

Too late ‘to dissolve the people and elect another? Cognition, Contingent Consent and Turbulence in the Integration Process?’

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Abstract

Consent to the process of European integration is contingent and the reproduction of consent is, in Renan’s (1882) terms, a ‘daily plebiscite’. Each new Treaty conveys a new understanding of what the EU is and ought to be. Analysis of the latest Treaty provisions, intended to bring Europe closer to the people and to address the democratic deficit, demonstrates the extent and implications of competition over competence between the various actors involved. The resulting compromises are manifestations of Haas’s (1976) ‘turbulence’ in practice and also contribute to further ‘turbulence’ by shaping understandings of what the role of the public and other actors within the EU system is and ought to be. Recognising the importance of cognition and contingent consent for the integration process, and the role of EU institutions in reproducing these, requires a rethink of existing approaches to European integration theory and a nuanced social-psychology of the European Union.

Key words: Cognition, consent, turbulence, integration theory, legitimacy

Too late ‘to dissolve the people and elect another’? Cognition, Contingent Consent and Turbulence in the Integration Process?

After the uprising of the 17th June
The Secretary of the Writers Union
Had leaflets distributed in the Stalinallee
Stating that the people
Had forfeited the confidence of the government
And could win it back only
By redoubled efforts. Would it not be easier
In that case for the government
*To dissolve the people
And elect another? (Bertolt Brecht, The Solution)*

Introduction¹:

The literature on the EU contains in almost equal measure: lamentation - over the lack of a European people and the implications of this for the emergence of a demos; and consternation - when the European people raises its voice in the rejection of various Treaties and the EU Constitution. The response to these rejections has involved: on the one hand, considerable scrambling around by national and EU elites to ‘fix the people’ and to finesse Treaty developments with minimum substantive change and maximum palatability; and, on the other, much head-scratching amongst academics attempting to understand why the supposedly non-existent, or ineffectual, people revolted and what this means for European integration.

This paper examines the often neglected concept of *consent* to the functioning of the European Union. The *contingent* nature of consent and the importance of *cognition* in influencing the degree of consent to the process of European integration are examined.

¹ A much earlier version of this paper was presented at a workshop on ‘The Lisbon Treaty and the Future of the European Union’, 6-7 December 2007, University of Glasgow. I am grateful to participants in that workshop and to James Mitchell for insightful comments.

The role played by the EU institutions in shaping the ‘appreciative systems’ (Vickers, 1965) and ‘mental models’ (Denzau and North, 1994) through which calculations of the costs and benefits, on the basis of which consent is offered or withheld, is central to this analysis. Each new Treaty, it is argued, whether ratified or not, conveys to the public a new understanding of what the EU is and ought to be and of what the role of the public within the EU system is and ought to be. As Anderson et al (2005: 193) argue, ‘[I]nstitutions make winners and losers and those two conditions imply very different sets of attitudes and behaviours for voters, not least of which is that they also create very different sets of attitudes towards the institutions themselves.’ To this extent a detailed examination of the Treaties, the processes through which they are agreed and implemented and the narrative which they contribute to in relation to the role of the various actors in the EU is crucial for any understanding of how consent is gained or lost in relation to the integration process.

As yet, there has been little attempt to understand how the processes, policies and institutions at the EU level not only *reflect* the changing role of the various actors involved, but *shape* the roles of those actors and *reinforce* expectations of what their role and the role of the EU is to be in the future. Yet these factors are central to any explanation of how and to what extent the EU is seen as legitimate, whether consent to the continuation of the process of European integration is granted and crucially as to whether ‘losers’ consent’ (Anderson et al, 2005) can be secured to ensure at least acquiescence to the continued functioning of the EU.

It is argued, along with Renan (1882), Deutsch (1969) and Levi (2001), that consent is contingent and that the reproduction of consent/affiliation is a ‘daily plebiscite’. However, perception of what is desirable or acceptable can change over time. Thus, the establishment of a ‘mental model’ (Denzau and North, 1994), which presents the solution to the legitimacy crisis of the EU and to each Treaty ratification debacle as that of bringing Europe ‘closer to the people’, has significant implications. Internalisation of this ‘mental model’ generates a new understanding of the role and rights of ‘the people’ in relation to an EU which can no longer remain the preserve of the elites. It is ironic that

attempts to bring the European Union, traditionally an elite run enterprise, ‘closer to the people’ and to enhance the legitimacy of the Union may, in fact, raise expectations about the ability of the EU to involve the people that cannot be met. Failing to meet its stated aims generates uncertainty and dissatisfaction and threatens the ability of the Union both to meet the demands of its expanded constituency (‘input legitimacy’) and to perform its traditional tasks efficiently and thus ensure at least a degree of ‘output legitimacy’ (Scharpf, 1999). In effect, the EU may be perceived by the public, as a result of its own efforts to legitimise its actions, to be less legitimate than it was to start with.

Cognition and Contingent Consent

Experience would thus suggest a general rule for integration. To be acceptable as a substitute for special group facilities – local, national, or even segregated ones – *integrated* facilities must usually be *better* facilities. International government and administration would have to be better than the national governments and the national administrations it would replace. And it would have to be better not just in the opinion of distant experts who arrive by airplane to check the accounting books but also in the experiences and emotions, in the feelings and daily lives of the populations directly concerned. No capabilities for such international government are now in sight. (Deutsch, 1969:171)

Edelman (1967), Vickers (1965) and Deutsch (1969) all recognised the crucial interplay between an individual’s pursuit of certain outcomes or benefits and the meanings and perceptions that determine the relative value of particular goals. This perspective has also informed the work of sophisticated institutionalists concerned to understand how beliefs are formed and how mental maps impact upon choices made (cf, Denzau & North, 1994; North, 2005) or how intangibles such as ‘fairness’ and ‘reciprocity’ enter into rational calculations of cost-benefit ratios (Levi, 1997).

