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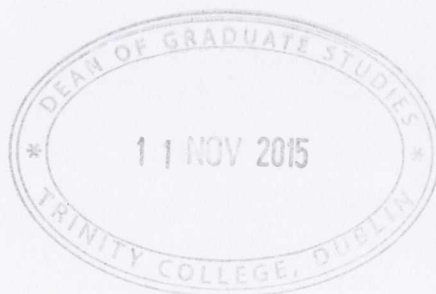
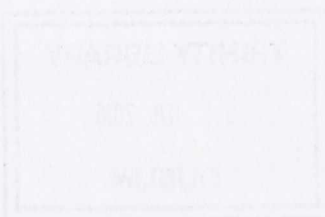
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The Legal Protections of Language in the European Union.

Volume I



Ph.D. Law

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Aislinn Lucheroni

October 2015

(submitted 11 November 2014.)

SUMMARY AND METHODS.

This thesis investigates the legal protection of languages within the legal system of the European Union (EU). It aims to determine the nature and scope of this legal protection, taking an interdisciplinary approach. This interdisciplinary doctrinal research investigates the multilingual legal system of the EU.

Part I examines the concepts of language and language rights:

Chapter 1 introduces the research and provides the methodology. Chapter 2 dissects the concept of language, placing it in a European historical perspective. Chapter 3 addresses the definitional difficulties in the concept of 'language rights', and the difficulties in assessing legal protections of language. The interdisciplinary academic background of language rights issues is explored, looking to language rights in both sociolinguistics and political philosophy as well as in the philosophy of law. Chapter 4 applies this theory, and outlines the protections of language rights at international law and in the European regional organisations.

Part II examines the practical implementation of the legal protections for language in the European Union, based in the protections enshrined in the Treaties. Chapter 5 demonstrates the divergent rules and practices regarding the official languages of the European Union. It examines the language rules in place in the European Union. The functional use of the terms 'official languages' and 'working languages' by the European Union is dissected. Chapter 6 illustrates the political weight of language issues, in particular in light of the expansion of the European Union, and the extensive provisions for multilingual authenticity in the EU. Chapter 7 characterises the language rights in the EU as procedural, based on the analysis of previous chapters. Chapter 8 compares the EU with the USA and Canada and the ECHR. This chapter also explores the potential for minority rights protections within the language rights regime of the EU, and highlighting the legitimising role of the EU's language regime. Chapter 9 draws conclusions.

The first part explores the contemporary understanding of languages and situates it historically. It then examines language rights, both in theory and in practice. The first half of the thesis is expository in nature. It unravels the concept of language first, then the different conceptualisations of language rights. The second part applies this knowledge to the context of the political organisation of the European Union. It examines the language rules in place, the

implications of these rules for the application of the multilingual law produced by the EU and the rules regarding the interaction between the citizen and the EU institutions. The political and legal importance of the principle of language equality in the EU institutions is assessed, and its practical implementation critiqued.

Based on this analysis, initially of the theoretical and legal background, and then of the European Union's provisions for language, the thesis concludes that the legal system of the European Union protects language in three major ways; institutional use, equal multilingual authenticity and official language rights.

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Aislinn Lucheroni

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Bibliography

Chapter 1: Introduction and Methodology

The European Union (EU) has 24 official languages. No other international organisation, and no nation-state has ever attempted working through so many languages. Currently, the official languages of the European Union are: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.¹ It uses three scripts: Cyrillic, Latin and Greek. It is unrivalled in its multilingualism. David Bellos describes the flexibility and inventiveness of the European Union's language system:

Unlike all previous empires, communities, treaties and international organisations, the European Union has no one language and no finite set of languages either. It speaks in all the languages that it needs, whatever they may be.²

The EU was established on the basis of linguistic parity for member states. Historically, the establishment of a nation-state was tied up with the creation and promotion of a national language.³ As more states joined the EU, they sought to do so as equals, thus adding to

¹Regulation 1 determining the languages to be used by the European Economic Community (OJ 017) 06/10/1958.

² David Bellos *Is That a Fish in your Ear? Translation and the Meaning of Everything* (Penguin, 2011) 237.

³ C. Carmichael and S. Barbour (eds). *Language and Nationalism in Europe* (Oxford University Press, 2000).

the number of 'official languages' which now stands at 24, since the accession of Croatia in 2013. The question of languages is at the core of the unique political system of the European Union. This thesis investigates the extent to which there is a unique legal protection of languages in the European Union, and the reasons behind this protection. In doing so, it posits that the legal protection of language takes place not only via EU language rights, but also through the distinctively multilingual nature of EU law. European Union language rights, furthermore, are characterised as distinct from Human Rights based conceptions of language rights.

This research analyses the legal protection of language in the European Union by first examining the concept of language, and language rights (part I) and then looking to the practices of the European Union (part II). This thesis will argue that the legal protections of language in the European Union are not limited simply to 'language rights'. The thesis aims to demonstrate that language is central to the European Union's legal system by outlining the extensive protection measures such as the multilingual authenticity of EU law, the multilingualism of the EU institutions and the citizenship-based language rights enshrined in the Treaties.

The present work considers the underlying principles which guide the EU language regime. It argues that protections of language within the European Union are unique in nature, and central to the political and legal system of the European Union. Article 3(3) of the

Treaty of European Union asserts that '(The Union)... shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. The multilingual character of the European project is either revered or ridiculed, precisely because it diverges so much from the traditional political structure of the nation-state which has been in existence for centuries. However, this thesis demonstrates that its multilingualism has its roots in the historical relationship between languages and European states. Each member state of the European Union has 'its own' language. These languages are now the official languages of the European Union.

This thesis aims to demonstrate that the EU guarantees extensive legal protection of language, within the limits of the official languages. As Schendl argues, it must be borne in mind that:

[a]ny multilingual situation is inseparably linked to the social context in which it exists, that is, to factors such as the relative status of the languages involved, the power relations of between the speakers of the different languages, the number and prestige of multilingual speakers, or the use of particular languages in specific domains⁴

This research deals with the unique nature of the EU legal order as multilingual. It investigates, therefore 'the use of particular languages

⁴ Herbert Schendl 'Multilingualism, Code-switching, and Language Contact in Historical Sociolinguistics' in *The Handbook of Historical Sociolinguistics* (Blackwell Publishing 2012) 521

in specific domains.’ Multilingualism is described by the European Commission as:

- A situation in which several languages are spoken within a certain geographical area.
- A person's ability to master several languages.
- A policy requiring an organisation, company or institution to use more than one language for its internal and/or external communication.

The Commission states that ‘Multilingualism is a key feature of Europe in all these senses’.⁵ The definition of multilingualism with which this thesis is concerned focuses on the first and third elements of this description. However, the three aspects of multilingualism are to some extent inextricable.

This thesis examines the Treaty provisions regarding language, and the practices in place in the Institutions of the European Union and uses these as the basis upon which to hypothesise about the nature of the language protections in the European Union. The nexus demonstrated between the state and its language provides insights into how the EU as a transnational polity creates a new infrastructure for languages via the provisions for its 24 official languages. This infrastructure is comprised of multilingual law created by multilingual

⁵ European Commission “Frequently asked questions on languages in Europe” MEMO/13/825 (26/09/2013)

institutions. It will be argued, furthermore, that the language rights of the European Union are based in participation, as distinct from the language rights protected at international level which are based in human rights, or in heritage justifications of language. It finds a different justification for the language rights the EU provides. It argues that the protection of language is not limited to 'language rights' as classically understood. This thesis begins by untangling the complex nature of language rights, examining them in their interdisciplinary context, and then examines the language regime in place in the EU in detail in part II.

Rather than being based in a human rights conception of language, this thesis argues that EU language rights are procedural in nature. These rights only extend to those languages sanctioned by the European Union, and do not stretch to all the languages present within the EU's territorial borders, such as regional or minority languages. Article 24 of the Treaty on the Functioning of the European Union (TFEU) guarantees European citizens the right to write to the European institutions in any official EU language and guarantees they will be answered in the same language. Article 21 (3) of the European Charter of Fundamental Rights (EUCFR) states that citizens may use any of the Treaty languages to correspond with the Union. The European Union's advanced form of supranational integration makes it the focus of extensive research on transnational

constitutionalism.⁶ This thesis investigates language rights within this framework.

The EU is an exceptionally integrated International Organisation. It includes 500 million citizens, all of whom vote for a central European Parliament. These citizens can travel and trade freely within the European Union. The institutions of the European Union are also multilingual. This research examines the regimes which govern the use of multiple languages in the institutions of the European Union. There is no clear division between official and working languages in the European Union. The political weight of these notions must be borne in mind when assessing the position of languages in the European Union, and this thesis analyses the delicate political balance achieved. EU law is inherently multilingual. Laws are drafted in 24 languages, and have equal legal effect across their 24 different spheres of meaning. Languages are protected in the EU not only by EU language rights, but also via the multilingual systems of EU law. The assertion in this thesis is that the unusual language rules of the EU themselves provide considerable and innovative protections for language. Language is at the heart of the EU's unique legal system.

⁶ Joan de Bardeleben and Achim Hurrelmann (eds.) *Transnational Europe : promise, paradox, limits* (Palgrave Macmillan, 2011)

I Thesis Structure

This research analyses the legal protection of language in the European Union. The European Union has no competence to implement supranational language policies, or to guarantee extensive language rights. This thesis argues, however, that the language rights provided within the EU legal order, that is to say, rights linked to the official languages of the European Union, are a central part of the legal system of the EU.

This thesis aims to demonstrate that although the substantive protection of broadly defined 'language rights' does not exist in the European Union the firm legal protection of language is central to the political and legal equilibrium achieved by the European Union. It will be argued that language rights in the EU are mainly procedural, rather than substantive in nature. The multilingual nature of the EU is a distinctive feature of its legal order which can be conceptualised as a manifestation of the power grab of Member States within an international organisation which embodies the diminishing importance of the nation-state at international level. This thesis attempts to disentangle the different lines of thought, and the divergent normative stances on the issues of language rights. The idea of language is examined from a sociolinguistic, philosophical and finally legal perspective. The central definitional difficulties which pose problems for legal analysis of 'language rights' are assessed.

Initially, the thesis investigates how the concept of 'language' is understood by the Member States of the European Union. To consider the legal protection afforded to languages in the European Union, it is fundamental to appreciate the general European understanding of the nature of language. Part I of the thesis, comprising chapters 2, 3 and 4, therefore, looks to the historical weight of this policy issue. The historical and philosophical overviews in chapter 3 provide context for later language rights discussion in Part II's hypothesising of the various language protections in the EU. Chapter 2 critically investigates our understanding of 'language' as a concept, analysing its historical development, and contextualising contemporary applications of the concept. The role of language in the formation of a polity and the importance of language as a political tool is examined. This exposition aids in understanding the interlinked nature of state and language in the European Union. In Chapter 3, a comprehensive appraisal of theories of language rights is carried out. This chapter analyses the limits of a theory of language rights from a variety of perspectives. It concludes that the fundamental, and perhaps irreconcilable differences in conceptions of language rights leave their definition open. Chapter 4 analyses how these ideas have taken root in the international legal order, particularly in the regional organisations in Europe. It argues that there are critical weaknesses in the aspirational policies around language rights, in particular in relation to minority languages.

Overall, Part I of this thesis explores how language and language rights have come to be defined. It argues that there are substantial and legally significant tensions between theories of language rights, national and supranational language ideologies and institutional realities. This then forms the basis of the analysis of the protections afforded to language within the system of the European Union.

Part II, comprising chapters 5, 6, 7 and 8, looks to the legal protections of language within the EU system, arguing that those language policies impact on the democratic shape of the European Union. It concludes that the legal protections of language in the EU go beyond the provision of 'language rights'. Chapter 5 demonstrates the divergent rules and practices regarding the official languages of the European Union. The functional use of the terms 'official languages' and 'working languages' by the European Union is dissected. The delicate political equilibrium of official language use is analysed. Chapter 6 investigates the multilingual legal system of the European Union, as protected by Article 55 TEU. It shows how the protection of languages is secured by the doctrine of equal authenticity and how this is integral to the process of drafting EU law, and its role in adjudication. It examines the role of translation in the European Union's legal system. Chapter 7 investigates language rights in the European Union. It shows how these affect the democratic shape of the European Union. Any language rights which can be asserted in the legal system of the European Union must refer

to the official languages it protects. It argues that the language rights protected are procedural rather than substantive in nature. Chapter 8 provides comparative analysis between the European Convention on Human Rights' conceptualisation of official language rights, and those in the European Union. It further compares the European Union with the USA and Canada.

The roots of the legal protections of language in the European Union are demonstrated in this thesis. It looks to the explicit rules in place in the European Union, rather than to broader normative concerns. It proposes a different typology of 'language rights' in the European Union, suggesting that these are procedural rights. This project is original in that it brings together the interrelated questions of citizenship, language and culture and uses them to explain the overall workings of the European Union, through its language rules. The interdisciplinary focus of this thesis aims to enrich legal scholarship on these issues: it is argued throughout that an understanding of philosophical and sociolinguistic scholarship offers new perspectives on language rights in practice as well as in theory. The European Union is unique as a political project, as a legal structure and as a multilingual polity. These three aspects are combined in order to understand the protections present for languages in the European Union, and their impact on spheres from legal theory to institutional governance.

II METHODOLOGY

Interdisciplinary and comparative methods are utilised to expand on the doctrinal research carried out. This section identifies how each chapter uses the various methods identified. The sources used in this thesis will also be outlined in this section.

There is no coherent definition of generalised language rights, because, as will be demonstrated, there is no generally applicable definition of language, which does not run in to the difficulties of politics. Similarly, there is no generally applicable definition of 'rights'.⁷ This thesis investigates the nature of the EU as a transnational democratic entity through an exploration of its language rules and legal protections. It argues that there is an important protection of languages within the EU's own linguistic rules that is often overlooked. This thesis argues that these rules provide extensive and innovative legal protections for language.

The research conducted is predominantly doctrinal, examining the theoretical foundations of claims to linguistic rights, and applying these to the structure of the European Union. This style of investigation is the classic legal approach⁸ to a thesis aiming to 'systemise, rectify and clarify the law on any particular topic by a

⁷ Joseph Raz, 'Rights and Politics (1995-1996) 71 *Indiana Law Journal* 27; Mark Tushnet, "An Essay on Rights" (1983-1984) 62 *Texas Law Review* 1363; Mary-Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse*, (The Free Press, 1991); Pierre Schlag, "Rights in the Postmodern Condition" in Sarat and Kearns, *Legal Rights: Historical and Philosophical Perspectives* (University of Michigan Press, 1996).

⁸ C. Chatterjee *Methods of Research in Law* (2nd edn, Old Bailey Press 2000)

distinctive mode of analysis to authoritative texts that consist of primary and secondary sources.’⁹ Doctrinal research ‘seeks to achieve more than simply a description of the law.’¹⁰ The interdisciplinary approach of this thesis serves a crucial clarificatory function, since disagreement over the concept of language, and a concomitant absence of understanding of the underlying sociolinguistic concepts has led to scholarly confusion. Therefore, this work adopts an interdisciplinary approach, attempting to unearth the normative concerns behind conceptualisations of language rights, both from a linguistic and a philosophical point of view.

This thesis places concepts from sociolinguistics and political philosophy at the heart of a practical understanding of the EU’s linguistic regime. An interdisciplinary approach is fundamental to the academic study of language rights and is implicit in much of the policy discourse on language.¹¹ Peled describes the idea of language rights as ‘intrinsically interdisciplinary.’¹² Interdisciplinarity, according to Repko is:

A process of answering a question, solving a problem or addressing a topic that is too broad or complex to be dealt with

⁹ M Mc Conville and W H Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007) 4

¹⁰ T. Hutchinson and N. Duncan, ‘Defining And Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) *Deakin Law Review* 83-119.

¹¹ A. Bastardas-Boada ‘Language policy and planning as an interdisciplinary field: Towards a complexity approach’ (2013) 14 3 *Current Issues in Language Planning* 363–381

¹² Yael Peled ‘Normative language policy: interface and interferences’ (2014) 13 (4) *Language Policy* 301-315.

adequately by a single discipline and draws on disciplinary perspectives and integrates their insights to produce a more comprehensive understanding or cognitive advancement.¹³

Newell, in responding to Benson's critiques¹⁴ of interdisciplinary research as promoting shallowness of intellectual analysis, sets out the purpose and usefulness of interdisciplinary research:

Interdisciplinary study should be understood to start with the confrontation of the interdisciplinarian with the world... out of that phenomenological confrontation comes a question, one which is too broad to be answered by any single discipline. The strategy of the interdisciplinarian is to bring the relevant disciplines... to bear upon the question, one at a time, letting each illuminate that aspect of the question which is amenable to treatment by the characteristic concepts, theories and methods of the respective disciplines. Out of the resulting disciplinary insights, the interdisciplinarian fashions a response to the question that would ideally be a complete answer but which at least leads to a greater appreciation of the nature and complexity of the question.¹⁵

This research shows the 'nature and complexity of the question' of the legal protections of language in the European Union, utilising a

¹³ A. F. Repko *Interdisciplinary Research: Process and Theory* (Sage 2008).

¹⁴ TC Benson 'Five Arguments Against Interdisciplinary Studies' (1982) 1 *Issues in Integrative Studies* 38-48

¹⁵ W. H. Newell 'The Case For Interdisciplinary Studies: Response to Professor Benson's Five Arguments' (1983) 2 *Issues in Integrative Studies* cited in Dominic Holland, *Integrating Knowledge through Interdisciplinary Research* (Routledge 2014) 12

legal perspective in order to explain the foundations of the language regime of the EU. It predominantly uses the conceptual frameworks of law. The approach, therefore, is perhaps multidisciplinary rather than interdisciplinary. Repko describes the difference between these approaches thus:

Multidisciplinary studies a topic from the point of view of several disciplines at one time, but makes no attempt to integrate their insights. Multidisciplinary approaches tend to be dominated by the method and theory preferred by the home discipline.¹⁶

The method and theory underpinning this research is distinctively legal. However, as the conceptual frameworks of other disciplines, particularly sociolinguistics, are investigated at length in part I and integrated to the explanation of the legal protections of languages in the EU, the claim of interdisciplinarity stands. This thesis explores definitional issues, placing the concept of 'language' in its historical and ideological context in Europe. The resulting tensions between legal, institutional, and popular understandings of language rights proved to be fundamental to a consideration of the EU's policies and practices, particularly in the years since the 2004 enlargement.

A comparative approach is adopted throughout this research. It compares the conceptions of language rights which sociolinguists,

¹⁶ A. F. Repko *Interdisciplinary Research: Process and Theory* (Sage 2008).

philosophers and lawyers have engendered. In order to compare these, the different normative stances of each of these disciplines is highlighted. The comparative aspects of this research serve to enrich our understanding of the relationship between language and the creation of, or evolution of, political communities at a national and an international level. In recognition of the useful role of comparative law in analysing the law of multilateral institutions,¹⁷ the chapters of Part II utilise comparative perspectives to consider EU law in the light of that prevailing in other international organisations and in multilingual polities. Chapter 4 compares the international and interregional protection mechanisms of the United Nations, the OSCE and the Council of Europe in order to argue that the language rights protected by the European Union are distinctive in that they refer only to the 24 official languages. The thesis assesses the scope of protection of language rights within the international and regional systems for rights protection within which the European Union and its Member States are situated. Chapter 8 compares the approach to official languages of the European Court of Human Rights with that of the European Union.

Comparative analysis is used throughout this thesis to shed light on the unusual nature of the protections in the EU system. Chapter 5 compares the notions of official language as implemented

¹⁷ R. Zimmermann and M. Riemann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006)

in the Member States of the European Union, as well within the internal language regimes of international organisations. Chapter 6 uses broad legal and political comparisons of the provisions in a number of multilingual states and systems, comparing the European Union with, for example, the legal systems of Canada and Hong Kong.

Moreover, this dissertation avoids a disproportionate focus on Anglophone attitudes by drawing on research and commentary from other linguistic communities in the European Union. It consults a wide variety of sources in French and Italian, including judgments of the European Court of Human Rights whose English translation is as yet unpublished. Considering the point of view of other language communities proved to be an interesting comparison mechanism. The perceived threat of English is palpable, and this is explored in chapter 5. This part of the research undoubtedly benefitted from perspectives on the nature of the multilingual EU from multiple language sources.

Any study of the protection of language in the laws of the EU must focus on a specific area, and this thesis confines its analysis to the legal *system* of the European Union. It mainly investigates the question of language rights as it pertains to the national languages of the Member States, the 24 official languages of the European Union. This thesis does not assess the role of the EU in protecting diversity.¹⁸

¹⁸ This is a considerable body of literature which is outside the direct scope of this thesis. For reference see, for example: S. Vertovec 'Toward post-multiculturalism? Changing communities, conditions and contexts of diversity', Background Paper,

Nor does it consider the current legal situation in the EU in relation to cultural provisions to any extent that involves scrutiny of legislation or policies already in place. It does not look to the role of language in personal matters such as consumer affairs or the provision of interpretation in criminal trials. It considers the role of minority languages in the European Union from a legal perspective, but largely avoids the cultural aspects of this debate. It avoids questions such as the role of language in the 'contemporary perceived need for official recognition to achieve self-actualisation'¹⁹ This project does not look at the European Union's promotion of language learning as part of its strategy on education and culture, or employment or discuss the benefits of a European strategy for language preservation.

It examines language in the legal system of the European Union. Therefore, it looks to how the relationship between language and the state developed. In doing so it engages with scholarship in the academic disciplines of linguistics, applied linguistics and sociolinguistics, all of which have strongly influenced theories of

UNESCO World Report on Cultural Diversity (UNESCO 2009); Armin Von Bogdandy 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity : Elements of a Beautiful Friendship' (2008) 19 (2) *European Journal of International Law*; D. Ferri 'EU Participation in the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks' (2005)3 *European Diversity and Autonomy Papers*; Will Kymlicka 'The rise and fall of multiculturalism? New debates on inclusion and accommodation in diverse societies' (UNESCO 2010).¹⁹ Vanessa Pupavac, *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012), 211. Pupavac is echoing Frank Furedi's ideas: see F. Furedi *Therapy Culture: Cultivating Vulnerability in an Uncertain Age* (Routledge 2003)

language rights, and highlighted the central role of the state in modern conception of language. Peled outlines that:

Paradoxically, a meaningful engagement with interdisciplinary research requires an underlying awareness of the existence of disciplinary boundaries, in order to highlight the distinction between their different ways of thinking.²⁰

(I) SOURCES

This thesis looks beyond the primary sources of legal doctrine. It provides overviews of the overlapping disciplines which have assessed language issues relevant to the EU. In the context of language rights, it uses academic commentary from the fields of sociolinguistics and political philosophy. It engages with translation theory regarding the distinctive multilingual law of the EU. In order to understand the bodies of literature of other disciplines academic textbooks, manuals, and handbooks were indispensable, particularly to get a broad understanding of new disciplines, before consulting academic journals. In order to better understand these disciplines I attended classes in Political Philosophy to understand the theorisations of the political community and the changing role of the state.²¹ I also attended a Summer School on 'Human Rights,

²⁰ Y Peled 'Normative Language Policy: interface and interferences' (2014) 13 (4) *Language Policy* 301-315

²¹ I attended Dr Irene O'Daly's *Contemporary Political Theories* module in the Politics Department, Trinity College Dublin, during Hilary Term of 2011.

Minorities and Diversity Management' in the European Academy (EURAC) of Bozen/Bolzano in the German-speaking Südtirol of Italy, in summer 2011. The 2011 edition of this annual Summer School had a special focus on linguistic diversity and language rights. Although the focus was largely on policy options for minority language communities, this experience was helpful in getting a broad overview of the protections of language rights, particularly for regional and minority languages, in the regional organisations in Europe other than the EU.

Primary materials and policy documents from European Institutions including guidelines, strategies, legislative instruments, parliamentary recommendations and reports resulting from EU-commissioned studies were used. These were particularly useful in identifying the institutional reasoning behind certain policies, and the institutional organisation of procedures such as the translation processes across 24 languages. Traditional legal sources such as the caselaw of the Court of Justice of the European Union, including the opinions of the Advocates General and Decisions of the European Ombudsman were consulted. Sources of academic commentary to deepen the analysis on the European Union used included textbooks, monographs, academic journals, and reports commissioned by the EU institutions. Commentaries on this field of EU law and policy often takes place outside of academia. This thesis used speeches given by EU officials to reputable think tanks, such as CEPS (the Centre for

European Policy Studies). Furthermore, EU explanatory materials used in practice by the multilingual institutions, such as the Interinstitutional Style Guide were used.²²

Outside the immediate reach of the European Union this research also consulted policies and the caselaw of international and regional organisations. A range of United Nations sources, including international Conventions and UN Declarations, UNESCO policies and decisions of the UN Human Rights Committee (UNHRC) are reviewed. The instruments and decisions of European regional organisations, namely the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE) were carefully considered. The Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML) were studied. The opinions of the Advisory Committees formed under the Framework Convention for the Protection of National Minorities and the Expert Committees of the European Charter for Regional or Minority Languages were useful to get a picture of minority language rights protection in Europe. Furthermore, certain judgments of the European Court of Human Rights, were used, along with the Council of Europe's thematic commentaries in this regard.

²² European Union, *Interinstitutional Style Guide* [2011] OA-31-10-655-EN-C.

To convey the elaborate language systems of the European Union, infographics, maps and graphs are used where they add clarity to the material described in the text. The information, for example, in the Eurobarometer surveys used in Chapter 5 is best represented visually. These pictorial depictions of language statistics came from a wide variety of sources. These were sometimes difficult to extract. The demonstrations of the results of the Special Eurobarometer 386 results (*Fig 3. Europeans and their languages*)²³ was found on a blog. I emailed the writer who kindly allowed me use the map in this thesis.²⁴ One particularly helpful visual representation (*Fig 2. EU languages over time*)²⁵ appeared on the Facebook page of DGT 'Translating for Europe', and I requested their permission to use it for the purposes of this research. Another came from a report commissioned by the EU.²⁶ The Hungarian agency responsible for researching the report²⁷ used in chapter 6 granted their permission to extract the images used in the report which were embedded. Consultation of a wide variety of sources of differing provenance gives a comprehensive overview of the situation regarding the legal protections of language in the European Union.

²³ See Vol II p.58.

²⁴ Europeans and Their Languages map (overlay) taken from <http://jakubmarian.com/map-of-the-percentage-of-people-speaking-english-in-the-eu-by-country/>. The author credits Tindo -fotolia.com for the blank map the information is overlaid onto.

²⁵ See vol II p. 13

²⁶ Réka Somssich *et al*, *Study On Lawmaking In The EU Multilingual Environment* (European Commission [EC-DGT] 2010)

²⁷ Cielito Lindo Kommunikációs Szolgáltató Bt..

III Overview

In Europe, language rights discourse has been used mainly in relation to 'regional or minority languages'. This thesis aims to show that within the legal order of the European Union, language rights are limited to the official languages and are administrative in nature. However, it delves deeper and includes the legal protections of language as part of Language Rights in the EU. Yon Maley declares that "Language is medium, process and product in the various arenas of the law".²⁸ Law is formed of language. Therefore, even generally speaking it is impossible to distinguish the substance from the form when speaking of law. Law is bound by language. There are 24 equally authentic versions of EU law- so EU law could be said to be bound by 24 languages.

As a matter of linguistic fact, no matter how well translated these 24 versions cannot be identical in all respects. This thesis aims to identify the legal and political tensions this causes within the European Union system. Language is central to the essence of the EU, both as a transnational polity and as a union of states. This research questions the nature of the legal protection of language in the European Union, their scope and the effects these have in practice. This thesis examines the legal protections of language in the European Union through three characteristics of language protection

²⁸ Yon Maley, 'The language of the law' in Gibbons (ed) *Language and the Law* (Longman 1994).

in the legal system of the EU; institutional use, multilingual authenticity and official language rights.

In order to fully understand the EU's linguistic regime, this thesis argues that it is crucial to understand the theoretical justifications which underlie its provisions for language. This is examined in Part I and is important to enable more full analysis in Part II. The interdisciplinarity mentioned above is absolutely crucial to understanding the strange and inconvenient linguistic regime of the European Union. The association between language, nation and state is a particularly European phenomenon, as part I demonstrates, and this work asserts that this explains the distinctive linguistic regime of the European Union.

The thesis begins by investigating the concept of language. It first explores the concept of language and its interaction with the State. It then explores how this has played out in an international setting. Part II applies the findings to the context of the European Union. It looks at the political balance of language in EU institutions, the multilingual authenticity of EU law, and the language rights catered for in the European Union to assess the nature and extent of the legal protections of language in the European Union.

Chapter 2: Defining 'Language'

This chapter aims to show that defining language is in itself a politically charged exercise. This initial analysis outlines the existing conflicts within the scholarly examination of language. In order to widen the academic perspective of this research, this chapter touches on language debates within linguistics and on the historical development of our idea of language. It is important to highlight how this idea of language is evolving. In order to facilitate analysis of the linguistic situation present in the European Union and the legal difficulties it presents, it will first be necessary to review 'language' as a concept. The broad themes covered in this chapter form the basis of the theoretical and historical framework within which this thesis is situated.

The interdisciplinary nature of this thesis dictates that these be at least briefly explained in order to properly address the role of language within the European Union. This chapter and the following explore these issues at some length, however. This is in order to demonstrate the deep rooted significance of the language regime of the EU. Language is an aspect of the European Union's political and legal essence which is dismissed as functional, or operational. However this thesis shows that it goes to the heart of the political and legal compromises which permeate the European Union. Full operational multilingualism has been dismissed as an aspirational

value by the Court of Justice of the European Union,²⁹ and this position has been echoed by the European Ombudsman. This chapter aims to explain the reasons it nonetheless remains the basis for the linguistic constitution of the EU.

I Exploring Our Understanding of 'Language'

Language is one of the defining characteristics of human beings.³⁰ It can be considered the ultimate expression of the personal and collective identity of the individual. Language is an identity marker as well as a functional means of communication; it provides a means of belonging to a group.³¹ The human faculty of language is the most highly developed and most flexible known system of communication.³² Language is also a primary element of our cultural structures.³³ The human capability and capacity for languages has

²⁹ Case C-361/01 P *Christina Kik V OHIM* [2003] ECR I- 8283.

³⁰ Steven Pinker, *The Language Instinct: The New Science of Language and Mind* (Penguin 1994) and *The stuff of thought: language as a window into human nature* (Viking 2007); Gibson K. and T. Ingold (eds), *Tools Language and Cognition in Human Evolution* (Cambridge University Press 1993).

³¹ Percy and Davidson (eds), *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012). These ideas will be developed throughout the thesis: for more on these topics see for example Tony Crowley, *Language in History: Theories and Texts* (Routledge 1996); David Crystal, *How Language Works* (Penguin 2007); Jourdan and Tuite (eds), *Language Culture and Society: Key topics in Linguistic Anthropology* (Cambridge University Press 2006).

³² R. Burling, *The Talking Ape: How Language Evolved* (Oxford University Press 2005); R. Millikan, *Language: A Biological Model* (Oxford University Press 2005); J. R. Hurford, M. Studdert-Kennedy and C. Knight (eds), *Approaches to the Evolution of Language* (Cambridge University Press 2000).

³³ Pinker and Jackendoff, 'The faculty of language: What's special about it?' (2005) 95 *Cognition* 201–236; Jourdan and Tuite (eds), *Language Culture and Society: Key topics in Linguistic Anthropology* (Cambridge University Press 2006).

fascinated scientists and philosophers and is considered to be at the centre of what defines us as human beings.³⁴

Language has an important role in how we interpret our world, and also in how we analyse it. To enquire about anything, we must first enquire about the tool we use to investigate and describe it. The essential role of language as a tool for philosophers has been highlighted:

[a]part from language's interest as a target of science and its centrality to our self-conception as describers of reality, language plays a key methodological role in philosophy. It is this role perhaps more than anything else that has explained the continued close attention paid to language in the past century by philosophers.³⁵

Language has been an intrinsic part of humanity's philosophical analysis of the world. Understanding language has been a core question for philosophers. Linguistic philosophy is concerned with the interaction of language and knowledge and the use of language in the communication of meaning.³⁶ Language is the key to understanding in the human world. It is the primary medium via which we communicate about the world around us, it is therefore

³⁴ R Dunbar, *Grooming, Gossip and the Evolution of Language* (Harvard University Press 1996).

³⁵ Mark Crimmins, 'Philosophy of Language' in E. Craig (Ed) *Routledge Encyclopedia of Philosophy* (Routledge 1998).

³⁶ Jourdan and Tuite (eds), *Language Culture and Society: Key Topics in Linguistic Anthropology* (Cambridge University Press 2006).

natural that it has formed the basis of philosophical enquiry since the earliest philosophers.³⁷

Linguistic philosophers have attempted to resolve the relationship between language and the nature of meaning and truth.³⁸ The twentieth century witnessed a revolution in linguistic philosophy with major developments in both philosophy and linguistics fundamentally changing how we think about language.³⁹ Enquiry into the nature of language is integral to certain philosophical theories regarding truth, meaning and self.⁴⁰ Language is both the means of communicating a message, the message itself, and the means by which the message is understood.⁴¹

This thesis does not propose to delve into ontological enquiries about the nature of language, or epistemological questions about the limits of our knowledge of language and languages; however, it is important to explore some of the current academic theories investigating and explaining how we understand language as a

³⁷ G. Beattie and A. Ellis *The psychology of language and communication* (Psychology Press 2014), H. Bussmann, *Routledge dictionary of language and linguistics* (Routledge 2006).

³⁸ For more on these topics see for example A. Cruse, *Meaning in Language* (Oxford University Press, 2nd edn 2004); Barbara C Scholz, Francis Jeffrey Pelletier, and Geoffrey K Pullum, 'Philosophy of Linguistics' *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition) Edward N. Zalta (ed) available online: <<http://plato.stanford.edu/archives/win2011/entries/linguistics/>>. (Last accessed 17 Feb 2013).

³⁹ Roy Harris, *Language Saussure and Wittgenstein: How to Play Games with Words* (Routledge 1990); E. Lepore and B.C. Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford University Press 2006).

⁴⁰ A. J. Ayer, *Language, truth and logic* (Courier Dover Publications 2012); G. Fauconnier *Mental spaces: Aspects of meaning construction in natural language* (Cambridge University Press 1994).

⁴¹ E. Lepore and B.C. Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford University Press 2006).

concept. We will see in the coming chapters how the current European understanding of language is borne out in policy, and in laws regulating the use of language. How we understand 'language' is suffused with conceptual schemes or ideologies.⁴² It is fundamental to recognise this when academically analysing language politics, or legal rules pertaining to language. The interaction between law and language concerns both the use of language in law and the use of the philosophy of language to address problems of the nature of law. The interaction between the philosophy of language and law involves legal interpretation, and meaning.⁴³

However, for the purposes of this thesis we can limit investigation of linguistic ideology to an examination of how we understand languages as a concept rather than becoming tangled up in philosophical considerations about how we understand the world via language.

Although the cultural aspects of language may play a role, as a broad source of inspiration, the European Union does not have the competence to decide on these issues supranationally. The European Union operates in 24 languages. This thesis argues that language as

⁴² J. Blommaert (ed), *Language Ideological Debates* (Mouton de Gruyter 1999); Clare Mar-Molinero and Patrick Stevenson (eds), *Language ideologies policies and practices: language and the future of Europe* (Palgrave Macmillan 2006); Duchêne and M. Heller (eds), *Discourses of Endangerment: Ideologies and Interests in the Defense of Languages* (Continuum 2007).

⁴³ M. S. Green, 'Dworkin's Fallacy Or What the Philosophy of Language Can't Teach Us About the Law' *Virginia Law Review* 89 (2003) 1897; A. Halpin, 'Or Even What the Law Can Teach the Philosophy of Language: A Response to Green's Dworkin's Fallacy' *Virginia Law Review* 91 (2005) 175; Brian Bix, *Law Language and Legal Determinacy* (Oxford University Press 1993).

part of the democratic process in the European Union is extensively facilitated by the widespread legal protection of the 24 official EU languages. The thesis demonstrates that these language provisions are central to the European Union's relationship with its citizens.

However, language as a concept is hotly debated. We will investigate the language ideologies which form the basis for the attitude to language within the European Union. This chapter looks to the political and historical role of language in the construction of the nation, placing the European Union's legal protections of language which are investigated in part II within a historic and ideological context. This exposition demonstrates that language is central to political organisation in Europe.

(i) Defining Language: the academic debate

Questioning our approach to language is fundamental in beginning to understand this topic. This section will investigate the academic debate within modern linguistics which has attempted to answer the question 'What is language?'

Modern linguistics approaches this question in a variety of ways. The classical discipline of linguistics (now referred to as structural or formal linguistics) examined language as an autonomous system, divorced from its speakers.⁴⁴ The common conception of what constitutes a language, academically termed 'the

⁴⁴ Coupland and Jaworski (eds), *The New Sociolinguistics Reader* (Palgrave Macmillan 2009).

ideology of language',⁴⁵ is coloured by the experiences of nationalism and colonialism.⁴⁶ It will become evident from this chapter that these considerations have been profoundly affected by European history. The political and economic expansion of states that associated themselves with a certain language variety, and the centralisation of government and its apparatus, developing communication with citizens. These factors, in combination with the use of written language among large numbers of people, facilitated by revolutionary developments such as the printing press and the Reformation, led to the standardisation of language.⁴⁷ The effects of these developments, which will be explored in this chapter, form the basis of the dominant contemporary European understanding of language.

Until the early part of the twentieth century mainstream study of language was relatively homogeneous and investigated properties of language as an inert and paradigmatic phenomenon.⁴⁸ The main investigation of language was either philosophical or scientific, comprising either philosophical theories or structural observations

⁴⁵ We explore this term in Section IV of this chapter

⁴⁶ On the idea of language being saturated with ideological considerations see inter alia N. Love (ed), *Language and History: Integrationist Perspectives* (Routledge 2006); T. Taylor and J.E. Joseph (eds), *Ideologies of Language* (Routledge 1990); J. Errington, *Linguistics in a Colonial World: A story of Language Meaning and Power* (Blackwell 2008).

⁴⁷ M. Hüning, U. Vogl and O. Moline (eds), *Standard Languages and Multilingualism in European History* (John Benjamins 2012).

⁴⁸ For an overview of these developments see for example Rajend Methstrie (ed), *The Cambridge Handbook of Sociolinguistics* (Cambridge University Press 2004); Wodak, Johnstone and Kerswill (eds) *Sage Handbook of Sociolinguistics* (SAGE 2011).

on language.⁴⁹ Philology was interested in the historical development of language, but, by and large, in academic and informal investigation a language was static, and 'purity' of language was a central concern. This conception has changed since the mid-twentieth century.

The study of language changed radically through the twentieth century.⁵⁰ Sociolinguists began to study language in use, in its daily practice and environment.⁵¹ Interestingly, these shifts in the study of language originated largely with European immigrants in the USA.⁵² 'Sociolinguistics' was first developed in the 1960s in America.⁵³ The study of human language since the 1960s tends to treat language as a human faculty which is in constant evolution. As the twentieth century progressed, sociolinguistics emerged 'as an alternative to the exclusion of social context and meaning by Chomsky.'⁵⁴ The twentieth century saw a paradigm shift across the study of language.⁵⁵ Heuristic differences emerged between these

⁴⁹ Peter Burke and Roy Porter (eds), *The Social History of Language* (Cambridge University Press 1987; Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011); E. Lepore and B.C. Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford University Press 2006).

⁵⁰ E. Lepore and B.C. Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford University Press 2006).

⁵¹ R. Wodak, 'History of Sociolinguistics' in Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

⁵² For an overview of the personalities involved see chapters 1-5 in Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011). Also see Frederick J. Newmeyer, *Linguistic Theory in America* (New York Academic Press 2nd ed 1986).

⁵³ Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011); Frederick J. Newmeyer, *Linguistic Theory in America* (New York Academic Press 2nd ed 1986).

⁵⁴ D. Hymes, 'The emergence of sociolinguistics: A response to Samarin' (2000) *Journal of Sociolinguistics* 312–315, 313.

