summaries of EU Legislation, ‘European Year of Languages 2001’, *Eur-Lex* [online], Last updated 6 December 2005, <[http://europa.eu/legislation\\_summaries/education\\_training\\_youth/lifelong\\_learning/c11044\\_en.htm](http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/c11044_en.htm)>, accessed 2 December 2013.

<sup>119</sup> R. G. Parry, ‘History, human rights and multilingual citizenship: conceptualising the European Charter for Regional or Minority Languages’, *Northern Ireland Legal Quarterly*, 2010, p. 331.

<sup>120</sup> Europa Summaries of EU Legislation, ‘Action Plan on Language Learning and Linguistic Diversity’, *Eur-Lex* [online], Last updated 13 September 2011, <[http://europa.eu/legislation\\_summaries/education\\_training\\_youth/lifelong\\_learning/c11068\\_en.htm](http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/c11068_en.htm)>, accessed 21 November 2013.

traditions of the area, a key element of which is the preservation of minority and regional languages. The European Charter for Regional or Minority Languages has been described as the most advanced of any international document in the area of language rights.

[The Charter] may be expected to *help*, in a measured and realistic fashion, to assuage the problem of minorities whose language is their distinguishing feature, by enabling them to feel at ease in the state in which history has placed them. Far from reinforcing disintegrating tendencies, the *enhancement of the possibility of use* of regional or minority languages in the various spheres of life can only *encourage* the groups who speak them to put behind them the resentments of the past which prevented them from *accepting their place* in the country in which they live and in Europe as a whole.<sup>121</sup> (*my italics*)

Yet once again, as with the language used to describe the aims and objectives of the initiatives noted above, the Charter uses very weak language such as ‘help’, ‘enhance’ and ‘encourage’, none of which imposes any legal obligation on the institutions of the European Union to guarantee the language equality of minority languages and regional dialects across the member states. As Rhona Smith comments:

The Preamble to the Charter makes it clear that its overriding purpose is cultural; the protection and promotion of regional and minority languages as a threatened aspect of Europe's cultural heritage. The Charter aims directly at the language, not at the speakers, since there is no individual or group rights for speakers of the language, although the implementation of the Charter *vis-a-vis* a given language will naturally have repercussions for the lives of its speakers.<sup>122</sup>

What this suggests then is that the EU is protecting languages in the abstract sense. The value of preserving all languages that are spoken within the borders of the EU seems to be understood and appreciated by the EU given the cultural heritage it carries with it, yet the actual function of language as a

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<sup>121</sup> Council of Europe, *European Charter for Regional or Minority Languages*, 4 November 1992, ETS 148, available at <<http://www.refworld.org/docid/3de78bc34.html>>, accessed 22 March 2016.

<sup>122</sup> R. K.M. Smith, 'Moving Towards Articulating Language Rights – New Developments in Europe', p. 444.

communicative tool between citizen and 'government' (for want of a better word) has been disregarded. It would seem that despite its ethos of language preservation and the equal treatment of all languages, the limited recognition of the plethora of languages in the EU is one of the elements alienating groups of citizens from the institutions.

#### **SECTION 1.d : WHAT THIS ALL MEANS FOR THE FUTURE OF LINGUISTIC RIGHTS WITHIN THE EU**

What is clear is that whether considering the position of minority languages or whether considering the position of official, state languages, there exists only a mere moral obligation on the institutions of the EU to actively treat, practise and promote all languages equally. 'The literature on linguistic human rights is very hortatory and at times strident. It echoes "shalls" and "shoulds" and "musts".'<sup>123</sup> Not only that, but (as discussed in the previous chapter) given the day-to-day practising of only a few official languages, it could be argued that the EU is almost creating more minority languages in its maltreatment of all official languages other than French, English and possibly German, thus developing an ever more complex linguistic hierarchy in the daily workings of its institutions.

It can therefore be concluded that with regards to human rights there may not be a technical, legal breach of (loosely defined) linguistic human rights in that the EU is under no obligation to positively promote minority languages or recognise all languages equally in the public sphere. It can however be

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<sup>123</sup> C. B. Paulston, 'Epilogue: Some Concluding Thoughts on Linguistic Human Rights', 127 *International Journal of the Sociology of Language*, 1997, p. 188.

affirmatively stated that the European Union has an active language regime which finds its legal basis in the provisions of: firstly, by consulting and being morally bound in certain aspects by the European Convention on Human Rights; secondly, the legal obligation of its member states that are signatories to certain international human rights instruments; and finally, the most comprehensive international legal document in the field of linguistic rights and minority rights protection, The European Charter for Regional and Minority Languages.

Although there is no technical breach of linguistic human rights by the EU, this cannot be solely blamed on the European Union's lack of explicit laws protecting such rights. More so, the complete lack of defined, tangible linguistic rights in any international legislation has likely given the EU the impression that they do not need to expressly define or protect these rights either. There is also the fact that a large number of the international declarations and resolutions defending human rights are non-binding in nature, rather they merely set standards and offer moral standpoints that should be followed. The issue of definition (or lack of rather) is something that will be discussed at greater length in following sections regarding the Rule of Law. With regards to human rights however, it is evident that the lack of concrete definition in the area of linguistic human rights both in international documents and EU treaty provisions is what is allowing the current unequal linguistic regime to prevail.

## CHAPTER 2. SECTION 2

### THE EU AND THE RULE OF LAW

In the previous chapter, it was asserted that the multilingual situation in the European Union and the lack of linguistic equality practised by its institutions could possibly mean that the EU is failing to fulfil certain formal requirements of the Rule of Law; specifically the accessibility and predictability aspects of legal certainty. As such, the democratic legitimacy of the European Union may be questioned in that adhering to formal attributes of the Rule of Law is a necessary characteristic of democratic entities. However, if questioning whether the institutions of the EU are upholding certain requirements demanded by the Rule of Law, it is of course necessary to define exactly what the Rule of Law is in the context of the European Union. The principle of the Rule of Law 'has progressively become a dominant organisational paradigm of modern constitutional law and is commonly recognised as one of the foundational principles undergirding and legitimating all European constitutional systems'<sup>124</sup> even if it is not expressly written into the constitutions of those states. Although the EU may not be a state in the traditional sense of the word, the functions and roles its various institutions provide means that in order to be seen as a democratic entity, adherence to the Rule of Law is inevitably one of its founding principles.

The aim of the following discussion is not to debate the definition of the Rule of Law, or the relative merits of differing definitions; but rather the aim is simply

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<sup>124</sup> See, e.g., J. Kokott, 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy. A Comparative Analysis*, Baden-Baden, Nomos 1999, p. 97-102.

to reveal that the formal attributes of legal certainty, accessibility and foreseeability of the law feature in most procedural, “thin” definitions of the Rule of Law. In doing so, this will provide evidenced justification to declare that the various institutions of the European Union are not adhering to the Rule of Law if the legal certainty cannot be guaranteed, or if accessibility and predictability (foreseeability) of the law are not assured due to its multilingual nature and/or inadequate laws protecting procedural language equality.

## **SECTION 2.a : DEFINING THE RULE OF LAW**

Since the nineteenth century the British concept of the Rule of Law has been closely linked to the views of Albert Venn Dicey, and of course being of British origin, this is the idea that the author of this thesis connotes when defining the rule of law. Dicey gave three meanings to the Rule of Law:

First, the rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness; a man may with us be punished for a breach of law, but he can be punished for nothing else. [Secondly, the rule of law guarantees] equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. [And thirdly, the rule of law signifies] that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.<sup>125</sup>

Although much criticism and academic debate inevitably still exists about the principles both included and omitted from Dicey's idea of the Rule of Law, along

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<sup>125</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution 187* (1889, 10th ed. 1982, pp. 202-203).

with criticism surrounding its anachronistic nature, it cannot be denied that the principles he laid out by and large form the idea of Rule of Law held within the British constitution. In a much more recent consideration of what the Rule of Law constitutes, Lord Bingham identified eight principles as being integral to the Rule of Law in any democratic society, the first of which states that there must be 'accessible, intelligible, clear and predictable rules'.<sup>126</sup> Similarly in the modern era, American legal scholar Ronald A. Cass draws on the ideas of Hayek and Fuller when discussing the integral features that the Rule of Law should contain. Cass sees the Rule of Law as involving 'principles predictability', emphasising the importance of:

- 1) Predictability being based on rules;
- 2) Sufficiently clarity for predictability;
- 3) Accessibility.<sup>127</sup>

Cass further explains that the Rule of Law 'pulls society in the direction of knowable, predictable, rule-based decision making, toward limitations on the alignment of power with legitimacy'.<sup>128</sup>

Of course to directly apply Dicey's, Lord Bingham's, Cass's or any other theorist's definition of the Rule of Law when assessing the adherence of the institutions of the European Union to its principles would be unfair given the differences in meaning that traverse the different constitutions of the member states. What the definition of the Rule of Law is causes numerous problems in itself. Firstly because the specific elements that constitute the Rule of Law solely with regard

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<sup>126</sup> Lord T. Bingham, 'The rule of law', *The Cambridge Law Journal*, vol. 66, no. 1, 2007, pp. 67-85; B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004.

<sup>127</sup> S. Zifcak, *Globalisation and the Rule of Law*, Routledge, 2004, p. 14.

<sup>128</sup> R. A. Cass, *The Rule of Law in America*, The Johns Hopkins University Press, 2001.

to the national constitutions is a source of continuous debate for legal academics. And secondly because the different member states that constitute the European Union also have varying ideas of what the Rule of Law is that relate to the legal and cultural heritage of their state.

Not only is the Rule of Law associated with different possible types of relationships between State and law and between law and moral but it is also rooted in different European legal traditions, making the scope of this notion, which is quite vague in any case, also dependent on the legal tradition in which the concept is used.<sup>129</sup>

Certain academics advocate a 'strict separation between the Rule of Law as applied in the national context of the Member States and the Rule of Law to be employed within the system of Community law. It should be up to the EU law alone to define the essence of EU Rule of Law'.<sup>130</sup> This is because to incorporate the national ideas of member states as to what the boundaries of the Rule of Law are would privilege the citizens of the state whose ideas and boundaries of Rule of Law are incorporated and thus stop the EU Rule of Law from being a unifying concept that sees everyone as equal before the law. Such difference in what the Rule of Law means can even be seen by simply looking at the difference in how the term 'the Rule of Law' has been translated in the languages of different member states.<sup>131</sup> Gosalbo-Bono refers to the French term *Etat de droit*, the Spanish *Estado de Derecho*, the Italian *Stato di Diritto* and the German *Rechtsstaat*, noting the inclusion of the element of statehood in their terminology, something that the English *Rule of Law* does not connote. If this lack of cohesion exists purely in the terminology, surely the differences in

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<sup>129</sup> D. Kochenov, 'The EU rule of law: cutting paths through confusion', *Erasmus Law Review*, vol. 2, no. 1, 2009, p. 9.

<sup>130</sup> Kochenov, 'The EU rule of law: cutting paths through confusion', 2009, p. 7.

<sup>131</sup> R. Gosalbo-Bono discusses this at great length in his paper 'The Significance of the Rule of Law and its Implications for the European Union and the United States', in *University of Pittsburgh Law Review*, vol. 72, 2010-2011, p. 229.

meaning and the connotations emanating from the terminology must be ever more great. That being said, the Rule of Law most certainly contains common procedural themes across different formal theoretical models. Principles of certainty and equality, as well as accessibility, predictability and foreseeability tend to feature in most accounts, and it is these features that are integral to this body of work. Such formal characteristics can be seen in the United Nations' definition of the Rule of Law:

For the United Nations, the Rule of Law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>132</sup>

Despite the fact that UN declarations only provide a moral guidance rather than binding legal obligations, the member states of the EU, as democratic entities, are morally guided by the declarations of this international institution. Therefore this definition could be viewed as a common, even if non legally binding, Rule of Law that exists between the 28 Member States of the EU. Thus, I will use this definition as a comparative tool in order to assess whether the EU has a fully formed concept of the Rule of Law that its institutions must uphold and critically assess whether legal certainty, accessibility and predictability are in fact upheld despite the multilingual nature of the Union. Hence, following discussion on what the Rule of Law is and how it has developed for the institutions of the EU, the aforementioned definition will be used as a

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<sup>132</sup> United Nations Rule of Law, 'What is the Rule of Law?', United Nations [webpage], <[http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3)>, accessed 3 December 2013.

comparative tool.

## **SECTION 2.b : WHAT IS THE RULE OF LAW FOR THE INSTITUTIONS OF THE EUROPEAN UNION?**

How the Rule of Law has been described in relation to the European Union has changed over the years. Looking firstly at the preamble to the Maastricht Treaty of 1992 which affirms that the member states are 'Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the Rule of Law'.<sup>133</sup> This seems to be a weak acknowledgement that as a democratic entity the Community (as it was known at the time) should demonstrate acknowledgement that the Rule of Law forms part of its ethos, but nothing more. The Treaty on the European Union was amended in 1997 and included a provision in the form of Article 6(1) which stated that 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the Rule of Law, principles which are common to the Member States'.<sup>134</sup> 'Article 6(1) EU is clear that the Rule of Law is one of the 'principles which are common to the Member States'. How true is it, actually, given the huge discrepancies existing between the concepts corresponding to the Anglo-American 'Rule of Law' in the legal traditions of [27] other Member States?'<sup>135</sup> This was subsequently followed by the addition of Article 7 into the 1997 Treaty of Amsterdam which allowed for

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<sup>133</sup> European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at <<http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>>, accessed 13 July 2013, Preamble.

<sup>134</sup> Ibid. article 6(1).

<sup>135</sup> Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion', p. 17.

EU sanctions in the case of serious and persistent breach of the principles mentioned in Article 6(1) TEU by any member state.<sup>136</sup> Article 2 of the Treaty on the European Union makes distinct reference to the fact that the European Union is a Union based on the value of the Rule of Law:

[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non discrimination, tolerance, justice, solidarity and equality between women and men prevail.<sup>137</sup>

More recently, the 'Treaty of Lisbon contains many other elements aiming at the further democratisation of the functioning of the Union. It details and reinforces the values and objectives on which the Union is built, notably the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law (Article 1a, Lisbon)'.<sup>138</sup>

A more solid confirmation of the Union's position regarding the Rule of Law came quite early on however. The first example of the European Union's relationship with the Rule of Law being taken a step further to being described as a 'Community based on the rule of law' comes from the European Court of Justice's case judgement in the *Parti écologistes Les Verts* case in 1986. The ECJ stated that:

[T]he European . . . [Community] is a [Community] based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular... the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to

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<sup>136</sup> L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', *European Constitutional Law Review*, vol. 6, 2010, pp. 360-361.

<sup>137</sup> European Union, *Treaty on European Union (Consolidated Version)*, article 2.

<sup>138</sup> Europedia, 'EU's democratic progress with the treaty of Lisbon', *Europedia* [website], <<http://www.europedia.moussis.eu/discus/discus-1257417559-394879-4644.tkl>>, 2011, accessed 3 December 2013.

review the legality of measures adopted by the institution.<sup>139</sup>

That being said, the ECJ's approach to upholding the Rule of Law has been academically criticised in that the teleological approach to interpreting EU law which the ECJ has adopted is often said to collide with the principle of legal certainty: 'Interpreting EU legislation by reference to systemic and, in particular, teleological considerations is said to run contrary to ideas associated with the principle of legal certainty, especially that of predictability. On this view, teleological interpretation disregarding the wording of a rule makes adjudication within the context of EU law particularly unpredictable.'<sup>140</sup>

It can be clearly determined from these examples that the institutions of the EU overtly intend to demonstrate a willingness to uphold the Rule of Law. By making continual reference to its commitment to upholding the Rule of Law in treaties, as well as the ECJ's decision to specifically outline the Rule of Law as being a founding basis of the Union, we can determine that the EU considers the upholding of the Rule of Law to be of significant importance for its democratic legitimacy. The problem is however, that just as with many national constitutions, the EU does not specifically outline what the Rule of Law means for its purposes, meaning that the EU's intentions aside, we are still no closer to understanding what the Rule of Law is for the EU.

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<sup>139</sup> Case 294/83, *Parti ecologiste "Les Verts" v. Parliament*, 1986 E.C.R. 1339, 1365.

<sup>140</sup> E. Paunio, 'Beyond Predictability - Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order', *German Law Journal*, vol. 10, no. 11, p. 1470.

## **SECTION 2.c : NO DEFINITION EQUALS NO RULE OF LAW? WHAT THIS MEANS FOR THE DEMOCRATIC LEGITIMACY OF THE EU**

What the above evidences is that 'the Treaties are silent on what the substance of the concept might be, 'not indicat[ing] which meaning [of the Rule of Law] should prevail in the Community law context'. Clearly, the Union Rule of Law cannot be identical to any of the Rule of Law concepts that developed within the legal systems of the Member States. Simultaneously, it can potentially build on the ensemble of these concepts'.<sup>141</sup> Looking again at the Rule of Law as a concept that is universally recognised by the United Nations as an integral necessity for the human rights of democracies to be upheld, there must be a breach on some level by the European Union as certain aspects of the Rule of Law are not being guaranteed because of public linguistic inequality. 'Promoting the rule of law at the national and international levels is at the heart of the United Nations' mission. [...] The principle that everyone – from the individual right up to the State itself – is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept.'<sup>142</sup> Thus as it stands, if we take the Rule of Law requirement of legal certainty as laid out in the UN definition and other definitional theories stated earlier, it could be argued that the EU is not adhering to the Rule of Law, more specifically the aspects of certainty, predictability and accessibility of law. How can there be legal certainty of any kind as both predictability and accessibility are impossible without a definition? There is nothing concrete in a definitional sense in existence at EU level that the

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<sup>141</sup> Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion', p. 19.

<sup>142</sup> United Nations Rule of Law, 'What is the Rule of Law?', United Nations [webpage], <[http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3)>, accessed 3 December 2013.

peoples of the EU would be able to have access to or predict outcome from. Perhaps using the various meanings that traverse the member states as a template to create a solid definition is the best solution. 'National understandings radically differ, and, on the other hand, that the Union cannot rely on this constitutional principle as it does not constitute a state [...] it is difficult to see why the Union should not be able to redefine the meaning and scope of the Rule of Law to fit the distinct features of its autonomous legal order.'<sup>143</sup> This is an entirely valid point as a definition encompassing the different Rule of Law principles that traverse the boundaries of the EU member states is undoubtedly what is needed given that in the current situation it is impossible to attribute any technical breach to the EU as it cannot be in breach of something that does not have a definitive meaning either within its legislation or case law. That being said, is picking and choosing which elements of the Rule of Law it wants to incorporate to suit its own needs a good thing either?

It is possibly the lesser of two evils as at least a statutory definition would provide recourse for the citizens and at least deliver the accessibility element of legal certainty. Admittedly, the EU may just be taking the lead from national constitutions which undeniably often offer vague definitions of the Rule of Law and rarely give concrete values that build its essence. Yet why then does the EU insist on basing its Union principles and values on such ill-defined concepts? Surely as a relatively 'new' political entity with such broad competences across its member states it could set a precedent and offer a mutually agreed upon

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<sup>143</sup> Pech, 'A Union Founded on the Rule of Law', p. 363.

definition that is laid out in legislation. Doing such would create a higher level of certainty about the Rule of Law than nations have thus far been able to provide for their citizens. This could therefore be a potentially defining feature of the European Union moving forward; creating a greater level of certainty in an area that the nations have failed to do so.<sup>144</sup>

Putting aside the fact that even at national level there is difficulty in defining the Rule of Law, and the fact that it would be difficult for the EU to decide on a definition that did not favour the ideas of certain nations have about the Rule of Law, the creation of a concrete definition (which is realistically highly unlikely) would also bring about its own problems given that multilingualism within the EU would lead to multiple inevitable inconsistencies that would arise from the issue of imperfect translation. Having a definition that was laid out in legislation would navigate around the problems arising from a complete lack of a definition, yet predictability of the law would still be questionable given the various different connotations that may emanate from the different language versions. That being said, 'predictability' doesn't necessarily mean that every person should interpret the law in the same way as reducing legal certainty down to just predictability is unworkable given that laws must be changeable to accommodate for progression. However, the procedure and legal reasoning of the ECJ must be predictable if we cannot rely on the language of the law to be predictable in itself. And as was mentioned earlier, the ECJ's teleological approach to interpretation itself collides with the legal certainty aspect of the Rule of Law. Given the level of multilingualism in the European Union, the risk

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<sup>144</sup> See *Chapter 5* discussion on a rights-based Union and the need for definition of rights at EU level.

comes not just from removing the citizen from being able to understand the adjudication process and its predictability, but also the legal expert or lawyer.

One thing I am certain of however, is that questioning the meaning of something that actually exists as a defined concept in the legislation of the EU offers more opportunity for recourse than questioning the meaning of something that doesn't have a definition. 'To use it merely as a tag, not as a tool, seems to be a waste of its potential.'<sup>145</sup>

The problem is that the Rule of Law can't be defined in any meaningful way. Even national legal systems are unclear on what the Rule of Law is within a single country with a single majority mother tongue language. For the EU however, there is not only this problem, but also the problem of having a defined Rule of Law that would emanate the same meaning when translated into all 24 languages of the EU. Thus, a definition of what the Rule of Law is for the EU would be a start but it would not solve the problem at large as the multilingualism issue cannot be overcome with simple definition. This chapter and the last has shown that the problems of multilingualism permeate all corners of the day-to-day workings of the EU and also its very democratic foundations. If the EU is unable to uphold such formal features of the Rule of Law as foreseeability and accessibility, then it could not be confidently claimed that the EU adheres to the Rule of Law. As such, given that adhering to the Rule of Law is a necessary feature of democracy, its democratic legitimacy is further questioned. If there can be no practical solution to this we need to find a

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<sup>145</sup> For an unflattering analysis of the general state of the EU legal theory, see N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay', *Oxford Journal Legal Studies*, vol. 25, 2005, p. 581.

conceptual one, a process which begins with understanding language conceptually.

## **CONCLUSION**

There are 2 battles at hand, the first of which is definitional. The EU must define the exact nature and extent of language rights in order to offer greater recourse to have these rights upheld. It must also define what it means by the Rule of Law in order to offer a greater level of certainty and thus increase their democratic legitimacy by creating a greater level of predictability and accessibility to the law. By doing so the EU would be demonstrating positive action and the willingness to uphold these fundamental necessities of democracy. The second is not something that can be so easily and readily solved. Even with defined language rights and a clearly laid-out definition of what the Rule of Law is for the EU, the ever-prevalent problems caused by the multilingual nature of the EU would still be present. As was concluded in the *Chapter One*, this is not something that can be solved with a practical solution, but instead requires a stronger understanding of language as a concept if we want to overcome the practical problems it is causing. In hindering the accessibility and predictability of law the EU's language situation is actively negatively affecting its democratic legitimacy, meaning we must gain greater understanding about 2 things: language(s) as a concept (in understanding the nature of the problem conceptually we can then come to a conceptual solution); and the demos (in that you cannot have a democracy without a demos), and of course, how these two things are intertwined.

Although it has been clearly demonstrated that the EU is not technically in breach of any international legal obligations, it is clear that this is merely because of a lack of definition. This lack of definition only increases the ever complained about democratic deficit within the European Union as key principles of democracy (human rights and the Rule of Law) are not being upheld to their full potential. For the situation to change it is necessary that linguistic inequality be classed as a human rights breach and thus for the EU have some sort of accountability when equality is not upheld and for there to be enforceable sanctions when this is breached. 'Language is intrinsically linked to the development of both an individual human consciousness and a sense of group or cultural identity. The protection of language and linguistic rights therefore becomes essential to the protection of human dignity.'<sup>146</sup> And the main thing standing in the way of these rights not being upheld is quite simply the ill-defined nature of the essential democratic elements of both linguistic human rights and the Rule of Law within the European Union. Without the express protection of language rights and minority rights the EU risks eroding certain, less dominant identities and inevitably losing a vast amount of the cultural heritage it claims to protect.

The following chapter explores language as a concept by looking at it through various ideas formed in Western linguistic theory. The hope is that by understanding language and eventually its power in identity and demos

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<sup>146</sup> J. P. Gromacki, 'The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights', *Virginia Journal of International Law*, vol. 32, 1991-1992, p. 515.

formation, I will be able to move towards discovering a theoretical solution to the democratic legitimacy problems multilingualism presents the EU with.

## CHAPTER 3.

### WESTERN LINGUISTIC THEORY: UNDERSTANDING LANGUAGE AS A CONCEPT IN ORDER TO OVERCOME THE PROBLEMS CAUSED BY MULTILINGUALISM IN THE EU

#### INTRODUCTION

The implications for truly adhering to certain aspects of the Rule of Law (as highlighted in the previous chapter and as attributed to the issue of linguistic diversity within the EU) undoubtedly contributes to the oft cited democratic deficit of the EU as an institution. It was constitutional theorist Dieter Grimm who made a significant link between his thesis that the EU lacks a genuine basis of democratic legitimation and the issue of language.<sup>147</sup> He wrote:

The importance of the language factor for the possibility of European democracy is often underestimated, partly because a democracy concept confined to the area of organized opinion formation predominates...partly because of a failure to perceive the dependency of democracy on communication opportunity. Pointing to multilingual states like Switzerland, Belgium or Finland...does not refute this. [A] country like Switzerland had formed a national identity well before constitutionalization and relates its multilingual political discourse to it...

By contrast the absence of a European communication system, due chiefly to language diversity, has the consequence that for the foreseeable future there will neither be a European public nor a European political discourse...The European level of politics lacks a matching public.<sup>148</sup>

Thus far in this thesis a mass of problems that are brought about for a multilingual political/legal/economic/social post nation-state such as the EU have been identified. What follows is a discussion of various theories on

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<sup>147</sup> P. A. Kraus, *A union of diversity: language, identity and polity-building in Europe*, Cambridge University Press, 2008. p. 141.

<sup>148</sup> D. Grimm, 'Does Europe need a Constitution', *European Law Journal*, Vol. 1, No. 3, November 1995, pp. 295-296.

language which I believe explain why these problems occur and mean that multilingualism is an insurmountable practical obstacle for a unified EU (in its currently (ill-)defined state/existence) to exist. The ultimate aim is to maintain linguistic diversity by finding new bases upon which to build a unified state/post nation-state that understands the reasons why the current system cannot and will not continue to thrive. In order to arrive at this point, however, this chapter essentially explores the importance of maintaining linguistic diversity and ensuring a language hierarchy does not become even more solidified than already at present in the day-to-day workings of the institutions of the European Union.

Extensive consideration of the academic works in the field has revealed a distinct lack of in depth exploration into the reasons *why* the linguistic issues within the European Union are a continuously prevailing concern. There is a distinct lack of thorough application of and explanation through linguistic theory, as well as a lack of deliberation on how such linguistic barriers could be minimised in order to facilitate a more democratically legitimate Union. As well as gaining a deeper understanding of language in order to find a solution to the democratic legitimacy issues of the European Union, further importance of such contemplation comes from the fact that, if we are to make possible further and continued integration within the EU, and in order to ensure the EU project does not fail, we must first understand exactly why it is that a weakly defined, multi-lingual post-national entity will inevitably stumble when attempting to foster integration and mould a citizenry. Upon reading this chapter the hope is that the reader will come to understand the influence that language holds over our

reality and thought process otherwise they will not fully be able to grasp the severity of placing the use of certain languages over others in political debate and law-making procedures. I am not claiming that this doesn't happen in other multilingual states, but how it is happening in the EU is different due to the sheer number of languages that must be considered as well as the lack of unifying identity, the existence/creation of which could possibly help us to overcome the problems caused by multilingualism (as will be discussed in *Chapters Four and Five*). To argue that multilingual democracies such as Switzerland, Belgium and Finland can be compared with the situation in the EU is to completely misunderstand the vastly different dimensions of language pluralism at the level of the Union as well as to lack a comprehension of the historical constitutionalising processes of such countries.

This chapter will begin by posing 'the language question' and the importance of its consideration for multilingual polities given the value placed on the politics of recognition, ultimately demonstrating that 'meaning' is something that language alone is unable to convey. Following this, the relationship between language and the law, and language and communication within a legal system is discussed in relation to the democratic credibility of the EU given its linguistic diversity. All of this is considered with the aim of providing evidence for the fact that, whatever angle we look at the EU from: socially, politically, economically, or culturally, the language question and the issue of multilingualism is all pervasive and must be given a great amount of consideration. The chapter goes further in its exploration of linguistic theory in relation to the EU than others that have come before it to demonstrate the fact that in order to tame the beast

that is multilingualism, we must understand the beast, down to the original component of simple 'language' and its dominating effect on numerous aspects of individual, collective, social and political life.

## **THEORETICAL CONSIDERATIONS** <sup>149</sup>

Theoretical discussion begins with the musing on language of Wilhelm von Humboldt, considered by many to be the father of modern linguistics. He was an advocate of the expressivist model of language which held that language served as a medium of self-expression and that language was a means not only to describe reality, but also to discover reality, that we are bound by the linguistic limits within which our mother tongue allows us to perceive, deconstruct and create our reality. The influence that von Humboldt's work had on the linguistic theories of later theorists Edward Sapir and Benjamin Lee Whorf is considered with specific reference to the linguistic relativity hypothesis. This is a simple concept which offers hypotheses about language encoding a particular experience of the world which thence predisposes its speakers to see the world according to the experience encoded in it and thus offers a means of explaining why it is that such linguistic issues arise when dealing with multilingual legislation. If a language encodes a particular experience of the world, its use might predispose its speakers to see the world according to the

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<sup>149</sup> In this chapter, it is not my objective to discuss the merits and criticised inconsistencies within any of the theories I discuss. Although I must note that all theories considered are contested and do not have concrete evidence proving their worth. Rather, I am discussing and applying them because I agree with their position and views and I believe they explain the problems caused by multilingualism in the EU, and offer an insight into the role of language in collective life which could go some way in leading to a solution to the democratic legitimacy issues created by the multilingual nature of the EU.

experience encoded in it. And the reason this cannot function in the multilingual setting of the European Union is because perfect translations are, strictly speaking, impossible because they require finding exact equivalents where none exist.<sup>150</sup> The problem does not always lie with finding an exact linguistic translation, but more with finding one which is functional, practical and teleological. We cannot have a single legal language across the EU because there is no single culture, history or language of communication across the EU:

beyond a few natural meanings which are encoded in most languages (*e.g.* basic colour terms), the majority of meanings in languages, and in different varieties of a language, are crystallised in response to the social, economic, technological and theoretical needs of the cultures concerned.<sup>151</sup>

It therefore could be argued that the only possible hope to have any sort of political and cultural homogeneity in a political entity is through a common, *native*, language. These are all aspects that will be covered in this chapter.