In the 1960s Vickers developed the concept of ‘appreciative systems’ in an attempt to explain the interrelationship between calculations of cost and benefits and the values or appreciation placed on those benefits. He argued that cognitive elements, often implicit or unconscious, shaped the extent to which one course of action rather than another might be perceived as more desirable or acceptable to an individual than another. He argued, moreover, that such cognitive elements developed over time and through the process of collaboration and interaction. Thus, like Deutsch (1969), Vickers (1965) argued that experience and perception were crucial factors in the explanation of any calculation of the costs and benefits of action or inaction:

Appreciation manifests itself in the exercise through time of mutually related judgement of reality and value. These appreciative judgements reflect the view currently held by those who make them of their interests and responsibilities, views largely implicit and unconscious which non the less condition what events and relations they will regard as relevant to them, and whether they will regard these as welcome or unwelcome, important, demanding or not demanding action or concern by them. Such judgements disclose what can best be described as a set of readinesses to distinguish some aspects of the situation rather than others and to classify and value these in this way rather than in that.’ (Vickers, 1965:67)

This approach finds a resonance in more recent attempts to understand the relationship between the competing conceptions of reality which underpin the various ‘mental models’ (Denzau and North, 1994) which help to shape decision structures: ‘As soon as we realise that we always have an imperfect grasp of ‘reality’ and frequently have contrasting and conflicting views of the human landscape, we can begin to get a handle on the process of human change. The process works as follows, the beliefs that humans hold determine the choices they make that, in turn, structure the changes in the human landscape.’ (North, 2005 :23).

The importance of cognition becomes all the more central when the concept of consent is recognised to be *contingent*. The distinction between *diffuse* support for the continued functioning of a political system and *specific* support or consent for individual policies (Easton, 1975) has been recognised and linked to the overall issue of the legitimacy of the political system. Renan (1882) famously wrote that the very existence of the nation is a ‘daily plebiscite’². This is equally true in relation to a political system such as the EU. Central to the generation of support for any given system is the perception of fairness. An individual can withhold specific consent for an unfavoured policy without withdrawing diffuse support for a system which may deliver his/her preferred policy next time round. Levi (2001), building on Beetham’s (1991) work on legitimacy, argues that individuals are willing to consent to obligations if it is felt that those obligations are evenly distributed and reciprocated by other citizens. However, she also warns that ‘...political obligation rests on the citizen’s perception that government actors and other citizens are trustworthy. The activation of obligation implies institutional arrangements that make promises and commitments credible, but it may also require extraordinary acts of compensation to overcome distrust based on past experience’ (Levi, 2001:208). New ‘mental models’, which provoke new expectations on the part of EU citizens, may have significant long terms implications for the process of European integration if those expectations are not met.

Anderson et al’s (2005) discussion of the importance of ‘losers’ consent’ for the stability of a political system also raises important questions in relation to the interplay between the requirements of any given system and the support sustained amongst those who perceive themselves as losers under that system for its continuation. Short-term, or intermittent, periods as ‘losers’ are deemed acceptable within a stable system which is generally perceived to operate fairly. However, how institutions are structured, and the ways that the goals of the institutions are articulated, shapes who the winners and losers are and the extent to which the system is perceived as being fair. In the case of the EU, for example, the same individuals who may have been winners if ‘economic progress’

² I have elsewhere explored the importance of insights from traditional theories of nationalism for understandings of the contingent nature of European identity (Cram, 2009a).

was viewed as the central requirement of the EU, and this remained an elite process, potentially become ‘losers’ if ‘democracy’ and ‘proximity to the people’ are used as a measure of the success of the EU. However, now that the latter has been offered as a possibility, the lack of ‘democracy’ and ‘proximity to the people’ becomes perceived as ‘unfair’ and the trustworthiness of the system comes into question, regardless of whether the EU is delivering the ‘economic progress’ it was set up to deliver or not.

A further issue for the EU in relation to Anderson et al’s (2005) discussion of losers’ consent, so essential to the continued functioning of the political system, is that the least likely systems to generate consent are those that are perceived as being unstable. Ironically, as attempts to bring Europe ‘closer to the people’ continue to raise then dash expectations and feed further ‘turbulence’, the EU system becomes less stable and less likely to generate consent amongst the European people.

There is a complex interrelationship between cognitive and material elements in determining a given course of action. Deutsch (1969), as quoted above, argued that the processes of integration and devolution were the result of a cost-benefit analysis concerning the capacities of the integrated or devolved bodies but were also a reflection of the *perception* of the capacity of the bodies and the *experience* of those affected by them. From this perspective, a mutually reinforcing relationship exists between Treaty Provisions and the creation of the ‘mental models’ (Denzau and North, 1994) through which the provisions are created, put into practice through the policy process and experienced by recipients as well as the ‘mental models’ through which subsequent demands on the system are understood and articulated: ‘policy making assumes, expresses and helps to create a whole system of “human values”’ (Vickers, 1965:29). By altering the beliefs of significant groups as to their rights and roles within the EU system, a new measure of the credibility of trustworthiness of the EU comes into play. Thus, incomplete efforts to *democratise* the EU in order to enhance the *legitimacy* of the EU system have, for example, very real consequences. When the logic of ‘contingent consent’ is taken into account, the contradictory provisions and messy compromises, evident in the analysis of the Treaty conducted below, are likely to contribute to the

generation of competing understandings of what is fair and what is acceptable in relations with the EU. To this extent, efforts to bring Europe ‘closer to the people’ have the potential not only to cause ‘turbulence’ and instability but also to undermine the very legitimacy which they sought to secure.

