Cambridge Law Journal, **69(3)**, November 2010, pp. 639–675
doi:10.1017/S0008197310000838

PSYCHOLOGICAL CONSTITUTIONALISM

DAWN OLIVER*

I. PSYCHOLOGY AND THE PUBLIC INTEREST AND PUBLIC SERVICE PRINCIPLES

MY question in this article is "what do the sciences of human nature and psychology tell us about constitutional law and constitutionalism in Western democracies?" I shall focus on psychological aspects of democracy, constitutionalism and the public or general interest. It is a pretty basic tenet of constitutional arrangements in the UK – actually in my view it is a foundational principle, and I shall explain why in due course – that Ministers and other public bodies can and should promote the general public interest and not, for instance, the interests of their parties or sponsors, their kin groups or the racial, ethnic, clan or religious groups they belong to. This basic tenet breaks down into two related principles. The public interest principle requires public bodies to act for the general public good. It assumes, among other things, that "the public" or the population is a sufficiently coherent group with sufficient shared communal interests for its service by government to be credible – for the population to accept that they are all served by government and for the government to believe that they can do so – and practical.

The public service principle involves the idea that it is realistic to expect politicians and public servants to serve interests other than their own selfish ones – the interests of the general public.

In this part of the article I shall explore the workings of these two principles in the United Kingdom and other liberal democracies generally. In Parts II and III I consider to what extent and in what conditions the implementation of these two principles in government is compatible with innate human psychology. In recent years research in various psychology related disciplines has produced valuable insights into these matters.

These questions may be broken down as follows. Given the natural tendencies of individuals to identify with some groups and to

* Professor of Constitutional Law, University College London. I am grateful to the following for commenting on previous drafts of this paper and providing information: Nick Barber, Oliver Curry, Brice Dickson, Robin Dunbar, Paul Evans, David Feldman, Oonagh Gay, Conor Gearty, Stephen Guest, Brigid Hadfield, Niki Lacey, Robert Layton, George Letsas, Ruth Mace, Stephen Neff, Javier Oliva, Meg Russell, Gijsbert ter Kuile and William Twining. The defects in and limited scope of this paper are entirely my responsibility

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

"otherise" those who do not belong, and to act selfishly, why do public officials in most democracies generally claim to promote the general interest as they see it? Or, looking at it from the opposite point of view, why does the general population in most democracies expect or demand that public bodies act in the general interest and not in the interests of their own families, clans, religious sects, parties and so on? An exploration of work in the fields of evolutionary anthropology, evolutionary psychology, economics and related disciplines can, it will be suggested, provide explanations for (i) the collective adoption of and broad adherence to these two principles in some countries, and (ii) the temptations in government and among populations to depart from those principles in some circumstances. These explanations should be useful resources for those involved in the development of public policy and for the understanding of some basic principles of constitutional law.

A. The Public Interest Principle

First let us explore the public interest principle. My focus here is not on arguments about the content of "the public interest"[1] (for example, equality, democracy, justice, fairness, free markets/regulated markets, high/low taxation, high/low public expenditure, limited immigration) or on how the substance of the public interest is to be determined (for instance on an evidence base, by deliberation, by politicking or by elections). My focus is on the assumptions about human psychology that underlie the widely accepted or promulgated belief that a large, often diverse population may constitute a group that has shared or common interests.

The origins of the concept of public interest and of its development as a constitutional principle in democracies, or at least in the UK, are ancient. Three quotations will give a flavour of them. John Locke in *Two Treatises of Government* wrote:[2]

> Whatever form the commonwealth is under, the Ruling Power ought to govern by declared and received laws and not by extemporary dictates and undetermined resolutions … . For all the power the Government has, being only for *the good of society*, as it ought not to be: arbitrary and at pleasure, so it ought to be exercised by established and promulgated law: that both the

[1] For discussion of what is *in* the public interest (what its content is) and how it is to be determined (e.g. by deliberation), see for instance B.M. Barry "The Use and Abuse of the Public Interest" in C.J. Friedrich (ed.), *Nomos V: The Public Interest* (New York 1962); V. Held *The Public Interest and Individual Interests* (New York 1970); C. Sunstein *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge Mass. 1990); M. Feintuck *The Public Interest in Regulation* (Oxford 2004).

[2] P. Laslett (ed. Cambridge 2003), second treatise chapter XI, para. 136. My italics.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

> people may know their duty, and be safe and secure within the limits of the law, and rulers too kept within their due bounds, and not to be tempted, by the power they have in their hands, to imploy it to such purposes, and by such measures, as they would not have known, and own not willingly.

The assumption that the people who form the whole population are a group – and one whose welfare and interests the government and Parliament are responsible for – was reflected very strongly in the statement of the theory of representation put by Edmund Burke in his famous speech to the Electors of Bristol:

> Parliament is not a congress of ambassadors from different and hostile interests which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of *one nation, with one interest, that of the whole*; where not local purposes, not local prejudices ought to guide, but the *general good*, resulting from the general reason of the whole. You choose a member indeed but when you have chosen him, he is not member of Bristol, but he is a member of parliament.[3]

Dworkin in *Taking Rights Seriously*[4]:

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of *the community as a whole* … Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group-right.

Of course the concept of "the community as a whole" or "the public as a whole" is problematic, as is the balancing of community, individual and sub-group rights and the resolution of conflicts between them. The comments by Locke and Burke were made at times when the population was fairly homogeneous and, presumably, felt themselves to be English or British and proud of it. Nowadays the populations of the United Kingdom and of many democracies are much more diverse, due to many generations of immigration[5], free movement of workers in the EU and other developments. But the general proposition that it is the duty of rulers to govern selflessly in the interests of the community

[3] E. Burke "speech to the Electors of Bristol", 3 November 1774. My italics.
[4] (London 1977), pp. 82–3. My italics.
[5] For discussion of the psychology of acculturation of immigrants into their "host" community and acceptance of immigrants by host communities see J.P. Van Oudenhoven and others, "Patterns of relations between immigrants and host societies" in (2006) 30 International Journal of Intercultural Relations, pp. 637–651; Van Oudenhoven and others, "Attitudes of minority and majority members towards adaptation of immigrants" (1998) 28 European Journal of Social Psychology, pp. 995–1013; D.L. Sam and J.W. Berry (eds.), *The Cambridge Handbook of Acculturatation Psychology* (Cambridge 2006), chapters 11 (Van Oudenhoven and others) and 23 (L. Robinson).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

is, in my view, "foundational" in liberal democratic systems. Duguit suggests that:

> There exists then an intimate relation between the possession of power and the obligation to perform certain services. It is a relation so clearly understood and desired as in itself to provide a sufficient basis for the legal duties of government. *All over the world to-day every ruler, emperor, king, president, minister, parliament, holds power not for his own but for his subject's advantage*, and the idea is so widespread that every statesman repeats it to nauseation even while in fact he tries to obtain the greatest advantage from his position.[6]

Two illustrations of politicians' understanding of the public appeal of the public interest principle are as follows: on the formation of the Conservative-Liberal Democrat coalition in the UK in May 2010 the new Prime Minister, David Cameron, stated that:

> Today we are not just announcing a new government and new ministers. We are announcing a new politics. A new politics *where the national interest is more important than party interest*, where co-operation wins out over confrontation, where compromise, give and take, reasonable, civilised, grown-up behaviour is not a sign of weakness but of strength.[7]

We shall return to the significance of these comments from time to time later in the article. The points of relevance for the moment in this quotation are (i) that Cameron would not have made the point about national interests if he did not know that it would resonate with the public at large and that no political party in the UK would challenge the principle; and (ii) that it implies acknowledgement that sometimes party interests do prevail over the national interest.[8]

When Mrs Thatcher arrived at Downing Street in 1979, after accepting the request from the Queen to form a new administration, she stated "Where there is discord, let there be harmony" (a reference to the words of St Francis of Assisi) and "… may we get together and strive to serve and strengthen the country of which we are so proud to be a part".[9]

In the UK the public interest principle finds expression in both hard and soft law. Many Acts of Parliament refer to "the public interest" or "the interests of the area", implying, among other things, that the general public in an area is itself a group – and the concept of "group"

[6] L. Duguit *Law and the Modern State*, (New York 1919), p. 44.

[7] Reported in The Guardian: www.guardian.co.uk/politics/2010/may/12/coalition-government-seven-page-pact. It is usual for newly appointed Prime Ministers to assert their commitment to the service of the whole country.

[8] The importance of Cameron's references to co-operation and compromise are discussed in Part II of this article.

[9] See http://news.bbc.co.uk/onthisday/hi/dates/stories/may/4/newsid_2503000/2503195.stm.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

is central here – with common interests. In the *Fewings* case[10] local authority action banning stag hunting on council owned land was required to be justified by the authority as being in the "interests of the area" and not as a simple exercise of the ownership rights of the council. In *Chandler v. DPP*[11] the House of Lords found that the interests of the state are not the interests of the government of the day. This is a restatement of the public service principle, which is discussed in the next section. However, given that the courts do not consider that they are the constitutionally competent institution to determine what the substantive interests of the state are in any given situation, the House of Lords held in that case that the interests of the state were to be determined (presumably honestly and in good faith) by the government of the day. In *R. v. Ponting*[12] the trial judge directed the jury in similar terms – and the jury returned a "perverse" not guilty verdict.[13] In *R (on the application of Corner House Research and others) v. Director of the Serious Fraud Office* Baroness Hale stated that "the public interest" must mean something of importance to the public as a whole rather than just to a private individual".[14] In that case the government of Saudi Arabia had threatened to withdraw from the existing bilateral counter-terrorism co-operation arrangements with the UK and co-operation in relation to UK strategic objectives in the Middle East unless a bribery investigation were discontinued. That withdrawal would have had detrimental implications for national security and British foreign policy objectives in the Middle East. The House of Lords held that it had not been unlawful for the Director of the Serious Fraud Office to discontinue the investigation in the light of the threats from Saudi Arabia. He had been entitled to form his own view of the predominant public interest and to act to safeguard it.[15]

The principle that the substance of some "public interests" is to be determined by the government of the day (or by Parliament, or the official with responsibility for the decision) rather than by the courts must, it is suggested, be right, but only if the government or Parliament are operating in a system of checks, balances and accountability that is weighted in favour of the public interest and not the interests of politicians. And clearly the interests of the community as a whole cannot mean that each and every interest of every member of the community is to be promoted.