This chapter will also feature the consideration and application of the theories of Ferdinand de Saussure, the father of structural linguistics, whose structural view of language considers the arbitrary nature of the linguistic sign in relation to the concept it denotes. In considering these theories with regard to the sphere of the EU, a fully comprehensive linguistic perspective to the language barrier concerns of the European Union can be understood by giving a level of theoretical explanation that legal scholars often do not take into consideration. Understanding these linguistic theories is imperative in order to critically assess the possibility of finding a deeper, more conceptual solution to the problems

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<sup>150</sup> R. Huntington, 'European Unity and the Tower of Babel', 9 *B.U. Int'l L. J.*, 1991, p. 328.

<sup>151</sup> P. Goodrich, 'The role of linguistics in legal analysis', *Legal Discourse*, Palgrave Macmillan UK, 1987, p.

caused by multilingualism in the European. By gaining a deeper level of comprehension about the various roles and importance of language these theorists put across, the following questions will be posed: does our native language determine our way of seeing the world or is it the other way round? How does this relationship between language and world view affect integration within the EU? And finally, can this understanding of language lead us to a conceptual solution to the practical barriers multilingualism puts up in the EU?

### **CHAPTER 3. SECTION 1**

#### **LANGUAGE AND THOUGHT, LANGUAGE AND THE COLLECTIVE**

*"But if thought corrupts language, language can also corrupt thought."* (George Orwell, 1984)

*"Don't you see that the whole aim of Newspeak is to narrow the range of thought? In the end we shall make thoughtcrime literally impossible, because there will be no words in which to express it. Every concept that can ever be needed will be expressed by exactly one word, with its meaning rigidly defined and all its subsidiary meanings rubbed out and forgotten."* (George Orwell, 1984)

Beginning the main thrust of this chapter with quotes from George's Orwell's *chef d'oeuvre, 1984*, sets the tone for the idea of language being presented throughout the thesis. The plot of the novel is well known; The Party believe that if they eradicate any language from the English language which has significations against party ideals, then there will be no uprising or revolt against the party as through the limitation of language they will eventually limit the ability to even think of such a thing. The Party create 'Newspeak', a new version of the English language which has the function of restricting and controlling the

population by narrowing the range of thought, thus making it impossible to express – or even conceive of – a concept which deviates from the Party line. It is essentially a demonstration of how language can be exploited to serve the interests of a political party or a certain social group. It is mind control through the manipulation of the mechanisms of language. Of course 1984 is a fictional, dystopian novel which exaggerates the author's grievances with the power held by our political leaders, but its depiction of the power of language over thought is an important lesson nonetheless; if our language knowledge is limited, so too is our ability to think, create and conceive of certain concepts.

“Power is in tearing human minds to pieces and putting them together again in new shapes of your own choosing.” (George Orwell, 1984)

So what exactly is language; this all powerful tool of which I speak?<sup>152</sup> The Oxford English Dictionary defines language as, ‘The system of spoken or written communication used by a particular country, people, community, etc., typically consisting of words used within a regular grammatical and syntactic structure’;<sup>153</sup> and the online dictionary as, ‘A body of words and the systems for their use common to a people who are of the same community or nation, the same geographical area, or the same cultural tradition’.<sup>154</sup> Moving away from dictionary definitions and more towards academic definitions, American anthropologist Joel Sherzer says that ‘Language is both cultural and social. It is

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<sup>152</sup> Language has several different meanings depending on individual opinion and area of study. For example, a linguist, a grammatologist, a semiologist and even an anthropologist will have greatly differing opinions on what language is, and will even dispute among themselves within their fields as to its definition.

<sup>153</sup> “language”, *The Oxford English Dictionary online*, 2016, <<http://www.oed.com/view/Entry/105582?rskey=6tXfUa&result=1#eid>>, accessed 14 June 2013.

<sup>154</sup> “language”, *Dictionary.com*, 2016, <<http://dictionary.reference.com/browse/language>>, accessed 14 June 2013.

cultural in that it is one form of symbolic organization of the world. It is social in that it reflects and expresses group memberships and relationships'.<sup>155</sup> However he goes on to elaborate that 'discourse is an elusive area, an imprecise and constantly emerging and emergent interface between language and culture, created by actual instances of language in use and best defined specifically in terms of such instances'.<sup>156</sup> All definitions mentioned, whether for general or academic purpose, make reference to language and the collective, the community, the group. The OED is the most vague (or perhaps cautious) of the definitions, referring only to the collective in the sense of a people, or a country. The online dictionary however is more detailed and particular in its reference, citing a geographical grouping, a nation even, and also cultural traditions when defining language. The academic definition provided by Sherzer also refers to language in a cultural sense, and also puts language in the context of society, not only as a means of communication within society, but as an expression of the group itself. From these definitions we can already begin to see the inseparable link that exists between language and the demos. Something that will be of greatest significance for the rest of this thesis.

## **SECTION 1.a : LANGUAGE AND THE POLITICS OF RECOGNITION**

Much has been said in the introduction about the insurmountable barrier of language diversity when creating a *polis* and how it creates a potentially impassable obstacle for further integration in the EU: 'Whenever it comes to

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<sup>155</sup> J. Sherzer, 'A Discourse Centred Approach to Language and Culture', *American Anthropologist, New Series*, Vol. 89, No. 2 (Jun., 1987), p. 296.

<sup>156</sup> Sherzer, 'A Discourse Centred Approach to Language and Culture', p. 296.

defining 'hard' criteria of cultural heterogeneity in Europe's multilingual constellation, the terrain of language is almost unavoidably brought into focus.<sup>157</sup> It is an unavoidable inevitability that the language question will be discussed when considering the political and cultural heterogeneity of the European Union given that language could arguably be said to be the main component of cultural differentiation that runs throughout the EU. It remains such an important element given the importance of the language question in understanding the 'politics of recognition' as well as the implications linguistic diversity has for the constitution of a democratic political order and the conflict potentials typical of multilingual political settings.<sup>158</sup> Let it be known though, it could not be said that language is the only barrier that must be navigated when attempting to unify such a geographically wide-reaching mass of people: varying economic strengths and GDP, common law legal systems versus civil law systems, differing standards in education and access to higher education, healthcare, cultural heritage, the list goes on. This following discussion in no way suggests that language is the only barrier when attempting to align nation-states politically, economically and socially, or that it is the only barrier to further integration, or even that it is the only cause of the EU's democratic deficit. What is considered rather is the often suggested instance that a *polis* or *demos* cannot exist without a common language and seeing as how the continuous integrating tendency of the EU suggests the aim of a further and continued integration in all aspects of 'state' life, multilingualism is definitely one of the most significant barriers to cross. After all, language is not only a

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<sup>157</sup> Kraus, *A union of diversity: language, identity and polity-building in Europe*, p. 76

<sup>158</sup> Kraus, *A union of diversity: language, identity and polity-building in Europe*, p. 77 (these issues are discussed by Kraus throughout ch.4 of his book).

means to comprehend the world: it is even a means to recognise it. It is a mental device to enable the mind to comprehend what it sees.<sup>159</sup> By understanding language as a concept and later its role in demosc formation, perhaps we can move towards a system which can surpass the surface level problems caused by multilingualism and go straight to rebuilding the EU's democratic legitimacy without worrying about the practical issues language causes.

It must be acknowledged that human beings have far more concepts (distinctive cognitive capacities) than words for expressing them. This idea that a given language commits its users to a distinctive philosophy was expressed by Lichtenberg: 'Our false philosophy is incorporated in our whole language; we cannot reason without, so to speak, reasoning wrongly. We overlook the fact that speaking, no matter of what, is itself a philosophy'.<sup>160</sup> Roman Jakobson wrote that 'the true difference between languages is not in what may or may not be expressed but in what must or must not be conveyed by the speakers'.<sup>161</sup> What Lichtenberg and Jakobson are essentially saying is that reason and meaning are not in themselves encapsulated by the words that we speak when we speak a language. It goes far beyond that into the realms of history and culturally accepted artefacts that have developed over time, the effects of which create conceptual filters that determine what we actually mean when we speak a language. When we evaluate any social system, our evaluation is necessarily encapsulated in our own system perspective. The capacity to

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<sup>159</sup> B. Grossfield, 'Language and the Law', *Journal of Air Law and Commerce*, vol. 50, 1984-1985, p. 797.

<sup>160</sup> M. Black, 'Linguistic relativity: the views of Benjamin Lee Whorf', *The Philosophical Review*, vol. 68, no. 2, 1959, pp. 232-234.

<sup>161</sup> R. Jakobson, 'On linguistic aspects of translation', *On translation*, vol. 3, 1959, pp. 30-39.

formulate language and other symbol systems entails the capacity - or perhaps better - the *incapacity* not to respond to the meaning of the symbol systems.<sup>162</sup>

Thus our individual linguistic capacity to create and respond both feeds and is dependent on the communicative society in which its creation has become embedded. Peter Kraus succinctly explains, with reference to the writing of Herder, Humboldt and Taylor, why this is imperative for the communicative relationship between the state and the individual:

Language is a resource we need for individual communication. By acquiring this resource, we are attached to a specific, culturally defined community. [...] [Language] becomes a matter of a collective support that, in modern polities, translates into institutional provisions devoted to reproducing this web. Thus, if the dignity of individuals is to be respected, the linguistic and cultural identity of their communities of origin must be recognised to a satisfactory extent as well. [...] By recognising a language we do not recognise a language 'in itself'. The point rather is to recognise a linguistic community and, ultimately, the individual speakers who form the community.<sup>163</sup>

What can be reasonably concluded from the above analysis is the need for linguistic consideration for the politics of recognition within a communicative political space. I will now aim to validate the need to discuss and further consider the relationship between language and the law, and language and communication within a legal system; two highly necessary relationships to consider when the democratic credibility of the EU is in question in relation to its linguistic diversity.

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<sup>162</sup> O. C. Lewis, 'Law, Language, and Communication', *Case Western Reserve Law Review*, vol. 23, 1971-1972, p. 312.

<sup>163</sup> Kraus, *A union of diversity: language, identity and polity-building in Europe*, pp. 80-81.

## **SECTION 1.b : LANGUAGE AND LAW, LANGUAGE AND COMMUNICATION**

Aside from the issue of legal language being a language unto itself, a topic worthy of a thesis in itself (but not strictly relevant to the language issue being discussed at present in this thesis), the law, in its over-arching, all-encompassing and complete meaning, could not be conceived of without language. Legal concepts exist only within the confines of the language in which they are written. The reality of the binding force of the law is expressed to those it governs through the medium of language. Many nations operate under a common law system, deriving their law from judicial precedent and custom rather than statute or a written constitution, but this system also uses language of a different kind as it is known and expressed from person to person through communication and expression within particular contexts. It would therefore unjustly narrow any analysis if the law and politics of the EU was discussed without considering the issue of multilingualism. Seeing law and linguistics as two separate entities that merely exist under the same faculty heading of 'Humanities' would be to severely restrict the possibility of a complementary relationship that could uncover solutions to problems in both disciplines. Many academics in both fields believe that an interdisciplinary relationship between language and legal studies would surely enhance legal studies and legal theory studies:

Language - and this consideration surpasses all the others - is at every moment everybody's concern; spread throughout society and manipulated by it, language is something used daily by all. " Although this may be doubted in the case of law, this doubt speaks only to our habit of leaving language to linguists (and to communicators, god forbid), law to the lawyers, and health to the doctors.<sup>164</sup>

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<sup>164</sup> J. W. Mohr, 'From Saussure to Derrida: Margins of Law', *Queen's Law Journal*, vol. 18, 1993, p. 354.

The relationship between law and language goes beyond the expression of law in either written or spoken language however, right back to the etymological roots of the words themselves:

The intimate connection between law and language is confirmed when looking into the etymological roots of both expressions. A first impression is derived from the fact that the Latin word "*lex*" means "law," but in the combination "*lexicon*" it has the meaning "word." Now let us compare "*lex*" and its genitive "*legis*" or its nominative plural "*leges*" with the Greek word "*logos*," which stands for "word" but also, as in logic, for "idea." Indeed, the common word is "*legein*," which means among others, "to speak." When we put the words "*lex*," "*logos*," and "*legein*" together, we realize immediately how law, language, and thought interrelate.<sup>165</sup>

This etymological explanation not only connects the meanings of 'law' and 'language', but also links 'language' to 'thought'. If the original roots of structured language as we know it (specifically with regards to Western languages that are derivatives of Latin, of which English is one) demonstrates these concepts as being closely related then surely this is evidence enough of the need to understand this relationship more within a multilingual polity. Every language constitutes a kind of logic - an expression in which law, language, and thought come together - that has a strong, although not inevitably determinative, influence on our thoughts.<sup>166</sup>

What happens to law that exists through and in language if it is transferred into a different language? If the structure of a particular language plays an important role in defining our thinking, it may well be that a particular language can only express certain legal ideas and that the limits of our particular language are the

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<sup>165</sup> Grossfield, 'Language and the Law', p. 798.

<sup>166</sup> Grossfield, 'Language and the Law', p. 799.

limits of our legal reasoning.<sup>167</sup> This factor increases exponentially with each enlargement of the EU as tested hypotheses about the influence of language over thought and vice versa suggest that the differences in our ability to conceive of and express thought through language vary more greatly between different language groups. The farther apart the language structures are from one another, the greater might be the change in the law. This results from the fact that when a legal rule is implanted into a different language context, the linguistic dynamics of the language might drive it in an unexpected direction.<sup>168</sup>

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<sup>167</sup> Ludwig Wittgenstein, *Tractatus Logico Philosophicus*, propositum 7, (1933).

<sup>168</sup> See Grossfield, 'Language and the Law', p. 801. See also G. Frege, *Die Grundlagen der Arithmetik: Studienausgabe mit dem Text der Centenarausgabe* 73 (1884), for whom words only have a meaning in the whole of a sentence. See also J. Bentham, 'Essay on Language', in *Essays on Bentham: studies in jurisprudence and political theory* 10 (H. Hart ed. 1982) – discussing the idea that this principle may be transferred to the connection between legal notion and language.

## SECTION 1.c : LANGUAGE GROUPS IN EUROPE

Figure 1.<sup>169</sup>



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<sup>169</sup> Languages of Europe [map] [image], in Fouberg, Erin, *Human Geography: People Place, and Culture*, 11th edition (AP edition), Wiley & Sons, 2014, p. 144, image available at <<http://teacherweb.ftl.pinecrest.edu/snyderd/mwh/projects/cov/maps/MapLang.htm>>, (accessed 20 October 2014). Permission to reproduce this image has been granted by Wiley publications.

As is shown in *Figure 1* above, the 24 official, working languages of the EU are spread across 8 different language groups: Dutch, German, English, Danish and Swedish belong to the Germanic group (although almost half of English vocabulary has Romance origins); Portuguese, Spanish, French, Italian and Romanian to the Romance group; Polish, Slovak, Czech, Slovene, Croatian and Bulgarian to the Slavic group; Irish to the Celtic; Lithuanian and Latvian to the Baltic; Greek to the Hellenic; Estonian, Finnish and Hungarian to the Finno-Ugric language group; and Maltese belongs to the Hamito-Semitic (also called Afro-Asiatic) group (not featured on above map). This figure further increases if we include the minority and regional languages that are also active within the boundaries of the EU. Different language groups will usually have different verb, subject, object placement within a sentence, some have gendered nouns whereas others don't, the conjugation of verbs can sometimes alter the structure and meaning of an entire phrase. The point being if the structure and technical construction of languages in different language groups vary considerably, it seems highly likely that so then can the meaning evoked from the sentence itself.<sup>170</sup>

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<sup>170</sup> In his article 'Linguistic Diversity versus Legal Unity in Europe: Beyond the Chicken-and-Egg Discussion', *The Journal of Comparative Law*, Vol. 2, 1, 2007, V. Smith notes: 'Herslund and colleagues have suggested a universal distinction between 'endocentric' and 'exocentric' representations of reality as encoded into the formal structure of particular languages, with the Germanic and the Romance languages as clear-cut examples of the opposing prototypes. In short, the key observation is that Germanic languages are organised around concrete information by having a relatively high lexical and informational weight in the verbs, i.e. in the centre of the proposition (hence endocentric), whereas Romance languages are organised around more abstract information by having a higher lexical and informational weight in the nominal arguments, i.e. outside the centre of the proposition (hence exocentric). He further footnotes that a number of language-specific comparative studies supporting this typology are presented in Herslund, M (ed) (2003) *Aspects linguistiques de la traduction*, Presses Universitaires de Bordeaux; Korzen, I (2005) 'Endocentric and Exocentric Languages in Translation' (13), *Perspectives: Studies in Translatology* 21; Korzen, I and D'Achille, P (eds), *Tipologia linguistica e societ. Due giornate italo-danesi di studi linguistici Roma*, 27-28 Novembre 2003. *Quaderni della Rassegna* 42 Franco Cesati Editore; Baron, I (ed), *Language and Culture. Copenhagen Studies in language* 2,9 Samfundslitteratur.

For the law however, the issue is not only one of how our predispositions based on our language or language group affect our perceptions:

it could be argued, law imposes a certain form on our pre-legal understanding of the world, i.e. the substance, by offering technical concepts and principles developed for that very purpose - which may also differ significantly from one legal system or tradition to the next. [...] legal orders too may differ considerably as to which circumstances are selected to be legally determinative, even when the real-world circumstances at issue are otherwise comparable.<sup>171</sup>

Perhaps then our particular linguistic spheres create boundaries within which we can create and conceive and hence our legal systems and certain legal concepts are formed within the remits of what our linguistic sphere allows. Civilization is uniquely and specifically in-formed by a given language; that language is the unique and specific matrix of its civilization.<sup>172</sup> Concerning the EU this possibility could hinder integration and state-citizen communication possibilities for a number of reasons. For instance, a law that does not correspond to the linguistic sensitivities of our society is not regarded as "our law" but is seen as something foreign. Without a conducive language, positive law cannot create legal mindedness.<sup>173</sup> If the citizen does not see European law as relating to them because its structure differs to the linguistic and legal mindedness they themselves are used to within their national law, they will be less likely to see themselves as European or identify with the political structure as a whole. To repeat the words of Grimm referenced in chapter one:

Comme la langue, le droit a dans ses origines, son développement et sa structure, un caractère foncièrement populaire et indigène qui manifeste le particularisme historique, culturel et national de chaque peuple. 'La langue et le droit ont une histoire, c'est-à-dire qu'il y a en eux un lien qui réunit le passé au présent, la nécessité à la liberté' écrit

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<sup>171</sup> V. Smith, 'Linguistic Diversity versus Legal Unity in Europe: Getting Beyond the Chicken-and-Egg Discussions', *The Journal of Comparative Law*, Vol. 2, 1, 2007, pp. 128-129.

<sup>172</sup> G. Steiner, 'Whorf, Chomsky and the Student of Literature', *New Literary History*, Vol. 4, No. 1, The Language of Literature (Autumn, 1972), p. 18.

<sup>173</sup> Grossfield, 'Language and the Law', p. 803.

Grimm;<sup>174</sup> 'Le droit positif d'un peuple est partie intégrante de sa langue et comme celle-ci, prend naissance et se développe de manière organique', écrit quant à lui Gustave Hugo.<sup>175\_176\_177</sup>

To feel as though living within the confines of and under the protection of a legal system the citizen must identify with it, something which goes far beyond the simple word of the law being written in their native tongue. The issue is not whether the law can be translated into each official language of the EU correctly (the perils of which were previously evidenced in *Chapter One*), but whether the translation decided upon is practical and evokes the same understanding of legal structures and a world view that concords with that of the language in question.

Many of his most inimitable forms of expression, all of his objective thinking, most of his daily communication, most of his storage of culture and its transmission in space and time, almost all of his environmental adjustment, socialization, societal organization and social action, rest upon language. It is his primary instrument of enlightenment.<sup>178</sup>

Our language is linked to our particular history, our culture, how our society has fared in home and foreign affairs over the centuries; it is our filter through which we perceive and understand the world around us and as such is not something that can be easily translated. Of course when domestic law is being written this

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<sup>174</sup> Leçon inaugurale prononcée par J. Grimm à l'Université de Berlin en 1841 : *Über die Alterthümer des deutschen Rechts*, in VI. Schr., Bd 8, p. 547, cité par A. Dufour (1974) 164.

<sup>175</sup> G. Hugo, 'Les lois ne forment pas la seule source des vérités juridiques,' 4 (1815 :4) *Civilistisches Magazin* 117.

<sup>176</sup> M-J. Campana, 'Vers un langage juridique commun en Europe?', *European Review of Private Law* 1, (200), p. 35.

<sup>177</sup> English Translation: *As with language, the law, in its origins, development and structure has a fundamentally common and local nature which expresses the distinctive historical, cultural and national identity of each nation. Language and the law have a history, that is to say, that there is a link which reunites the past with the present, need with freedom. The substantive law of a nation is an integral part of its language and as such, comes into being and grows in an organic way.*

<sup>178</sup> J. O. Hertzler, 'Toward a Sociology of Language', *Social Forces*, Vol. 32, No. 2, (1953), p. 109.

is not an issue as it will be discussed and deliberated in the native language of the individual country. The problem for the EU is that the institutions heavily rely on English, French and German for internal deliberations. This means that, given the relationship between language, thought and worldview, the mere act of discussing and deciding in one of these languages could lead to the cultural, political and social preferences of their language country being inadvertently privileged over those of the language countries that are not used for discussion. If an institution is deliberating in English for example, the boundaries of the law being discussed might be dependent on the linguistic limits of English and may unwittingly be more compatible with the national systems in place in England and potentially encourage English values and policies over others:

Thought is language internalized and we feel and think as our particular language impels and allows us to do. Tongues differ even more profoundly than do nations. They also are monads, "perpetual living mirrors of the universe" each of which reflects or, as we would now put it, "structures" experience according to its own particular sight-lines and habits of cognition. No two languages construe the same world.<sup>179</sup>

The main linguistic problem for the EU lies with the fact that perfect translations are, strictly speaking, impossible because they involve finding exact equivalents where none exist.<sup>180</sup> 'A word operates phonologically and grammatically [and] by virtue of its denotation, connotations, potential or actual collocations and by virtue of its place in a particular semantic field [...] so that to 'understand' a word is a complicated process where we are required to synthesise meanings derived simultaneously from many sources.'<sup>181</sup>

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<sup>179</sup> Steiner, 'Whorf, Chomsky and the Student of Literature', p. 16.

<sup>180</sup> R. Huntington, 'European unity and the tower of Babel', *Boston University International Law Journal*, vol. 9, 1991, p. 328.

<sup>181</sup> J. F. Wallwork, *Language and Linguistics: An Introduction to the Study of Language*, London, Heinemann Educational Books, 1969, p. 98.

## CHAPTER 3. SECTION 2

### THE RELATIONSHIP BETWEEN THE EU AND LANGUAGE: WHAT CAN THE EU LEARN FROM LINGUISTIC THEORY?

Linguistics could be described as being the discovery of meaning behind language and thus turning to linguistic theory will undoubtedly aid us in our discovery of meaning behind the multilingual law. When discussing the issue of language/multilingualism in relation to the EU, or Europe as a continent, it is difficult to know where to start in the long linguistic history of the continent in order to justify its relevance to the field and then to subsequently decide which theorists to look at.<sup>182</sup> Given the Christian heritage of Europe as a continent<sup>183</sup> and the acknowledged reference to 'devotion to the *spiritual* and moral values which are the common heritage of their peoples' (my italics) as early on in the EU's history as the signing of the Statute of the Council of Europe in London 1949 ('spirituality' has continually been referenced in later treaties), certain academics have found it necessary to go as far back as considering Biblical references to language:

In order to tackle these provocative questions, let us first consider the status of language in human thinking in general. This evaluation takes us back as far as Adam and Eve. The Bible tells us that in the beginning "Adam gave names to all cattle, and to the fowl of the air, and to every beast of the field." Thus, man recognizes the world around him through

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<sup>182</sup> In his paper 'Concepts of Language Underlying the 18<sup>th</sup> Century Controversy about the Origin of Language', John Viertel discusses the sources of Wilhelm von Humboldt's theory of language by revealing the historical context of the concepts of language that developed out of the 18<sup>th</sup> century. This includes discussion on: The Cosmologies of the Ionian philosophers of the 6<sup>th</sup> century, B.C., Plato's *Theaetetus*, Nominalist theories such as that of Hobbes in his 'Objections to Descartes' Meditations', Herder in his essay on the *Origin of Language*, Wolffian Johann Peter Suessmilch in his 'Versuch eines Beweises', and Jacques Rousseau's 'Discourse on the Origin and Foundations of Inequality Among Men' to name a few. **Footnote Source:** pp. 109-132 in: Dinneen, Francis P.; Problems in Semantics, History of Linguistics, Linguistics and English. Washington, DC; Georgetown UP; 1966.

<sup>183</sup> For further discussion on the spiritual and religious heritage of Europe within the constitutional and political framework of the European Union see: R. McCrea, 'The recognition of religion within the constitutional and political order of the European Union', *LEQS Paper* 10 (2009) which discusses such issues as: religion as a source of the constitutional values of the EU, recognition of the role of religion in law-making, the pluralistic public morality of EU law, and limitations on public morality within EU law.

the medium of language, and language enables him to grasp and to define reality. Through language he attains power.<sup>184</sup>

Aside from the above biblical reference, a brief departure from the main direction of discussion in this chapter to tell the biblical tale of the Tower of Babel is most certainly justified.

**Genesis 11:** 1-Now the whole earth used the same language and the same words. 2-It came about as they journeyed east, that they found a plain in the land of Shinar and settled there. 3-They said to one another, "Come, let us make bricks and burn them thoroughly." And they used brick for stone, and they used tar for mortar. 4-They said, "Come, let us build for ourselves a city, and a tower whose top will reach into heaven, and let us make for ourselves a name, otherwise we will be scattered abroad over the face of the whole earth." 5-The LORD came down to see the city and the tower which the sons of men had built. 6-The LORD said, "Behold, they are one people, and they all have the same language. And this is what they began to do, and now nothing which they purpose to do will be impossible for them. 7-"Come, let Us go down and there confuse their language, so that they will not understand one another's speech." 8-So the LORD scattered them abroad from there over the face of the whole earth; and they stopped building the city. 9-Therefore its name was called Babel, because there the LORD confused the language of the whole earth; and from there the LORD scattered them abroad over the face of the whole earth.<sup>185</sup>

According to the story then, God's punishment for the Tower of Babel was to render communication between men difficult, so that man could not attain the height of God and the heavens. Without a single language man could not attain everything that he wished as the punishing multiplicity of languages created too great an obstacle for communication, and worse the inability for language to convey an understanding of truth. Considering the Christian heritage of Europe as a continent, the EU was thus formed on the confounding confusion of multilingualism inherent in its spiritual heritage as demonstrated in this biblical tale. It is also worth briefly noting the oft mentioned similarity between the

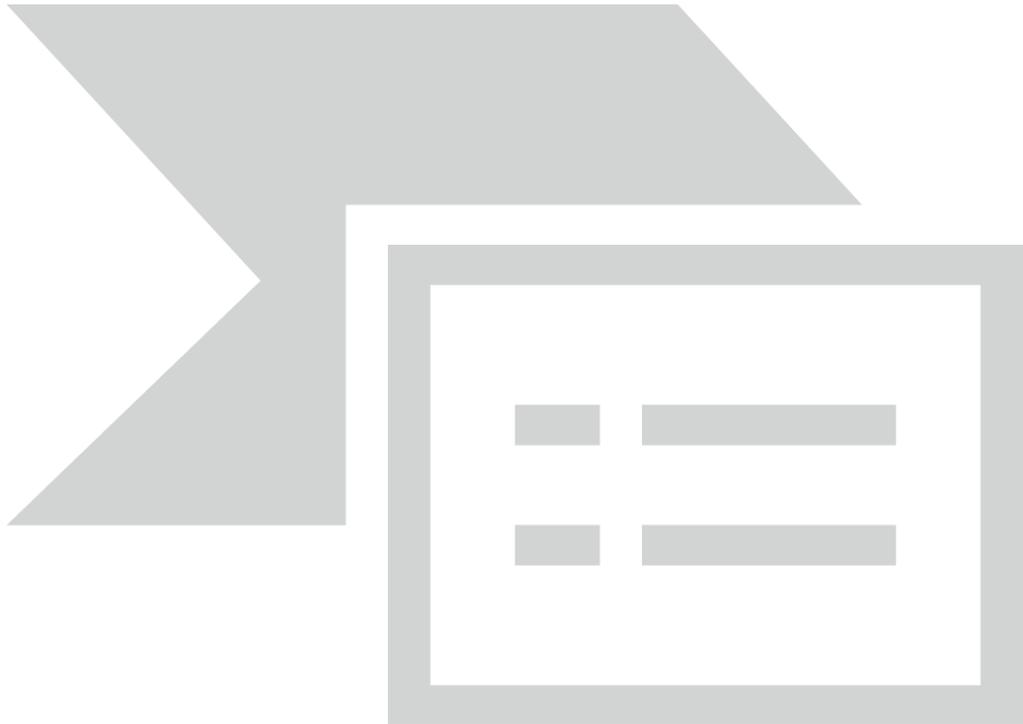
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<sup>184</sup> Grossfield, 'Language and the Law', p. 795.

<sup>185</sup> *The Bible: Contemporary English Version*, Harper Collins, London, 2000, Genesis 11: 1-9.

Louise Weiss building (the principal building of the European Parliament) in Strasbourg and Pieter Bruegel's painting of his vision of the Tower of Babel (Vienna version).

*Figure 2: Pieter Bruegel's Tower of Babel (Vienna version)* <sup>186</sup>



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<sup>186</sup> Pieter Brueghel Elder, 1563, *The Tower of Babel: Oil on Canvas* [painting] [image of painting], Kunsthistorisches Museum, Vienna. Image of painting available at <[http://artgallery10p.weebly.com/uploads/9/2/6/1/9261226/5442338\\_orig.jpg](http://artgallery10p.weebly.com/uploads/9/2/6/1/9261226/5442338_orig.jpg)>, (accessed 20 October 2014).