Bringing Europe Closer to the People: Turbulence in Practice

‘The condition of turbulence can be visualized as a giant simultaneous chess match over which the judges have lost control’ (Haas, 1976: 175)

The Nice Summit undertook to launch a debate on the ‘Future of Europe’. Both in the process of its conduct, which was to ‘encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc’ (Treaty of Nice (2000) Declaration 23, point 3), and with regard to the points for consideration, such as ‘how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity’ and ‘the role of national parliaments in the European architecture’ (Treaty of Nice (2000) Declaration 23, point 5), the debate was to bring Europe ‘closer to the citizens’. Thus, ‘the Conference recognises the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States’ (Treaty of Nice (2000) Declaration 23, point 6).

In the ensuing Convention on the Future of Europe, charged with conducting this debate and with drafting the Constitutional Treaty, 30 members of national parliaments were formally included as members and for the first time the ‘civil dialogue’ was utilised in the preparation of an EU Treaty: ‘In order for the debate to be broadly based and involve all citizens, a Forum will be opened for organisations representing civil society (the social partners, the business world, non-governmental organisations, academia etc)’ (Laeken

Declaration, 15/12/2001:5). The convention was charged with considering how: ‘A better division and definition of competence in the European Union’ might be established and with addressing a series of questions relating to the role of national parliaments in the EU decision process (Laeken Declaration, 15/12/2001). The failed Constitutional Treaty³ upgraded the Subsidiarity Protocol of the Amsterdam Treaty (1997), substantially increasing the role of national parliaments in the monitoring process, and Article 1.47 was entitled ‘The Principle of Participatory Democracy’ and specifically recognised the role of ‘regular dialogue with representative associations and civil society’. The preamble to the Lisbon Treaty, Treaty on European Union (TEU), in turn, declares the need to enhance the ‘democratic and efficient functioning’ of the Union institutions. The role of national parliaments is further strengthened, with an 8 week period in which parliaments may raise an objection to an EU legislative act on the grounds of subsidiarity, and a commitment to consult civil society continues to be declared to be one of the ‘Democratic Principles’ of the EU (Title II, Lisbon Treaty on European Union, 13 December 2007).

Evident in the debate since Nice, and in the various attempts to codify a set of instruments in Treaty format, has been a renewed focus on the issues of subsidiarity and proportionality with heavy emphasis on the issue of how competences should be allocated and defended at the various levels of the EU decision-making structure. This has been closely related to the question of democratic oversight by the national parliaments and to some extent by regional and local parliaments and assemblies on the basis of the subsidiarity principle. Meanwhile, the issue of the democratic deficit has also been addressed by ensuring more routine involvement of wider civil society through a number of more direct mechanisms.

In sections (i), (ii) and (iii) below, the complex range of instruments, actors and processes in the Lisbon Treaty which aim to bring Europe ‘closer to its citizens’ are examined. It is argued that a two-pronged approach is evident. First, the Treaty *strengthens channels of indirect or representative democracy*: providing an increased

³ The Constitutional Treaty, signed by Heads and State of Government on 29 October 2004, was rejected in referenda in France, on 29 May 2005, and in The Netherlands, on 1 June 2005.

role for national parliaments and potentially for regional and local parliaments and assemblies.⁴ In particular, the role of national parliaments has benefited from an increased oversight/scrutiny function at least in relation to the ‘ordinary legislative procedure’ (or community method, as was) and, in particular, in relation to the monitoring of the subsidiarity provisions.

Secondly, evident in both the Treaty provisions and in daily policy practice is an *increased role for ‘new modes of governance’ and for more ‘participatory’ forms of democracy*. For example, there is repeated reference in the TFEU to the Commission’s right to take ‘any useful initiative’ to promote the coordination of member state actions in a wide range of areas which are formally areas of member state competence. This coordination approach is already being modelled on the existing OMC procedures in employment, social inclusion, health and pensions which encourage bench-marking, mutual learning and peer review. At the same time, civil dialogue has been institutionalised in the ‘Democratic Principles’ of the Treaty on European Union, thus potentially strengthening the formal involvement of civil society in the EU policy process. Specific organisations such as the social partners have had their direct role in the EU social policy process further entrenched and the ‘Citizens Initiative’ formally creates a direct agenda-setting role for EU citizens.

(i) The Lisbon Treaty

The Lisbon Treaty signed by the Heads of State and Government of the Member States of the European Union on 13 December 2007 amends the Treaty on European Union (which retains its Title (TEU)) and the Treaty Establishing the European Community (which

⁴ Although this will be subject to the interpretation of ‘where appropriate’. For example, in Protocol No2, Article 2: Commission consultation should ‘*where appropriate* take into account the regional and local dimension of the act envisaged’, while in Protocol No 2, Article 6: ‘It will be for each national Parliament or each chamber of a national parliament to consult, *where appropriate*, regional parliaments with legislative powers’ (emphasis added).

becomes, under Lisbon, the Treaty on the Functioning of the European Union (TFEU)). Broadly, the revised TEU deals with the fundamental institutional principles and goals guiding the EU, while the TFEU deals with the specific application of these principles in relation to specific policy areas. The two Treaties are accompanied by 37 Protocols, each of which shares the same force of law as the Treaties, and 65 Declarations which are considered to be expressions of political rather than legal commitment but which may be taken into account by the European Court of Justice. The Lisbon Treaty has not yet been ratified by all member states. On 12 June 2008 the Treaty was rejected in a referendum in Ireland. Meanwhile the Czech Republic, Germany, Poland and Sweden have yet to ratify the Treaty, although none of these require a referendum.