The Human Rights Act 1998, with its incorporation into UK law of most of the articles of the European Convention on Human Rights,

[10] *R. v. Somerset County Council, ex parte Fewings* [1995] 3 All E.R. 20.
[11] [1964] A.C. 763.
[12] [1985] Crim. L.R. 319.
[13] For discussion see N. MacCormick *Questioning Sovereignty* (Oxford 1999), chapter 3.
[14] [2008] UKHL 60, at para. 53. This case is discussed further below.
[15] See further discussion of this case below.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

assumes broad, nationwide public interests in, for instance (depending upon the right at stake) national security, territorial integrity, public safety, the economic wellbeing of the country, the prevention of disorder or crime, the protection of health or morals, public order and the protection of the rights and freedoms of others; these public interests can form elements of legitimate justifications for overriding an individual's Convention rights.

B. Some Comparisons

The public interest principle is not always made explicit in other countries' written constitutional documents, which tend to focus on legality, it being assumed that legality subsumes public interest and public service principles. However, a few examples of constitutional references to the public interest principle or synonyms do appear in liberal Constitutions.

The German Basic Law provides by article 38 that members of the Bundestag shall be "representative of the whole people". On taking office the President, under article 56, takes an oath to dedicate efforts to "the well-being of the German people, promote their welfare, protect them from harm … ."

In the Spanish Constitution of 1978 "The general interest" is the expression used to make this point in Articles 33, 47, 103 and 128. Article 33 also refers to "public utility or social interest" in relation to justifications for deprivation of property. The Basic Law on Public Employment (Estatuto Básico del Empleado Público) refers to the "general interest" in articles 52 and 53. According to Spanish legal texts, case law and the overwhelming majority of commentators, "public interest" and "general interest" are synonymous concepts.[16]

In Greece the President of the Republic is required to serve "the general interest and the progress of the Greek people". Article 106 of the Constitution of Greece refers to "the general interest"; in article 17 property rights may not be exercised contrary to "the public interest", a phrase also used in article 24 on the preservation of the environment.[17]

Article 50 of the constitution of the Netherlands lays down that the States-General (the parliament) represent "the entire Dutch people", and this is taken to mean that parliament must serve the general and public interest, rather than individual or group interests.[18] The Explanatory Notes to the Dutch Civil Servants Act (Ambtenarenwet)

[16] See P. Gutiérrez de Cabiedes e Hidalgo de Caviedes *La tutela jurisdiccional de los intereses supraindividuales colectivos y difusos* (Navarra 1999), p. 55. I am grateful to Javier Oliva for this information.

[17] I am grateful to George Letsas for this information.

[18] G.J. Leenknegt, "Artikel 50" in A.K. Koekkoek (ed.), *De Grondwet. Een systematisch en artikelsgewijs commentaar* (Deventer 2000), at p. 332.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

states that: "The government has as its purpose to serve the public interest. In government policy the interest of the community in a general sense needs always to be given precedence. … The government serves the general interest with collective means. These means need to be spent as efficiently and effectively as possible".[19]

C. The Public Service Principle

We turn now from the public interest to the public service principle. That public officials should act in the service of the public and not in the interests of their kin, family, friends and others with whom they have connections has long been recognised in the law of the UK. A number of cases illustrate the point: *Porter v. Magill*[20] (selling council-owned flats to Conservative supporters in order to increase the Conservative vote in particular areas held to be unlawful); *Padfield v. Minister of Agriculture*[21] (avoiding political embarrassment by refusing to exercise a statutory power to refer an issue to a committee held to be unlawful).

In *R (on the application of Corner House Research and others) v. Director of the Serious Fraud Office*[22] the question was whether it had been unlawful for the Director of the SFO to discontinue a criminal investigation into alleged bribery involving Saudi Arabia. Baroness Hale stated:

> It is common ground that *it would not have been lawful for [the Director of the Serious Fraud Office] to take account of threats of harm to himself*, threats of the "we know where you live" variety. That sort of threat would have been an irrelevant consideration. So what makes this sort of threat different? *Why should the Director be obliged to ignore threats to his own personal safety (and presumably that of his family) but entitled to take into account threats to the safety of others? The answer must lie in a distinction between the personal and the public interest.* The "public interest" is often invoked but not susceptible of precise definition. But it must mean something of importance to the public as a whole rather than just to a private individual.[23]

Many legal responses to breaches of the public service principle are targeted at ensuring that the public service values prevail over loyalties not only to family members, but also to other groups – parties, unions, religious bodies and so on.

[19] Kamerstukken II, 2003–2004, 29 436, pp. 6–7. I am grateful to Gijsbert ter Kuile for providing this information about Dutch constitutional arrangements.
[20] [2001] UKHL 67.
[21] [1968] A.C. 997.
[22] [2008] UKHL 60.
[23] Ibid. at para. 53. My italics.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

The public service principle received statutory underpinning in the UK Constitutional Reform and Governance Act 2010[24] which imposes on civil servants duties of integrity, honesty, *objectivity and impartiality* (my italics) – concepts which also find a place in the constitutional documents of other European states (see below). Thus the public service principle as embodied in formal legal requirements entails that public bodies and officials should not act selfishly or in the interests of their own careers or families or political parties to the exclusion of public interests. Nor should they indulge their own whims, moral or other, or act otherwise irrationally. This set of assumptions and the precepts they imply acknowledge that the opposites – selfishness and nepotism – are possible, though undesirable. Thus the Bribery Act 2010 criminalises the performance of a function of a public nature if it is done in breach of an expectation that it will be exercised in good faith, impartially or if the person is in a position of trust.[25]

The principle also finds expression in the UK in soft law. The Seven Principles of Public Life developed by the Committee on Standards in Public Life (often referred to as "the Nolan Principles" after the chair of the CSPL at the time) are interestingly explicit about this, laying down principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership.[26] These principles have been widely adopted by public bodies and are incorporated into the Ministerial Code.[27] The House of Commons in the resolutions it passes when MPs are found to have accepted bribes[28] or mandates from sectional interests[29] provides further examples of articulation of the public service principle.

[24] Section 7 sets out the "Minimum requirements for civil service and diplomatic service codes" as follows:

(1) This section sets out the provision that must be included in a civil service code or the diplomatic service code in relation to the civil servants covered by the code. (The code may include other provision as well.)
(2) The code must require civil servants who serve an administration mentioned in subsection (3) to carry out their duties for the assistance of the administration as it is duly constituted for the time being, whatever its political complexion.
(3) The administrations are—
  (a) Her Majesty's Government in the United Kingdom;
  (b) the Scottish Executive;
  (c) the Welsh Assembly Government.
(4) The code must require civil servants to carry out their duties—
  (a) with integrity and honesty, and
  (b) with objectivity and impartiality.
(5) But the code need not require special advisers (see section 15) to carry out their duties with objectivity or impartiality.

[25] Sections 1–4.
[26] Cm. 2850, 1995.
[27] 2010. See www.cabinetoffice.gov.uk/media/409215/ministerialcodemay2010.pdf at Annex A.
[28] See *Erskine May Parliamentary Practice*, 23rd ed. (London 2004), ch. 8.
[29] See for instance the case of W.J. Brown 118 HC Deb., and 440 HC Deb., col. 284 (1946–7).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

Of course the fact that these rules exist also recognises that humans are capable of the opposite, selfish or untrustworthy action: politicians – like other human beings – will be inclined to selfishness. So the public service principle is underpinned by – in fact I suggest that it reflects awareness of the existence of – social controls (the subject matter of much of Part II of this article): anger and shaming by the public, the press and opposition parties for breach of the Seven Principles; discipline – for instance dismissal or demotion – of a minister by the Prime Minister for breach of the Ministerial Code, and of civil servants by their line managers or ministers for breach of the Civil Service Code.

Openness – for instance a freedom of information regime – serves to encourage adherence to the public service ethos: people behave better – conform to social expectations – if they feel they are being watched (even if that feeling is generated by a picture of a pair of eyes[30]). The press and public opinion, both of which favour public service values and oppose selfishness and nepotism[31], act as future "eyes" the existence of which serves to influence political and public behaviour to comply with the likely expectations of the "seers" – though whether metaphorical eyes are as effective in promoting good behaviour as real eyes or representations of eyes has not yet been demonstrated.

D. The MPs' Expenses Row in 2009

The 2009 row over MPs' expenses in the UK illustrates the importance of openness – and the negative implications of a lack of openness – and of press and public opinion in upholding the public service principle. The row shows how individuals can experience embarrassment at their own selfishness once it is revealed, and how social norms can operate to punish selfishness and to promote altruism and public service. It was revealed by the Daily Telegraph over the summer of 2009 that some MPs had claimed reimbursement of extravagant expenditure or of expenses (for instance mortgage payments) which had not in fact been incurred. The response among the general public was of anger and a desire to shame the MPs, including a desire to punish offending MPs, and withdrawal from MPs of status, respect, trust and cooperation by sections of the public. We shall return to the importance of these to human psychology and sociality in Part II of this article.

[30] See for instance M. Bateson, D. Nettle and G. Roberts, "Cues of being watched enhance cooperation in a real-world setting" (2006, Royal Society) Biol Lett. 2006 September 22; 2(3) at www.pubmedcentral.nih..gov/articlerender.fcgi?artid=16862.