*Figure 3: Louise Weiss Building – Seat of The European Parliament in Strasbourg*  
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The image originally presented here cannot be made freely available via LJM Digital Collections because of copyright. The image was sourced at:

<[http://www.pehlemann.com/assets/images/European\\_Parliament\\_Europaisches\\_Parlament\\_Parlement\\_europeen\\_Strasbourg\\_France\\_Louise\\_Weiss\\_building\\_Frankreich\\_\\_Foto\\_2008\\_c\\_Wolfgang\\_Pehleman\\_IMG\\_0096.jpg](http://www.pehlemann.com/assets/images/European_Parliament_Europaisches_Parlament_Parlement_europeen_Strasbourg_France_Louise_Weiss_building_Frankreich__Foto_2008_c_Wolfgang_Pehleman_IMG_0096.jpg)>

*Figure 4: Hybrid of the artist's impression of the Tower of Babel and the Louise Weiss building*<sup>188</sup>

The image originally presented here cannot be made freely available via LJM Digital Collections because of copyright. The image was sourced at:

<[http://www.bibliotecapleyades.net/imagenes\\_sociopol/globalizacion41\\_06.gif](http://www.bibliotecapleyades.net/imagenes_sociopol/globalizacion41_06.gif)>

<sup>187</sup> Pehlemann, Wolfgang, 2008, Louise Weiss Building [photograph], available at <[http://www.pehlemann.com/assets/images/European\\_Parliament\\_Europaisches\\_Parlament\\_Parlement\\_europeen\\_Strasbourg\\_France\\_Louise\\_Weiss\\_building\\_Frankreich\\_\\_Foto\\_2008\\_c\\_Wolfgang\\_Pehleman\\_IMG\\_0096.jpg](http://www.pehlemann.com/assets/images/European_Parliament_Europaisches_Parlament_Parlement_europeen_Strasbourg_France_Louise_Weiss_building_Frankreich__Foto_2008_c_Wolfgang_Pehleman_IMG_0096.jpg)>, accessed 20 October 2014.

<sup>188</sup> Unknown Author, 'Hybrid image of The Tower of Babel and The Louise Weiss Building' [web image], available at <[http://www.bibliotecapleyades.net/imagenes\\_sociopol/globalizacion41\\_06.gif](http://www.bibliotecapleyades.net/imagenes_sociopol/globalizacion41_06.gif)>, accessed 20 October 2014.

From the above discussion we can see that it would be possible to justify theoretical considerations beginning at any point in the history of Europe, however my justification in commencing with the theories of Wilhelm von Humboldt comes from the fact that he is considered the father of modern day linguistics, and therefore the father of linguistics as it was thought of at the time of the *naissance* of the European Community project. As discussion below reveals, von Humboldt's musings on multilingualism as a hindrance on true communication and understanding are the more widely accepted views on the language-thought relationship debate in our society today, and thus it simply makes sense to commence using his theories rather than others that may have preceded.

## **SECTION 2.a : WILHELM VON HUMBOLDT**

Despite being highly influenced by the writings of Gottfried Wilhelm Leibniz and Johann Gottfried Herder, Wilhelm von Humboldt is considered by many to be the founding father of modern day linguistics. What is meant by modern day linguistics is the way we currently think of the relationship between language and communication and language and thought, compared with how differently this relationship was perceived prior to the 19<sup>th</sup> century. Von Humboldt was one of the chief proponents of the Romantic view of language. Prior to the 19<sup>th</sup> century the referential view of language was the dominant model of language. This model had been in favour from the time of Plato up to at least the Neo-classicists in the eighteenth century. The referential model pertained that signs are like mirrors the meaning of which derives from the objects they represent.

By contrast, in the nineteenth century, an expressivist model of language emerged according to which language, functioning less like a mirror than a lamp, serves as a medium of self-expression.<sup>189</sup>

Given that this thesis has the aim of demonstrating exactly why it is that multilingualism will cause insurmountable obstacles for a multilingual political entity such as the EU, it would be remiss to not consider the views of Wilhelm von Humboldt given his great contribution in changing how we perceive the relationship between language and thought and thus how this affects aspects of social life, including communication between the citizen and the state. Von Humboldt's views on language were extremely influential on the study of language in the nineteenth century and were largely responsible for the development of linguistics as a distinct field of study at this time (distinguishing the field from merely being thought of as a sub-field of psychology as was previously the case). He was responsible in particular for what subsequently linguists would come to call the diachronic emphasis in the field, that is, the study of language as it develops and changes over time by focusing on the etymology of words and changes in syntactic structures.<sup>190</sup>

Whereas earlier writings seemed to present 'national character' as a result of linguistic variation, Humboldt rather emphasizes the importance of national character as original cause of, and a continued influence on, language variation<sup>191</sup>: 'this emphasis, however, invests Humboldt's language theory with

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<sup>189</sup> R. L. W. Clarke, 'Wilhelm von Humboldt On Language: On the Diversity of Human Language Construction and its Influence on the Mental Development of the Human Species (1836)', *LITS2002 Notes 07C* [pdf], <<http://www.rlwclarke.net/Courses/LITS2002/2005-2006/07CHumboldtOnLanguage.pdf>>, accessed 16 June 2013, p. 1.

<sup>190</sup> Clarke, 'Wilhelm von Humboldt On Language', p. 3.

<sup>191</sup> M. L. Manchester, *The Philosophical Foundations of Humboldt's Linguistic Doctrines, Studies in the*

a racist aspect, since language-one of the main forms of cultural transmission-no longer constitutes or forms peoples so much as it expresses their absolute difference'.<sup>192</sup> In his essay 'The Diversity of Human Language-Structure and its Influence on the Mental Development of Mankind'<sup>193</sup> (*Über die Verscheidenheit des menschlichen Sprachbaues und ihren Einfluss auf die geistige Entwicklung des Menschengeschlechts*), Humboldt's model of language is summarised as thus:

the character and structure of a language expresses the inner life and knowledge of its speakers, and that languages must differ from one another in the same way and to the same degree as those who use them. Sounds do not become words until a meaning has been put into them, and this meaning embodies the thought of a community. What Humboldt terms the inner form of a language is just that mode of denoting the relations between the parts of a sentence which reflects the manner in which a particular body of men regards the world about them. It is the task of the morphology of speech to distinguish the various ways in which languages differ from each other as regards their inner form, and to classify and arrange them accordingly.<sup>194</sup>

Von Humboldt held that language is a means not only to describe reality, but also to discover reality. We are bound by the linguistic limits within which our mother tongue allows us to perceive, de-construct and create our reality. Humboldt writes that the differences in languages indicate a different "Weltansicht" (world-view) meaning that different languages draw our thoughts into particular and differing patterns through which we view the world. In a piece published in 1812, 'Essay on the Languages of the NewWorld' (written

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*History of the Language Sciences*, vol. 32, Amsterdam/ Philadelphia: John Benjamins, 1985, p. 118.

<sup>192</sup> J. Grossman, 'Wilhelm von Humboldt's Linguistic Ideology: The Problem of Pluralism and the Absolute Difference of National Character: Or, Where Do the Jews Fit in?', *German Studies Review*, vol. 20, no .1, 1997, p. 34.

<sup>193</sup> Also known as 'On Language: On the Diversity of Human Language Construction and Its Influence on the Mental Development of the Human Species' or 'The Heterogeneity of Language and its Influence on the Intellectual Development of Mankind', first published in 1836.

<sup>194</sup> Free online Encyclopaedia Britannica, 'Karl Wilhelm von Humboldt', *Free online Encyclopaedia Britannica* [website], 2015, <<http://www.1902encyclopedia.com/H/HUM/wilhelm-von-humboldt.html>>, accessed 16 June 2013.

in French), von Humboldt wrote: <Le monde dans lequel nous vivons est donc exactement celui dans lequel nous transplantons l'idiome que nous parlons> ('The world in which we live is exactly that into which we are transplanted by the language which we speak').<sup>195</sup>

Von Humboldt takes this idea further by discussing the idea of 'world-view' in relation to the acquisition of foreign languages. He states that:

As the individual sound stands between man and the object, so the entire language steps in between him and the nature that operates, both inwardly and outwardly, upon him. He surrounds himself with a world of sounds, so as to assimilate and process within himself the world of objects. Man lives primarily with objects, indeed, since feeling and acting in him depend on his presentations, he actually does so exclusively, as language presents them to him. By the same act whereby he spins language out of himself, he spins himself into it, and every language draws about the people that possesses it a circle whence it is possible to exit only by stepping over at once into the circle of another one. To learn a *foreign language* should therefore be to acquire a new standpoint in the world-view hitherto possessed, and in fact to a certain extent is so, since every language contains the whole conceptual fabric and mode of presentation of a portion of mankind. But because we always carry over, more or less, our own world-view, and even our own language-view, this outcome is not purely and completely experienced.<sup>196</sup>

Given the theory expressed by Von Humboldt here we can now understand the logic behind the discussed issues presented in the previous two chapters regarding the problems relating to translation inconsistencies and the effect this has on the accessibility and foreseeability requirements of the Rule of Law. Not only does translation cause problems given the impossibility of translating concepts rather than mere words, but we must also consider the impossibility of escaping our own world-view held in our language. If discussions at

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<sup>195</sup> H. Mueller, 'On re-reading von Humboldt', *Monograph Series on Languages and Linguistics*, vol. 19, 1966, p. 104.

<sup>196</sup> Wilhelm von Humboldt, *On Language: On the Diversity of Human Language Construction and its Influence on the Mental Development of the Human Species*, Ed. Michael Losonsky, Trans. Peter Heath, Intro. Hans Aarsleff, Cambridge, Cambridge University Press, 1988, p. 60.

institutional level in the European Union are taking place in a lucky few languages (mostly English, French and German), then the world-views contained within these languages will inevitably prioritise concerns that are contained within the limits that their linguistic sphere allows. This may not necessarily mean that the concerns of the countries speaking these languages will be prioritised (although this may well be the case also as was discussed in *Chapter One*) but rather that certain ways of thinking about the world, certain solutions to problems and certain manners in which to unite a people for example, may not be able to be grasped or even conceived of if the linguistic sphere and world-view of those creating policy does not allow them to do so. Von Humboldt does however go further than this in suggesting a definite link between the language and the shaping of a nation's mental power:

insight into the true essence of a nation, and into the internal connection of a single tongue [...] depends wholly on consideration of the overall individuality of mind. For only through this, as nature has furnished it and circumstances have worked on it, is the character of the nation bonded together, on which alone depend the deeds, arrangements and thoughts which that nation produces, and in which lie the power and virtue that are again handed down to individuals.<sup>197</sup>

He even argues that language is 'deeply entangled in the spiritual evolution of mankind', to the extent that 'at every stage of its local advance or retreat, and the state of culture at any time is also recognizable in it'.<sup>198</sup>

What von Humboldt presents us with throughout his works is the idea that there is a definite determinacy between language and world-view meaning that language and thought, language and culture, and language and nation cannot be separated from one another as each depends on the other for its existence,

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<sup>197</sup> von Humboldt, *On Language*, p. 21.

<sup>198</sup> von Humboldt, *On Language*, p. 24.

form and evolution. Despite claiming that the power of the individual, (compared with the might of language) is minimal, von Humboldt surprisingly does not go as far as suggesting that it is not possible for man to also hold certain power over the medium of language. He sees possibility in overcoming the tyranny of language and the barriers it creates within the human mind. Even in his own native language man is free, inasmuch as language is a process and the development goes in the direction of greater perfection in the process of making the articulated sound capable of expressing thought.<sup>199</sup> 'Nobody means by a word precisely and exactly what his neighbour does, and the difference, be it ever so small, vibrates, like a ripple in water, throughout the entire language. Thus all understanding is always at the same time a not-understanding, all concurrence in thought and feeling at the same time a divergence.'<sup>200</sup> There is therefore a principle of freedom rather than complete determinacy in language as the speaker is freely and willingly expressing his particular world-view which, even though shaped by the linguistic sphere of his mother tongue, is particular to himself or herself and the experiences that individual has thus far encountered in life. This once again raises the question about whether freedom of speech can truly be free within the European Union when some discourse between EU institutions and the citizen (excluding criminal proceedings of course) is held in a language other than the citizen's native language.

These theories of Von Humboldt's has earned him the title of father of modern day linguistics to many academics in the area as he is credited with connecting

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<sup>199</sup> Meuller, 'On Re-Reading von Humboldt', pp. 106-107.

<sup>200</sup> von Humboldt, *On Language*, p. 63.

the study of language to the national romanticist program by proposing the view that language is the very fabric of thought, that is that thoughts are produced as a kind of inner dialog using the same grammar as the thinker's native language. This view was part of a larger picture in which the world view of an ethnic nation, their 'Weltanschauung', was seen as being faithfully reflected in the grammar of their language.<sup>201</sup> In one of his strongest statements, he proposed: 'Users of markedly different grammars are pointed by their grammars towards different types of grammars and different evaluations of externally similar acts of observation, and hence are not equivalent as observers but must arrive at somewhat different views of the world'.<sup>202</sup> The theory triumphed by Von Humboldt, combining of our language fields and world-view with what we perceive as our society, has since been elaborated upon and become well known in the field through the work of Edward Sapir and Benjamin Lee Whorf. Von Humboldt's work paved the way for what many know as the *Sapir-Whorf hypothesis* or *linguistic relativity hypothesis*, which is where discussion will now turn.

## **SECTION 2.b** : EDWARD SPAIR AND BENJAMIN LEE WHORF: THE LINGUISTIC RELATIVITY HYPOTHESIS

Edward Sapir and Benjamin Lee Whorf were highly influenced by the way in which von Humboldt considered the relationship between language and thought and how this related to a linguistic group's world-view. Their names

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<sup>201</sup> P. Baofu, *The Future of Post-Human Semantics: A Preface to a New Theory of Internality and Externality*, Cambridge Scholars Publishing, 2012, p. 306.

<sup>202</sup> Slobin, Dan I, 'From "thought and language" to "thinking for speaking"', in J. Gumperz & S. Levinson (eds.), *Rethinking Linguistic Relativity*, Cambridge University Press, 1996, p. 70.

are most frequently associated with the *Linguistic Relativity Hypothesis* which can be summarised as the theory that differences in language can lead to great differences in thought and experience due to the fact that each language embodies a certain world-view which differs from the world-views embodied in other languages, and thus leads to the speakers of different languages to perceive and think about the world in different ways.<sup>203</sup> The 'weak' version of the hypothesis suggests that language limits thought, whereas the 'strong' version proposes that language determines thought: 'The Sapir-Whorf hypothesis, as usually formulated, searches for isomorphisms between grammar and culture and views language as either providing the means for thought and perception, or, in its stronger form, conditioning thought, perception, and world view'.<sup>204</sup>

It was Sapir who first turned to von Humboldt's idea that languages in themselves contained the key to understanding the differing world-views of people. In studying different languages he noted that the grammatical systems between languages could differ so greatly that in his opinion there was never enough similarity to allow for perfect translation between them: 'Sapir also thought because language represented reality differently, it followed that the speakers of different languages would perceive reality differently'.<sup>205</sup> Sapir stated that:

Human beings do not live in the objective world alone, nor alone in the

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<sup>203</sup> Effects of linguistic relativity have been shown particularly in the domain of spatial cognition and in the social use of language, but also in the field of color perception. See, Benjamin L. ee Whorf., 'Science and Linguistics', *Technology Review*, vol. 44, 1940, pp. 229-231, 247-248; E. Sapir, *Language: An introduction to the Study of Speech*, 8th ed., New York, Harcourt, Brace & Co, 1949; E. Sapir, 'The status of linguistics as a science', *Language*, 1929, pp. 207-214.

<sup>204</sup> Sherzer, 'A Discourse-Centered Approach to Language and Culture', p. 295.

<sup>205</sup> P. Baofu, *The Future of Post-Human Semantics: A Preface to a New Theory of Internality and Externality*, Cambridge Scholars, Publishing, 2012, p. 307.

world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society. It is quite an illusion to imagine that one adjusts to reality essentially without the use of language and that language is merely an incidental means of solving specific problems of communication or reflection. The fact of the matter is that the "real world" is to a large extent unconsciously built upon the language habits of the group. No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached ... We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation.<sup>206</sup>

For Sapir this meant that 'our customs of speech are the outcome of a cumulative dialectic of differentiation: languages generate different social forms, these forms further divide languages'.<sup>207</sup> However, Sapir did not agree with the idea of complete linguistic determinism, stating that:

[The forms of each language] establish a definite relational feeling or attitude towards all possible contents of expression and, through them, towards all possible contents of experience, in so far, of course, as experience is capable of expression in linguistic terms.<sup>208</sup>

And in a later piece of work:

It would be naïve to imagine that any analysis of experience is dependent on pattern expressed in language. Any concept, whether or not it forms part of the system of grammatical categories, can be conveyed in any language. If a notion is lacking in a given series, it implies a different configuration and not a lack of expressive power.<sup>209</sup>

His student and colleague, Benjamin Lee Whorf was more so a proponent of the 'stronger version' of the *Linguistic Relativity Hypothesis*, stating that the tool of perception, or 'thought world' constructs 'the microcosm which each man carries about within himself, by which he measures and understands what he

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<sup>206</sup> E. Sapir, Edward, 'The status of linguistics as a science', *Language*, 1929, pp. 207-214.

<sup>207</sup> G. Steiner, 'Whorf, Chomsky and the student of literature', *New Literary History*, vol. 4, no. 1, 1972, p. 19.

<sup>208</sup> E. Sapir, 1924, 'The Grammarian and His Language', *American Mercury* 1, pp. 149-155. (Reprinted in 1958, *Selected Writings of Edward Sapir in Language, Culture and Personality*, ed. D. G. Mandelbaum, Berkeley/Los Angeles: University of California Press), p. 152.

<sup>209</sup> E. Sapir, and M. Swadesh (ed.), 'American Indian grammatical categories', *Word*, vol. 2, no. 2, 1946, pp.103-112.

can of the macrocosm'.<sup>210</sup> According to Whorf, there is no 'universal objective reality', there is only 'an aggregate of "segmentations" made by different language-cultures'.<sup>211</sup> Whorf does not however claim that there are no rudimentary universal neuro-physiological apprehensions of time, space, identity, and sequence common to the human species, but rather that these universals ramify and take on local specification as soon as the infant enters the world of his particular speech<sup>212</sup>:

Actually, thinking is most mysterious, and by far the greatest light upon it that we have is thrown by the study of language. This study shows that the forms of a person's thoughts are controlled by inexorable laws of pattern of which he is unconscious. These patterns are the unperceived intricate systemizations of his own language-shown readily enough by a candid comparison and contrast with other languages, especially those of a different linguistic family. His thinking itself is in a language-in English, in Sanskrit, in Chinese. And every language is a vast pattern- system, differing from others, in which are culturally ordained the forms and categories by which the personality not only communicates, but also analyzes nature, notices or neglects types of relationship and phenomena, channels his reasoning, and builds the house of his consciousness.<sup>213</sup>

From this we can see that Whorf progressed his ideas beyond those of Sapir and von Humboldt before him. Through studying Native American languages he attempted to demonstrate the ways in which differences in grammatical systems and language use alter and affect the speaker's perceived the world.

We dissect nature along lines laid down by our native language. The categories and types that we isolate from the world of phenomena we do not find there because they stare every observer in the face; on the contrary, the world is presented in a kaleidoscope flux of impressions which has to be organized by our minds—and this means largely by the linguistic systems of our minds. We cut nature up, organize it into

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<sup>210</sup> B. L. Whorf, and J. B. Carroll (ed.), 'The Relation of Habitual Thought and Behaviour to Language', in *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf*, Cambridge, London, 1956, p. 147.

<sup>211</sup> Steiner, 'Whorf, Chomsky and the student of literature', p. 20.

<sup>212</sup> Steiner, 'Whorf, Chomsky and the student of literature', p. 20.

<sup>213</sup> Whorf and Carroll ed., *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf*, p. 252.

concepts, and ascribe significances as we do, largely because we are parties to an agreement to organize it in this way—an agreement that holds throughout our speech community and is codified in the patterns of our language [...] all observers are not led by the same physical evidence to the same picture of the universe, unless their linguistic backgrounds are similar, or can in some way be calibrated.<sup>214</sup>

Sapir and Whorf, much like von Humboldt before them, evidently view and theorise about language as a psychological or mental phenomenon which either forms or very heavily influences our perceptions of the world around us. In contrast to this way of thinking about language, Ferdinand de Saussure saw language as primarily a social fact, stating that 'the culture of a nation exerts an influence on its language, and the language, on the other hand, is largely responsible for the nation'.<sup>215</sup> What I aim to establish in including the theories of de Saussure here is that whether we agree with language theories which consider the relationship between language, thought and world-view (von Humboldt, Sapir and Whorf), or whether we agree with the structuralist approach of de Saussure discussed below, the concluding consequences for the multilingual regime of the EU remain the same, as is demonstrated below.

## **SECTION 2.c : FERDINAND DE SAUSSURE AND THE ARBITRARY NATURE OF THE SIGN**

Ferdinand de Saussure, much like von Humboldt, is another figure who is often referred to as 'the father of linguistics', except de Saussure is credited with the founding of semiology, which he described as 'the science that studies the life of signs within society'. De Saussure believes that semiology is the study of

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<sup>214</sup> Whorf, B. L., 'Science and Linguistics', *Technology Review*, vol. 44, 1940, pp. 229-231, 247-248.

<sup>215</sup> F. de Saussure, *Course in General Linguistics*, Open Court Publishing, 1998 (first published July 1915), p. 20.

what constitutes signs and the laws that govern them, meaning that it could discover the laws applicable to the signs employed in language and to the signs in social life more generally. In relation to language, within his semiological model of society de Saussure included his linguistic model of *structural linguistics*, which aimed to uncover the structures that determine our place in the world and which alone can give us meaning; such is the nature of 'structuralism'. As a field in itself, 'structuralism argued that the systematic form of language, rather than the particular linguistic elements of actual spoken words, gave rise to intelligibility [and] meaning was contained in the intralinguistic system', thus displacing the role of the speaker. 'The speaker was now dependent on language itself to engage in meaningful activities. The meaning available to a subject was that opened up by the conceptual ordering his or her language afforded. The subject was better understood as a product of culture, an identity created in language, a potentiality limited by the language that defined the conventions of a world.'<sup>216</sup> The structuralist approach to language would suggest that the speaker is more of a vessel in which the structural limits of a language define the speaker's ability to define society.

Turning specifically to de Saussure's linguistic structuralism, he makes the assumption that language is a system of forms, of relations between constituent units, or as he calls them, *signs*. He wrote about how 'the linguistic sign unites, not a thing and a name, but a concept and a sound image', further explaining that:

the combination of a concept and a sound-image a *sign* [...]. I propose to retain the word *sign* [*signe*] to designate the whole and to replace *concept* and *sound-image* respectively by *signified* [*signifié*] and

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<sup>216</sup> T. C. Heller, 'Structuralism and Critique', *Stanford Law Review*, 1984, pp. 140-141.

*signifier [signifiant]. [...] The bond between the signifier and the signified is arbitrary. Since I mean by sign the whole that results from the associating of the signifier with the signified, I can simply say: the linguistic sign is arbitrary.*

What de Saussure means by this is that the relationship is arbitrary as there is no logical link between a 'concept' and a 'thing'. A 'door' may well be called something entirely different, what matters is that this meaning is generally accepted by the collective community, not that it is logically linked in some pre-linguistic knowledge way to the 'thing' itself. Thus, the *signifier* and the *signified* have a completely arbitrary relationship. De Saussure elaborates upon this, stating that 'language is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of others'.<sup>217</sup> For him this means that 'value is therefore not fixed so long as one simply states that it can be "exchanged" for a given concept, i.e. that it has this or that signification: one must also compare it with similar values, with other words that stand in opposition to it. Its content is really fixed only by the concurrence of everything that exists outside it'.<sup>218</sup> Thomas C. Heller remarks in relation to de Saussure's distinction that 'signs in a system are differentiated from other signs in the same system not by their "essence," or "natural place" within a linguistic order that mirrors the world, but only by certain differences wholly internal to the system of language itself that mark them off from other constituent units'.<sup>219</sup> It is therefore the relationship between different signs that gives rise to meaning within the language system rather than a specific substance that is related to the specific sign itself. 'It is "constructed"- not a reflection of individual

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<sup>217</sup> de Saussure, *Course in General Linguistics*, p. 114.

<sup>218</sup> de Saussure, *Course in General Linguistics*, p. 115.

<sup>219</sup> Heller, 'Structuralism and Critique', p. 141.

experience of world or desire, but rather the product of shared systems of signification.'<sup>220</sup> Words do not signify anything outside of the relationships within the system they belong to and as such, meaning arises precisely because each sign has an identity given to it by its systematic differentiation from related terms in the language.<sup>221</sup>

Considering the structural linguistic model of language that de Saussure advocates, it is clear how his explanation of language systems could have severe consequences for communication and translation within multilingual polities such as the EU. De Saussure lays it out for us quite simply:

If words stood for pre-existing concepts, they would all have exact equivalents in meaning from one language to the next; but this is not true [...] Instead of pre-existing ideas then, we find in all the foregoing examples values emanating from the system. When they are said to correspond to concepts, it is understood that the concepts are purely differential and defined not by their positive content but negatively by their relations with the other terms of the system. Their most precise characteristic is in being what others are not.<sup>222</sup>

As the *signifier* and the *signified* have an arbitrary relationship, and as the linguistic *sign* as a whole is constructed along with the culture and tradition of that linguistic grouping, we cannot rely on words in translated documents conveying the same *signified* as that which was intended by the designated *signifier* in the initial language version. Only if we were able to embrace the sum of word-images stored in the minds of all individuals could we identify the social bond that constitutes language.<sup>223</sup> The problem lies with the fact that in respect of the law, significations are accessible only to those who recognize the sign, which is especially important when we consider that ignorance of the law

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<sup>220</sup> Heller, 'Structuralism and Critique', p. 142.

<sup>221</sup> Heller, 'Structuralism and Critique', p. 142.

<sup>222</sup> de Saussure, *Course in General Linguistics*, pp. 116-117.

<sup>223</sup> de Saussure, *Course in General Linguistics*, p. 13.

is no defence. In relating de Saussure's theory to the law, Mohr explains that, like language systems 'law, too, as an everyday activity has to have some semblance of sense and order and again we must realize that this is mainly constituted by a disciplinary system which one has learned and follows, even if it does not make any sense. Any characterization we find in cases is pieced together along diachronic structures such as pre-existing rules, precedents, and documents applied to "facts" which have mainly been constituted by the same disciplinary knowledge'.<sup>224</sup> Evidently, this structural disciplinary knowledge will vary in form and substance from language to language.

The arbitrary nature of the sign demonstrates how approaching the language question from de Saussure's structuralist linguistic approach also hinders communication possibilities (between the citizen and the institution at large) within a multilingual polity such as the EU, and thus puts into question the EU's democratic legitimacy. The reason different languages (most notably across different language groups) evoke different concepts of the world and different world views therefore could be said to be due to the arbitrary nature of the linguistic sign. If there is no logical link between the *sign* and the *signified* (*referent*), how could the same concepts emanate from different *signs* for the same *signified* (*referent*)?

As Saussure states in his *Course on General Linguistics*: 'Linguistics then works in the borderland where the elements of sound and thought combine; *their combination produces a form, not a substance*'.<sup>225</sup> This would suggest then that

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<sup>224</sup> Mohr, J. W., 'From Saussure to Derrida: margins of law', *Queen's Law Journal*, vol. 18, 1993, p. 354.

<sup>225</sup> de Saussure, *Course in General Linguistics*, p. 113.

the structural differences between languages, and the lack of a relationship between the *signifier* and the *signified* (thus the arbitrary nature of the *sign*) means that legal translations will inevitably fail to capture the true concept being conveyed in the original language version. Whereas the main issue if we take the language-thought-world view considerations of von Humboldt, Sapir and Whorf would be that due to deliberation being carried out in either English, French or German, the world-views contained within these languages may prioritise concerns that are contained within the limits that their linguistic sphere allows. The danger with this is that certain ways of thinking about the world, certain manners of interaction between 'state' and citizen, may not be able to be grasped or understood by citizens who speak a language other than that of deliberation if their linguistic sphere and world-view does not allow them to do so.

## **CONCLUSION**

By this point I would hope to have given a comprehensive understanding of my reasoning behind diverging into the realm of linguistic theory – the plethora of information it has revealed in relation to how language as a mechanism and concept works – and what this therefore means for multilingual political entities such as the EU. I firmly believe that many of the boundaries that hinder democratic participation possibilities stem from the EU's underestimation of the power of language over thought and socialisation. Looking back to von Humboldt's theory on 'world-view' there would be an inevitable communication impossibility between the governing political powers and the

citizen as communication of world-view is a near impossibly feat. And the more serious problem lies with the issue of laws being discussed and created in one language and thus one world-view being dominant in the creation of laws that affect numerous linguistic diversities and thus numerous world-views. A potential further consequence of this would be that those citizens who speak the language that a certain law was originally discussed and created in, would have more effective communication possibilities with governing powers and potentially more means by which to influence and interact with the laws that govern them. The case law demonstrates that whether it be through the need for comparison across numerous language versions, or whether it be due to translation inaccuracies, the result is the same: the ability of the citizen to rely on their own native language version of a regulation, directive or article can never be assured and as such, neither can the legal certainty of Union legislation.

This chapter focussed on looking at the EU through the eyes of a linguist to see if theoretical linguistic considerations could point the EU towards a solution for its multilingualism caused problems. Relating this back to the issue discussed in *Chapter One* of whether we should support a Union-wide *lingua franca*, it becomes ever more evident given the linguistic reasoning above why this would not be a solution to the linguistic problems that arise. By understanding of the application of Western linguistic theory to the sphere of the European Union I explained *why* it is that the Rule of Law cannot exist within such a multilingual, ill-defined sphere such as the European Union, and thus how the multilingual situation of the EU affects its democratic legitimacy. Discussion moved on to consider the theoretical rationale into the linguistic reasoning why it is that a

multi-lingual, post-national entity will inevitably stumble when attempting to foster integration, in order to begin on the pathway to finding potential solutions to this insurmountable problem in later chapters. This chapter demonstrated that the European Union's current ethos of 'unity in diversity', specifically in reference to the 24 official languages, is undoubtedly one of the main reasons for the Union's lack of cultural unity and common identity amongst its citizens.

By looking at different approaches to linguistics (linguistic relativism as well as structuralism) it was shown that no matter which linguistic approach is considered, the outcome for the problems of multilingualism remains the same. What has been shown is that, in order to navigate around the language issues of the European Union, we must look beyond the language regime towards a solution that does not necessarily rely on language being a solution to the language problem. What it is meant by this is that in looking at identity construction I will look for an alternative solution to the language question without looking for a linguistic/language solution – a change in language policy will not fix anything, the problem is too deep rooted in the inherent nature of language as a concept and as a primary feature of identity.

The constitutional lawyer is particularly sceptical about the chances of establishing a European community of participation without first creating a European community of communication. He uses a straightforward line of argument to stress this point: there can be no European democracy because there is no European public sphere; there can be no European public sphere because there is no European people (in the sense of a *demos* possessing a collective identity that would serve as a frame for political unity); and there can be no European people because there is no common European language.<sup>226</sup>

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<sup>226</sup> Kraus, *A union of diversity: language, identity and polity-building in Europe*, p. 23.