The commitment to bringing Europe closer to its citizens remains a key stated goal of the Union in the Lisbon Treaty. Thus, the preamble to the Treaty on European Union ‘RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity’. In the same Treaty, Title 1, Common Provisions, Article 1, it is stated that ‘This Treaty marks a new stage in the process of creating an ever closer union among the people of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’. Again, in Title II Provisions on Democratic Principles, Article 10: 3 it is declared that ‘Decisions shall be taken as openly and as closely as possible to the citizen’.

The principles of Conferral and Subsidiarity are laid out in the Common Provisions of the TEU (Title 1), Provisions on Democratic Principles of the TEU (Title II) details the role of both representative and more direct forms of participation in and scrutiny of the EU policy process and the Final Provisions of the TEU reinforce the importance of a clear delineation of competences and declare the possibility of decreasing the competences of the Union rather than simply increasing them.⁵ Attempts to operationalise these broad commitments in relation to specific policy areas and the roles of the various actors and institutions are provided in the TFEU

⁵ See also Declaration No 18 Declaration in Relation to the Delimitation of Competence

(ii) Treaty on European Union

(a) Provisions Relating to the Principles of Conferral and Subsidiarity

From the outset, the TEU stresses that competences belong to member states which may choose, or not, to confer the right to act upon the Union and its institutions. Thus, TEU Title I, Common Provisions, states: ‘By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union" on which the Member States *confer*⁶ competences to attain objectives they have in common.’ Also from the outset, the limitations on the Union activities in relation to the principle of conferral are established: ‘The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties’ (TEU Title I, Common Provisions, Article 3:6). To this end, the principles of subsidiarity and proportionality are invoked: ‘The limits of Union competences are governed by the principle of conferral, ‘The use of Union competences is governed by the principles of subsidiarity and proportionality’ (TEU Title I, Common Provisions, Article 5:1).

Should there be any doubt about the principle of conferral, the statement that ‘Competences not conferred upon the Union in the Treaties remain with the Member States’ is repeated twice (TEU Title I, Common Provisions Articles 4:1 and 5:2).⁷ Article 5:3 (TEU Title I, Common Provisions), meanwhile, seeks to establish a measure of what constitutes reasonable justification for and limitation upon Union action in areas of shared competence: ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’.

⁶ Emphasis added

⁷ And again in Declaration No 18. Declaration in relation to the delimitation of competences

The Common Provisions of the TEU refer to the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality and to the role of national parliaments in ensuring compliance with the subsidiarity principle. The Protocol provides that: ‘Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers’ (Protocol No 2, Article 6). Protocol No 2, thus, provides a procedure through which EU institutions, national and regional legislatures may operationalise the subsidiarity principle in relation to draft legislation. If one-third of all votes allocated to national parliaments raise objections, the draft legislation must be reviewed. These provisions undoubtedly represent an enhanced role for national parliaments, at least, in relation to the ‘ordinary legislative procedure’ (‘community method’ as was).

(b) Provisions Relating to Democracy and Civil Engagement

The provisions of the TEU in relation to democracy and civil engagement target a wide range of actors, emphasising different and potentially conflicting roles for the various bodies. TEU, Title II Provisions on Democratic Principles declares that the ‘functioning of the Union shall be founded on representative democracy’. The direct role of the European Parliament, in representing citizens at the European level (Article 10:2) is emphasised. In the same clause, the indirect representative role of members states, represented by their Heads of State or Government (in the European Council) or by their governments, and which are ‘democratically accountable either to their national Parliaments, or to their citizens’ (Article 10:2) is also stressed. Interestingly, an explicit role is allotted to ‘Political parties at European level’ in ‘forming a European awareness and to expressing the political will of the citizens of the union’ (Article 10:4), although

no such mention is made of the role played by domestic political parties.

Title II, Provisions on Democratic Principles, of the TEU⁸ also address the role of broader ‘civil society’. The Union institutions are required to ‘give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’ (Article 11:1) and to ‘maintain an open, transparent and regular dialogue with representative associations and civil society’ (Article 11:2). The Commission, meanwhile, is charged with carrying out ‘broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent’ (Article 11:3). Additionally, a direct initiating role for citizens is introduced: ‘Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties’ (Article 11:4).

The role of national parliaments is specifically addressed in Article 12 of TEU, Title II Provisions on Democratic Principles. National Parliaments are said to ‘contribute to the good functioning of the Union’. Specifically, it is stated, in relation to Protocol No 1 On The Role of National Parliaments in the European Union and Protocol No 2 On the Application of the Principles of Subsidiarity and Proportionality, that national parliaments play a key role: ‘through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union’ and ‘by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality’ (Article, 12, a & b).

⁸ The Provisions of Article 11 (clauses 1, 2 & 3) are identical to those which previously appeared in the Constitutional Treaty in Article 1:47 entitled ‘Participatory Democracy’. There have been some small changes to Article 4 on the Citizens’ Initiative.