[31] See Committee on Standards in Public Life *Survey of public attitudes towards conduct in public life 2008.* The public outrage at revelations of MPs' misuse of expenses in the summer of 2009 provides an illustration of public attitudes to selfishness and public service.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

Some months earlier some MPs realised that their expenses claims were going to be published under the House of Commons publication scheme which was required by the Freedom of Information Act 2000 (FOIA). They secured the passage of a bill by the Commons which would exempt publication of such information from the FOIA. The bill did not make progress in the House of Lords and was lost. This attempt by MPs to prevent publication of information itself caused public opprobrium. This phase of the saga shows both the selfishness of those MPs and their recognition that if the public "eye" saw the facts, the public would assert social norms against such selfish behaviour that was contrary to the public service principle by anger, withdrawal of trust, respect and status. Thus we see that the FOIA can serve as a surrogate "eye".[32] Individuals – in this case MPs – are conscious of the expectations others in their groups and in the population at large have of them. This awareness normally gives rise to conformity with those expectations and "sociality" on the part of, in this case, MPs, but here is gave rise to attempts to close or blind the public eye.

In the next part of the saga, the publication of expenses claims, the public did indeed respond with anger to the breaches by MPs of what had hitherto been largely unarticulated, but widely held, social norms requiring selflessness and commitment to the public service on the part of elected representatives. Their selfish behaviour duly led to some MPs forfeiting trust, losing social status, finding that their constituency parties were not willing to readopt them, and in some cases deciding not to stand at the forthcoming general election.[33] But public anger was such that the government pushed the Parliamentary Standards Act 2009 through Parliament to place these matters on a statutory footing and provide for independent administration and scrutiny of a scheme for reimbursement of MPs' expenses.

In sum, the MPs' expenses scandal served to demonstrate the importance of openness (an eye) in the control of political behaviour and to expose the existence of strong social norms, hitherto unarticulated but articulated since then in the Parliamentary Standards Act 2009 in favour of the public service principle, and to illustrate popular responses to such breaches – anger, withdrawal of trust and ostracism.

E. Social Rewards for Public Service

The public service principled is underpinned not only by punishments for its breach but also by socially valuable rewards for its observance. Many rewards and punishments operate informally – not in justiciable

[32] See for instance M. Bateson, D. Nettle and G. Roberts, note **31** above.

[33] It is notable that by no means all MPs had abused their expenses: many of them fulfilled the requirements of the public service principle and had not taken advantage of system. The culture of public service had won against the predisposition to selfishness in those cases.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

ways. This illustrates the significance of psychology – the attitudes both of the general public and of politicians and others who are expected to serve the public interest – in the operation of the public service principle. This is the focus of the next Part of this article. Here are some examples of how these influences work in the UK system.

If a person has given public service, and if those with honours to bestow believe that the service to the public has not yet been sufficiently rewarded, then an honour may be awarded: Knighthoods, CBEs, OBEs and MBEs, some peerages (e.g. for independents), are rewards for public service. The honoured person is thus rewarded, significantly in a politically neutral, merit-based (not patronage based) process with visible and titular tokens. These give rise to heightened social status, which in turn generates trust on the part of the others with whom s/he deals, and their cooperation. This brings benefits to the individual – who may continue to provide public service – as well as to society at large.

It is significant that the punishments for breaches of the public service principle and rewards for its implementation are commonly social rather than legal in nature: they reflect the expectations on the parts of members of society that public officials will act in the public interest – expectations in effect of "sociality" (an adaptive element of human psychology, as we shall see in Part II). This set of expectations on the part of the population is often overlooked: the trend among commentators on constitutional matters tends to be to emphasise the negative, punitive ways in which the public service and public interest principles are promoted, when in practice the positive rewards or potential rewards for those who implement these principles – including re-election, trust, status – may well be far stronger influences on political and state behaviour than law.

F. Some more Comparisons

As with the public interest principle, the public service principle is embedded in constitutional arrangements in other democracies. It is strongly reflected in the French concept of "service public", according to which the principal function of the administration is serving the public, and this involves, among other things, equality of individuals before the public service and neutrality: a public authority may not use public money or public buildings for partisan political causes.[34]

In Spain, civil servants are expected to carry out their tasks according to ethical values.[35] (The legislation is not explicit when it refers

[34] J. Bell, S. Boyron and S. Whittaker *Principles of French Law*, 2nd ed. (Oxford 2008), pp. 168–176; see also J. Bell *French Administrative Law*, 5th ed. (Oxford 1998), pp. 129–135.
[35] See *Estatuto Básico del Empleado Público* 2007 – The Basic Law on Public Employment.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

to politicians.) The *Estatuto Básico del Empleado Público* by article 53 sets out "Ethical principles", including that civil servants will carry out their tasks in compliance with the principle of dedication to the public service. They must refrain from actions which are contrary to the public service or other activities which put the neutrality of these public services in jeopardy or at risk.[36]

In the Netherlands the White Paper accompanying the Civil Servants Act states that the principle of integrity which governs the civil service means that a person is unimpeachable, righteous, trustworthy, impartial and just; in the Netherlands this is directly linked to the rule of law and democratic principles underlying integrity. Each public authority should have its own integrity code.[37]

II. Public interest, public service: Insights from evolutionary perspectives on human nature

A. Six Preliminaries

Let us now turn to psychological perspectives on the public interest and public service principles. What follows in this section is a brief review of literature in evolutionary psychology and related disciplines which has a bearing on them.[38] I shall give examples from time to time of how evolutionary psychology can be seen to be influencing political behaviour in situations in which the public interest and public service principles are supposed to be followed by political actors in the UK as in other liberal democracies. Part III contains a case study focussing on Northern Ireland, in which we can see how part of the problem there has flowed from an absence of senses of common or shared interests among the population, resulting in failures of those in government to follow the public interest and public service principles. The relationships between the two communities in Northern Ireland illustrate how dependent liberal democratic constitutional arrangements are on senses of common interests and public service in the population and those holding public office.

[36] I am grateful to Javier Oliva for this information.

[37] Kamerstukken 11, 2003–2004, 29 436, pp. 6–7. Again, I am grateful to Gijsbert ter Kuile for information about Dutch constitutional arrangements.

[38] Readable introductions for those new to the subject include: L. Workman and W. Reader, *Evolutionary Psychology. An Introduction*, 2nd ed. (Cambridge 2008); J. Cartwright, *Evolution and Human Behaviour. Darwinian Perspectives on Human Nature*, 2nd ed. (Basingstoke 2008); D.M. Buss, *Evolutionary Psychology. The New Science of the Mind* 3rd ed. (London 2008); R. Dunbar and L. Barrett *The Oxford Handbook of Evolutionary Psychology* (Oxford 2007); D.M. Buss (ed.), *The Handbook of Evolutionary Psychology* (Hoboken NJ 2005); L. Barrett, R. Dunbar and J. Lycett, *Human Evolutionary Psychology* (Basingstoke 2002); P.H. Rubin, *Darwinian Politics: The evolutionary origin of freedom* (Piscataway NJ 2002); M. Ridley *The Origins of Virtue* (London 1996).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

The account in this part of the article is of necessity selective, and I shall not be able to consider important evidence from these disciplines about issues such as innate human senses of justice and fairness, about decision making and heuristics, and reason, moral sentiments and emotion: there are rich seams to be mined by public – and other – lawyers in the literature in these disciplines. Nor shall I consider the literature on public interests and public service in social psychology. It is not my claim that evolutionary material is the only source of understanding of aspects of political behaviour and constitutional law. It is one among many. It contributes valuable insights because evolution provides explanations for these phenomena.

1. Methodological issues

First, a few words need to be said about the nature and methodology of evolutionary interpretations of human behaviour and psychology and their relevance to those working in law- and politics-related disciplines. Socio-biology, behavioural ecology, evolutionary psychology, memetics and gene-culture co-evolution each generate hypotheses about human behaviour which are then tested in a range of ways.

Hypotheses about innate human psychology are generated from inferences from evolutionary theory or history.[39] A mixture of research methods is used to test these hypotheses – laboratory and group experiments, questionnaires, surveys, computer simulations, and a range of outcome measures (self-reports, peer-ratings, behavioural ratings) each of which has strengths and limitations.[40] Workman and Reader claim that "Evolutionary psychology merely attempts to find out the facts as far as is scientifically possible" and continue that facts should not be feared.[41] Cosmides and Tooby state that "Evolutionary psychology in the narrow sense is the scientific project of mapping our evolved psychological mechanisms; in the broad sense, it includes the project of reformulating and expanding the social sciences (and medical sciences) in light of the progressive mapping of our species' evolved architecture".[42]

The evolved predispositions with which I shall be concerned in this Part may be less adaptive in modern conditions of population growth and mobility, environmental challenges and the like than they were when they evolved. And they may not be conducive to what would now be regarded in the West as rational decision-making.[43] But some of the

[39] See "Conceptual foundations of evolutionary psychology" in Buss (ed.), *Handbook*, note **38** above, at pp. 5–6.
[40] J.A. Simpson and L. Campbell "Methods of evolutionary sciences" in Buss (ed.), *Handbook*, op. cit. at p. 120.
[41] L. Workman and W. Reader, *Evolutionary Psychology*, note **38** above, at p. 28.
[42] D. Buss, (ed.), *Handbook*, op. cit., at pp. 5–6.
[43] G. Marcus, *Kluge: The haphazard construction of the human mind* (Boston 2008).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

psychological traits that will be discussed in what follows do, in my view, remain highly adaptive or potentially adaptive in modern politics. And, adaptive or not, they are influential in politicians' behaviour and that of individual members of the public and of groups in the population, and they have, over time, generated legal and political responses which are of interest to those working in these fields. Essentially humans are seen as sophisticated animals guided by psychological adaptations.[44] These sciences are not, then, based on "grand theories" of an abstract, purely hypothetical kind.