So the question becomes then, how do we create a community of communication without a common language? If language holds such great power over our democratic participatory capacity because of its primary role in identity formation, could we not look beyond language into identity formation at the European level that does not have language as one of its defining features? This will be the remit of the remainder of this thesis.

As a final note to this chapter, I must rather humorously note that the irony has not escaped me that perhaps the limitations caused my own linguistic sphere are stopping me from finding a solution to the problem. If I cannot think outside of the limits of my native language, perhaps my native language does not allow for the thought that would solve this issue:

We can only know what our systems of knowledge allow us to know. But if language ecology is not the answer, could there be an argument that western (European) knowledge – bound up in western European languages – can do without the collected knowledge of other forms of language around the world? It would seem hard to argue so, given the levels of inequality and threats to our environment being carried out in the industrialised world, which operates within discourses constructed in and through majority languages, while local varieties of language contain valuable local knowledge. Thus, it can be argued that as linguists, we have a moral imperative to help maintain and promote global linguistic diversity.<sup>227</sup>

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<sup>227</sup> D. M. Skerrett, 'Can the Sapir-Whorf hypothesis save the planet? Lessons from cross-cultural psychology for critical language policy', *Current Issues in Language Planning*, vol. 11, no. 4, 2010, p. 337.

## CHAPTER 4.

### WHAT IS IDENTITY? WHAT IS EUROPEAN IDENTITY?

#### INTRODUCTION

*“It doesn’t seem possible to be European without a projection into a world which doesn’t yet exist and even, as we will see, can’t be adequately qualified according to the classic notions of political science.”<sup>228</sup>*

This chapter begins with a quote which points to its conclusion. This chapter will be a journey of identity; an exploration of the impact of language on our collective identity formation, a discussion on what it means to have an identity, and consideration of what identity is for the European Union at present and why it is failing in its attempts to create a collective identity for its citizens. All of this is necessary given that the previous chapters have uncovered language’s primary role in identity formation. From this discovery, I believe that language by itself is not the origin of the problems it causes that subsequently lead to questioning the EU’s democratic legitimacy. In fact, the root of the problem comes from language’s role in identity formation, which suggests the possibility that if we solve the EU’s demos problem by suggesting ways of forging a European identity that do not contain the requirement of a common language, we could perhaps overcome the issues surrounding democratic participation and democratic legitimacy.

The previous chapter explored at great length the theories behind the

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<sup>228</sup> M. Abélès, ‘Identity and borders: an anthropological approach to EU institutions’, *Twenty-First Century Papers*, vo. 4, 2004, p. 3.

mechanics of language, its effect on world-view, and how this impacts the multilingual entity of the European Union when it comes to democratic participation, democratic legitimacy and European integration. Language, or more specifically multilingualism, has undoubtedly limited the democratic participation and also integration possibilities within the European Union between the Member States, but it is not the only factor. The larger issue to consider is identity, which of course includes the significantly influential role of a common language, but there are also many other factors to consider. In order to navigate around the language issues of the European Union, we must look beyond the language regime and search for a solution that does not necessarily rely on language being a solution to the language problem. What I mean by this is that in looking at identity construction I will look for an alternative solution to the language question without looking for a linguistic/language solution. Identity as a construct is very complex. In order to have a comprehensive discussion on how a European identity that has the strength of national identities can be formed, we must first understand what exactly it is that is meant by identity. This means exploring the difference and relationship between individual and collective identity, as well as distinguishing between identity and identification; two differing yet intertwining notions.

Whatever the eventual aim of the EU, establishing itself as a legitimate economic, political, legal and cultural community will continually be met with criticism and disagreement as there is not yet a fully formed or defined European collective. I reiterate the words of Grimm: "There can be no European democracy because there is no European public sphere; there can be no

European public sphere because there is no European people (in the sense of a demos possessing a collective identity that would serve as a frame for political unity); and there can be no European people because there is no common European language". What Grimm is saying cannot be doubted if we are to take identity in the form that it is commonly understood from the post Enlightenment idea of national identity formation. But what if we were to look at identity in a different way, using different symbols and different archetypes? Could we then conceive of a European identity which did not supplant national ones but in fact existed alongside them? Could we conceive of a European identity that did not require language in order for the collective to feel able to democratically participate? These questions do not come with a simple answer. To even consider the possibility involves firstly looking at what we actually mean when we say 'identity' and secondly looking at what kind of identity exists, if any, within the EU as it stands. Undoubtedly the EU is in the process of developing some sort of supra-national/post-national identity, but this statement in itself raises several issues. Why is it still in-process when the EU has such wide-ranging competencies and powers over the citizens of its Member States? What exactly is a supra-national or post-national identity? And what archetypes is it based around?

These are just some of the issues around the European identity that are considered throughout this chapter. One thing that the research for this chapter has not relied in any part on is Eurobarometre studies which obtain their data on citizens' feelings of attachment and belonging to the EU through standardised questionnaires. These have not been relied upon as it is my

opinion that identity, and especially collective identity, is subconscious and abstract in nature and therefore cannot be studied or measured in such a way. Although such studies might provide relevant data on how citizens feel, they would not be greatly useful in understanding the failings of collective identity formation at the European level. In being artificially constructed through the use of symbols, identity is a greatly unconscious manifestation and thus something that the individual could not fully conceive of even if they were knowledgeable in the area of identity formation. Understanding must instead come from consideration of the concept itself, not those who it is felt by.

Discussion of the above issues comes to the conclusion that the European Union needs to lead the way in creating new and different artefacts upon which contemporary identity can thrive on rather than relying on the traditional archetypes used by national identity formation if it is to create a Union where true democratic participation is possible.<sup>229</sup> 'For people to feel European, the European Union institutions have to become more meaningful and inclusive for ordinary citizens. The main challenge for the EU integration project is to invent new ways and materialize in practice a sense of belonging with Europe.'<sup>230</sup> Given that the standards of national identity formation are relatively new in their existence (as new as the concept of nation state as we currently understand it), there is hope that we can once again formulate something novel and unprecedented that fits into the supranational existence of the Union. Doing so would add great integrity, legitimacy and stability to contemporary

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<sup>229</sup> Although the next chapter does also consider the practicalities of the European Union continuing along the path of national identity emulation and whether this would be successful/possible.

<sup>230</sup> C. Matiuta, 'How to build the European Identity? Attitudes towards the European Union across its countries', *Journal of Identity and Migration Studies*, vol. 7, no. 2, 2013, p. 10.

identity formation at the European level.<sup>231</sup>

## **CHAPTER 4: SECTION 1**

### **LANGUAGE AND IDENTITY; AN INTRODUCTION**

*“Language is the mother of thought, not its handmaiden.” Karl Kraus*

Having understood the significance of language on how we, as individuals within a certain linguistic group, perceive the world around us and the immense effect the perceptive possibilities of our mother language places on our world view, consideration must now turn to what influence this has on our identity as a collective and why its impact is so very forceful when it comes to hindering integration within the EU and the formation of a European identity? After all, if ‘each language reflects a unique world-view and culture complex, mirroring the manner in which a speech community has resolved its problems in dealing with the world, and has formulated its thinking, its system of philosophy and understanding of the world around it’<sup>232</sup>, then is that not also how we subconsciously construct our group or collective identity over time also? Is our collective identity not formed by the histories that we, as a group, share between each other in a common language; our common philosophies and our overcoming of problems as a collective?

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<sup>231</sup> As was stated in the introduction of this thesis; this chapter is rather descriptive and arguably opens more issues than it solves. This is because *Chapters 4 and 5* are two sides of the same coin in their exploration of identity, existing European identity and its downfalls, and how a European identity could and should be forged which could resolve the legitimacy problems caused by the multilingual nature of the European Union. Therefore many issues raised in this chapter are left unresolved until *Chapter Five*, when they are discussed in relation to a possible solution rather than as an existing problem.

<sup>232</sup> Wurm, Stephen. A., ‘Atlas of the World’s Languages in Danger of Disappearing’, Unesco [pdf], 2001, <<http://unesdoc.unesco.org/images/0012/001236/123609e.pdf>>, accessed 10 October 2013.

The post-modern concept of identity considers language to be undoubtedly one of the most important aspects of identity construction given that the postmodern concept of identity is based on the idea that identity is constructed by discourse.<sup>233</sup> 'The postmodern idea of identity presents a fragmentary, hybrid and dynamic notion of the self. Postmodernists argue that "identity processes are fundamentally ambiguous and always in a state of flux and reconstruction".'<sup>234</sup> This postmodern view of identity must therefore be looked at in two ways: 1) its reliance on discourse as a key constructing factor and 2) its fluidity and changeability. What this statement on postmodern identity process suggests however is that our identity is reliant on discourse and therefore linguistic communication within a society. Yet to rely on discourse as a constructing factor of our identity as Europeans doesn't seem like a possibility not only given the multilingual nature of the European Union, but also given what was discussed in the previous chapter on language and its effect on world view. It is not necessary to repeat my concerns over the current language situation within the European Union as they have already been discussed at great length in the previous chapters, yet it is worth restating here the realisation from the earlier that neither a lingua franca nor equality to all languages of the EU is a suitable solution for the democratic legitimacy problems posed by the EU's multilingual situation. What follows is hence an exploration of identity formation. This chapter delves into the numerous components of identity. Only in knowing its full substance can there be hope of

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<sup>233</sup> S. Ivic and D. Lakicevic, 'European Identity: Between Modernity and Postmodernity', *Innovation: The European Journal of Social Science Research*, vol. 24, no. 4, p. 399.

<sup>234</sup> D. Collinson, 'Rethinking followership: a post-structuralist analysis of follower identities', *The Leadership Quarterly*, vol. 17, no. 2, 2006, p. 182.

resolving the language problems of the European Union through a novel form of identity formation that does not rely on discourse in the same way our national identities currently do.

## **CHAPTER 4. SECTION 2**

### **WHAT IS IDENTITY?**

*“For people to feel European, the European Union institutions have to become more meaningful and inclusive for ordinary citizens. The main challenge for the EU integration project is to invent new ways and materialize in practice a sense of belonging with Europe.”<sup>235</sup>*

Before discussing identity specifically in relation to the European Union or before attempting to create a structure for a solidly defined European identity, it is first necessary to consider what is in fact meant by the term ‘identity’ for the purposes of this thesis. Although individual identity is not the topic of discussion in relation to the EU, it remains vital to understand the distinction between individual identity and collective identity and how the two interact. Identity has different meanings to different people. We carry numerous identities with us on both the individual and collective level; gender identity, sexual identity, political identity, legal identity and cultural identity are just a few that spring to mind. We cannot exist without our identities, and on the collective level, our societies cannot exist without a defined collective identity, subconscious though it may be. Identities provide us with a psychological strength of attachment to the archetypes and symbols that have been

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<sup>235</sup> Matiuta, ‘How to build the European Identity? Attitudes towards the European Union across its countries’, p. 10.

artificially constructed within the borders of the society within which we live, which in turn gives us the feeling of belonging. Understanding the components of collective identity formation is undoubtedly essential if social and cultural integration on an EU level are desired, and if true democratic participation is to take place within the EU. Three significant features of collective identity are discussed with the aim of understanding how and why these concepts form a collective identity: 1) a shared history, 2) common myths and identification with artificial symbols, and 3) the collective identification with the nation and national identification. It is argued that the EU should subvert these ideas to form a collective identity in new and different ways to those relied upon in national collective identity formation.

## **SECTION 2.a : DISTINGUISHING BETWEEN INDIVIDUAL AND COLLECTIVE IDENTITY**

Undoubtedly numerous problems exist concerning how to define the term “identity”, both at an individual and collective level. The inherent ambiguity of the term poses a great difficulty when it comes to discussing it in the context of the European Union and a European identity. ‘Identity is a demanding concept as it aims to deal with persistence and change, similarity and difference, objectivity and subjectivity, the collective and the individual level of social and political understanding of the self, all at the same time.’<sup>236</sup> The paradoxically opposed concepts of similarity and difference that are contained within the

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<sup>236</sup> S. Duchesne, Sophie, ‘Waiting for a European Identity...Reflections on the Process of Identification with Europe’, *Perspectives on European Politics and Society*, Taylor & Francis (Routledge): SSH Titles, 2008, 9 (4), p. 402.

general definition of identity can certainly cause confusion, but our 'self' (individual) and our 'group' (collective) are equally influential and co-dependent when it comes to our identity.

Acceptance of diversity implies the dialogue between different identities. Identity is a dynamic concept and involves the self-identification of individuals with certain values and symbols. The concept of identity is used with respect to individuals: "...All identity is individual, but there is no individual identity that is not historical or, in other words, constructed within a field of social values, norms of behaviour and collective symbols. The real question is how the dominant reference points of individual identity change over time and with the changing of institutional environment" (Balibar & Wallerstein, 1991). No form of identity is ever complete, nor totally stable.<sup>237</sup>

This definition would suggest that our identity is built on a cultural pluralism that is related to our social history, the present norms by which our society lives by and through identification with artificially constructed social symbols or artefacts. There is evidentially an internal aspect to identity, perhaps this is what we could call 'individual identity': the identification with the self on an ethnic, sexual and gendered level; as well as an external aspect, our 'collective identity'. This external aspect could perhaps be described as the identification of the self with our immediate society or social norms, politics and common cultural symbols, as opposed to those of others in alternative societies.<sup>238</sup> I would argue that our internal, individual identity is a constant aspect that, whilst influenced by external stimuli (especially when talking about gender identity and sexual identity), is more solidly fixed than what we would consider to be our collective identity. What's more, it is entirely possible that language is the link between the 'internal self' and the 'external self' when it comes to

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<sup>237</sup> Matiuta, 'How to build the European Identity? Attitudes towards the European Union across its countries', p. 3.

<sup>238</sup> The idea of collective identity needing an 'other' to define itself against in order to form a comprehensive identity is something that will be discussed later in this chapter.

identity. Our linguistic sphere, having been present with us since birth, almost forms a part of our internal self, as well as being a limiting force on how we experience the external world and how the external self interacts in society.

Charles Taylor's model of identity suggests that identity is constructed dialogically, through a process of mutual recognition where participants recognise each other as both equal in their human dignity and separate in their individual uniqueness or cultural distinctiveness.<sup>239</sup> Whereas Anthony D. Smith suggests that 'for the individual, identity is usually "situational", if not always optional. That is to say, individuals identify themselves and are identified by others in different ways according to the situations in which they find themselves. [...] Collective identities, however, tend to be pervasive and persistent. They are less subject to rapid changes and tend to be more intense and durable'.<sup>240</sup> Whilst I would agree that identity is situational in that our surroundings undeniably impact our sense of self as we grow and form a 'self', I do not agree that the core internal sense of identity is situational. Being identified in a certain way or identifying with a certain group in a certain situation does not change our individual identity. Identity is made up of a series of identifications both on an individual and collective level and so choosing one or another to identify with in a certain situation does not change the whole core of our pluralistic identity. 'Individuals identify with different groups and, while they therefore have different identifications, they have only one identity which may change to a certain extent over time but which is considered to be basically

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<sup>239</sup> P. Nanz, *Europolis: Constitutional Patriotism Beyond the Nation State*, Manchester University Press, 2006, pp. 55-56.

<sup>240</sup> A. D. Smith, 'National Identity and the idea of European Unity', *International Affairs (Royal Institute of International Affairs 1944)*, vol. 68, no. 1, January 1992, p. 59.

stable.’<sup>241</sup> However Smith’s assertion about collective identities is of more interest for the purposes of this chapter. He proposes that collective identities are more pervasive and persistent and less subject to change, an idea that must be considered in two ways. Firstly, our collective identity is formed through a complex yet artificial series of identifications within a certain social group, the members of which are subject to identification with the same set of artificial symbols as we are. Due to the complex and historical nature of collective identity formation I would have to agree that collective identities are not subject to rapid changes. However secondly, in being based on artificially constructed archetypes it is certainly plausible to reckon that these artificial constructs could, over time, be reconstructed to form new and different symbols and archetypes with which the collective comes to identify with and subsequently form their collective identity. After all, our collective identity is determined by artificial external forces rather than internal forces.

## **SECTION 2.b : COLLECTIVE IDENTITY**

The sum of what constitutes collective identity as a general concept (and as separate to individual identity) must be considered before a discussion on what European identity is as it stands and what it could potentially become can be entered into. The eventual aim in pursuing this line of investigation will be firstly to understand the current identity situation within the EU and better

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<sup>241</sup> S. Duchesne and A-P. Frogner, ‘National and European Identifications: A Dual Relationship’, *Comparative European Politics* (2008) 6, p. 144.

understand the relationship between identification and identity formation within the European Union.<sup>242</sup>

Although definitive differences are present between individual and collective identity (as described above), collective identity is made up of several individuals, all of whom identify with the same group, and therefore it could be described as both an individual and a group phenomenon. Three undeniably significant features of collective identity are those of: 1) a shared history, 2) common myths and identification with artificial symbols, and 3) the collective identification with the nation and national identification.<sup>243</sup>

### 2.b.i. A Shared History

An undisputed aspect of collective identity is that it is partially formed by a shared sense of cultural continuity and cultural history:

shared memories of earlier periods, events and personages in the history of the unit - the collective belief in a common destiny of that unit and its culture - there can be no collective cultural identity without shared memories or a sense of continuity on the part of those who feel they belong to that collectivity.<sup>244</sup>

Powerful shared histories are often amalgamations of historical events and the narratives that have come out of these events and changed over time.

Momentous events such as war often have the greatest effect on solidifying the feeling of a common belief and common destiny within the members of a

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<sup>242</sup> Section 3 of this chapter.

<sup>243</sup> See R. Poole, *Nation and Identity*, Routledge, 1999. Particularly Chapter. 1, Section. 1 'the nation: imagination and culture', which discusses the theories of Benedict Anderson concerning the roles of emblems, symbols, war commemorations and language in imagining the community, or feeling like you belong to a collective.

<sup>244</sup> Smith, 'National Identity and the idea of European Unity', p. 58.

collective. Once these events have passed then the story-making begins. Take for example the instances of WW1 and WW2 and how remembrance of these events has changed throughout the years. Focusing on the heroic actions of certain individuals, propaganda and perpetuating the idea of having “survived” a potential threat to our way of living breeds narratives that change the actual event into a story that we, as a collective, share, perpetuate and eventually change. It is not the event itself which we are remembering as a collective, but rather the stories that this history has formed and changed over generations, all of which creates a strong sense of nationalism and reinforces the strength of the collective identity. Ross Poole discusses the value of such sentiments in the aftermath of war in relation to national identity, stating: ‘The various commemorations of war – cenotaphs, tombs of the unknown soldier, and the like – play a central role in the iconography of the nation just because they symbolise the sacrifices that men and women have been willing to make on its behalf’.<sup>245</sup> And as Kymlicka points out, the fact is that, ‘void as these tombs are of identifiable mortal remains or immortal souls, they are nonetheless saturated with ghostly national imaginings’.<sup>246</sup> Whilst not advocating that the member states of the European Union should go to war as a united force, war is most definitely a way that emotive shared histories reinforce the sense of a group which influences the formation of a collective identity. There has been no emotive incident that the members of the European Union have tackled as an entity that could potentially form stories that become shared histories.

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<sup>245</sup> R. Poole, *Nation and Identity*, Routledge, 1999, p. 12.

<sup>246</sup> W. Kymlicka, *Liberalism, Community and Culture*, Oxford, Clarendon Press, 1989, ch. 8. Kymlicka reiterates this position in *Multicultural Citizenship*, Oxford, Clarendon Press, 1995, ch. 5, pp. 80-94.

There is also the issue that these shared histories need to be communicated in order to act with any significant force, which brings us back to the problem of language. Should an emotive shared history happen, the subsequent shared stories would evolve in differing ways depending on the linguistic possibilities of the language it was shared in, potentially creating vastly diverging accounts from what began as the same shared history.

Collective identities refer to a space of communication, the boundaries of which vary with what is communicated. This is an implication of the theoretical assumption that collective identities are constructed through stories. Stories that link people vary with the communicative network which they constitute. Thus, the reference object of collective identities is a network of communication with boundaries which are identified and controlled by an identity. Networks of communication generate identities as a project of control of their boundaries.<sup>247</sup>

These artificial stories that are fundamental for collective identity construction are communicated through a common language, something that for the reasons explained in the previous chapter, the EU does not nor should have. That being said, it could be that this is precisely the reason why it is so hard for 'European stories' or 'constructs' to take hold with the same level of force.

The national collective identity is built on the shared histories of that nation. These shared national histories reinforce the symbols as well as reinforcing the exclusivity of the group. In addition to the point raised above about histories not being able to be shared because of the limits of each different linguistic sphere, at the European level there cannot be a shared national story as there are too many competing stories which refer to other EU member states as being the "other" due to the numerous historical wars between European countries.

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<sup>247</sup> K. Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', *European Journal of Social Theory*, vol. 12, no. 4, November 2009, p. 435.

'The problem is the co-existence of many hegemonic stories. This creates not only a practical problem but also a theoretical problem: How to conceive the narrative network underlying a political community in a situation where we have many narratives floating around and referring to it? The case in point is Europe.'<sup>248</sup> The EU clearly is lacking any kind of formed collective identity, an incontrovertibly necessary element if integration on a social and cultural level is to happen to the same extent as current economic integration. This sense of collective identity is needed if the EU is going to be successful as a democratically legitimate project. But it is a two-way stream. 'For a person, an identity allows them to be recognized as something particular vis-à-vis others.'<sup>249</sup> Having an identity at the collective level creates a sense of belonging to a certain and defined "something" as opposed to something else. This sentiment of belonging results in positive consequences such as an understanding of what your rights as an individual are within that specific collective as well as a feeling of recognition from within and without of the collective. Officially having European citizenship therefore means nothing if the European identity has not come beforehand.

### 2.b.ii. Common Myths and Constructed Artificial Symbols

It is clear that collective identities are social constructions which begin as a shared history and then develop into stories that give the individuals of a group a sense of belonging both as an individual and as a collective. 'Collective identity

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<sup>248</sup> Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', p. 432

<sup>249</sup> Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', p. 428.

is first and foremost an artificial phenomenon because it is a social construction. [...] This kind of construction is based on strategies of inclusion and exclusion, demarcation and the definition of commonality and dissimilarity.<sup>250</sup> We, as a group, create symbols that demonstrate our “we-ness”. Artificially constructed symbols such as an anthem or flag give us a sense of belonging. We can recognise these symbols as being “ours” as opposed to “theirs”. Such symbols highlight the artificial and socially constructed nature of collective identity. Rather than evolving naturally, this aspect of identity formation is consciously and artificially forged in a manner that leads us to subconsciously feel a sense of belonging when surrounded by these artificial constructs. According to Viktoria Kaina and Ireneusz Pawel Karolewski there are two main theories that explain collective identity formation: essentialism and constructivism. Essentialists believe that political collective identities result from the given cultural ‘raw material’ within a society, whereas constructivists stress the active role of intellectuals and political entrepreneurs, for instance by manipulating cultural symbols and mobilizing ethnic or cultural cleavages.<sup>251</sup> In essence, essentialists believe that the “we-ness” of belonging are qualities emerging from physiological traits, psychological predispositions, regional features, or the properties of structural locations.<sup>252</sup> The similarities of these common qualities are internalised by the individuals in a group in order to subconsciously form the idea of a common, unified society that is experienced in the same way by all of the members within it.

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<sup>250</sup> V. Kaina and I. P. Karolewski, ‘EU Governance and European Identity’, *Living Reviews in European Governance*, vol. 4, no. 2, 2009, p. 15.

<sup>251</sup> Kaina and Karolewski, ‘EU Governance and European Identity’, p. 14.

<sup>252</sup> K. A. Cerulo, ‘Identity Construction: New Issues, New Directions’, *Annual Review of Sociology*, vol. 23, 1997, p. 386.

The problem for the European Union when it comes to these shared stories is this:

Through rituals and ceremonies, political myths and symbols, the arts and history textbooks through these the links with a community of origin, continually reshaped as popular 'ethno-history', are reforged and disseminated. In this respect, national identifications possess distinct advantages over the idea of a unified European identity. They are vivid, accessible, well established, long popularized, and still widely believed, in broad outline at least. In each of these respects, 'Europe ' is deficient both as idea and as process. Above all, it lacks a pre-modern past-a 'prehistory ' which can provide it with emotional sustenance and historical depth.<sup>253</sup>

Lacking such well-established myths or truly emotive prehistory, one might ask why it is that the EU seems to have attempted to forge a collective European identity following this blueprint.

### 2.b.iii. The Collective and the Nation<sup>254</sup>

The most effectively constructed and clear archetypes and symbols of a collective are those created at the national level. Flags and anthems are the most obvious examples of symbols that allow simple identification between the citizen and the national collective. National identity is by far the strongest example of a defined collective identity:

National identities do what collective identities do in general: they are stories that combine a series of events in texts, songs and images which

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<sup>253</sup> Smith, 'National Identity and the idea of European Unity', p. 62.

<sup>254</sup> For a fully comprehensive understanding of national identity formation and nation-state building see: A. S. Arnaiz (ed), Carina Alcoberro Llivina (ed), *National constitutional identity and European Integration*, (Law and Cosmopolitan Values, Vol.4), Intersentia Ltd, 2013; J. E. Lane, *Constitutions and Political Theory*, 2nd revised edition, Manchester University Press, 2011; M. Sarup, *Identity, Culture and the Postmodern World*, Edinburgh University Press, 1996; A. D. Smith, *The Ethnic Origins of Nations*, John Wiley & Sons, 2009; K. W. Deutsch, *Nationalism and its alternatives*, Knopf, (distributed by Random House), 1969; Z. Bauman, *Identity: Conversations with Benedetto Vecchi* (Themes for the 21st Century Series), 1st edition, Polity Press, 2004; E. Balibar, *Race, Nation, Class*, Verso, 1996; A. D. Smith, *Nations and Nationalism in a Global Era*, Polity, 1995; R. Poole, *Nation and Identity (Ideas)*, Routledge, 1999. S. Kuhnle (ed), P. Flora (ed), *State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan (Comparative European Politics)*, Oxford, Oxford University Press, 1999.

some people recognize as being part of their particular we, i.e. as a collective identity. In addition, national identity constructions have succeeded in imposing themselves as a hegemonic identity in a territorially bounded political community. This exclusiveness is built into a story which links people defined as citizens of a political community. This story is transmitted to and learned by new generations, practised in national rituals and objectified in songs (anthems) and images (flags).<sup>255</sup>

National identity formation is a relatively new phenomenon that gives the collective geographical borders within which to solidify their collective sentiment at this level. As is discussed at various points throughout this chapter and the next, in its attempt to form an identity the EU has cookie cut aspects of national identity formation. Therefore what the collective attachment is and its strength at the national level must be understood if we are to comprehend the format so far followed by the EU. Only then will it be possible to conceive of how we can move forward in creating a European identity that is able to resolve the democratic legitimacy questions caused by its multilingual situation.

Looking further into Anthony D. Smith's work on national identity and nation building, he reveals that national identity, as a secular ideology, appeared following the American and French Revolutions.<sup>256</sup> National identity, as we understand and construct it today thus came out of a period of struggle; where the rights of the people within the nation and the relationship between the nation and the citizen became more defined and widely understood than ever before. He explains that:

The first, or 'Western', model of the nation arose out of the Western absolutist states whose rulers inadvertently helped to create the conditions for a peculiarly territorial concept of the nation. The Western model of the nation tended to emphasize the centrality of a national territory or homeland, a common system of laws and institutions, the

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<sup>255</sup> Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', p. 432.

<sup>256</sup> Smith, 'National Identity and the idea of European Unity', p. 55.

legal equality of citizens in a political community, and the importance of a mass, civic culture binding the citizens together.<sup>257</sup>

The nation emerged therefore as a territorial concept within which apparent commonalities between the peoples of that territory could be observed, and under which citizens were afforded legal equality under a system of laws. The rise of the nation state and thus national identity is hence strongly linked to the emergence of democratic civic society in the West, yet again affirming the relationship between a defined people and democratic participation. Democracy emerged out of the revolutions in emerging nations as the people could identify a defined structure within which they could enforce their rights.

The three aforementioned features of collective identity in fact derive from the assumptions and beliefs nationalists generally accept build the concept of national identity. In explaining the complex and multidimensional nature of national identity construction Smith outlines the following features:

- \* the territorial boundedness of separate cultural populations in their own 'homelands';
- \* the shared nature of myths of origin and historical memories of the community;
- \* the common bond of a mass, standardized culture;
- \* a common territorial division of labour, with mobility for all members and ownership of resources by all members in the homeland;
- \* the possession by all members of a unified system of common legal rights and duties under common laws and institutions.<sup>258</sup>

Which he summarises as 'a named human population sharing a historical territory, common memories and myths of origin, a mass, standardized public culture, a common economy and territorial mobility, and common legal rights

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<sup>257</sup> Smith, 'National Identity and the idea of European Unity', p. 61.

<sup>258</sup> Smith, 'National Identity and the idea of European Unity', p. 60.

and duties for all members of the collectivity.<sup>259</sup> In critiquing Smith's work on national identity, John Erik Fossum adds the vital factor of 'national identity [as] based on the conception of a collective national consciousness, whose sources are culturally based but need not be predetermined or given and can be constructed'<sup>260</sup>, an element which will prove fundamental when later discussing how the EU can move forward with identity construction. Nationalist scholars also insist that a common language is vital to the fostering of a national identity. Karen A. Cerulo discusses Benedict Anderson's ideas on imagined community and identity, stating that he approaches the idea of national identity as a socio-cognitive construct:

[It is] both spatially and temporally inclusive, both enabled and shaped by broader social forces. [Anderson] documents key moments of identity construction, times during which cultural (language) and social factors (capitalism, print technology) convene in a particular historical moment, effectively remaking collective images of the national self.<sup>261</sup>

If language plays such an important role in the construction of the national self then it follows that it must play an important part of the process of nation creation also. Does this then mean that the European Union cannot define itself, and does not "exist" until the identity of its people has been constructed? If so, demos creation through European identity formation is of vital importance for the democratic legitimacy of the Union in that democratic participation is impossible if there are, technically speaking, no people. There cannot be a nation without a people, and if the cultural assimilation of the people is largely influenced by their common collective identity which is by in

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<sup>259</sup> Smith, 'National' Identity and the idea of European Unity', p. 60.

<sup>260</sup> J. E. Fossum, 'Identity Politics in the European Union', *Journal of European Integration*, vol. 23, no. 4, October 2001, p. 378.

<sup>261</sup> Cerulo, 'Identity Construction: New Issues, New Directions', p. 390.

large forged by their common language then the 'nation' cannot be conceived of without there first being a national identity (not geographically speaking, of course).