⁵⁵ M. Tomalin, *Linguistics and the Formal Sciences: The Origins of Generative Grammar* (Cambridge University Press 2006); Louise M. Antony and Norbert Hornstein (eds), *Chomsky and His Critics* (Blackwell 2003).

revolutionary methods of studying language. The discipline of linguistics continued to investigate language as a form, whereas sociolinguistic approaches to the study of language encompassed ever broader social phenomena into the study of language. During this time, the study of language as a fixed archetype began to be challenged.⁵⁶ Language began to be investigated as a social practice, and as a human faculty. The so-called 'sociolinguistic' approach was a radical break from traditional, 'structural', linguistics which concentrated on linguistic forms and accuracy, focusing instead on variations in language use, and the use of language in social interactions.⁵⁷ Initially, the application of general social theories, such as those pertaining to class and gender, to language, characterised sociolinguistics. Sociolinguistics sought to answer questions about societal imbalances, about class and colonialism and about the role of language in these systems.⁵⁸ Although the root of sociolinguistics is the relationship between society and language, it is important to distinguish between sociolinguistics and the sociology of language. Romaine states:

⁵⁶ The leading American schools of thought in this arena are represented by Dell Hymes and Noam Chomsky. For more on these approaches see Frederick J. Newmeyer, *Linguistic Theory in America* (New York Academic Press 2nd ed 1986); Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

⁵⁷ D. Cameron, 'Demythologizing Sociolinguistics' in Coupland and Jaworski (eds), *The New Sociolinguistics Reader* (Palgrave Macmillan 2009).

⁵⁸ R. Wodak, 'History of Sociolinguistics' in Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

Sociolinguistic research is intended to produce a linguistic description as its end result, although it uses social facts and even social methods to arrive at this end; the sociology of language uses linguistic information as a means of describing social behaviour.⁵⁹

Sociolinguistics was the first academic discipline to examine language as a personal phenomenon. Sociolinguistics as a discipline was a politicised take on language.⁶⁰ Sociolinguists believe that 'language' is what is spoken by people in a certain social context rather than a fossilised, idealised 'standard', and study language as such.⁶¹ Previously, language was considered as an abstract system and a distinct phenomenon, whereas sociolinguistic approaches considered language as a social product.⁶² Pioneering sociolinguists in the 1960s attempted to incorporate the new methodological techniques of sociology into the study of language variation, then referred to as 'dialectology', in particular.⁶³ This change in approach broadened the worldview of linguistics.

Language is regarded as intrinsically adaptable and across most of linguistics standardised 'correct' forms of language are considered

⁵⁹ S. Romaine, *Socio-historical linguistics: its status and methodology* (Cambridge University Press 1982) 9.

⁶⁰ R. Wodak 'History of Sociolinguistics' in Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

⁶¹ D. Cameron, 'Demythologizing Sociolinguistics' in Coupland and Jaworski (eds), *The New Sociolinguistics Reader* (Palgrave Macmillan 2009).

⁶² S. Romaine, *Language in Society: an Introduction to Sociolinguistics* (Oxford University Press 2000).

⁶³ Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

arbitrary, of no inherent greater value than other pidgins, creoles, regional varieties, or other non-standard usages.⁶⁴ It has been said that '[l]anguages and dialects were given shape and scientific (and shortly afterwards, political) reality as soon as they could be delineated and identified on the basis of a descriptive apparatus that emphasised the pure, correct, and unique features of such units.'⁶⁵ The standard forms, which are the objects of formal linguistics, have been critically termed *ideolects* (i.e. stylised abstracted languages which ignore the social aspects of language).⁶⁶

Broadly speaking, contemporaneous with the development of sociolinguistics was the move within linguistics and the broader study of language from sterile scientific investigations into the system of language to a more social view of the human faculty of language and communication.⁶⁷ The effects on the academic explanation and investigation into the nature of language have been enormous. Language is now seen as fluid and variable. It is widely recognised by academic linguists that language 'acquires, generates, recognises and interprets variability ... [and that] formal theories of this faculty are inadequate unless they account for this.'⁶⁸ This, however, is at odds

⁶⁴David Crystal, *How Language Works* (Penguin 2007).

⁶⁵Blommaert, Leppainen, and Spotti, 'Introduction' in Blommaert and others (eds), *Dangerous Multilingualism: Northern Perspectives on Order Purity and Normality* (Palgrave 2012) 5.

⁶⁶Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

⁶⁷D. Cameron, 'Demythologizing Sociolinguistics' in Coupland and Jaworski (eds), *The New Sociolinguistics Reader* (Palgrave Macmillan 2009).

⁶⁸G. Guy, 'Sociolinguistics and Formal Linguistics' in Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011)

with centuries of scientific and political definitions of language, which have formed popular understandings of language and languages.

Of course, ancient civilisations across the world had languages, sophisticated languages with established literary traditions and translation professionals.⁶⁹ However, it is during the Early Modern Period, a range of factors including but not limited to the development of print, religious change, the growth and extension of the state its institutions and the centralisation of government came together to lead to the rise of notional 'standard' languages in Europe. These came with new found trappings, such as dictionaries, grammars, and in some cases a central regulatory body in the form of an Academy. In the sixteenth and seventeenth centuries, a standard language was created and promoted as an integral part of a new European phenomenon, the nation-state.⁷⁰ What we regard as 'a language' has been centrally affected by the political projects of European nation-states and affected by their philosophical and practical expansions. Any discussion of language implies our current understanding of language, which formed on the basis of the ideological norms outlined in this chapter. Despite the widespread recognition of these subtleties in the academic field, it must be recognised that prevalent understandings of language, (what we

⁶⁹ W. Ostler, *Empires of the Word: A Language History of the World* (Harper Collins 2006).

⁷⁰ P. Burke, *Languages and Communities in Early Modern Europe* (Cambridge University Press 2004).

could call 'language ideologies' to use it as a general term⁷¹) do not include these distinctions. Understanding these approaches is central to unravelling the political attitudes towards language in the EU, before assessing the legal implications of the EU's language regime in the forthcoming chapters. The next section investigates the historical development of language and its relationship with the development of European nation-states. In the European Union, the wording of the Treaty is equally valid in all 24 Member State languages. This then trickles down through the legal system to mean that EU legislation is equally valid in 24 official languages of the Union. This is because 'language' has its roots in the establishment of states in Europe, and vice versa.

II Language and the State

Each member state of the European Union has its 'own' language, the defined language (or languages) which the State uses to engage with its citizens, and this is habitually, by design, the same language that those citizens use to communicate with each other.⁷² Many of the 24 official languages of the European Union, are the culmination of determined political projects of standardisation of the way people spoke, wrote and otherwise used language. The role of official language in the creation of a nation-state will be examined in this section. This allows us to then examine the role that official languages

⁷¹ This term is explored in section IV of this chapter.

⁷² B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 2006).

play in the European Union in later chapters. This section provides a brief overview of the historical role of language in Europe.

(i) Languages in European History

Historically, language was a very localised phenomenon. Interaction was face-to-face. There was little need for homogeneity when language was used largely for oral communication, before the invention of the printing press.⁷³ Broadly speaking, language was merely a functional method of communicating. Exchange of language meant that languages converged in an organically developed way of communicating.⁷⁴ Historically, groups largely spoke only, or mainly, to their peers, so language differed greatly between social classes.⁷⁵ The particular forms of language they spoke were moulded by their local structures. This local structure was usually their only frame of reference. The 'peasant' class interacted mainly in their immediate surroundings, and language development through education was limited thus, for as most people were not literate, language remained oral. Consequently, language standardisation did not occur outside of local structures. In contrast to the multilingual aristocracy '[t]he great mass of the people moved little, and the limitations of their

⁷³ Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011); W. Ostler, *Empires of the Word: A Language History of the World* (Harper Collins 2006); Tore Janson, *Speak: a short history of languages* (Oxford University Press 2002).

⁷⁴ Joseph Errington, *Linguistics in a Colonial World* (Blackwell 2008).

⁷⁵ Peter Burke and Roy Porter (eds), *The Social History of Language* (Cambridge University Press 1987).

language competence was rarely apparent to them.⁷⁶ Language for the peasantry was not a defined distinct phenomenon.

Apart from a limited European merchant class, the majority of the population of Europe experienced 'language' very broadly, if in limited circumstances until the Early Modern period⁷⁷ in Europe. This period marked the first major language standardisations in Western Europe since Antiquity.⁷⁸ The explosion in trade during the Renaissance meant that language communities came into contact with each other.⁷⁹ The after-effects of the Reformations in Europe meant that the vernacular had a new role and prestige, and language became associated with power.

The political role of language has been important in the creation of the nation-state paradigm.⁸⁰ This section will briefly explain the reasons for the development of national languages, and explain how the linguistic landscape of the modern European Union came into existence. As the European continent evolved, language emerged as an important means of unification, and thus became a political tool.⁸¹ 'Languages' can be interpreted as being ideological

⁷⁶ Sue Wright (ed), *Language Politics and Society: Festschrift in honour of Prof D.E Ager* (Multilingual Matters 2000) 119.

⁷⁷ From circa 1500 AD to 1800 AD.

⁷⁸ Robert Mc Coll Millar, *Authority and Identity: A Sociolinguistic History of Europe before the Modern Age*. (Palgrave Macmillan 2010) 181.

⁷⁹ Peter Burke, *Languages and Communities in Early Modern Europe* (Cambridge University Press 2004).

⁸⁰ Hüning U.Vogl and O.Moline (eds), *Standard Languages and Multilingualism in European History* (John Benjamins 2012).

⁸¹ Carmichael and Barbour (eds), *Language and Nationalism in Europe* (Oxford University Press 2000); Peter Burke, *Languages and Communities in Early Modern Europe* (Cambridge University Press 2004).

constructions which have been exported by European colonialism to the rest of the world.⁸² As Europe advanced throughout the world, language became a key political tool in the policies of colonisation pursued by European powers.⁸³ Colonisation necessitated standardised language and marked the beginning of the formalisation of language as a political device to exert power.⁸⁴ Before the project of linguistic standardisation, language change was horizontal rather than vertical, that is to say there was no 'top-down' standard imposed, rather languages developed as people spoke.⁸⁵

Language became a central concern for the apparatus of the state, and began to be regulated by State authorities. This was a central concern for European powers, the results of which are still keenly felt in EU language policy today. As Janson highlights:

[t]he new national languages did not just spring up spontaneously, they were deliberately created, the spoken forms were often there when the new states came into existence but the important thing was

⁸² J. Normann Jørgensen, 'Language and Languages in European Ideology, Political Documents and Real life' in Kjaer L. and Adamo S. (eds), *Linguistic Diversity and European Democracy* (Ashgate 2011).

⁸³ Peter Trudgill, *Investigations in Sociohistorical Linguistics: Stories of Colonisation and Contact* (Cambridge University Press 2010); Percy and Davidson (eds), *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012).

⁸⁴ Peter Trudgill, *Investigations in Sociohistorical Linguistics: Stories of Colonisation and Contact* (Cambridge University Press 2010).

⁸⁵ David Crystal, *How Language Works* (Penguin 2007).

to obtain what was perceived (and is still perceived) as a real language, that is a written language with norms of its own.⁸⁶

Due to a combination of developments such as the Age of Exploration, the Reformation, the spread of capitalism and the technological advances of the printing press, the idea of a national language took hold, and over time 'language' came to be one of the defining criteria for a nation.⁸⁷

During the Early Modern period in Europe, rulers began to issue linguistic legislation. Requirements in statutes such as the edicts of François I and Henry VIII made the use of the newly coined national languages compulsory on official state business.⁸⁸ It is with the diffusion of settlement colonisation that the increasing political importance of language can be observed. The first linguistic legislation, The Statutes of Kilkenny (1366),⁸⁹ imposed by King Edward III of England, are claimed to be the first evidence of a language being outlawed in Europe. These statutes were an important tool in the creation of a community which would be

⁸⁶ Tore Janson, *Speak: A short history of languages* (Oxford University Press 2002) 167.

⁸⁷ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 2006); Michael Billig, *Banal Nationalism*. (SAGE 1995) in particular Chapter 2: *Nations and languages*.

⁸⁸ Nicholas Ostler, *Empires of the Word: A Language History of the World* (London 2005) 404-5; Tony Crowley *Wars of Words: the politics of language in Ireland 1537-2004* (Oxford University Press 2005); Felicity Heal 'Mediating the Word: language and dialects in the British and Irish reformations' *Journal of Ecclesiastical History* 56 (2005) 261-286.

⁸⁹ See text in Tony Crowley 'The Politics of Language in Ireland 1366-1922- a Sourcebook' (Routledge 2000) p. 14-16.

sympathetic to Anglo-Norman rule in Ireland.⁹⁰ Despite the aforementioned linguistic legislation, the spread of English in Ireland was negligible before the introduction of settlers during the 17th century plantations.⁹¹ The course of colonisation, the consequence of which was the development of European spheres of influence across the world, has had a huge impact on the perception of language generally, and its impact has continued to the present day. The linguistic transition in South America at the hands of European colonial powers has been deemed '[t]he largest linguistic change in History'.⁹² On publishing his first Grammar of the Spanish language in 1492, Antonio de Nebrija, a colonialist scholar who was one of the first codifiers of the Spanish language, is said to have declared that *'language has always been the perfect instrument of Empire.'*⁹³ Nebrija foresaw precisely the key role Spanish was to play in the conquest of South America. Across all of South America there remain at least 350 American Indian languages, 500 years after the conquest by European forces, consequently, the dominance of Spanish and Portuguese to this day must be seen as a testament to the

⁹⁰ Nicholas Ostler, *Empires of the Word: A Language History of the World* (Harper Collins 2006).

⁹¹ D Leith and L Jackson, 'English: colonial to postcolonial' p.117-52 in D. Graddol and others (eds) *Changing English* (Routledge 2007).

⁹² Tore Janson, *The History of Languages: An Introduction* (Oxford University Press 2012) 177.

⁹³ Responding '*su Alteza la lengua es el instrumento del Imperio*' (language is the tool of Empire) when asked by queen Isabella about the utility of his Grammar of the Spanish Language.

determination of the European conquerors to promote and preserve political and linguistic unity in their new colonies.⁹⁴

The colonisation of the Americas by European powers marked '[a] new step in language consciousness'⁹⁵ and the beginning of a more widespread acceptance or understanding of the power and political impact that language could have. The links between the creation of an ideology of national language and the creation of a cohesive nation state, and colonial expansion, are at the root of our ideas about language itself. In the aftermath of colonisation, the analysis and linguistic description, and the language teaching which formed an integral part of the process of colonisation, all served to impose European views of language and European understandings of language.⁹⁶

The linguistic unity which colonisers strove to create abroad did not mirror the situation in place in Europe. The pre-industrial peasant class in Europe did not have the same experience of language as we have in the present day. Language was highly localised. There was little to no coordination of language standards. Royal courts in Europe were multilingual, as families intermarried strategically and, thus, members of the ruling class usually spoke many languages.⁹⁷

⁹⁴ Tore Janson, *The History of Languages* (Oxford University Press 2012).

⁹⁵ Nicholas Ostler, *Empires of the Word: A Language History of the World* (Harper Collins 2006) 464.

⁹⁶ J. Errington, *Linguistics in a Colonial World* (Blackwell 2008); J. Blommaert (ed) *Language Ideological Debates* (Mouton de Gruyter 1999).

⁹⁷ Tore Janson, *The History of Languages* (Oxford University Press 2012).

The polyglot aristocratic class could furthermore communicate via Latin for formal purposes, which was the language of education and high culture.⁹⁸ Anyone not 'of high birth' who happened to acquire an education also acquired competence in Latin, as education was largely conducted by religious orders.⁹⁹ As the reformation spread across Europe, however, Latin fell out of favour because of its associations with Catholicism, and increasing divergence in national pronunciation. The move towards the vernacular was a move away from Latin and from the Church, and consequently, a move away from the Church monopoly on education and literacy.¹⁰⁰ Latin had functioned as a communicative language for a variety of purposes across Europe for almost a millennium after the fall of the Roman Empire.¹⁰¹ The importance of the use of the vernacular in the Reformation and the near-contemporaneous advent of the printed word were important factors in the unification and standardisation of language in this period in Europe.¹⁰² Anderson attributes the rise of the vernacular to an emerging national consciousness across Europe, arguing that this was down to a confluence of historical

⁹⁸ Peter Burke, *Languages and Communities in Early Modern Europe* (Cambridge University Press 2004).

⁹⁹ *Ibid.*

¹⁰⁰ Tore Janson, *The History of Languages* (Oxford University Press 2012); P. Burke *Languages and Communities in Early Modern Europe* (Cambridge University Press 2004); Nicholas Ostler, *Empires of the Word: A Language History of the World* (Harper Collins 2006).

¹⁰¹ Tore Janson, *A Natural History of Latin* (Oxford University Press 2004).

¹⁰² Carmichael and Barbour (eds), *Language and Nationalism in Europe* (Oxford University Press 2000).

factors, not least the rise of an urban bourgeoisie and the spread of capitalism and mercantilism.¹⁰³

At this time, multilingualism was relatively commonplace in certain parts of Europe, within merchant classes in particular.¹⁰⁴ Language-learning took place mainly in trade hubs and was viewed as an instrumental necessity by merchants and traders, and by travellers.¹⁰⁵ Those who did need to learn a foreign language often did so via private tutors, however, and there was little structured learning of languages and language had not yet been standardised. Literacy was for the privileged, and there was negligible systematic language-learning to any extent.

The advent of the nation-state era meant the imposition of 'top-down' vertical language structures on speakers, in their role as citizens. Previously, language had been an organic phenomenon, with the advent of the nation it became a political tool.¹⁰⁶ The top-down imposition of language forms coincides with the construction of nation-states in the aftermath of the 1648 Treaty of Westphalia. The congruence of the 'nation' with a language in Europe, and by extension in the world, did not fully emerge until the fifteenth and

¹⁰³ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 2006).

¹⁰⁴ P. Burke, *Languages and Communities in Early Modern Europe* (Cambridge University Press 2004).

¹⁰⁵ N. Ostler, *Empires of the Word: A Language History of the World* (Harper Collins 2006); Tore Janson, *Speak: a short history of languages* (Oxford University Press 2002).

¹⁰⁶ Sue Wright, *Community and Communication: the role of language in Nation-State Building* (Multilingual Matters 2000).

sixteenth centuries.¹⁰⁷ Throughout the sixteenth and seventeenth centuries, a standard language was created and promoted in all of Europe's 'great nations'.¹⁰⁸ Across Europe, language 'Academies' were created, from the Tuscan *Accademia della Crusca* to Richelieu's *Académie Française*, in order to standardise the language decided upon as the emblem of the nation.¹⁰⁹ Proclaiming language status was usually the first goal of these Academies, which designated a 'national language' and fostered its creation.¹¹⁰ They aimed to create a standardised version of the vernacular languages used by the aristocracy, and produced the first monolingual dictionaries, listing the terms that were to be included as part of these new languages.¹¹¹ Legitimation of vernacular languages *vis-à-vis* Latin was an implicit goal of the Academies.¹¹² The 'national languages' they chose to champion often did not correspond to language used among the inhabitants of the putative nation-state.¹¹³ Language began to be perceived as a clear identity marker and the 'symbolic value of a

¹⁰⁷ Carmichael and Barbour (eds), *Language and Nationalism in Europe* (Oxford University Press 2000).

¹⁰⁸ Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide Vol II* (Berlin:Walter de Gruyter 2011).

¹⁰⁹ Matthias Hüning, Ulrike Vogl, and Olivier Moliner (eds), *Standard Languages and Multilingualism in European History* (John Benjamins 2012).

¹¹⁰ B. Spolsky, 'Language Academies and other Language Management Agencies' in *Language Policy* 2011 10:4 285-287.

¹¹¹ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 2006).

¹¹² J. Myhill, *Language Religion and National Identity in Europe and the Middle East: a Historical Study* (John Benjamins 2006).

¹¹³ Carmichael and Barbour (eds), *Language and Nationalism in Europe* (Oxford University Press 2000).

medium that provides group distinctiveness'¹¹⁴ became ever more prized. As David Bellos points out:

The conceptualisation of anything as grand and comprehensive as the Dictionnaire de l'Academie involves treating the written form of a spoken language as a thing that can be learned and studied not by foreigners, but by native speakers of that language. It's a peculiar idea. By definition, what a monolingual dictionary codifies is precisely the ability to speak that users of the dictionary possess.¹¹⁵

Norms began to be enforced by the newly created Academies and speakers of regional languages or regional variants of the new state-sanctioned language were stigmatised and marginalised.¹¹⁶ Even where no formal academy or officially designated standard existed, as is the case in Early Modern England, a standardised language began to emerge and regional varieties were denigrated.¹¹⁷ Language was an important functional instrument for the political project of state building. The top-down imposition of national languages which began in this period is in part responsible for the creation of what are now referred to as 'autochthonous minority

¹¹⁴ J. Edwards in Percy and Davidson (eds), *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012).

¹¹⁵ David Bellos, *Is That a Fish in your Ear? Translation and the Meaning of Everything* (Penguin, 2011) 97.

¹¹⁶ J.E. Joseph, *Eloquence and Power: The rise of language standards and Standard Languages* (Blackwell 1987).

¹¹⁷ Paula Blank, *Broken English* (Taylor and Francis 2002).

languages'.¹¹⁸ As a result of the fluctuating borders of a state, various nations with multiple 'languages' were often present.¹¹⁹

National languages gained importance through the intention of assuring a unified state and through the legitimation by state bodies of one particular standardised language form. Unifying languages were strategically used to introduce social cohesion within these new political structures, and to create the necessary 'community of communication' seen as a fundamental necessity in the creation of a nation-state polity.¹²⁰ Furthermore, the administration of the new enlarged state, including tax collection, law reporting and written correspondence with authorities, was carried out in the new national languages which created important incentives for the population to learn the new standards.¹²¹ While language remained oral, the ruling class had little control over the language used by populations, but with the advent of the printing press the role of language in society changed dramatically.¹²² The spread of written language has had an effect on language vitality in particular due to the ease of diffusion of written language.¹²³ The

¹¹⁸ Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Walter de Gruyter 2011).

¹¹⁹ Mairead Nic Cráith *Europe and the Politics of Language- Citizens, Migrants and Outsiders* (Palgrave London 2006).

¹²⁰ S Wright, Chapter 20 'Language Policy and Language Planning' in *The Routledge Companion to Sociolinguistics* (Routledge 2007) 166.

¹²¹ Tore Janson, *The History of Languages* (Oxford University Press 2012).

¹²² Tony Crowley, *Language in History: Theories and Texts* (Routledge 1996).

¹²³ Nettle and Romaine, *Vanishing voices: the extinction of the world's languages* (Oxford University Press 2000).

dynamic relationship between language, standard language, and power will be explored further in chapter 3.

The association of language with nation is one of the key contributing factors to the current attitudes towards language within the European Union. This then explains the basis for the legal protections of language within the European Union. The political and historical role of language in the construction of the nation, allows us to place the legal protections of language we will explore in part II within a historic context.

(ii) Language and Nationalism

It is important to understand the political incentives for the creation of national languages. Human beings have a fundamental capacity for language, but *languages* themselves are 'historical formations in which the thoughts and feelings precipitate and are transformed into common heritage'.¹²⁴ The creation of a common, standardised language was the foundation stone for the creation of political communities. The central role of language in European expansion overseas has been outlined. The political ends to which language was used meant that language, in particular shared language, became a central part of the philosophical explanations and justifications of the nation.¹²⁵

¹²⁴ Lia Formigari (Translated by G. Poole) *A History of Language Philosophies* John Benjamins 2004 129.

¹²⁵ Joep Leersen, *National Thought In Europe: A Cultural History* (Amsterdam University Press 2006).

Early theorisations of language and nationalism

Language has been described as one of the defining elements of nationalism.¹²⁶ Language began to be seen as a necessary instrument in the construction of a unified citizenry. This chapter established that Europe's monolingual nations were not historically organic language communities which then organised themselves as a state, but rather political projects. Language could be used as a tool to unite, rather than as mere proof that a group was naturally united.¹²⁷

National languages were used by states to create political communities. Use of the national language was a sure sign of belonging to the nation. As theorists of modern day multilingualism have identified, 'full membership of a nation was predicated on full (and exclusive) membership of an ethnolinguistic community; a community defined by one language and one culture.'¹²⁸ The importance of this language conformity was externally enforced, that is to say, the reigning powers decided upon a language, and that language was the representation of the nation. There was no democratic process of language selection, and no permission for those within the designated boundaries to diverge from the

¹²⁶ Camille C. O'Reilly (ed), *Language Ethnicity and the State Vol. 1: Minority Languages in the European Union* (Palgrave Macmillan 2001).

¹²⁷ Sue Wright, 'The map the group and language ideology' (2014) 1 (2) *Journal of World Languages* 81-98.

¹²⁸ Blommaert, Leppainen and Spotti 'Introduction' in Blommaert and others (eds), *Dangerous Multilingualism: Northern Perspectives on Order Purity and Normality* (Palgrave 2012) 5.

designated language for those national boundaries. Where language use did not change naturally, it was imposed.¹²⁹

In the Eighteenth century in Europe, sharing a common language was fundamental to the mythical, ethnic nationalist philosophies which developed across Central Europe.¹³⁰ The emergent nationalism and, later, Romanticism paired the concept of 'nation' with a people possessing a common history, all conveyed through a shared language.¹³¹ These philosophical explorations form the basis for European 'modern linguistic nationalism'.¹³² Perhaps the most prominent 'forefather'¹³³ or exponent of this ideology of modern linguistic nationalism is Herder, one of the principal theorists in the nationalist, folkloristic *Sturm und Drang* movement in Germany.¹³⁴ Herder's 1772 treatise on the origin of language¹³⁵ is one of the clearest articulations of what remains a dominant concept

¹²⁹ Robert Mc Coll Millar, *Authority and Identity: A Sociolinguistic History of Europe before the Modern Age*. (Palgrave Macmillan 2010); M.Nic Cráith (ed) *Language Power and Identity Politics* (2007 Palgrave Macmillan).

¹³⁰ Tore Janson *The History of Languages* (Oxford University Press 2012).

¹³¹ M.Nic Cráith (ed.) *Language Power and Identity Politics*; see also Robert Mc Coll Millar *Language Nation and Power* (Palgrave Macmillan 2005).

¹³² J. Myhill *Language Religion and National Identity in Europe and the Middle East : a Historical Study* (John Benjamins 2006).

¹³³ R. Baumann and C. L. Briggs *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press 2003).

¹³⁴ For more detail on Herder see, for example, F.Barnard, *Herder's social and political thought: from enlightenment to nationalism* (Clarendon Press 1965). Herder is commonly recognised as the principal theorist for nationalism and language among a movement of German Romantics (Klopstock Voss Hamann et al.) who went on to influence many ethnolinguistic nationalist philosophies across Europe in the Eighteenth and Nineteenth centuries.

¹³⁵ Johann Gottfried Herder 'Abhandlung über den Ursprung der Sprache' (1772).

of national language; language as congruent with a population which in turn is congruent with a state.¹³⁶ According to Bauman and Briggs:

Herder's legacy lies at the heart of the one nation equals one language approach, the notion that a common language is the social glue that binds a nation together, engenders a unique and shared culture and is also a requisite to a viable democratic state.¹³⁷

The discourse that Herder proposed profoundly affected philosophers and theorists of the time.¹³⁸ The German nationalist movement's advocates and protagonists placed language at the centre of the Germanic nation during the nineteenth-century struggles between France and Germany.¹³⁹ The philosophical turn to Romanticism during this period is responsible for the ethnolinguistic determinism we now associate with the concept of 'national languages'. Ethnolinguistic determinism is the absolute identification of language communities with ethnicities.¹⁴⁰ The complications of this essentialist point of view will be further explored in the analysis of language rights in chapter 3.

¹³⁶ R. Baumann and C. L. Briggs *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press 2003).

¹³⁷ *ibid* 302.

¹³⁸ H. De Schutter 'Herder Johann Gottfried' in Claeys G. (eds), *Encyclopedia of Modern Political Thought* (CQ Press 2013) 394-395.

¹³⁹ For more detail on the Nationalist movements across Europe see for example John E. Joseph, 'The Construction of Nationalism' in N. Love (ed), *Language and History: Integrationist Perspectives* (Routledge 2006).

¹⁴⁰ Lia Formigari (Translated by G. Poole) *A History of Language Philosophies* John Benjamins 2004.

Control of language was, particularly, a European political tool, and was applied to serve a variety of social functions across European history.¹⁴¹ Its role as both symbol and tool was important for intellectual movements that wanted to challenge the symbolism of the use of Latin:

[t]he Enlightenment perceived a need for a vernacular language as a lever for challenging the educational privilege of the nobility and clergy, while Romanticism stressed the glorification of language as a national treasure, rendering language cultivation a patriotic rather than a social task.¹⁴²

The Romantic philosophers of the nineteenth century¹⁴³ painted a picture of language as a primordial feature which defined and united an ethnic group, whose ultimate aim would be to self-govern.¹⁴⁴ This philosophy swept across Europe, where each of the peoples of Europe had their own national language ideologues, and many linguistic communities were subsumed by this ideological fervour.¹⁴⁵

The Romantic period is seen as central to the formation of the 'authenticity' of these national languages, providing an essentialist

¹⁴¹ Castiglione and Longman (eds) *The language question in Europe and diverse societies: political legal and social perspectives* (Hart Publishing 2007).

¹⁴² A. Caviedes, 'The role of language in nation building within the European Union' (2003) 27 *Dialectal Anthropology* 249-268.

¹⁴³ Romantic philosophers across Europe were inspired by the resurgence in ideas of a unified people philosophers such as Hegel and Fichte influenced movements in Romanticism across the arts all over Europe.

¹⁴⁴ Robert Mc Coll Millar, *Language Nation and Power* (Palgrave Macmillan 2005).

¹⁴⁵ Linguistic changes occurring at the time include the creation of the Scandinavian languages the Catalan language movement the Napoleonic imposition of French across France. For more on this period Susan Gal, 'Linguistic theories and national images in Nineteenth century Hungary' *Pragmatics* 5(2) 1995: 155-166.

justification.¹⁴⁶ Following the French and American revolutions, the discourse moved towards civic unity. Here, a more instrumental view of language can be observed.¹⁴⁷ The Herderian paradigm is one of nationality and language, where language is the essential proof of community and ethnicity. This is known as 'the ethnolinguistic assumption'.¹⁴⁸ The ethnolinguistic assumption is the cornerstone of the Herderian language ideologies of the nation state. These ideologies were met with great success in nineteenth century Europe. As a consequence, by the twentieth century, nation-states were firmly associated with 'their' languages.

Modern interpretations of the link between language and Nationalism

The ideology of nationalism, and the consequence of the primordial justifications of group identity reached its zenith in the early twentieth century in Europe. Naturally, ethnolinguistic justifications formed part of this nationalist fervour.¹⁴⁹ Romantic nationalism was taken up by fascism in the early part of the twentieth century, and its ideology contributed strongly to the ideas of supremacy and ethnic predetermination. Theoretically connecting 'nations' with language, and using this to justify essentialist conceptions of ethnicity, race, and

¹⁴⁶ Percy and Davidson (eds), *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012).

¹⁴⁷ Robert Mc Coll Millar, *Language Nation and Power*. (Palgrave Macmillan 2005).

¹⁴⁸ Percy and Davidson (eds), *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012).

¹⁴⁹ See inter alia Linke Uli, 'Ethnolinguistic racism :The predicaments of sovereignty and nationhood under global capitalism' 2004 (4) 2 *Anthropological Theory* 205-228; Craig Brandist, 'The origins of Soviet sociolinguistics' 2003 7 (2) *Journal of Sociolinguistics* 213-231.

nation, is a consequence of the instrumentalisation of language in the creation of the nation-state.¹⁵⁰ The ideological distortion of Nationalism and essentialisation of groups and minorities formed the context for the horrors perpetrated on the European continent in the name of extremist Nationalism.

The coercion and manipulation necessary to create standard languages had not been examined on a large scale by historians or theorists until the mid-twentieth century. Twentieth-century theorists analyse the importance of language in the construction of the nation, and how it has affected our current ideologies.¹⁵¹ The philosophical and historical foundations of nation and nationality were fundamentally reassessed in the twentieth century, in the period of reflection which came after the World Wars and, in particular, during the Cold War.¹⁵²

In the post-war period, the preceding ideological canon which had led to two wars in quick succession in Europe began to be deconstructed. In a neo-modernist vein, Gellner and Hobsbawm both redefined nationalism in this understanding, departing from the view that language communities naturally converged and formed harmonious nation groups, as Romantic and Enlightenment thinkers

¹⁵⁰ Robert Mc Coll Millar, *Language Nation and Power* (Palgrave Macmillan 2005).

¹⁵¹ Robert Mc Coll Millar, *Authority and Identity: A Sociolinguistic History of Europe before the Modern Age*. (Palgrave Macmillan 2010).

¹⁵² Bowring and Fotherell (eds), *Minority and Group Rights in the New Millennium*. (1999 Kluwer Law International).

maintained during the Eighteenth and Nineteenth centuries.¹⁵³ Hobsbawm acknowledges that national languages are a discursive construction, and affirms that they are 'attempts to devise a standardised idiom out of a multiplicity of actually spoken idioms, which are downgraded to dialects'.¹⁵⁴ Gellner's accounts focus on the importance of linguistic unification for industrialisation and the creation of the new 'nation state' economic model.¹⁵⁵ The historian and sociologist Benedict Anderson observes the nation as an 'Imagined community', and claims that this is the abstract foundation for the European model of a nation-state. Anderson gives a holistic account of the rise of the national language, linking standardisation and the necessity for codification with the rise of printing and its coincidence with nationalism and colonisation in Early Modern Europe and the ideology of the nation state.¹⁵⁶ These are what Adrey terms the 'broad contextual changes' which contributed to the emergence of standardised languages as expressions of the nation.¹⁵⁷ However, De Witte questions whether the historical analytical focus on language to facilitate nation building can only be considered central in the context of the social and economic climate of the time,

¹⁵³ Eric Hobsbawm, *Nations and Nationalism since 1780* (Cambridge University Press 1990).

¹⁵⁴ *ibid* 51

¹⁵⁵ Ernest Gellner, *Nations and Nationalism* (first published 1983 2nd edn Blackwell 2006).

¹⁵⁶ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 2006).

¹⁵⁷ J.B. Adrey, *Discourse and struggle in minority language policy formation: Corsican language policy in the EU context of governance* (Palgrave Macmillan 2009).

and that the subsequent industrialization and nation formation in the eighteenth century mean this is no longer relevant.¹⁵⁸

Although by now we have a more profound understanding of the historical factors which led to the development of national languages, linguistic nationalism still marks the ideology of language in Europe. This language planning and its social effects will be investigated further in the next chapter. Although linguistic nationalism has been referred to as 'the ideological dead weight of the nineteenth century',¹⁵⁹ language issues have had political currency throughout the twentieth century and into the twenty-first. Language issues were prominent in the post-war reconstruction of Europe, and are still a key feature of conflict resolution in Europe, the forthcoming chapters will reveal.¹⁶⁰ The idea of language being inextricably linked to national identity was a response to 'profound historical changes'¹⁶¹ which called for new ways of defining identity for the individual, and for groups. These profound historical changes were the expansion and imperialism of European nation-states, who

¹⁵⁸ Bruno De Witte, 'The Impact of European Community Rules on Linguistic Policies of the Member States' in F. Coulmas (ed) *A language policy for the European Community: Prospects and Quandaries* (Mouton de Gruyter 1991) 163.

¹⁵⁹ F Coulmas, 'European integration and the idea of the national language: Ideological roots and economic consequences' in F. Coulmas (ed), *A language policy for the European Community: Prospects and Quandaries* (Mouton de Gruyter 1991).

¹⁶⁰ Snežana Trifunovska (ed), *Minority Rights in Europe: European Minorities and Languages* (TMC Asser 2001); F. Palermo, 'When the Lund Recommendations are Ignored Effective Participation of National Minorities through Territorial Autonomy' (2009) 16 (4) *International Journal on Minority & Group Rights* 653-663.

¹⁶¹ J. Myhill, *Language Religion and National Identity in Europe and the Middle East: a Historical Study* (John Benjamins 2006) 6.

began to compete with each other. Wright identifies three 'European' models to explain the role of language in Nation State formation in Europe: 'assimilation', 'blood and belonging' and 'fragmentation', differentiating between

States whose borders were set by conquest or inheritance and whose elites attempted to weld the heterogeneous populations within those borders into a cohesive, monolingual nation, and states whose borders were determined to reflect the belief of the population within that they already possessed some commonality and basis for association, in particular a 'community of communication'.¹⁶²

It is important to underline that Wright does not make any assertion that there is any natural congruence of language, nation and state: rather, she highlights the linguistic dimension of in an attempt to analyse language's relationship with the formation of Nation States across the continent. Malloy argues that the congruence of nation and state is only a twentieth century conceit, stating that

[t]he idea which had been used as an instrumental means both to achieve nationhood (in the hands of the French and German intellectuals) and as an Ideological end (in the minds of Wilson and Lenin), metamorphosed into a post-World War II view of liberal ideology of democratisation based on universal human

¹⁶² Sue Wright, *Community and Communication: the Role of Language in Nation State Building and European Integration* (Clevedon Multilingual Matters 2000) 31.

rights and self-determination for some but not all nations. In this supposedly global view, the nation became coterminous with the State.¹⁶³

However, although it could be argued that the result was fully concretised in the twentieth century, we have seen language was used as a vehicle to unite the State with the amorphous Nation since the very conception of the idea of nations. Within this narrative of the nation, 'Language was seen as the repository for the nation's uniqueness'.¹⁶⁴ The role of the State has changed dramatically since the beginning of the twentieth century. The next section will examine some of the linguistic issues presented when considering language within the context of the modern State.

(iii) Language and the State in the twenty-first century

In order to properly analyse language in the European Union it is essential first to tease out the relationship between language and the State in our day. State policies have contributed greatly to language standardisation and convergence in the last century.¹⁶⁵ The development of the democratic nation-state increased the importance of language, both on theoretical and practical levels. The

¹⁶³ T. H. Malloy *Deconstructing the 'Nation' for the 21st Century through a Critical Reading of the Parliamentary Assembly's Recommendation 1735 (2006)* 5 *European Yearbook on Minority Issues* 161 (2005-06)

¹⁶⁴ Sue Wright *Community and Communication: the role of language in Nation-State Building* (Multilingual Matters 2000)

¹⁶⁵ Robert Mc Coll Millar, *Language Nation and Power*. (Palgrave Macmillan 2005).

nation-state model was exported to parts of the world other than Europe, as peoples who had suffered colonisation sought their independence. Democratic rule became the aspiration and the model for nationhood in the 20th century.¹⁶⁶

The State's choice of language(s) for its communication are of huge importance. Moreover, shared language is necessary in order for effective communication to take place. As the role of the State expands and its interactions with citizens become ever more wide-ranging, language becomes ever more fundamental to participation. For these reasons it remains impossible for the state to be neutral with regard to language (as it might be, for example, with regard to religion), as it must communicate with its citizens. Alan Patten terms this 'the problem of the loquacious state.'¹⁶⁷ The sociolinguist Lionel Wee describes language as 'irreducibly illiberal' in nature for this same reason.¹⁶⁸ Language is an aspect of political organisation which is dismissed as functional, or operational. Throughout this chapter, and indeed, this thesis we will see that this is not the case. Language regimes go to the heart of the political essence of an organisation. This thesis will assess the phenomenon of language in interaction between the European Union and its citizens, in chapter 7. This communication is the basis for the concrete language rights which

¹⁶⁶ Sue Wright, *Community and Communication: the Role of Language in Nation State Building and European Integration* (Multilingual Matters 2000).

¹⁶⁷ Kymlicka and Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

¹⁶⁸ Lionel Wee, *Language Without Rights* (Oxford University Press 2011).

are provided in the legal system of the European Union. This section aims to show where the roots of this linguistic citizenship come from. The choice of language reflects the chosen identity for the 'nation', and for the EU of the new political entity created. The legal protections of language(s) in a given political entity reflect the importance of language beyond a simple communicative function.

The role of language developed as the State grew. Language became an important signifier of belonging to a certain national community. Therefore, shared language is seen as proof of belonging to the national community. This attitude is still very much alive in many member states of the European Union. Codó and Pérez-Milans explain that

[t]raditionally, the mission of institutions, especially those of the nation state, has been the production of citizens and the creation of homogeneous social bodies. This is carried out through specific regimes of citizenship centred on the ideological regulation of attitude and practice. Language features prominently among the elements defining citizenship, and is thus, subject to strict institutional regimentation.¹⁶⁹

As part of this re-evaluation of citizenship, the legal requirements for the acquisition of citizenship or residency in EU Member States now

¹⁶⁹ Eva Codó and Miguel Pérez-Milans, 'Multilingual discursive practices and processes of social change in globalising institutional spaces: a critical ethnographic perspective' (2014) 11 (4) *International Journal of Multilingualism*.

often include the completion of a language test.¹⁷⁰ This issue has come to the fore in certain member states of the EU, and will be further examined later in the thesis. In the current European approach to language it seems natural that the language spoken by the state is the language spoken by its people. This ignores the fact that monolingual countries are rare on a world scale.¹⁷¹ The historical factors which were outlined in this chapter throw into question the traditional image of a linguistically homogeneous state.