2. Concerns about "scientism"

Secondly, and linked to the above, there are concerns about the influence of "scientism"[45] and scientific analogies in legal – and political and philosophical – theory. One of these concerns is whether the literature from these disciplines undermines established theories or assumptions about human nature that are made by those working in the disciplines of philosophy, politics and law. It is not my purpose to argue either way on that question. But if the science is informative it ought, surely, to be taken on board and not rejected out of hand for fear that it will reveal that respected philosophers and other theorists have been influenced by scientifically unsound assumptions about human nature.

3. "Human nature is neither good nor bad"

Third, we need to bear in mind that innate human psychology is neither "good" nor "bad". It includes predispositions to empathise and cooperate, which are *capable* of being "good" influences on human behaviour. But it also includes predispositions to selfishness, generally considered to be "bad" in most countries and cultures. Cosmides and Tooby make an important point: "Human nature is not inherently good or bad: it is, 'inherently,' a collection of programs, which execute their functions".[46] In considering the influence on or relevance of innate human psychological predispositions to political behaviour and constitutional laws it would be a mistake to adopt a "moralistic fallacy", a belief that whatever is in nature is morally good. It is obviously not: selfishness is natural and generally selfishness is not regarded as morally good.[47]

[44] See K.N. Laland and G.R. Brown, *Sense and Nonsense: Evolutionary perspectives on human behaviour* (Oxford 2002) for accounts of the methodologies of these evolutionary approaches.

[45] See W.L. Twining, *Jurisprudence* (Cambridge 2009), chapter 16.5, accessible via www.cambridge.org/twining.

[46] L. Cosmides and J. Tooby, "Evolutionary psychology, moral heuristics, and the law" in G. Gigerenzer and C. Engel (eds.), *Heuristics and the Law* (Cambridge Mass. 2006).

[47] S. Pinker, *The Blank Slate* (London 2002), chapter 9. This article does not engage with issues as to what is or is not morally good, but the literature with which I am concerned here obviously has important implications for moral philosophy and the assumptions within it about human nature.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

4. The influence and importance of culture

Fourth, human behaviour is also influenced by a person's experience and the surrounding culture. Acting against certain of a person's natural predispositions to be selfish and in favour of altruistic or "public service" behaviour, for instance, may be the result of the person balancing the short term gain from selfishness against the long term gain that s/he expects to derive from cooperation and altruism towards others. This balance may in turn be influenced by learning or social pressures, sometimes referred to as "gene culture co-evolution"[48], or by the individual's own reasoning, which may balance the advantages and disadvantages of apparently selfish and unselfish action in the situation in which s/he finds him/herself. The learning, culture or social pressures towards altruism and public service may derive, for instance, from religious belief or tradition or from economic and environmental imperatives that influence the behaviour and expectations of group members or reciprocation of past favours. Or, as I shall show in discussion of altruism below, what appears to be altruistic behaviour may in fact involve pay-offs for the altruist.

5. The diversity of governance

Fifth, the fact that humans all share certain predispositions, some of which conflict with others, does not entail that the same predispositions prevail in all societies. It is obvious that different, sometimes opposite, values surface or prevail in different societies. This too may be due to environmental, economic, social, cultural and other factors. The contextual balance between short term (selfish) and long term (sociable/cooperative/reciprocal) interests can flip a system as a whole one way or the other without needing any changes in the underlying evolved predispositions. The differing experiences of groups and individuals within societies and their ability to pass those down the generations as culture or learned traits and memes – ideas that catch on in a community[49] – affect which predispositions become entrenched in society.

6. Human nature, politics and constitutional law

Sixth, behaviour of a political kind is part of human nature. This is where EP becomes particularly relevant to our study of the public interest and public service principles. Political behaviour can exist

[48] See generally P.J. Richerson and R. Boyd, *Not by Genes Alone: How Culture Transformed Human Evolution* (Chicago 2005).

[49] The term "meme" was coined by R. Dawkins in *The Selfish Gene* (Oxford 1976). The *Oxford English Dictionary* definition of a meme is "An element of culture that may be considered to be passed on by non-genetic means". See D.C. Dennett, *Breaking the Spell* (London 2006), Appendix A "The New Replicators"; and Laland and Brown, *Sense and Nonsense*, note **44** above, chapter 6.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

without articulated or formally enforceable rules. But in advanced human societies at least political behaviour is often regulated by rules. The importance of politics and its reflection in rules of various kinds is summarised by Edwards as follows:

> What distinguishes man from other animals is that he is "political" – in other words, he is endowed with the capacity to act in accord with other men in order to determine the system of rules that bind them together and shape their conduct in a specific community. One of the central concerns of evolutionary psychology – if not the central concern – has been to demonstrate how this capacity has arisen in human prehistory – i.e. the capacity to form rule-governed institutions and practices that have allowed men to create communities which enjoy internal peace and stability, even where its members are not closely genetically related and conflict between individuals naturally persists.[50]

In what follows, we shall discuss some of the preconditions for internal peace and stability in communities.

B. The Public Interest Principle: Psychological and Cultural Bases and Vulnerabilities

Most democracies – illustrations were given in Part I – and most of their citizens recognise and institutionalise in various ways the legal, political and cultural importance to the proper functioning of their systems of senses of communal identity and therefore of the general good or public interest and the public service principle. I suggest this shared recognition is possible only to the extent that societies are not deeply split by clan, tribal, religious and other divisions of the kind that dominate politics in some countries (obvious examples include Afghanistan, Fiji, Iraq, Nigeria, Somalia). If this shared recognition does not exist democracy is unlikely to be able to function effectively. (See the case study on Northern Ireland in Part III.)

But why does a sense of communal interest and commitment to the public service develop, even in a diverse population, in some countries and not in others? A sense of communal interests may have developed and survive in response to a range of historical influences, for instance resistance to a common enemy, use of a common language, leadership, religious belief, and popular pressure to adopt a democratic form of government. But adoption of a democratic form of government does not necessarily produces a sense of common interest or public service among the people and the rulers and thus a properly functioning democracy: Some former British colonies and dominions were granted "democratic" constitutions by the UK but are divided e.g. on tribal or

[50] J. Edwards, "Evolutionary psychology and politics" (2003) Economy and Society vol. 32, number 2 May 2003, 280–298, at p. 290. See also P.H. Rubin *Darwinian Politics*, note **38** above.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

religious lines despite the terms of their constitutions. Northern Ireland had a democratic form of government after the Republic was formed until the Troubles in the 1970s, but the population did not share senses of common interest and identity, and government was not conducted in a spirit of public service. It is the attitudes – perhaps the culture – of the population and the government towards the general interest and public service that determine whether those principles operate – and attitudes and culture do not necessarily comply with the law's requirements.

In the next sections of this article I shall suggest that five related human predispositions can, if directed to promotion of the public interest and public service, provide the human social capital on which liberal democracies rely for their survival and success: Groupishness, Reciprocity, Altruism, Negotiation and Trust – GRANT values for short.

1. "Groupishness"[51]

Humans are genetically programmed to form coalitions – "groupishness". This involves a willingness to co-operate with other group members and to subordinate some at least of what are, on the surface, their individual selfish interests to those of the group or members of the groups to which they belong, and not just to kin. It could be regarded as something that emerges from the forming of social relationships with others based on co-operation, reciprocity, negotiation and trust.[52] There may be unobvious pay-offs from making sacrifices in groups: in contemporary societies the benefits to individuals of subordinating some of their interests to the group would include acquisition of status and reputation in the group for oneself and one's offspring, being trusted, and being given access to valuable (e.g. cultural) information and know-how.[53] This, I suggest, is what civil society is about. The predisposition is adaptive: humans need to be able to live together in groups larger than their kin, and cooperation and reciprocity[54] enable this to happen.

Groups exist, then, in the minds and attitudes of the individuals who believe that they belong to groups, or that others do so, or that they or

[51] The term "Groupishness" was coined by Ridley in *The Origins of Virtue*, note **39** above, at pp. 39–40, 179. Weaknesses in groupishness and sociability/sociality may be the sources of current concerns about citizens having responsibilities as well as rights. "Responsibility" in lawyers' and politicians' language may translate into "sociability/sociality" which operates within groups in the language of sociology and psychology.

[52] I am grateful to Robert Layton for this insight into groupishness. See E. Wyman and M. Tomasello "The ontogenetic origins of human cooperation" and M. Van Vugt, G. Roberts and C. Hardy "Competitive altruism: A theory of reputation-based cooperation in groups" in R. Dunbar and L. Barrett, eds. *The Oxford Handbook of Evolutionary Psychology*, note **39** above, chapters 17 and 36.

[53] See for instance H. Gintis, S. Bowles, R. Boyd and E. Fehr in Dunbar and Barrett, eds., note **38** above.

[54] See also discussions of altruism and reciprocal altruism, below.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

others do not belong to particular groups.[55] Individuals may consider themselves, or be considered by others, to belong to a large range of groups – in neighbourhoods, clubs, places of work, religious communities, political parties, football fan clubs, mods and rockers and so on – as well as to the group that is "the whole population". Humans are also genetically programmed to detect the coalitions and alliances that others are making in the group or groups which they belong to and those with whom they have contact who are not in "their" group. This ability is essential to surviving in a complex society. The "cues" for membership of sub groups, alliances or coalitions (which may be very short-lived or long term) can include dress, dialect, language, manner, gait, flags and other "badges", participation in marches and processions, and taking or refusing to take oaths of allegiance.[56]

Often there is no tension or conflict between parallel or overlapping group memberships, but sometimes there will be[57]: an example relevant to this article would be the conflicts between belonging to a political party and being a member of a coalition government or a Member of (the whole body that is) Parliament, containing as Parliament does rival parties and their members. Relations between groups – for example between political parties – and between groups and the individuals, members or not, with whom they have contacts, may be co-operative or conflictual depending on the situation. MPs, when acting individually, may have tendencies to promote their own interests with a view to gaining the support of their constituency electorate or of influential members of their party. When acting as party members they are likely to conform to their party lines and cooperate with their leaders, and to be competitive and hostile towards other parties, willing to engage in Tit for tat[58] behaviour and to attempt to undermine trust in their opponents. Such behaviour serves to build up solidarity within their own group, and is particularly common when the group feels itself threatened. When acting as members of (cross-party) select committees MPs may become excessively "groupish" in order to protect themselves against criticism for disloyalty from others, e.g. in their party. Commonly when relationships are conflictual in politics, groups and their members tend to put their own interests, e.g. in gaining or retaining power, before the public interest, which they are supposed to be prioritising. Then they may be reminded, for instance by their leaders,

[55] See e.g. R. Kurzban and S. Neuberg, "Managing ingroup and outgroup relationships" in D.M. Buss (ed.), *Handbook*, note **38** above, pp. 653–669.