Nikiforova highlights that national identity formation also includes 'the formation of national states, connection of citizenship with ethno-cultural community, changes in economic system, the formation and distribution of mass education in a national language [and] the process of cultural homogenization'. She suggests that national identity is formed as a symbiosis of national statehood and the ethno-cultural ground and that the dominating differences of national identities are the linguistic and religious specificity of belonging to a certain group.<sup>262</sup> It is without a doubt these two central elements of culture: language and religion, which create the most obvious distinctions between societies. Where the EU is concerned, historically the continent of Europe has been largely dominated by Christians (although this also is changing with modern migration trends), meaning that a common language has been and could currently be said to be the major unifying aspect that is absent from the EU.

Anthony D. Smith however suggests a middle-ground attitude towards identity. 'He links social constructionism to more essentialist views. He defines national identity as a product of both "natural" continuity and conscious manipulation. Natural continuity emerges from pre-existing ethnic identity and community; conscious manipulation is achieved via commemoration, ideology, and

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<sup>262</sup> B. Nikiforova, 'Language policy and language of cultural pluralism', *Santalka: Filosofija, Komunikacija*, vol. 15, no.1, 2007, p. 44.

symbolism.’<sup>263</sup> Whether taking an essentialist or constructivist approach however, what is clear about the collective identity is that we, as humans, need defined categories that we can identify with in order to form and understand our collective identity. On a collective level, identification with defined systems, symbols, ideologies and archetypes, all of which are artificial constructions, leads to collective identity formation.

### CHAPTER 4. SECTION 3

#### WHAT IS EUROPEAN IDENTITY?<sup>264</sup>

*“We are not bringing together states, we are uniting people.” (Jean Monet, 1952)*

‘The old dream of the EU founding fathers was to see citizens identify more and more with Europe and eventually cease to identify with their own nations — a transfer of attachment which was expected to ward off the nationalist conflicts and wars which have cast a shadow over the continent for several centuries.’<sup>265</sup>

As we know, nearly 60 years after the birth of the European Community, this has not happened. Along with the inherent problems caused by not having the unifying feature of a common language, the EU has created its identity around the same archetypes and symbols traditionally used by the nation state in its artificial construction of collective identity. This has had the resulting

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<sup>263</sup> Cerulo, ‘Identity Construction: New Issues, New Directions’, p. 390-391.

<sup>264</sup> For a comprehensive discussion on European identity, see G. Delanty, *Inventing Europe: Idea, Identity, Reality*, London, Palgrave Macmillan, 1995, which discusses the crisis of European identity. See also, P. Blokker, and G. Delanty, ‘European Identity, Post-Western Europe, and Complex Cultural Diversity’, in: Browning, Christopher and Lehti, Marko (eds.) *The Struggle for the West: A Divided and Contested Legacy*, Routledge Critical Security Studies, Taylor & Francis, Abingdon and New York, 2009; and G. Delanty, ‘The quest for European identity’, in: Erikson, Erik Oddvar (ed.) *Making the Euro-Polity: Reflexive Integration in Europe*, Routledge studies on democratizing Europe, Routledge, Abingdon and New York, 2006, pp. 127-142.

<sup>265</sup> Duchesne and Frogner, ‘National and European Identifications: A Dual Relationship’, p. 145.

consequence of placing the EU in conflict with national identities rather than succeeding in its aim of superseding national identities or existing alongside them.

So what has the EU done thus far? And why is it failing to achieve a defined collective European demos? This section considers the current markers of European identity as it stands so that we have a comprehensive understanding of its make-up. Beginning with discussion on The European Declaration on Identity 1973 this section discusses the numerous shortcomings of this declaration as well as its seemingly complete lack of understanding of identity as a concept. However, hope springs from The Charter on European Identity which demonstratively reveals a much better understanding of the complexities of identity. This leads to a discussion on the difference between a defined economic space and a defined cultural space, and the differing resulting consequences from the two. The economic identity of the European Union has been relatively clearly defined since its naissance, with political and legal identities following not long after. It is the cultural identity of the Union that is causing most problems, and it is the cultural identity that is hindering any true sense of citizenry and collective amongst the European people, and thus hindering democratic participation and legitimacy.

The identity of the European Union, both that of its collective people and that of itself as an institution is still in process. The attempt of the EU to define itself along the same lines of national identity formation is quite possibly its biggest downfall. In doing so it has created a heightened sense of nationalistic sentiments and has placed itself in direct conflict with the already strongly

formed national identities of its Member States, rather than placing itself alongside them. This weak sense of identity at the European level is invariably discussed in relation to the inherent power of a common language in identity formation (and lack of it within the EU), as well as the uncertainty caused by continually expanding geographical borders. It is quite possible that linguistic issues are the main reason behind the lack of identity – both in terms of a high level of multilingualism and in terms of the lack of linguistic equality at institutional level within the EU. In recognising this as the problem, we need to look further into identity and what it is in order to find a potential solution.

One significant consideration of this section is that of The Other and the role it plays in collective identity formation. The EU may not be able to define itself or create a collective identity for its people without first defining what it is not. Can we only truly understand ourselves once we know what we are not?

### **SECTION 3.a : WHAT IS IDENTITY FOR THE EUROPEAN UNION AT PRESENT? <sup>266</sup>**

#### **3.a.i. The Declaration on European Identity 1973 <sup>267</sup>**

The Declaration on European Identity 1973 presents European identity as the foundation of EU citizenship. The declaration, in its naivety, seems to assert

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<sup>266</sup> The Preamble of the Treaty on European Union, 1992, makes a small note about European identity: 'RESOLVED to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world'. See: European Union, *Treaty on European Union, Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities, available at: < [http://europa.eu/eu-law/decision-making/treaties/pdf/treaty\\_on\\_european\\_union/treaty\\_on\\_european\\_union\\_en.pdf](http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf) >, (accessed 13 July 2013), Preamble.

<sup>267</sup> European Union, *The Declaration on European Identity*, 14 December 1973, available at <[http://www.cvce.eu/obj/declaration\\_on\\_european\\_identity\\_copenhagen\\_14\\_december\\_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html](http://www.cvce.eu/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html)>, accessed 14 May 2014.

that merely declaring something to be part of the European Identity thus makes it so. The document, whilst acknowledging the need for unity and assimilation in identity formation, is completely ignorant in its understanding of the complexity of identity and its formation as a concept integral to the human subconscious. The document would seem to imply that the 9 member states of the time naively believed the common market, customs union and institutions could form essential elements of the European identity – collective identity formation theory, as discussed in the previous section, tells us this is impossible.

2. The Nine have the political will to succeed in the construction of a united Europe. On the basis of the Treaties of Paris and Rome setting up the European Communities and of subsequent decisions, they have created a common market, based on a customs union, and have established institutions, common policies and machinery for co-operation. All these are an essential part of the European Identity.<sup>268</sup>

It could be argued that by declaring these mechanisms to be an integral part of the European identity, the EU was attempting to form its collective identity on things other than the archetypes that our national identities are formed on. However, the error in this comes from not understanding the distinction between legal and political collective identity in contrast to social or cultural collective identity. The European identity is embodied firstly by practical components which belong to social welfare and democratic rules and less by symbolic and emotional elements which are underlying the national identity (such as language, ethnicity, religion, common history, myths, symbols, geographic boundaries).<sup>269</sup> These practical mechanisms that serve as legal and

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<sup>268</sup> Ibid.

<sup>269</sup> Matiuta, 'How to build the European Identity? Attitudes towards the European Union across its countries', p. 10.

economic identifiers are not emotively strong enough to create a European citizenry, collective identity or demos. That is not to say that the citizens of Europe are not concerned by or passionate about their legal rights and economic situation; what it means is that this type of collective identity is in no way linked to our subconscious. They are models that we are consciously concerned about rather than things which we feel to be inherent to our being both as an individual and a collective. Making an attempt to forge the collective identity of a people based around such models is futile and, whilst the economies and policies can prove successful, it will prove difficult to encourage the people to back economic and political decisions within the area without there first being a defined social and cultural collective.

Continuing our look at the declaration, it states further elements that are key to the European identity, noting the principles of representative democracy, the Rule of Law, social justice and human rights.

1. The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity.<sup>270</sup>

These are fundamentally more plausible as means of evoking a sense of collective at the subconscious level. The individual element of collective identity formation is recognised by acknowledging the individual in relation to

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<sup>270</sup> European Union, *The Declaration on European Identity*, 14 December 1973, available at <[http://www.cvce.eu/obj/declaration\\_on\\_european\\_identity\\_copenhagen\\_14\\_december\\_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html](http://www.cvce.eu/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html)>, accessed 14 May 2014.

democracy, the Rule of Law and social justice. Whether it is possible to use a common understanding of democracy, social justice and human rights as bases for collective identity formation within the EU will be discussed at length in the next chapter with regards to the possibility of a rights-based union. However it is worth mentioning here the glaring problem as raised in *Chapter 2* of this thesis: that of a lack of concrete definition when it comes to the Rule of Law as well as the inequality at an institutional level in the area of linguistic human rights. If the EU were to use these mechanisms as bases for collective identity formation, which is entirely possible if the correct definitional steps are taken (see *Chapter 5*), then the first task at hand would be to sort out the current level of linguistic inequality and decide upon a concrete definition of the Rule of Law.

Ivic and Lakicevic highlight a further issue in defining European identity through common values:

Although the diversity of cultures is recognized within this document, it is limited to the framework of common values and principles. The Declaration on European Identity emphasizes the need for “the increasing convergence of attitudes to life”, “common European civilization” and “the attachment to common values and principles”. Thus it tends to homogenize and essentialize European identity. It perceives “Europe”, “identity” and “values” as static categories.<sup>271</sup>

As we know, neither “Europe” nor “identity” are static values. As a physical, geographical entity the borders of the EU are continually expanding and identity at a collective level is artificial and therefore capable of reconstruction (though this is not at all an easy process). Identity is not a stable, unified category; it is constantly transformed and reconfigured. Hence the idea of

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<sup>271</sup> Ivic and Lakicevic, ‘European Identity: Between Modernity and Postmodernity’, p. 402.

European identity embodied in the Declaration on European Identity should be rewritten.<sup>272</sup>

The Declaration also makes an attempt at defining the then European Community against an 'Other'. There are a number of paragraphs detailing the 'friendly' and 'cordial' relationships between the then 9 Member States and other countries (such as America, Canada, Japan, China, the countries of Latin America), and yet Russia is glaringly absent from this. Section 22 of The Declaration, as referenced below, conclusively demonstrates the Nine's recognition that in order to have a unified identity, they need to define their unity in relation to other countries or groups of countries:

22. The European identity will evolve as a function of the dynamic construction of a United Europe. In their external relations, **the Nine propose progressively to undertake the definition of their identity in relation to other countries or groups of countries. They believe that in so doing they will strengthen their own cohesion and contribute to the framing of a genuinely European foreign policy.** They are convinced that building up this policy will help them to tackle with confidence and realism further stages in the construction of a United Europe thus making easier the proposed transformation of the whole complex of their relations into a European Union. (my bold)<sup>273</sup>

In the following chapter it is argued that the EU does need a defined Other to contrast itself against in order to begin the process of collective identity and demosc formation. I would therefore argue that recognition of this idea in the wording of The Declaration is a positive step by the EU in the path towards collective identity formation. That being said, relying on politics of The Other can be dangerous in itself as it runs the risk of fostering tensions between the "self-group" and the "other-group" and can result in new types of nationalism.

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<sup>272</sup> Ivic and Lakicevic, 'European Identity: Between Modernity and Postmodernity', p. 395.

<sup>273</sup> European Union, A Charter of European Identity, 28 October 1995, available at <kms1.isn.ethz.ch/.../Files/.../5060\_Charta+of+European+Identity.pdf> accessed 22 March 2014.

### 3.a.ii. The Charter of European Identity

Although the Declaration on European Identity is the most valuable document considering what the EU is striving towards in terms of identity, there is also The Charter of European Identity, a document initiated by Václav Havel in 1994, the then President of the Czech Republic. This Charter - which discusses Europe under the headings of its destiny, values, living standards, economic and social policies, and responsibilities - aims to stimulate a wide-ranging debate of these issues in order that we may achieve a Union which is closer to its citizens, committed to common policies "based on solidarity, credible, and capable of making its citizens proud to be Europeans".<sup>274</sup>

The first striking difference between The Charter and The Declaration comes from comparing their opening sections. Section 1 of The Declaration begins with a statement about the then Community's unity, basing it on "the cherished values of their legal, political and moral order" and declaring that the common market, customs union and common policies are all an essential part of the European identity. As discussed in the above section, all of these are concepts that are not emotively strong enough to create a European citizenry or collective identity. In contrast, The Charter opens by defining Europe as a Community of Values:

The aim of European unification is to realize, test, develop and safeguard these values. They are rooted in common legal principles acknowledging the freedom of the individual and social responsibility. Fundamental European values are based on tolerance, humanity and fraternity. Building on its historical roots in classical antiquity and Christianity, Europe further developed these values during the course of the Renaissance, the Humanist movement, and the Enlightenment,

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<sup>274</sup> Ibid.

which led in turn to the development of democracy, the recognition of fundamental and human rights, and the rule of law.

By prioritising the unifying values of tolerance, humanity, democracy and human rights, the Charter takes a significantly more humanist approach to European identity. This approach is more understanding of the nature of identity and offers potential bases for collective identity formation at a European level. Unfortunately the EU identity in practice has not taken hold in this manner, perhaps partly due to Member State scepticism around EU membership caused in part by the oft cited democratic deficit, and in part by national political parties using EU membership as a political popularity tool. Whatever the reason, as it stands the EU seems to have quite a strong sense of legal and economic identity, but this has not transferred in forming a collective people. Therefore the following chapter, whilst considering other possibilities, will explore the potentiality of these humanist concepts and their feasibility as subconscious and emotively strong bases for collective identity formation at the European level. This chapter however will continue by examining the EU as a collective economic space as opposed to a collective cultural space.

### **SECTION 3.b : ECONOMIC SPACE vs. CULTURAL SPACE**

Economically speaking the European Union has a strongly defined identity. This likely stems from the fact that it started out as an exclusively economic community (EEC) before moving on to become an economic, legal and political community (EC), and then furthering their aim into the realm of social and cultural cohesion (EU). The change in terminology from European Economic

Community to European Community to European Union reflects the evolving aims of the EU. By removing the term 'economic' from its name it was demonstrating its progression from a purely economic community into something that unified politically and legally also. Then changing the term 'community' to 'union' demonstrated its aim to also unify the people of the EU socially. The possibility of social and cultural cohesion did not come into the European consciousness until much later, and unfortunately the strength held by its economic identity has not translated over into a collective culture or true sense of citizenship.

The Maastricht Treaty was probably the most important single change. It was a major step in the process of polity making in Europe and reminded policy-makers and publics alike that the EU was now an entity that required a measure of direct legitimacy. It had developed such strong supranational features that it could no longer rely only on an indirect notion of legitimacy. By then, the EU had established a supranational legal system, it was a rights-granting entity, and it had taken on a wide range of additional tasks that are highly relevant to identity-formation and which affect the question of recognition.<sup>275</sup>

Essentially, the EU had begun to act like a state in many ways but not only was its legitimacy to do so an issue (as still is to this day) but it was copying features of a nation state without having a national people. Obviously there is a European people, being a citizen of a Member State automatically gives an individual European citizenship legally speaking; but the individuals that make up this citizenry do not have a fully formed identity as a collective. Thus meaning that any advancements by the EU towards further competences is going to be viewed as a threat to the national identity, rather than an enhancement of the European identity, as this does not yet fully exist.

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<sup>275</sup> Fossum, 'Identity Politics in the European Union', p. 388.

The Maastricht Treaty allowed the EU, which is historically geared towards the economy and trade, to take action in the field of culture in order to safeguard, disseminate and develop culture in Europe. Yet in its cultural initiative the EU is committed to its 'unity in diversity' motto, respecting the national and regional diversity of Member States and aiming to highlight the shared cultural heritage. As stated on the EUR-Lex website:

Article 167 of the Treaty of the Functioning of the European Union defines the role of the European Union (EU) in the area of culture: it **supports, coordinates** or **supplements** the actions of member countries and seeks to bring Europe's common cultural heritage to the fore. The EU **supports** actions to preserve cultural heritage, and **promote** cooperation and transnational exchanges between cultural institutions in member countries. A new funding programme 'Creative Europe' will run between 2014 and 2020. Other initiatives include Heritage Days (locally-based initiatives that allow access to sites not normally open to the public) and Capitals of Culture, both launched in 1985.<sup>276</sup>

As with the terminology used in its initiatives to promote the equality of languages as discussed in *Chapter 2*, the order of the day seems to be promotion and support. The Union is stuck between a rock and a hard place: it understands the emotive response that culture provokes in members of a particular group and so does not wish to be seen to be creating homogenising cultural initiatives by regulating or standardising the various cultures of the Member States into one cultural melting pot; however it clearly does not understand that in order to make the citizens of the EU more emotively attached to the Union creating a cultural identity of its own is a must. The cultural initiatives that the EU has put in place (European Capitals of Culture for

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<sup>276</sup> Europa Summaries of EU Legislation, 'Culture', Eur-Lex [online], <[http://eur-lex.europa.eu/summary/chapter/culture.html?root\\_default=SUM\\_1\\_CODED=10](http://eur-lex.europa.eu/summary/chapter/culture.html?root_default=SUM_1_CODED=10)>, accessed 15 January 2015.

example) have come too late in the game and thus have not been successful in forging a separate European identity for its citizens.<sup>277</sup>

### **SECTION 3.c : EUROPEAN IDENTITY IN PROCESS**

There is no doubt that the construction of a European identity is still in process. John Erik Fossum argues that the development of a post-national European identity is given added impetus by international legal developments and the manner in which the development of the Union draws on and fuses legal orders at different levels.<sup>278</sup> Cristina Matiuta also remarks upon the “in-process” state of the European identity, additionally noting the similarities between European identity construction and national identity construction: ‘The process has an objective dimension (territory, sets of common legal rights and duties) and a subjective one (symbols as flag, anthem, a Europe day, a motto, cultural/educational exchange meant to create a sense of solidarity to the EU project, to expose younger generation to patterns of cooperation and to emphasize the unity-in diversity-rather than difference)’.<sup>279</sup>

The EU has made several attempts to foster an image of a united Europe in the hope of creating a sense of we-ness within the collective. Things such as the

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<sup>277</sup> See M. Bruter, *Citizens of Europe? The Emergence of a Mass European Identity*, Basingstoke, Palgrave Macmillan, 2005. Particularly Ch. 4 ‘With Aforethought? Institutions, Symbols, and the quest for a New Identity in Europe’ which discusses the process by which the institutions of the EU became concerned with identity. In this chapter, Bruter argues that the project of developing an EU citizenship with a corresponding identity did not begin until what he calls the ‘fourth phase’ in European integration, and which began in the 1980s. Bruter argues that this push towards creating a European identity was a direct consequence of the attempt to provide the institutions of the EU with greater legitimacy. Thus supporting my hypothesis that the democratic legitimacy of the European Union is linked to its ability to foster a true European demos with a collective European identity.

<sup>278</sup> Fossum, ‘Identity Politics in the European Union’, p. 401.

<sup>279</sup> Matiuta, ‘How to build the European Identity? Attitudes towards the European Union across its countries’, pp. 3-4.

European flag, the anthem, and the European passport were created to support the aim of forming a common collective European identity. However, much like with the cultural initiatives mentioned above all of these things were created and introduced into the European consciousness much later than declarations and regulations on economic, legal and political unification. It took almost thirty years for the flag to become officially recognized by the European Union. Likewise, it took seven years before the Community adopted Beethoven's Ode to Joy as the European anthem.<sup>280</sup> The EU has tried to use these symbols as a means of giving its citizens means of identification with the aim of creating a feeling of belonging and forging a true sense of citizenship. Many issues arise from these attempts: firstly, identity is more than just identification; and secondly, these are yet again all traditional archetypes that have been utilised by the nation state in solidifying the collective identity of a nation.<sup>281</sup>

What these attempts at symbolism show is that the EU understands what is needed to forge a people: powerful artificially created symbols that impose themselves onto the collective subconscious and consequently create a sense of belonging. The EU's error has been to copy the symbols used by the nation state. In my opinion, the only explanation for why these attempts have not proved successful is that in using the same symbols as the nation, the EU has in fact placed itself in conflict with the national identity rather than alongside it. If we as a collective are to understand and appreciate how Europe is imagined,

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<sup>280</sup> Abélès, 'Identity and borders: an anthropological approach to EU institutions', p. 6.

<sup>281</sup> Again, See M. Bruter, *Citizens of Europe? The Emergence of a Mass European Identity*, Basingstoke, Palgrave Macmillan, 2005, Ch. 4 sub-section on 'Symbols of Europe', pp. 81-85 in which Bruter outlines the EU's utilisation of a flag, an anthem, a single currency and other symbols. He does this following a discussion which defines symbols as, 'an emblem, a flag, a name, an allegory, an anthem, or any other element that could be used to attach a physically apprehensible signifier to a Nation, a State, or any other human collectivity', (p. 75) once again reaffirming the use of such symbols at national level.

it is important both to take EU symbolic initiatives seriously, and to try and grasp the specificity of these symbols and the peculiar conditions of their use. What is evident is that legal and economic integration alone will not create a united Europe.<sup>282</sup> Without an identity the EU will continually find it difficult to validate its existence, and legitimate democratic participation will not be possible.<sup>283</sup> As Chrysochoou and Warleigh separately point out, 'The absence of a European demos, that is, a 'community of citizens linked to each other by strong democratic bonds and pressing to acquire a measure of effective control through formal or informal means over government' is the principle problem faced by architects of democratisation in the EU'.<sup>284</sup> Christopher Lord is even more emphatic in his assertion that, 'institutional innovations can only go so far in removing perceptions of a democratic deficit in EU politics: without 'a shared identity, a common deliberative forum, and an open system of communications', citizens are unlikely to be aware of whatever institutional change is effectuated'.<sup>285</sup> This directly refers back to the issue of legitimacy discussed earlier in this thesis. Yes, it is true that there are the issues of practical democratic legitimacy raised through the multilingual nature of the EU. However, it is evidently through understanding legitimacy at the social level,

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<sup>282</sup> M. Sassatelli, 'Imagined Europe: The Shaping of a European Cultural Identity through EU Cultural Policy', *European Journal of Social Theory*, Vol. 5, No. 4, (November 2002), p. 435.

<sup>283</sup> Refer back to footnote 7 of this thesis, which outlines what legitimacy means for the purposes of this work. See also the works of Scharpf, Zurn and Mill, all of whom have written works belonging to a branch of thinking which argues that collective identity is a necessary condition for democratic decision-making.

F. W. Scharpf, *Regieren in Europa: Effektiv und demokratisch?*, Campus, Frankfurt/New York, 1999; M. Zurn, 'Democratic Governance beyond the Nation-State: The EU and Other International Institutions', *European Journal of International Relations*, vol. 6, no. 2, 2000, pp. 183–221; J. S. Mill, 'Considerations on representative government', in *Utilitarianism, On liberty, Considerations on representative government*, (Ed.) Williams, Geraint, 1861, pp. 188–410, J.M. Dent, London. Reprinted 2002.

<sup>284</sup> See A. Warleigh, *Democracy and the European Union: theory, practice and reform*, Sage, 2003, p. 109; and D. Chrysochoou, *Democracy in the European Union*, London, Tauris, 1998, p. 89.

<sup>285</sup> C. Lord, *Democracy in the European Union*, Sheffield, Sheffield Academic Press, 1998.

(i.e. demos formation) that any and all legitimacy issues have any hope of being resolved.<sup>286</sup>

### **SECTION 3.d : THE EUROPEAN UNION'S LACK OF DEFINED IDENTITY AS AN ENTITY**

There is one certainty that has come from this discussion so far, that is that the European identity as it stands is incomplete and lacks any *original* (unique to the EU) emotive symbolism that its citizens can identify with on a subconscious level. This should not, however, be surprising; how could the EU possibly form any coherently defined and adequately emotive identity for its citizens when its own definition as an entity is in question. The very nature of the EU is a highly contested subject, and one that provokes further debate on the democratic deficit and general legitimacy of the EU as a whole. Failure to admit to an end aim in political integration is hindering the possibility of a collective identity – if the EU cannot be defined as an institution because of a lack of understanding as to what it is, or what it could become, then its people will never have a strong sense of collective without a clear idea of what they are attaching themselves to. Throughout this thesis I have tended to stick to using

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<sup>286</sup> See the works of the following academics who do not believe in the possibility of the further democratic legitimization within the EU until all the peoples of the European Union share a strong sense of community or “we-ness”.

See, E. W. Bockenforde, ‘Demokratie als Verfassungsprinzip’, in *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht*, (Ed.) Bockenforde, Ernst-Wolfgang, Suhrkamp, Frankfurt, 1991, pp. 291–378; P. G. Kielmansegg, ‘Integration und demokratie’, in *Europäische Integration*, VS Verlag für Sozialwissenschaften, 1996, pp. 47-71; F. W. Scharpf, *Regieren in Europa: Effektiv und demokratisch?*, Campus, Frankfurt/New York, 1999; M. Zürn, ‘Democratic Governance beyond the Nation-State: The EU and Other International Institutions’, *European Journal of International Relations*, vol. 6, no. 2, 2000, pp. 183–221; R. Dahrendorf, ‘The Challenge for Democracy’, *Journal of Democracy*, vol. 14, no. 4, 2003, pp. 101–114; K. Offe, ‘Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Streiß der europäischen Integration’, in *Herausforderungen der Demokratie: Zur Integrations- und Leistungs-fähigkeit politischer Institutionen*, (Ed.) Offe, Claus, Campus, Frankfurt/New York, 2003, pp. 239–273.

the terms “supra-national entity” or “post-national entity” as though these are somehow adequate as definition of what the EU is, which they are not. Whilst it may take on many features of the nation, it is not a nation; it equally is not a federation, a confederation or anything else within our realm of comprehension of entities with as much legal, political and economic structure and power as the EU has over its members. It is new, it is novel, and it is ambiguous.

It has been argued that the ambiguity of what exactly the EU is does not necessarily mean confusion, but rather is to be viewed as a response to the European cultural diversity.<sup>287</sup> ‘Although the Monnet method has been successful in pushing forwards European unification, it had one unexpected consequence: the political aim of the project has never been clarified. And what is most interesting for the anthropologist: it *must* not be clarified.’<sup>288</sup> I find it difficult to agree with the last sentence of this statement. Whilst the inherent diversity of the EU has hindered the development of a collective European identity for its citizens, it should not affect the definition of the EU as a political and legal system. Even if the EU did come up with new identifiable symbols and archetypes that allowed the collective to form an identity, they would not hold with any force if their attachment was to an entity that itself did not have a defined identity. Whilst discussion in the previous section remarked upon the instability of identity as a concept, in that it is based on artificial constructs that could be reconstructed (though not easily), that should **not** also be the case for

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<sup>287</sup> Sassatelli, ‘Imagined Europe: The Shaping of a European Cultural Identity through EU Cultural Policy’, p. 446.

<sup>288</sup> Abélès, ‘Identity and borders: an anthropological approach to EU institutions’, p. 4-5.

the European Union as an entity. Fitting into a previously defined “box” forms a set of parameters within which we are able to comprehend something’s existence. The EU does not fit into any previously defined parameters making its identity ambiguous at best, but it has also failed to define its own parameters or even give its box a name.

As an emerging un-identified political object, Europe deeply affects a very old and perhaps obsolete perception of identity rooted in territorial grounds. Even if there is no word in the political vocabulary to qualify Europe (is it postnational, supranational, poststate, multigovernmental?), it appears that Europe as an emerging form will significantly change Europeans’ conception of politics and of identity.<sup>289</sup>

And so it should. The European Union should firstly be focussing on defining itself as a political power in the international forum, then and only then will it be able to figure out what forms of symbolism will work to allow its citizens to integrate and democratically participate through a series of new and novel constructed and manipulated identifications which could lead to a collective identity that can exist alongside, and not in competition with the various national identities within its borders. What it needs is a set of values that embody an identity that is particular and unique to the EU. And, the further away from similarities with national identity the EU can get, the better.

## **CONCLUSION**

Returning to the second aspect of postmodern identity construction mentioned earlier, that of fluidity and changeability, we may find some hope. If identity truly is fluid and in a constant state of flux and reconstruction, then surely this

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<sup>289</sup> Abélès, ‘Identity and borders: an anthropological approach to EU institutions’, p. 25.

offers hope for the eventual construction of a European identity that is just as strong as our other identities, and yet does not need to be based on same archetypes (most notably that of language) as our national collective identities. If this is possible, we could potentially form a collective supra-national European identity that can coexist alongside the older more established identities that the citizens of the European Union already carry with them; their national identities, religious identities, cultural identities, etc.

It appears that the EU has perhaps attempted to forge a European identity for its citizens by cookie-cutting the components of collective national identity: creating a flag, having an anthem, creating a single currency, giving European citizenship to those born within its borders etc. The problem with this lies in the fact that the EU is not a nation:

National citizenship is the result of a long process of historical concept formation in which national identity emerged, integrating social and cultural differences under a new concept: citizenship (Somers, 1995). This same concept is now used to make a European identity. [...] This story, since its beginning, has exclusively been tied to nationally defined networks of social actors. Thus there is an inherent difficulty with constructions of a collective identity based on the citizenship story.<sup>290</sup>

We should not be constructing, defining or identifying with Europe under the same terms as we do with the nation state. If the EU cannot use stories or shared histories in the same way nations do, and cannot use the unifying power of language in the same way nations do, why would it try to use symbols in the same way nations do? Surely it would make more sense for the EU to break down all of these artificial constructions that form national collective identities and either subvert them or come up with entirely new and different artefacts

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<sup>290</sup> Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', p. 436.

and symbols in order artificially construct its own collective identity that the European people can identify with alongside and separate to their national identifications.

It has been suggested that in order to gain support for further European integration and to improve the democratic legitimacy of the EU a stronger collective attachment to Europe is needed.<sup>291</sup> The formation of a European demos with a collective identity is one of the preconditions to improve the democratic legitimacy issues of the European Union. In the context of subsequent EU enlargement waves and increased cultural diversity, one might ask whether there is sufficient commonality in the Europeans' perceptions regarding the EU project to substantiate a collective identity.<sup>292</sup> The danger is though that the EU's attempt so far has failed in forming any sense of genuine collective identity of similar strength to our national affiliations. This failure may have in fact hindered any potential future attempts to subvert the traditional national collective identity archetypes in the EU. That being said, all identity is social and also, in being an artificial construction, can be constructed and reconstructed at will. That doesn't necessarily mean it will take hold, but it must at least be attempted if the European project is to succeed democratically with a collective demos. 'Changing social relations might produce forms of identity beyond the nation, an issue that is at the core of the

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<sup>291</sup> V. Slavtcheva-Petkova, 'Europe – a default or a dream? European identity formation among Bulgarian and English children', *Ethnicities*, vol. 13, no. 5, October 2013, p. 566.