From a purely practical perspective, a monolingual nation-state with a homogeneous ethnic group sharing one language is easier to govern than even the simplest local-level political organisation trying to govern in multiple languages. The practical problems faced in multilingual communities increase when considering the massive state apparatus central to running a contemporary state. Engaging in balanced multilingualism poses many governance challenges for a state. All of these considerations become even more complicated when dealing with a broad-ranging regional organisation such as the European Union. However, multilingual polities can work successfully. 'Multination states' such as Belgium, Canada or Switzerland must overcome these difficulties, and can successfully do

¹⁷⁰ Baubock R. and S. Wallace Goodman 'Naturalisation' *EUDO Citizenship Policy Brief* (European University Institute Florence 2010); A. Bocker and S. Tineke, 'Language and Knowledge Tests for Permanent Residence Rights: Help or Hindrance for Integration?' (2011) 13(2) *European Journal of Migration and Law* 157-184.

¹⁷¹ B. Spolsky, *Sociolinguistics* (2nd Edition) (Oxford University Press 2010) 54.

so. The administrative and power implications of multiple language communities within one political unit will be discussed in the next chapters, in examining the rules on language within the governance unit of the European Union.

These 'multination states' have been cited as examples for the European Union to follow, or at least as proof that even in large-scale political systems, multilingualism can work.¹⁷² In fact, multilingualism by now forms a fundamental aspect of Canadian national unity, and patriotism.¹⁷³ Arguing from a Canadian perspective, Kymlicka outlines the problem thus:

Most liberal accounts of civic identity argue that shared political principles are the basis of civic identity. Implicitly, however, they typically assume that citizens share not only principles, but also a common language and sense of membership in a national community. The problem is that neither the explicit emphasis on principles, nor the implicit emphasis on shared language and history can explain social unity in multination states.¹⁷⁴

The paradigm of the monolingual nation state is no longer fêted as the ideal, but the alternatives are complex and require political compromise. Dominik Bohl asserts that multilingualism has become

¹⁷² Carol Schmid, *The Politics of Language: Conflict Identity and Cultural Pluralism in Comparative Perspective*. (Oxford University Press 2001); Kymlicka and Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

¹⁷³ Eve Haque, *Multiculturalism within a bilingual framework: language race and belonging in Canada* (University of Toronto Press 2012); Carol Schmid, *The Politics of Language: Conflict Identity and Cultural Pluralism in Comparative Perspective* (Oxford University Press 2001).

¹⁷⁴ W. Kymlicka, *Multicultural Odysseys* (Oxford University Press 2007) 314.

a more prevalent model for nationhood, using a sociological institutionalism to prove his point.¹⁷⁵ Bohl points to the general move away from assimilationism, and to the actions of international organisations in their attempts to maintain linguistic diversity.¹⁷⁶ Nonetheless, the ideology of linguistic unity has proved to persist as a feature of many of the Member States of the European Union.

(iv) Language and Territoriality

Until very recently, the territorial limits of language did not correspond to political frontiers.¹⁷⁷ As outlined, before the political management of language the territorial limits of language largely reflected the geographical limits of oral communication.¹⁷⁸ Language was local. As humans began to move, languages spread, converging and diverging. The communicative function of language creates a natural group, and as has been demonstrated, this communitarian feature has been successfully instrumentalised for political ends. The territorial border of the 'nation' is often demarcated along linguistic borders, be they organic or forcibly generated.¹⁷⁹

¹⁷⁵ Dominik Bohl, 'Language Rights in the World Polity – From Non-Discrimination to Multilingualism' D. Richter and others (eds) *Language Rights Revisited - The Challenge of Global Migration and Communication* (Berliner Wissenschafts-Verlag 2012).

¹⁷⁶ Ibid.

¹⁷⁷ Kenneth McRae, 'The principle of territoriality and the principle of personality in multilingual states.' 1975 (4) *International Journal of the Sociology of Language* 33–54.

¹⁷⁸ For a fascinating outline of the link between geography and language or the roots of language in a specific territory see J. Diamond *Guns Germs and Steel: The Fates of Human Societies* (Vintage 1998).

¹⁷⁹ G Hogan-Brun and S Wolff (eds), *Language Nationalism and Democracy in Europe* (Palgrave 2003).

Our current understanding of monolithic nation-states as containing monolingual populations within a defined territory is not a reflection of the historical reality in Europe. The territorial foundation of a language was unrelated to the governing structures, by and large, until the advent of modern industrialised society.¹⁸⁰ The powers which reigned an area fluctuated, and in any case authorities communicated little with the populations over which they ruled.¹⁸¹ Until the age of Nations language simply was not an important issue for governing peoples beyond the immediate need for functional communication.¹⁸² Language became a key element of constructing a national community, as discussed in preceding sections. This concerted effort at language change had widespread effects.¹⁸³ However, as the ideological considerations outlined above gained momentum, linguistic homogeneity within a territory began to be seen as important.¹⁸⁴ As a result, Europe is regarded as relatively linguistically homogeneous, although the problem of minority languages had always existed across Europe.¹⁸⁵ It has been stated

¹⁸⁰ See Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Walter de Gruyter 2011).

¹⁸¹ Colin Williams, 'Language policy territorialism and regional autonomy' in B. Spolsky (ed) *The Cambridge Handbook of Language Policy* (Cambridge University Press 2012).

¹⁸² Peter Burke and Roy Porter (eds), *The Social History of Language* (Cambridge University Press 1987).

¹⁸³ J. Aitchison, *Language Change: Progress or Decay?* (3rd ed) (2001 Cambridge University Press).

¹⁸⁴ D. Watt and C. Llamas, *Language Borders and Identity*. (2014 Edinburgh University Press).

¹⁸⁵ Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Walter de Gruyter 2011).

that this development created a particularly European version of language communities within a territory:

[t]he building of a national territorial community in fact forced the great majority of subjects into some level of bilinguality: one language for close interaction within the immediate community, and at least one other for communication over longer distances. The first is the language of the home and local friendship circle, the other of markets, networks of external contacts, and agencies of control and administration.¹⁸⁶

Although it has been recognised that the language planning necessary for the development and promotion of these languages was often carried out via coercive means, many minor language communities in Europe persist in the present day as a result of these policies, while many more have disappeared because of them.¹⁸⁷

Minority languages form an underlying theme of the discussion throughout the thesis; these are a direct consequence of the European link between language and territory.¹⁸⁸ The fact that the prevailing ideology in Europe is one of monolingualism and national languages is a testimony to the success of these projects.

¹⁸⁶ Flora Kuhnle and Urwin (eds), *State Formation Nation Building and Mass Politics in Europe: The Theory of Stein Rokkan* (Oxford University Press 1999) 171.

¹⁸⁷ Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Walter de Gruyter 2011).

¹⁸⁸ C. Williams (ed), *Linguistic Minorities Society and Territory* (Multilingual Matters 1991).

Castellino suggests that '[t]he increased State-centricism of post-Westphalian regimes suggests that territoriality is likely to be the most definitive of the factors determining the nature of a minority regime'.¹⁸⁹ As has been demonstrated, language forms a key part of the narrative of the state in Europe. However, the role of the State is changing. The association of territorial integrity with linguistic homogeneity is an outdated inference, which has never been an accurate reflection of the linguistic reality. However, it still carries weight in contemporary Europe. Territorial arrangements for minority language communities are a common solution within most EU Member States.¹⁹⁰ Hornsby and Agarín point out the obsolescence of these attitudes, maintaining that 'the logic of linguistic territorialization espoused by the EU and the majority of nation-states worldwide dismisses the future reality of an increasingly borderless world and the importance of linguistic identity in each individual's life.'¹⁹¹

As the world becomes increasingly globalised and the role of the nation state is called into question, the place of language has shifted. The process of 'deterritorialization' is identified as a key

¹⁸⁹ J. Castellino, 'The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis' (2010) (17) *International Journal on Minority and Group Rights* 393–422.

¹⁹⁰ Territorial language rights are observed as an integral part of the constitutions of Italy Belgium Spain and Hungary, see further C.Williams (ed), *Linguistic Minorities Society and Territory* (Multilingual Matters 1991).

¹⁹¹ Michael Hornsby and Timofey Agarín, 'The End of Minority Languages? Europe's Regional Languages in Perspective' (2012) (11) 1 *Journal on Ethnopolitics and Minority Issues in Europe* 88-116.

feature of globalization.¹⁹² David Harvey describes this process as time-space compression.¹⁹³ Globalisation is eroding territorial barriers. The following section will explore some of the effects that modern globalised society has had on language, and how these have been applied to academic study of language in society.

III Language and Globalisation

This section will briefly outline some of the linguistic interactions and connections which have emerged or changed due to globalisation, as they are relevant to the approaches in the analysis of language discussed throughout the thesis. This section addresses the relationship between language and economics, the evolving relevance of territorial boundaries to linguistic boundaries, and the development of linguistic ideologies. It outlines some of the major theorists in this area, and aims to serve as a background introduction to the understanding changing role of language and how this fits in with the European Union's legal and political context.

According to Albrow and King, 'Globalisation refers to all those processes by which the peoples of the world are incorporated into a single world society, global society.'¹⁹⁴ A further key aspect of the theorisation of Globalisation appears to be the shortening of distances and the intensification of cross-cultural interaction.

¹⁹² N. Coupland (ed), *The Handbook of Language and Globalisation* (Blackwell 2010).

¹⁹³ David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Blackwell 1990).

¹⁹⁴ Martin Albrow and Elizabeth King (eds), *Globalization knowledge and society: readings from International sociology* (Sage 1990) 9.

Giddens proposes that 'Globalisation can [...] be defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.'¹⁹⁵ Held suggests in the same vein that 'Globalisation can be thought of as a process (or set of processes) which embodies a transformation of the spatial organisation of social relations and transactions.'¹⁹⁶ Appadurai defines globalisation as flows of people, money, technology, media messages and ideas.¹⁹⁷ 'Globalisation' is a complex phenomenon, and the effects of globalisation on culture and language are innumerable.¹⁹⁸ The concept of global cultural flows is of particular importance to the belief that language and culture are inextricable, and their relationship is in constant flux. This idea will be examined further in chapters 3 and 4.

Language is central to the debate on globalisation and the convergence and divergence of local identities since the start of the twenty-first Century.¹⁹⁹ Language is now a product as well as a

¹⁹⁵ "the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa", in Anthony Giddens, *Consequences of Modernity* (Polity Press, 1990), 64.

¹⁹⁶ David Held, A. McGrew, D. Goldblatt, and J. Perraton, *Global Transformations: Politics Economics and Culture* (Polity Press 1999) 16.

¹⁹⁷ A. Appadurai, 'Disjuncture and difference in the global cultural economy' (1990) 2(2) *Public Culture* 1-24.

¹⁹⁸ N. Coupland (ed), *The Handbook of Language and Globalisation* (Blackwell 2010).

¹⁹⁹ Peter Ives, 'Cosmopolitanism and global English: language politics in globalisation debates' (2010) 58 (3) *Political Studies* 516-535.

process, and is an important marker of authenticity.²⁰⁰ Language as authenticity is crucial in dealing with local markets, and authenticity is one way to assert consumer power in a world where a globalised market is so competitive for producers.²⁰¹ The short introduction which follows should serve as a brief outline of the effects that the global economic environment has had on language, in particular in Europe.

The notion of language as an instrument for empire is not a new one, its instrumentality in the construction of European colonies around the world has been touched upon. However, the term 'linguistic imperialism' has recently gained a new currency. This description has been used not to analyse language in periods of colonisation but rather was coined by Peter Mühlhäusler to argue that diversity is being eroded by the exponential growth of powerful language over others.²⁰² Imperialism as a term has been used further to lament the spread of English.²⁰³

Endangered languages are cause for concern given that if trends continue, estimates suggest that half the languages spoken in

²⁰⁰ Monica Heller, 'Language as a Resource in the Globalised New Economy' in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

²⁰¹ Monica Heller, 'Language as a Resource in the Globalised New Economy' in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

²⁰² P. Mühlhäusler, *Linguistic Ecology: Language Change and Linguistic Imperialism in the Pacific Region*. (Routledge 1996).

²⁰³ Phillipson Robert, *English-only Europe?: Challenging Language Policy* (Routledge 2003).

the world today will be gone within the next century.²⁰⁴ Media discourse displays concern for the phenomenon of 'language death'²⁰⁵ and endangerment.²⁰⁶ Issues of language death have garnered popular attention.²⁰⁷ The concept of the death of a language is controversial, and the term 'language shift' is generally preferred, as language itself does not die, but speakers merely switch to another variety of language. Language endangerment is becoming a central concern worldwide.

The debates about language and globalization, including the spread of English, the development of linguistic markets, the commodification of identity, the disappearance of local usage and linguistic homogenisation are echoed at the EU level.²⁰⁸ In trying to assess the effects that the modern, globalised society has had on language, the interaction between language and economics has become a particularly popular topic in sociolinguistics since the beginning of the 21st century.²⁰⁹ Edwards observes that:

²⁰⁴ Tore Janson, *The History of Languages* (Oxford University Press 2012) 212; see also Moseley Christopher *Encyclopedia of the World's Endangered Languages* (Routledge 2007).

²⁰⁵ Mark Janse and Sijmen Tol (eds), *Language Death and Language Maintenance* (2003); P. Mulhausler, 'Language Planning and Language Ecology' 2000 (1) *Current Issues in Language Planning* 306-367.

²⁰⁶ A. Duchêne and M. Heller (eds), *Discourses of Endangerment: Ideologies and Interests in the Defense of Languages* (Continuum 2007).

²⁰⁷ Kolbert Elizabeth, 'Last words: a language dies' *The New Yorker* (6 June 2005) 46-59.

²⁰⁸ This thesis does not address the idea of language as a commodity which has emerged in recent scholarship and which may also fit into the conceptualisation of the EU and the language rights it provides.

²⁰⁹ See sections in Chapter 2 and 3.

[l]anguage decline and shift are most often symptoms of contact between groups of unequal political and economic power. Decline, then, is an effect of a larger cause, and it follows that attempts to arrest it are usually very difficult.²¹⁰

The standardisation of language was affected by the ideology of nationalism. Another significant historical development which increased the salience of shared language over vast geographical swathes was the Industrial Revolution.²¹¹ The opportunities and necessities it created expanded the need for common language and communication. According to Bauman and Briggs, philosophers and linguists since the 1600s created new forms of social inequality thorough the nexus between modernity and standard language.²¹² Shared language is seen as central to modern industrial and management models of economics and is linked to the emergence of the modern state.²¹³ Moreover, the development of the Welfare State and its universal education is an important factor in the propagation of linguistic homogeneity.²¹⁴ The provision of universal education by the nation-state both necessitated and encouraged linguistic standardisation, leading to more homogeneity within

²¹⁰ J. Edwards, 'Players and power in minority-group settings' (2006) *Journal of Multilingual and Multicultural Development* 27(1) pp 4-20 7.

²¹¹ R. Baumann and C. L. Briggs, *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press 2003).

²¹² R. Baumann and C. L. Briggs, *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press 2003).

²¹³ Monica Heller, 'Globalization the new economy and the commodification of language and identity.' (2003) 7(4) *Journal of Sociolinguistics* 473-492.

²¹⁴ John Myhill, *Language Religion and National Identity in Europe and the Middle East* (John Benjamins 2006).

language across Europe and, over time, in the rest of the world. The necessity of linguistic homogeneity for economic development was a given by the twentieth century.²¹⁵ The full extent of the economic role of language and the interconnection between languages, economic behaviour and power within the European Union goes beyond the scope of this thesis. It is sufficient to note that they are fundamentally linked. The creation of standard languages and their association with political power created economic incentives for language convergence.

(i) Language and Economics

Economic analysis of language is a way to identify rational actors and to explain the power play between languages.²¹⁶ It also analyses language as a public good or an economic resource for the State.²¹⁷ Economic theorists of language adopt the reasoning of economics to sustain their case for language preservation.²¹⁸

Vaillancourt was among the first to economically analyse language in the 1980s in Canada, identifying the interaction between language and economics as the key to deciding on linguistic

²¹⁵ Monica Heller, 'Globalization the new economy and the commodification of language and identity.' (2003) 7(4) *Journal of Sociolinguistics* 473-492.

²¹⁶ D. Laitin, 'The Game Theory of Language Regimes' *International Political Science Review* 14 (1993): 227-239.

²¹⁷ Grin Francois, 'Economic Considerations in Language Policy' in Ricento Thomas (Ed), *An Introduction in Language Policy* (Blackwell 2006) 77-94.

²¹⁸ For an overview see De Schutter H. 'Language policy and political philosophy: on the emerging linguistic justice debate.' *Language Problems & Language Planning* . (2007) 31.1 1-23.

policies.²¹⁹ The sociolinguistic usage of the term linguistic market began in the 1970s.²²⁰ Bourdieu's notion of the linguistic market implements his ideas of 'cultural capital', he analyses the operation of linguistic capital in a market of cultural production.²²¹ The study of how market forces affect language choice has come to the fore, within a context of declining linguistic diversity globally. Ammon and De Swaan both create models in which different languages have different capital values. This approach sees linguistic shift as a rational economic decision.²²²

François Grin categorises the academic analysis of the economic value of languages into six approaches: language as a defining element of economic processes, language as an element of human capital in which people invest, language teaching as social investment, language policies and their economic implications, income inequality based on language, and language work (such as interpreting and translation) as an economic sector.²²³ However, analysis of language through an economic lens may be incompatible

²¹⁹ Vaillancourt F. (ed) *Economie et langue* (Conseil de la langue française 1985) ; R. Baldauf and R. Kaplan (eds.) *Language Planning and Policy in Europe* (Vol. 2). (Multilingual Matters 2006)

²²⁰ According to Coupland this nomenclature can be traced to Sankoff and Laberge 'The linguistic market and the statistical explanation of variability' in *Linguistic Variation: models and Methods*, 239-50 (Academic Press New York) cited in Nikolas Coupland 'introduction: Sociolinguistics in the Global Era' in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

²²¹ Pierre Bourdieu, *Language and Symbolic Power* (edited by J.B. Thompson) (Polity Press 1991).

²²² Abram De Swaan, *Words of the World: The Global Language System* (Wiley 2002) and Ulrich Ammon World Languages: Trends and Futures' in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

²²³ François Grin 'English as Economic Value: Facts and Fallacies' (2003) 20 (1) *World Englishes* 65-78.

with ideas of language rights.²²⁴ Theorisations of the interaction between language and economics will be further explored in the next chapter, when examining the interpretation of language rights in the domain of political philosophy.

Economic factors profoundly affect language shifts, for example the shift towards 'prestigious codes' that is to say standard language, or in fact other languages. The articulation of languages with economic values can be theorised as part of Appadurai's 'production of locality'²²⁵ as part of his theory of Globalisation. The symbolic value of language is being thrown into question by globalisation; and language is being redefined as an economic commodity.²²⁶ Susan Gal maintains that we are witnessing the construction of a new language ideology.²²⁷ This is related not only to 'ethnolinguistic diversity as a value in itself',²²⁸ but also to economic advantages that competence or fluency in a particular language can

²²⁴ François Grin and François Vaillancourt, 'The economics of multilingualism: Overview and analytical framework' in William Grabe (ed). *Annual Review of Applied Linguistics* (Cambridge University Press 1997) 43-65; François Grin, 'The Cost-Effectiveness Evaluation of Minority Language Policies: Case Studies on Wales Ireland and the Basque Country' (European Centre for Minority Issues 1999); François Grin, 'Language planning and economics' (2003) 4(1) *Current Issues in Language Planning* 1-66.

²²⁵ A. Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' *Theory Culture and Society* 7 1990 pp 295-310.

²²⁶ M. Jacquemet, 'Transidiomatic practices: Language and Power in the age of globalisation' *2005 Language and Communication* (25) pp257-77.

²²⁷ Susan Gal, 'Migration, Minorities and Multilingualism: Language Ideologies in Europe' in Clare Mar-Molinero and Patrick Stevenson (eds) *Language ideologies policies and practices: language and the future of Europe* (Palgrave Macmillan 2006).

²²⁸ Susan Gal, 'Migration, Minorities and Multilingualism: Language Ideologies in Europe' in Clare Mar-Molinero and Patrick Stevenson (eds) *Language ideologies policies and practices: language and the future of Europe* (Palgrave Macmillan 2006) 26.

give.²²⁹ The economic reality is one of a globalised economy based around services. Within this service context language skills or linguistic competence is key, and is a strong economic resource.²³⁰ It is argued that the commodification of language has led to the detachment of language as a skill from language as identity.²³¹ The effects of this can be felt in the European Union. Language is dissociated from its deterministic connotations, which associated it strongly with identity and belonging, and returns to its initial function as a tool. English is the language most associated with this functionality free from identitarian associations. The role of English in the world is a prominent theme in the literature on language and globalisation.²³² The spread of English is a core feature of the new global linguistic reality.²³³ The effect that English has had on the global linguistic panorama is also linked to its economic weight, which ties in to the economic analysis of language briefly outlined above. The use of English in the workplace is now standard practice in many multinational companies, and it is often suggested as a solution to

²²⁹ Grin François, 'Economics and Language Policy: Recent Advances and Controversies' in M. Hellinger and A. Pauwels (eds) *Handbook of Applied Linguistics* (vol. 9) (Mouton de Gruyter 2007).

²³⁰ Duchêne and M. Heller (eds), *Discourses of Endangerment: Ideologies and Interests in the Defense of Languages* (Continuum 2007).

²³¹ M. Heller, 'The commodification of language.' *Annual Review of Anthropology* 2010 (39) 101-114.

²³² Van Parijs Philippe, *Linguistic Justice for Europe and for the World* (Oxford University Press 2011).

²³³ D. Crystal, *English as a Global Language* (2nd edn, Cambridge University Press 2003).

the linguistic problems of the European Union.²³⁴ The role of English will be discussed further in the context of the European Union.

The historical and contextual factors sketched in this chapter fundamentally affect how we perceive language. This thesis argues that language is central to political organisation in Europe. The legal protections of language explored in part II of this thesis pertain to official languages only and next section examines the academic dissection of our perception of language, to clarify where this understanding of 'language' originates.

IV Language Ideology

Language ideology is fundamental to approaching questions of language in the European Union. We can broadly understand 'language ideology' as 'ideas about the nature of language' for the purposes of this thesis. This includes considerations regarding what is and is not a language, considerations about correct language usage, and considerations about language in the community. What constitutes a language is a culturally specific concept. What is and what is not language is affected by the historical ideological context we have considered here. What can be constituted a 'minority' language, a pidgin, a creole a dialect or a fully correct standardised language associated with a state is related to language ideology.²³⁵

²³⁴ Constant Leung and Jennifer Jenkins (eds), *Reconfiguring Europe: the Contributions of Applied Linguistics* (Equinox Publishing 2006). This point is returned to at length in chapter 5.

²³⁵ M. Hellinger and A. Pauwels (eds), *Handbook of Applied Linguistics* (vol. 9) (Mouton de Gruyter 2007).

There are presumptions inculcated in modern scientific theorisation of language which have affected our cultural understanding of this phenomenon.²³⁶ The Eurocentric view of language permeates all academic discussion of language, forming the foundations of the 'scientific' discipline of linguistics.²³⁷ Linguistic ideology²³⁸ is the sum of our preconceptions about language, which we have built up through a lifetime of interaction with the governance structures of the state, the educational system and with the language, oral and written, which surrounds us in our world.²³⁹

The historical exposition of the previous section aimed to reveal the extent to which the apparently neutral, scientific description of language conceals within it linguistic ideology.²⁴⁰ This will also be important in the examination of language rights as a theoretical principle. In approaching the concept of language rights, it is fundamental to understand the place of language in society, examining the dynamic of power between organised political systems and language choice. To fully understand the role of language in the European Union from a legal perspective it is fundamental to contextualise the position of Member States in relation to language.

²³⁶ B. Schieffelin, K. Woolard, and P.V. Kroskrity, *Language Ideologies: Practice and Theory* (Oxford University Press 1998).

²³⁷ Coupland and Jaworski (eds), *The New Sociolinguistics Reader* (Palgrave Macmillan 2009); J. Blommaert (ed), *Language Ideological Debates* (Mouton de Gruyter 1999).

²³⁸ Also referred to as 'the ideology of language'.

²³⁹ B. Schieffelin, K. Woolard, and P.V. Kroskrity, *Language Ideologies: Practice and Theory* (Oxford University Press 1998).

²⁴⁰ Joseph Errington, *Linguistics in a Colonial World* (Blackwell 2008).

The rules on language currently in place in the European Union must be examined via their historical and ideological origins. The concept of 'linguistic ideology' in postmodernist thought has been used to deconstruct discourse and explain power relationships.²⁴¹ Bakhtin's conception of the ideology of language explains that language is linked inherently to each person's ideology, and language is inherently subjective and personal.²⁴² Drawing on Foucault, it is considered that the institutional and historical conditions within which languages, as objects of knowledge emerged is completely inextricable from our understanding of the nature of language itself.

The effects that European history has had on the evolution of common ideas of language are clear. How language is perceived in our day is largely due to the nationalist narratives which have been formative in the history of our continent. The national language is not a natural phenomenon, but a recent European invention.²⁴³ This model is European in creation, and is protected fervently as a notion by certain states, many of whom were founding members of what is now the European Union.²⁴⁴ In Europe, the majority of people spoke

²⁴¹ T. A. Van Dijk, *Ideology: A multidisciplinary approach* (Sage 1998); K. Woolard and B Schiffelin, 'Language Ideology' (1994) (23) *Annual Review of Anthropology* 55-82.

²⁴² M. Bakhtin, *The Dialogic Imagination: Four Essays*. Michael Holmquist (ed) trans. Caryl Emerson and Michael Holmquist (University of Texas Press 1989).

²⁴³ Susan Gal, 'Migration, Minorities and Multilingualism: Language Ideologies in Europe' in Clare Mar-Molinero and Patrick Stevenson (eds), *Language ideologies policies and practices: language and the future of Europe* (Palgrave Macmillan 2006).

²⁴⁴ See further; Carmichael and Barbour (eds), *Language and Nationalism in Europe* (Oxford University Press 2000); R. Baumann and C. L. Briggs, *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press

regional variations of what would probably today be considered the same language.²⁴⁵ The regional variations in language within a geographical entity were often mutually unintelligible.²⁴⁶ Linguistic differentiation (i.e. calling one thing a language and another thing a different language, or differentiating between a language and a dialect) is a process which is profoundly affected by our personal understanding of language and the of the purportedly objective term 'language'.²⁴⁷ Language ideology has been defined as the way in which actors:

'[l]ocate, interpret, and rationalize sociolinguistic complexity, identifying linguistic varieties...and accounting for differences among them.'²⁴⁸

Jaffe explains linguistic ideology as relating to:

'[a] wide range of phenomena that include (1) ideas about the nature of language itself; (2) the values and meanings attached to particular codes, genres, media and discourses; (3) hierarchies of linguistic value ... and (4) how

2003); Percy and Davidson (eds), *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012).

²⁴⁵ Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Berlin:Walter de Gruyter 2011).

²⁴⁶ Peter Burke and Roy Porter (eds), *The Social History of Language* (Cambridge University Press 1987).

²⁴⁷ J. Milroy, 'Language Ideologies and the consequences of standardisation'(2001) 5(4) *Journal of Sociolinguistics* 530-55.

²⁴⁸ Irvine and S. Gal, 'Language-Ideological Processes' in Coupland and Jaworski (eds)*The New Sociolinguistics Reader* (Palgrave Macmillan 2009) 375.

specific linguistic codes or forms are connected to identities ... as well as sociocultural roles and stances.²⁴⁹

What is casually termed a 'language' is, in fact, widely recognised as a European invention.²⁵⁰ This is especially important for the discussion of the role of language in the political structure of the European Union, as the terms with which we discuss languages are seen to be tied to a particularly European view of language.²⁵¹

The explanation of language ideologies and their importance for inter-language demarcation (identifying one thing as Italian and another as Spanish, for example) are equally valid for intra-language observations. This means that the phenomenon whereby one utterance is considered one 'language' and another utterance is considered in 'another language' can be translated to a context where one utterance is correct and another is incorrect.²⁵² The rules by which we consider a statement as correct in English, divorced from the comprehensibility of its meaning, is affected by a body of grammar, a rulebook (literal and figurative) and a distinct set of

²⁴⁹ A. Jaffe, 'The production and reproduction of language ideologies in practice' in Coupland and Jaworski (eds), *The New Sociolinguistics Reader* (Palgrave Macmillan 2009) 391.

²⁵⁰ See J. Milroy, 'Language Ideologies and the consequences of standardisation' (2001) 5(4) *Journal of Sociolinguistics* 530-55; Susan Gal, 'Migration, Minorities and Multilingualism: Language Ideologies in Europe' in Clare Mar-Molinero and Patrick Stevenson (eds), *Language ideologies policies and practices: language and the future of Europe* (Palgrave Macmillan 2006).

²⁵¹ See J. Milroy, 'Sociolinguistics and Ideologies in Language History' in JM Hernández-Campoy and JC Conde-Silvestre (eds), *The Handbook of Historical Sociolinguistics* (Wiley Blackwell 2012); M. Hüning, U. Vogl and O. Moline (eds), *Standard Languages and Multilingualism in European History* (John Benjamins 2012).

²⁵² J. Milroy, 'Language Ideologies and the consequences of standardisation' (2001) 5(4) *Journal of Sociolinguistics* 530-55.

ideological choices which have been made throughout the history of the language.²⁵³ These standards vary between British English, American English, Australian English and so forth, but as native English speakers we feel we can identify whether something is in 'correct English' or is somehow incorrect. This intra-language differentiation, between correct and incorrect is largely distinct from whether we can understand the meaning of the communication. These internalised rules form part of our linguistic ideology.

This ideology affects our ontological understanding of language, on which political discourse about minority languages and dialects is based. These cause problems for discussions of how to deal with languages politically and legally, as will be demonstrated by this research. Contemporary academic debate is more nuanced, and there is explicit and implicit recognition of the ideological subjectivity often present even in descriptions which purport to be objective.²⁵⁴ However, the typical understanding of 'languages' common across much of the Western world is as a well-defined, countable phenomenon, even within scientific academic disciplines. Indeed, 'The influence of the standard ideology on traditional historical descriptions of major modern languages cannot be overstated.'²⁵⁵

²⁵³ Lynda Mugglestone (ed), *The Oxford History of English* (Oxford University Press 2012).

²⁵⁴ Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Berlin:Walter de Gruyter 2011).

²⁵⁵ J. Milroy, 'Sociolinguistics and Ideologies in Language History' in *The Handbook of Historical Sociolinguistics* (Wiley Blackwell 2012) page 579.

Linguistic standardisation is part of the European legacy in the rest of the world, and is a contested notion.²⁵⁶ Most linguists recognise that the relationship between language varieties is dynamic.²⁵⁷ Standardised varieties are considered 'correct' but this understanding may change depending on temporal and geographical factors.²⁵⁸

Distinguishing between 'dialects' and 'languages' proper is one of the most laboured debates in linguistics and there is no satisfactory apolitical answer to the challenge of differentiating a language from a dialect.²⁵⁹ Political events, such as Norwegian independence or the break-up of the former Czechoslovakia have led to former 'dialects' being characterised as languages, this indicates just how profoundly political developments can precipitate linguistic change, 'creating separate languages where previously none existed.'²⁶⁰ One need only look to the situation in countries of the former Yugoslavia to see the permeability of the language/dialect differentiation, an arbitrary distinction which is in constant flux.²⁶¹

²⁵⁶ Hüning U. Vogl and O. Moline (eds), *Standard Languages and Multilingualism in European History* (John Benjamins 2012).

²⁵⁷ Chambers J.K. and Peter Trudgill, *Dialectology*. (Cambridge University Press 1999).

²⁵⁸ J. Milroy, 'Sociolinguistics and Ideologies in Language History' in JM Hernández-Campoy and JC Conde-Silvestre (eds), *The Handbook of Historical Sociolinguistics* (Wiley Blackwell 2012).

²⁵⁹ E. Haugen, 'Dialect Language Nation' *American Anthropologist* (1966) 68 922–935.

²⁶⁰ Stephen May, 'Language Nationalism and Democracy in Europe' in G. Hogan-Brun and S. Wolff (eds) *Minority Languages in Europe* (Palgrave Macmillan 2003) 212.

²⁶¹ For more on this see Busch and Kelly-Holmes (eds) *Language Discourse and Borders in the Yugoslav Successor States* (Multilingual Matters 2004); Brigitta

The language formerly known as Serbo-Croatian is now four distinct national languages; Bosnian, Croatian, Serbian and Montenegrin. These are distinguishable by certain grammatical and lexical features, but are fully mutually intelligible. Serbian can be written using Cyrillic or Latin script. When written in Latin script, Serbian uses the same characters and diacritics as Croatian. Bosnian may also be written in Arabic script but now usually is seen in either Latin or Cyrillic script. This language change is ongoing and is highly politicised,²⁶² with the boundaries of language and territory in flux.²⁶³ Pupavac claims that the 'treatment of Bosniaks, Croats, and Serbs as separate language communities has tended to legitimise ethnic divisions and social exclusion.'²⁶⁴ This Balkan example is a contemporary European demonstration of language politics in play.²⁶⁵

The ideology of language, and the instrumentality of language for power are at the source of European colonial history, and this is central to the scientific study of language.²⁶⁶ Errington, a historian of

Busch *New national Languages in Eastern Europe* in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

²⁶² Tatjana Felberg Radanović and Ljiljana Šarić (2013) *Discursive Construction of Language Identity through Disputes in Croatian and Montenegrin Media Scando-Slavica* 59:1 7-31.

²⁶³ Brigitta Busch, 'New National Languages in Eastern Europe' in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

²⁶⁴ V. Pupavac, 'Language Rights in Conflict and the Denial of Language as Communication' (2006) *the International Journal of Human Rights* (10) 161-78.

²⁶⁵ R. Greenberg, *Language and Identity in the Balkans: Serbo-Croatian and Its Disintegration* (Oxford University Press 2004).

²⁶⁶ Vivien Law, *The History of Linguistics in Europe From Plato to 1600*. (Cambridge University Press 2003).

colonial linguistics, identifies that linguistics makes languages 'objects of knowledge so their speaker could be made subjects of power.'²⁶⁷ Language ideology underpins the scientific discipline of linguistics and on the study of the world's language systems, and has caused much debate, as will be explored in the next chapter.²⁶⁸ The preceding discussion demonstrates that only with the construction of nation-states and the advent of the modern concept of the State, which required some involvement on the behalf of the citizens, has language acquired the political importance which deems certain ways of speaking 'languages' and others not. This practice has rendered European states apparently monolingual. For centuries, in Europe, the idea of nation has been fundamentally linked to the notion of a shared language. This creation of practices and ideologies by European elites was then universalised, creating what we now view as language itself. Language control is fundamentally linked with the creation of the nation, and linguistic problems in the European Union bear witness to this.²⁶⁹

V Conclusions and Analysis

The history of language and languages is the history of humanity. It is important to critically appraise what is meant by

²⁶⁷ Joseph Errington, *Linguistics in a Colonial World* (Blackwell 2008) 3.

²⁶⁸ Woolard and Schiffelin, 'Language Ideology' (1994) (23) *Annual Review of Anthropology* 55-82.

²⁶⁹ Máiréad Nic Craith, 'Linguistic Heritage and Language Rights in Europe: Theoretical Considerations' in M. Langfeld, W. Logan and M. Nic Craith (eds), *Cultural Diversity Heritage and Human Rights*. (Routledge 2010) 45-62.

'language' and the historical and political developments which have formed this understanding before assessing the role of languages in the structures of the European Union. This thesis analyses the legal protections afforded to language in the system of the European Union. It identifies three main types of language protection in the legal system of the EU; institutional use, multilingual authenticity and official language rights. In order to examine these, it is necessary to understand the theoretical limitations of legal regulation of language. The idea of language rights was examined from a sociolinguistic, philosophical and finally legal perspective.

The relationships between language and territory and language and political organisation were explored. In analysing the reasons behind the EU's maintenance of an unwieldy regime which grants one language per state. This chapter unpicked a variety of historical approaches to language, identifying the different schools of academia which have examined language, and how their explanations of this human phenomenon have evolved. This explanatory chapter had the intention of demonstrating the complex and multi-layered nature of the concept 'language'. It also contextualised it within Europe. This chapter has demonstrated the interlaced history of European nation-states and language. Its aim was to establish clear links between the current Member States of the European Union and the historical nation-states who pioneered language engineering.

This chapter has introduced the themes of language in a globalised world and the interaction of language with economics which are fundamental in addressing the questions of language preservation which will be examined in the next chapter. This chapter has shown how what we consider to be 'language' has been affected by European history, and in turn Europe's historical predominance and colonial past has affected how language is perceived. Naturally, economic incentives created a favourable environment for control of language, and often language change happened organically. However, exposition of the relationship between language and power helps us to understand the economic weight of language choices, which will be examined further in chapter 3.

The twentieth century has witnessed a revolution in linguistic philosophy and how we perceive language and communication. Language has been revealed to be a nuanced concept with many social, personal and societal aspects. Language is no longer analysed as a static phenomenon. The human and personal dimension of language and how this is collectively expressed by the community is fundamental to the academic study of language and is implicit in much of the policy discourse on language. This approach is at odds with the *realpolitik* of language as a measure of political power within the EU, which centres on national languages. Taking these questions into account is essential when attempting to appraise the role of language in the European Union, as deep-rooted attachments to

language are an essential element of the foundation of many of the Member States of the EU. This will help in the iteration of a theory of language rights for the European Union. It shows why the protection of Official languages is of central importance to the Member States, and why multilingual authenticity of EU law is so valued.

Questioning our approach to language, that is to say, taking into account linguistic ideology, is integral to the consideration of the legal protection of language in the European Union.

Chapter 3: The limits to 'Language Rights'

Innovative and substantial legal protections of language are central to the political and legal equilibrium achieved by the European Union. This thesis demonstrates that the multilingual nature of the EU is a distinctive feature of its legal order which reflects the centrality of language. The present chapter aims to demonstrate the limits of restricting our understanding of legal protection of language to 'language rights'. It outlines the major questions and discussions in the contemporary debate on language rights. This chapter explores the limits to a theory and/or a practical implementation of 'language rights' from an interdisciplinary perspective. The political charge of this area makes its regulation by the law complex. Analysing legal protections of language through the lens of 'language rights' alone leads to an incomplete picture. This chapter aims to demonstrate the conceptual limits of 'language rights'. Examining the theoretical background in this way strengthens the analysis of the broader legal protections of language in the EU in part II. It will be argued in part II that language rights in the EU are mainly procedural, rather than substantive in nature. The legal protection of language in the European Union, therefore, in limiting itself to the protection of official languages only, means that these ideological difficulties can be avoided. The legal protection of language in the European Union is bound up in the status of official language.

Comparing the various understandings of the term 'language rights', particularly in light of the complexity of 'language' highlighted in chapter 2 allows us to see the limits to assessing legal protections of language only in these terms. This chapter examines the idea of language rights from a sociolinguistic, philosophical and finally legal perspective.

Chapter 2 investigated language ideological preconceptions and attitudes with regard to language. The first section attempted to address fundamental questions regarding the nature of language. The second section then investigated the political and historical role of language in the construction of the nation. This contextualised the debate on the role of language in the EU within a historically Eurocentric ideology of language, and explains its provenance and development. The third section broadly outlined the theories on language in a globalised world economy, and briefly addressed how the nationalistic theories of language are contextualised in the global sphere. This allows us to understand the approach of the Member States to the legal protections of 'their' languages within the European Union.

This chapter outlines the divergent normative stances on the issues of language rights. It takes the form of a literature review, examining how the question of language rights has been approached across the principal academic disciplines which have reflected on these issues. This chapter will consider the normative bases behind

the varying conceptions of language rights. It aims to identify the commonalities and divergences in the conceptualisations of language rights in order to clarify the nature of the legal protections of language in the European Union in part II.

This begins with an elaboration of the language rights themes which have emerged in the development of sociolinguistic ideas on language, building on the description of the origins of sociolinguistics in chapter 2. Part II of this chapter returns to the theme of language and the State, examining the theorists who have analysed the political formation of the State and its communities. These theorisations of the problems of language rights from a philosophical and linguistic point of view tend not to fully consider the difficulties from a legal point of view, which are tackled later in the chapter. Any claim to positive rights is an appeal to the law.