(iii) Treaty on the Functioning of the European Union

The TFEU seeks to establish a working legislative framework within which the broad principles identified in the TEU can be put into practice. The importance of the distribution of competences in the EU is established from the opening lines of the TFEU. Part One Principles Article 1:1, TFEU thus declares: ‘This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences’. The whole of Title I is, in turn, devoted to establishing Categories and Areas of Union Competence.

In the TFEU, the starting point concerns not, however, the principal of conferral and thus the ability of the member states to limit the activities of the Union, but the degree to which the ‘exclusive competence’ of the Union limits the ability of the member states to act without the authority of the Union. Thus, ‘When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts’ (Title I, Categories and Areas of Union Competence Article 2:1). To this end Article 3 (clauses 1 and 2) details a series of areas in which the Union exercises exclusive competence.⁹ It is also stated that: ‘The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy’ (Article 2:4).

⁹ TFEU, Title I, Categories and Areas of Union Competence Article 3: 1: The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. TFEU, Title I, Categories and Areas of Union Competence Article 3: 2: The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

More problematic, however, are the areas of shared or mutual competence. These areas are central to the discussion of subsidiarity. As the UK House of Lords' European Union Committee has noted: 'The principle of subsidiarity only applies where the EU and the Member States have shared competence i.e. where both the EU and Member States can make the law. If the EU has exclusive competence in a matter, or none at all, then subsidiarity issues do not arise' (HL Paper 101, 14 April 2005: 9).

Unsurprisingly, TFEU provisions relating to areas of shared competence are complex: 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence' (Title I, Categories and Areas of Union Competence Article 2:2). A detailed explanation of how this situation might manifest itself in practice is found in Declaration No 18 Declaration in Relation to the Delimitation of Competences: 'The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests'. The limitations on the scope of shared competence are reinforced in the Protocol (No 25) On the Exercise of Shared Competence 'With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.'

Article 4:2 provides a list of areas in which the Union and Member States share

competence.¹⁰ In addition, however, Article 4:1 states that: ‘The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.’ Article 6 details a hybrid category in which competence is not shared but remains with member states but where: ‘The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States.’¹¹ The basis for this hybrid category is found in Article 2:2:

In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

As a result, a number of these hybrid cases appear both within Title 1 and throughout the TFEU in relation to specific policy areas. Thus, in relation to economic and employment policies it is stated in Title 1, Article 2:3 that member states shall coordinate their activities ‘within arrangements as determined by this Treaty, which the Union shall have competence to provide’ and in the same title, it is stated that: ‘The Member States shall coordinate their economic policies within the Union. To

¹⁰ Title I, Categories and Areas of Union Competence’ Article 4:2: Shared competence between the Union and the Member States applies in the following principal areas:(a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection;(g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

¹¹ The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

this end, the Council shall adopt measures, in particular broad guidelines for these policies' (Article 5:1). The areas of research, technological development and space (Article 4: 3) and development cooperation and humanitarian aid (Article 4: 4) also enjoy a specific mention in identically worded provisions: 'the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs'. Similarly, the 'Union may take initiatives to ensure coordination of Member States' social policies' (Article 5:3).

Critical analysis of the application of these principles in the TFEU itself reveals how difficult it is to distinguish in practise between areas of 'shared competence' between the Union and the Member States and competence which is retained by member states but where the Union has the right to coordinate member state activities. This is important, not least, because Title 1, Article 2:6 states: 'The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area'.

One particular provision is utilised repeatedly in the TFEU in relation to a range of policy areas:

The Commission may, in close contact with the Member States, take *any useful initiative*¹² to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

This precise wording is utilised in relation to: Public Health Title XIV, 168:2 (an area of shared competence under article 4:2 (k)); Industry Title XVII, 173:2 (an area excluded from shared competence under Article 4:1, due to its inclusion in Article 6(b)); and

¹² Emphasis added

Research, Technological Development and Space, Title XIX, 181:2 (which enjoys a special hybrid status in Article 4: 3). Although the Article in Title 1 concerning Humanitarian Aid and Development Cooperation (Article 4:4) defines a special hybrid status for these areas which is worded identically to the provision for Research, Technological Development and Space, the wording of the specific Articles enacting this provision in the body of the TFEU is different. The Commission is also, however, allowed to employ ‘any useful initiative’ to promote the coordination of member state activities in Humanitarian Aid and development cooperation.¹³ The same permission to utilise ‘any useful initiative’ is also applied to the area of Trans-European Networks in Title XVI, 171:2 although this is an area of ‘shared competence’ under Article 4:2(k).

Finally, the case of social policy provides a useful example of the complexity of the provisions. TFEU Article 156 states that ‘the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action *in all social policy*¹⁴ fields under this Chapter’.¹⁵ Article 156 continues: ‘To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.’ In practice, however, social policy enjoys a very unclear status in Title 1, Categories and Areas of Union Competence. Under Title 1, employment policy is given a special mention: ‘The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies’ (Article 5:2), while vocational

¹³ Development Cooperation, Title III, Chapter 1, 210:2 and Humanitarian Aid, Title III, Chapter 3, 4:6

¹⁴ emphasis added

¹⁵ Article 156 continues ‘particularly in matters relating to: –employment, – labour law and working conditions, – basic and advanced vocational training, – social security, – prevention of occupational accidents and diseases, – occupational hygiene, – the right of association and collective bargaining between employers and workers.