<sup>292</sup> Matiuta, 'How to build the European Identity? Attitudes towards the European Union across its countries', pp. 2-3.

debate of European identity and that makes this debate theoretically important.<sup>293</sup>

What is most striking about national collective identity as a concept is the ease with which we are tricked into believing, or at least not questioning the idea that none of what we feel as a collective is natural. In taking advantage of man's need to feel like (s)he belongs, the nation has been able to manipulate us into believing that these archetypes are natural to our existence, when in fact they are entirely artificial constructions. What the European Union therefore needs to do is to construct its own simulated archetypes that have the same strength of power over our subconscious and consequently enforce the same strength of collective solidarity amongst its citizens. In doing so the EU could potentially resolve the democratic legitimacy problems caused by multilingualism, without having to change the practical, linguistically hierarchical day-to-day workings of its institutions.

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<sup>293</sup> Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', p. 429.

## **CHAPTER 5.**

### **SOLUTIONS TO THE EU'S DEMOCRATIC LEGITIMACY CRISIS: MOVING PAST THE PRE-CONDITION OF A COMMON LANGUAGE IN DEMOS FORMATION**

#### **INTRODUCTION**

The reasons behind the inexistence of a European demos have been clearly outlined as well as the full force and impact that the lack of a common language has on this inexistence. The previous chapter made clear that it is my opinion that we should not be constructing, defining or identifying with Europe under the same terms as we do with the nation state. That being said, given the direction the EU has taken in its attempt to form a European identity, and in reluctant recognition of that fact that the EU can't just "start again", this chapter will firstly consider whether there are any other features and archetypes of national identity that the EU could adopt to possibly forge a strong sense of European identity by continuing along its chosen path of national-identity emulation, and thus consider whether these archetypes would hold enough strength to support a greater level of democratic participation by making European citizens feel like a European people.

One specific aspect of national identity formation that will be looked at during this chapter in relation to the EU's identity construction is that of The Other. This line of thinking within identity formation theory argues that in order to answer the question "Who are we?" we must first be able to answer the question "Who aren't we?" This question is important because if there is no certainty about who the people are then this has direct consequences for the

legitimacy of the institution as a whole and its democratic value. What is lacking is a defined geographical “We” border due to continued enlargements throughout the EU’s lifespan. Linguistically, geographically and conceptually we do not know for certain who We, the people of Europe, are in terms of having a collective identity.

In contrast however the suggestion that follows, impractical and idealistic as it may be, is a deconstruction of all theory that has come before. The current dominant position in academic literature takes the position of: no common language = no demos = no democracy. ‘According to Peter Graf Kielmansegg, the most determined representative of this school of thought, there is no European demos sharing a collective identity because the European level lacks a community of communication, collective experiences and common memories.’<sup>294</sup> But what if we deconstructed our current understanding of what identity formation entails? In other words, what if we took the common language necessity out of demos creation? Would it then be possible to hypothesise about how a European identity could be forged and thus create a European demos that feels able to actively democratically participate without having a common European language? It is my opinion that the *feeling* of being a people i.e. having a strongly felt and strongly defined collective European identity is all that is needed for this to happen.<sup>295</sup> This is supported by my earlier

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<sup>294</sup> P. G. Kielmansegg, ‘Integration und demokratie’, *Europäische Integration*, VS Verlag für Sozialwissenschaften, 1996, pp. 47-71; V. Kaina, and I. P. Karolewski, ‘EU Governance and European Identity’, *Living Reviews in European Governance*, vol. 4, no. 2, 2009, p. 7.

<sup>295</sup> This is an opinion shared by many academics in the field. For example, see J. Diez Medrano and P. Gutierrez, ‘Nested Identities: National and European Identity in Spain’, *Ethnic and Racial Studies*, vol. 24, no. 5, 2001, pp. 753–778; S. L. Croucher, *Globalization and Belonging: The Politics of Identity in a Changing World*, Rowman & Littlefield, Lanham et al, 2004; M. Bruter, *Citizens of Europe? The Emergence of a Mass European Identity*, Palgrave Macmillan, Houndmills et al., 2005.

explanation of legitimacy being made of two components: a formal one and a social one (see *footnote. 7* of this thesis). If we can forge a European demos, and thus increase social legitimacy, then this could mitigate the problems caused by formal (procedural) legitimacy such as those created by the multilingual nature of the EU.

Benedict Anderson states that the nation is “an imagined political community – and imagined as inherently limited and sovereign”. If so, then surely we can imagine something else.

## **CHAPTER 5: SECTION 1**

### **START AS WE MEAN TO GO ON**

In his writings on nation formation Benedict Anderson suggests that ‘a nation [is] a socially constructed community, imagined by the people who perceive themselves as part of that group. It has an objective dimension (territory, mass education, common legal rights and duties) and a subjective one (common culture, symbols, myths)’.<sup>296</sup> Based on what previous discussion has shown, the EU has so far emulated some of these objective and subjective features, but not all. On the objective side it has implemented common legal rights and duties to all citizens of all member states, but not the mass education or territorial aspects. On the subjective side the EU has copied the form but not the content of the symbols and myths used by nation states in order to create a common culture, but has not been successful in doing so. Whilst it is not

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<sup>296</sup> Matiuta, ‘How to build the European Identity? Attitudes towards the European Union across its countries’, p. 3.

being suggested that the EU is trying to forge a nation it cannot be denied that the EU works as a collective on many of the social and economic factors that are inherent in national identity formation as outlined in the previous chapter: anthem and flag symbolism, single currency creation, citizenship, free movement of people, free movement of goods etc. According to Ulrich Beck and Edgar Grande, 'in public debates, Europe is still mostly conceived as an "incomplete nation," an "incomplete federal state," and in consequence it is treated as if it should (and could) become both nation and state'.<sup>297</sup> Yet what is missing from the list? What features of the nation-state or national identity has the EU thus far not adopted? We know which traits of national identity formation the European Union has emulated, but which ones *hasn't* it emulated? The starkest absences are undoubtedly the lack of: a common education system, a common welfare system and a joint defence system/strategy.

Discussing the economics of a common welfare system goes beyond my comprehension. But suffice to say that where economics are concerned on a European level (that is to say the Euro), there has been much hostility due to the fluctuation in and strength or weaknesses of different economies across European Union member states. Implementing a EU-wide welfare system will more likely than not increase such tensions and lead to intense resistance from the more wealthy EU members states such as Germany, the UK and France. And what of the possibility of a common defence/joint military strategy? Such a

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<sup>297</sup> U. Beck and E. Grande, 'Cosmopolitanism: Europe's Way Out of Crisis', *European Journal of Social Theory*, vol. 10, no. 1, 2007, p. 69; U. Beck, 'Toward a New Critical Theory with a Cosmopolitan Intent', *Constellations*, vol. 10, no. 3, 2003, pp. 453-468.; O. Parker, 'Why EU, Which EU? Habermas and the Ethics of Postnational Politics in Europe', *Constellations*, vol. 16, no. 3, 2009, pp. 392-409.

consideration as an identity creating or strengthening tool forms part of the discussion on the EU and “The Unknown Other” below (in *Section 1.b*).

### **SECTION 1.a : A COMMON EDUCATION SYSTEM** <sup>298</sup>

A common education system would certainly have its benefits in terms of European identity formation. In creating a bond between the youth of the member state nations this would permit a gradual solidarity that would carry into the workplace and support the free movement of people in the sense of a workforce. Arguments about quality standards when employing people from other EU countries could be quashed if all member state nations had been subject to the same rigorous education system and assessment procedures across the board:

One of the committees established to analyze aspects of further European integration examined the concept of European identity under the leadership of Pietro Adonnino. “A People’s Europe” (Adonnino, 1985), known as the Adonnino Report, was significant for the development of European citizenship. It included the right of residence, freedom of movement, right of establishment and right of citizens’ participation. Within this report the concept of European identity was closely tied to European citizenship. The Adonnino Report focused on culture and education, “which is essential to European identity and the Community’s image in the minds of its people” (Adonnino 1985, p. 21).<sup>299</sup>

Clearly the European Union itself understands the great potential of education in the battle to forge a true European identity and consequently valued and loyal European citizenship. Education could arguably play a greater role in solidifying a European identity than such the freedom of movement or right of

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<sup>298</sup> For a searching analysis of the role of mass, public education systems in shaping national identities, see E. Gellner, and J. Breuilly, *Nations and nationalism*, Cornell University Press, 2008.

<sup>299</sup> Ivic and Lakicevic, ‘European Identity: Between Modernity and Postmodernity’, p. 402.

residence as European ideals would be instilled in the European population from a younger, more impressionable age.

The furthest the EU has so far ventured in terms of education is through their present Erasmus (Erasmus Plus) programme and the former Socrates and Socrates II programmes. These programmes are generally well received and highly viewed for their generosity in funding opportunities for those who wish to study abroad for a short period of time. The Erasmus Plus programme (initiated in 2014) has even extended this possibility so that it is not only those in tertiary education who can take advantage of this system, but also those who are in secondary education. The success of these programmes is likely largely due to their lack of interference with member states' national education systems, being a supplementary option rather than enforced educational requirement. Although, it is highly probable that any attempt to introduce a standardised, EU-wide education system would be met with hostility, there is of course an argument for it in terms of supporting the creation of a European identity. Certain academics argue that mass education systems are an effective tool for state control and manipulation:

The possibility that governments may actively intervene [in the education curriculum] to try to change popular perceptions of their identity. One could cite here not only the recent efforts of the British government to change the content of the history curriculum to accord with its perceived 'national interests', but also the efforts of France and Germany to change earlier perceptions of each other, through the use of symbols, through massive youth exchange programmes, and by subsidizing academic studies of common history, all of which have after 25 years had a significant effect.<sup>300</sup>

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<sup>300</sup> Smith, 'National Identity and the idea of European Unity', p. 65

Such a tool could arguably be used on a European level to “manipulate” the population from a young age into identifying with the symbols of their choice as a means of forging a European identity. As Patricia Nanz explains, such inter-societal learning as a citizenship practice ‘could produce a European political community which is not based on a demos or a common cultural heritage, but on the shared pursuit of the most just and efficient solutions to social problems’.<sup>301</sup> A common education system, distributed in the numerous languages of European member states might allow for a collective vision and understanding of what it means to be European, whilst also leaving space for the different world-views each language naturally holds.

On the other side of the argument however, a common education system at national level is largely linked to the utilisation and promotion of a single common language; something that the EU is lacking. Meaning that there is no guarantee that a common education system on a European scale would have the same effect that national education systems have historically had, due to the missing elements of a single (dominant) language of that education. Mass, standardised education systems came into the public realm in European nation states as a post-Enlightenment means of uniting the then recently defined geographical nations. Rolling out a common national education system was used as a means of standardising language homogeneity across the nation and marginalising regional, minority languages in favour of the dominant language spoken by the elites in public political discourse:

Mass education systems, while on the face of it uniting a given national population into a single civic culture, also creates divisions along pre-existing ethnic lines. By forcing all its different peoples to employ a

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<sup>301</sup> Nanz, *Europolis: Constitutional Patriotism Beyond the Nation State*, p. 177.

single civic language and by preaching allegiance to national symbols and historical myths, the state's elites may actually stir up resentment and bitterness at the neglect of minority cultures and the suppression of minority peoples' histories.<sup>302</sup>

Of course there are examples of countries where education is delivered in several languages; as in Switzerland for example. However as has been stated previously in this thesis<sup>303</sup>, comparisons between the multilingualism of Switzerland, Belgium and Finland for example and that of the EU are oversimplified and fail to understand that these countries had a fully formed national identity well before constitutionalisation and before fully-fledged national education systems were imposed, whereas the EU does not.<sup>304</sup> As Habermas argues, 'democratic collective identity rests on 'a prior cultural integration of what is initially a number of people thrown together'. This integration is needed to create a solidarity that will enable citizens to feel responsible for one another'.<sup>305</sup>

Whilst national education systems may well be a greatly useful tool in symbol identification and potential population manipulation, the success of this at a European level (when distribution would be in several different language) is questionable. To introduce a common education system in similar fashion to the nation-state model could therefore go one of 2-ways. It would succeed in playing a large role in the eventual solidification of a European identity through symbol manipulation and identification of the young European population. Or, it would in fact stir up even further nationalist sentiment as it might be seen to

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<sup>302</sup> Smith, 'National Identity and the idea of European Unity', p. 63.

<sup>303</sup> See *Chapter 3* of this thesis.

<sup>304</sup> Grimm, 'Does Europe need a Constitution', pp. 295-296.

<sup>305</sup> Habermas, 2001, p. 64; see also Habermas, 1998, p. 118 in Spinner-Halev, Jeff, 'Democracy, Solidarity and Post-nationalism', *Political Studies*, vol. 56, no. 3, October 2008, p. 606.

marginalise the histories of certain minority groups within Europe whose stories there may not be space for in a Europe-wide curriculum.

## **SECTION 1.b : EUROPEAN IDENTITY AND THE OTHER** <sup>306</sup>

Looking back to the previous chapter, The Declaration on European Identity 1973 made a distinct attempt at defining the then European Community against an Other with paragraph 22 stating that ‘the Nine propose progressively to undertake the definition of their identity in relation to other countries or groups of countries’.<sup>307</sup> The Other in terms of identity formation is the established, yet contested idea that collective identity can only be formed against the background of a different collective identity that it recognises as being Other to the collective. Perhaps the most pertinent and succinct explanation of The Other in identity formation comes from Basia Nikiforova in her article ‘Language Policy and Language of Cultural Pluralism’. In it she writes:

Identity is formed and supported through “external” identification, distinguishing ourselves from Others. The Other is represented as something ontologically external and hostile. Therefore, he has to be assimilated or banished. Concern about the Other allows forgetting

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<sup>306</sup> See Mark Currie’s explanation of ‘Other’ in: M. Currie, *Difference*, London, Routledge, 2004, pp. 85-87. In academic literature, there is a comparatively broad consensus that the presence of an ‘other’ is an indispensable part of the identity concept. See, A. Wendt, ‘Collective Identity Formation and the International State’, *American Political Science Review*, vol. 88, no. 2, 1994, pp. 384–396; S. N. Eisenstadt, B. Giesen, ‘The Construction of Collective Identity’, *European Journal of Sociology*, vol. 26, no. 1, 1995, pp. 72–102; R. Hettlage, ‘European Identity – Between Inclusion and Exclusion’, in *Nation and National Identity: The European Experience in Perspective*, (Eds.) Kriesi, Hanspeter, Armingeon, Klaus, Siegrist, Hannes, Wimmer, Andreas, Ruegger, Zurich, 1999, pp. 243–262; G. Delanty, *Citizenship in a global age: Society, culture, politics*, Open University Press, Buckingham, 2000; S. L. Croucher., *Globalization and Belonging: The Politics of Identity in a Changing World*, Rowman & Littlefield, Lanham et al, 2004; B. Rumelili, ‘Constructing Identity and Relating to Difference: Understanding the EU’s Mode of Differentiation’, *Review of International Studies*, vol. 30, no. 1, 2004, pp. 27–47; P. Schlesinger, ‘“Europeanness” – a New Cultural Battlefield?’, in *Nationalism: Critical Concepts in Political Science*, (Eds.) Hutchinson, John, Smith, Anthony D., Routledge, London/New York, 2000, pp. 1866-1882.

<sup>307</sup> For full paragraph see *Chapter 4, Section 3.a i. reference 46*.

personal problems and communal conflicts; [The] Other doesn't exist outside me. He is the only unique way of my self-identification.<sup>308</sup>

On a collective level therefore must we firstly have a perceived and defined Other in order to have a comprehensive We? Historically this is how nations have increased nationalistic sentiment, by contrasting their values and cultural symbols against those of neighbouring nations in order to demonstrate difference and distinction. The suggestion that the Other poses a threat is perhaps the strongest way of affirming fidelity to the home nation. 'The in-group/out-group antagonism is a latent phenomenon which can be activated under certain circumstances such as the insiders' perception that outsiders pose a threat to the in-group.'<sup>309</sup> This in turn forces the insiders of the 'we-group' to react with discrimination against outsiders in order to protect the collective self from perceived or real, substantial or symbolic 'attacks' of the obvious others.<sup>310</sup>

A clear marker of difference between 'us' and 'them' in national terms has been linguistic distinction between nations. The idea of "I belong to the nation of England because I speak English"; "I belong to the nation of France because I speak French" etc. An idea that, as mentioned before, was reinforced through the introduction of national education systems being standardised in one single dominant national language following the Enlightenment. Although linguistic borders do not realistically work like this, the dominant language of a nation is still one of the strongest symbols of difference between 'us' and 'them'. Throughout history when such nations as England, France, The Netherlands etc.

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<sup>308</sup> Nikiforova, 'Language policy and language of cultural pluralism', pp. 43-44.

<sup>309</sup> L. M. McLaren, *Identity, Interests and Attitudes to European Integration*, Palgrave-Macmillan, Houndmills et al., 2006.

<sup>310</sup> Kaina and Karolewski, 'EU Governance and European Identity', p. 15.

were colonising African nations, one way of asserting their power and establishing their colonised territories was by enforcing the use of the home/colonising nation's language within these territories. However, assimilation as the process of evening out "otherness", adjusting oneself to a dominant cultural-linguistic environment is usually accompanied by the weakening of national identity, and this is exactly what many Europeans fear.<sup>311</sup> Given the linguistic inequality inherent within the institutions of the European Union (see *Chapters 1 and 2*), the very real fear is that further political and cultural unity within the Union will eventually lead to a cultural assimilation led by the culture of the most dominant practical language(s) used within the institutions. And with this, many fear that their national identity will be replaced by a European identity, rather than coexisting alongside it. This can only be overcome forming an equally strong European identity without the precondition of a common language. Something that I hope to demonstrate is possible throughout this chapter.

'We are witnessing a revival of nationalism even as the globalizing trends of post-industrial society become clearer. Established cultures are essentially antithetical to the development of a cosmopolitan culture.'<sup>312</sup> I would suggest there are 2 reasons for this revival of nationalism amongst European nations. Firstly, the European Union has vastly underestimated the power of language, both as a practical tool for communication and as a dominant feature of identity formation; and secondly, it has relied on the same archetypes and symbols as nations when forming its identity (common currency, flag, anthem etc.) which

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<sup>311</sup> Nikiforova, 'Language policy and language of cultural pluralism', p. 45.

<sup>312</sup> Smith, 'National Identity and the idea of European Unity', p. 55.

has in fact placed it in competition with the national identities of European Member States rather than aligning itself alongside them.<sup>313</sup> Some academics suggest that the EU can only have a fully formed identity if it defines itself exclusively against other world actors.<sup>314</sup> If this is the case, then what characteristics could we say distinguish Europe as a collective from “not Europe”? This would involve recognising or discovering unique identifiers that were exclusive to Europe but nowhere else. This all suggests that having a defined Other is a feature of national identity formation that cannot be escaped in any identity formation, even that which exist beyond the nation, such as the European Union. But does this distinction between the self and other necessarily have to come along with discrimination and conflict? The question we need to answer from a European perspective is: what mind-set produces stronger feelings of attachment to the group? Do we need the negative associations that come with distinction from an Other in order to fully form an Us? Or can this difference between Us and Them be outlined in a more positive manner that does not breed discrimination against the Other? Highlighting difference and distinction between the in-group and the out-group generally evokes highly negative sentiments towards the perceived other, however some scholars argue that collective identities do not necessarily rest on adverseness

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<sup>313</sup> For discussion and debate on the relationship between national identity and European identity, see: J. Diez Medrano, and P. Gutierrez, ‘Nested Identities: National and European Identity in Spain’, *Ethnic and Racial Studies*, vol. 24, no. 5, 2001, pp. 753–778; M. Bruter, *Citizens of Europe? The Emergence of a Mass European Identity*, Basingstoke, Palgrave Macmillan, 2005, pp. 15-19, 114-118; S. Carey, ‘Undivided Loyalties: Is National Identity an Obstacle to European Integration?’, *European Union Politics*, vol. 3, no. 4, 2002, pp. 387-413; J. A. Caporaso, M. Kim, ‘The dual nature of European identity: subjective awareness and coherence’, *Journal of European Public Policy*, vol. 16, no. 1, 2009, pp. 19-42; L. Hooghe, and G. Marks, ‘A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’, *British Journal of Political Science*, vol. 39, no. 1, 2009, pp. 1-23; T. Risse, ‘Nationalism and Collective Identities: Europe versus the Nation-State?’, in *Developments in West European Politics*, (Eds.) Heywood, Paul; Jones, Erik; Rhodes, Martin; Palgrave Macmillan, Houndmills et al., 2nd edn, 2002, pp. 77-93.

<sup>314</sup> *Ibid.* p.55.

to others because strangers do not have to be enemies.<sup>315</sup> Yes, strangers do not have to be enemies, but whether this is true for identity formation is another question.

### 1.b.i Europe against Russia, the US and afar<sup>316</sup>

The values of collective identity are formed in opposition to the values cherished in other cultures. Constructing or perceiving an “enemy” of the collective gives those within it the idea that this “Other” poses a possible threat to the collective’s way of life, culture, economy, security or whatever else it defines its distinguished self with. ‘These Others are, however, shifting objects: the non-European world is projected on some particular Others, sometimes on the ‘East’, sometimes on the ‘Orient’, sometimes on ‘America’. Distinguishing a European culture from such Others is a strategy for the foundation of a story about a European Self, i.e. a collective identity.’<sup>317</sup>

In his article ‘From Cultural Defence to Political Culture’, Philip Schlesinger argues that the ending of the Cold War has had a profound impact on how we categorise European culture. He suggests that having the defined other of Russia allowed us to see ourselves in polar opposition to another entity: democracy vs. totalitarianism, capitalism vs. socialism, freedom vs. repression.

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<sup>315</sup> See G. Delanty, *Inventing Europe: Idea, Identity, Reality*, Palgrave Macmillan, 1995; L. Jamieson, ‘Theorising identity, nationality and citizenship: Implications for European citizenship identity’, *Slovak Sociological Review*, Vol. 34, No. 6 (2002), 506-532; I. B. Neumann, ‘European identity, EU expansion, and the integration/exclusion nexus’, *Alternatives: Global, Local, Political*, Vol. 23, No. 3 (1998), 397-416; L. E. Cederman, *Constructing Europe's identity: the external dimension*, Lynne Rienner Publishers, London, 2001.

<sup>316</sup> The reader may find it interesting to read ch.8 of G. Delanty, *Inventing Europe: Idea, Identity, Reality*, London, Palgrave Macmillan, 1995, which discusses Europe as a Cold War construction.

<sup>317</sup> Eder, ‘A Theory of Collective Identity: Making sense of the Debate on a ‘European Identity’’, p. 436.

Given the changing political atmosphere since the Cold War, along with the expansion of the EU eastwards to former Soviet states, the ability to define ourselves against Russia, the Other, no longer exists with the same clarity. It is blurry, indistinct and unclear, to the point where Europe is unsure against whom to measure or contrast itself. The recent tensions with Russia with regards to the situation in the Ukraine could be a situation upon which the EU could once again define itself as an Us against the Other, being Russia once more. Should the Member States of the European Union decide upon joint military action against Russia if the situation worsens, this is exactly the type of situation that leads to stronger nationalistic, or in this case supra-nationalistic sentiments.<sup>318</sup> Should this situation arise, it would perhaps be an example of negative experiences being stronger in identity formation than positive ones. Anthony D. Smith suggests that the effect of such frontiers on creating an out-group depends on the degree of unity of perceptions and sentiments among the Europeans themselves, and on the degree of common political action, of which the field of defence and foreign policy is especially significant.<sup>319</sup> Collective military action, although negative in consequence, would form a collective memory that would be emotively significant enough to move towards a sense of collective at the European level.

In many ways The United States could be the “Other” against which Europe distinguishes itself. The US has a level of international political power comparable, if not greater, than that of the combined EU states, and is

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<sup>318</sup> This was written prior to the Russian involvement in Syria which has led to increased discussions between Russia and European leaders in order to resolve this conflict. As such, the situation in the Ukraine has largely been side-lined. Nevertheless the sentiment behind the theory remains the same.

<sup>319</sup> Smith, ‘National Identity and the idea of European Unity’, p. 69.

undoubtedly an ally to the EU in many situations of global concern; yet there are certain aspects of its legal and political system which stand in such stark contrast to the (some would say) more liberal and progressive stances taken by the EU member states that its opposition in the form of the “Other” could be defined:

[T]he EU stresses its progressive stance, for instance in rejecting death sentence or in promoting and implementing environmental policies. By so doing it asserts its leading role and depicts, for instance, the US as a laggard. In other words, the EU promotes its positive image as the forerunner in the fight against climate change, thus claiming its moral supremacy. Consequently, the EU uses the vanguard-laggard dichotomy in order to describe its own identity in contrast to other countries, in particular the US. The United States are especially useful for the EU’s identity constructing processes, since being a global power with their own normative appeal, they can serve as a ‘significant other’. In this case, the EU uses techniques associated with the construction of the inferiority of the other with the aim of establishing and perpetuating its own positive image.<sup>320</sup>

Promoting its progressive human rights and environmental stance aside the danger here would lie in the fact that the US, like the EU, is a democratic, Christian, capitalist group of states, meaning that its otherness might become confused given its level of sameness. As such it would quite probably be seen as a rather ambiguous “Other” to imagine. Even Habermas notes that the differences between Europe and the US ‘are overdrawn and constantly risk “orientalising” an egoistic, religious, unilateral, consumerist American other and reifying a democratic, secular, solidaristic Europe’.<sup>321</sup>

The pitfalls of these two suggestions aside, the fact remains that if the EU insists on forming its collective identity based on the recipe provided by national identity construction, then it must decide upon which Other it is going to pit

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<sup>320</sup> Kaina and Karolewski, ‘EU Governance and European Identity’, p. 23.

<sup>321</sup> Parker, ‘Why EU, Which EU? Habermas and the Ethics of Postnational Politics in Europe’, p. 399.

itself against. There are other options of course: Political opposition with China given its communism; Economic opposition with India and its expanding economy; or religious opposition with the Middle East and Islam as the dominant religion. The dangers of defining this Other in such a multicultural age however, are very real and present a very real level of difficulty. The nature of modern identity is very different to that even of 30-40 years ago prior to high levels of economic migration. Our modern idea of Us almost always includes what would once have been perceived as Them. Individual nations, particularly European nations, are much more religiously and culturally diverse than they were say 50 years ago and this diversity has become part of modern multicultural identity. This only increases at the collective European level not only with the continually expanding geographical borders, but also given the inclusion of third country nationals who gain European citizenship. A big problem for envisaging an Other for Europe is that the various nations of the EU are made up of multicultural citizens who are Others in a sense. The Other can be simply described as being something which is outside ourselves, outside what we perceive to be common amongst ourselves in our chosen collective. However, multiculturalism makes this definition of what we are *NOT* much harder when what we are not may also be what we *ARE*.

It might be an inescapable necessity for the EU to define itself against an Other in order to begin creating a fully formed European identity which would allow its citizens to feel like a collective. But just because it may be a necessity, that does not make it a necessary evil. By following the national identity formation concept of Otherness it does not mean that they have to do it in the same way.

In acknowledging the multiculturalism and the narratives of sameness and difference that already exist within the European culture the EU should not turn to marginalisation in order to form an Us. 'European identity should not lead to new forms of nationalism. That is why it should be flexible and dynamic. It is necessary that the European Union "set out to define a new identity for its supranational agenda as more and more Eastern European countries started knocking on the Union's doors".'<sup>322</sup> The EU needs to find a means of giving a solid definition which also allows room for the changeability of collective identity and the multicultural nature of its citizens, something that could possibly be done through simple geographical certainty and definition. Defining the collective inevitably comes along with some potential problems for consideration however:

Definition and self-definition are always relational and contextual; cultures are not homogenous wholes but relationally constructed; and nations do not consist of essences or given national characters. Rather, nations provide the boundaries through which difference is most easily constructed and recognized.<sup>323</sup>

Abélès' statement therefore supports the earlier assertion that modern identity is not a homogenous concept, so perhaps producing identifiers unique to the nations of Europe would in fact cause confusion due to the pluralistic nature of modern identity. What Abélès does reveal however is the necessary element of **boundaries** provided by the nation to form a space within which these modern, pluralistic concepts of collective can be formed. Is this then the way forward for the EU in terms of identity formation? Distinguished, certain geographical

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<sup>322</sup> Ivic and Lakicevic, 'European Identity: Between Modernity and Postmodernity', p. 396.

<sup>323</sup> Abélès, 'Identity and borders: an anthropological approach to EU institutions', p. 17.

borders which physically outline who we are? It could at least be a starting point.

#### 1.b.ii Defining the European Union's Geographical Borders <sup>324</sup>

Geographical borders not only physically define the boundaries of a collective Us and externally Them, but also create a sense of exclusivity within each particular collective. To be able to physically see the borders of a collective identity highlights the 'Us' and 'Them' narrative that is also necessary for collective identity formation. It could perhaps be suggested that this is a further reason why the EU and its citizens have no sense of a strong European identity. The EU's borders are continually moving, with regular expansions over its lifetime. If the European citizens can't identify what they are not, as what they currently **are not** may be part of what they **are** in the future, then they do not know the defined extent of their collective on a physical level. There cannot be a Them if we do not know where expansion will end and who We are. Without major institutional structural reform the problems outlined throughout this thesis caused by the multilingual nature of European Union law will never be resolved. The only way to configure these potential institutional reforms is to find or create a complete definition for the EU as an entity, a process which can only begin with the solidification of geographical borders. Given that the EU cannot distinguish itself linguistically due to its multilingual nature, and given

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<sup>324</sup> On Europe's protected geopolitical position, see introduction, C. Tilly, ed., *The formation of national states*, Princeton University Press, 1975; for Europe's problematic eastern boundaries, see R. Pearson, *National minorities in Eastern Europe, 1848-1945*, London, Macmillan, 1983; and Roger Portal, *The Slavs*, London, Weidenfeld & Nicolson, 1969.

that its definition as an entity is contested and vague, geographical borders are perhaps the only certainty that the EU could reasonably commit itself to.