Prima facie, the use of one language by public authorities excludes groups who do not speak that language. Certain groups within a state, who do not form part of the majority language community may have a legitimate claim to that communication with the state. Based on the outlines of the historical and nationalist roots of the concept of 'language' this chapter identifies the limits to a concept of 'language rights'. The practical application of 'language rights' within the political and legal system of the European Union will be examined in part II, which outlines the language rules of the EU in detail in chapters 5 and 6. The underlying philosophy of these

language rules resides in the fact that the wording of the Treaty is equally valid in all 24 Member State languages

The discursive move towards rights in modern political and legal thought and commentary has been widely critiqued.²⁷⁰ However, it is undeniable that 'the language of rights is central to how language problems are approached today.'²⁷¹ Entering into the territory of rights discourse means that 'a complex and polarising debate is inescapable.'²⁷² 'Language Rights' is a contested concept with many potential meanings.

This chapter will assess the various enunciations of the idea of language rights across the disciplines which concern themselves with these issues, aiming to tease out the differences in approach of the various academic discussions of linguistic rights issues. The basis for current conceptions of language rights from the point of view of other academic disciplines must first be considered in order to better understand the quandary of language rights from a legal perspective, and, in the later chapters of the thesis, apply this to the context of the European Union.

²⁷⁰ Norberto Bobbio, *The Age of Rights* (Polity Press 1996); Mary-Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (The Free Press 1991); Joseph Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27; J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 (2) *The American Political Science Review* 303-316.

²⁷¹ Vanessa Pupavac, *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012).

²⁷² Fernand de Varennes and Clare Murray, 'Thematic Introduction' (2001) *International Journal on Multicultural Societies* (3) 2, 56-60.

I Sociolinguistics and Language Rights

Sociolinguistics is concerned with language variation and the broad processes of language change.²⁷³ Sociolinguistics includes a broad spectrum of commentary on topics ranging from ethnographic research in linguistic communities, studies on the situational use of language, and critical discourse analysis.²⁷⁴ It addresses questions such as accent, language evolution and linguistic differentiation, but its overarching focus is on studying language in social uses. Applied Linguistics today comprises within it the discipline of sociolinguistics. However, the contemporary discipline of Applied Linguistics is a broader term which includes all practical applications of language studies, for example translation, speech therapy and the study of language acquisition.²⁷⁵ Initially, the terms were used interchangeably.²⁷⁶ There is controversy over the origin of the term 'sociolinguistics'²⁷⁷ and the boundaries of this discipline are still unclear.

This chapter outlines the limits to a theory of 'language rights'.

A fuller cross-disciplinary understanding of the academic debate

²⁷³ B. Spolsky, *Sociolinguistics* (2nd Edition) (Oxford University Press 2010).

²⁷⁴ Rajend Methstrie (ed), *The Cambridge Handbook of Sociolinguistics* (Cambridge University Press 2004); Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

²⁷⁵ M. Hellinger and A. Pauwels (eds), *Handbook of Applied Linguistics* (Mouton de Gruyter 2007).

²⁷⁶ Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

²⁷⁷ J.K Chambers, *Sociolinguistic Theory* (2nd ed. Oxford 2002) credits it to HC Currie in a 1952 paper exploring the relationship between speech and social status. However it is also attributed to a group who met at the University of Indiana, Bloomington in the 1960s.

involved means that the legal protection of language in the European Union can then be understood outside the limits of 'language rights' theory alone. It was explained in chapter 2 that the advent of sociolinguistics marked the move from the more classically scientific investigations of formal linguistics to a more social view of the human faculties of language and communication in context. The move towards sociolinguistics 'appealed for studies that would analyse in detail how language is deployed as a constitutive feature of the indigenous settings and events that constitute the social life of the societies of the world.'²⁷⁸ Sociolinguistics in its previous incarnations remained firmly as a subdivision of linguistics where linguists investigated language in its standard forms and geographical variations from the standard.²⁷⁹ Linguistic Ethnography was a key part of the study of language, using immersion & participation in field work to study the language systems of other civilisations.²⁸⁰

Although prevalent by now, the view of language as a socioculturally created phenomenon is a recent one. As has been established, this view has only gained currency since the twentieth century. The dominant focus of linguistics in the nineteenth century was comparative and historical.²⁸¹ Of course, the study of language in

²⁷⁸ C. Goodwin and A. Duranti (Eds.), *Rethinking context: Language as an interactive phenomenon* (1992 Cambridge University Press).

²⁷⁹ R. Baumann and C. L. Briggs, *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press 2003).

²⁸⁰ Joseph Errington, *Linguistics in a Colonial World* (Blackwell 2008).

²⁸¹ G. Guy, 'Sociolinguistics and Formal Linguistics' in the Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

society has always existed but earlier focus was usually by comparative reference to a standard, and treated themes such as dialectology, or on the study of regional languages or the use of language in colonies.²⁸² This paradigm shift in the academic and scientific approach to language has had a profound effect on the academic discipline of linguistics. Myhill explains the development thus:

Basic to modern linguistics is the assumption that it is primarily social and political factors rather than linguistic facts on the ground that determine which spoken languages come to be popularly considered to be 'languages.'²⁸³

Academic focus in the sociolinguistic study of language is largely on the language spoken by people in their everyday lives, rather than on an abstract standard language divorced from its use.²⁸⁴ By and large, purism and prescriptivist approaches to language are widely seen as outdated, and language is studied as something inherently changeable and variable.²⁸⁵ Sociolinguistics as a distinct academic discipline emerged at a time of great social change and must be

²⁸² For further detail on the history of sociolinguistic developments see, for example, Wardhaugh, *An Introduction to Sociolinguistics* (Blackwell 2006) or Trudgill and Cheshire (Eds.), *The Sociolinguistics Reader Vol.1 Multilingualism and Variation* (Arnold 1998).

²⁸³ J. Myhill, *Language, Religion and National Identity in Europe and the Middle East : a Historical Study* (John Benjamins 2006) 9.

²⁸⁴ For further detail on the history of sociolinguistic developments see for example Wardhaugh, *An Introduction to Sociolinguistics* (Blackwell 2006) or Trudgill and Cheshire (Eds.), *The Sociolinguistics Reader Vol.1 Multilingualism and Variation* (Arnold 1998).

²⁸⁵ Trudgill and Cheshire (Eds.), *The Sociolinguistics Reader Vol.1 Multilingualism and Variation* (Arnold 1998).

considered, when analysing it in the context of language rights, as part of a response to the new global reality which was emerging.²⁸⁶ Its history is tied up in advocacy for changes in general society, particularly in the American context.²⁸⁷

Within sociolinguistics, the role of the state in language began to be examined.²⁸⁸ Any contemporary debate on the nature of language itself must also be situated within a wider debate about the enforcement of norms within language, the roots of which lie in the system of nation-states. The historical factors which led to language standardisation have affected the popular understanding of language issues and the development of language ideologies, which have been outlined in chapter 2. Given their personalisation of a phenomenon previously treated as universal, and their emphasis on language as an individual, subjective entity it is unsurprising that it is from Sociolinguists that we first see widespread academic discussion of the ideas of language rights and the move towards 'Linguistic Human Rights'. The discussion of these issues in the sociolinguistic field, which preceded the current language rights debate, attempted to address a much broader base than simply answering questions about the nature of language.

²⁸⁶ B. Spolsky, *Sociolinguistics* (2nd edn Oxford University Press 2010).

²⁸⁷ R. Wodak, 'History of Sociolinguistics' in Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011), William Labov, *Principles of Linguistic Change* (Blackwell 1994).

²⁸⁸ Language planning will be explored more fully later in the chapter.

It is possible to distinguish three broad strands of language rights discussion within sociolinguistics: language rights to counter language decline, ecolinguistics, and LHR theories. These will be outlined before examining the critique of the notion of language rights in the sociolinguistic field.

The discourse of language rights coincides with a general concern, not limited to professional linguists, about the future of languages in the modern world. The accelerated pace of language disappearance, and the erosion of linguistic diversity that the rapidly changing language situation has provoked have led to scholarly and public concern.²⁸⁹ The spread of written language and the importance of literacy since the beginning of the twentieth century has had a huge effect on language vitality.²⁹⁰ This reality has provoked extensive literature regarding language loss and language death within applied linguistics, which is related to discussions of language rights. Language endangerment, in particular of indigenous or minority languages, initially led to the development of theories on Linguistic Human Rights by sociolinguists. It is important to

²⁸⁹ See Moseley, Christopher (ed), *Atlas of the World's Languages in Danger*, (2010. 3rd ed. UNESCO Publishing) Online version: <http://www.unesco.org/culture/languages-atlas> (accessed 19/5/2013); see also N. C. Dorian, *Investigating Obsolescence Studies in Language Contraction and Death* (Cambridge University Press 1992).

²⁹⁰ Nettle and Romaine, *Vanishing voices: the extinction of the world's languages* (Oxford University Press 2000).

understand these contextual issues before assessing theorisations of language rights.

(i) Endangered languages and language preservation

Language evolution is not a new phenomenon. Languages have constantly disappeared, reappeared and changed so as to become unrecognisable over the course of human history. However, it is the asymmetrical effect of this development which causes apprehension.²⁹¹ The biggest transformation since the dawn of the twentieth century has been the rapid decline of certain languages and language varieties.²⁹² Languages die all the time, in the sense that language use is constantly developing and evolving, but what is new is the speed at which they are dying out.²⁹³ Krauss claims, in a seminal article on the topic that by the next century between 300 and 600 languages will be all that survive, of the world's current estimated 6,800 languages.²⁹⁴

As a result of the historical and colonial factors expanded upon, the language decline currently being experienced across the world

²⁹¹ Michael Morris and Jacques Maurais (eds) *Languages in a Globalising World* (Cambridge University Press 2003).

²⁹² J. A. Fishman (ed) *Can Threatened Languages Be Saved? Reversing Language Shift, Revisited: A 21st Century Perspective* (Multilingual Matters 2001); P. Mülhausler 'Language Planning and Language Ecology' (2000) *Current Issues in Language Planning* (1) 306-367.

²⁹³ D. Nettle and S. Romaine *Vanishing Voices: The extinction of the world's languages* (Oxford University Press 2000); David Crystal *Language Death* (Cambridge University Press 2000); T. Tsunoda *Language Revitalisation and Endangerment* (Mouton de Gruyter 2002).

²⁹⁴ Michael Krauss "The world's languages in crisis" (1992) *Language* 68(1)1-42.

has disproportionately affected certain languages.²⁹⁵ As Janson explains: 'The expansion of school education, travel, trade and mass media bring advantages to large languages and problems to small ones.'²⁹⁶ Chapter 2 introduced the themes of language and economics and language in a globalised world which are contributing to the decline of certain language varieties. Language change in favour of 'big' languages which are associated with economic progress and social advantage has been touched upon in chapter 2, in particular in its investigation of the new postmodern conceptualisation of language as an economic resource. Stephen May believes that it is fundamental to acknowledge the centrality of power relations in this language shift, stating that '[t]he loss of a minority language almost always forms part of a wider process of social, cultural and political displacement.'²⁹⁷ Language shift is a gradual process.²⁹⁸ The late twentieth century literature, explored in the previous chapter, attributes the spread of national languages and consequent loss of smaller languages, not attached to state power, to ideological motivations.²⁹⁹ The United Nations Office of the High

²⁹⁵ Grenoble and Whitley *Saving Languages: An Introduction to Language Revitalization* (2006 Cambridge University Press).

²⁹⁶ Tore Janson *The History of Languages* (Oxford University Press 2012) 209.

²⁹⁷ Stephen May *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd edn, Routledge 2012)

²⁹⁸ Nancy C. Dorian, Language shift in community and individual: The phenomenon of the laggard semi-speaker. (1980) 25 *International Journal of the Sociology of Language* 85-94.

²⁹⁹ Eric Hobsbawm, *Nations and Nationalism since 1780* (Cambridge University Press 1990); Ernest Gellner, *Nations and Nationalism* (first published 1983 2nd edn Blackwell 2006); B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 2006).

Commissioner for Human Rights states that: '[i]ndigenous peoples' languages represent at least 4000 languages of the world's linguistic diversity and most of the indigenous languages belong nowadays to the category of languages 'seriously endangered'.³⁰⁰ Language shift is a process which is only discernible over time, often beginning with the introduction of bilingualism, and a move towards another language over time.³⁰¹

Language rights concerns have materialised in discussions on the preservation of languages. Understanding the issues related to endangered language, the ecology of language and theories of linguistic human rights is important in order to be able to assess the contributions of sociolinguists to the language rights debate. Language Ecology is identified as a distinct movement within language rights debates in sociolinguistics.³⁰² This will be briefly explained, as it underpins the approach of some International policy documents, particularly those of the United Nations bodies. The Linguistic Human Rights theory emerged as part of the ecology of

³⁰⁰ Indigenous Peoples and Minority Unit, *Human Rights Legal Framework and Indigenous Languages*, International Expert G Meeting on Indigenous Languages, 8-10 January 2008, New York, Office of the High Commissioner for Human Rights, UN Doc. PFII/2008/EGM1/15.

³⁰¹ JW Minett and WS-Y Wang, 'Modelling endangered languages: the effects of bilingualism and social structure' (2008) *Lingua* 118, 19 – 45; MV Otero-Espinar, LF Seoane LF, JJ Nieto, and J Mira, 'An analytic solution of a model of language competition with bilingualism and interlinguistic similarity' (2013) *Physica D* 264, 17– 26.

³⁰² S. May, 'Language Rights: moving the debate forward' (2005) *Journal of Sociolinguistics* 9(3) , pp 319- 347.

language approach, but has subsequently moved in a different direction.

(ii) Language Ecology³⁰³

The loss of linguistic diversity is the central concern of the Linguistic Ecology movement, which attempts to address this perceived dangerous imbalance.³⁰⁴ The language ecology or ecolinguistics movement concerns itself with preservation of the planet's linguistic diversity as part of broader concerns for the loss of biodiversity.³⁰⁵ In fact, some go so far as to explicitly correlate biodiversity and linguistic diversity in a causal link where loss of one leads to loss of the other.³⁰⁶ Advocates of an ecolinguistic approach claim that linguistic diversity is a significant aspect of biodiversity.³⁰⁷ Their concern is that 'The world's linguistic 'gene pool,' along with the cultural knowledge associated with these languages, will be irremediably diminished.'³⁰⁸

Discourse on the preservation of languages echoes aspects of the

³⁰³ The term Language Ecology is credited to Haugen in 1972 (E. Haugen, *The Ecology of Language* (Stanford University Press 1972), and was originally intended as merely the study of interactions between a language and its environment. See also Haugen, 'Dialect, language, nation' (1966) *American Anthropologist* 68 922-935.

³⁰⁴ L.A. Grenoble, Language ecology and endangerment in PK Austin and J Sallabank (eds), *The Cambridge handbook of endangered languages* (Cambridge University Press 2011).

³⁰⁵ P. Mulhausler, 'Ecology of Languages' in Kaplan (ed.), *Oxford Handbook of Applied Linguistics* (2nd edn, Oxford University Press 2010) 374.

³⁰⁶ A. Stibbe, 'Ecolinguistics and Globalisation' in N. Coupland (ed), *Handbook of Language and Globalisation* (Blackwell 2010).

³⁰⁷ This belief is integral to all ecolinguistic approaches to language rights, however languages can also be integral to biodiversity in that many indigenous languages serve as a repository for traditional knowledge for more on this see K.D. Harrison, *When Languages Die: The Extinction of the World's Languages and the Erosion of Human Knowledge* (Oxford University Press 2007).

³⁰⁸ Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (Routledge 2nd end 2011).

scientific discourse on biodiversity.³⁰⁹ However, it is possible that analogies with biodiversity are based on an abstraction of language and as such have provoked criticism.³¹⁰ De Swaan reminds us that: 'Threatened languages are not like threatened species: they do not die out but are abandoned by those who used to speak them.'³¹¹

The preservation of 'biocultural diversity'³¹² as part of the planet's ecology of language along with the ecology of the material environment are seen as being necessary for the survival of the planet.³¹³ This line of argument is widespread and is often an undercurrent of discussions on language rights and language preservation. UNESCO's website cites the 'fundamental linkage between language and traditional knowledge.'³¹⁴ In this sense, linguistic diversity can aid in the descriptions of the material environment, and often indigenous languages serve unique descriptive purposes. Certain languages are indubitably a repository for ancient terminology and explanations of natural phenomena.

³⁰⁹ *Journal of Linguistic Anthropology* 2002 12(2) 119-156. (Special issue focusing on the language used when discussing problems of language endangerment.)

³¹⁰ Kenan Malik, *The Meaning of Race: Race, History and Culture in Western Society* (Palgrave / New York University Press, 1996).

³¹¹ Abram de Swaan, 'Endangered languages, sociolinguistics and linguistic sentimentalism' (2004) *European Review* 12 (4) 567-80.

³¹² For more on this concept see Maffi, 'Biocultural Diversity and Sustainability' chapter 18 in Pretty et al (ed), *The SAGE Handbook of Environment and Society* (Sage Publishing 2007).

³¹³ A. Dalby, *Language in Danger: the loss of linguistic diversity and the threat to our future* (Penguin 2003); P. Mulhausler, 'Language Planning and Language Ecology' *Current Issues in Language Planning* 2000 (1) 306-367.

³¹⁴ <http://www.unesco.org/new/en/culture/themes/endangered-languages/biodiversity-and-linguistic-diversity/> <last accessed 7 May 2013>.

Linguistic Human Rights have developed in an independent direction, and can be separated from the ecolinguistics movement within the field of sociolinguists' conceptions of language rights.³¹⁵ The advent of the ideas of 'Linguistic Human Rights' which take a sociolinguistic approach to issues previously treated by law and policy have served as a springboard for much of the debate on Language Rights.

(iii) Linguistic Human Rights

The Linguistic Human Rights (LHR) movement has been widely discussed in the literature and is often misunderstood to be synonymous with 'language rights', or used as justification for what are much slighter demands.³¹⁶ The rights they claim are very extensive, LHR have both individual and community features, containing 'necessary individual rights and necessary collective rights'³¹⁷ and include rights such as the right to acquisition of languages. LHR theories are linked to education in particular.³¹⁸ The

³¹⁵ R.E. Hamel, 'Language Conflict and Language Shift: A Sociolinguistic Framework for Linguistic Human Rights', *International Journal of the Sociology of Language*, Vol.27 (1997) 1-24; Wee, *Language Without Rights* (Oxford University Press 2011).

³¹⁶ Tove Skutnabb-Kangas and Robert Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Mouton, The Hague, 1994), 1, 71; Tove Skutnabb-Kangas, 'Language Policy and Linguistic Human Rights' in Ricento (ed.), *An Introduction to Language Policy: Theory and Method* (Oxford University Press 2006); Tove Skutnabb-Kangas and Robert Phillipson, 'The Global Politics of Language: Markets, Maintenance, Marginalization, or Murder?' in Nikolas Coupland (ed.) *Handbook of Language and Globalisation* (Blackwell 2010).

³¹⁷ Lionel Wee, *Language Without Rights* (Oxford University Press 2011) 56.

³¹⁸ Skutnabb Kangas, *Linguistic genocide in education, or worldwide diversity and human rights?* (L. Erlbaum Associates 2000); Olthuis, Kivelä and Skutnabb-Kangas, *Revitalising indigenous languages : how to recreate a lost generation* (Multilingual Matters, 2013).

LHR theory of language rights has been critiqued by both lawyers approaching the idea of language rights and commentators from within the sociolinguistic community.

The LHR hypothesis was first proposed by Robert Phillipson and Tove Skutnabb-Kangas.³¹⁹ They themselves distinguish Linguistic Human Rights from broader language rights in general.³²⁰ The work of LHR theorists addresses topics such as 'linguistic imperialism'³²¹ and 'linguicism' and champions the cause of ecolinguistics as a reaction to globalisation and an attempt to limit the disappearance of smaller languages. The movement calls for the preservation of indigenous languages and asks for action from both academic circles and governments, appealing primarily to the international legal order. Its proponents theorise Linguistic Human Rights as being fundamental rights, and vigorously frame them as necessary for the preservation of languages. The rights they would sustain include the right both to learn the official language of the country (usually the language of the majority), and the right to learn and use one's 'mother tongue.'³²² LHR language activists typically engage in

³¹⁹ Miklós Kontra and others (eds), *Language: A Right and a Resource. Approaching Linguistic Human Rights* (Central European University Press 1999).

³²⁰Tove Skutnabb-Kangas, 'Linguistic Human Rights' in L. Solan and P.Tiersma (eds), *The Oxford Handbook of Language and Law*, Oxford University Press, 2012); Robert Phillipson 'The EU and Languages: Diversity in What Unity?' in Kjaer L. and Adamo S. (eds), *Linguistic Diversity and European Democracy* (Ashgate, 2011) 71.

³²¹ R. Phillipson, *Linguistic Imperialism Continued* (Routledge 2010).

³²² For criticism of the concept of 'mother tongue' see Anthea Fraser Gupta, 'When Mother-tongue Education is not Preferred', (1997) *Journal of Multilingual and Multicultural Development*, 18 (6) 496-506.

provocative discourse. The original proponents of LHR have taken their ideas further, responding against 'Linguistic Genocide'³²³ and attempting to right what they see as the broader societal inequalities which lead to language inequality.

The LHR conceptualisation of language rights comprises both individual and collective rights, seeing language as forming a fundamental aspect of identity. Linguistic Human Rights are necessary according to this theory to rectify the status of oppressed languages and to allow the individual to flourish as part of a community. The LHR movement is criticised both for its misuse of sociolinguistic vocabulary and its essentialism by sociolinguists.³²⁴ The LHR movement has been criticised by non-sociolinguists for its approach because it ignores the nature of the political process, and the legal nature of rights.³²⁵ The claim of antecedent language rights which should be guaranteed to everyone by international law is a far-fetched one. LHR advocates have come into conflict with other proponents of linguistic diversity and language variation. The tension

³²³ Skutnabb Kangas, *Linguistic genocide in education, or worldwide diversity and human rights?* (L. Erlbaum Associates 2000); Skutnabb Kangas and Dunbar 2010: *Indigenous Children's Education as Linguistic Genocide and a Crime against Humanity? A Global View* available at www.galdu.org. This extreme position has been taken up by certain activists (incl. MEPs from minority communities. For example, the Hungarian MEP Csaba Sógor used the terminology of 'linguistic genocide' in a speech in the plenary assembly of the European Parliament on 24/11/2009).

³²⁴ Jaffe, 'Discourses of endangerment: contexts and consequences of essentializing discourses.' in Duchêne and Heller, *Discourses of Endangerment: Interests and Ideology in the Defense of Languages* (Continuum 2007).

³²⁵ Xabier Arzoz, 'Accommodating Linguistic Difference- five normative models of Language Rights' *European Constitutional Law Review* 6 (2010) 102-122.

between the promoters of Linguistic Human Rights and general willingness to preserve linguistic diversity springs from a perceived lack of nuance in the LHR conception of language and languages.³²⁶ Jean Blommaert is of the opinion that the wish of Linguistic Human Rights supporters' political ambition that 'all languages should be equal' is a sociolinguistic impossibility, as it encourages the fossilisation of language.³²⁷

Although they may not all go as far in their demands as the proponents of the LHR movement, sociolinguists do often seek the proactive protection of smaller languages and may use the terminology 'language rights' carelessly themselves also. The language rights philosophies which have emerged from sociolinguistics have also been severely critiqued within that discipline. The next section explores this critique.

(iv) Sociolinguistic critiques of 'Language Rights'

It is necessary to set broader questions about the legitimacy of 'rights talk'³²⁸ in the political arena to one side when analysing the sociolinguistic discussion of this topic. This section will focus on the objections from within the discipline, which are rooted in the

³²⁶ CB Paulston, 'Language Policies and Language Rights' (1997) *Annual Review of Anthropology* 26 pp 73-85; see also M. Kontra, 'Some Reflections on the Nature of Language and its Regulation', (1999) 6 *International Journal on Minority and Group Rights* [Special Issue on the Linguistic Rights of Minorities, ed. by J. Packer] 281.

³²⁷ J. Blommaert, 'Linguistic human rights as a source of policy guidelines: A critical assessment.' (2005) *Journal of Sociolinguistics* 9 p.390-417.

³²⁸ Mary-Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (The Free Press 1991).

different conceptualisations of the nature of language. The objections from a legal and political perspective will be considered later in this, and subsequent, chapters. This chapter will first concentrate on disagreements *within* the discipline of sociolinguistics about the ideas proposed regarding language rights, before expanding our analysis to other academic disciplines.

Sociolinguistic developments can be described as the foundation of language rights theories. As the discipline became more established, the interests of sociolinguists also extended beyond simply noting variations in language, to looking to the reasons behind those variations, and towards a wider, social, theory of language. This approach then formed the basic building-blocks for academic analysis of language policy, and eventually the construction of theories of language rights. The issue of language rights, however, still engenders vicious debate within the discipline of sociolinguistics.³²⁹ This section outlines what May determines:

[t]he emerging critique, particularly from within critical sociolinguistics, concerning the limits of applying macro principles of language rights, which necessarily involve the

³²⁹ See, for example, the 2001 special edition of the *Journal of Sociolinguistics* 5(1): 131-154, which contains a dialogue between ideologically opposed sociolinguists: Jan Blommaert, 'The Asmara Declaration as a sociolinguistic problem: Reflections on scholarship and linguistic rights'; Tove Skutnabb-Kangas and Robert Phillipson, with Miklos Kontra, 'Reflections on scholarship and linguistic rights: A rejoinder to Jan Blommaert.'

codification of languages and language groups, to complex, mixed, and fluid microlinguistic contexts.³³⁰

The reasons behind language shift and language death are varied and complex. Therefore, some sociolinguists are reluctant to impair the natural patterns of the development of human communication. Language conservation efforts can be perceived as patronising. Flores-Farfan and Holzcheiter believe that the field of endangered languages is an 'eloquent illustration of ideologies and discourses at work,'³³¹ where language preservation is synonymous with the imposition of Western ideologies of language on other linguistic systems.³³² Nelde claims the notion of language is 'a metaphor based on linguists' experience of European national languages.'³³³ These concerns are echoed in the frequent critique of the LHR movement. The sociolinguist Jean Blommaert's derisive comments that 'A political programme is not a substitute for analysis,'³³⁴ are typical of the scathing criticism of LHR reasoning.³³⁵

³³⁰ S. May 'Language Rights: moving the debate forward' (2005) *Journal of Sociolinguistics* 9(3), pp 319-347.

³³¹ Flores Farfan and Holzcheiter, 'Power and Discourse' chapter 10 in Wodak et al (ed.) *SAGE Handbook of Sociolinguistics* 148.

³³² See also José Antonio Flores Farfán, and Fernando Ramallo, *New perspectives on endangered languages: Bridging gaps between sociolinguistics, documentation and language revitalization* (John Benjamins 2010).

³³³ PH Nelde 'Language Contact' in Kaplan (ed.) *Oxford Handbook of Applied Linguistics* (2nd edn, Oxford University Press 2010) 70.

³³⁴ J. Blommaert, 'The Asmasra Declaration as a Sociolinguistic Problem: Reflections on Scholarship and Linguistic Rights' (2001) 5(1) *Journal of Sociolinguistics* 131-42; and J. Blommaert 'Review of Skutnabb Kangas 2000 Linguistic Genocide in Education or Worldwide Diversity and Human Rights?' (2001) 22(4) *Applied Linguistics* 539-42.

³³⁵ Phillipson and Skutnabb-Kangas, 'Getting Language Rights Right: A Response to Makoni' (2012) 7 (1) *Journal of Multicultural Discourses*, 29-35.

The notion central to these objections is that the ends which language preservation is supposed to serve are unclear, and not sociolinguistically sound. Some sociolinguistics maintain that the evolution of language simply implies constant convergence and divergence of language varieties.³³⁶ The difficulty of assessing the success or failure of a language are inextricable from the difficulty in defining the concept of 'a language'.³³⁷ At international level, discussion of language rights is often in the context of language death and preservation of linguistic diversity, as discussed above. Crystal terms this type of approach 'preventive linguistics,'³³⁸ implying that it is somehow skewing the otherwise natural ebb and flow of languages. A similar criticism comes from Lionel Wee who queries the approach of 'rights', stating:

If languages have rights, then we need to ask whether we are in danger of reifying a social practice that is inherently changeable and variable, by dissociating it from the interests of speakers.³³⁹

Although sociolinguists decry the loss of linguistic diversity worldwide, they may not be in favour of attempts to regulate language and language use. A rights based approach to language is

³³⁶ S. Mufwene, *The Ecology of Language Evolution*. (Cambridge University Press, 2001).

³³⁷ Joshua A. Fishman and Ofelia Garcia (eds) *Handbook of Language and Ethnic Identity: The Success-Failure Continuum in Language and Ethnic Identity Efforts (Volume 2): The Success-Failure Continuum in Language and Ethnic Identity Efforts* (Oxford University Press 2011).

³³⁸ David Crystal, *Language Death* (Cambridge University Press 2000) 107.

³³⁹ Lionel Wee, *Language Without Rights* (Oxford University Press 2011) 9.

seen as harmful to the evolution of language.³⁴⁰ The idea of language rights has been criticised by many in the field of sociolinguistics for its interlanguage rather than intra-language focus.³⁴¹ This approach is criticised by Wee as he claims it ignores the intricacy of language, and limits the natural development of language and languages.³⁴² If language rights are founded on the concept of linguistic security or even merely on the promotion of linguistic diversity, then their remit should be not limited to languages as countable, fixed structures but broader than this, extending from dialects to all speech varieties.³⁴³ Dunbar summarises this difficulty succinctly: If language rights are founded on the concept of linguistic security/the positive values of linguistic diversity, it is difficult to see why particularly threatened dialects should necessarily be excluded.³⁴⁴ This echoes some of the divergences in the current approach to language and language ideologies outlined in chapter 2. Dialects generally are excluded from the claims for languages rights, by reason of their uncertain status and problematic definition. The highly subjective differentiation between a dialect and a language is one of the great debates of

³⁴⁰ J. Blommaert, 'The Asmasra Declaration as a Sociolinguistic Problem: Reflections on Scholarship and Linguistic Rights' (2001) 5(1) *Journal of Sociolinguistics* 131-42; Lionel Wee, *Language Without Rights* (Oxford University Press 2011).

³⁴¹ J. Edwards, 'Contextualising Language Rights' (2003) (2) *Journal of Human Rights* 551-71.

³⁴² Lionel Wee, *Language Without Rights* (Oxford University Press 2011).

³⁴³ Robert Dunbar's echoes this objection, from a legal perspective - see Robert Dunbar, 'Minority Language Rights in International Law' (2001) (50) *International and Comparative Law Quarterly*, 90-120.

³⁴⁴ *ibid.*

linguistics. It is difficult conceptually however, in particular coming from a sociolinguistic approach, to distinguish why the protection of dialects should be excluded. Beyond interlanguage equality, Wee believes it is more important to concentrate on intra language equality, stating that:

[t]here is no principled basis on which we can justifiably limit our discussion of linguistic discrimination only to those cases involving identifiable varieties, while ignoring discrimination that involves individual lexical items or styles of discourse.³⁴⁵

Criticism of the language rights paradigm within the field of sociolinguistics has its roots in a concern for language. Sociolinguists warn against the danger of reification of language and the propagation of dominant modes of expression, valuing one 'form' of language over another.³⁴⁶ The development of critical sociolinguistics increasingly questions the possibility of treating languages as enumerable and distinct units. This highlights one of the main problems which occur when dealing with a legal approach to non-legal subject matter. From the point of view of certain sociolinguists, a rights approach cannot adequately account for the fluid nature of language.³⁴⁷ Lionel Wee states that as a sociolinguist he is involved in

³⁴⁵ Lionel Wee, *Language Without Rights* (Oxford University Press 2011) 9.

³⁴⁶ Joseph Errington, 'Getting Language Rights: The Rhetorics of Language Endangerment and Loss' (2003) 105(4) *American Anthropologist* 723-732.

³⁴⁷ Lionel Wee, *Language Without Rights* (Oxford University Press 2011) 23.

conceptualising language, and as such finds the theories of Linguistic Human Rights to be harmful.³⁴⁸ Language is a socio-cultural construction, and thus language itself is individual. Our relationship to the socioculturally constructed phenomena we call 'languages' are thus social categorisations, and cannot, or at least should not, be regulated by legal means.³⁴⁹

Setting aside considerations regarding the enumerability of languages, another source of criticism is the fact that language has an economic role, and often the choice to learn an economically powerful language is an aspect of social mobility. Socioeconomic factors affect language change and language preservation attempts can be seen as ex post facto actions of a dominant class, who can enjoy all the economic privileges of literacy and codified languages.³⁵⁰ On the other hand, while some regret the decline of languages and language varieties, it is also seen as a reasonable choice to learn languages which are attached to economic power. Language preservation attempts are often attempts at crystallising a status quo which is no longer viable, and the language shift is merely testament to that.³⁵¹ People decide to learn a new language, or move away from

³⁴⁸ Tove Skutnabb-Kangas, Miklós Kontra and Robert Phillipson 'Getting Linguistic Human Rights Right: A Trio Respond to Wee (2005)' 27(2006) *Applied Linguistics* 318–324.

³⁴⁹ J. Normann Jorgensen 'Language and Languages' in Kjaer L. and Adamo S. (eds) *Linguistic Diversity and European Democracy* (Ashgate 2011).

³⁵⁰ Abram de Swaan, 'Endangered languages, sociolinguistics and linguistic sentimentalism' (2004) *European Review* 12 (4) 567-80.

³⁵¹ J. Edwards, 'Contextualising Language Rights' (2003) *Journal of Human Rights* (2) 551-71.

their home language or mother tongue for a variety of reasons. Often economic pressures play a large role, but the appropriateness of advocating for external interaction to preserve the linguistic, and therefore economic, situation of others has been called into question. Abraam de Swaan's approach views linguistic shift as a rational economic decision.³⁵² John Edwards describes this point of view as 'resigned language realism'.³⁵³ Edwards would prefer that the situation were one of linguistic diversity and vitality but believes that it is unfair to place a higher value on our external demands for language maintenance than the value we place on the freedoms of those who are members of an endangered language community. He remarks that:

[i]t is important to note that although external pressures bear heavily upon parents' decisions not to have their children learn a language there is also a good deal of acquiescence in a shift which is – rightly or wrongly- thought to be a stepping stone to mobility and advancement.³⁵⁴

Other critiques regard the form rather than the substance, criticising the language used. Pupavac claims that LHR literature 'equates language loss with social pathology'.³⁵⁵ It is the anthropomorphisation

³⁵² Abram de Swaan, 'Endangered languages, sociolinguistics and linguistic sentimentalism' (2004) *European Review* 12 (4) 567-80.

³⁵³ J. Edwards, *Multilingualism* (Routledge 1994).

³⁵⁴ *ibid*, 107.

³⁵⁵ Vanessa Pupavac, *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012), 68.

of language which externalises responsibility for its demise. Janson argues against the use of the term 'language death', claiming that:

[i]t describes the process well enough but it also implies that languages have lives. If they do not they obviously cannot die ... People do not stop using language: rather they use another language instead.³⁵⁶

Thus, he prefers the term 'language shift'. The conceptualisation of language by proponents of the LHR theories, and perhaps of language rights more generally, although their intention is to save languages, is perceived as one that is inherently dangerous and harmful for language, considered from the perspective of those sociolinguists who view language as a social practice that is inherently variable, and in constant evolution.³⁵⁷

This section investigated the main critiques of language rights from within the contemporary field of sociolinguistics. The insights of sociolinguistic theorists have contributed to the formation of a new understanding of language, and of the role of language in society. Central to this conception was a recognition of the role the State has in the formation of language, and in the formation of our contemporary ideas about language. Before investigating the political philosophy of language and the state, the influence of the nation-

³⁵⁶ Tore Janson, *The History of Languages* (Oxford University Press 2012) 206.

³⁵⁷ Blommaert and Rampton, 'Language and superdiversity' (70) *Working Papers in Urban Language & Literacies*
<http://www.kcl.ac.uk/innovation/groups/ldc/publications/workingpapers/70.pdf>.

state on language will be further examined, following our exposition of their historically interlinked nature in chapter 2. The multilinguality of the EU has acquired significant additional political weight.

II Language and the State - Theorisations

The limits to a theory of 'language rights' are assessed here in terms of political philosophy and the role of the State. The increased role of the State was elaborated in terms of language in chapter 2. This chapter shows how this in turn affects the possibility of 'language rights' being granted in the sociolinguistic sense.

Although, as outlined in chapter 2, language has acquired its current political significance relatively recently, it has played a fundamental part in the creation of the political community we now recognise as the State. The politicised interpretation of language within the broad discipline of applied linguistics has been useful in identifying how standard language forms part of our modern perception of the world. This is referred to in the body of literature of sociolinguistics and applied linguistics as 'Language Planning'.

(i) Language planning

The term language planning is broadly speaking used to describe the process of state intervention in the natural flow of language.³⁵⁸ The saying 'A language is a dialect with an army and navy'³⁵⁹ ties language

³⁵⁸ Wodak, Johnstone and Kerswill (eds), *The SAGE Handbok of Sociolinguistics* (SAGE 2011).

³⁵⁹ The origin of this quote is disputed- it appears it is a common saying in Yiddish which was popularised by the Yiddish linguist Max Weinreich (first published in

planning to the definition and expansion of states explored in chapter 2. Language planning explains the process whereby language is moulded and given prestige by the state. This label comprises a range of activities, from the simple designation of a national language to proactive promotion of certain forms of language, to the creation of the linguistic landscape.³⁶⁰ Language policies, whether education or otherwise are also often classified as language planning. Ricento states that “there is no overarching theory of language policy and planning, in large part because of the complexity of the issues which involve language in society”³⁶¹ One of the main questions regarding language policy and planning is the extent to which language policy outside of the simple designation of an official language can affect language vitality and use.³⁶² This can include everything from early childhood education policies, to the use of certain languages in signposting. Footitt and Kelly establish that:

Language policy has often been regarded as synonymous with language planning and has referred to the efforts of

YIVO Bleter 25.1, 1945, p. 13); for discussion see the *notes* section of the journal *Language in Society* 26 (03) September 1997, pp 469-470.

³⁶⁰ B. Spolsky (ed), *The Cambridge Handbook of Language Policy* (Cambridge University Press 2012).

³⁶¹ T. Ricento, ‘Language policy: Theory and practice - an introduction’ in T. Ricento (ed.) *An introduction to language policy: Theory and methods* (Blackwell 2005) 10.

³⁶² John Joseph, ‘The grammatical being called a nation: history and the construction of political and linguistic nationalism’ in Nigel Love (ed.) *Language and History: Integrationist Perspectives* (Routledge 2006).

states or political movements to manage language use within a country in response to, or in pursuit of, social change.³⁶³

In this context, social change can mean the adaptation towards the use of a standardised language variety, or the shift to an entirely new language, endorsed by the State. When assessing the relationship between the State and language, all activities of the State regarding language could be considered language planning, however, a more restrictive view terms only that which regards the substantive content of the language itself as language planning.³⁶⁴

The transition towards discussions of language planning and language policy both in language studies generally and within the field of applied linguistics marks a move 'from the more micro-level investigation correlating social and linguistic variables to more macro-level concerns.'³⁶⁵ These are two sides of the same coin, which, it is claimed, legitimise the standard language ideologies exposed in this thesis.

Language Planning focuses on the state as the locus and the originator of the standard language to be perpetuated.³⁶⁶ Through implicit and explicit language planning, political power has been the

³⁶³ H. Footit and M. Kelly (eds), *Languages at War: the Politics and Practice of Language Contacts in Practice* (Palgrave 2012).

³⁶⁴ Elana Shoamy, *Language policy: Hidden agendas and new approaches* (Routledge, 2006).

³⁶⁵ Martin J. Ball (ed), *Routledge Handbook of Sociolinguistics Around the World*. (Routledge 2010) introduction.

³⁶⁶ M. Nahir, 'The five aspects of language planning' (1977) 1 *Language Problems and Language Planning*, 107–123.

main driver in the standardisation of language. Susan Gal sees standardisation as 'an ideological project of differentiation and hierarchisation.'³⁶⁷ Bauman and Briggs challenge this standardisation as a practice which is a means of structuring social relations. The ultimate endorsement of one variety or form of language is its use by the state. State endorsement of one language for communication, and its exclusion of other language were important and often used as political tools in Europe, as was discussed in chapter 2.³⁶⁸ Language planning describes the state regulation of language, whether that be the creation of new forms, the modification of old forms, the codification of existing forms or the invention of a written form. The term 'language planning' encompasses a broad spectrum. Spolsky notes that 'no consensus has emerged about the scope and nature of the field, its theories or its terminology.'³⁶⁹ However, it is broadly agreed that there is no bright line distinction between micro and macro sociolinguistics, and therefore, broadly speaking in the language planning involved in affecting the language itself, or its status.³⁷⁰ This is sometimes referred to as corpus planning. Corpus planning refers to the process whereby new words are formally declared to form part of the 'corpus' or main body of a language, and

³⁶⁷ Susan Gal, 'Sociolinguistic Regimes and the Management of "Diversity"', in A. Duchêne and M. Heller (eds.), *Language in Late Capitalism* (Routledge 2012) 29.