[56] See R. Kurzban, J. Tooby and L. Cosmides "Can race be erased? Coalitional computation and social categorization" www.psych.ucsb.edu/research/cep/papers/eraserace.pdf No doubt we can all think of ways in which this happens in UK politics and how constitutional rules respond to them – notions of parliamentary and unparliamentary language and differential dress codes – tie colour and pattern, for instance – spring immediately to my mind.

[57] See later discussion in this article of otherization and negative stereotypes.

[58] See discussion of Tit for tat in the next section of this article.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

by the public itself, by the media or by other authoritative bodies such as the courts, that their purpose is supposed to be a public interest, not a party-promoting, one. If they are not, there is a risk that party rivalry and the winning of inter-party battles will outweigh the commitment to the general interest – to its detriment, as the story of the formation of the Joint Committee on Human Rights discussed in the next section demonstrates.

2. Defection and Tit for tat[59]

Anthropological evidence suggests that in smallish groups of up to about one hundred and fifty[60] individuals Tit for tat ("be done by as you did") in its various forms and the reciprocity with which it is linked work in favour of maintaining or restoring cooperation between group members.[61] (This is now known as Dunbar's Number, after his publications on the subject.[62]) In such relatively small groups trust and reciprocity seem to work easily and naturally, because the members have personal knowledge of one another. Strong reaction against defection by a group member can lead either to the punishment and ostracism of the defector by other group members, which may be successful in changing future behaviour, or else to endless recrimination and thus destruction of reciprocity And yet, according to Tit for tat theory, individuals have developed strategies for protecting reciprocity from such demolition, for instance by retaliation and selective forgiveness. In practice, then, humans are conditional co-operators – naturally disposed to be cooperative under some conditions, but not others. An individual will cooperate or defect depending on what the other party last did.[63] An important benefit of sociality will be avoiding or escaping from the ostracism, anger and punishment which are generated in a group when a member allows selfish interests to prevail over the values of the group – values on which all members depend and on which there will be tacit if not explicit agreement: avoiding, in other words, being treated as a cheat or free-rider and losing reciprocity, cooperation, trust and the opportunity to negotiate relationships.

[59] See J. Edwards, "Evolutionary psychology and politics" (2003) Economy and Society vol. 32, number 2 May 2003, 280–298, for discussion of the relevance of Tit for tat theory to politics and evolutionary psychology; see also the discussion under the heading "Altruism and patronage" below.

[60] One hundred and fifty may have been the maximum size of human communities at the time that the groupishness predisposition evolved.

[61] See R. Axelrod, *The Evolution of Cooperation* (New York 2006), and, with W.D. Hamilton "The evolution of cooperation" (1981) Science 11, 1390–6. Tit for tat theory is complex and there is not the space to go into it in any detail here.

[62] R. Dunbar, "Neocortex size as a constraint on group size in primates" (1992) Journal of Human Evolution 22: 469–493, and.*Grooming, Gossip, and the Evolution of Language* (London 1996); see also M. Gladwell, *The Tipping Point – How Little Things Make a Big Difference* (London 2001), pp. 177–181, 185–186.

[63] I am grateful to Oliver Curry for putting this so neatly.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

Examples of communal arrangements to avoid cheating and free-riding include the use of lotteries to allocate community generated benefits.[64]

In larger groups – and in most democracies everyone lives in many much larger groups – Tit for tat strategy is not on its own effective as a means of cultivating cooperation and sociality. However, a tendency to conformism – which again is innate in humans – can enable cooperation to persist even in large groups.[65] It is often cheaper and usually better to do what other people – leaders, for instance – say than to figure out the best way to do something yourself.[66] Individuals tend to conform to the norms of successful, powerful or prestigious individuals or groups in their society. (Returning to British politics, we can see conformism operating in the whip system in parliamentary parties.) This tendency to conformism may serve to strengthen a group when in conflict or competition with other groups and may thus be, or have been when it evolved, adaptive.

Other ways of enforcing group conformism include gossip.[67] It forms bonds between members of the community[68] and it may enable members to keep track of the reputations of others, protect their own reputations[69] and keep track of group membership and the coalitions around them.[70] Gossip may also serve a policing function in large groups, warning others of free-riders and cheats.[71]

3. Example: Formation of the Joint Committee of Human Rights in 2001

The influence of Tit for tat strategies as responses to what is perceived as defection may be demonstrated by the story of the setting up of the Joint Committee of Human Rights in the UK Parliament in 2001. The

[64] See discussion in R. Layton, *Order and Anarchy* (Cambridge 2006), chapter 2. Some local education authorities in England have decided to allocate school places to children by lot to secure fair allocations.

[65] On conformist bias see P.J. Richerson and R. Boyd *Not by Genes Alone*, note **48** above, chapter 4. The tale of The Emperor's New Clothes provides an illustration of conformism.

[66] H. Simon, "A mechanism for social selection of successful altruism" (1990) Science, 250, 1665–8.

[67] R. Dunbar, "Gossip in evolutionary perspective" (1994) General Review of Psychology 8, 100–110.

[68] R. Dunbar, "Coevolution of neo-cortal size, group size and language in humans" (1993) Behavioural and Brain Science, 16, 681–735.

[69] N. Emler, "A social psychology of reputation" (1990) European Review of Social Psychology, 1, 171–93; and "Gossip, reputation and social adaptation" in R. Goodman et al. (eds.), *Good Gossip* (Kansas 1994).

[70] R. Dunbar, "Groups, gossip and the evolution of language" in A. Schmitt et al. (eds.), *New Aspects of Human Ethology* (New York 1997), pp. 77–90.

[71] M. Enquist and O. Limar, "The evolution of cooperation in mobile organisms" (1993) Animal Behaviour 45, 747–57; see also V.E. Stone, L. Cosmides, J. Tooby, N. Kroll and R.T. Knight, "selective impairment of reasoning about social exchange in a patient with bilateral limbic system damage" (2002) Proceedings of the National Academy of Sciences, 99, 11531–11536 (noted in Buss, *Handbook*, note 39 above, at p. 275), for evidence of specific cheater-detection adaptations in humans. Do we observe gossip to be influential in British politics?

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

Royal Commission on Reform of the House of Lords recommended in its report[72] that a House of Lords committee should be established to scrutinise bills and Statutory Instruments for human rights implications. There was general agreement between the parties that a preferable step would be the formation of a joint committee of the two Houses of Parliament with this remit. In line with this policy, in early 2000 a legal adviser to the proposed committee (Professor David Feldman) was appointed.

However the Conservative Opposition in the House of Commons withdrew cooperation with the government in deciding on the terms of reference and membership of the Joint Committee through "the usual channels" because they felt the Labour Government's whips had defected – reneged on a completely different matter: whereas the Opposition considered that there had been an agreement with Labour to improve parliamentary scrutiny by careful timetabling of bills, the Government proposed instead streamlining the legislative process by imposing strict timetabling of bills amounting to regular guillotining, in order to secure the swift passage of government legislation. The Conservative opposition responded to what it considered to be defection by Labour by refusing to cooperate with Labour in the House of Commons on any issues – Tit for tat.

The House of Lords agreed on its arrangements for the Joint Committee on Human Rights in July 2000. Impatient with the inability of the Commons to agree on this – its defection from the agreement that a joint committee should be formed – the House of Lords threatened to form a Committee of its own – a Tit for tat move. The government business managers in the Lords pressed the Leader of the House of Commons, Margaret Beckett, to break the deadlock so that the usual channel arrangements could be restored for the purposes of forming the Joint Committee. This was done. The Tit for tat strategies adopted first by the Opposition and then by the House of Lords eventually resulted in a restoration of cooperation. The Opposition suspended its non-cooperation policy in relation to the joint committee issue, the Commons eventually passed its resolution in January 2001, and the Joint Committee was formed.[73] Presumably few commentators would now suggest that pursuit by the Opposition of a dispute about the programming of bills by the withdrawal of all cooperation between the opposition and the government was a legitimate reason – in public interest terms – to prevent the formation of a committee to promote the protection of human rights: the point illustrates the subordination by

[72] Cm 4534, 2000.
[73] See D. Feldman (2002) "Parliamentary scrutiny of legislation and human rights" [2002] Public Law 323.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

parties of the public interest principle to other more strongly-felt tribal interests.

4. Outsiders, otherization and negative stereotypes

Thus individuals have an innate tendency to distinguish between those who are members of their group, and outsiders.[74] Attitudes to one's own group members may be influenced by positive stereotypes.[75] Attitudes to outsiders may rest on indifference or hostility, which may in turn rest on learned or cultural negative stereotypes.[76] Taylor labels this a tendency to "otherize".[77] Otherization, can, Taylor argues, provide long-term benefits for group survival, by building up group identity and thus group solidarity and defence against perceived threats from outsiders.