training is included in Article 6, detailing areas where member states retain competence but the Union may be allowed to act. Meanwhile, ‘social policy, for the aspects defined in this Treaty’ is listed under Article 4 (b) as an area of explicitly shared competence. Declaration No 31 of the TFEU, rather than clarifying the position, further complicates matters by stating: ‘The Conference confirms that the policies described in Article 156 fall essentially within the competence of the Member States. Measures to provide encouragement and promote coordination to be taken at Union level in accordance with this Article shall be of a complementary nature. They shall serve to strengthen cooperation between Member States and not to harmonise national systems.’ This potentially attributes a hybrid status to ‘all social policy fields under this chapter’. It is not clear how this relates to those areas detailed in Title 1, Article 4 as areas in which competence is shared, and where according to Title 1, Article 2:2: ‘The Member States shall exercise their competence to the extent that the Union has not exercised its competence.’

(iv) ‘Competence’: Contestation and Compromise

The degree to which any attempt to clarify the relative spheres of competence of the various actors in the EU system is controversial is evidenced by the need to state and restate the principle of conferral, to provide a full Title of the TFEU on Categories and Areas of Union Competence and to append three additional protocols and three declarations to the Treaties: Protocol (No 1) On the Role of National Parliaments in the European Union; Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality; Protocol (No 25) On the Exercise of Shared Competence; and Declaration Nos 18, 24 and 31.

Extreme care is taken in the Treaties to stress that any transfer of competence to the Union need not be a one way process and that Union competence may be decreased as well as increased. The Final Provisions of the TEU in Article 48:2 state: ‘The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may,

inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties’. This statement is further reinforced in Declaration No 18 Declaration in relation to the delimitation of competences: ‘the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties upon which the Union is founded, including either to increase or to reduce the competences conferred on the Union in the said Treaties.’

It is also emphasised that the new provisions in the Treaties, allowing for the EU to acquire the status of a ‘legal personality’ and introducing simplified revision procedures for parts of the TFEU, should not be understood as an extension of the competences of the Union. To this end, it is stated in **Declaration No.24**, Declaration in relation to the new legal personality of the EU, that: ‘the fact that the EU has a legal personality will not in any way authorise the Union to legislate or act beyond the competences conferred upon it by Member States in the Treaties’. In the Final Provisions of the TEU, Article 48:2, meanwhile, it is asserted that the simplified revision procedure for Part Three of the TFEU: ‘shall not increase the competences conferred on the Union in the Treaties’.

Despite the many statements and assertions to the effect that competence may not be compromised, in practice the situation is highly complex. As became clear in the previous section, the issue of subsidiarity only arises where competence is shared between the Union and the member states. As also became clear, there are many more areas of *de facto* shared competence than those formally stated in the provisions of Lisbon Treaty.

The dual approaches to bringing Europe ‘closer to the people’ evident in the Lisbon Treaty provisions are mutually incompatible and highlight the problem of ‘turbulence’ in practice. It is in those areas where the Union enjoys least competence that ‘new modes of governance’ such as the Open Method of Coordination (OMC), with a particular focus on the wider inclusion of civil society, have begun to emerge. The Union’s ‘Europa’ web-

site states, for example, that: ‘The open method of coordination takes place in areas which fall within the competence of the Member States’.¹⁶ Similarly, the process of civil dialogue is most developed in areas in which the Union has traditionally lacked competence.¹⁷ The implications of such ‘new modes of governance’ in relation to democracy and subsidiarity are not, however, straightforward. The direct participation of so-called civil society and the spread of ‘new modes of governance’ provides, in practice, support for a more influential role for unelected supranational institutions, in particular the Commission (Deganis, 2006), than a focus on the principle of conferral might have predicted. This undermines the impact of the subsidiarity measures and the apparent extension of the oversight powers of national, regional and local parliaments and assemblies.

Turbulence and the Integration Process

Turbulence is a term we bestow on the confused and clashing perceptions of organizational actors which find themselves in a setting of great social complexity. The number of actors is very large. Each pursues a variety of objectives which are mutually incompatible; but each is also unsure of the trade-offs between the objectives. Each actor is tied into a network of interdependencies with other actors which are as confused as the first. Yet some of the objectives sought by each cannot be obtained without cooperation from others. A turbulent field, then, is a policy space in which this type of confusion dominates discussion and negotiation. It can be sub-national, national, regional, inter-regional and global – and all at the same time. ..

...The questioning of older norms and values then accelerates and problem-solving machinery which had been accepted earlier falls into disuse. New organizations are then devised in large numbers in the attempt to cope; but they change form and purpose almost as fast as they are created. As old rules fall into disrepute the new rules lack

¹⁶ http://europa.eu/scadplus/glossary/open_method_coordination_en.htm

¹⁷ For a more detailed discussion of this phenomenon see Cram (2009b)

legitimacy and efficacy and are soon discarded. Everything is ‘up for grabs’ (Haas, 1976: 179)

It is clear that the Treaty provisions aimed to bring Europe ‘closer to the people’ bring with them as many problems as they do solutions. However, in the light of the earlier discussion in relation to the role of cognition in the delivery of contingent consent, the very suggestion that this is the resolution to the legitimacy crisis of the EU is in itself important. The evident contradictions notwithstanding, the Treaty provisions contribute to a narrative which states that for the EU to become more legitimate it must become more democratic and that closer involvement of, for example, civil society organisations and an expanded role for national parliaments, will make it more democratic and hence more legitimate.¹⁸

The representativeness of civil society organisations at EU level has been widely questioned, the focus in EU reform on democracy rather than legitimacy has been criticised (Majone, 2005, 2006) and the ‘new modes of governance’ potentially undermine the principle of subsidiarity (Borras and Jacobsson, 2004: 198). Nevertheless, the impact of this narrative and of the ‘mental models’ which it informs should not be underestimated. There is an increasingly wide range of actors who believe that they have a key role to play in the EU policy process and a **right** to play this role (Cram, 2009), depriving them of this role would now have significant implications for the generation of consent for the functioning of the EU as a system.