The European Union itself needs to be defined in a way that its citizens understand its nature, and physical, geographical definition might just be the starting point. The competences of the Union have been continually advancing since its naissance; growing from a simple economic union, to a political, legal and social union over its lifetime. As an entity, it is not like anything which has existed before; it is neither a federation nor a confederation; not a nation nor simply an international organisation, all of which casts confusion over its political nature. We tend to describe it as a supranational entity, a definition which goes no way in helping the citizen understand the relationship between the citizen and the EU. It makes sense to begin with a defined physical certainty to begin the process of identity formation as it offers a real and physical Other against which the European self can be projected upon. This would allow for the process of demos formation to begin and thus creating the space of democratic legitimacy that the EU is currently lacking and which linguistic diversity has somewhat limited. As Habermas says: 'Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members.'<sup>325</sup>

Others have questioned whether we should really be aggregating the EU on these terms. 'Is a European identity merely the sum total of its various national

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<sup>325</sup> Habermas, Jurgen, *The Postnational Constellation: Political Essays*, John Wiley & Sons, 2015, p. 107.

identities and communities? If so, is there not something quite arbitrary about aggregating such identities simply because certain otherwise unrelated communities happen to reside in a geographical area which is conventionally designated as the continent of Europe?<sup>326</sup> Not necessarily in my opinion. Even if geographical aggregation seems arbitrary to some, it is no more arbitrary than many of the other artificial tools nations use to strengthen attachment at collective level. What's more, doing so would potentially allow for a defined space in which to assert a rights based Union. What this geographical definition would also allow for is a certain space within which the European Union could solidly define what the Rule of Law means in relation to the laws of the Union, as discussed in *Chapter 2* of this thesis. If the European Union is able to define the geographical limits of its membership, then it can begin working on a Rule of Law definition that encompasses the understanding of the Rule of Law within all of its member states. Physical boundaries, once in place, open up the doors from numerous other certainties and definitional possibilities to begin, upon which a solidly defined European identity can begin to be formed.

Whilst my argument maintains that the traditional, post-Enlightenment structure of nation-state building and thus national identity formation is not the path that the EU should be following, it would be remiss of me to not accept that there is a place in European identity formation for Otherness. The external validation of a Them seems to be a necessary component for Us, the in-group, to feel attachment to each other as well as to the European Union itself. It is the internal archetypes that I am sceptical and dismissive of, not the external

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<sup>326</sup> Smith, 'National Identity and the idea of European Unity', p. 68.

validation. According to Derrida, the European Union reflects the Enlightenment ideals based on homogeneous values that produce binary distinctions such as: European/non-European, self/other, essential/contingent, universal/particular, and so on. He argues that European identity should be more open to differences. Hence it should be re-defined.<sup>327</sup> Perhaps then what is needed is another Enlightenment. If the EU lacks the preconditions of nationhood (as I have demonstrated is the case) meaning it is therefore deficient both as an idea and as a process, I suggest we should not be forming its identity on the post late 18<sup>th</sup> century Western ideas of nation but on a different set of preconditions that we equally artificially constructed. With defined geographical European borders within which European identity formation can take place, another Enlightenment would mean that we can reform our idea of what identity formation should entail at the European level.

## **CHAPTER 5. SECTION 2**

### **STARTING AFRESH**

As John Erik Fossum writes: 'It is not clear that the EU needs to equip itself with similar means to foster a post-national identity. Another and related question is whether these socialising mechanisms mean the same today as they did when the nation states were forged. The challenge is to understand how identity formation takes place in the contemporary world'.<sup>328</sup> And this is where the challenge lies. As the EU does not fit into any of our traditional

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<sup>327</sup> Ivic and Lakicevic, 'European Identity: Between Modernity and Postmodernity', p. 404.

<sup>328</sup> Fossum, John Erik, 'The European Union in search of an identity', *European Journal of Political Theory*, vol. 2, no. 3, 2003, pp. 319-340.

understandings of nation or state formation, it must find a contemporary manner of conducting identity formation that fits into its contemporary condition. Discovering a way to form its identity (both the collective identity of its people and that of itself as an institution) is the starting point for the EU to become more united politically, socially, economically and culturally, and to become a democratically legitimate entity. As we know from the above discussion, the EU has adopted several concepts that would normally, or historically be associated with the nation state: creating a single currency, the common market, the supremacy of EU law etc. Yet the most traditional mechanisms for socialising a people are still held at national level: a common language, a common heritage, a national education system. The problem isn't that the EU has only been able to emulate some of these characteristics, it is rather than it attempted to emulate any of them at all. Rather than forming a supra-national identity that exists with the same strength and alongside national identities, it has instead made something weak yet opposing which has led to low levels of identification and a defensive attitude towards the EU. In order to stop this attitude from perpetuating the European Union needs to decide upon new archetypes that aren't the same as those that national identity is based upon. Perhaps this would also stop negative sentiment towards the EU in that the people would take on this additional identity without feeling as though they were sacrificing their national identity. It is through finding its identity and forging a collective identity for its peoples that the questioned democratic legitimacy of the European Union can begin to be overcome. By forging such an identity without the archetype of a common language in particular, the democratic viability of the EU as a whole would no

longer be dependent on communication possibilities in the same way as those of the nation state.

This thesis thus far, although separated into titled subject chapters in an attempt to force structured coherence from what is often untamed thought, has led to a point which hopefully makes clear the inter-relatedness of such concepts as language, thought and identity with notions that we (wrongly) perceive to be stable, timeless entities such as the nation state. All that which has come before leads to this point: given what we now understand about the problems caused by multilingualism and having a weak sense of identity on a European level, how can we make the situation better than it currently is? Before leading into discussion on the idea of a re-Enlightenment I consider the Habermasian idea of Constitutional Patriotism, Charles Taylor's Deep Diversity and the oft-cited possibility of a rights-based Union as means of demos formation within the EU. Certain aspects of these alternatives most certainly could feature in a re-Enlightened European identity. However others are dispelled for their lack of understanding of the strength of attachment needed for identity formation to take place.<sup>329</sup>

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<sup>329</sup> My omission to discuss such integration theories as neofunctionalism, intergovernmentalism, conservatism, multi-level governance, federalism etc. comes not from my agreement or disagreement with their arguments or points of view, but rather for the reason that they are theories of integration, **not** theories of identity or demos formation. Being of the opinion that integration is a conscious political initiative whereas identity is a subconscious association linked to defined symbols of recognition means that for the purposes of this thesis, discussing integration theories would neither further nor refute my argument.

## SECTION 2.a : CONSTITUTIONAL PATRIOTISM, DEEP DIVERSITY AND A RIGHTS-BASED UNION

### 2.a.i Constitutional Patriotism <sup>330</sup>

Turning first towards the concept of constitutional patriotism, more specifically Jurgen Habermas' development of the concept. The term 'constitutional patriotism' is a concept borne out of post-war Germany by political philosopher Dolf Sternberger, the idea of which was later taken up and developed by Jurgen Habermas. To say that Habermas developed what we understand as constitutional patriotism is true, yet it could not be said that it has been truly defined as a self-supported political theory. Some scholars even question its status as a free-standing political value: 'there has been significant disagreement as to whether constitutional patriotism is a political value in itself or a means to ensure other values, such as political stability'.<sup>331</sup> Nevertheless, from what is generally understood from Habermas' writings on constitutional patriotism, he argues that cultural and ethnic identity should be detached from the state or political culture as it were, and thus suggests that loyalty should be based on abstract procedures and principles.<sup>332</sup> Many consider constitutional patriotism an attractive option to engender political allegiance in an ever more multicultural world, particularly in multicultural societies such as that of the European Union. This is because it hypothetically allows for political recognition

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<sup>330</sup> The reader might find it interesting to read: D. Grimm, 'Does Europe Need a Constitution?', *European Law Journal*, vol. 1, no. 3, 1995, pp. 282-302; and Habermas' response to this: J. Habermas, 'Does Europe Need a Constitution? Response to Dieter Grimm', in *The Inclusion of the Other: Studies in Political Theory*, Polity, 1999, pp. 155-161.

<sup>331</sup> Symposium, 'Constitutional Patriotism: An Introduction', *Int J Constitutional Law*, vol. 6, no. 1, 2008, pp. 68-69.

<sup>332</sup> See: J. Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate*, Trans. S.W. Nichol森, Cambridge, MIT Press, 1989, p. 261; and J. Habermas, *The Inclusion of the Other: Studies in Political Theory*, Trans. C. Cronin, Cambridge, MIT Press, 1998, pp. 117-118; and J. Spinner-Halev, 'Democracy, Solidarity and Post-nationalism', *Political Studies*, vol. 56, no. 3, 2008, p. 617.

and inclusiveness when a broad range of cultures and nationalities are politically aligned. '[Constitutional patriotism] attempt[s] to bind the state around its constitution and the abstract principles and procedures of liberal democracy, moving it away from a basis in an ethnic or cultural identity.'<sup>333</sup> As

Mason explains:

In principle at least, the citizens of a state could identify with their major institutions and practices, and feel at home in them, without believing that there was any deep reason why they should associate together, of the sort which might be provided by the belief that they shared a history, religion, ethnicity, mother tongue, culture or conception of the good.<sup>334</sup>

What this means is that while the various identities of the peoples of Europe could exist and co-exist within the European Union, they would not actively be echoed within its institutions. Habermas is hence suggesting that the citizens of the European Union should hold their collective identities yet not look to the state (the institutions of the EU in this sense) to validate these or to create the symbols that the collective can form their identity around. Habermas believes that 'the European Union can be based on a 'thin' collective identity stemming from a set of abstract universalistic principles such as human rights, but evolves and thickens from this Kantian cosmopolitan conception into the European constitutional patriotism which is expected to replace the ethnic bonds of European nations'.<sup>335</sup>

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<sup>333</sup> Spinner-Halev, 'Democracy, Solidarity and Post-nationalism', p. 617.

<sup>334</sup> Mason, Andrew, *Community, Solidarity and Belonging: Levels of Community and their Normative Significance*, Cambridge, Cambridge University Press, 2000, p. 127.

<sup>335</sup> J. Habermas, 'Towards a Cosmopolitan Europe', *Journal of Democracy*, vol. 14, no. 4, 2003, pp. 86-100; N. Stevenson, 'European Cosmopolitan Solidarity: Questions of Citizenship, Difference and Post-Materialism', *European Journal of Social Theory*, vol. 9, no. 4, 2006, pp. 485-500; Kaina and Karolewski, 'EU Governance and European Identity', p. 22.

Constitutional patriotism therefore seems to be a type of identity separation rather than identity formation. It separates the already existing European national identities from the larger institution of the EU by distinguishing national identity from political identity. By doing this constitutional patriotism dismisses the idea of finding a possible way to form a valid and strong supra-national European identity. One of the many problems with this idea is that by separating identity from the state (or the political allegiance) it is unclear where peoples' loyalty to the European Union will stem from. The political state is enmeshed with the notions that form our national collective identities, and so if we separate our political allegiance and our collective allegiance, who's to say that the strength of belonging and loyalty will remain with solely the political? What is more, having the collective's identity and therefore loyalty be "thin" would inevitably lead to the bonds between that collective being weak. As has been written about in the previous chapter, collective identity or national identity uses symbols to form a sense of solidarity which in turn fosters loyalty to the nation. 'It is doubtful that the idea of good government is enough to motivate people to make such sacrifices in new democracies since the government is too young to be proven to be good. Rather, for many people to make sacrifices they need to think they are making sacrifices for an entity that is both part of and greater than themselves.'<sup>336</sup> The problem with constitutional patriotism is that it doesn't grasp the whole sense of importance of collective identity in relation to the (political) state, that is to say the importance of collective identity for democratic communication and hence the democratic viability of the larger entity as a whole. With its separation of collective identity

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<sup>336</sup> Spinner-Halev, 'Democracy, Solidarity and Post-nationalism', p. 609.

from the state, and its thin identity suggestion, no comprehensive understanding of where the loyalty and strength normally provided by a strong sense of collective identity will come from instead. Citizenship (as in the political recognition of and legal right belong to a collective and be subject to the rights and laws of that collective) alone is not strong enough to forge or sustain a common identity. Assuming the ineffectiveness of constitutional patriotism at the European level can be supported by the fact that the EU has funded and promoted numerous citizenship initiatives with the aim of forging loyalty between its peoples, none of which have formed anything close to the bonds formed by collective identity.

#### 2.a.ii Deep Diversity

In contrast, Charles Taylor's concept of Deep Diversity most certainly grasps the complexity of collective identity and the strength of loyalty that such an identity fosters amongst members of the group. John Erik Fossum succinctly and rather impressively explains the content of Charles Taylor's deep diversity:

[Deep Diversity] was developed as a means of understanding identity and citizenship in complex, multinational and polyethnic states. It refers to a situation in which a 'plurality of ways of belonging . . . [are] . . . acknowledged and accepted' within the same state. Deep diversity is more than mere ethnic and cultural diversity. Forms of diversity are politically and legally – and perhaps also constitutionally – acknowledged and accepted in three fundamental ways. First, society is marked by the absence of an overarching agreement on *what the country is for*. This entails different conceptions of the cultural, national, linguistic or ethnic make-up of the society and where these conceptions constitute different collective goals for what the society ought to be and ought to look like. This is generally the case with states that are both multinational and polyethnic. Second, society acknowledges the existence of different collective goals and tries to accommodate these through accepting differentiated citizenship and through allowing

collectives to maintain their sense of difference. Third, those groups or collectives that feel different or distinct actively take measures to maintain their sense of difference or distinctiveness over time. Deep diversity thus denotes a sense of attachment in which a group's or collective's belonging to the overarching entity 'passes through' its belonging to another and more tightly integrated community.<sup>337</sup>

Breaking this description down, let us first look at the idea of 'a plurality of ways of belonging being acknowledged and accepted within the same state'. Looking back at the discussions on language equality and minority rights explored in *Chapters 1 and 2* of this thesis, it can be said that the European Union already officially acknowledges the plurality of cultures that exist within its borders (although as we know, official recognition does not necessarily lead to practised equality). And as Deep Diversity would suggest is necessary, these forms of ethnic and cultural diversity are politically and legally acknowledged within the treaties of the European Union. Looking further along in Fossum's explanation of Deep Diversity, it seems to fit very well with the first criteria that is the lack of an overarching agreement on what the "country" is for. The various member states of the EU most certainly have different visions and aims about what European society at large should look like and the direction the EU as a larger supra-national entity should be heading towards. The EU can also be said to be adhering to the second and third criteria of Deep Diversity in that; 1) the different collective goals of the various member states are acknowledged and accommodated, 2) difference and diversity is celebrated rather than stamped out, and 3) cultural and ethnic difference is actively promoted by the

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<sup>337</sup> J. E. Fossum, 'The European Union in search of an identity', *European Journal of Political Theory*, vol. 2, no. 3, 2003, p. 323.

institutions of the EU with a large amount of funds being set aside purely for this purpose.

It is clear that Taylor's social concept of Deep Diversity understands the complexity of issues surrounding the relations between the larger political/legal state and the cultural collectives which inhabit the spaces demarcated politically and geographically. It also clearly acknowledges that bonds and unity between peoples comes from a cultural or ethnic collective, it is only citizenship that comes from political and/or legal recognition of such collectives. 'Taylor argues that "a sovereign people, in order to have the unity needed for collective agency, had already to have an antecedent unity or culture, history or (more often in Europe) language". Behind the political nation there 'had to stand a pre-existing cultural (and sometimes ethnic) nation'.<sup>338</sup>

What Deep Diversity offers us is a well-rounded understanding of the necessary preconditions for the political entity to exist, as well as a social theory into which the EU seems to fit quite nicely. It understands the current situation as being one of plurality, diversity and difference, within which different cultural collectives in the form of member states have various goals and conceptions, all of which are considered equally (legally speaking at least).

Whilst effectively explaining the identity model of the EU as the grouping of a plurality of collectives whose loyalty lies in the smaller national collective and passes through that of the larger political unit of the European Union, Deep Diversity does not in any way offer a solution to the problem of lack of existence of a European identity in itself or the lack of a defined European demos. Deep

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<sup>338</sup> Spinner-Halev, 'Democracy, Solidarity and Post-nationalism', p. 605.

Diversity simply acknowledges this lack of a European demos and rather than offering up suggestions on how to forge one, and seems to rely on the possibility of loyalty at the national level being enough to have loyalty at the European level given that the nations have politically affiliated themselves with the EU. What's more, whilst it may be true that (as Deep Diversity suggests) the EU politically and legally acknowledges the cultural and linguistic plurality of the various collectives that exist within the member state nations, as was discussed in *Chapters 1 and 2* of this thesis, there are serious practical failings and shortcomings of such acknowledgement, especially given the previously highlighted problems caused by the plurality of languages within those borders. Therefore, what is the point in the legal and political recognition of such diversity if its practical implementation is not equally felt by the citizens of each diverse cultural collective within the borders of that legal system?

It would seem that the Deep Diversity approach would work for the European Union if it were to decide that its collective goal was to move towards a federal system of government given that 'Deep Diversity entails a commitment to live together within an overarching political entity but where different modes of life and collective projects are accepted'.<sup>339</sup> As it stands however, the EU has neither a solid definition of what it presently is nor a confirmed idea about what it will be in the future. What is more, who's to say that the same stumbling blocks caused by the lack of a collective identity and common language would not appear along the federal route also? Yet again, unlike other Western

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<sup>339</sup> Fossum, 'The European Union in search of an identity', p. 330.

federations (the US and Germany for example), the EU is blighted by the lack of a common, unifying language.

### 2.a.iii Rights-based Union

Both Habermas' Constitutional Patriotism and Taylor's Deep Diversity have rights as being central to their theories in that the formal, legal recognition of the rights of different collectives forms a necessary feature of both. That being said, 'deep diversity is reflective of the communitarian position that rights are inadequate to foster a sense of community and belonging'.<sup>340</sup> There are those however who hold the opinion that given the distinct and diverse nature of the European Union, forming a collective sense of being based on collective rights is the way forward:

A rights-based politics of equal dignity, which not only places limits on and constrains national identities but also fosters novel, post-national ones. This scenario depicts the EU as a rights based federal-type entity, which propounds a post-national type of allegiance akin to what has come to be known as 'constitutional patriotism'. [...] This political culture is supportive of cultural difference but cultural difference cannot be permitted to undermine the common allegiance. Such an entity is premised on an EU-wide citizenship, based on a bundle of civil and political rights that ensure citizens' autonomy and permits them to consider themselves as the ultimate authors of the laws. [...] This scenario is premised both on the development of such allegiance-forming institutions at the EU level as well as on a significantly reduced ability of the nation states to maintain their national identities.<sup>341</sup>

The idea of a rights-based union therefore centres around the possibility of forming a sense of belonging based on collective group rights of the citizens of the EU. Yes, each cultural collective is supported and promoted, but this is

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<sup>340</sup> *ibid*, p. 324.

<sup>341</sup> Fossum, 'Identity Politics in the European Union', p. 395.

secondary to the union which is formed between these distinct groups, founded in the equal enforcement of common rights. In making rights the central focal point, cultural distinction becomes secondary in terms of importance to the structure of the union. As the rights are the bond, or the bridge, which unify the different peoples of each different collective, their precedence is paramount to the union succeeding.

Taking the idea of a rights-based union in its most simple form we can understand why it seems like such a good idea to many. Collective rights mean collective recognition, and recognition by the “state” is a key factor of collective identity formation. What’s more, blanket rights that are applicable to all citizens within the union, no matter which national, ethnic or cultural collective they associate themselves with promotes equality and could be the starting point for a sense of belonging based on shared recognition and equal rights. According to the standard Eurobarometer 69: ‘Peace (45%), human rights (42%) and respect for human life (41%) are the three most important values in the eyes of Europeans. These three values are on the podium far ahead of democracy (27%), the Rule of Law and individual freedom (21% in both cases), equality (19%) and tolerance (16%)’<sup>342</sup>.<sup>343</sup> Clearly European citizens themselves feel the importance of human rights and thus building a union based on what the citizens themselves see as integral to their being could be a positive step forward. That being said:

The sheer diversity of the EU also means that it is still far from clear precisely which institutional level this thrust, if successful, will support.

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<sup>342</sup> Carausan, ‘Is European Union at the Heart of Citizens’ Identity?’, p. 69.

<sup>343</sup> TNS opinion & social at the request of the European Commission, Directorate-General for Communication, ‘Standard Eurobarometer: Eurobarometer 69: Public Opinion in the European Union, European Commission [pdf], Spring 2008, <[http://ec.europa.eu/public\\_opinion/archives/eb/eb69/eb69\\_uk\\_nat.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb69/eb69_uk_nat.pdf)>, accessed 13 February 2015.

In principle, it can occur (a) through a strengthened harmonisation of national systems of rights; (b) through the establishment of full-fledged European citizenship; (c) through the 'Europeanisation' of international rights, in particular those embedded in the ECHR; or (d) through some kind of co-evolution of rights at national, EU and European/international levels.<sup>344</sup>

Furthermore, as with Constitutional Patriotism and Deep Diversity, a Right-based Union does not in any way attempt to forge a European collective in its own right, instead relying on the (potential) unification of already existing collectives around a system of rights. Given my earlier discussion in *Chapter 2* on the impact of multilingualism on minority rights implementation, the same problems would likely arise but on a wider scale if the EU based its entire sense of being around this concept. Making rights the EU's primary identity marker still does not solve any of the identity issues currently present within the Union that have been outlined throughout this thesis. Those rights would still be subject to potential unequal enforcement due to the EU's multilingual nature unless an alternative, equally compelling identity marker was found to replace that of a common language. And unfortunately, as others have also suggested, rights just aren't emotively compelling enough to replace such a strong, sub-consciously formed identity feature as a common language. There is also the issue that the above three ideas attempt to provide a political solution to a demos problem. If we want to increase the democratic legitimacy of the European Union, we need to start by looking at the demos at the European level, not by segmenting it into a collective of several demos (as with Deep Diversity), and not by attempting to get those distinct collectives to co-exist in

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<sup>344</sup> Fossum, 'Identity Politics in the European Union', p. 396.

the name of political patriotism (as with Constitutional Patriotism). Without a defined European demos, how can the EU be democratically legitimate?

As Sophie Duchesne has pointed out, 'identity change is a complex issue and current concepts of European identity do not seem convincing, because they are overly analytical, insufficiently refer to the process of political community building and are too ambitious'<sup>345</sup>. Furthermore, history has shown us that attempting European demos formation through political processes is likely to be met with hostility. Rather than being seen as an additional identity to become attached to, it pits the already strongly defined national collective identities against the European attempt. The failure of the TCE (European Constitution) is an example of the failure of overt, forced political and legal merging of the states and people of Europe. Morally dubious as it may sound in description, what must instead be done is an artificial construction of archetypes that are not the same as the archetypes our national identities are based upon. We must forge and construct archetypes that subconsciously create a sense of unity rather than attempt an overt reconstruction of the Union through constitutionalism or other political processes. I am not suggesting that the people should be tricked into feeling a loyalty for the EU so that they would then want a European Constitution; rather I am saying that forming a defined European demos is necessary for both the democratic legitimacy of the Union and if a move towards a more socially integrated European Union is desired. No political entity can hope to generate loyalty to

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<sup>345</sup> Duchesne, 'Waiting for a European Identity...Reflections on the Process of Identification with Europe', p. 403.

the institution without a defined people who feel that they have an emotional, subconscious attachment to the body at large.

To reiterate the conclusion of the previous chapter, the formation of a European demos with a collective identity is one of the preconditions to improve the democratic legitimacy issues of the European Union. Given what was discussed in the previous chapter with regards to national identity formation and identity being an artificial social construction, we must start to look at ways of beginning to artificially construct a European identity beyond that of national identities. As previously stated, copying the archetypes of national identity construction (as the EU has thus far tried to do) is not a good idea given the identity conflict it brings between national identity and post-national identity. But just because copying the symbolic content of national identity is not a good idea, that does not mean there is any problem with copying its format. Identity construction at the national level has proved to be a remarkably strong concept. The collective identity formed around the nation-state has been able to create within the citizens of that nation a feeling of belonging based on archetypes which, although artificially constructed, we feel are natural to our existence. What the European Union therefore needs to do is to follow the nation-state format but construct its own simulated archetypes that have the same strength of power over our subconscious and consequently enforce the same strength of collective solidarity amongst citizens at the European level.

## **CHAPTER 5. SECTION 3**

### **STARTING FROM SCRATCH: A RE-ENLIGHTENED IDENTITY**

As discussed in the previous chapter and earlier in this, our present concept of nation-state and hence national collective identity arose following the 18<sup>th</sup> Century Enlightenment period in Europe. Perhaps then, if demos formation at the EU level is the solution to the democratic legitimacy issues created by its multilingual nature (as I am suggesting it may well be), and following the format, not the content of national identity formation is the way to proceed, then we need to start with a re-Enlightenment.

You can't just make an Enlightenment happen. Enlightenment is more the resulting period of a gradual collective change in social views about both the personal and the political. It is the collective's response to archaic ways of thinking that dominate society by demonstrating social progression through art, protest and social movements. It is using reason over tradition and using that reason to move society forward. And this is what the European Union must do. Progress in human thought has brought us the birth of democracy, women's suffrage, racial equality and human rights. There was a time when these things were inconceivable to the collective conscious, but now we could not imagine a (Western) world without the existence of these things, imperfect though their application may be. What is being suggested is that the EU needs to think outside the box; to see its own existence beyond the confines of what is already defined and what can already be conceived of. Only then will it be able to overcome the democratic legitimacy issues caused by its multilingual nature and form an identity both for itself and for its citizens as a collective that

does not conflict with their pre-existing national identities. As Rosamond notes, 'this tendency to "familiarize" the EU might seriously downgrade its novelty, its distinctiveness and its potentially transcendent qualities'.<sup>346</sup>

An ethical vision of a European future is one which aims at moving beyond a methodological nationalism and goes further towards embracing – rather than *overcoming* – the plural reality of Europe. This may involve new imaginative ways of thinking about the world and Europe – both in social scientific and normative theoretical domains – which adopts what Ulrich Beck calls a methodological cosmopolitanism in place of a methodological nationalism. Adopting such an approach, Beck and Grande advocate a "both-and" cosmopolitanism for Europe. In other words, the aim should be a *cosmopolitan Europe* – rather than an oxymoronic *European* cosmopolitanism – where *both* loyalty to nation *and* loyalty to Europe (and, indeed, globally) is possible.<sup>347</sup>

The general idea of creating a European collective identity in addition to national ones is not new in itself. There are two predominant views about national and European identity; 'one claiming that national and European identities are competing, therefore, to develop a European identity, national identity needs to be at least eroded; and another one claiming that the bases of identification with the European community are different from those with the national community, so national and European identities are compatible and they can coexist peacefully'<sup>348</sup>. Whilst my view falls within the realm of the latter of these two, my suggestion of using the format but not the content of national identity is where the novelty of solution comes from. In order to form a European identity and thus demos we do not need to erode national identities. Conflict between the two has only arisen in my view because the content of European identity has so far copied and thus conflicted with the

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<sup>346</sup> B. Rosamond, "European integration and the social science of EU studies: the disciplinary politics of a subfield," *International Affairs*, vol. 83, no. 2, 2007, p. 234.

<sup>347</sup> Parker, 'Why EU, Which EU? Habermas and the Ethics of Postnational Politics in Europe', p. 402.

<sup>348</sup> Matiuta, 'How to build the European Identity? Attitudes towards the European Union across its countries', p. 4

content of national identities. 'Any further integration of Europe must be guided not by the traditional ideas of uniformity in a European federal state, but must take the *unalterable diversity* of Europe as its starting point'.<sup>349</sup> If created in the right way, with a full understanding of the gravity and weight held by the symbols and archetypes that form its content, European identity could be constructed to function alongside national identity, by using its format but not its content.

### **SECTION 3.a : STAGE 1. RE-ENLIGHTENED IDENTITY: CONSCIOUS CONSTRUCTION AND SUBCONSCIOUS ATTACHMENT**

Looking back at the 2 markers of identity in the postmodern theory discussed in the previous chapter: 1) its reliance on discourse as a key constructing factor, and 2) its fluidity and changeability, the European Union must make use of the second marker to overcome the first. In other words, use the fluid and changeable nature of identity to surpass the reliance on discourse in the traditional sense. It should re-work our idea of collective identity in order to hypothesise about how a post-national European identity could be forged and thus create a European demos that feels able to actively democratically participate without having a common European language.

When it comes to European identity formation, 'some scholars believe that the European Union has marked the start of a new kind of political system which is free from any kind of exclusive commitment on the part of its citizens — be it

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<sup>349</sup> See, U. Beck and E. Grande, 'Cosmopolitanism: Europe's Way Out of Crisis'; U. Beck, 'Toward a New Critical Theory with a Cosmopolitan Intent' Beck, Ulrich, 'Toward a New Critical Theory with a Cosmopolitan Intent'.

because of the development of a basic global solidarity or because of the transformation of political decision systems from governments to multi-level governance'.<sup>350</sup> Because of this, many feel that identification with the European Union 'would be a unique process, based on different kinds of feelings of belonging than existing identification with a nation'.<sup>351</sup> Others have argued that 'there can only be a European identity if it is *civic* – based on a 'social contract' – and not *cultural* – based on a shared tradition'.<sup>352</sup> All of these arguments have valid points, and different though their approach might be in substance, one thing that they all agree on is that European identity needs to be something *different*. Whilst I agree that exclusive commitment to the EU is not necessary for European identity formation to take place, commitment beyond political allegiance most certainly is. Not only that but, as many scholars also suggest, this process must be unique and comprise of different kinds of feelings than those bound up in national identity commitment.

Perhaps the most physically prominent feature of national identity formation is the demarcation of geographical borders discussed earlier. For the EU, each enlargement brings along with it an increase in nationalistic sentiments, with the citizens of present member states often displaying hostility towards the

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<sup>350</sup> See, for example: E. Meehan, 'European integration and citizens' rights: a comparative perspective', *Publius*, vol. 26, no. 4, 1996, pp. 91-121; J-M. Ferry, 'L'Etat Européen', in R. Kastoryano (ed.), *Quelle Identité pour l'Europe? Le Multiculturalisme à l'Epreuve*, Paris, Presses de Sciences Po., 1998; A. Wiener, *European Citizenship Practice. Building Institutions of a Non-State*, Oxford, Westview Press, 1998; C. Neveu, 'Citizens of Europe and European Citizens: Exploring European Citizenship', in I. Bellier and T.M. Wilson (eds.) *An Anthropology of the European Union: Building, Imagining and Experiencing the New Europe*, Oxford, Berg, 2000; J. Habermas, *The Postnational Constellation. Political essays*, Cambridge, Polity Press, 2001; K. Nicolaidis, and S. Weatherill, 'Whose Europe? National Models and the Constitution of the European Union', *European Studies at Oxford Series*, Oxford University Press, September 2003.

<sup>351</sup> Duchesne and Frogner, 'National and European Identifications: A Dual Relationship', p. 145.