Thus a spin-off of groupishness is a tendency to regard those who do not belong as falling outside any duties of reciprocity and cooperation and potentially as enemies or competitors.[78] This tendency can lead to conflict of various kinds, even wars. In a world in which humans can no longer survive as members of groups of some one hundred and fifty but have to exist in very large populations this natural predisposition to "otherize" outsiders is clearly maladaptive if it leads to violent confrontations and the death of members. An issue for governments seeking to promote acceptance that there is such a thing as the general public interest and that the government seeks to promote it (and thus to establish their own legitimacy) is to minimise damaging otherization of and by sub-groups within the population and to promote positive predispositions rather than negative ones: antidiscrimination laws and general equal treatment are obvious responses that illustrate governments" (and the EU's) recognition of this point.

5. Negotiation, exchange and trade

In practice one way in which potentially hostile attitudes to "others" and other groups is commonly counteracted is through negotiation,

[74] See J.M. Rabbie, "The effects of intragroup cooperation and intergroup competition on in-group cohesion and out-group hostility" in A.H. Harcourt and F.B.M. de Waal (eds.), *Coalitions and Alliances in Human and Other Animals* (Oxford 1992), pp. 175–205.

[75] M. Sherif, *Group Conflict and Cooperation: Their social psychology* (London 1967); H.L. Tajfel, "Experiments in intergroup discrimination" (1970) Scientific American, 223, 96–102 and *Differentiation Between Social Groups* (London 1978); M.B. Brewer and W.D. Crano, *Social Psychology* (New York 1994).

[76] This tendency has been influential in the work of theorists such as Carl Schmitt who distinguished between "friend" and "enemy" in 1932 in *The Concept of the Political* (Chicago 2007). The fact that such tendencies can be used to develop anti-democratic and anti-human rights theories does not of itself invalidate the evidence that these tendencies exist as innate human predispositions or the conclusion that they are bad and maladaptive in contemporary societies and ought to be subordinated to positive principles.

[77] K. Taylor (2009) *Cruelty: Human Evil and Human Brain* (Oxford 2009).

[78] E.O. Wilson, *Sociobiology: The New Synthesis* (Cambridge Mass. 1975).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

exchange and "trade" and the compromises they entail.[79] There is anthropological evidence that groups may create and sustain trading relationships even where the traded articles are not needed or not useful in themselves, the implication being that the ultimate objective of trade may not be the exchange of goods but the avoidance of conflict that would otherwise arise between the groups or parties to the trading activity.[80] This may be regarded as a form of reciprocity.

Trade, exchange, negotiation between groups also take place in activities other than commerce. In the British Parliament "the usual channels" and "behind the Speaker's chair" contacts involve the negotiation of differences between the governing and opposition parties about matters such as the parliamentary business agenda, despite the fact that each party presents a public face of competitive and hostile tribal conflict. The coalition agreement reached by the Conservative and Liberal Democrat parties after the general election in May 2010 provides an example of negotiation and "horse trading" over differences with a view to resolving and avoiding disputes. Cameron specifically referred to compromise in his speech on the subject, noted earlier. Such "horse-trading" techniques can be conducive to peaceful politics and the avoidance of violent conflicts: to this extent they are adaptive. Fair trading relationships become meaningful to all parties to them and create mutual dependency, reciprocity and thus disincentives to conflict.

But what if, for some reason, groups in conflict are unable to resolve their disagreements through negotiation? We have already noted that, if the groups in question are political parties, this could mean the prioritisation of the pursuit of conflict and party interests over the public interest. Sometimes such conflict may damage the electoral prospects of parties. A way out may come from convincing the population that promotion of the public or general interest prevails over party interests and inter-party conflicts. The formation of the coalition government in May 2010, and David Cameron's speech about it[81] again illustrate the point. (Whether in due course the pursuit of inter-party conflict and party interests between the coalition partners prevails over

[79] For anthropological evidence of the importance of trade and exchange see also P. Wiessner, "Taking the risk out of risky transactions: a forager's dilemma" in F.K. Salter, ed. *Risky Transactions, Kinship, Ethnicity and Trust* (Oxford 2002), pp. 21–43. On trade and exchange generally, see M. Ridley (1996) *The Origins of Virtue*, note **39** above, chapter 10, and *The Rational Optimist* (London 2010), chapter 2. Ridley gives the development of the *lex mercatoria* as an example of the importance of mutual trust and reciprocity to the development of trade and good relations between individuals or groups, and of the effectiveness of ostracism as a reaction to breach of trust.

[80] N. Chagnon. *Yanomamo. The fierce people* (New York 1983). This observation sheds interesting light on the motivations for the formation of the European Economic Communities after the Second World War: the creation of a common market and fair trade within it were primarily designed to prevent violent conflict/war.

[81] Note **8** above.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

a commitment to agreement about and pursuit of the public interest is yet to be seen. It may well be in the party interests of parties outside the coalition to seek to split the coalition. Whether to do so would be in the public interest may not be the dominant consideration for those seeking to bring a government down.) The point about the resolution of inter party conflict is further illustrated by the history of the formation of the Joint Committee of Human Rights in 2001, noted above.

To summarise, the public interest principle, though widely approved of in principle among the general population in most democratic countries and reflected in politicians' public statements, comes up against problems in implementation in the behaviour of political actors brought about by the natural human predispositions of opponents to strengthen the solidarity of their sub-groups by otherisation.

C. The Public Service Principle: Psychological and Cultural Bases and Vulnerabilities

We now turn to the evidence from the evolutionary sciences of human nature about pursuit of the public service principle.

1. Altruism and patronage

In the terms of the literature on human nature and psychology, the public service principle requires "altruism" on the part of political actors.[82] Humans all have predispositions to altruism towards close kin (inclusive fitness), i.e. to promote the interests of those to whom an individual knows or believes that s/he is genetically related. This is known as the Hamilton Rule.[83] Such behaviour in public life by public actors is, however, commonly regarded as improper, even corrupt, in liberal democratic societies. Nepotism is contrary to both the public interest and public service principles: this was the point made by Baroness Hale in the passage from the *Corner House* case quoted above.

Nepotism and other forms of kin altruism and patronage will not be considered wrong in a population whose members do not have a sense of collective or shared interests, for instance in societies riven by tribal, racial or religious conflicts which cause groups to identify and "otherize" members of other groups in the population. The Northern Ireland case study in Part III illustrates the point, as do divisions between, for instance, Sunni and Shia Muslims (in Iraq), Christians and Muslims (Nigeria), Pashtun and other tribes (Afghanistan). Such conduct is

[82] H. Gintis, S. Bowles, R. Boyd and E. Fehr, "Explaining altruistic behaviour in humans" in R. Dunbar and L. Barrett, eds. *The Oxford Handbook of Evolutionary Psychology*, note **39** above, chapter 42.

[83] W.D. Hamilton, "The genetic evolution of social behaviour" (1964) Journal of Theoretical Biology 7, 1–52.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

however seen as damaging to collective interests if the population has a sense that such interests exist. In the absence of a sense of collective interests members of the ruling or dominant group will expect the government to promote their interests and not those of the other groups. Members of other groups will resent this. And – as in Northern Ireland (and in South Africa under apartheid) – resentment may turn into violent conflict if the causes of resentment cannot be resolved through negotiation.

Let us explore in general terms ways in which selfishness is reduced in society and altruism is promoted. We need to start with one to one relationships. It can be rational (and Tit for tat game theory suggests this) for an individual in a one-off relationship to defect[84] or act in his or her own interests rather than according to any prior agreement or expectation between the parties as to how they will behave, or for the common good. However, this rationality does not apply to stable, repetitive, long term relationships such as group members tend to have. Then in practice reciprocal altruism[85] surfaces – and can be rational. The parties do good turns to one another, remembering past experience. Human memory and recognition are essential for this mechanism to work. Each party comes to depend on and trust in the other's continuing presence and cooperativeness.

Altruism and reciprocity also occur in groups, and they involve a belief or expectation that all members of the group will reciprocate altruism and act altruistically and in trustworthy ways towards other members of the group.[86] This mode of conduct too appears to be innate. There may of course be social pay-offs for altruists, for instance in terms of reputation and prestige in the group: the reward for altruism may come from the group or elsewhere rather from the beneficiary of the altruistic act. The Good Samaritan's virtue and altruism is recognised by a wider range of individuals than the "other" person he took pity on and helped and his status grows with that recognition.[87] A person's reputation in a group matters: it may encourage others to trust you not to defect, which will encourage them to cooperate with you to your benefit.[88]

If we accept the Darwinian assumption that humans have limited capacities for altruism, it would be unrealistic for citizens in democracies to expect public officials and bodies to act purely altruistically in

[84] See R. Axelrod, *The Evolution of Cooperation*, note **62** above, and, with W.D. Hamilton, "The evolution of cooperation" (1981) Science 11, at 1390–6.

[85] See R.L. Trivers, "The evolution of reciprocal altruism", (1971) Quarterly Review of Biology, 46, 35–57; and *Social Evolution* (Wokingham 1985).

[86] R. Alexander, *The Biology of Moral Systems* (New York 1987); J. Alcock, *Animal Behaviour: An Evolutionary Approach* (Sunderland MA 2005).

[87] *New Testament* Gospel of St Luke chapter 10, verses 30–37.

[88] See D. Cummins (2005) "Dominance, status and social hierarchies" in D.M. Buss, *Handbook*, note **39** above, pp. 676–693.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

a subjective sense in the public interest. But if we recognise that public service brings rewards to public servants, for instance in the form of social status and trust, an act may be both altruistic/public serving and, in the long term, selfish.

Where – as in most liberal democracies – public bodies are expected by the population to act in the public interest, they may be punished (socially or legally), ostracised and forfeit status and trust if they do not do so. (This was the experience of MPs in the wake of the expenses scandal of 2009, discussed in Part I of this article: the classic instinctive punitive instruments of social control were employed by "the public" as a whole, to dramatic effect.)