³⁶⁸ John Joseph, 'The grammatical being called a nation: history and the construction of political and linguistic nationalism.' in Nigel Love (ed.). 2006. *Language and History: Integrationist Perspectives* (Routledge 2006).

³⁶⁹ B. Spolsky *Language Policy* (Cambridge University Press 2004).

³⁷⁰ Wodak, Johnstone and Kerswill (eds), *The SAGE Handbok of Sociolinguistics* (SAGE 2011).

the codification of language varieties through the production of grammars, dictionaries, and other accounts of language which purport to be definitive.³⁷¹ Whereas status planning is more overtly political, involving the selection of 'official' varieties of language.³⁷² Language planning can serve to officialise a language, to include or exclude certain varieties, it can refer to state efforts for language promotion or state policies suppressing language(s).³⁷³ It is a broad term used for a range of different behaviours, policies and standards. Ruiz identifies strands of orientation within discussion of language planning, depending on the end goal of the planning being undertaken.³⁷⁴ Makoni and Pennycook argue that ethnolinguistic situations vary so widely across the world that even academic language planning discourse is coloured by linguistic ideology.³⁷⁵ Their concerns echo those regarding the preservation of linguistic diversity across the discipline of applied linguistics mentioned above.

An increased awareness of the role of the state in language has been highlighted in this chapter. This can be identified not only within the body of literature of Applied Linguistics, but also within those

³⁷¹ B. Spolsky (ed), *The Cambridge Handbook of Language Policy* (Cambridge University Press 2012).

³⁷² B. Spolsky (ed), *The Cambridge Handbook of Language Policy* (Cambridge University Press 2012).

³⁷³ Dennis Ager, *Motivation in Language Planning and Language Policy* (Multilingual Matters 2001).

³⁷⁴ Richard Ruiz, (1984) 8(2) 'Orientations in language planning' 15–34.

³⁷⁵ Makoni and Pennycook 'Disinventing multilingualism: From monological multilingualism to multilingual francas' in Marilyn Martin-Jones, Adrian Blackledge, Angela Creese (eds.) *The Routledge Handbook of Multilingualism* (Routledge, 2012).

disciplines which study the connection between citizens and the state. In the area of political philosophy, much time and energy has been dedicated to teasing out the form and function of the state, its relationship with the people that inhabit it and their political relationships with each other.³⁷⁶ The majority of political thought until the last century tried to emphasise homogeneity within a political structure, and exclude the 'other' to create and justify a political community.³⁷⁷ Thus, the creation of the nation state was achieved through many tools, not least among which, language homogenisation, as discussed in the previous chapter.

Language has only recently returned as central to political philosophy and truly generated discussion and academic debate on its own. Furthermore, discussion of language rights and language communities can be contextualised in the wider debate about culture, multiculturalism and minorities in the modern nation state. Among democratic political theorists, however, the recognition that most political communities contain multiple language groups has been relatively recent, and that recognition has resulted in only a fraction of the theorizing it deserves.³⁷⁸ Commentary on how states

³⁷⁶ Lack of both space and expertise dictate the minimal discussion of these principles here, as it is impossible to do justice to the close philosophical examination given to these topics (for further examination of these see *inter alia* Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd edn., Oxford University Press 2002) and Goodin, R.E. and Pettit, P. (eds.), *A Companion to Contemporary Political Philosophy* (2nd ed.)

³⁷⁷ Goodin, R.E. and Pettit, P. (eds.), *A Companion to Contemporary Political Philosophy* (2nd ed.)

³⁷⁸ R Schmidt, 'Democratic theory and the challenge of linguistic diversity' 2014 *Language Policy*

should deal with language diversity and its management from a philosophical point of view is difficult. The unique nature of language serves to complicate the treatment of linguistic issues within political philosophy. This difficulty has been adverted to by theorists in this area who attempt to compare the attitude of the state towards languages to the attitude of the state towards religion.³⁷⁹ The vast difference in the consequences of state attitudes to language and religion is neatly summarised thus:

Whereas a state can allow itself to be godless, it cannot afford to remain speechless. In other words, whereas religious neutrality is conceivable, linguistic neutrality is not... the State, by definition, must enter into contact with its citizens- a politically organised community cannot avoid communication: Its leaders and officials cannot avoid making noises and printing signs ... Collective decisions must be made - prepared, discussed, promulgated, implemented, enforced.³⁸⁰

The lack of analogy between language and religion are further teased out by Alan Patten:

The duties of the liberal state with respect to religion and conscience do not extend so far as a guarantee to anyone of a

13, 4, 395-411.

³⁷⁹ W. Kymlicka and A. Patten, *Language Rights and Political Theory* (Oxford University Press 2003); Alan Patten, 'Liberal Neutrality and Language Policy' *Philosophy and Public Affairs* 31 (4) 2003 359-386.

³⁸⁰ Van Parijs and Aziz, 'Linguistic Legislation for 21st Century Europe' Université catholique de Louvain: Chaire Hoover, DOCH 87; available online <http://www.etes.ucl.ac.be/Publications/dochs.htm>.<last accessed 14 March 2014>.

flourishing religious community or of one that survives... The State ought to avoid policies that disadvantage religious communities in certain ways but this falls far short of securing their existence or success.³⁸¹

Wee terms this fundamental problem when dealing with linguistic politics and policies the 'unavoidability of language'.³⁸² Alan Patten and Ruth Rubio-Marín also allude to it as a central difficulty in elaborating a 'neutral' language policy.³⁸³ The next section will provide a brief overview of the main debates in political philosophy regarding language rights.

(ii) Political philosophy and Language Rights

We have seen in the preceding chapter how language was a fundamental aspect of the political philosophy of nationalism. Language is fundamentally tied up with questions of identity and of power, as explored in chapter 3. Nonetheless, political philosophers' treatment of the aspects of language rights specifically is a relatively new phenomenon.³⁸⁴ Language forms an important part of the general discourse on democracy and participation, although often it

³⁸¹ Alan Patten, 'Survey article: The justification of minority language rights' (2009) *Journal of Political Philosophy* 17 (1) 102-128.

³⁸² L. Wee, *Language Without Rights* (Oxford University Press 2011) 15.

³⁸³ R. Rubio Marín, 'Language Rights: Exploring the Competing Rationales', in W. Kymlicka and A. Patten, *Language Rights and Political Theory* (2003); Alan Patten, 'Liberal Neutrality and Language Policy' *Philosophy and Public Affairs* 31 (4) 2003 359-386.

³⁸⁴ For an overview on the minority rights debate of the 1990s in political philosophy and political theory, see W. Kymlicka, *Politics in the Vernacular* (Oxford University Press, 2001) 17-38.

is not explicitly acknowledged.³⁸⁵ This section will describe language and its relationship with communities and with the state in the context of political philosophy and outline the way political philosophers have approached questions of language rights. These theorists show the possibilities and potential of interdisciplinary study when approaching questions of language, and perhaps the necessity for a more rounded analysis of the effects of language policies.³⁸⁶

Laitin and Reich identify 3 main approaches within contemporary political philosophy to questions relating to language policy: the redistributive linguistic justice approach, the nationalist approach to linguistic justice and a 'liberal culturalist' approach.³⁸⁷ By a nationalist approach to linguistic justice they refer to attempts to preserve national languages and national minority languages, which have been discussed in the preceding chapter. The redistributive approach will be dealt with briefly first as it is a discrete part of language rights discussion, then analysis will move to the debate between multiculturalism and liberalism on linguistic issues, which address broader questions.

³⁸⁵ Yael Peled, 'Normative language policy: interface and interferences' (2014) 13 (4) *Language Policy* 301-315.

³⁸⁶ For a Political Science rather than a political philosophy approach to questions involving language see Michael A. Morris (ed) *Culture and Language: Multidisciplinary Case Studies* (Peter Lang 2011) the work of Francois Grin is also truly interdisciplinary.

³⁸⁷ Laitin and Reich, 'A liberal democratic approach to language justice' in W. Kymlicka and A. Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

(iii) The redistributive approach: linguistic justice

The concerns regarding the depletion of the world's linguistic repository and the disappearance of language has led to the development of many of the linguistic rights theories.³⁸⁸ The reasons behind this trend have been briefly explored in the exposition of the relationship between language and economics in a globalised world in chapter 2. An economic analysis of language, where linguistic shift is a result of rational actors' choices, does not account for the fact that the same speakers who move to more prestigious varieties of their language, or adopt the majority or official language, often do so while regarding their minority language fondly. Fishman's notion of 'language loyalty' explains this idea as 'the ability or lack of ability of speakers of a language to stand up to the pressure of more powerful ones.'³⁸⁹ As Janson describes it: 'A language vanishes not because the speakers desire it but in spite of the fact that they do not wish it.'³⁹⁰ The economic analysis of language policies and language rights provisions has provided interesting insights into multilingualism and language policies of states and international organisations.³⁹¹

³⁸⁸ Yael Peled, 'Language, rights and the language of language rights The need for a new conceptual framework in the political theory of language policy' (2011) *Journal of Language and Politics* 10:3 436–456.

³⁸⁹ B. Spolsky, *Oxford Introduction to Language Study* (Oxford University Press first ed 1998 this ed 2010) 55

³⁹⁰ Tore Janson *The History of Languages* (Oxford University Press 2012) 215.

³⁹¹ François Grin and François Vaillancourt, 'The economics of multilingualism: Overview and analytical framework' in William Grabe (ed). *Annual Review of Applied Linguistics* (Cambridge University Press 1997) 43-65; François Grin, 'The Cost-Effectiveness Evaluation of Minority Language Policies: Case Studies on

The redistributive approach to language rights aims to provide an economic justification for language preservation, and for policies which favour smaller language communities.³⁹² Redistributive economic arguments, whether to support language maintenance using subsidies, or arguing that the imposition of endangered languages on traditional communities impairs the chance of economic fulfilment for members of those communities, imply that language is fundamentally political in nature.³⁹³

Robert Phillipson is one of the proponents of the Linguistic Human Rights theory whose ideas have been dealt with at length already in this chapter. Phillipson uses economic justifications to support his arguments for the support of minority or endangered languages in the interest of 'linguistic justice'. Phillipson claims that language is too sensitive a partisan issue which scares politicians and thus language policy is left to (damaging) market forces, which in turn add to the political sensitivity of language issues.³⁹⁴ He crusades against the hegemonic spread of English,³⁹⁵ claiming that economic

Wales Ireland and the Basque Country' (European Centre for Minority Issues 1999); François Grin, 'Language planning and economics' (2003) 4(1) *Current Issues in Language Planning* 1–66; François Grin, 'Economic Considerations in Language Policy' in Ricento Thomas (Ed), *An Introduction in Language Policy* (Blackwell 2006) 77-94.

³⁹² Michele Gazzola and Alessia Volpe, 'Linguistic justice in IP policies: Evaluating the language regime of the European Patent Office' *European Journal of Law and Economics* 38 (2014) 47-70.

³⁹³ F. Coulmas, *Language and Economy* (1992 Blackwell).

³⁹⁴ Robert Phillipson (ed), *Rights to Language: Equity, Power and Education*. (Lawrence Erlbaum, 2000).

³⁹⁵ Robert Phillipson, *English Only Europe? Challenging Language Policy* (Routledge 2003); Phillipson R. *Linguistic Imperialism* (1992 Oxford University Press) and *Linguistic Imperialism Continued* (Routledge 2010); Robert Phillipson

neoliberal reasoning is harming linguistic equity and warning against 'the risks of laissez faire language policies.'³⁹⁶ Belgian academic Philippe Van Parijs endeavours to find an economic solution to what he perceives as linguistic injustices created by asymmetrical language shift. Van Parijs has a redistributory point of view which Laitin and Reich describe as 'compensatory schemes to maximise fairness.'³⁹⁷ He would economically compensate speakers of smaller languages with subsidies from speakers of bigger languages, adding to the potential for communication by adopting English as a lingua franca across the world. Van Parijs believes that language should be made into a 'public good' for the purposes of communication, hence the worldwide adoption of one lingua franca, and yet that worldwide linguistic diversity should also be secured.³⁹⁸ He believes that using his ideas could lead to a situation of egalitarian global linguistic justice, and would both increase communication and allow for the protection of languages.³⁹⁹ This approach is idealistic.

'Review essay: languages, genocide and justice in the European Integration Process', *Journal of Contemporary European Studies* 20.3: (2012) 377–414.

³⁹⁶ Robert Phillipson, *English Only Europe? Challenging Language Policy* (Routledge 2003).

³⁹⁷ Laitin and Reich, 'A Liberal Democratic Approach to Language Justice' in W. Kymlicka and A. Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

³⁹⁸ Philippe Van Parijs, *Linguistic Justice for Europe and for the World* (Oxford University Press 2011).

³⁹⁹ Philippe Van Parijs, 'The ground floor of the world: on the socioeconomic consequences of linguistic globalization' *International Political Science Review*, 21, 2000 pp 217-34; Philippe Van Parijs, 'Linguistic Justice' in W. Kymlicka and A. Patten, *Language Rights and Political Theory* (Oxford University Press 2003); Philippe Van Parijs, 'Linguistic Diversity as a Curse and as a By-product' in X. Arzoz (ed) *Respecting Linguistic Diversity in the European Union* (John Benjamins 2007); Philippe Van Parijs *Linguistic Justice for Europe and for the World* (Oxford University Press 2011).

Other economists tackle language in society and rationalise their case for state intervention in language policy using economic reasoning.⁴⁰⁰ Francois Grin approaches the maintenance of minority languages as a policy goal, using the tools of economics to make the case for linguistic justice.⁴⁰¹ His approach is to move away from philosophising and to treat language as other policy objectives would be treated in an economic breakdown of the interests at stake.⁴⁰² He argues that '[i]t may be that the traditional exercise of commentary on international legal instruments, which often amounts to a somewhat exegetic, and circular, discourse on normativity, has partly run its course, and that the most useful contributions of the rights-based perspective now lie elsewhere.'⁴⁰³ While remaining sympathetic to the causes of language diversity and language preservation he advocates 'a progressive absorption of some aspects of the rights-based discourse into the policy analysis perspective.'⁴⁰⁴ Believing that reliance on moral considerations weakens the

⁴⁰⁰ For an overview see H. De Schutter, 'Language policy and political philosophy: on the emerging linguistic justice debate.' *Language Problems & Language Planning* . (2007) 31.1 1-23.

⁴⁰¹ F. Grin. 'The economics of language: Survey, assessment, and prospects.' *International Journal of the Sociology of Language* 121 (1996); F. Grin, 'The economics of language planning' *Current Issues in Language Planning* 2003 (4) pp1-66.pp 17-44; F. Grin 'Linguistic human rights as a source of policy guidelines: A critical assessment', *Journal of Sociolinguistics*, 9(3), 2005 pp 448-460.

⁴⁰² F. Grin and B. Kuzmany 'Evaluating Policy Measures for Minority Language in Europe: Towards effective, cost-effective and democratic implementation' ECMI reports no.6 2000.

⁴⁰³ F. Grin, 'Linguistic human rights as a source of policy guidelines: A critical assessment', *Journal of Sociolinguistics*, 9(3), 2005 pp 448-460 and 452.

⁴⁰⁴ F. Grin, 'Linguistic human rights as a source of policy guidelines: A critical assessment', *Journal of Sociolinguistics*, 9(3), 2005 pp 448-460 and 452.

arguments they make, his policy analysis makes the case for language preservation avoiding rights discourses.⁴⁰⁵ Michele Gazzola takes a similar approach in his analysis, using the economic tools of policy evaluation to support language preservation arguments.⁴⁰⁶

Economic theorists such as Van Parijs and Grin believe in using the tools of economics to make the case for linguistic justice, which implies that the current state relationship between language and economics is one of injustice.⁴⁰⁷ The concept of 'linguistic justice' is also discussed by Mowbray, who uses it to evaluate language rights protections at international law.⁴⁰⁸ The theme of linguistic injustice is common among those who study language death and linguistic preservation. However, discussions of linguistic justice and of the economic rationalizations for particular language regimes remain of niche interest.⁴⁰⁹ Distributive justice analyses of language policy are somewhat decontextualised from the political cultural and emotive issues concerning language. Political philosophy deals in precisely the

⁴⁰⁵ F. Grin, 'Principles of policy evaluation and their application to multilingualism in the European Union.' in X. Arzoz (ed.), *Respecting linguistic diversity in the European Union*. (John Benjamins 2008).

73–83.

⁴⁰⁶ Michele Gazzola, 'Managing Multilingualism in the European Union: Language Policy Evaluation for the European Parliament' (2006), *Language Policy* 5(4) 393–417.

⁴⁰⁷ Philippe Van Parijs, *Linguistic Justice for Europe and for the World* (2011, Oxford University Press).

⁴⁰⁸ J Mowbray, 'Linguistic Justice in International Law: An Evaluation of the Discursive Framework' (2011). , 24(1) *International Journal for the Semiotics of Law* 79–95.

⁴⁰⁹ Peter Ives, 'De-politicizing language: obstacles to political theory's engagement with language policy' (2014) 13 (4) *Language Policy*.

emotive political issues regarding belonging, community and the reflection of this within the political community of the state.

Liberal theory in the twentieth century aims to work out how to account for cultural difference within the conception of societal principles of individual freedom, but also of justice and human rights. Debates in political philosophy about multiculturalism address how we can best design modern, pluralist models of society, and the role of distinct groups, cultural or otherwise, within this modern society.

(iv) Multiculturalism and language

This section will address the interaction between political philosophers investigating the nature of the state and the difficulties posed by multilingualism and multicultural societies. Language communities and language rights have been part of the contextual background from which many of the seminal debates in political philosophy about multiculturalism and modern society of the last forty or so years have arisen. Attention has only turned to the specific issues of the treatment of language communities and their particular rights and needs in more recent times.⁴¹⁰ The question of whether

⁴¹⁰ May notes Kymlicka and Patten's 2003 collection is:

'clearly important because it constitutes the still singular example of a direct, substantive, engagement in political theory with the question of language rights. However, even here, the majority of contributors are largely sceptical and/or opposed to the recognition/implementation of such language rights.'

Stephen May 'Language Rights: The 'Cinderella' Human Right', (2011) *Journal of Human Rights*, 10 (3) p. 265-289, 265; see further Yael Peled 'Language, rights and the language of language rights The need for a new conceptual framework in the political theory of language policy' (2011) *Journal of Language and Politics* 10:3 436-456.

cultural rights, which include language rights should be considered separately from classical civil and political rights, and treated in a different way has risen to the forefront of discussion in theorising modern society. Political philosophy's contributions to theorising the role of culture, in particular minority cultures in society are highly relevant to the debate on language rights.

Contemporary political philosophy struggles with the treatment of various cultural groups in society, with entrenched camps both in favour of and against recognition for 'minorities'. Culture itself is a problematic notion; in Critical Sociology the notion of 'culture' is considered to be a social construction that is manipulated by ideology and politics.⁴¹¹ Marc Ross' description of culture as the 'narrative' of a group, giving a system of meaning to measure the world and providing the basis for the group's social and political identity⁴¹² demonstrates the multiple features of 'culture', and can neatly be used to describe the centrality of the linguistic dimension to culture.

The place and definition of the terms 'culture' and 'ethnicity', have been hotly debated within sociology and these issues are by no means clear cut.⁴¹³ Moreover, the interaction between language and

⁴¹¹ C. Geertz *The Interpretation of Cultures* (Basic Books, 1973); see further Jeffrey C. Alexander, Ronald Jacobs, and Philip Smith, *The Oxford Handbook of Cultural Sociology* (Oxford University Press 2012).

⁴¹² Marc Ross, *Culture and Belonging in Divided Societies* (University of Pennsylvania Press, 2012).

⁴¹³ For a clear summary of the issues see Maria Montserrat and John Rex (eds), *The Ethnicity Reader: Nationalism, Multiculturalism and Migration* (Polity Press 2010).

culture forms a core aspect of anthropological research.⁴¹⁴ Michael Agar believes language and culture to be inextricable to the extent that he refers to 'languaculture'.⁴¹⁵ Stephen May argues that languages vary in their salience to ethnic and cultural issues within and between historical periods.⁴¹⁶

As regards language maintenance it is a common complaint that the pervasive discourses tend to reduce culture to identifiable linguistic aspects, and does not sufficiently take into account the complexity of language.⁴¹⁷ This type of criticism echoes the debate within sociolinguistics about language preservation discussed in the previous section. Holliday claims that cultural overgeneralisation and 'neo essentialism' permeate discourse on multiculturalism.⁴¹⁸ This is the objection of political philosophers who have issues with this narrow definition of culture and its lack of reflection of 'new' groups in society.⁴¹⁹ The rigidity of the law and its inflexibility when dealing with cultural issues is central to the debate on language rights. The

⁴¹⁴ See further: Holland and Quinn (Eds.), *Cultural Models in Language and Thought* (CUP 1987); A. Duranti, 'Language as Culture in U.S. Anthropology.' *Current Anthropology* 44 (3) 2003 323-47; and in the same issue Spitulnik, Debra 2003. 'Comments on Language as Culture in U.S. Anthropology by Alessandro Duranti.' *Current Anthropology*, 44 (3): 339-40.

⁴¹⁵ M. Agar, *Language Shock. Understanding the Culture of Conversation*. (William Morrow 1994).

⁴¹⁶ Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd edn, Routledge 2012).

⁴¹⁷ A. Duchêne, *Ideologies across Nations: The construction of linguistic minorities at the United Nations*. (2008 Mouton de Gruyter); Vanessa Pupavac, *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012); Wee *Language Without Rights* (Oxford University Press 2011).

⁴¹⁸ A. Holliday, 'Culture Communication Context and Power' in Jackson (ed.), *Routledge Handbook of Language and Intercultural Communication* (Routledge 2012).

⁴¹⁹ Nancy Fraser, *Justice Interruptus* (Routledge 1997).

main critique is that the law has a tendency to reify and reduce culture to its constituent parts. Culture is an amorphous phenomenon which is not simply divisible into legal structures.⁴²⁰ Language use is so complex and involves so many facets of cultural expression that it cannot fit into a legal frame of reference.⁴²¹ The argument against using law to preserve language is that the pervasive discourse tends to essentialise both culture and the idea of language, limiting them both by singling out easily identifiable aspects and focusing on those. However, any discourse which speaks of 'language rights' is inevitably involving the law. This will be examined further later in the chapter.

Critics of a multiculturalist approach believe that culture is dynamic. Culture is not homogenous and can include a variety of different aspects, from religion to sexuality.⁴²² Multiculturalism has been accused of essentialism. Pupavac claims that 'Identity Rights Governance' mummifies cultures in the name of cultural authenticity, and is antithetical to fostering diverse experiments in living and communication between people.⁴²³ Iris Young criticises the approach of multiculturalism for being 'culturally monistic', maintaining that

⁴²⁰ C. Geertz *The Interpretation of Cultures* (Basic Books, 1973); Jeffrey C. Alexander, Ronald Jacobs, and Philip Smith, *The Oxford Handbook of Cultural Sociology* (Oxford University Press 2012).

⁴²¹ W Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989).

⁴²² C. Geertz, *The Interpretation of Cultures* (Basic Books, 1973); C Heyes, 'Identity Politics' *The Stanford Encyclopedia of Philosophy* (2009). Available at: <http://plato.stanford.edu/archives/spr2009/entries/identity-politics/> <last accessed: 10 March 2011>.

⁴²³ Vanessa Pupavac, *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012) 250.

fundamentally identity is not fixed, and that the basic assumption should be one of general heterogeneity rather than trying to group sections of society together.⁴²⁴ The contention is that identities are multiple. Waldron maintains that cultures must evolve and be reactive, and it is artificial and stifling to delineate 'cultures' in order to protect them, and that this protection in fact harms cultures, he advocates a 'cosmopolitan alternative' which has cultural exchange and evolution at its heart.⁴²⁵

The ideas of multiculturalism address the need to allow minorities to protect themselves from assimilation within the mainstream normative understanding of the nation state as predicated on linguistic and cultural homogeneity. The choice of 'recognition' can be criticised from a sociolinguistic point of view.⁴²⁶ The very act of labelling (even in order to protect) may be interpreted as power relations at play, demonstrating the asymmetry of power for minority language communities.⁴²⁷ The 'politics of difference'⁴²⁸ can be one dimensional, attributing disproportionate importance to the exotic, and in essence 'otherising' communities within the wider citizenry. Those in favour of recognition believe that overemphasis on equality and liberalism can neglect minorities who need to be treated

⁴²⁴ Iris M. Young, *Justice and the Politics of Difference* (Princeton, 1990).

⁴²⁵ J. Waldron, 'Minority Cultures and the Cosmopolitan Alternative' in Kymlicka (ed.) *The Rights of Minority Cultures* (Oxford University Press 1995).

⁴²⁶ Keith Allan, Kasia M. Jaszczolt (eds.), *The Cambridge Handbook of Pragmatics* (Cambridge University Press 2012).

⁴²⁷ Mc Nay, *Against Recognition* (Polity Press 2008).

⁴²⁸ Iris M. Young, *Justice and the Politics of Difference* (Princeton, 1990).

differently in order to survive.⁴²⁹ Taylor argues that the 'politics of equality' enshrined in the traditional liberal approach are insufficient to protect these minorities, and instead advocates a 'politics of recognition', explicitly recognising separate cultural identities and attempting to allow space for these within a majoritarian system.⁴³⁰

There are countless types of multiculturalism which have been analysed both by anthropologists and political scientists.⁴³¹ Multiculturalism goes beyond mere non-discrimination. It actively singles out groups for protection. It recognises the role of the cultural community and thus is fundamentally different from traditional liberal-democratic approaches which focus on the individual.⁴³² The influential Canadian theorist Will Kymlicka's 'liberal multiculturalism' attempts to reconcile the wealth of cultural diversity with a traditionally liberal individual based perspective. His theory claims not to value languages or other cultural features for themselves but for their instrumental nature to the wellbeing of individuals and their fulfilment.⁴³³ Kymlicka argues that multicultural polities can only function if diversity is valued at the core and thus the lack of

⁴²⁹ Taylor, 'The politics of recognition' in A. Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994); Honneth *The Struggle for Recognition Polity* (Press 1996).

⁴³⁰ C Taylor, 'The politics of recognition' in A. Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994).

⁴³¹ M. Koenig and P. De Guchteneire (eds), *Democracy and Human Rights in Multicultural Societies* (Ashgate/UNESCO 2007).

⁴³² C. Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' 2004 55(2) *British Journal of Sociology* 237-57.

⁴³³ W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, (Oxford University Press 2009).

homogeneity can then form a foundation for common citizenship.⁴³⁴ Tully also sustains this theory, claiming that societies can engender a sense of belonging despite multiplicities of cultural contexts by constitutional developments taking into account dialogue and discussion, via the process of deliberation.⁴³⁵ Kymlicka's multiculturalism is an attempt to reconcile the new communities who migrated to Canada and to include them to some extent within Canada's multiculturalism.⁴³⁶ However, he differentiates between immigrant communities and autochthonous groups. May believes that liberal accounts of accommodations for other cultures all begin from a (misguided) assumption of the State's ethnic neutrality.⁴³⁷ The 'de-ethnicised view of liberal democracy'⁴³⁸ would propose that any language rights be granted universally to all individuals, these language rights should be applicable to all citizens and should be blind to the potential differences between them. This is incompatible with the point of view of minority rights advocates who state the need for specific language rights for certain linguistic communities.⁴³⁹ Cultural

⁴³⁴ W. Kymlicka, *Multicultural Odysseys: Navigating the new International Politics of Diversity* (Oxford University Press 2007).

⁴³⁵ J. Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press 1995).

⁴³⁶ For more on Canadian language politics see Eve Haque *Multiculturalism within a bilingual framework : language, race, and belonging in Canada* (University of Toronto Press 2012).

⁴³⁷ Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd edn, Routledge 2012) p.108.

⁴³⁸ Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd edn, Routledge 2012) p. 99.

⁴³⁹ See for example R. Baumann and C. L. Briggs, *Voices of Modernity: Language Ideologies and the Politics of Inequality* (Cambridge University Press 2003); C. Williams (ed), *Linguistic Minorities, Society and Territory*, (Multilingual Matters 1991).

identity is considered 'important for the well-being, and dignity of individuals and communities'.⁴⁴⁰ However, perhaps because of its amorphous nature culture can be seen as a catch-all justification for behaviour and can be perceived as threatening liberal egalitarianism, due to its emblematic recognition of difference.⁴⁴¹ Brian Barry is one of the most prominent European advocates of a strictly liberal approach, believing that the provision of cultural accommodations for groups is damaging, and that multiculturalism has failed. His contribution is one of the few to openly include questions of language and to fully address question of language preservation. Barry is vehemently opposed to current Welsh language policy in Britain. He considers that 'A liberal society cannot adopt policies designed to keep a language in existence if those who speak it prefer to let it go.'⁴⁴² His approach which centres on autonomy and liberty is in the classical liberal vein. Biku Parekh is also British, but his account of pluralist multiculturalism is critical of Brian Barry and his 'anti-culture' stance.⁴⁴³ According to Parekh, culture is central to what it is to be human, and he believes that we cannot surrender our right to it any

⁴⁴⁰ Y. Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002).

⁴⁴¹ B. Barry, *Culture and Equality* (Oxford University Press 2000); for critique of Barry's approach see P. Kelly (ed.), *Multiculturalism Reconsidered: Culture and Equality and its Critics* (Oxford University Press 2002).

⁴⁴² B. Barry, *Culture and Equality* (Oxford University Press 2000).

⁴⁴³ B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd ed Palgrave, 2000). In the second edition Parekh adds a chapter which addresses Barry's difficulties with multiculturalism.

more than we can surrender our right to liberty.⁴⁴⁴ Parekh criticises the traditional liberal multicultural theorists and advocates a pluralist society, recommending a new view of multiculturalism which takes into account the embeddedness of culture and allows for cultures to be recognised.⁴⁴⁵ Raz believes cultural communities are important for individual freedom, combining both communitarian and liberal points of view.⁴⁴⁶

Political philosophy's contributions to theorising the role of culture, in particular minority cultures in society are highly relevant to the debate on language rights. The foregoing discussion of multiculturalism demonstrates the difficulties of reconciling a diverse population with the structures of the nation state which were designed to impose homogeneity. Ultimately, the tensions within theories of political philosophy which aim to deal with the problem of diversity within the political community can only apply in part to addressing the treatment of language communities within the wider State.

⁴⁴⁴ V. Spencer, 'Language, history and the nation: an historical approach to evaluating language and cultural claims' (2008) *Nations and Nationalism* 14 (2), 241–259.

⁴⁴⁵ B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd ed Palgrave, 2000).

⁴⁴⁶ Margalit and Raz, 'National Self-determination' in Kymlicka (ed.) *The Rights of Minority Cultures* (Oxford University Press 1995).

(v) The emergence of language rights theories: tolerance or promotion?

The initial theorisations of language rights posed some difficult questions which have never successfully been answered. This demonstrates the incomplete nature of the idea of 'language rights'. The limits to this theory have been outlined from a variety of different perspectives in this chapter.

Early theories of language rights are notable for their interdisciplinarity.⁴⁴⁷ Although within the relevant academic disciplines the focus has narrowed, interdisciplinarity is still an important, perhaps even inevitable, aspect of language right theorisation.⁴⁴⁸

One of the formative distinctions in the academic debate on language rights was first proposed by a sociolinguist, Heinz Kloss.⁴⁴⁹ He distinguished between 'promotion oriented' and 'tolerance oriented' language rights.⁴⁵⁰ In Kloss's description 'tolerance-oriented' rights are the minimum freedoms guaranteed, such as the

⁴⁴⁷ Wodak, Johnstone and Kerswill (eds), *Sage Handbook of Sociolinguistics* (SAGE 2011).

⁴⁴⁸ Y Peled 'Language rights and the language of language rights The need for a new conceptual framework in the political theory of language policy' (2011) 10 (3) *Journal of Language and Politics* 436.

⁴⁴⁹ Kloss was a German linguist who was a successful and influential academic. His collaboration with the Nazi regime has recently been uncovered and thus there is some reluctance to cite him. See C.M. Hutton, *Linguistics and the Third Reich Mother-Tongue, Fascism, Race and the Science of Language* (Routledge 1998).

⁴⁵⁰ H. Kloss, *The American Bilingual Tradition* (Newberry House Publishers, 1977); Kloss, H. 'Notes concerning a language-nation typology' in Fishman, J., Ferguson, C. and Gupta, J. Das (eds.) *Language Problems of Developing Nations* (1968 Wiley).

right to freely use a language in personal interactions, whereas 'promotion-oriented rights' require some action on the part of government facilitating interaction in the language desired within the public sphere. As a result, early language rights debates tend to have two dimensions which broadly correspond to the tolerance oriented/promotion oriented distinction: focusing on language's function as a medium for communicating, which is mainly related to procedural rights, and fits into the minimalistic 'tolerance' bracket, as compared to 'promotion oriented' language rights which are more linked to issues of identity and of language preservation.

The Canadian context, and the evolution of its bilingual hybrid legal system also provided stimulus for discussion of language rights issues. The input of Canadian legal theorists such as Leslie Green and Denise Réaume was extremely valuable to early iterations of ideas of language rights.⁴⁵¹

Their input is very clear. They were keen that language rights should include being guaranteed opportunities to learn the language of choice, and the principal language of the state.⁴⁵² Their concern was both to facilitate interaction and to guarantee language for the future. They defined language rights as protections of speakers from

⁴⁵¹ Leslie Green, 'Are language rights fundamental?' (1987) *Osgoode Hall Law Journal*, 25 639-669; Green 'Freedom of expression and choice of language.' (1991) *Law & Policy*, 13, 215-29; Leslie Green and Denise Réaume 'Education and linguistic security in the Charter.' (1989) *McGill Law Journal* (34) 777-816.

⁴⁵² Leslie Green and Denise Réaume, 'Education and linguistic security in the Charter.' (1989) *McGill Law Journal* (34) 777-816.

unfair or coercive pressures. An approach such as Réaume's which concentrates on the idea of 'linguistic security'⁴⁵³ over 'language rights' attempted to reconcile these two aspects of language rights. While language remain central to the focus she is reserving the individual at the centre of this right and argues in this way that language preservation can be compatible with an individual rights approach. Canadian explanations of language rights, must be viewed in light of their unique system.⁴⁵⁴ The Canadian context will be further investigated in chapter 8 and compared with the European Union and the USA.

Kloss believed that 'tolerance oriented rights', such as the right to speak the language one chooses in the private sphere were insufficient to protect language, and therefore more substantial 'promotion oriented rights' were needed. These 'promotion oriented' rights include the provision for symbolic choice of language, facilities for language learning and promotion and permission to use the language of choice in interaction with state bodies. Kloss' input is typical of early discussions of language rights issues. The discussion of rights was fairly limited, concentrating on language's practical

⁴⁵³ Réaume, "The Right to Linguistic Security: Reconciling Individual and Group Claims", in Sylvie Léger (ed.) *Linguistic Rights in Canada: Collusions or Collisions?* (Canadian Centre for Linguistic Rights, University of Ottawa, 1995); Réaume "The Group Right to Linguistic Security: Whose Rights, What Duties?", in Judith Baker, ed., *Group Rights*, (University of Toronto Press 1994).

⁴⁵⁴ See for example Leslie Green, 'Are Language Rights Fundamental?' 25 *Osgoode Hall Law Journal* (1987), 639-669; Denise Réaume 'Official Language Rights: Intrinsic Value and the Protection of. Difference', in Will Kymlicka and Wayne Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press 2000) p. 245 et seq.

function, and not considering legal or political implications beyond the rudimentary. Whereas the symbolic and political dimensions of language were to be accorded greater importance in later explanations, often language rights' early proponents concentrated on practical speaking and interaction rights. Much of the later commentary divides language rights further into categories for analysis. For example, Kymlicka and Patten further divide Kloss' 'promotion oriented' rights into the sub categories of 'norm-and-accommodation' rights, which permit (accommodate) the use of language(s) other than the main language in a state. This accommodation provision they then distinguish from the 'officialisation' of languages, which provides status, and which they view as a supplementary step.⁴⁵⁵ The question of whether languages have intrinsic value is outside the parameters of this study. This thesis does not attempt to normatively posit whether the political community, be that at EU level or state level, should actively engage in language promotion or preservation. However the intrinsic value of language forms part of the basic normative values underpinning many notions of extensive language rights.⁴⁵⁶ Thornberry analyses the attitudes towards language preservation thus:

⁴⁵⁵ Kymlicka W. and A. Patten (Eds), *Language Rights and Political Theory* (Oxford University Press 2003) *introduction*.

⁴⁵⁶ For more on this idea see Réaume, "Official Language Rights: Intrinsic Value and the Protection of. Difference", in Will Kymlicka and Wayne Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press 2000) and D. Weinstock "The antinomy of language policy" in Kymlicka W. and A. Patten (Eds) *Language Rights and Political Theory* (Oxford University Press 2003).

The degree of logical coherence between a commitment to preserve a language, and one to secure its gradual elimination from use is not great. The commitment to preserve is, to be sure, only to preserve as far as possible so that the balance is tipped in favour of elimination.⁴⁵⁷

Therefore, the line between promotion and tolerance becomes blurred, if the normative basis for the tolerance involves the protection of language as a public good or as an aspect of heritage. Rubio Marin asserts that protecting language is just as important as protecting speakers, distinguishing between non-instrumental and instrumental language rights.⁴⁵⁸ Her view is that one is useless without the other, stating that 'non-instrumental language rights focus on the cultural dimension of language and such a dimension loses its meaning without the community experience that makes of language a cultural identity-maker.'⁴⁵⁹ For her, language rights for communities which are cultural in focus can be classed as 'non-instrumental', but she believes they are important nonetheless. Rubio Marin's distinction between instrumental and non-instrumental language rights aims to cover both traditional and new minority

⁴⁵⁷ Patrick Thornberry, *International Law and the Rights of Minorities*, (Clarendon 1991) at p. 362.

⁴⁵⁸ Ruth Rubio-Marín, 'Language Rights: Exploring the Competing Rationales' in Will Kymlicka and Alan Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

⁴⁵⁹ Ruth Rubio-Marín, 'Language Rights: Exploring the Competing Rationales' in W. Kymlicka and Alan Patten, *Language Rights and Political Theory* (Oxford University Press 2003), 57.

language situations. She wants to ensure the right to learn the majority language as part of a package of language rights while still avoiding 'linguistic obstacles that may curtail the enjoyment of rights, freedoms and opportunities that rest on the possibility of comprehensible linguistic interactions'.⁴⁶⁰ However, her calls for language rights are distinctive in that they frame them in conjunction with a 'duty' to learn the language of the majority/dominant culture, which implies access to the resources to do so, in order to avoid 'linguistic obstacles'.⁴⁶¹ Rubio Marin wants to ensure the right to learn the majority language, avoiding 'linguistic obstacles that may curtail the enjoyment of rights freedoms and opportunities that rest on the possibility of comprehensible linguistic interactions'.⁴⁶²

In Kloss's description 'tolerance-oriented' rights are the minimum freedoms guaranteed, such as the right to freely use a language in personal interactions, whereas 'promotion-oriented rights' require some action on the part of government facilitating interaction in the language desired within the public sphere.⁴⁶³ For this reason, De Witte distinguishes between 'rights to freedom and

⁴⁶⁰ Ruth Rubio-Marin, 'Language Rights: Exploring the Competing Rationales' in W. Kymlicka and Alan Patten, *Language Rights and Political Theory* (Oxford University Press 2003), 68.

⁴⁶¹ Ruth Rubio-Marin, 'Language Rights: Exploring the Competing Rationales' in W. Kymlicka and Alan Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

⁴⁶² Ruth Rubio-Marin, 'Language Rights: Exploring the Competing Rationales' in W. Kymlicka and Alan Patten, *Language Rights and Political Theory* (Oxford University Press 2003).