The same process, whereby hopes have been raised by institutional processes and provisions but dashed in practice, has become evident in relation to the various attempts to ratify the EU Constitution and, most recently, the Lisbon Reform Treaty. Increasingly, however, developments at the Treaty or Constitutional level, despite (or perhaps because of) the failings of the Treaties themselves, can be seen to have generated further demands from the public for the extension of a role to which they now feel entitled. This has

¹⁸ I have discussed this narrative and its institutionalisation as an example of Morgan’s (1989) ‘fiction’ elsewhere (Cram, 2006a, 2006b).

important implications for understandings of what is now perceived to be an acceptable role for the public in EU constitutional affairs.

It has become increasingly apparent that the process of European integration is not reducible to the occasional signing of Treaties by member states. National executives were forced to issue a Reform Treaty because the Constitutional Treaty, arguably reflecting the lowest common denominator bargain between member state preferences, which they had signed was rejected by the citizens of key member states. It is difficult, in this context, to argue that member state governments any longer, if they ever did, dictate the pace and direction of European integration.

This situation raised fundamental questions, even ‘soul-searching’ (Hooghe and Marks, 2006) amongst scholars about the utility of the dominant theoretical approaches to the study of European integration. As the integration process has become what Haas (1970) described as ‘turbulent’, the utility of key theories of integration has been called into question. As EU citizens are increasingly politicised, domestic interests are impacted upon ever more explicitly by regional interests and the choice set of member state citizens has been dramatically expanded, it is increasingly unclear that national executives can continue their role as gate-keepers in the way that intergovernmentalists would have expected. Schmitter (2005), has, meanwhile, discussed the current state of ‘politicisation’ of European integration and the implications that this has for the utility of the neo-functionalist approach. He asks whether neo-functionalism may have exhausted itself:

When citizens begin to pay attention to how the EU is affecting their daily lives, when political parties and large social movements begin to include ‘Europe’ in their platforms, and when politicians begin to realise that there are votes to be won or lost by addressing policy issues at the regional level, the entire low profile strategy becomes much less viable. Discrete regional officials and invisible interest representatives, in league with national civil servants, can no longer monopolize the decision-making process in Brussels (known in Euro-speak as ‘comitology’). Integration

starts to generate ‘winners and losers’ within member states, and loses its perception of being an all winners game (Schmitter 2005:268)

Perhaps most important are the implications of the involvement of citizens in the process of constitutional change, most obviously in the ratification referenda for understandings of the political behaviour of EU citizens, As Hooghe and Marks (2008) point out, in their discussion of the importance of identity in shaping contestation over Europe, referenda have a long half-life. At the very least, the direct involvement of citizens in the constitutional processes of the European Union has generated a clear desire for more systematic involvement in these processes. A Financial Times/Harris poll FT poll (FT 17 October 2007), indicated that seventy-six per cent of Germans, seventy-five per cent of Britons, seventy-two per cent of Italians, sixty-five per cent of Spaniards and sixty-three per cent of French want a referendum on the reform treaty. Further, as Dehousse (2006: 157) has argued, the referenda call into question the traditional understanding of citizens’ votes on EU issues as ‘second order elections’. The debates over the referenda reflected not only domestic policy concerns or, indeed, the ‘identity’ issues associated with ‘diffuse’ support but related to specific support for particular policies: ‘European citizens give clear evidence of their will to weigh in on the choices that are made’.

Clearly, the traditional ‘integration by stealth’ (Majone, 2005) favoured by the EU institutions, particularly the European Commission, has become less and less sustainable as a greater degree of politicisation and more public oversight permeates the EU system. The return by member states to an amending Treaty and their retreat from the more ambitious attempt to establish a Constitutional status for the EU Treaties fits nicely with Majone’s (2006) suggestion that the EU should pare back its activities to deal with its core business and thus focus on enhancing its efficiency. However, it is not the fact that national executives have sought to return to the Reform Treaty, sloughing off the Constitutional paraphernalia of anthems, flags and currency, that should most interest observers. It is the fact that member state governments were ever persuaded that a Constitution was feasible or desirable that should be a focus of study. How

member states reached a point where this shared ‘mental model’ was imaginable is worthy of detailed analysis as are the implications of this model for public perceptions of what is desirable and what is acceptable in relation to an EU system for which the consent of the public is increasingly required. Over the long term, this may help to ‘invent a people’ for the EU (cf Morgan, 1989; Cram 2006). In the short term, it contributes to ‘turbulence’ and increasing dissatisfaction: on the one hand, on the part of the people disappointed with the behaviour of the elites; and, on the other hand, on the part of the elites discomfited by the insubordination of a traditionally quiescent people.

Conclusion: Too late to dissolve the people and elect another?

It is no longer perceived to be acceptable that the EU be dominated by elites. The ‘integration by stealth’ which formed the bedrock of neo-functionalism is not sustainable in a climate of increasing politicisation (Schmitter, 2005). The debacle over the Constitutional Treaty and the Lisbon Reform Treaty, meanwhile, confirmed once more that member states do not enjoy the control that they once had over the integration process (Marks and Hooghe, 2008).