Mechanisms need to be put in place in a system of government to ensure that politicians and public officials will have strong enough short term selfish motives to perform other-serving acts if that is expected by the population – for instance through such devices as freedom of information which exposes activity to a public "eye"[89], performance-related rewards for public service, or re-election and democratic accountability, including punishment (e.g. loss of elected office), shaming and ostracism for breach of the duty. A short digression may be in order here: this was the insight – deeply shocking to some when it was first expounded – that public choice theory[90] brought to politics and government in the UK under Mrs Thatcher. The assumption in this theory is that public servants are utility maximisers and log rollers, concerned primarily with their own interests. The solutions to this in the 1980s and 1990s included introduction of competitive tendering for public contracts, performance related pay and other measures to incentivise service providers to prioritise the government-defined public interests in question. In practice many of our constitutional norms do align public and selfish interests in these ways – including the award of honours, noted above.

We need to relate the public service duty to the assumption behind the public interest principle that the public is itself a group. If a public official considers him or herself to be a member of one of the groups that is the public or the section of the public that the official serves (e.g. NHS patients), then serving that group – one's own group – may itself be "selfish" in the sense that each individual's own interests and those of kin include being members of a group in which reciprocity and respect for individual and communal interests operates and in which there will be a loss of status, trust and respect if the official does not act on the public service principle. If however officials do not consider

[89] See discussion of work by M. Bateson, D. Nettle and G. Roberts (2006) "Cues of being watched enhance cooperation in a real-world setting", note **31** above.

[90] See for instance W.A. Niskanen, *Bureaucracy and Representative Government* (Chicago 1971); J. Buchanan, *The Inconsistencies of the National Health Service* (London 1965).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

themselves to be members of the group they are supposed to serve, they may not care about the status, trust or respect of that group. The Northern Ireland case study in the next Part of this article provides illustrations of the point.

2. Where does respect for individuals fit in?

This brings us to the issue of human rights. We noted earlier that the public service and public interest duties are generally subject to legal duties on the part of officials to respect the interests of individuals and to achieve a balance between them and the general public interest. Liberal democracies do in practice respect the interests of individuals to a considerable extent, whether under a Charter of Rights, or under the ordinary law. This involves weighing up the balance between public interests and the interests of individuals, as is provided for, for instance, in articles 8 to 11 of the European Convention of Human Rights. This is not the place to go into the details of these provisions. But the disciplines with which we are concerned do shed light on why democracies' legal systems – and civil society – tend to respect individuals: it is to do with the evolved capacity for empathy.

Empathy may generate feelings of altruism towards the victim (the Good Samaritan, we are told, had compassion on the man who had fallen among thieves and took care of him) and the experience of senses of injustice and unfairness on their behalf. (Individuals are also predisposed to experience senses of injustice and unfairness on their own behalf.[91]) Gearty has suggested that the human tendency to empathise underlies commitments to the protection of human rights.[92] I find this persuasive.

Part of the explanation for empathy giving rise to social norms in favour of the protection of individuals is rooted in neuroscience:[93] for instance, the chemical oxytocin is released in the brain when empathy is experienced. This process too must have evolved. It generates trust[94] and generosity[95] towards the other, which in turn generates an inclination to fair play and cooperation.[96] Empathy and human responses to it may be close to the purest form of altruism.

[91] D.W. Pfaff, *The neuroscience of fair play: Why we (usually) follow the golden rule* (Chicago 2008).
[92] C. Gearty "Human rights after Darwin: Is a General Theory of Human Rights now possible?" (unpublished lecture delivered at the London School of Economics on 7 May 2009).
[93] J. Panksepp, "The neuroevolutionary and neuroaffective psychobiology of the prosocial brain" in Dunbar and Barrett, eds, *The Oxford Handbook of Evolutionary Psychology*, note **38** above, chapter 12.
[94] See Panksepp, op. cit.
[95] P.J. Zak, *Moral Markets: The critical role of values in the economy* (Princeton 2008); P.J. Zak, A.A. Stanton and S. Ahmadi, "Oxytocin Increases Generosity in Humans" (2007) Public Library of Science One 2(11): e1128. doi:10.1371/journal.pone.0001128.
[96] See Pfaff, note **92** above; and R. Trivers, *Social Evolution* (Wokingham 1985), at pp. 387–9; J. Henrich et al. "Costly punishment across human societies" (2006), Science 312: 1767–1770.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

However, as Taylor suggests, empathy and associated processes are less likely to be generated if the "victim" is considered to be "other" by the empathiser. For many people in many situations all human beings belong to their group: the parable of the Good Samaritan illustrates this capacity. But it is clearly not the case that all humans consider all other humans to belong to their group – hence otherization and through it lack of respect for and ill-treatment of others.

3. Where and why do public interest and public service principles prevail?

All this brings us to the question why public interest and public service principles do not prevail in all countries. It is suggested that these principles cannot prevail unless there are sufficiently strong senses of communal group membership in the population as a whole and public officials are conscious of and respond to this. In countries or regions where the population is split by strongly held loyalties to sub-groups – family, clans, tribes, races, nationalities, religious sects – those loyalties and the negative stereotypes they generate may outweigh any sense of national or general community loyalty and belonging.

But why do such loyalties prevail over or prevent the development of shared communal national identities in some countries or in some circumstances and not in others? The reasons may be historical and cultural. Past – and present – conflicts over resources may have embedded otherisation in the culture of groups within populations. In poor countries more than in wealthy ones members of kin groups and large extended families, tribes and clans will grow to depend upon one another for support, and obligations of support will pass down the generations and continue even after economic changes have taken place and even in the face of the law (as with forced marriages, and bride price arrangements in many countries).

Recent research suggest that an explanation for the difficulty in establishing senses of common interest in some, lower latitude, regions may that small group loyalties and the exclusivity of tight-knit groups have evolved – either genetically or as learned traits or culture – partly to promote the health of members by protecting them against infections that may be caught from contact with other groups.[97] The diversity of language and religion in regions where infectious diseases and parasites are rife – mostly in lower latitudes – may underpin the exclusivity of these small groups, thus limiting the development of democracy beyond the small locality and the public service and public

[97] R. Thornhill, C.L. Fincher and D. Aran, "Parasites, democratization, and the liberalization of values across contemporary countries" (2009) *Biological Reviews* 84: 113–131; C.L. Fincher and R. Thornhill, "Assortive sociality, limited dispersal, infectious disease, and the genesis of global pattern of religious diversity" (2008) Proceedings of the Royal Society of London *B* 275: 2587–2594.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

interests that go with it as a side-effect – even if nowadays medical treatment and other measures reduce the threat posed by such infections. By contrast in cooler, higher latitudes – where a high proportion of democracies are found – the dangers of infection and the parasite loads have always been less, so that the promotion of small, tightly knit, exclusive communities will not carry the benefits that are found in lower latitudes, and the benefits from wider cooperation and senses of communal interest have prevailed.

But these are clearly not the only possible explanation for exclusivity and an absence of a sense of common interests in populations. We need to bear in mind that members of a vulnerable section of a population may bolster their sense of security by negative stereotyping of other members of the population, and that cultural traditions may promote exclusivity, including religious, racial and other affiliations. Such traditions may in fact be adaptive in cementing solidarity in those communities in the face of insecurity, or they may have been adaptive when formed and continue to prevail even when the cultural environment has changed.

III. Northern Ireland – A Case Study[98]

An important question then is what would the implications be if substantial sections of a population did not consider themselves, or others, to be members of the large national group – the British for instance? These are complex issues in which many other disciplines, notably social psychology, have developed a rich literature. My focus however is on what an evolutionary psychology interpretation can contribute to understanding of these issues. I shall illustrate the importance of these questions by the following brief case study on Northern Ireland. The purpose is not to suggest solutions, but to show how, in the absence of senses of public or common interest and thus of public service among members of a legislature, government or civil service and the population, it is hard, perhaps impossible for democracy, the rule of law and human rights protections to be maintained and for a spirit of public service to survive.

A. The Nature of the Problem

The problems in Northern Ireland for most of the twentieth century lie to a great extent in the mental attitudes – the psychologies – of the

[98] See C. McCrudden, "Northern Ireland and the British Constitution" in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 6th ed. (Oxford 2007); P. Dixon *Northern Ireland: The politics of war and peace* (2nd edn. Basingstoke 2008); B. O'Leary and J. McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (Atlantic Highlands, NJ 1992); J. Whyte, *Interpreting Northern Ireland* (Oxford 1990); D. Birrell and A. Murie, *Policy and Government in Northern Ireland: Lessons of Devolution* (Dublin 1980).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

population and the groups within it: an endogenous explanation.[99] As Boyle and Haddon put it, Northern Ireland "is a divided society in which two separate communities are locked in political conflict".[100] (In what follows the communities will be referred to as nationalists and unionists, though there are shades of meaning within those categories. Nationalists may be referred to as Catholics or republicans, unionists as Protestants or loyalists.) In EP terms the groupishness of one section of the population has led them to identify with the people of the Republic of Ireland to the South and not with the people of the United Kingdom, while the groupishness of another section of the population lies with the UK and not with the Republic.

The explanations for these separate community identities include the different historical narratives passed on as culture among the two populations in many aspects of their lives – education, religious observance and politics. As Dixon comments:

> Politicians are not necessarily interested in the "truth" of what actually happened in history, but rather in telling a story about history that is useful in the propaganda war for political advantage now. Their stories imply guilt and blame for the conflict that has occurred … . History has been used to emphasize past injustices and patterns of oppression …[101]

Such narratives, involving the perpetuation of negative stereotypes of "others" may have been, and may continue to be, used as defensive strategies to promote solidarity within each group, an innate and often adaptive human response to perception of threats from outside.[102]

Other factors promoting divisions between the communities have included the separate education of children – which in itself transmits cultures of sectarian prejudice – and residential segregation.[103] And yet research[104] suggests that promoting contact between the two communities can serve to reduce inter-group conflict.

Here is a population, then, substantial sections of which have not only very different, but actually incompatible, senses of self-identity and group membership. Individuals consider themselves to belong to separate, mutually exclusive groups. As O'Leary and McGarry put it in

[99] See Whyte, 1990, op. cit., chapter 9. Whyte considers other, exogenous explanations as well. For a psychological approach to Northern Ireland see M. Fraser, *Children in Conflict* (Harmondworth 1973).