⁴⁶³ H. Kloss, *The American Bilingual Tradition* (Newberry House Publishers, 1977).

rights to equality,⁴⁶⁴ rights to freedom broadly cover private use of language, whereas rights to equality would concern public uses, and use in contact with the administration of the state. The distinction pioneered by Kloss between 'promotion oriented' and 'tolerance oriented' language rights identifies the difficulties in language policy. It is necessary, therefore, to acknowledge the unique nature of language, and to treat it as a case apart. Conceding language rights which are designed to promote and protect languages is fundamentally opposed to the liberal democratic tradition with the individual at its core. The line, however, between tolerance and promotion, is a very fine one. The acts of linguistic promotion the State undertakes are not limited to proactive policies promoting language, but can stretch to the endorsement and/or use of a particular variety over another. All language policy promotes a political point of view regarding language. Ultimately, the tolerance/promotion distinction proves difficult to use as it is impossible to categorise much of the policy in the sphere of language neatly.

III Language Rights in Legal Theory

In order to assess language rights in the European Union it is important to be clear about what language rights might entail as a

⁴⁶⁴ Bruno De Witte, "A Legal Perspective" in S.Vilfan (ed) *Ethnic Groups and Language Rights* (NYU Press 1993).

concept. The thesis so far has explored contextual background on language rights in disciplines other than law. This was necessary in order to understand the complexity of the protection of language rights, and the competing narratives of what ends language rights are designed to serve. This section will now explore academic commentary on these issues from a legal perspective. Speaking to 'rights' is an invocation of the law. The limits to a legal theory of 'language rights' are assessed here. Framing the legal protections of language in terms of 'rights' complicates an already complex area of law. It will be argued in part II that language rights in the EU are mainly procedural, rather than substantive in nature. Procedural rights can be distinguished from 'human rights'. The legal protection of language in the European Union, therefore, in limiting itself to the protection of official languages only, means that these ideological difficulties can be avoided.

Language rights' is a contested concept with many potential meanings. The research on 'language rights' tends to be highly partisan in nature, particularly in the area of 'traditional minority languages'.⁴⁶⁵ Silverman defines partisan research, stating that

The partisan seeks to provide the theoretical and factual resources for a political struggle aimed at transforming the

⁴⁶⁵ For more on traditional linguistic minorities see Kortmann and van der Auwera (eds.) *The Languages and Linguistics of Europe, a Comprehensive Guide*. Vol II (Walter de Gruyter, 2011)

assumptions through which both political and administrative games are played.⁴⁶⁶

Recent decades have seen a wave of attempts to conceptualise the issue of language rights. Emotive language is commonplace. Paulston terms this the 'exhortatory' analysis of language rights.⁴⁶⁷ The concept of language rights, however, is not purely legal.

The very issue of 'language rights' is questionable from a variety of perspectives, the approaches of linguists and of political theorist have been outlined. The discourse of rights by necessity implicates law. A consideration of the legal difficulties in the classification of language rights helps to understand why difficulties may arise, and what the limits may be to analysing legal protections of language through this lens only.

From a legal perspective, there are serious obstacles to classifying language rights as substantive rights. First of all, the vagueness characteristic of most discussions of language rights and the room for ever-broader interpretations of the concept is incompatible with a legal perspective. In particular, the avoidance of the notion of limits to language rights in discussion of the issue poses problems. From a legal point of view the limitations placed on rights

⁴⁶⁶ David Silverman *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (3rd edition Sage 2006).

⁴⁶⁷ CB Paulston 'Language Policies and LANGUAGE RIGHTS' (1997) 26 *Annual Review of Anthropology* 73-85

are as substantively important as the extent of any right itself, as Arzoz explains:

The notion of limits is even more cogent should LHR actually become human rights, because a notion of limits is inherent to the concept of rights: since they inevitably clash with each other and with other respectful values. Most human rights are not absolute.⁴⁶⁸

From a legal perspective, a right is not possible in a vacuum. A further examination of the term 'language rights' reveals that certain difficulties have arisen in the examination of language rights as legal rights. We will first outline and analyse the criticisms which have arisen.

There is no coherent, general definition of language rights, because, as chapter 2 has demonstrated definitions of language form the basis for sociolinguistic disagreements. Furthermore, there is considerable debate in legal theory regarding the concept of 'rights'.⁴⁶⁹ The analysis of the developments in the conceptualisation of language rights made in the field of political philosophy demonstrated the extent to which language rights are involved with the idea of the State, and, with the political communities which

⁴⁶⁸ Arzoz, 'The Nature of Language Rights' (2007) (2) *Journal on Ethnopolitics and Minority Issues in Europe* 1-34.

⁴⁶⁹ Joseph Raz, 'Rights and Politics (1995-1996) 71 *Indiana Law Journal* 27; Mark Tushnet, "An Essay on Rights" (1983-1984) 62 *Texas Law Review* 1363; Mary-Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse*, (The Free Press, 1991); Pierre Schlag, "Rights in the Postmodern Condition" in Sarat and Kearns, *Legal Rights: Historical and Philosophical Perspectives* (University of Michigan Press, 1996).

compose it. The assertion of a language *right* 'endows a language claim with unconditional normative value and immediate applicability regardless of local distributional consequences.'⁴⁷⁰ Bastarache J of the Canadian supreme court highlights this difficulty in his statement that, 'language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided,'⁴⁷¹ however, they are not in the same bracket as socio-economic rights as they are usually conceived. Language rights, he declares, 'are a particular kind of right.'⁴⁷² Even where the normative value of language rights claims is not in dispute, there are other difficulties which arise in classifying language rights as 'rights.' These will be explored briefly.

(i) Group rights

One of the most distinctive properties particular to language is that it requires human interaction; therefore it is difficult to frame language rights as individual rights purely, due to their mixed nature. Language cannot fully be individualised as a concept, due to its function as a means of communication. Hence, there is an inherent tension in trying to term it in frames of rights. One of the most distinctive properties particular to language is that it requires human

⁴⁷⁰ Moria Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' (2013) 54 *Harvard International Law Journal* 157-218, 172.

⁴⁷¹ *R v Beaulac* [1999] 1 S.C.R. 768 (Justice Bastarache- paragraph 20).

⁴⁷² *R v Beaulac* [1999] 1 S.C.R. 768 (Justice Bastarache- Paragraph 25).

interaction. No one individual speaker is sufficient for the survival of a language and the use of language is a collaborative enterprise.

The theory of 'group-differentiated rights for cultural minorities'⁴⁷³ has been explored in the section on multiculturalism. As a counter to the universalism of human rights ideologies, group rights attempt to take into account the community.⁴⁷⁴ This is considered particularly fundamental when dealing with language, particularly within a cultural conception of language rights. Many commentators sustain that individual rights are not enough to guarantee full enjoyment of cultural diversity.⁴⁷⁵ They claim that the nature of these cultural rights is such that they are mainly enjoyed in the collective, and as such must be considered collective or group rights.⁴⁷⁶ The LHR commentators outlined earlier in this chapter believe that language rights are only of use as collective rights for communities.⁴⁷⁷ Donders appeals to a 'collective right to cultural identity'⁴⁷⁸ allowing for groups to enjoy rights communally. She believes this is central to the preservation of cultures and languages.

⁴⁷³ Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (Oxford University Press 1995).

⁴⁷⁴ Peter Jones, 'Human rights, Group rights, and People's rights', *Human Rights Quarterly*, 21:1 (1999) 80-107.

⁴⁷⁵ G. Andrásy, 'Freedom of Language: A Universal Human Right to Be Recognised' (2012) 19 *International Journal on Minority and Group Rights* 195–232.

⁴⁷⁶ Michael Hartney, 'Some confusions concerning collective rights', in Kymlicka, (ed.) *The Rights of Minority Cultures* (Oxford University Press, 1993); Peter Jones, 'Human rights, Group rights, and People's rights', *Human Rights Quarterly*, 21:1 (1999) 80-107.

⁴⁷⁷ R.Hamel, 'Language Conflict and Language Shift: a Sociolinguistic Framework for Linguistic Human Rights' (1997) *International Journal of the Sociology of Language* 127 pp105-34.

⁴⁷⁸ Y. Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002).

Kymlicka believes in the necessity of state protection of minority cultures and languages, in order to enable members of those minorities to enjoy and benefit from the cultural structures which are fundamental to their wellbeing.⁴⁷⁹ In the same way, De Witte and Mancini affirm that language rights are cultural rights.⁴⁸⁰

This reading of language rights as belonging to a group rather than individuals is often tied up in more politically skewed concerns about colonialism and self-determination. Castellino claims that minority language rights validate Western concepts of nation-building and do not sufficiently consider the importance of the group in other communities.⁴⁸¹ However, by singling out groups, the promotion of the ideals of language rights has the potential to increase ethnic or other divisions. Within the African context, Makoni comments that 'language rights can, on the one hand, be used to provide institutional support to minorities and, at the same time, provide a rationale for language-based discrimination.'⁴⁸² Language is generally collaborative in nature and the aspects of its use are complex. The individual within the community is fundamental to this examination as: '[s]ociolinguists and Applied Linguists regard the

⁴⁷⁹ Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (Oxford University Press 1995).

⁴⁸⁰ S. Mancini and B. de Witte, 'Language Rights as Cultural Rights: A European Perspective' in Francioni and Scheinin (eds), *Cultural Human Rights* (Brill, 2008).

⁴⁸¹ J. Castellino, 'Affirmative Action for the Protection of Linguistic Rights: An Analysis of International Human Rights; Legal Standards in the Context of the Protection of the Irish Language' 2003 *Dublin University Law Journal* (25) 1.

⁴⁸² S. Makoni, 'Language and human rights discourses in Africa: Lessons from the African experience' (2012) 7 (1) *Journal of Multicultural Discourses* 1-20.

collective performance of language by speech communities as the proper object of study.’⁴⁸³ This, therefore, necessarily affects sociolinguistic concepts of language rights. The nexus between language and community has been asserted by Spolsky. He claims:

[t]he linguistic identity of a speaker constructs that individual’s membership in a group using a particular idiom in the everyday. If we think of language as a base for linguistic identity, upon which collectivities develop their convictions about the content of culture, tradition and ethnicity, it becomes clear that language serves a particular function for social cohesion.’⁴⁸⁴

If, therefore, we focus on the limiting ourselves to thinking of language rights as purely ‘individual rights’, the argument is that we are overlooking the defining characteristic of language. The perspective of group rights does not sit comfortably within the classic Western constitutional democratic tradition. The justifications of multiculturalism and Human Rights are viewed sceptically by Critical Legal Studies Scholars.⁴⁸⁵ The mainstream legal approach tends to prefer liberalism’s individual-centric account of citizens’ interaction with society, which fits in with the constitutional democratic

⁴⁸³ R.L Trask, *Language and Linguistics: The Key Concepts* (2nd Edition) P.Stockwell Ed. (Routledge, 2007) 130.

⁴⁸⁴ B. Spolsky, *Sociolinguistics* (2nd edn Oxford University Press 2010).

⁴⁸⁵ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2000); see also Bill Bowring, *The Degradation of the International Legal Order?: The Rehabilitation of Law and the Possibility of Politics* (Routledge 2008); Vanessa Pupavac, *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012).

tradition. The collective nature of language is problematic, and further complicates any legal analysis. However, it is also difficult to accommodate language rights within this framework while rejecting the possibility of group rights. The problem with language rights as individual rights is that for a language to survive, speakers generally need someone to speak to. This leads to the next problem, the identification of the object of language rights- do they protect speakers, or languages?

(ii) The object of rights

The debate on language preservation and language rights revolves around the value of language, and the significance of the individual's choice to speak one language or another. Some commentators are opposed to the focus remaining on the language rather than on the rights of the speakers of the language. Weinstock affirms that: [a]ppealing to the intrinsic value of languages is actually a way of ascribing rights to languages or linguistic communities against their own members.⁴⁸⁶ In this chapter it has been demonstrated that much language preservation advocacy focuses on languages, reifying them. When discussing the question of language rights, there is considerable confusion over the object of the right from a legal perspective. Identifying the object or bearer of the right must be central to any legal discussion of language rights. A pure Human

⁴⁸⁶ D. Weinstock 'The antinomy of language policy' in Kymlicka W. and A. Patten (Eds) *Language Rights and Political Theory* (Oxford University Press 2003) 255 (italics in original)

Rights focus would tend to focus on speakers, but we have seen previously that the human rights approach popularised in the ideals of 'Linguistic Human Rights' is very strongly language focused, going so far as to establish a right to a mother tongue.

However, there is a second complicating factor to consider. If a language cannot have rights, it must also be remembered that a language cannot survive without its speakers. Often, language preservationists come under fire for their ardour in respect to languages, rather than people. The debate on language preservation and language rights revolves around the value of language, and the significance of the individual's choice to speak one language or another. Some commentators are opposed to the focus remaining on the language rather than on the rights of the speakers of the language. The two aims of facilitating interaction and guaranteeing language for the future may be mutually exclusive. Standardised language greatly eases interaction. However, guaranteeing language for the future by definition requires a multiplicity of languages and versions which some theorists argue are eliminated by standardisation.⁴⁸⁷ Language rights can most easily be ascribed to standard languages. However the process of linguistic standardisation required for protection by the law may be counterproductive.

⁴⁸⁷ J. Blommaert, 'Linguistic human rights as a source of policy guidelines: A critical assessment. (2005) (9) *Journal of Sociolinguistics* 390.

Furthermore, if the objective is to preserve languages, granting speakers of a language a whole panoply of rights pertaining to every aspect of communication is however, entirely useless if those speakers have no interest in communicating using the language in question. If the bearers of language rights are merely the individuals in question, by making the choice not to speak the language they are availing of their language rights. If the objective is language preservation for a broader purpose, then, individual language rights are insufficient.⁴⁸⁸

If language is fundamentally constitutive of identity, then it is a common justification that language must be preserved to allow individuals to access their identity.⁴⁸⁹ Those who do not believe in language preservation believe that it is reductionist to say that language is *fundamental* for identity, while still recognising it as an important peripheral aspect.⁴⁹⁰ The current debate over the extent to which language is central to ethnicity and identity, can be tied to globalisation and the role of the state. Stephen May believes that

⁴⁸⁸ Paul Bruthiaux 'Language rights in historical and contemporary perspective', (2009) 30 (1) *Journal of Multilingual and Multicultural Development*, 73-85

⁴⁸⁹ J. Mowbray, 'Ethnic Minorities and Language Rights: The State, Identity and Culture in International Legal Discourse', Sydney Law School Legal Studies Research Paper No. 10/78, August 2010.

⁴⁹⁰ See for example J. Edwards, in Percy and Davidson Eds *The Languages of Nation: Attitudes and Norms* (Multilingual Matters 2012); S. Romaine, *Language in Society: An Introduction to Sociolinguistics* (Oxford University Press 2000); J. Blommert, 'Language Policy and National Identity' in T. Ricento (ed.), *An Introduction to Language Policy: Theory and Method*. (Blackwell 2006).

languages vary in their salience to ethnic (and thus, identitarian) issues within and between historical periods.⁴⁹¹

This question is also central to assessment of the fundamental nature of language rights by Linguistic Human Rights proponents. The debate on language as fundamentally constitutive of identity is at the core of the problem with defining language rights as rights in a classic sense. This is because a rights perspective for all practical purposes assumes a specific understanding of language, identity and group rights. This is one whereby languages are commonly projected to be in a 'monovalent' relationship to identity as markers of ethnicity, and as indexically tied to the emotions and social values supposedly attached to the ethnicity. Furthermore, identity is viewed as something fixed, a permanent feature.⁴⁹²

The question is whether speakers can have the right, or duty, to have their language preserved, even if this is against their will, if it is central to speakers' identity. Weinstock affirms that: '[a]ppealing to the intrinsic value of languages is actually a way of ascribing rights to languages or linguistic communities against their own members.'⁴⁹³

⁴⁹¹ Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd edn, Routledge 2012).

⁴⁹² Christopher Stroud 'African Mother-tongue Programmes and the Politics of Language: Linguistic Citizenship Versus Linguistic Human Rights', (2001) 22(4) *Journal of Multilingual and Multicultural Development*, 339-355.

⁴⁹³ D. Weinstock, 'The antinomy of language policy' in Kymlicka W. and A. Patten (Eds), *Language Rights and Political Theory* (Oxford University Press 2003) pg 255 italics in original.

The difficulties in analysing language rights are in part due to the difficulty in ascertaining the object of a language right, whether it is the language itself, as an intrinsically valuable part of human heritage, or whether the object is speakers who wish to exercise their linguistic rights. This approach to language preservation has been described as valuing the language over the individual, which also creates problems for a legal analysis of the problem.⁴⁹⁴ The focus on the need to preserve languages as cultural objects or historical artefacts may disempower linguistic minorities.⁴⁹⁵ Those who Paulston accuses of 'exhortatory' analysis of language rights would claim that these rights have a special character which is relevant to them only as language rights, and cannot be compared with other cultural objects as language is fundamentally implicit in interpreting the world.⁴⁹⁶ Proponents of this approach believe that language is fundamental to human survival, and each language is a unique interpretation of the world.⁴⁹⁷ LHR proponents, for instance, believe it is fundamental to promote and protect languages, and believe that speakers have a basic right to have their language both protected and promoted as part of their Linguistic Human Rights. Patten distinguishes in this respect between 'fairness' language rights and 'end-state' language

⁴⁹⁴ D. Weinstock, 'The antinomy of language policy' in Kymlicka W. and A. Patten (Eds) *Language Rights and Political Theory* (Oxford University Press 2003).

⁴⁹⁵ Vanessa Pupavac, 'Language rights in conflict and the denial of language as communication' (2006) 10(1), *International Journal of Human Rights* 61-78.

⁴⁹⁶ C.B. Paulston, 'Language Policies and Language Rights' (1997) *Annual Review of Anthropology* 26, 73-85.

⁴⁹⁷ See section I (iii) on Linguistic Human Rights.

rights, end-state rights look to a *result* ie the non-disappearance of a language whereas fairness rights look only to a process, Patten stating that, 'without them, there would be unfairness in the social process that determines the availability of language options.'⁴⁹⁸

The question of whether language is fundamental to identity is beyond the scope of this thesis, but it colours many of the discussions on language rights. If language is part of identity, it is argued that it should be a right which is inherent in a person, no matter where they happen to be located,⁴⁹⁹ whereas language rights are often territorially circumscribed, with language borders reflecting political territorial borders.

(iii) Language rights: Territorial or personal?

The issue of territoriality is of key importance in the discussion of language rights.⁵⁰⁰ Languages have been intrinsically associated with territory in the ideology of the European Nation State.⁵⁰¹ The territorial question goes to the heart of the nature of language rights. If language rights inhere in people, as they do in conceptualisations which paint them as fundamental human rights, then they should not

⁴⁹⁸ Alan Patten, 'Survey Article: The Justification of Minority Language Rights' (2009) 17 (1) *Journal of Political Philosophy* 102-28, 120.

⁴⁹⁹ G. Andrassy, 'Freedom of Language: A Universal Human Right to Be Recognised' (2012) 19 *International Journal on Minority and Group Rights* 195–232

⁵⁰⁰ For an overview of the history of the ideas of territoriality in relation to language rights see D. Réaume, 'Beyond personality: the territorial and personal principles of language policy reconsidered.' in Kymlicka and Patten (eds) *Language Rights and Political Theory* (Oxford University Press 2003).

⁵⁰¹ Helder de Schutter, 'The linguistic territoriality principle: A critique' (2008) *Journal of Applied Philosophy*, 25(2), 105–120.

be bound by territorial borders. This is contrary to the reality in many parts of Europe where language rights are granted to minorities only within a limited sphere, and often as a function of the number of speakers of minority languages in a region.⁵⁰² This approach avoids the issues regarding language choice and the protection of language as heritage, instead limiting the protection of language to those areas where it has survived, often against historically oppressive national linguistic regimes. Many Member States in Europe, particularly those where devolution is advanced such as in the UK or Spain and Italy now have a language law of some kind providing for speakers of the regional dialect or language within a given territory.⁵⁰³ Hornsby and Agarín, in arguing against this point out that this limit the use of languages outside their traditional territorial remit and is a form of oppression, declaring that 'regulating linguistic regimes according to the territoriality principle inhibits the chances of using languages with limited intelligibility beyond the region of their traditional use, thereby marginalizing them outside a given territory.'⁵⁰⁴ Languages with no territories such as the languages of the Roma⁵⁰⁵ and languages associated with religions and religious communities such

⁵⁰² Colin Williams (Ed), *Linguistic Minorities Society and Territory* (Multilingual Matters 1991).

⁵⁰³ Colin Williams, 'Language policy, territorialism and regional autonomy' in B. Spolsky, (ed.) *The Cambridge Handbook of Language Policy* (Cambridge University Press, 2012).

⁵⁰⁴ Michael Hornsby and Timofey Agarín, 'The End of Minority Languages? Europe's Regional Languages in Perspective' (2012) *Journal on Ethnopolitics and Minority Issues in Europe* (11) 1, 88-116.

⁵⁰⁵ I. Pogány, 'Minority Rights and the Roma of Central and Eastern Europe' (2006) 6(1) *Human Rights Law Review* 1-25.

as Hebrew and Yiddish⁵⁰⁶ demonstrate that this has not always been the case in Europe. Multilingualism was commonplace and a territory could contain multiple languages. The complex nature of identities in high modernity and the consequent recognition of the place of languages in this has also thrown into question territorial conceptions of language and language rights.⁵⁰⁷

Migration has caused a change in the flow of languages present. This has led both to a questioning of territorialism as a limit to language rights and an increased look to supranational governance.⁵⁰⁸ There is a tension between regionally integrated post-national governance structures and the adherence to a nationalistic concept of language within these structures. This forms a core aspect of the protection of languages in the European Union, which Part II of the thesis will explore. There is unprecedented social and cultural diversity thanks to globalisation. This is referred to as 'superdiversity'. It is present especially in large urban areas with high migration, which make up much of the land mass of the European Union.⁵⁰⁹ Appadurai

⁵⁰⁶ Kenneth McRae, 'The principle of territoriality and the principle of personality in multilingual states.' 1975 (4) *International Journal of the Sociology of Language* 33–54.

⁵⁰⁷ Blommaert and Rampton 'Language and superdiversity' (70) *Working Papers in Urban Language & Literacies*
<http://www.kcl.ac.uk/innovation/groups/ldc/publications/workingpapers/70.pdf>
<Last accessed 7 December 2013>.

⁵⁰⁸ Francesco Palermo and others (eds), *Globalization, Technologies and Legal Revolution: The Impact of Global Changes on Territorial and Cultural Diversities, on Supranational Integration and Constitutional Theory* (Nomos, 2012).

⁵⁰⁹ Steven Vertovec, 'Super-diversity and its implications', (2007) 29(6) *Ethnic and Racial Studies* 1024-54.

defines globalisation as flows⁵¹⁰ of people, money, technology, media messages and ideas.⁵¹¹ The European Union's four freedoms facilitate these globalizing 'flows' of commodities, people, money and culture, without regard for the differences of language. Some theorists argue that global economic conditions have led to an instrumentalisation of language, where it is viewed as a skill in pure economic terms and thus removed from identity.⁵¹²

The differences in approach between those who view language as a fundamental aspect of individual identity and those who view it as a skill or function are irreconcilable. This leads to a lack of clarity in the debate on language rights. Most theories in favour of language rights comprise both a concern for the language and a concern for the speaker. Achieving balance between these, however, is delicate. Limiting language rights territorially is a solution which recognises the claim certain groups may have to use of their own language within a state, however it allows for the maintenance of one official state language. The increasing irrelevance of territorial limits to human communication, however, may lead to a questioning of this limitation in future.⁵¹³

⁵¹⁰ The idea of 'flows' is central to theorisations of globalisations: see Appadurai 'Modernity at large: cultural dimensions of modernity' (University of Minnesota Press 1996).

⁵¹¹ A. Appadurai, 'Disjuncture and difference in the global cultural economy' (1990) 2(2) *Public Culture* 1-24.

⁵¹² Monica Heller, 'Language as a Resource in the Globalised New Economy' in N. Coupland (ed) *The Handbook of Language and Globalisation* (Blackwell 2010).

⁵¹³ Michael Hornsby and Timofey Agarin, 'The End of Minority Languages? Europe's Regional Languages in Perspective' (2012) (11) 1 *Journal on Ethnopolitics and Minority Issues in Europe* 88-116.

(iv) Typologies of language rights

Alan Patten, a political philosopher, identifies 5 types of theorisations of language rights, (1) tolerance rights (2) accommodation rights, (3) context-of-choice rights, (4) end-state rights, and lastly (5) fairness rights.⁵¹⁴ These differing formations of the same idea are all slightly differing versions of the concept of language rights. They have different, but often overlapping goals in mind. This chapter has examined how these differing conceptions play out and assessed how these are developed by legal theorists.

Language rights in Europe can be categorised following a model proposed by Xabier Arzoz.⁵¹⁵ These categories are beneficial as they give concrete examples which demonstrate the lack of one coherent conception of language rights in Europe at present. Arzoz proposes five categories for the classification of language rights; human rights, 'old' minority rights, 'new' minority rights, indigenous peoples' rights and the official language model.⁵¹⁶ Arzoz claims that 'these normative models of language rights do not exclude, but rather supplement each other.'⁵¹⁷ Outlining these categories allows the study of the language protections at regional and international level in the next

⁵¹⁴ Alan Patten, 'Survey article: The justification of language minority rights' (2009) *Journal of Political Philosophy*, 17(1), 102–128.

⁵¹⁵ Xabier Arzoz, 'Accommodating Linguistic Difference- five normative models of Language Rights' *European Constitutional Law Review* 6 (2010) 102-122.

⁵¹⁶ Xabier Arzoz, 'Accommodating Linguistic Difference- five normative models of Language Rights' *European Constitutional Law Review* 6 (2010) 102-122; see also X. Arzoz, 'Language Rights as Legal Norms', 15 *European Public Law* (2009) 541.

⁵¹⁷ Xabier Arzoz, 'Language Rights as Legal Norms', 15 *European Public Law* (2009) 544.

chapter within their different categories. It permits us to see these as differing, but complementary models for the provision of language rights and shows that the European Union language rights proposed in the final chapter need no supplant, but can rather, complement these regional and international provisions.

The first categorisation of language rights Arzoz proposes is the minimalist 'Language Rights as Human Rights' model. This is distinct from the similarly named 'Linguistic Human Rights' explored elsewhere in this thesis. A language rights as human rights view sees language rights and their protections as not distinct from other human rights protections. Arzoz claims that language rights are inevitably protected to some extent through ordinary international human rights instruments and mechanisms. These are generally agreed upon, but are very weak language rights and 'linguistic communities who need or wish to protect their languages have little to rejoice if their only acceptable recourse is an appeal to the right against interference and discrimination.'⁵¹⁸ The nature of language rights develops when one tries to apply them in the context of use of language by public authorities and promotion of language. Therefore, to see linguistic rights as human rights merely doesn't provide a full picture of the language rights landscape.

⁵¹⁸ Xabier Arzoz, 'Accommodating Linguistic Difference- five normative models of Language Rights' *European Constitutional Law Review* 6 (2010) 107.

The second grouping of language rights he addresses, in an attempt to widen the scope, is encompassed within the category of minority rights. Arzoz divides minority rights into 'old' minority rights and 'new' minority rights. In brief, 'old minority rights' refers to autochthonous minorities, whereas 'new' minority rights' refers to immigrant communities.⁵¹⁹ He further divides minorities in his categorisation, so that indigenous peoples' rights form their own separate category. The concern of these indigenous rights is explicitly ethnocultural, in that their purpose is the preservation of traditional cultures and ways of life. Rights in this category include the right to mother tongue education, or to tribal practices. He claims these are distinct as they are treated on a different legal basis, with two international documents supplementing article 27 of the International Covenant on Civil and Political Rights; the 1989 ILO Convention on Indigenous and tribal Peoples, and the Declaration on the Rights of Indigenous Peoples of the UN General Assembly. While acknowledging their importance, Arzoz points out the limited number of states who have ratified the convention and the limits of its application in Europe. Traditionally, this has arisen with linguistic minorities. All the concerns highlighted above regarding essentialism, can apply to this categorisation of rights, however, their tendency towards an essentialist perspective and the problems with legislating

⁵¹⁹ For a thorough explanation of the tensions in this area see: Henrard and Dunbar (eds), *Synergies in minority protection: European and International law perspectives* (Cambridge University Press, 2008).

for culture are not at issue here. There is a clear category of legal instruments and international legislation which aims to protect indigenous rights, and the claim is that these can be seen as distinct from other categorisations of language rights as they have distinct concerns at their roots.

Arzoz claims the final category – ‘Official Language Rights’ – are the result of constitutional compromises between linguistic communities. He states that in this sense ‘language rights are special guarantees accorded to citizens as a ‘natural’ part of State-building or re-building arrangements... thus language rights are compromise rights.’⁵²⁰ The designation of official language will be analysed further in Part II of the thesis. Official language rights in this sense generally operate in multilingual polities and the process of officialisation arises as a response to particular situations. These rights are territorially limited and anchored in texts. They are regulated by domestic provisions, usually constitutional, which are further elaborated by legislation.

Regulation by the law requires standardisation and easily categorisable classifications, which, as discussed, may be incompatible with the nature of language itself, and is rendered more difficult by the political charge of this area.

⁵²⁰ Xabier Arzoz, ‘Language Rights as Legal Norms’, 15 *European Public Law* (2009), 544.

IV Conclusions

The idea of language rights was examined in chapter from a sociolinguistic, philosophical and finally legal perspective. The difficulties in reconciling the imprecision of 'language rights' with legal analysis and the problems of classifying language rights as rights proper and have been broadly outlined. The content of these rights has been considered from the perspective of sociolinguistics and political philosophy in the previous sections. The conceptualisations of language rights within other disciplines serves to highlight the complexity of the issue from a legal point of view. Unfortunately, there is a limited awareness of the complexity of these background definitional issues within the legislative frameworks designed to deal with languages in the international sphere. Nonetheless, language communities and the management of linguistic minorities are a central preoccupation of many governments worldwide. This chapter has analysed the definitional problems with language rights from a legal perspective, building upon the sociolinguistic and political philosophy analysis of the previous chapter. Abstract legal analysis of this subject matter is extremely difficult. The breadth of approach of early sociolinguists included broader issues such as identity and culture in their theorisations of language rights.

As discussed in chapter 2 many sociolinguists see reasoning on language issues as coloured by ideology, believing that western attitudes to language have been affected by our statist, capitalistic

history. This ideology leads to standardisation of language, and this attitude is being exported to the rest of the world.⁵²¹ It is precisely these broader issues which colour the debate on language rights and have contributed to its indeterminacy. The next chapter will examine the international context regarding the protection of language rights, including the considerable regional legislation in place in Europe, outside the European Union's organisation. By protecting procedural language rights, and largely avoiding the question of substantive or fundamental language rights, the EU distinguishes its own language rights approach. The legal protection of language in the European Union is bound up in the status of official language, and avoids human rights based understandings of 'language rights'. The legal protection of language in the European Union, therefore, in limiting itself to the protection of official languages only, to some extent circumvents the difficulties this chapter has outlined. The particular rights pertaining to language in the EU are administrative and will be explored at length in part II.

⁵²¹ Duchêne and Heller, *Discourses of Endangerment: Interests and Ideology in the Defence of Languages* (Continuum 2007).

Chapter 4: Legal Protections of Language Rights in International and Regional Legal Systems

This thesis examines the legal protections of language in the European Union. It argues that these include, but are not limited to language rights. In order to prove this, an examination of the protections of language rights at international law is necessary.

There is still considerable conceptual indeterminacy regarding the phenomenon of language rights. Nonetheless, the discourse of language rights has gained considerable currency in policy and in International Law, and has been used as an effective tool for conflict prevention and diversity management, particularly in Europe.⁵²² This chapter examines the safeguards and linguistic rights in place in the international system, to demonstrate the provisions for linguistic groups which have been recognised in the international community, before focusing on European regional and EU provisions. This section of the thesis will trace the actions of major international institutions in the area of language rights. These protections are often used as a justification for normative claims of substantive language rights protection by the European Union. The historical development of the treatment of minorities and of language groups is a core feature of the history of European nation states and their colonies. Malloy believes that the relationship between national minorities and state

⁵²²Francesco Palermo 'Judicial Adjudication of Language Rights in Central Eastern and South-Eastern Europe: Principles and Criteria' in *EURAC European Diversity and Autonomy Papers* EDAP 02/2011

nationalism is the root of the problems with the international law regime.⁵²³ Throughout this thesis it is evident that the weight of the nation-state persists, even in the most integrated systems of regional governance such as the EU.

The first part of this chapter provides some historical context for the international protection of minorities, building on the foundations of chapter 2 and chapter 3. An exploration of the definition of minorities, and how this subject has been approached at international law will follow. The international legal instruments which have been devised in this field will be outlined and the chapter will examine the international system's formal provisions for language, and language rights.

Subsequently, the focus will shift to Europe, outside of the European Union in the other regional organisations which have been the home of many important legal developments. This chapter provides a context within which to examine the language rights provisions of the European Union. The main provisions for minority language protection at International Law protect language rights through the provision of schemes for linguistic preservation. Pupavac is critical of the utility of this approach, claiming that 'Linguistic Human Rights strategies are essentially bureaucratic

⁵²³ Tove H. Malloy *National Minority Rights in Europe* (Oxford University Press 2005)

institutionalising solutions.’⁵²⁴ With regard to language protection, reporting and monitoring processes are ever more important both in the European and the International context.⁵²⁵ The question of whether this ‘standard setting’ could lead to hard law remains open.⁵²⁶ Chapter 7 examines the standard setting by the European Union, and looks at minority language protection in the EU. European regional organisations have provided new legal instruments in the ambit both of minority protection, and language rights protection more specifically. This chapter will explore the instruments which have emerged, and place them in their political and historical context. This then allows for the identification of an innovative typology of language rights for the European Union in part II. EU language rights in a citizenship conception of language, whereas language rights at international law are based in the ideals of human rights. Having summarised the key theories across various academic disciplines regarding language rights in the preceding chapters, this chapter now examines their practical implementation by the international community, and the problems encountered.

⁵²⁴ Vanessa Pupavac *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012) 168

⁵²⁵ Emma Lantschner ‘Minority Participation in International and Bilateral Monitoring and Reporting Processes’ in Marc Weller and Katherine Nobbs (eds) *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010) 705-734

⁵²⁶ E. Lantschner ‘Standard-Setting in the Field of Minority Rights – From Soft Jurisprudence to Hard Law?’ 8(6) *International Journal of Diversity in Organisations Communities and Nations* (2009) 129-137

I Language Rights in International Law

International means to enforce language preservation goals are not always desirable from a linguistic point of view, as we explored in chapters 2 and 3. At international law, language rights protections are considered 'a dog without a bark,'⁵²⁷ due to their lack of specificity and enforceability. The implementation of systems of minority rights is 'characterised as necessary to protect minority groups from state action, in particular, state action designed to assimilate minorities or otherwise deprive them of their distinctive culture and identities.'⁵²⁸ Their distinctive culture and identities often include linguistic aspects. Chapter 2 examined the creation of the unitary monolingual nation-state, and its implications for language development. Linked to the evolution of the nation-state, the question of how to define minorities have been a central feature of political and legal dialogue, particularly in the last century.

The philosophy of 'Human Rights' was viewed as a general tool to protect all individuals, irrespective of which nation, ethnicity or minority they might belong to. Marc Weller states that:

During the League of Nations era, positive rights relating to language, education, religion and culture were established...After the catastrophe of the Second World War,

⁵²⁷ Sadhana Abayasekara, 'A Dog without a Bark: A Critical Assessment of the International Law on Language Rights' (2010)17 Australian International Law Journal 89-111.

⁵²⁸ Vanessa Pupavac *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012) 31

they appeared to be thoroughly discredited and provisions relating to minority identity were no longer pursued. Instead, individual human rights were extended to all persons. Provided these rights were extended equally to all persons, it was assumed, no need for additional measures in favour of minorities would be required.⁵²⁹

Since the end of the Second World War it can be said that interest in minority protection has been 'largely of an indirect nature.'⁵³⁰ Ahmed declares that: 'The homogeneous basis of human rights is problematic for minorities on theoretical and practical levels alike.'⁵³¹ Classic twentieth century enumerations of human rights such as the UN Universal Declaration of Human Rights of 1948 and subsequent seminal international human rights documents propose, according to the classic western liberal tradition, that minority rights are sufficiently protected in the guarantees for the rights of the individual.⁵³² The basis of the 'equal citizen' means that minorities,

⁵²⁹ M. Weller 'The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights' in M. Weller (ed) *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press 2005) p. 620.

⁵³⁰ Rehman, J. *International Human Rights Law* (2nd ed Pearson Education 2010) 453

⁵³¹ Tawhida Ahmed *The Impact of EU Law on Minority Rights* (Hart Publishing 2011) 17

⁵³² Steiner and Alston *International Human Rights in Context: Law Politics Morals- Texts and Materials* (3rd edn Oxford University Press 2008)

then, are only entitled to rights which are also available to the majority group.⁵³³

The idea of granting specific minority rights, among which language rights, has been used to counter secessionist tendencies or to create compromise as part of a late twentieth/ early twenty-first century approach to dealing with minorities. This approach is partly in tension with the universalism of a human rights perspective which characterised the International Community's approach to the Second World War. In order to understand why this might be, first of all, the difficulties encountered when trying to define minorities within the international community will be examined. Despite frequent attempts at their protection, 'minorities' have been a very difficult concept to define.⁵³⁴ While there is a large scale rejection of the essentialism which underscored some of the minority protections originally instated by the international community, there is still a need for the protection of rights of minorities.

(i) The international definition of 'minority'

There is no generally accepted definition of the features which constitute a 'minority'.⁵³⁵ This section will look at how 'minorities' are

⁵³³ Tawhida Ahmed *The Impact of EU Law on Minority Rights* (Hart Publishing 2011)

⁵³⁴ J. Packer 'Problems in Defining Minorities' in Bowring and Fotherell (eds) *Minority and Group Rights in the New Millennium* (Kluwer Law International 1999).

⁵³⁵ P. Macklem 'Minority Rights in International Law' 6 (3/4) *International Journal of Constitutional Law* (2008) 531-553; N.S. Rodley 'Conceptual Problems in the Protection of Minorities: International Legal Developments' 17(1) *Human Rights Quarterly* (1995) 48-71; John R. Valentine 'Toward a Definition of National Minority' 32 *Denver Journal of International Law and Policy* (Summer 2004) 445-474.

defined and the changing limits of this definition. International attempts at consensus building and protection in this ambit have led to the weakness of the international legal instruments investigated in this thesis.⁵³⁶ The theoretical difficulties involved in dealing with groups who do not fit into the mainstream culture of the state have been examined in chapter 3. International law includes within its scope many issues of minority rights; however, these are not unequivocally defined anywhere. International law has been deployed in order to find solutions to the problems created by nationalism and colonisation.⁵³⁷ Vroldjak identifies this as an attempt to remedy the mismatch between cultural communities and territorial communities, stating:

Despite the efforts of early twentieth century statesmen to square territorial boundaries with cultural groupings, there was a realisation that this task could (and should) never have been fully implemented. Instead, international law, and more specifically human rights law, has been deployed in achieving a workable equilibrium for that which cannot be realised as a reality on the ground.⁵³⁸

⁵³⁶ Jacqueline Mowbray *Linguistic Justice: International Law and Language Policy* (Oxford University Press 2012).

⁵³⁷ G. Pentassuglia *Minorities in international law: an introductory study* (Council of Europe Publications 2002); Vijapur A. 'International protection of minority rights' (2006) *International Studies* 43(4) 367–394; W. Kymlicka 'The Internationalization of Minority Rights' 2008 6(1) *International Journal of Constitutional Law* 1–32.

⁵³⁸ A.F. Vroldjak 'Liberty Equality Diversity: States Cultures and International Law' in Vroldjak (ed) *The Cultural Dimension of Human Rights* (Oxford University Press 2013).

The various philosophical approaches to the treatment of minority groups in modern society have been briefly touched upon in the section on political philosophy and language rights. There is perennial disagreement over the need for special rights for certain groups, in addition to the (individual) human rights they enjoy. Since the advent of the twenty-first century and the development of a globalised society these issues have been viewed within a context of multicultural diversity management, as explored in chapter 3. Normative attempts to account for the heterogeneity of modern society vary in their approach, from advocating explicit recognition and protection of difference to blindness to difference and an emphasis on equality, as chapter 3 outlines.