Here it has been argued that consent to the process of European integration is contingent and the reproduction of consent is, in Renan’s (1882) terms, a ‘daily plebiscite’. Analysis of the latest Treaty provisions, intended to bring Europe ‘closer to the people’ and to address the democratic deficit, demonstrates the extent and implications of competition over competence between the various actors involved. The resulting compromises are manifestations of Haas’s (1976) ‘turbulence’ in practice and also contribute to further ‘turbulence’ by shaping understandings of what the role of the public and other actors within the EU system is and ought to be. If institutions define the ‘boundaries of the possible’ (Majone, 1989:35), they do this, at least in part, by defining what is *expected* and consequently by influencing what is *accepted*.

The emerging narrative which underpins both Treaty provisions and policy practice in relation to the need to bring Europe ‘closer to the people’, influences the value placed on

different outcomes. Thus, the conditions upon which the cost-benefit calculations (on the basis of which contingent consent to the process of European integration is achieved) are made are altered. This narrative may have significant implications for the integration process over the long term by ‘inventing the people’ for the EU (cf Morgan, 1989, Cram, 2006). In the meantime, however, it is likely to contribute to the acceleration of what Haas (1976) has described as ‘turbulence’ in the integration process.

Recognising the role of cognition and contingent consent, as well as of the wider range of relevant actors in the integration process, requires a radical rethink of existing approaches to European integration theory. To understand the mechanisms through which Treaties, policy practice and EU institutions as structures and as actors define understandings of what the EU is and ought to be and of the role of the public within it, a nuanced social-psychology of the European Union and of how its institutions influence political behaviour is required. Not least this might forewarn Treaty makers about the long-term consequences of short-term compromises. With no clear agreement as to who the managers ought to be at the EU level, the task, so critical for any regime, of *managing expectations* becomes daily more challenging in the EU context.

References

- Beetham, David (1991) *The Legitimation of Power* Basingstoke: Palgrave.
- Borras, S and Jacobsson, K (2004) "The Open Method of Coordination and new governance patterns in the EU" *Journal of European Public Policy* 11:2, 185-208
- Brecht, B (1976) 'Solitude' in Poems 1913-1956, eds. John Willett and Ralph Manheim Methuen p. 440 (English translation)
- Cram, L (2006a) "Inventing the People", in Smismans, S. (ed.), Civil Society and Legitimate European Governance Aldershot: Edward Elgar, 241-259.
- Cram, L (2006b) *Civil Society, Participatory Democracy and the Governance of the Union: The Institutionalisation of a Fiction*, paper prepared for workshop on European Governance, Osnabruck 2-4 November 2006.
- Cram, L (2009a) *Identity and European Integration: Diversity as a source of Integration* Nations and Nationalism 15:1 January 2009
- Cram, L (2009b) 'EU Social Policy in Historical Perspective' in Toemmel, I & Verdun, A (eds) Innovative Governance in the European Union: The Politics of Multi-Level Policy-Making Boulder, Co.: Lynne Rienner
- Deganis, I (2006) 'The Politics Behind Consensus: Tracing the Role of the Commission within the European Employment Strategy' *Journal of Contemporary European Research* 2:1, 221-40
- Dehousse, R (2006) 'The Unmaking of a Constitution: Lessons from the European Referenda' *Constellations* 13:2, 151-164
- Denzau, Arthur T. and Douglass North (1994), 'Shared Mental Models: Ideologies and Institutions', *Kyklos*, 47: 3-31
- Deutsch, K (1969) Nationalism and its Alternatives New York: Alfred A Knopf
- Edelman, M. ([1967] 1985) *The Symbolic Uses of Politics*, (Greenwood: New York).
- Haas, E B (1976) 'Turbulent Fields and the Theory of Regional Integration' *International Organization* 30:2, 173-212
- Hooghe, Liesbet & Marks, Gary. 2006. 'Europe's Blues: Theoretical Soul-Searching after the rejection of the European Constitution' *Political Science and Politics* 39, 247-250.

- Hooghe, L and Marks, G (2008) 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' *British Journal of Political Science* 39, 1-23
- House of Lords (2005) 'European Union Committee 14th Report of Session 2004-05 Strengthening national parliamentary scrutiny of the EU—the Constitution's subsidiarity early warning mechanism' London: House of Lords
- Levi, M (1997) *Consent, Dissent & Patriotism* Cambridge: Cambridge University Press.
- Majone, G (1989) Evidence, Argument and Persuasion in the Policy Process Yale: Yale University Press
- Majone, G (2005) Dilemmas of European Integrations: The Ambiguities and Pitfalls of Integration by Stealth Oxford: Oxford University Press
- Majone, G (2006) 'The Common Sense of European Integration' Journal of European Public Policy 13:5, 607-626
- North, D (2005) Understanding the Process of Economic Change Princeton: Princeton Economic History of the Western World Series
- Renan, E (1990) 'What is a Nation?' in Bhabha, H K (ed) Nation and Narration London: Routledge.
- Scharpf, F. (1999) 'Legitimacy in the Multi-actor European Polity' in Egeberg, M. & Lægreid, P. (Eds.) Organizing Political Institutions. Essays for Johan P. Olsen Oslo: Scandinavian University Press.
- Vickers, G (1965) The Art of Judgement: A Study of Policy Making London: University Paperbacks