<sup>352</sup> G. Delanty, *Inventing Europe: Idea, Identity, Reality*, London, Macmillan, 1995; M. Sassatelli, Monica, 'Imagined Europe: The Shaping of a European Cultural Identity through EU Cultural Policy', *European Journal of Social Theory*, vol. 5, no. 4, November 2002, p. 439.

idea of further enlargement, and what they perceive as the further stretching of resources and funds. A logical starting point would be to define the geographical borders of the EU, by stating that no further enlargements will take place. Historically, national borders have been put into place through wars, battles and tensions with neighbouring states; 'nation building has been marked by struggle, by people actively seeking recognition for their particular culture, history, language, and identity'.<sup>353</sup> Evidently, this is not the path that the EU would or should take given that the essence of its being was borne from a desire to stop wars between European countries ever happening again. However that does not mean that the EU cannot follow the format of geographical nation-state boundary definition, without following the hostile manner in which it took place. Border definition through political debate and general consensus of the citizens already within those borders would be a democratic, peaceful start to defining the boundaries of the EU, at least geographically speaking. Following the idea of politics of "The Other", having defined geographical borders is the starting point for the creation of a collective demos. Once the people within those borders can identify those that do not fall within their borders, i.e. identify the Them collective, they can begin to form their Us collective. Continuing with the idea that we should be following the format but not the substance of national-identity formation, one significant factor for the European Union is making sure that their Us and Them dynamic is neither ethno-central nor religion-centric as is the case with national identity Other distinction. Given the multicultural, diverse nature of the European Union, it is vitally important that in forging a European identity we are careful

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<sup>353</sup> Fossum, 'Identity Politics in the European Union', p. 374.

to avoid the xenophobic characteristics that featured in post-Enlightenment national identity formation. 'A 'post- modernist' global culture is more likely to resemble is the eclectic patchwork we are witnessing in America and Western Europe today-a mixture of ethnic elements, streamlined and united by a veneer of modernism'.<sup>354</sup> According to Inglehart:

Identification with Europe will take place in a more abstract way than it did with formerly with nations. This would constitute a further level in the development of cosmopolitan attitudes, in such a way that post-materialist concerns – freedom, quality of life, human values, as opposed to materialist concerns like consumer goods and physical security – would become more important for Europeans than they were for members of national states.<sup>355</sup>

What Inglehart is suggesting not only points to the need for a cosmopolitan and diverse appropriation of the Us and Them dynamic for a European identity, but his idea also evokes rights promotion as a feature of that identity. Although the early discussion on a right-based union was critical of this approach to European identity formation, perhaps the problem with it in its current state lies not with the concept of a rights-based Union itself, but instead with creating an identity based on such with the EU in its current ill-defined state. Whilst still holding the opinion that rights alone are not enough to form a strong sense of collective identity, they would most certainly feature as one of the hallmarks of European identity if the correct conditions of definition and other archetypal feature formations were met.

Once geographical certainty is in place, self-determination of the EU as an entity could begin. In order to then solidly define what the EU is within those geographical borders, the extent of its competences would need to be more

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<sup>354</sup> Smith, 'National Identity and the idea of European Unity', p. 66.

<sup>355</sup> Duchesne, 'Waiting for a European Identity...Reflections on the Process of Identification with Europe', p. 404.

clearly outlined and defined by ending the pattern of gradual competence extension that it has thus far taken. If the EU were to fulfil these definitive features (geographical definition without further enlargements and competence definition) as a stage-1 of identity formation the possibility of a union in which rights featured as one of the unifying collective characteristics is more likely. Geographical definition and limitation could therefore open the door for many other aspects of identity formation to be put in place, and a certainty defined space in which a rights based union would be viable. Certainly work would have to be done on the definition of these rights in order to encompass the necessary element of diversity and ensure a system of morality beyond religious and cultural distinction. But it would most definitely be a more likely possibility to include rights in the definition of what it is to be European means if there is a certain geographical space in which those rights can be defined.<sup>356</sup>

Earlier in this chapter when discussing the idea of a rights-based union, I stated that “rights would still be subject to potential unequal enforcement due to the EU’s multilingual nature unless an alternative, equally compelling identity marker was found to replace that of a common language”. But perhaps this equally compelling marker can come from several sources rather than just one, through a process of European identity formation rather than a product

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<sup>356</sup> But have we missed an opportunity given the recent situation with Syrian refugees? As a collective, the Member States of the EU did not take action quickly enough to protect the rights of those in danger, neither did they agree on a collective response and strategy as a Union. The individual responses of the Member States were varied in forthcoming assistance and strategy. Take for example the difference between the German response, which was greatly positive and open to assisting those in need; whereas the UK was criticised for being “too low, too slow, too narrow” (see BBC News online, ‘Migrant crisis: UK response criticised by senior former judges’, 12 Oct 2015). Therefore, were the EU to follow the path of a ‘rights-based Union’, certain questions would need to be answered; such as, who do those rights apply to? And, what are the boundaries of those rights?

creation. Beginning with geographical definition is most certainly a start, and defined rights for the people and competences of the Union within that space becomes a viable possibility. 'The question then becomes: can this commitment be generated, or must we wait for it to 'grow', in harmony with the underlying conditions for the formation of any large group identity and community?'<sup>357</sup> Or perhaps there is room for both. This initial stage could be described as being the "*conscious stage*" of European identity construction. The clear and overt carving of a physical space and the duties and powers of the EU within that space. Identity is a process which is formed through the artificial construction of symbols and archetypes, which then over time subconsciously form part of the collective self. Some may argue that geographical definition of the peoples of Europe is an arbitrary attempt to unite peoples who happen to be situated within a certain geographical region. True as this may be what geographical definition allows for is much more than that; it is the beginning of a process which can be consciously generated in the first instance, but has the aim of forming a subconscious sentiment of loyalty and attachment within those its construction is formed around; something that takes process rather than production.

Much like identity itself, the European Union is often referred to as a process and not a product. European identity formation goes hand-in-hand with the European Union defining its own identity. Starting from scratch and beginning with the *conscious stage* of identity construction would be the EU carving its position as a state-like entity. Defining a physical space for rights, duties and

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<sup>357</sup> A. D. Smith, 'A Europe of Nations. Or the Nations of Europe?', *Journal of Peace Research*, vol. 30, no. 2, May 1993, p. 134

competences and outlining what those are. 'Common legal rights and duties for all members is not what one should expect from a cultural community, such as the nation. Rather, this is a function of the state, the political institution that regulates the lives of people within its territory'.<sup>358</sup> The *sub-conscious stage* of identity formation would then follow this conscious demarcation to allow for the more sentimental attachment that we would usually associate with the nation. But how would this take place?

If we were to look at the European Union as if it were a tree, the conscious construction of physical space and comprehensive powers is the seed, and the EU needs to choose the correct species of seed and get the conditions of growth right or the tree will either grow into something unexpected or won't grow at all. What the EU wants to grow is a unique collective attachment that is equally as strong as national identity but does not conflict. Looking at the strength of national-identity bonds, Montserrat Guibernau writes:

Sharing a national identity generates an emotional bond among fellow nationals, which, as Connor puts it, is fundamentally psychological and non-rational. It is not irrational, only 'beyond reason' (Connor 1994b). This is so because, basically, a nation is a group of people who feel that they are ancestrally related. In Connor's view, the nation 'is the largest group that can command a person's loyalty because of felt kinship ties; it is, from this perspective, the fully extended family'. However, 'the sense of unique descent, need not, and in nearly all cases will not, accord with factual history' (Connor 1994b: 202) since nearly all nations originate from the mixing of peoples from various ethnic origins. For this reason, what matters is not chronological or factual history but sentient or felt history.<sup>359</sup>

The hope would be that once the consciously constructed aspects of European identity formation are in place, the subconscious aspects that create the

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<sup>358</sup> M. Guibernau, 'Anthony D. Smith on nations and national identity: a critical assessment', *Nations and Nationalism*, vol. 10, no. 1-2, January 2004, p. 128.

<sup>359</sup> *Ibid.* p. 135.

emotional bond and forge loyalty to the institution could take hold. As Guibernau notes, when it comes to national identity these emotional bonds are irrational, not built on historical fact and are beyond reason. 'The strength of emotions overrides reason, because it is through a sentimental identification with the nation that individuals transcend their finite and, at least for some, meaningless lives'.<sup>360</sup> This can only be a positive thing for the European Union as what it needs to emulate (yet subvert) in form is an artificial feeling. Meaning that it could create the basis of the sentiment, rather than having to overcome and form something that is very real.

### **SECTION 3.b : STAGE 2. RE-ENLIGHTENED IDENTITY: THE BATTLE BETWEEN PAST AND FUTURE** <sup>361</sup>

The next stage for the European Union, the "*subconscious stage*" shall we call it, is to make the collective feel something that isn't necessarily real in a tangible or even intangible sense. Guibernau's quote above, as well as discussion in the previous chapter about the nature of national identity, reveals the important aspect of a shared history and an imagined idea of ancestral relatedness. This past, this historical belonging of togetherness could be said to be the link

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<sup>360</sup> Ibid. pp. 135-136.

<sup>361</sup> Although not the same as my suggested solution in content, the idea that a European collective identity is entrenched in the Europeans' consciousness of sharing a common fate has been advocated by such academics as Offe, Kielmansegg, Horeth and Maurer, all of whom suggest that forging a European identity around this idea of a common fate may reinforce the mutual willingness to work together by pursuing common goals and solving collective problems that go beyond the capacities of single nation-states.

See, K. Offe, 'Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Streß der europäischen Integration', *Swiss Political Science Review*, vol. 4, no. 4, 1998, pp. 35-56; A. Maurer, 'Nationale Parlamente in der Europäischen Union—Herausforderungen für den Konvent', *Integration*, vol. 25, no. 1, 2002, pp. 20-34; P. G. Kielmansegg, 'Integration und demokratie', *Europäische Integration*, VS Verlag für Sozialwissenschaften, 1996, pp. 47-71; M. Horeth, 'No way out for the beast? The unsolved legitimacy problem of European Governance', *Journal of European Public Policy*, 1999, vol. 6, no. 2, pp. 249-268.

between all of the other symbols and archetypes of national identity. The shared myths and stories are a way of remembering (or creating) the past that creates the sense of being united, these stories are shared in the common language, a language which is shaped by and shapes the past experiences of that collective. Europe, in contrast 'is deficient both as idea and as process. Above all, it lacks a pre-modern past-a 'prehistory ' which can provide it with emotional sustenance and historical depth'.<sup>362</sup> Perhaps then, in continuing with the idea of following the format of national-identity formation but not the content, and in attempting to discover something which could overcome the strength of unity forged by a common language, we should instead look to the future rather than the past. We should not be looking to make the EU collective feel ancestrally related as this would again create the conflict scenario that is posing problems today. What the EU should instead focus on is an ideological relatedness in a future sense, a vision of ideals that we are working towards as a collective rather than looking backwards as national identity does. Instead of relying on sentiment for a past connection, we could create a yearning for a future one. In this way the identity is being consciously constructed but also allows for natural growth to strengthen bonds between the various peoples of the EU. This would also fit well with the idea of European identity being a process. The xenophobic past of the nation-state (national identity) could be contrasted with the diverse, cosmopolitan, racially and religiously inclusive future of the EU.

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<sup>362</sup> Smith, 'National Identity and the Idea of European Unity', p. 62.

Contrasting the past-focused myths of national identity with future-focused ideals of European identity may well be the step needed to stop one conflicting with the other. As Anthony D. Smith writes, 'The revival of ethnic myths, memories and traditions, both within and outside a globalizing but eclectic culture, reminds us of the fundamentally memoryless nature of any cosmopolitan culture created today'.<sup>363</sup> He also points out the 'time-bound' nature of existing cultures, highlighting the fact that they are 'tied to specific peoples, places and periods' and are 'bound up with definite historical identities'.<sup>364</sup> All of these features of national identity conflict with the cosmopolitan nature not only of the European Union, but also modern existence at the national level. My issue with Smith's evaluation of cosmopolitan demos creation is that he fails to see beyond the past. He writes:

Here lies the new Europe's true dilemma: a choice between unacceptable historical myths and memories on the one hand, and on the other a patchwork, memoryless scientific 'culture' held together solely by the political will and economic interest that are so often subject to change. In between, there lies the hope of discovering that 'family of cultures' briefly outlined above, through which over several generations some loose, over-arching political identity and community might gradually be forged.<sup>365</sup>

Smith does not consider the artificial nature of historical myths, symbols and ancestry and in doing so is unable to see the potential for artificial cosmopolitan demos creation at the European level. I agree with Smith that we must work with materials destined for the very projects which [the European Union] seeks to supersede'<sup>366</sup>, yet I do not see this as a problem. As has been stated many times in this chapter and the last, working with these materials should not

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<sup>363</sup> Ibid. p. 66.

<sup>364</sup> Ibid. p. 66.

<sup>365</sup> Ibid. p.74.

<sup>366</sup> Ibid. p. 67.

involve copying them as this creates identity conflict. European demos formation 'should not be built on the Enlightenment's universalist assumptions nor on the metaphysical understanding of a cultural and historical heritage'<sup>367</sup> as 'stories telling a shared past constitute boundaries with high emotional value'<sup>368</sup>. Instead, having a sense of collective based on an artificial past and artificial myths can be contrasted with having a future sense of self based on artificially created future ideals such as rights and genuine cosmopolitanism that can be worked towards. In other words, the European Union should create a concept or a vision of what our people will be if we work and unify together, and rights could play a large part in this. 'The proposal is to look not at political or cultural symbols but at stories that emerge in the making of a network of social relations among those living in Europe. [...] A story based on a successful process of unification, [...] the story of the making of a rich, yet socially responsible continent, the story of an economic yet social Europe.'<sup>369</sup> This is exactly the way in which the European Union should be thinking when it comes to demos creation at the European level. Prospective stories of future ideals to work towards which incorporate the element of process that is necessary in solidifying collective identity at such a level. Just as the stories of the past are artificial yet believed in a very real sense at the collective level, the future stories of Us can be a dream that we can work towards – a future sense of togetherness which, in attempting to achieve, unites and solidifies the European collective.

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<sup>367</sup> Ivic and Lakicevic, 'European Identity: Between Modernity and Postmodernity', p. 404.

<sup>368</sup> Eder, 'A Theory of Collective Identity: Making sense of the Debate on a 'European Identity'', p. 433.

<sup>369</sup> Ibid. p. 433.

### SECTION 3.c : STAGE 3. RE-ENLIGHTENED IDENTITY: LABEL MANIPULATION

Stages 1 and 2 of my Re-Enlightened European demos formation focused on the identity of the collective itself and how the process of collective identity formation should begin to take place. However, there is one final aspect that is of vital importance for demos creation at this level which, rather than being at the collective level, must be defined at the institutional level. As mentioned both earlier in this chapter and in the previous chapter, the EU has an identity crisis of its own. Not only in regards to the competence creep but also in the sense of terminological definition. We continuously switch between referring to it as either a 'post-national' or 'supra-national' state or entity. There are 2 main problems with this: firstly, given the EU's unique nature there is no definite, comprehensive term which describes its state of being; and secondly, both terms currently used make reference to the nation in their name. If we look back at the idea of the European Union when it was first conceived, 'Monnet's vision was of a federation of member states, with a substantial component of supranationality modeled on the nation state, the United States of Europe', whereas Jacques Delors referred to it as an "*objet politique non identifié*".<sup>370</sup> Such terminology as "federalism" or "federation" has always been shied away from when it comes to the writing of the treaties as 'the word "federation" seems to repel most of the member states. [...] It is interesting to observe that all European political leaders try never to name or define the European political system as it is constructed'.<sup>371</sup> Neither the terminology used by Monnet nor that of Delors is helpful. The former increases hostile nationalist

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<sup>370</sup> Abéles, 'Identity and Borders: An Anthropological Approach to EU Institutions', p. 5.

<sup>371</sup> Ibid. p. 5.

sentiment and is seen as a threat to sovereignty, whereas the second wilfully ignores the need for a defined certainty in a democratic entity. What is more, Delors' choice to term it in such a vague, ambiguous manner in fact harms the EU as such a lack of certain self-determination by the EU impedes identity formation, identification processes and even integration at the level of the citizen. How could any of these processes begin without certainty about the larger institution that they are identifying with? The following quote from Marc Abeles sums up the EU's position on self-definition:

The absence of identification of what could appear as "political Europe" (a new sort of nation state? a federation? a postnational?) can be interpreted in two different ways: for many politicians and political scholars this situation reflects only situational difficulties that can be overcome. Anthropologists have to take into account the difficulty not only of finding an adequate word to designate the future shape of Europe, but also denial concerning the opportunity to adopt a clear position on this point. In all speeches, reports, and literature produced by the political actors, this indeterminacy has become a commonplace.<sup>372</sup>

Just because the European Union is unique in every sense of its being, that does not mean that it should have remained ill-defined for all of this time. By thus far only ill-defining its nature and its name in terms of the nation (by referring to itself as a post or supra nation) the EU has once again pitted itself against the strength of attachment felt towards the nation. Much as with the arguments used throughout the second half of this chapter, the EU has yet again made the error of defining itself in terms of the nation. By consciously constructing its name in a way that did not refer to the nation, there is the possibility of manipulating or altering people's perceptions about what the EU is and what it is trying to become. If this were the world of advertising it would be a case of

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<sup>372</sup> Ibid. p. 6.

renaming and rebranding a product after bad publicity in order to trick the consumer into believing the content of the product itself was also different.

How, then, would we define the European Union? Beginning with the post/supra options, etymologically speaking 'supra' has connotations of superiority, which some might find adverse to the pursuit of European identity existing alongside national ones, not instead of. 'Post' on the other hand does not generate the same potentially negative connotations. Rather, given that it evokes the idea of coming 'after' something else, we could quite literally chronologically justify 'post' being used in the EU's definition since the EU did indeed come after other types of united entities that collectives had been attached to. Next, we must find something which encompasses the discussed notions of European demos creation and definition beginning from a re-Enlightened position as well as the future-centred identity process that was proposed. Given the nature of the argument that our sense of being as a collective could come from a constructed future yearning for something better that we can work towards rather than an artificial shared past, the word "ideology" springs to mind. The Oxford Dictionary offers the following definitions for the word:

1. A system of ideas and ideals, especially one which forms the basis of economic or political theory and policy;
2. The set of beliefs characteristic of a social group or individual;
3. Visionary speculation, especially of an unrealistic or idealistic nature.<sup>373</sup>

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<sup>373</sup> "ideology", The Oxford English Dictionary online, 2016, <<http://www.oxforddictionaries.com/definition/english/ideology>>, accessed 15 January 2016.

The definitions combined cover the sense that is intended; the aim of moving towards united political, economic, and social beliefs, theory and policy through an idealistic shared collective vision.

With all of these elements in mind, I would suggest that terming the European Union as a *post-ideologue juris civitas* encompasses the European Union as an establishment but also as a community of citizens, that those citizens can then go on to identify with. The given name defines the EU as a political and economic Union but also offers a means of the citizen identifying with it by evoking ideologies of a rights-based community; all without referencing the nation and thus avoiding conflict in definition. What is more, each word of the given name etymologically is derived from either Latin or Greek, meaning that the numerous linguistic families that exist within the European Union would be able to identify with the words themselves given the etymology of the language families within Europe that existing European identities are formed around.

Beyond the idealistic vision it is also important to include a more solid idea of what this ideology would contain when defining the EU. As was stated earlier, although I disagree with the suggestion of a rights-based union in the current state of the EU, I most certainly agree that rights could and should form a significant part of the EU's identity once the stages suggested above were implemented. Naming the European Union in a manner which evokes the legally enshrined nature of collective rights would also conjure ideas of social justice which could solidify the peoples' sense of collective communication possibility with the establishment. By defining the EU in terms of rights a belief in communication possibilities would be aroused. This is because the people of

Europe do not necessarily need to practically use or speak the same language in order to feel able to democratically participate. By creating a true, solidly defined European identity that took hold of the peoples' subconscious sentiment so that they felt like a collective, democratic participation would be believed in. If people feel like they belong, then they feel able to participate and like their voice is heard. Thus, in forging a demos the problems of unequal democratic participation caused by multilingualism (and thus questions around democratic legitimacy) can be overcome.

## **CONCLUSION**

By exploring existing theories about European demos formation, as well as considering the path thus far taken by the European Union (that of emulating national identity formation), I have been able to outline a new idea of how European demos formation should take place. By taking the format but not the content of national identity formation, I have been able to suggest a way of forging a collective which, in theory, should take hold with the same strength as national identity attachment has done so. None of the above has overtly solved the language problem when it comes to multilingualism putting a block on democratic legitimacy. What I have instead offered is a way for the EU to mitigate the fact that its multilingual nature hinders the true and complete application of the Rule of Law within its borders by constructing a European identity through a redefinition of its status as a post-nation state.

I have also presented and justified a viable hypothesis that identity formation at the European level would be able to surpass the problems caused by multilingualism simply by making the peoples of the EU feel as though they are a collective, which will hence automatically lead to those peoples feeling a sense of the possibility of democratic participation. Democratic participation therefore becomes a reality through the collective's subconscious attachment to the entity of the European Union through demosc formation. Doing so allows for the cultural diversity of the EU to remain a celebrated attribute and does not require any sacrifice or change on the part of existing national or regional identities.

## CONCLUSION

This thesis opened with an examination of the multilingual language situation of the European Union, more specifically the legislation that is in place to protect the linguistic equality of the official languages of the Member States and the Union prescribed distinctions between *treaty languages*, *official languages*, *working languages* and *languages of the case*. Examination revealed a lack of procedural equality of languages throughout the institutions of the EU, and more importantly, that the unequal treatment of languages resulted in a lack of certainty and predictability in the law. Through the consideration of ECJ case law, *Chapter One* revealed that the Union's current situation presents numerous shortcomings such as the relative rather than absolute equality of languages, and translation errors that lead to non-uniform law due to the impossibility of perfect translation. This further revealed the wider issue of the impact such linguistic uncertainty has on the existence of the legal certainty aspect of the Rule of Law.

The case examples discussed in *Chapter One* demonstrated how complications arising from multilingualism can diminish legal certainty, the equal enforcement of the law and the equality of all language versions, and thus how this directly affects rights enshrined in international human rights laws. *Chapter Two* moved on to further examine what our linguistic human rights actually are by looking at the key international instruments on human rights in order to better understand the extent of linguistic human rights within the international community so that discussion which followed could debate whether or not the EU is legally or morally in breach of linguistic human rights. This discussion

revealed that language rights are ill-defined across all international instruments and that the minimal protection they are in fact granted is not done so through specific language rights, but through general human rights that have an implied linguistic dimension. The inadequacy of such linguistic rights exposed the larger issue that is the effect such inadequate linguistic rights within a multilingual entity such as the EU has on the standing of the Rule of Law in the political structure of the EU as a whole. It was shown that there is a lack of adherence to the certain formal, procedural features of the Rule of Law such as foreseeability of the law, accessibility of the law and a lack of legal certainty; all resulting from either the multilingual nature of the EU or the lack of well-defined language rights.

*Chapter Two* concluded by stating that there are two steps that the EU must take. Firstly, it must define the exact nature and extent of language rights, and also what it means by the Rule of Law in order to offer a greater level of legal certainty, greater recourse to have these rights upheld at EU level, and of course, increase the democratic legitimacy of the EU by creating a greater level of predictability and accessibility to the law through definition. The second step it was concluded that the EU must take is not so easily resolved. I concluded this chapter by highlighting the fact that even if the EU actively takes steps to define language rights in their own right, and even if it clearly lays out a definition for the Rule of Law at EU level which encompasses the necessity for legal certainty, accessibility and predictability of the law, the aforementioned problems caused by the multilingual nature of the EU would still be present due to the inexact nature of language as an entity, and the impossibility of perfect translation. This is why *Chapter Three* of this thesis subsequently turned to

grasping a stronger understanding of language as a concept in order to comprehend the nature of the problem conceptually, and thus move towards creating a conceptual, theoretical solution where no practical one could be found. By exposing such inadequacies, *Chapters One and Two* gave a deeper understanding of the democratic implications of multilingualism with regards to rights not being upheld and formal elements of the Rule of Law not being fully adhered to. Thus, the content discussed in these chapters showed that the problems caused by multilingualism have roots in deeper issues, which alighted the idea that it was possible to discover a theoretically conceptual solution to the practical problems caused by multilingualism.

*Chapter Three* explored language as a concept by looking at it through various ideas formed in Western linguistic theories; those of Wilhelm von Humboldt, Ferdinand de Saussure, Edward Sapir and Benjamin Lee Whorf. Understanding the theories espoused by these linguists explained why the problems caused by multilingualism that were discussed in *Chapters One and Two* present an insurmountable practical obstacle for a unified EU. The content of these theories offered an insight into the influence that language holds over our reality and thought process, and as such revealed the more serious issue of laws being discussed and created in one language and thus one world-view being dominant in the creation of laws that affect numerous linguistic diversities and thus numerous world-views. However, discussion of these theories not only explained why such problems present themselves, but also opened up a starting point for a potential solution by revealing language's position in collective identity formation. The chapter commenced by quoting Dieter Grimm, evoking the idea that the absence of a European communication

system, due chiefly to language diversity, has the consequence that for the foreseeable future there will neither be a European public nor a European political discourse.<sup>374</sup> Through a conceptual, theoretical understanding of language, this chapter presented the idea that language has a great power in its role as a significant feature of collective identity, and thus plays a major role in demos formation.

What the consideration of linguistic theories in *Chapter Three* uncovered was that in order to navigate around the language issues of the European Union, we must look beyond the language regime towards a solution that does not necessarily rely on language being a solution to the language problem. It exposed an opening towards the possibility that, if language holds such great power over our democratic participatory capacity because of its primary role in identity formation, could we not look beyond language into identity formation at the European level that does not have language as one of its defining features. The chapter therefore progressed the line of thought into the direction of whether it would be possible to create a community of communication and participation which is not reliant on a common language, and within which language does not feature as one of the markers of the collective identity.

Although not the main area of originality within the thesis, *Chapter Three* was novel in the approach that was taken to explain and resolve the language issues of the European Union. Prior legal academic consideration of the field lacked in

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<sup>374</sup> D. Grimm, 'Does Europe need a Constitution', *European Law Journal*, vol. 1, no. 3, November 1995, pp. 295-296.

depth exploration into the reasons *why* the linguistic issues within the European Union are a continuously prevailing concern. It also lacked thorough application of and explanation through linguistic theory, as well as an absence of deliberation on how such linguistic barriers could be minimised in order to facilitate a more democratically legitimate Union.

*Chapter Four* begins from the premise that the root of the EU's language problems comes from language's role in identity formation, and thus the chapter commences with the suggestion that: if we solve the EU's demos problem through finding a way to forge a European identity that does not contain the requirement of a common language, we could also overcome the issues surrounding democratic participation and democratic legitimacy within the EU.

*Chapter Four* covers discussion on: 1) the impact of language on our collective identity formation; 2) what it means to have an identity; 3) what identity is for the European Union at present; and 4) why the EU is failing in its attempts to create a collective identity for its citizens. Exploration of these first two topics reveals that collective identity is an artificial construction which uses symbols and artefacts to manipulate peoples' loyalty to an artificial construct; most frequently, the nation state. And exploration of the second two topics exposes the weak nature of European identity at present, and that its failure is due to the fact that its artificial construction has thus far followed the criteria used to form national identity (flag, anthem, single currency, border-defined citizenship). This has had the consequence of putting this weak European identity in competition with national identities rather than existing alongside or

above them. The EU should not have been following the path of national identity formation as it is not a nation. National citizenship is the result of a long process of historical concept formation in which national identity emerged, integrating social and cultural differences under a new concept: citizenship. This is something that the EU does not have and therefore inevitably invalidated any European identity that was being forged using the same criteria. The EU is unable to use stories or shared histories in the same way nations do and also is unable to use the unifying power of language in the same way nations do. Thus, it should not be attempting to use symbols in the same way nations do.

Coming to this understanding lead me to the idea that the EU needs to break down all of these artificial constructions that form national collective identities and either subvert them or come up with entirely new and different artefacts and symbols in order artificially construct its own collective identity. Given that earlier discussion in *Chapter Four* had revealed the artificial nature of national identity construction, and had also looked at the post-modernist view of identity which declares identity to be fluid and changeable, I felt confident that it should therefore be possible to create a novel and unprecedented European identity which was not formed around the same symbols and artefacts of national identity, but which instead fit into the post-national existence of the Union. And that if we did so, it would add great integrity, legitimacy and stability to contemporary identity formation at the European level.

*Chapter Four* concludes that the European Union needs to lead the way in creating new and different artefacts upon which contemporary identity can thrive on rather than relying on the traditional archetypes used by national

identity formation if it is to produce the same strength of collective solidarity amongst its citizens as the nation state, and if it is to create a Union where true democratic participation is possible. If so, the EU could potentially resolve the democratic legitimacy problems caused by multilingualism, without having to change the practical, linguistically hierarchical day-to-day workings of its institutions.

Although *Chapter Four* was most certainly novel in its resulting decision on how a European identity should be formed and how this goes some way in resolving democratic participation potential, it is in *Chapter Five* where the true novelty of this thesis comes to the fore. The chapter outlines two separate paths for European demos/collective identity formation: firstly, a path which reluctantly acknowledges the fact that in reality the EU cannot just “start afresh”; and secondly a path which is idealistic, impractical, but resoundingly novel and insightful in its approach and content.

As such, the first pathway that is discussed considered whether there are any other features and archetypes of national identity that the EU could adopt (that it thus far has not) to possibly forge a strong sense of European identity by continuing along its chosen path of national-identity emulation. Discussion focussed on the aspect of “The Other” within national identity formation; a line of thinking within identity formation theory which argues that in order to answer the question “Who are we?” we must first be able to answer the question “Who aren’t we?” By considering this question it was highlighted that the EU is lacking a defined geographical “We” border due to continued enlargements throughout its lifespan. Linguistically, geographically and

conceptually citizens of the EU do not know for certain who We, the people of Europe, are in terms of having a collective identity, given that there is not definite, defined They.

Conversely, the second pathway deconstructs the current dominant position in academic literature that: no common language = no demos = no democracy. This path of investigation deconstructed our current understanding of what identity formation entails by taking the common language necessity out of demos creation and by following the format, but not the content, of national identity formation. By doing so, I offered a possible route which, if followed, could forge a collective and should theoretically take hold with the same strength as national identity attachment has done so. This also involved creating a definition which described the existence of the European Union: *post-ideologue juris civitas*, with the aim of facilitating citizen identification with the Union.

The novel approach and theory outlined in *Chapter Five* did not overtly solve the EU's language/multilingualism problems with regards to democratic legitimacy. Instead, it offered a way for the EU to mitigate the fact that its multilingual nature hinders the true and complete application of the legal certainty aspect of the Rule of Law within its borders by constructing a European identity through a redefinition of its status as a post-nation state. This theory is largely based around the belief that democratic participation is made possible through the act of making a people feel as though they are a collective, whether there are practical, linguistic barriers in place or not. The democratic participation of the people becomes a reality through the collective's

subconscious attachment to the entity of the European Union through demonstration.

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