The definition of a minority by Francesco Capotorti, special rapporteur to the UN who was assigned to prepare a study pursuant to Article 27 ICCPR, devised what can be considered the classic modern definition. He defines a minority as:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members- being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity,

directed towards preserving their culture, traditions, religion, or language.⁵³⁹

Although Capotorti's seminal description from the 1970s has been criticised in particular for its mixing up of subjective and objective criteria⁵⁴⁰, its reliance on the numerical inferiority⁵⁴¹ and an essentialist focus⁵⁴² it remains in currency today.⁵⁴³ Another source of debate, which this central definition does not resolve, is whether the criteria for minority belonging should be subjective or objective. That is to say, whether the definition of a group or a minority should be externally measured, or whether a subjective sense of belonging to a group could suffice. Capotorti's definition remains silent on this. Objectivity in the approach to minorities means that members of the minority group are seen as such despite their self-identification, it is 'a demographic fact independent of the will of the members.'⁵⁴⁴ The flexibility of self-identification and subjective criteria leading to an internal sense of belonging to a minority have been lauded.⁵⁴⁵ However the limits of when a subjective definition of a person as

⁵³⁹ Francesco Capotorti *Study on the Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities* (1979 United Nations).

⁵⁴⁰ Although it has also been widely criticised too. See further; Shaw *International Law* (Cambridge University Press 2008).

⁵⁴¹ Kristin Henrard *Devising an Adequate System of Minority Protection* (Kluwer Law International 2000)

⁵⁴² J. Deschenes *Proposal Concerning a Definition of the Term 'Minority'* UN Doc. E/CN.4/Sub.2/384/1985/31 (1985).

⁵⁴³ See further; J. Deschenes *Proposal Concerning a Definition of the term 'Minority'* (United Nations 1985) UN docs E/CN.4/Sub.2/1985/31

⁵⁴⁴ Gorter and Cenoz 'Legal Rights of Linguistic Minorities in the EU' in L. Solan and P. Tiersma (eds) *The Oxford Handbook of Language and Law* Oxford University Press 2012) 263.

⁵⁴⁵ Tawhida Ahmed *The Impact of EU Law on Minority Rights* (Hart Publishing 2011)

belonging to a particular group is sufficient are very difficult to draw. In particular, the criterion of minority as numerical minority has shown its lack of reliability as an indicator, taking into consideration such situations as the genocide in Rwanda and apartheid in South Africa where there were clear cut conditions of minority detention of political power to the detriment of a numerical majority.⁵⁴⁶ The complexities inherent in defining a minority, and the lack of political consensus on this matter may go some way towards explaining the lack of clarity regarding linguistic rights at international law. The next section will focus on the international legal and policy instruments which have been developed to deal with the issue of linguistic minorities in particular.

(ii) International legal instruments

There is a move towards the use of international law to protect minority populations.⁵⁴⁷ Considerable linguistic legislation is treated under the aegis of minority protections within the UN system and the two issues are often interlinked, with language being one of the distinguishing features of a minority, as we have seen from Capotorti's seminal definition provided which is still regarded as the

⁵⁴⁶ P. Hilpold 'UN Standard-Setting in the Field of Minority Rights' in G. Pentassuglia (ed) *Reforming the UN Human Rights Machinery: What Does the Future Hold for the Protection of Minorities and Indigenous Peoples?* (2007) 14 (2/3) (special issue) *International Journal on Minority and Group Rights* 181–205.

⁵⁴⁷ W. Kymlicka 'The Internationalization of Minority Rights' 6(1) *International Journal of Constitutional Law* (2008) 1–32; J. Kunz 'The Present Status of the International Law for the Protection of Minorities' 48(2) (1954) *American Journal of International Law* 282–287; J. Pejic 'Minority Rights in International Law' 19(3) *Human Rights Quarterly* (1997) 666–685.

central definition in the UN system.⁵⁴⁸ There is a multiplicity of treaties and conventions which treat these topics. Their provisions are often overlapping and vary in terms of solutions offered.

The tension between the post-war reluctance to single out minority groups and the emergence of Universalist human rights led to a focus on the individual as the bearer of rights. Seminal documents such as the International Covenant on Civil and Political Rights (1966) are notable for their individualistic focus. However, this began to change in the late 1970s, with the aforementioned Capotorti report, and the development of the OSCE in Europe with the Helsinki Final Act.⁵⁴⁹ After the fall of the Berlin Wall in 1989 a marked change in European attitudes can be observed.⁵⁵⁰ European developments will be explored further later in the chapter. As the Soviet East-West split grew in political importance, the issue of minority groups began to raise its head again in the international arena, the UN's working group on minorities was established in 1978. This was an open ended group that engaged in continued discussion on issues of protection of minorities in the context of legislating internationally. The drafting process for a UN Declaration on Minorities was tortuous. Drafts were created in 1978 and 1979, and

⁵⁴⁸ P. Hilpold 'UN Standard-Setting in the Field of Minority Rights' in G. Pentassuglia (ed) *Reforming the UN Human Rights Machinery: What Does the Future Hold for the Protection of Minorities and Indigenous Peoples?* (2007) 14 (2/3) (special issue) *International Journal on Minority and Group Rights* 181–205.

⁵⁴⁹ These will be explored later in the chapter.

⁵⁵⁰ E. Stamatopoulou 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' 16(1) *Human Rights Quarterly* (February 1994) 58-81

carried on through the 1980s with various disagreements.⁵⁵¹ In 1992 in response to the newly sensitive political situation after the fall of the Berlin Wall, when ethnic tensions were building, they proposed the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁵⁵² This declaration supplements the provisions of Article 27 of the International Covenant on Civil and Political Rights (1966) ICCPR, the International Community's central legal rule regarding minority protection, which will be explored further. The UN Declaration on the Protection of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) is supported by recommendations from the UN Minority Forum.⁵⁵³ The UN Declaration on the Rights of Minorities contains specific individual cultural rights for members of minorities, such as rights to enjoy their culture, to use their language and to practice their religion (Article 2) in addition to linguistic and educational rights (Article 4).

The United Nations system deals with minorities through a patchwork variety of different instruments and bodies.⁵⁵⁴ The UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (this is a sub commission of the Human

⁵⁵¹ E. Stamatopoulou 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' 16(1) *Human Rights Quarterly* (February 1994) 58-81

⁵⁵² UNGA Declaration on the Rights of Minorities GA Res 47/135.

⁵⁵³ UNGA Declaration on the Rights of Minorities GA Res 47/135.

⁵⁵⁴ Alexandra Xanthaki *Indigenous Rights and United Nations Standards* (Cambridge University Press 2007)

Rights Council and reports to them.) The Working Group of the UN Sub-Commission was formed in May 1982 to review developments relating to indigenous peoples and to submit conclusions and recommendations as to appropriate measures to promote respect for their human rights and fundamental freedoms.⁵⁵⁵ The Working Group's efforts led to a draft Declaration on the Rights of Indigenous Peoples in August 1994 whose provisions were not agreed upon for over a decade. The protections of the UN Declaration on the Rights of Indigenous Peoples (2007) are extensive. They include provisions for government responsibility to support and provide resources for the revitalisation of indigenous languages.⁵⁵⁶ The UNDRIP provides that indigenous people should have autonomous governing and legal structures, but also a host of rights pertaining to language and culture. The UN Permanent forum on Indigenous issues is charged with the supervision of these rights. In 2007, a UN Forum on Minority Issues was established by the Human Rights Council, to the Working Group on Minorities.⁵⁵⁷ The multiplicity of sources and the relative weakness of instruments in this area is seen as problematic, and

⁵⁵⁵ Working Paper on the Relationship & Distinction between the Rights of Persons Belonging to Minorities & Those of Indigenous Peoples. UN Doc. E/CN.4/Sub.2/2000/10 see also M. Barelli 'The Role of Soft Law in the International Legal System: the case of the United Nations Declaration on the Rights of Indigenous Peoples' 58(4) *International & Comparative Law Quarterly* (2009) 957-983.

⁵⁵⁶ F. de Varennes 'Language Rights and Opportunities: The Role of Language in the Inclusion and Exclusion of Indigenous Peoples' Submission on the role of languages and culture in the protection and promotion of the rights and identity of indigenous peoples to the UN Expert Mechanism on the Rights of Indigenous Peoples

⁵⁵⁷ (Resolution 6/15) 2007.

many of the solutions provided are seen as furthering the 'talking shop' approach.⁵⁵⁸ Colin Williams identifies that many language regimes 'have opted for an increase in the legislative underpinning which gives purchase to the rights and expectations of identifiable groups and citizens.'⁵⁵⁹

There have been many legislative instruments developed which address issues both of minorities in general, and of language more specifically. These will be outlined below. It is unclear, however, whether it is possible to distinguish a minority by the sole characteristic of language. It has been contended that the international system 'arrived at the concept of 'linguistic minority' only because of the assumption that language provides a relatively unproblematic cultural characteristic for the purpose of identifying minorities compared to other cultural criteria.'⁵⁶⁰ Duchêne discusses the identification of linguistic minorities, arguing that language was an easy external identifier for a minority which 'allowed discussion on national religious and ethnic minorities to be avoided, these being too nebulous or even politically sensitive.'⁵⁶¹ As well as the lack of political consensus on issues of linguistic minorities, there are also

⁵⁵⁸ P. Hilpold UN Standard-Setting in the Field of Minority Rights' in G. Pentassuglia (ed) *Reforming the UN Human Rights Machinery: What Does the Future Hold for the Protection of Minorities and Indigenous Peoples?* (2007) 14 (2/3) (special issue) *International Journal on Minority and Group Rights* 181–205.

⁵⁵⁹ Colin Williams *Minority Language Promotion Protection and Regulation: The Mask of Piety* (Palgrave 2013) Introduction 9.

⁵⁶⁰ Lionel Wee *Language Without Rights* (Oxford University Press 2011) 23

⁵⁶¹ Alexandre Duchêne *Ideologies across Nations: The construction of linguistic minorities at the United Nations*. (2008 Mouton de Gruyter)

doctrinal questions regarding the definition of language groups, and in particular regarding minority languages. What can be constituted a 'minority language' is related to the problems with language ideology and language power outlined in the initial chapters of this thesis. It is crucial when discussing these issues to be aware of our ontological understanding of language, on which political discourse about minority languages and dialects is based. The difficulties inherent in inter/intra language differentiation, and the dominance of the European model have been touched on in Chapter 2. The question of how to define a linguistic minority remains as open as that of defining a minority writ large.⁵⁶² Overall, therefore, assertions of extensive language rights within the international legal order can be considered optimistic and involves an overstatement of international commitments.⁵⁶³

(iii) Cultural rights at International Law

The main instrument for the protection of cultural rights internationally has been the International Covenant on Civil and Political Rights (ICCPR).⁵⁶⁴ The International Covenant on Civil and Political Rights (1966) is the first attempt at a world-wide protection of certain rights. This broadly includes linguistic rights, or at least

⁵⁶² M. Heller *Linguistic Minorities and Modernity : a sociolinguistic ethnography* (Continuum 2007)

⁵⁶³ Fernand de Varennes 'Language Rights as an Integral Part of Human Rights ' (2001) 3 *MOST Journal on Multicultural Societies* 1

⁵⁶⁴ Fernando Arlettaz 'Derechos de Las Minorías en el Pacto Internacional de Derechos Civiles y Políticos ' *Jurisprudencia/ Jurisprudence* 2013 20(3) p. 901–922

rights with linguistic aspect. Language is touched upon in ICCPR articles 2, 14, and 19, however, only as an ancillary issue. Article 14 covers language in the context of fair trial rights, Article 2 is a general non-discrimination provision which refers to 'discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', Article 19 refers to freedom of expression. The main provision focused on, Article 27, constitutes the principal international defence of cultural rights, which remains today 'the only specific provision of binding international law with regard to the protection of speakers of minority languages.'⁵⁶⁵ Andrassy states that it creates an 'original language right'.⁵⁶⁶ Article 27 ICCPR states:

[I]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

This provision constitutes '[t]he first and perhaps most notable expression in a binding universal instrument of minorities' direct right to their culture and language that goes beyond a guarantee of non-

⁵⁶⁵ Xabier Arzoz 'Accommodating Linguistic Difference- five normative models of Language Rights ' *European Constitutional Law Review* 6 (2010) 102-122 108

⁵⁶⁶ G. Andrassy 'Freedom of Language: A Universal Human Right to Be Recognised' (2012) 19 *International Journal on Minority and Group Rights* 195-232

discrimination.’⁵⁶⁷ Article 27 is a vaguely formulated provision, however, which leaves many of the questions it alludes to open-ended.⁵⁶⁸

The first Optional Protocol to the Convention came into force in 1976. This allowed a mechanism of individual complaints before the UN Human Rights Committee (UNHRC).⁵⁶⁹ The International Covenant on Civil and Political Rights, although well-established as a source of international law foresees the right to self-determination, which is controversial for many of the States parties.⁵⁷⁰ Rehman points out that ‘the implementation of the right to self-determination has raised controversy and debate’⁵⁷¹ with regard, in particular, to the treatment of minorities. Nonetheless, Article 27 is the most widely accepted legally binding provision directly addressing minorities at international law.⁵⁷² Via the innovations of the Optional Protocol to the ICCPR, this article has furthermore provided international jurisprudence of sorts regarding language rights. The

⁵⁶⁷ Moria Paz, ‘The Failed Promise of Language Rights: A Critique of the International Language Rights Regime’ (2013) 54 *Harvard International Law Journal* 157-218, 172

⁵⁶⁸ Manfred Nowak ‘UN Covenant on Civil and Political Rights’ CCPR commentary (1993) at p.485

⁵⁶⁹ For summary of minority rights cases before the United Nations Human Rights see S. Joseph J. Schultz and M. Castan *The International Covenant on Civil & Political Rights: Cases Materials and Commentary* (Oxford University Press 2000)

⁵⁷⁰ Antonio Cassese *Self Determination of Peoples* (Cambridge University Press 1995); Klabbers ‘The right to be taken seriously: Self determination in International Law’ 28 *Human Rights Quarterly* (2006) Thomas Musgrave *Self Determination and National Minorities* (Oxford University Press 2000).

⁵⁷¹ Javaid Rehman *International Human Rights Law* (2nd ed Pearson Education 2010) 87

⁵⁷² Tawhida Ahmed, ‘Demanding Minority (Linguistic) Rights from the EU: Exploiting Existing Law’ (2009) 15 (3) *European Public Law* 379-402.

ICCPR, therefore, remains the leading international legal instrument protecting cultural heritage, which includes language. Although through these cases we can see the concrete effects that the UN Human Rights Committee has had in the sphere of language rights, Paz points out that '[a]pplicants armed with a direct language entitlement- Article 27- did not enjoy more protection of their language than they would have enjoyed through equality and due process rights, which are not linguistically or culturally specific.'⁵⁷³

This chapter briefly outlined the development of the UN Declaration on the Protection of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) Although it can be situated within the urgency regarding minority protection at the end of the Cold War, this declaration was not adopted until 2006. Dickson believes that the Declaration on the Protection of Persons belonging to National or Ethnic, Religious and Linguistic Minorities is a concerted effort to overcome the limits posed by Article 27 ICCPR.⁵⁷⁴ The declaration has been deemed 'influential, if not formally binding'⁵⁷⁵. However, in reality, as weak as Article 27's provisions

⁵⁷³ Moria Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' (2013) 54 *Harvard International Law Journal* 157-218, 166.

⁵⁷⁴ Brice Dickson 'The United Nations and Freedom of Religion' (1995) 44 *International & Comparative Law Quarterly* 354

⁵⁷⁵ Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford University Press, 2005), 46.

have been proven, the Declaration does not go much further in providing concrete help or protection to minorities.⁵⁷⁶

The ICCPR is not the only international recognition of cultural rights, although it remains the central provision. The contemporaneous International Covenant on Economic, Social and Cultural Rights (1966) also contains protections of language and culture. Article 2, of the ICESCR contains the basic guarantee of non-discrimination, this is framed in terms of non-discrimination within the enjoyment of the substantive rights guaranteed.⁵⁷⁷ Cultural rights, however, have been somewhat neglected in favour of economic and social rights, due to their complicated nature.⁵⁷⁸ Article 15 of the International Covenant on Economic, Social and Cultural Rights includes the right to 'take part in cultural life'. According to the UN Committee on Economic, Social and Cultural Rights, this right includes the right to express oneself in one's language of choice.⁵⁷⁹ Economic, Social and Cultural Rights, or 'second generation human rights' are a contested category of rights.⁵⁸⁰ It has been suggested that they are more akin to guidelines

⁵⁷⁶A. Eide *Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities* U.N. Doc. E/CN.4/Sub.2/AC.5/2001/2 (2001)

⁵⁷⁷ International Covenant on Economic, Social and Cultural Rights (1966) Article 2(2)

⁵⁷⁸ María A. M. Estébanez 'The United Nations Covenant on Economic Social and Cultural Rights' in Kirsten Henrard and Robert Dunbar (eds) *Synergies in Minority Protection* (Cambridge University Press 2008).

⁵⁷⁹ General Comment no. 21 November 2009.

⁵⁸⁰ J. Symonides (ed) *Human Rights: Concept and Standards* (Ashgate 2000) see also Kirkup and Evans 'The myth of Western opposition to Economic Social and

by Whelan and Donnelly who state that: '[t]he understanding of economic and social rights as directive rather than justiciable was shared by all states (at the time of drafting of the ICESCR).'⁵⁸¹

In 2008 an optional protocol to the ICESCR was unanimously accepted by the General Assembly of the United Nations. The UN Committee on Economic Social and Cultural Rights (a body of independent experts which monitors implementation of the ICESCR) has stressed the centrality of language rights.⁵⁸² This can be contextualised within the growing concern for language endangerment explored in chapter 3. This concern is manifested in multilateral policies, which we will now examine.

UNESCO's role in language preservation

Within the framework of the United Nations, UNESCO is the main international policy actor in the language field. The role of UNESCO is to preserve 'the fruitful diversity of the cultures and educational systems of the States Members of the Organisation.'⁵⁸³ As part of these aims they have developed initiatives to protect and promote linguistic diversity via initiatives such as the UN Year of languages.⁵⁸⁴

Cultural Rights: a reply to Whelan and Donnelly ' (2009) 31 (1) *Human Rights Quarterly* 221-38

⁵⁸¹ Daniel J. Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908, 935.

⁵⁸² Dominik Bohl, 'Language Rights in the World Polity – From Non-Discrimination to Multilingualism' D. Richter and others (eds) *Language Rights Revisited - The Challenge of Global Migration and Communication* (Berliner Wissenschafts-Verlag 2012).

⁵⁸³ Article 1 (3) of the UNESCO Constitution 4 UNTS 275

⁵⁸⁴ Dominik Bohl, 'Language Rights in the World Polity – From Non-Discrimination to Multilingualism' D. Richter and others (eds) *Language Rights Revisited - The*

UNESCO have taken actions across the linguistic spectrum, from coordinating meetings of expert groups, within the UNESCO endangered languages programme to awareness promotion initiatives such as the UNESCO Atlas of World Languages.⁵⁸⁵ UNESCO is a prolific actor and plays a role in encouraging the international community to act regarding cultural issues. It produces policy papers and recommendations, often with implicit or explicit linguistic aspects. Prominent language preservation examples include, UNESCO's Guidelines on Language Policies⁵⁸⁶ which as designed by the UNESCO Ad Hoc Expert Group on Endangered Languages, or its Language Vitality and Endangerment tool (LVE) which was designed to help governments assess language vitality.⁵⁸⁷ UNESCO also acts as a locus for bringing the diverse actors and stakeholders in this field together. The Harare Declaration of 1997, for example, is a direct result of the Intergovernmental Conference on Language Policies in Africa. These conferences result is the setting out of 'Plans of Action' and other soft law instruments for the development of policy frameworks and strategies. Their implementation, however, is often negligible. They have also attempted to create binding legislation

Challenge of Global Migration and Communication (Berliner Wissenschafts-Verlag 2012).

⁵⁸⁵ Mauro Rosi 'Unesco and Languages: a commitment to Culture and Development ' 2008 60 (3) *Museum International* 8

⁵⁸⁶ UNESCO Guidelines on language policies) Online version:

<http://www.unesco.org/culture/ich/doc/src/00120-EN.pdf> (accessed 19/5/2013)

⁵⁸⁷ UNESCO (2003) Language Vitality and Endangerment Ad Hoc Expert Group on Endangered Languages UNESCO Paris

<http://www.unesco.org/culture/ich/doc/src/00120-EN.pdf>. <last accessed July 2012>.

with regard to language preservation for example, the 2003 UNESCO Convention for the Safeguard of Intangible Cultural Heritage⁵⁸⁸ Article 2 of which protects language as 'a vehicle of the intangible cultural heritage' or the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁵⁸⁹ Although this convention has been classified as a response to concerns relating to the trade in media goods and services only.⁵⁹⁰ UNESCO's *Why Languages Matter in the Millennium Development Goals* report⁵⁹¹ has been criticised as a typical example of international organisations unreflectively picking up on language rights and recognition discourse and feeding it into wider policy discussion.⁵⁹² De Varennes comments that these UNESCO Conventions are: '[m]inimal to the point of being irrelevant and of no consequence for most languages in practical terms, since once again it does not actually impose any legal obligations on governments to take concrete steps for indigenous languages on their own territory, much less create any

⁵⁸⁸ UNESCO *Convention on the Protection And Promotion Of The Diversity of Cultural Expressions* 2368 UNTS 117 October 2003.

⁵⁸⁹ UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. 2368 UNTS 117 October 2003.

⁵⁹⁰ Rachel Crauford Smith 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?' *International Journal of Communication* 1 (2007)

⁵⁹¹ UNESCO *Why Language Matter in the Millenium Development Goals* (2012) <http://www.unescobkk.org/resources/e-library/publications/article/why-language-matters-for-the-millennium-development-goals/> (last accessed 10 July 2013)

⁵⁹² Vanessa Pupavac *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012) 216

rights in relation to the use or safeguard of indigenous languages.’⁵⁹³

The area of indigenous languages, however, has generated some specific legal instruments.

(iv) Indigenous language rights

The cultural nationalism which swept through Europe in the early 20th century affected developments in the international arena in this area.

The system of protection and provision for minorities within the League of Nations system was exceptionally detailed.⁵⁹⁴ The International Labour Organisation (ILO), began to consider the treatment of indigenous peoples in the 1920s.⁵⁹⁵ The rights of minorities in a broader sense are often treated in the literature in conjunction with specific rights for indigenous peoples. In earlier UN legislation these were conflated, but now the rights of indigenous peoples tend to be treated separately.⁵⁹⁶ According to De Varennes the languages of indigenous peoples ‘appeared as an international legal concern for the first time in 1957’⁵⁹⁷ in the ILO Convention (No.

⁵⁹³ F. de Varennes ‘Language Rights and Opportunities: The Role of Language in the Inclusion and Exclusion of Indigenous Peoples’ Submission on the role of languages and culture in the protection and promotion of the rights and identity of indigenous peoples to the UN Expert Mechanism on the Rights of Indigenous Peoples.

⁵⁹⁴ H. Rosting ‘The Protection of Minorities by the League of Nations’ 17(4) (1923) *American Journal of International Law* 641-660; C. Fink ‘The League of Nations and the Minorities Question’ (1995) 157(4) *World Affairs*, 197-205.

⁵⁹⁵ Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law*, (Oxford University Press 2012).

⁵⁹⁶ Li-ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff, 2005); Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press 2005).

⁵⁹⁷ F. de Varennes ‘Linguistic Identity and Language Rights’ in M. Weller (ed) *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007).

107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.⁵⁹⁸ Rights relating to indigenous languages were first recognised in the international arena via this treaty. This action led to the adoption in 1989 of the ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries which stipulates that states must respect the language rights of indigenous peoples. Thornberry has described this particular piece of legislation as 'empowering and underrated'⁵⁹⁹, as the rights are asserted as belonging to peoples, and collective interests protected, along with considerable language provision. This ILO convention replaced the earlier (1957) convention⁶⁰⁰ which displayed a more imperialist paternalism regarding indigenous peoples.⁶⁰¹

Most indigenous peoples, however, are unable to rely on these legal provisions for minority protections as the provisions have not been ratified. The treatment of indigenous peoples can be distinguished from the treatment of national minorities to some extent, although there is significant crossover. Within the discussion

⁵⁹⁸F. de Varennes 'Language Rights and Opportunities: The Role of Language in the Inclusion and Exclusion of Indigenous Peoples' Submission on the role of languages and culture in the protection and promotion of the rights and identity of indigenous peoples to the UN Expert Mechanism on the Rights of Indigenous Peoples

⁵⁹⁹ P. Thornberry 'Introduction' in Peter Cumper and Steven Wheatley (eds) *Minority Rights in the 'New' Europe* (Kluwer Law Publishing 1999) 3.

⁶⁰⁰ International Labour Organisation, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, (No 107 of 1957).

⁶⁰¹ Stephen May *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd edn, Routledge 2012), 290.

of how to protect minorities, it is important to be aware of a theoretical distinction which has emerged in the doctrine. This is of particular relevance in the European context, where minority protections, especially in the arena of language rights, are afforded only to autochthonous minorities. Many minorities were created, dissolved, and recreated elsewhere by shifting state borders through the history of Europe. It is argued that the temporal restrictions imposed by contemporary legal treatment of minorities can be classified as arbitrary.⁶⁰² New minorities are groups which stem from migration.

Old minorities and new minorities

Until relatively recently the issues of 'national minorities' and those of migration were dealt with separately, both in international instruments and in academic literature. A separation is forged between the historical or traditional minorities, which have claims to international protections and so-called new minorities.⁶⁰³ Despite the fact that this approach can be marked by both essentialism and reductionism, it prevails.⁶⁰⁴ The theory is that 'old' minority rights refers to communities within a state who have a traditional presence

⁶⁰² B. Bowring 'European Minority Protection: The Past and Future of a 'Major Historical Achievement' (2008) *International Journal on Minority and Group Rights* 15 413-425; S.B. Elias 'Regional minorities, immigrants, and migrants : The Reframing of Minority Language Rights in Europe' (2010) 28 *Berkeley Journal of International Law* 261.

⁶⁰³ R. Medda Windischer *Old and New Minorities: Reconciling Diversity and Cohesion* (Nomos 2009)

⁶⁰⁴ R. Medda Windischer *Changing Paradigms in the Traditional Dichotomy of Old and New Minorities* in Kristin Henrard (ed) *Double Standards Pertaining to Minority Protection* (Martinus Nijhoff 2010).

there, however minimal inspection reveals that this historical basis is unfounded. The understanding, in European legal commentary of 'new' minorities is that of immigrant communities. Arzoz's distinction echoes the categorisation of old/new minorities, however with a minor distinction, what Arzoz refers to as the 'old minority rights' model is the pragmatic approach towards minorities which developed in the 1990s in Europe.⁶⁰⁵ This is regarded as 'old' as it does not address the question of whether minority protection should concentrate on indigenous groups or take immigrant groups also into consideration as minorities. This minority rights model will be examined in the next section. The distinction between old and new minorities is an attempt to limit the protections afforded to immigrant communities.

The protection of rights by international documents such as the UN Declaration of Human Rights has been widely criticised as being too western in focus.⁶⁰⁶ Particularly those rights relating to cultural questions are critiqued. Attitudes to language displayed in international rights documents have been criticised as reductionist and an imposition of the language ideology of colonising nation states.⁶⁰⁷ The International Convention on the Elimination of All

⁶⁰⁵ Marc Weller and Katherine Nobbs *Political Participation of Minorities A Commentary on International Standards and Practice* (Oxford University Press 2010).

⁶⁰⁶ Antonio Cassese *International Law* (Oxford University Press 2001) p. 358.

⁶⁰⁷ Carmen Fought *Language and Ethnicity: Key topics in Sociolinguistics* (Cambridge University Press 2006).

Forms of Racial Discrimination attempts to avoid ethnocentric reasoning. It is evidence of a modern attempt at elimination of discrimination against groups, as it does not mention language its relevance for language rights is mainly related to indigenous peoples. In all, despite the laudable declared aims of the international community it can be surmised that their attempts at guaranteeing language rights do not succeed in reaching those aims. This is due to a lack of concrete political commitment to linguistic diversity on the part of states. Furthermore, states are, broadly speaking, reluctant to grant concessions to groups which threaten the paradigm of the nation-state, and are even more reluctant when these concessions imply significant spending. Language rights are often also evoked often in separatist or secessionist contexts which renders many states hostile at best to claims for language rights.⁶⁰⁸

The international community is still uneasy about the issue of minorities, both because of the threat of secession and the consequent damage to territorial integrity. This may be counterproductive, however, because as Taylor indicates, the failure of public recognition can 'fuel precisely the desire of those locked into a minority position within a federated structure to secede.'⁶⁰⁹ It is clear that at International level there has been some significant

⁶⁰⁸ Colin Williams *Minority Language Promotion Protection and Regulation: The Mask of Piety* (Palgrave 2013)

⁶⁰⁹ Charles Taylor 'The politics of recognition' (1994) *New contexts of Canadian criticism*, 98-131

international legislative action in this area despite there being no international consensus on these matters.⁶¹⁰ This long history of ambiguity and lack of political commitments means it is difficult to assert a clear configuration of language rights protections at International Law. However, it can be established that there is a clear move towards recognition of language legislation in the international arena, as we saw from the policies of UNESCO. The utility of this type of 'soft' law is acknowledged in its capacity to enunciate broad principles without stipulating details of obligation.⁶¹¹ This approach is mirrored in Europe's regional provisions for language rights.

The importance of reporting and monitoring systems has increased.⁶¹² Monitoring bodies for minority issues within the sphere of international and regional law generally have a lot more power than was originally intended.⁶¹³ Pupavac is critical of this approach of 'expert governance'⁶¹⁴ which is favoured by the governing organisations. By briefly outlining some of the main decisions of the UN HRC regarding language rights under article 27, it becomes evident that the jurisprudence of the Human Rights Committee has

⁶¹⁰ M.Weller (ed) *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2008).

⁶¹¹ Li-ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff, 2005.)

⁶¹² Marc Weller and Katherine Nobbs *Political Participation of Minorities A Commentary on International Standards and Practice* (Oxford University Press 2010).

⁶¹³ Marc Weller and Katherine Nobbs *Political Participation of Minorities A Commentary on International Standards and Practice* (Oxford University Press 2010).

⁶¹⁴ Vanessa Pupavac *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012), 17.

been reluctant to make broad statements regarding minority protection.

Decisions of the UN Human Rights Committee

Under the Optional Protocol to the ICCPR the United Nations Human Rights Committee can consider communications from individuals who claim their rights under the convention have been violated. The HRC monitors the implementation of the ICCPR, determining the obligations which fall on state parties with regard to Article 27's provisions. Due to the loose structure of rights and the ambiguity written into the legal instruments, it is often up to the monitoring bodies to assume the role of judge and determine the limits of the rights asserted.⁶¹⁵ Indeed, this practice has created a form of UN 'jurisprudence' on the issues covered by Article 27. The Human Rights Committee has been conservative in its protections for language communities. This section outlines some of their main decisions relating to language. In *Ballantyne, Davidson and McIntyre v. Canada*,⁶¹⁶ the HRC emphasised that the use of a particular language in private correspondence or communication cannot be banned by public authorities, establishing that freedom of expression includes 'freedom to express oneself in a language of one's

⁶¹⁵ Vanessa Pupavac *Language Rights: from Free Speech to Linguistic Governance* (Palgrave 2012).

⁶¹⁶ *Ballantyne Davidson McIntyre v. Canada* Communications Nos. 359/1989 and 385/1989 UN Human Rights Committee CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

choice.’⁶¹⁷The case of *Ballantyne* regarded the display of signs in a minority language, in this case the English-speaking minority in Quebec. The applicants argued that a law permitting advertising in French only in Quebec constituted discrimination against English-speakers. The HRC noted that domestic law requiring the use of French only in commercial advertising outdoors affected both French and English speakers, and speakers of all other languages equally. It held there was no discrimination on the ground of language therefore. In *Ballantyne*, the HRC was hesitant to uphold the rights of a particular language minority but the Committee did make pronouncements on language rights more broadly.

In *Diergaardt v. Namibia*,⁶¹⁸ the substance of which was an appeal to minority language protection, the HRC did not rely on Article 27. The decision of the Human Rights Committee in *Diergaardt* allowed for a language community to continue its language practices however the Committee did so relying on ‘general’ human rights provisions and the non-discrimination enshrined in article 26 of the ICCPR rather than the more specific provisions of Article 27. Although this case set out important principles of public administration regarding the use of language, it is explicitly not a UN HRC statement

⁶¹⁷ *Ballantyne Davidson McIntyre v. Canada* UN Human Rights Committee (31 March 1993) U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989 13-14.

⁶¹⁸ *Diergaardt et al v. Namibia* Communication No. 760/1997 UN Human Rights Committee (25 July 2000) U.N. Doc CCPR/C/69/D/760/1997.

on the guarantee of language rights for minorities.⁶¹⁹ However, in *Lovelace v. Canada*,⁶²⁰ language was recognised as an aspect of community life. Sandra Lovelace was a registered 'Maliseet Indian' living on a reserve in Canada. She married another Canadian citizen and under the Canadian Indian Act, Section 12 (1) (b), her marriage to a non-Indian resulted in her no longer being a legally registered Indian.⁶²¹ When their marriage ended and she attempted to move back onto the reservation she was not legally entitled to remain on the reservation, or to other benefits allocated to 'registered Indians' in Canada. The view of the Human Rights Committee was that Sandra Lovelace was entitled to "belong" to the minority group, and that she should have a right of access to her native culture and language "in community with the other members" of her group.

This case is significant because in this instance the HRC recognised language as a fundamental part of the 'cultural environment' for minorities protected by article 27. The UNHRC have also read into the Article the requirement for positive measures of protection by States Parties.⁶²² This proactive protection means that:

⁶¹⁹ Alexander H. E. Morawa 'Minority Languages and Public Administration: a Comment on Issues Raised in *Diergaardt et al. v. Namibia*' ECMI Working Paper no.16 (2002)

⁶²⁰ Communication No. 24/1977 UN Human Rights Committee A/36/40 (1981).

⁶²¹ Interestingly, the same act allowed registered-Indian men who married a non-Indian to remain registered.

⁶²² HRC General Comment number 23 *The Rights of Minorities* (art.27) 8/4/1994 (paragraph 6.1 and 6.2)

[a]lthough Art.27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure the existence and exercise of this right are protected against their denial or violation.⁶²³

Although this pronouncement may seem strong, in reality the effective protection carried out via Article 27 has been minimal.⁶²⁴ However weak the protections afforded by Article 27 ICCPR can be considered, they at least create an international forum for minority complaints to be adjudicated. The UNHRC has addressed issues of language rights as a central concern in the protection of minorities. This brief overview focused on the major UN HRC cases in the field of language rights, tracing the evolution of UN jurisprudence on these issues. A more detailed examination of the existing regional legal instruments in place in Europe shows how the issues of minority rights and language rights interact.

The protection of linguistic minorities or other linguistic groups can take place either through targeted linguistic instruments, such as the European Charter for Regional or Minority Languages, or as part of a broader protection of minorities. The legal instruments explored comprise both categories. This investigation is used to assess the

⁶²³ HRC General Comment number 23 The Rights of Minorities (art.27) 8/4/1994 (paragraph 6.1)

⁶²⁴ Kristen Henrard (ed) *Double-Standards Pertaining to Minority Protection* (Martinus Nijhoff 2010)

legal protections of language in the European Union in chapter 8. It compares the European Union with the protection of language in the ECHR and in the other instruments which have arisen from the various regional organisations of Europe. It looks at the role of minority languages in the European Union and how they fit in to the legal protections of language in the European Union. The contextual background for these protections, the norms and attitudes which have developed in the European Union have been formed by these regional practices.⁶²⁵ This section will examine in detail, therefore, how these concepts have been put into practice by European regional organisations, namely the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE), before turning our attention to the European Union in the second part of the thesis.

II Language Rights in European Regional Law

In comparison with the linguistic diversity present in the rest of the world, Europe is a linguistically homogeneous region,⁶²⁶ yet has served as a testing ground for many language rights developments.⁶²⁷

Europe can be seen as one massive regional laboratory for legal

⁶²⁵ Heather Grabbe, 'Six Lessons of Enlargement Ten Years On: The EU's Transformative Power in Retrospect and Prospect' (2014) *Journal of Common Market Studies* (52), 40-56.

⁶²⁶ Tove Skutnabb-Kangas, "Guide for the Development of Language Education Policies in Europe: From Linguistic Diversity to Plurilingual Education" (2002, Council of Europe Language Policy Division).

⁶²⁷ Francesco Palermo 'Judicial Adjudication of Language Rights in Central Eastern and South-Eastern Europe: Principles and Criteria ' in *EURAC European Diversity and Autonomy Papers* EDAP 02/2011

developments, with a multiplicity of instruments emerging.⁶²⁸ The legal structures developed to protect languages in Europe were largely part of the pragmatic attempt to contain the hazard of minorities during the 1990s. The result is that Palermo declares Central, Eastern and South Eastern Europe to be: '[p]erhaps the most advanced laboratory for minority rights in general, and linguistic rights of persons belonging to minorities in particular.'⁶²⁹ Before examining these in detail, some further historical context is necessary, building on our analysis in the previous chapters. The political importance of the language question in Europe is not to be underestimated.

As a region, Europe (outside the political structures of the European Union) has the strongest formal protection of language rights in the world. The regional infrastructure for the protection of languages and affirmation of language rights in Europe will be explored. Language accommodations have been used to this end in particular in Europe since the fall of the Berlin Wall. Given our brief exposition of the myriad international documents which regulate this area earlier in this chapter, we can see that there are a large number of overlapping protections of language and related rights at

⁶²⁸ D.J. Galbreath and J. McEvoy *The European Minority Rights Regime: Towards a Theory of Regime Effectiveness* (Palgrave 2011) Kristen Henrard (ed) *Double-Standards Pertaining to Minority Protection* (Martinus Nijhoff 2010) Tawhida Ahmed *The Impact of EU Law on Minority Rights* (Hart 2011).

⁶²⁹ Francesco Palermo 'Judicial Adjudication of Language Rights in Central Eastern and South-Eastern Europe: Principles and Criteria' (2011) (2) *EURAC European Diversity and Autonomy Papers* EDAP

International Law. These international provisions are almost doubled within the European region. Various organisations of regional integration in Europe have either assumed or were created with a dimension of minority protection. The following section will analyse the rights mechanisms that have developed in Europe, focusing mainly on the Council of Europe and the OSCE. The forthcoming chapters will assess the effects that these regional actions have had in the sphere of the European Union. Although the precise content or meaning of language rights is by no means clearly defined, Europe has fostered many developments in this ambit. Protection of Language Rights is very strong in Europe, through Regional Organisations and relatively effective and stable monitoring mechanisms.

(i) European regional instruments

An increased consideration of language rights in Europe can clearly be identified since approximately the 1970s. In Europe, since the end of the Second World War, minorities have been progressively accorded more of a share in political power. The European continent has been the locus of development for many minority protection mechanisms.⁶³⁰ Poggeschi points out that

[i]n the European legal tradition, linguistic rights are an aspect of the challenge that minorities (in this case, from the linguistic

⁶³⁰ B. Bowring 'European Minority Protection: The Past and Future of a 'Major Historical Achievement' (2008) 15 *International Journal on Minority and Group Rights* 413-425

point of view), or disadvantaged groups, have mounted against majorities, or dominant groups.⁶³¹

With the fall of the Berlin Wall, and the emergence of a radically different political structure in Europe, many states feared the secession of their national minority regions, especially in Eastern Europe.⁶³² This became of particular concern with the dissolution of the former Yugoslavia. The collapse of Communism and the end of the Cold War incited a revival, and a crisis, of the UN's system of Collective Security.⁶³³ There was a rallying, therefore, of more localised legal organisations and a proliferation of regional cooperation in Europe to try to address the problems which emerged as a result of the shifting boundaries of states.

In highly pressurised situations, a new approach to minorities was forged in Europe and the inadequacy of the post-war approach in dealing with minority issues was revealed. Therefore, a boom in legal instruments can be observed during the period 1990-1995. These instruments were both multilateral, elaborated within the various European regional organisations, and bilateral. The bilateral treaties were particularly common where states and newly formed

⁶³¹ Poggeschi G. 'Language rights and duties in domestic and European courts' (2003) *Journal of European Integration* 25(3) 207-224.

⁶³² P. Thornberry *International Law and the Rights of Minorities* (Oxford University Press 1991); Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law*, (Oxford University Press 2012).

⁶³³ Li-ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff, 2005); Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press 2005); Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law*, (Oxford University Press 2012).

states had 'mirror minorities', such as for example the Hungarian communities in Slovakia and vice versa.⁶³⁴ The regional approach was formed in response to the perceived destabilizing effect of minorities, and is highly pragmatic, with a focus on security and stability. This section will outline the communal efforts to protect and provide for minorities in Europe's regional organisations. At this time, Thornberry claims 'International Organisations competed to 'do something about' minorities; the CSCE/OSCE and UN were quick, the Council of Europe painfully slow.'⁶³⁵ Williams describes 'the fate of smaller nations within Europe' as 'a history of subordination, conquest, and periodic resurgence as the international political and economic system opens and closes in terms of minority recognition.'⁶³⁶

These are problems which shifted in nature due to the fall of the Iron Curtain, and the Council of Europe's actions in this domain, in addition to those of the OSCE are clear evidence of this. The 'soft law' of the Council of Europe on this issue was generated mainly as a response to the problems experienced in Central and Eastern Europe after the fall of Communism. Under the aegis of The Council of

⁶³⁴Li-ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff, 2005.)

⁶³⁵ Patrick Thornberry, cited in Daniel J. Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908, 935. 934.

⁶³⁶ C. Williams 'Let Freedom Reign: the Impress of EU Integration on Minority Survival ' in Elisabeth Prugl and Markus Thiel (eds) *Diversity in the EU* (Palgrave 2009).

Europe (including their European Court of Human Rights), the OSCE (including its High Commissioner), the Council of Europe Charter bodies such as those formed by the European Charter for Regional and Minority Languages a doctrine of language rights has developed. Each of these regional bodies will be examined in turn, bringing the entirety of the European language provisions together in the final analysis before moving to a comparative exploration of language rights in other jurisdictions.

(ii) OSCE

The 1973 Conference on Security and Co-operation in Europe (CSCE) began a process of East-West dialogue during the Cold War. This led to the formation of the Organisation for Security and Cooperation in Europe (OSCE), under the auspices of the United Nations.⁶³⁷ The OSCE sees itself as a conflict prevention agency working at a regional level, but its actions span a wide range of activities, from issuing policy documents to collecting data. The scope of the OSCE is broader than only Europe, encompassing North America and Central Asian countries also. It has 56 participating states. The Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990) sets out that:

The Participating States recognise that the questions relating to national minorities can only be satisfactorily resolved in a

⁶³⁷ J. Wright 'The OSCE & the Protection of Minority Rights' 18(1) Human Rights Quarterly (1996) 190-205

democratic political framework based on the Rule of Law, with a functioning independent judiciary.⁶³⁸

The Document of the Copenhagen meeting of the Conference of the Human Dimension of the OSCE⁶³⁹ marked a watershed in the process of recognition of minority rights and an encouragement of action in this area by the OSCE. Minorities were a 'hot' issue in Europe and the prevention or spread of war was a paramount concern.⁶⁴⁰ The Organisation for Security and Co-operation in Europe, marked the institutionalisation of a move towards a more holistic approach in dealing with conflict. In recognising the 'human dimension' of conflicts, the OSCE moved towards considering security issues as related to wider concerns, encompassing political, economic, environmental as well as military dimensions.⁶⁴¹ It was a revolution in the international treatment of minorities and was heralded as containing 'some of the most advanced standards'⁶⁴² in the field of minority protection.

The main innovation brought about by the creation of the OSCE was that it aimed to move towards a model of prevention, rather

⁶³⁸ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe.

⁶³⁹ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe. (1990)

⁶⁴⁰ Marc Weller *The Twenty Year's Crisis International Legal Aspects of the Dissolution of Yugoslavia* (Oxford University Press 2012)

⁶⁴¹ VY Gheballi 'La CSCE et la question des minorités nationales' in Liebich and Reyler (eds) *L'Europe Centrale et ses Minorités : vers une solution Européenne ?* (L'Harmattan 1993)

⁶⁴² María A. M. Estébanez 'Minority Protection and the OSCE' in Peter Cumper and Steven Wheatley (eds) *Minority Rights in the 'New' Europe* (Kluwer Law Publishing 1999), 47.

than the resolution of conflicts which had already erupted.⁶⁴³ With this unprecedented cooperation between Eastern and Western Europe, a more flexible approach towards international law was developed. The OSCE, rather than establishing international legal obligations, which are (at least theoretically) binding in nature, established 'standards' and 'commitments'. This standard-setting mechanism has served as a basis for the actions taken by the Council of Europe, examined below, and to some extent echoes the provisions arrived at in the UN regarding Article 27 ICCPR and the 2008 protocol to the ICESCR.

The OSCE marked that start of 'the consideration of minority issues as a distinctive element of security deserving specific consideration.'⁶⁴⁴ In 1992, a High Commissioner on National Minorities (HCNM) was established. The establishment of the High Commissioner for National Minorities acknowledged fully the pragmatic reality of dealing with minority issues expressly in order to prevent conflicts breaking out.⁶⁴⁵ This approach continued throughout the 1990s, with the Human Dimension forming a key part of the approach towards guaranteeing security in Europe. To some

⁶⁴³ María A. M. Estébanez 'Minority Protection and the OSCE' in Peter Cumper and Steven Wheatley (eds) *Minority Rights in the 'New' Europe* (Kluwer Law Publishing 1999).

⁶⁴⁴ María A. M. Estébanez 'Minority Protection and the OSCE' in Peter Cumper and Steven Wheatley (eds) *Minority Rights in the 'New' Europe* (Kluwer Law Publishing 1999).

⁶⁴⁵ Arie Bloed and Rianne Letschert 'The OSCE High Commissioner on National Minorities' in Kirsten Henrard and Robert Dunbar (eds) *Synergies in Minority Protection* (Cambridge University Press 2008).

extent it can be said to have failed, given the wars which occurred following the dissolution of Yugoslavia⁶⁴⁶, but the OSCE still forms a key part of conflict management in this area.⁶⁴⁷ The philosophies of early warning and conflict prevention have been active in keeping ethnic conflicts at bay.

The office of the OSCE High Commissioner on National Minorities has played a key part in minority disputes in the area of Central and Eastern Europe in particular. This role, akin to a mediator or Ombudsman, was created largely to prevent tensions from erupting, or to avoid the escalation of conflicts. The 'quiet diplomacy' of the HCNM has led to the development of legal instruments to tackle specific problems within the framework of the OSCE.⁶⁴⁸ The High Commissioner was designed to take place 'behind the scenes', and was created to promote a culture of prevention rather than reaction.⁶⁴⁹ This Office compiles reports and issues recommendations, and attempts to monitor situations on an ongoing basis. This approach has been instrumental in the provision of support for minorities in Central and Eastern Europe. The procedures established within the OSCE, in particular the Human Dimension

⁶⁴⁶ Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press 2005).

⁶⁴⁷ María A. M. Estébanez 'Minority Protection and the OSCE' in Peter Cumper and Steven Wheatley (eds) *Minority Rights in the 'New' Europe* (Kluwer Law Publishing 1999).

⁶⁴⁸ W.Kemp (ed) *Quiet Diplomacy in action: The OSCE High Commissioner on National Minorities* (Kluwer Law Publishing 2001)

⁶⁴⁹ W.Kemp (ed) *Quiet Diplomacy in action: The OSCE High Commissioner on National Minorities* (Kluwer Law Publishing 2001)

Mechanism marked a turning point for the development of European processes and procedures in dealing with minority issues. The actions of the OSCE are non-binding; however, they reveal the political expediency of these issues during the early 1990s.⁶⁵⁰ The breadth of mandate given to the High Commissioner would not be possible today.⁶⁵¹

Focusing on the language aspects of this approach, the developments of note from the OSCE are The Hague Recommendations regarding the Education Rights of National Minorities, October 1996, which included as central many provisions regarding language of instruction, and protection of linguistic heritage for certain minorities.⁶⁵² In 1998, the OSCE's HCNM demonstrated how central linguistic issues are to the problem of minorities in Europe when the office of the High Commissioner published the Oslo Recommendations Regarding the Linguistic Rights of National Minorities.⁶⁵³ These recommendations draw on international norms to formulate recommendations for policy-makers in OSCE member states to ensure they comply with these

⁶⁵⁰ S. Holt & J. Packer 'OSCE Developments and Linguistic Minorities' *International Journal on Multicultural Societies* 3 2 (2001) 99-126.

⁶⁵¹ C. Williams 'Let Freedom Reign: the Impress of EU Integration on Minority Survival' in Elisabeth Prugl and Markus Thiel (eds) *Diversity in the EU* (Palgrave 2009).

⁶⁵² Organisation for Security and Co-operation in Europe The Hague Recommendations regarding the Education Rights of National Minorities, October (1996)

⁶⁵³ Organisation for Security and Co-operation in Europe *The Oslo Recommendations Regarding the linguistic Rights of National Minorities* (1998).

standards.⁶⁵⁴ They go quite far in the assertion of wide ranging language rights, claiming that 'Language is one of the most fundamental components of human identity. Hence, respect for a person's dignity is intimately connected with respect for the person's identity and consequently for the person's language.'⁶⁵⁵

The precedent which had been set by the Oslo Recommendations Regarding the Linguistic Rights of National Minorities, was followed by a further recommendation on language issues in the form of the OSCE's 2003 Guidelines on the use of Minority languages in Broadcast Media⁶⁵⁶ which provided more specific guidance to member states and furthered the programmatic approach which characterises OSCE instruments. The OSCE's consensus based model of conflict resolution and prevention means that the instruments it provides fall into the bracket of 'soft law'. This soft approach has been very successful, but there have been more traditional regional legislative instruments in the region also. The Council of Europe, perhaps the most prolific regional organisation outside the European Union, has also been very active in this field.

⁶⁵⁴ Packer John & Guillaume Siemienski 'The Language of Equity: The Origin and Development of The Oslo Recommendations Regarding the Linguistic Rights of National Minorities.' (1999) *International Journal on Minority and Group Rights* 6(3) 329-350.

⁶⁵⁵ Organisation for Security and Co-operation in Europe *The Oslo Recommendations Regarding the linguistic Rights of National Minorities* (1998).

⁶⁵⁶ OSCE Guidelines on the use of Minority languages in Broadcast Media, 10 June 2003 available electronically on <http://www.osce.org/hcnm/recommendations>

The actions of the Council of Europe demonstrate the attitude and policy background that shapes the approach of the European Union.

(iii) Council of Europe

The Council of Europe (CoE) is the oldest European intergovernmental organisation. It was founded on 5 May 1949 by the Treaty of London, during the aftermath of the Second World War. It has gone from an organisation of 15 states in 1950 to 49 states in 2014.⁶⁵⁷ Brownlie and Goodwin-Gill describe the Council of Europe as

an organisation created in 1949 as a sort of social and ideological counterpart to the military aspects of European co-operation represented by the North Atlantic Treaty Organisation. [It] was inspired partly by interest in the promotion of European unity, and partly by the political desire for solidarity in the face of the ideology of Communism.⁶⁵⁸

This description places it solidly within the historical framework evoked above in approaching the treatment of minorities in Europe. The 1990s were turbulent times on the European continent, and the

⁶⁵⁷ Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law*, (Oxford University Press 2012).

⁶⁵⁸ I. Brownlie and G. Goodwin-Gill *Basic Documents on Human Rights* 5th (ed) (Oxford University Press 2006) 609

Council of Europe could not ignore this. Its legal instruments have been very influential despite its lack of political strength.⁶⁵⁹

Although the Council of Europe has a wide ranging function, it is perhaps best known as the originator of the European Convention on Human Rights (ECHR) and its court system. We will briefly outline the provisions of the ECHR related to language, and investigate some of the major language rights developments it has fostered, before moving on to an examination of the political actions the Council of Europe has taken in the area of minority rights.

(iv) The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is a major achievement of post-war Europe.⁶⁶⁰ The ECHR was a revolutionary institutional mechanism for the regional protection and promotion of human rights. In 1998, the European Court of Human Rights became the first permanent human rights court in the world.⁶⁶¹ The European Court of Human Rights (ECtHR) is considered a major success story in the architecture of rights protection internationally.⁶⁶²

The Court, although sympathetic to minorities, has not made any significant pronouncements on languages or language rights. The

⁶⁵⁹ G. Sasse 'The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution' in Neil Walker, Jo Shaw & Stephen Tierney (eds) *Europe's Constitutional Mosaic* (Hart 2011) 171-204.

⁶⁶⁰ Donna Gomien *Short Guide to the European Convention on Human Rights* (3rd ed Council of Europe 2005)

⁶⁶¹ Donna Gomien *Short Guide to the European Convention on Human Rights* (3rd ed Council of Europe 2005)

⁶⁶² R. Mackenzie C. Romano Y. Shany and P. Sands (eds) *The Manual on International Courts and Tribunals* (2nd ed 2010)

language rights protected are instrumental, as Williams and Rainey point out, 'in the few places where language is mentioned it is in the context of protecting another right rather than with a view to protecting a right to speak one's mother tongue per se.'⁶⁶³ Gulieva argues that the cases on language taken before the ECHR demonstrate the limitations of the ECHR's approach with regard to minority languages.⁶⁶⁴ Van Bossuyt, however, observes that: 'the jurisprudence of the ECtHR is carefully progressive. Especially since 2000, the ECtHR has made use of the substantive provisions of the ECHR in support of minority protection.'⁶⁶⁵ The ECtHR generally deals with minority protection when scrutinizing the margin of appreciation of states. Minorities are only mentioned in one article of the Convention.

The term 'national minorities' appears in Article 14 of the ECHR, however this is simply a classic non-discrimination provision and not designed to protect minorities *qua* minorities. Despite the restrictive character of Article 14, the European Court of Human Rights held that minority groups could use its provisions to protect group interests for

⁶⁶³ K. Williams and B. Rainey 'Language Education and the European Convention on Human Rights in the Twentyfirst Century' (2002) 22 *Legal Studies* 625

⁶⁶⁴ G. Guliyeva 'Joining Forces or Reinventing the Wheel? The EU and the Protection of National Minorities' (2010) *International Journal on Minority and Group Rights* (17) 287–305

⁶⁶⁵ A. Van Bossuyt 'Fit for Purpose or Faulty Design? Analysis of the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Legal Protection of Minorities' (2007) *Journal on Ethnopolitics and Minority Issues in Europe* (1) 1-20, 5.

http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2007/Issue1/1-2007_van_Bossuyt.pdf <last accessed on 31 May 2012>

minorities.⁶⁶⁶ Despite a very minimal mention of languages explicitly in the Convention, the European Court of Human Rights has made some pronouncements regarding language policy. Articles 5 and 14 explicitly mention language. Furthermore, in the arena of Language Rights the Convention provides for the rights of an accused person to a translator and/or interpreter, free of charge, under articles 5 and 6 of the ECHR,⁶⁶⁷ however trial fairness is the focus rather than language itself. Article 14 mentions language in the broad context of general discrimination provisions. Article 14 enshrines a prohibition on discrimination based on language in the exercise of the substantive rights the ECHR protects. Articles 10, 11 and 14 of the ECHR, in addition to Article 2 of its First Protocol (the right to education) have been invoked in support of the aims of language rights activists.⁶⁶⁸ In fact, however, it is under Article 8 ECHR which protects privacy and the life of the family that the ECtHR's seminal language rights pronouncements were reasoned. The so-called 'Belgian Linguistics Case' of 1968⁶⁶⁹ has been called 'the first and leading case on the right to education,'⁶⁷⁰ and 'possibly the most

⁶⁶⁶ G. Gilbert 'The Burgeoning Minority Rights Jurisprudence of the ECHR' (2002) *Human Rights Quarterly* (24) 736

⁶⁶⁷ Right to liberty and security (Article 5) and Right to a fair trial (Article 6).

⁶⁶⁸ I. Brownlie and G. Goodwin-Gill *Basic Documents on Human Rights* 5th (ed) (Oxford University Press Oxford 2006)

⁶⁶⁹ Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (*Belgian linguistics case*) 23 July 1968 1 EHRR 252

⁶⁷⁰ Robin C A White and Clare Ovey. *Jacobs White and Ovey on The European Convention on Human Rights* (5th edition Oxford University Press 2010) 50.

famous international case involving schooling.’⁶⁷¹ The Belgian context remains interesting today in terms of language management. This case was taken by a group of Francophone Belgian parents, who challenged the administrative divisions of the schooling system in Belgium. This system predicated the language of instruction in state schools in certain regions. The parents were Francophone, in a Flemish speaking region, where state subsidies had been withdrawn from private Francophone schooling.

The ECtHR held that the Belgian system violated the Convention, as access to French language medium education was based on the parents’ residency. The Court held that Article 2 of Protocol 1 to the ECHR (the right to education) does not imply a right to education in the language of choice however. The Court stated that ‘conferring on everyone... a right to obtain education in the language of his own choice would lead to absurd results.’⁶⁷² De Varennes contends that the Court could have articulated an expansive language rights narrative.⁶⁷³ However it took a more conservative approach interpreting that the right to education could grant access only to the existing (majoritarian) forms of language instruction, as the children in question were not precluded from

⁶⁷¹ Moria Paz, ‘The Failed Promise of Language Rights: A Critique of the International Language Rights Regime’ (2013) 54 *Harvard International Law Journal* 157-218, 181.

⁶⁷² Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’ (*Belgian linguistics case*) 23 July 1968 1 EHRR 252

⁶⁷³ F. de Varennes ‘Linguistic Identity and Language Rights’ in M. Weller (ed) *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007)

attending school taught through French, either in other administrative districts, or in non-subsidised private Francophone schools.⁶⁷⁴

The Court's pronouncements in the *Belgian Linguistic Case* can be contrasted with its later decision in *Cyprus v Turkey*.⁶⁷⁵ There was no provision, in the Turkish Occupied Territories of Northern Cyprus for schooling through the medium of Greek, beyond primary schooling. However, it must be noted that '[t]he dicta of the court in the Belgian Linguistic case support the view that the right to 'effective education' implies a duty on the state to provide education at least in the official language,'⁶⁷⁶ but do not go further than that. The Court underlined this fact, stating that the right to education under Article 2 of the First Protocol 'does not specify the language in which the education must be conducted in order that the right to education be respected.'⁶⁷⁷ However, in this case they found a right to secondary education in public schools in one's own language (Greek in the present case) after receiving primary education in one's own language, under the right to private life and right to education. Turkey and Cyprus are of course, in a very particular conflict situation,⁶⁷⁸ and this was part of the context within which the

⁶⁷⁴ Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (*Belgian linguistics case*) 23 July 1968 1 EHRR 252

⁶⁷⁵ *Cyprus v Turkey* App no.25781/94 Eur.Ct. H. R. (2001) 2002 35 EHRR 30

⁶⁷⁶ Robin C A White and Clare Ovey. *Jacobs White and Ovey on The European Convention on Human Rights* (5th edition Oxford University Press 2010) 50.

⁶⁷⁷ App. No. 25781/94, *Cyprus v. Turkey* ECtHR (2001) 51.

⁶⁷⁸ For detail on the conflict between Cyprus and Turkey see James Ker-Lindsay *The Cyprus Problem*

applicants were successful. The Court recognised the fact that, while Greek speaking students could go to the Southern part of the island to complete their education, this then precluded them from returning to the Northern territories, and that the students could not meaningfully pursue their education in the English-medium or Turkish-medium schools which were available to them. This left the students in an 'unrealistic'⁶⁷⁹ situation, according to the Court. Therefore, although perhaps in substance the students' rights related to language, the protection was rather of a due process right relating to their right to education, rather than a substantive language right.⁶⁸⁰

The more recent case of *Oršuš v Croatia*⁶⁸¹ also touched upon language in the context of schooling. This case built upon the jurisprudence of the ECHR established in *DH v Czech Republic*⁶⁸² a similar case, which involved Roma children who were placed in schools for those with learning difficulties, due only to their language skills. The DH case was significant more for the development of the Court's view on indirect discrimination, and their reliance on statistical evidence, than the substantive development of a jurisprudence on language rights. In the *Oršuš* case, which also

What Everyone Needs to Know (Oxford University Press 2010).

⁶⁷⁹ App. No. 25781/94, *Cyprus v. Turkey* ECtHR (2001), 278

⁶⁸⁰ Paz echoes this point: Moria Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' (2013) 54 *Harvard International Law Journal* 157-218.

⁶⁸¹ *Oršuš and Others v. Croatia* App no 15766/03 (ECtHR, 16 March 2010).

⁶⁸² *D.H. and Others v. the Czech Republic* (No. 57325/00) (ECtHR, 13 November 2007).

involved the Roma minority, the court found indirect discrimination, but again the language issue was tangential rather than the substantive grounds for the decision.

Where a right depends on its linguistic content, the Court has tended to find in favour of applicants, but reserves a wide margin of appreciation for State protection of its national language. For example the Court has found that the right to Freedom of Expression (protected by Article 10 ECHR) includes the right to choose the language of that expression; in *Ulusoy and Others v. Turkey*,⁶⁸³ the Court found that a ban imposed on staging a Kurdish-language production in a theatre run by a Turkish local authority was in breach of freedom of expression. The Court has, however been careful to confirm the central importance of a national language, and has placed itself squarely within a statist conception of language.

For instance, in the case of *Mentzen/Mencena v. Latvia*⁶⁸⁴ the court allowed the Latvian government to impose Latvian orthography on a German name. This case concerned a Latvian national who had married a German. Her married name, *Mentzen*, was transliterated into Latvian as *Mencena*, the applicant objected to this. She complained under Article 8 of the Convention that the distortion of the written form of her surname in her passport 'constituted an unjustified and disproportionate interference with the exercise of her

⁶⁸³ *Ulusoy and Others v. Turkey* app no. 34797/03 (ECtHR, 3 May 2007).

⁶⁸⁴ *Mentzen v Latvia* App no 71074/01 (ECtHR, 7 December 2004)

right to respect for her private and family life.’ However, given the historical circumstances in which Latvian had recovered its status as the official language and after the Soviet regime, and the clarity of the rules on the spelling of foreign names in Latvian, the court accepted that this constituted a ‘legitimate aim’, and found there to be no disproportionate interference. The Court has granted states a wide margin of appreciation.⁶⁸⁵ Its only requirement seems to be that the restriction imposed on the spelling or origin of names have a clear and explicit legal basis.⁶⁸⁶

From the minimalist language rights provisions and the restrained jurisprudence of the ECHR we can identify a broad margin of appreciation granted to states in their handling of language policies. The Council of Europe has been perhaps more successful, and certainly more proactive in the area of language rights under the auspices of the Framework Convention for the Protection of National Minorities and its subsidiary the European Charter for Regional or Minority Languages.

⁶⁸⁵ *Mentzen v Latvia* App no 71074/01 (ECtHR, 7 December 2004); *Baylac-Ferrer and Suarez v. France* App no. 27977/04 (ECtHR, 25 September 2008).

⁶⁸⁶ Compare for example the two Turkish cases of *Güzel Erdagöz v. Turkey* app no. 37483/02 (ECtHR, 21 October 2008) and *Kemal Taşkın and Others v. Turkey* (nos. 30206/04 and others 2 February 2010). In the former case the Court found in favour of the applicant and in the latter did not although the substance of the cases was similar. Both involved Kurdish orthography of names which the Turkish government refused to recognise. In the Erdagöz case the applicant was successful as it seemed to be an arbitrary interference with the spelling whereas the Kemal Taskin series of cases involved letters which do not exist in the official Turkish alphabet. However the Court allows States to alter spellings and to change diacritics in line with its respect for the principle of national languages and its wide margin of appreciation in this area.

(v) The Council of Europe's other legal instruments

The Council of Europe has played a fundamental role in the protection and promotion of Minority rights in the wider Europe. During the 1950s and 60s the Council of Europe did not take a strong stance on minority issues, although it is worth noting a Recommendation of the Parliamentary Assembly in 1961.⁶⁸⁷ Recommendation 285 (1961) proposed to include minority rights in the second Protocol to the ECHR. This proposed wide-ranging protections for minority groups including protections of language, culture, and religion.⁶⁸⁸ After the 'Belgian linguistics' case, explored below, this provision was dropped. Later, the Council of Europe's Committee of Experts decided in 1973 there was no particular need for a protocol regarding minority rights.⁶⁸⁹ As explored above, after the collapse of the Soviet Union, there were significant political developments in order to try to preserve peace in Europe. Based on the events taking place in the OSCE and in the United Nations, European states which were members of the Council of Europe recognised the need for further action in the arena of minorities. In May 1990, the Council of Europe established its 'European Commission for Democracy through Law', known as the Venice Commission. It acts as the Council of Europe's advisory body on

⁶⁸⁷ PA Recommendation 285 (1961)

⁶⁸⁸ Patrick Thornberry *International Law and the Rights of Minorities* (Oxford University Press 1991), 305-6.

⁶⁸⁹ Patrick Thornberry *International Law and the Rights of Minorities* (Oxford University Press 1991).

matters relating to democracy and constitutionalism, and is composed of national and international experts.

The Parliamentary Assembly of the Council of Europe drafted Recommendation 1134 in 1990 which established some common principles. A Committee of Experts was established in 1992 to coordinate better with the OSCE. These compiled various different multilateral solutions to the problems of protecting minorities. The Council of Europe's Parliamentary Assembly recommendation of 1993 defines minorities in its first article:

The expression "national minority" refers to a group of persons in a state who:

- (a) reside on the territory of that state and are citizens thereof
- (b) maintain longstanding, firm and lasting ties with that state
- (c) display distinctive ethnic, cultural, religious or linguistic characteristics
- (d) are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state
- (e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.⁶⁹⁰

⁶⁹⁰ Parliamentary Assembly of the Council of Europe, Recommendation PACE Rec 1201/1993

In 1994 the Council of Europe adopted a Framework Convention for the Protection of National Minorities (FCNM). The Council of Europe has been the home of seminal developments in the field of language rights legislation, issuing both the FCNM and the European Charter for Regional or Minority Languages (ECRML). These two documents are generally considered a landmark in the protection of minority rights in Europe.⁶⁹¹

The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities came into force in 1998. It is the first multilateral convention to spell out the details of rights pertaining to minorities specifically with their corresponding obligations on the states parties. It has an extensive monitoring system through both an expert body, and a politically representative 'Committee of Ministers'⁶⁹². The genesis of the Framework Convention for the Protection of National Minorities is the rejection of an additional protocol specifically on Minority Rights to the European Convention on Human Rights.

The Framework Convention for the Protection of National Minorities decided not to define 'minorities', in order to better protect them. Although it is legally binding, and thus, in contract to

⁶⁹¹ Weller, Blacklock and Nobbs (eds.) *The Protection of Minorities in Wider Europe* (Palgrave 2008).

⁶⁹² For more detail see Marc Weller *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford Commentaries on International Law) (Oxford University Press 2005)

the OSCE actions can be considered 'hard law', States are granted a high degree of flexibility. It can be criticised for this flexibility, and the vagueness created in its wording. Troebst describes it as 'a wide meshed net which contains a great number of large holes. Each government which intends to slip through will no doubt succeed.'⁶⁹³ Nonetheless, it was the first international treaty 'specifically and exclusively directed at minorities'.⁶⁹⁴

Section I of the FCMN situates the protection of National Minorities in the context of existing protections of Human Rights in the international legal sphere. Section II sets out programmatic provisions for minorities which states can choose to adopt, it is from this that the Convention can be seen as a 'framework', it is designed to lay out the options for states parties, who may then choose to implement all or some of the suggested provisions.

The main innovation of the FCMN is its section IV which establishes its monitoring mechanisms. The monitoring process under the Framework Convention takes place in 4 steps: the first is reporting, where the States respond to questions and outline their provisions. Civil Society actors can submit alternative reports. The second stage is the Advisory Committee. Here, a committee of independent experts examines the state reports and analyses them

⁶⁹³ Stefan Troebst 'Preface' in Maria Amor Martin Estebanez and Kinga Gál (eds) *Implementing the FCNM* (European Centre for Minority Issues 1999)

⁶⁹⁴ Kirsten Henrard and Robert Dunbar (eds) *Synergies in Minority Protection* (Cambridge University Press 2008).

using a variety of sources of information.⁶⁹⁵ Civil society and advocacy groups are actively encouraged to get involved in the process of examination, and provide information. The third step is the Committee of Ministers which adopts resolutions, which include recommendations for the state in question. This process is supposed to be non-confrontational. In reality unfortunately it therefore results in very weak protections. Gilbert describes the Framework Convention as 'the worst of all worlds.'⁶⁹⁶ In addition to the regular monitoring mechanisms adopted, the Advisory Committee has also established a practice of 'Thematic Commentaries' which is a more transversal approach, addressing themes such as education or religion. The third thematic commentary regarded 'The Language Rights of Persons Belonging to National Minorities under the Framework Convention'. This report can demonstrate some of the weakness of the approach taken with this instrument:

'Minority language' within this Commentary thus means any of the different terms used by member states such as 'language of the national minority', 'language used by the national minority', 'language of persons belonging to national minorities', 'native language' or 'mother tongue'. It does

⁶⁹⁵Emma Lantschner 'Evolution and Value of the Thematic Commentaries of the Advisory Committee of the Framework Convention for the Protection of National Minorities' (2010) *European Yearbook on Human Rights* 275-284

⁶⁹⁶G. Gilbert 'The Council of Europe and Minority Rights' 18 *Human Rights Quarterly* (1996) 189.

not imply official recognition as a 'minority language' by the authorities.⁶⁹⁷

Having recognised linguistic issues, as a specific theme and common problem in the treatment of minorities in Europe during the extensive drafting of the FCNM, the Council of Europe took further action, under the umbrella of the Framework Convention. However, the European Charter for Regional or Minority Languages was designed to protect an aspect of shared heritage, namely Europe's minority languages, rather than to protect members of those minorities. It is considered 'the most comprehensive international legal document in the field.'⁶⁹⁸

The European Charter for Regional or Minority Languages.

The European Charter for Regional or Minority Languages (ECRML) was signed in 1992 and came into force in 1998. Although it is a subsidiary of the Framework Convention for the Protection of National Minorities, it precedes it, and Dunbar explains that its roots are very different:

It was not inspired by the re-emergence of ethnic conflicts that accompanied the fall of Communism, but by concerns

⁶⁹⁷Council of Europe Advisory Committee on the Framework Convention for the protection of national minorities Thematic commentary no. 3: The language rights of persons belonging to national minorities under the Framework Convention (ACFC/44DOC(2012))

⁶⁹⁸Xabier Arzoz (2009): 15 (4) 'Language Rights as Legal Norms' *European Public Law* 541-574

about the threat to Cultural Diversity that was posed by the impending loss of linguistic diversity in Europe.⁶⁹⁹

The process of drafting of the European Charter for Regional or Minority Languages began in 1981.⁷⁰⁰ The protection of regional and minority languages was arrived at as a common policy goal within the Council of Europe.⁷⁰¹ The stated aims of the European Charter for Regional or Minority Languages are to 'Protect regional and minority languages as an integral part of the European cultural heritage.' It is equally innovative in its approach to obligations and aims to facilitate dialogue and interaction, and is inspired by the mechanisms of the FCNM. No common definition of autochthonous language minority exists, just as no definition of minority language exists.⁷⁰²

Article 1 of the Charter defines its scope. The Charter explicitly discriminates between the language rights of autochthonous and allochthonous minorities. The Charter applies for languages 'traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and which is different from the official languages

⁶⁹⁹Dunbar Robert 'The European Charter for Regional or Minority Languages ' in Kirsten Henrard and Robert Dunbar (eds) *Synergies in Minority Protection* (Cambridge University Press 2008).

⁷⁰⁰ Parliamentary Assembly of the Council of Europe drafted Recommendation PACE Resolution 928/1981.

⁷⁰¹ Robert Dunbar G Parry and S Klinge (eds) *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Council of Europe Publishing 2008)

⁷⁰²Jeroen Darquennes 'Minorities Language Policies and Language Planning in Europe ' in Kortmann and van der Auwera (eds), *The Languages and Linguistics of Europe a Comprehensive Guide*. Vol II (Walter de Gruyter 2011).

of that State but does not include the languages of migrants.’⁷⁰³ The Charter is categorically not recognising a general principle of ‘Language Rights’ which can then be asserted throughout Europe but rather valuing Europe's endangered languages and attempting to protect and preserve them.

The Framework Convention for the Protection of National Minorities has an individual rights approach whereas the European Charter for Regional or Minority Languages does not.⁷⁰⁴ It consciously omits the uncertainties of language rights and concentrates more on technical measures for states to take to promote minority languages. The European Charter for Regional or Minority Languages does not create any rights, and this is made explicit in its Explanatory Report.⁷⁰⁵ The charter avoids the language of subjective rights as it overtly does not aim to impose rights upon signatories. Instead it aims to facilitate the protection and promotion of regional and minority languages through a range of measures. Its established ‘Objectives and Principles’ are a broad declaration of political commitment.⁷⁰⁶ The requirement for only 5 ratifications of the

⁷⁰³ European Charter for Regional or Minority Languages (1992), Council of Europe Treaty Series No 148.

Framework Convention for the Protection of National Minorities (1998), Council of Europe Treaty Series No 157.

⁷⁰⁴ Council of Europe Advisory Committee on the Framework Convention for the protection of national minorities Thematic commentary no. 3: The language rights of persons belonging to national minorities under the Framework Convention (ACFC/44DOC(2012) at p.5

⁷⁰⁵ In particular Chapter 11 European Charter for Regional or Minority Languages (1992), Council of Europe Treaty Series No 148. (Explanatory Report).

⁷⁰⁶ Part II European Charter for Regional or Minority Languages (1992), Council of Europe Treaty Series No 148.

European Charter for Regional or Minority Languages before its coming into effect demonstrates its relative lack of importance (the Framework Convention for the Protection of National Minorities, by contrast required 35 ratifications). These five ratifications were only achieved in 1998. Eighteen EU member states have ratified the Charter. Of these, three member states (France, Italy and Malta) have signed but not ratified the Charter. In Bulgaria, Estonia, Greece, Lithuania and Portugal it has neither been ratified nor signed.⁷⁰⁷

The European Charter for Regional or Minority Languages however is quite conservative as a document. In the languages it protects, it echoes territoriality, although certain non-territorial languages, such as Romani and Yiddish, are also protected, and expressly excludes the protection of 'dialects'.⁷⁰⁸ The European Charter for Regional or Minority Languages expressly excludes the languages of recent migrants. The Charter is composed of 5 parts: Part I outlines the definitions and scope, Part II establishes the objectives and principles of the Charter, Part III, which forms the main substance of the Charter includes a list, or 'menu'⁷⁰⁹ of measures to promote the use of Regional or Minority Languages. This menu system has been heralded as innovative, in that it provides for

⁷⁰⁷ Guus Extra and Kutlay Yağmur (eds) *Language Rich Europe: Trends in Policies and Practices for Multilingualism in Europe* (Cambridge University Press; British Council 2012)

⁷⁰⁸ European Charter for Regional or Minority Languages (1992), Council of Europe Treaty Series No 148.

⁷⁰⁹ European Charter for Regional or Minority Languages (1992), Council of Europe Treaty Series No 148.

concrete measures under separate headings, such as Education, Media, Cultural Activities and Facilities and so forth. States can choose a range of action points to address language problems in their state, with a minimum requirement for each heading. The Charter's structure is such that signatories have to subscribe a minimum number of the obligations which are listed in the 'menu', that is 35 out of the 69 provisions listed. Part IV establishes the monitoring system for the Charter. This involves periodic country reports, monitoring via a Committee of Experts, made up of national and international policy and linguistics experts. Part V contains the procedural provisions regarding the signature and ratification of the charter.

The monitoring system of the Charter is original. The States parties must deliver a periodic report every 3 years. The Committee of Experts examines the reports, and makes recommendations based on this to Council of Europe's Committee of ministers. The Committee of Experts' supervisory role may prove influential. Dunbar suggests that the role of the Committee of experts should not be explicitly political, nor should it see itself as quasi-judicial in nature, but rather it should provide sound policy advice.⁷¹⁰ Although the charter does not define language, it protects a formalist, structuralist

⁷¹⁰ Dunbar 'Definitively interpreting the ECRML: the legal challenges' in R. Dunbar G Parry and S Klinge (eds) *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Council of Europe Publishing 2008)

conception of language. This is implicit in the drafting of the document, which is a depoliticised approach to protection, and perhaps the fossilisation, of Europe's linguistic heritage. It recognised the value of linguistic diversity, and was a multilateral declaration that minority languages are also an integral part of the European cultural heritage. The charter's strict definition and limitation of scope leads to the obfuscation of the power plays at stake in the selective recognition of language rights in Europe.

(vi) Conclusions on European regional protections

There are many structures which protect language rights across the various pan European institutions with different understandings of the depth and breadth of language rights ideas. It is important to understand the context and rationale for the regional protections for minorities, and, consequently, language rights. The broad language rights instruments which originate from the Council of Europe, namely the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages have been hailed as granting unprecedented recognition for minority languages. The philosophy is one of sustaining language rights, and minority language communities, however, on closer inspection it becomes clear that the central players in the language rights game remain States. The model that has been followed in the European regional legislation on language is precisely in the 'directive

rather than justiciable vein'⁷¹¹ as regards language rights. Regarding the provisions of the ECRML and the FCNM, Oeter claims that:

Ambivalent states...keen on avoiding a rhetoric of linguistic rights, want to phrase language legislation in purely objective terms - but it is difficult to avoid that suitable legal standards developed in the field of minority language policy are understood as linguistic rights and are instrumentalized by minority language communities as a tool of empowerment vis-a-vis the state.⁷¹²

The European regional instruments are more explicitly targeted toward language maintenance than the international instruments mentioned above. Although the language of rights is present, they are more akin to policy roadmaps.⁷¹³ Voluntariness is a hallmark of the European approach. This can be seen as both a strength and a weakness of these regional innovations. The à la carte approach and relatively technical formulations of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages are convenient as they provide pragmatic solutions and guidelines for states, backed up by the monitoring mechanisms in place. However, this might not instigate

⁷¹¹ Daniel J. Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908

⁷¹² Stefan Oeter 'Minority Language Policy: Theory and Practice' (2007) 6(2) *Journal on Ethnopolitics and Minority Issues in Europe* 54-78.

⁷¹³ G Hogan-Brun and S Wolff (eds), *Language Nationalism and Democracy in Europe* (Palgrave 2003).

the strongest form of protection or promotion. In fact, the Charter, in offering the states parties the choice of provisions meant that the degree of protection by the Charter is not prescribed, and can be looser or tighter depending on the context. The instruments are dialogue based and are keen to involve a multiplicity of actors. Arzoz argues that recognition of language rights in soft law instruments does not automatically entail the creation of a right in the sense of imposing a duty on the State.⁷¹⁴ Although the European legal instruments outlined echo the discourse of rights, they are innovative in nature to the extent that they are non-binding. There is no court designated to enforce them, they merely set up standards and supervisory mechanisms. This approach is also present in the international fora, as a result of the lack of political consensus on these issues. This chapter outlined the programmatic approaches enshrined in the European Regional Instruments. De Witte links the trend for 'rights without litigation', which they establish, with the Europeanisation of language laws.⁷¹⁵

Certain commentators have discerned an enthusiasm for Language Rights in Europe from *inter alia*: the European Charter for Regional or Minority Languages' place within the structures of the Council of Europe, its own reference, in the preamble, to the ECHR

⁷¹⁴ Xavier Arzoz (2009) 15 (4) *European Public Law* 'Language Rights as Legal Norms' 541-574.

⁷¹⁵ B. de Witte 'Language Rights: the interaction between domestic and European developments' in Kjaer L. and Adamo S. (eds) *Linguistic Diversity and European Democracy* (Ashgate 2011).

and 'the principles embodied in the United Nations International Covenant on Civil and Political Rights' and the painstaking manner in which the Advisory Committee go about their job.⁷¹⁶ However, when examining the actions of the principal actors involved, the states themselves, it becomes clear that they are not keen on providing for linguistic minorities outside of situations of political expediency. It is clear that the instruments of the Council of Europe were created to protect 'old' minorities.⁷¹⁷ A lack of flexibility in this regard has been widely criticised.⁷¹⁸ From an investigation both of the jurisprudence of the court and the projects of the Advisory Committees both of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages it is obvious that the substantive protection of language rights is minimal in the patronage of the Council of Europe. The provisions for language communities foreseen by the OSCE are of an openly preventative nature and as such are not language rights writ large but are more akin to political concessions.

⁷¹⁶ Marc Weller and Katherine Nobbs *Political Participation of Minorities A Commentary on International Standards and Practice* (Oxford University Press 2010); Colin Williams, *Minority Language Promotion, Protection and Regulation: The Mask of Piety* (Palgrave 2013); Colin Williams 'Let Freedom Reign: the Impress of EU Integration on Minority Survival' in Elisabeth Prugl and Markus Thiel (eds) *Diversity in the EU* (Palgrave 2009).

⁷¹⁷ Emma Lantschner Renate Kicker and Markus Möstl 'Reforming the Council of Europe's Human Rights Monitoring Mechanisms' (2011) 29(4) *Netherlands Quarterly of Human Rights* 460-490.

⁷¹⁸ R Medda Windschner (2011) 12 'New Minorities Old Instruments' *International Community Law Review* 361-391