[100] K. Boyle and T. Haddon, *Ireland: A Positive Proposal* (London 1985), at p. 53.

[101] For brief accounts of the two narratives see P. Dixon, note **98** above, pp. 6–13 (Nationalist views) and pp. 13–17 (Unionist views).

[102] See work by Wilson and Taylor under the subheading "Outsiders, otherization and negative stereotypes" by note **78** above.

[103] See P. Dixon, note **98** above, "Introduction".

[104] Reviewed in P. Dixon, "Why the Good Friday Agreement in Northern Ireland is not Consociational" (2005), 76 Political Quarterly 357–367.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

1993, before the Belfast or Good Friday Agreement[105]: "The political aspirations of nationalists and unionists are therefore not only conflicting but apparently mutually exclusive".[106] Many members of the general population have not therefore had a sense of shared group membership. Added to this there has been a conflict over access to resources – employment, political power – between the two populations, the unionist section of the population being generally the better off.[107] As Kurzban and Neuberg note "Research … indicates that intergroup prejudice and conflict increase as real competition between groups for valuable resources increases".[108] In the absence of a sense that the whole population is a group, sociality, co-operation and trust have not operated beyond each community.[109] Instead conflict and competition have often prevailed.

B. The Public Interest and Public Service Principles in Northern Ireland

What does this have to do with the public interest and public service principles on which this article has focussed? For some fifty years the majority unionist government promoted the interests of its own followers and its sections of society over those of the minority, discriminating against nationalists and exercising patronage in favour of unionists:[110] this was all contrary to the spirit of the public service and public interest principles.[111] As Birrell and Murie put it "The Government was always sure of a majority and could thus afford to ignore the Opposition".[112] This may have been "justified" in the minds of some members of that majority by the negative stereotyping of the minority as, among other things, disloyal.

1. Groupishness in Northern Ireland

This is where innate predispositions to "groupishness" come into the picture. The majority unionist government and many (but not all) members of the unionist population did not have a sense that nationalists were part of their group; they knew that nationalists did not consider themselves to belong to the same group as the unionists, and

[105] The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, April 10, 1998, Cm 3883 (1998).
[106] Supra, at page 2.
[107] See O'Leary and McGarry, note **98** above, chapter 3.
[108] See Kurzban and Neuberg, note **55** above, at p. 665.
[109] See R. Kurzban and S. Neuberg, note **55** above, and discussion under the heading "Groupishness", also above.
[110] See for instance J. Whyte, "How much discrimination was there under the Unionist regime 1921–68?" in T. Gallagher and J. O'Connell (eds.), *Contemporary Irish Studies* (Manchester 1983).
[111] See Dixon, note **98** above, chapter 3.
[112] See D. Birrell and A. Murie, note **98** above, at p. 65. Of course this is sometimes the position in the UK, but Great Britain has been spared the problem of a population divided into two mutually exclusive and incompatible communities.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

that many of their number rejected British and unionist rule. There was then no concept among the leaders and members of the two communities of the whole population being, among other things, a group with shared and common interests which should be served by the government. Instead the unionists treated the nationalists as "other" and did not respect, trust or empathise with them. They relied on majoritarian justifications for the policies they pursued, contrary to the public interest and service principles. A "good Samaritan" sense of common humanity did not prevail over innate ingroup/outgroup attitudes.[113] Substantial and influential sections of the nationalist community created negative stereotypes of the others in turn, they too rejecting any notion that they all belonged to one group, the population of Northern Ireland, or that they owed any allegiance to the system or to the UK. Such attitudes were, and continue to be, reinforced by the segregation of most schoolchildren in Catholic or Protestant schools.

2. Trust, otherization and negative stereotypes

From the 1970s trust in government, the police and the state generally in the Province on the part of nationalists broke down, many members of the two communities had no trust in one another; each blamed the other for the Troubles. These are examples of natural human predispositions at work. We may recall from earlier in this article that trade, negotiation and exchange[114] are techniques that humans have the capacity to resort to where conflict between individuals or groups occurs and could result in violent conflict,[115] but fair horse-trading and negotiation are only possible where a degree of trust exists.

Each community, in order to strengthen its own community bonds in the face of conflict with the other group, developed negative stereotypes of the opposing group members. An example would be the assertion by some unionists that the Pope, the spiritual leader of many nationalist Catholics, was the "anti-Christ". Tit for tat attacks were made by each side, but there was no sense of common community that would allow Tit for tat to restore cooperation and reciprocity – in effect to allow some senses of common identity to develop between members of the two communities.

[113] See the work of J.M. Rabbie "The effects of intragroup cooperation and intergroup competition on in-group cohesion and out-group hostility" in A.H. Harcourt and F.B.M. de Waal (eds.), *Coalitions and Alliances in Human and Other* Animals, note **74** above, 175–205, discussed above.

[114] See discussion under the heading "Negotiation, exchange and trade" above, and M. Ridley *The Rational Optimist*, note **79** above, chapter 2.

[115] See O'Leary and McGarry, note **98** above. For discussion of how such concerns were resolved in the Netherlands despite ethno-religious divisions, see A. Lijphart (1968) *The Politics of Accommodation* (Berkeley CA 1968).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

3. Tit for tat, democracy and the rule of law

Sectarian violence added another ingredient to the toxic brew in the Province. Some members of the minority community were not content to have disputes settled by majority vote – the conventional way of settling disputes in the Westminster Parliament and indeed in many parliaments where there is a sense of shared identity and interests among the population; the parties were unable to negotiate resolutions to their differences. Tit for tat violence ensued. And thus, as we all know, the rule of law was undermined, jury trial was suspended, the nationalists did not trust or accept the authority of the police service, the Royal Ulster Constabulary, it became difficult or even practically impossible to provide effective legal and other state protection for individuals' rights and interests, and "democracy" – the Stormont Parliament – was not able to function.[116] In my view these breakdowns happened in part at least because the public interest and public service principles could not operate in Northern Ireland, because of the attitudes – mindsets – of protagonists in the two communities and of those of their leaders who did not consider the population to have shared interests.

4. The conditions for negotiation and "horse trading"

The reasons why the members of these two communities were unable for many years to negotiate and "horse trade" their ways out of this conflict also included lack of trust in the British government on the part of nationalists, reluctance on the part of the unionists to forgo their advantages and fear of damage to the unionist community and its sociality and solidarity if the province were to join the Republic of Ireland – exogenous explanations.[117] Members' reliance on their communities and fear of losing the support, status and identity which communities give to their members is a powerful psychological motivator.

It took many painful years of negotiation to find a way in which the leaders of the two communities would feel able to trust one another – and even to form a sub-group – and the other parties involved – the British and Irish governments – sufficiently to resolve political differences by peaceful processes (involving, for instance, power sharing, enforced by elaborate voting procedures, and reform of the police service) rather than by violence.[118]

[116] See works referred to in note **98** above.
[117] See O'Leary and McGarry, note **98** above, chapters 3 and 4.
[118] On the peace process generally see J. Powell, *Great Hatred, Little Room* (London 2008).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

5. Towards negotiated power sharing and pursuit of the public interest?

It required the intervention of George Mitchell, the US Special Envoy for Northern Ireland, and of the British and Irish governments to press the parties to accept the need to put in place arrangements – in what came to be the Belfast or Good Friday Agreement – that would, inter alia, promote the public service principle as against partisanship and foster the growth of a version of the public interest principle – the common public interest being in an end to violence and the development of political processes – even in the absence of a sense of shared wide interests in the Province. Given that the public service and public interest principles require neutrality as between sections of a population or community, it is notable that the vocabulary chosen in the Good Friday agreement and in the Northern Ireland Assembly Act 1998 is studiedly neutral. The legislature is an Assembly, not a Parliament, its laws are Measures, not Acts, it has a Presiding Officer, not a Speaker, a Chief Minister rather than a Prime Minister, and an Executive rather than a Government. However, members of the Assembly are required to identify themselves as members of one of the communities so that power can be fairly shared. This arrangement perpetuates the concept of a divided population and may make it harder for a sense of common interests and identity to develop in the Province. The police service has been reformed and renamed in neutral terminology as the Police Service of Northern Ireland[119] in place of the Royal Ulster Constabulary.[120]

The Agreement provides that the power of the government there

> shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.[121]

Thus the arrangements look more like a traded, negotiated set of deals between two communities and between the UK and the Republic of Ireland than the development of a sense or assumption of common interests and identity among the whole population in Northern Ireland. McCrudden has referred to "intangible values, such as creating a stable political community from a number of diverse groups" and communitarian approaches as aspects of what he considers to be an

[119] See www.psni.police.uk.
[120] See discussion by McCrudden, note **98** above, at pp. 251–2.
[121] Agreement, note **105** above, Constitutional Issues, 1(v).

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

ideological constitutional approach which informs the 1998 Agreement.[122] As already suggested, habits of public service and commitment to the general public interest cannot develop unless the general population acquires such a sense and expects these principles to be followed by those in power. Social as well as legal respect for the human rights of members of the "other" side is also hard to develop unless otherization and the mistrust that may go with it cease.

A lack of trust has bedevilled the arrangements since the 1998 Agreement with the result that the arrangements have been suspended by the UK government for substantial periods of time. But it is significant that an aim has been to make progress towards a "shared future" and a "sharing society" – sharing often being a form of "trade" and taking turns which may, ultimately, produce a sense of common interests.

6. The future?

Although many members of the population in Northern Ireland do not identify very strongly with one or other of the two communities, problems persist between them. Integration or assimilation, which would result in the two communities merging into one, will not be possible for as long as the two communities' identities are strongly different and incompatible. There appears to be little or no support among the population for a new, separate, independent Northern Ireland to be established on the off-chance that this would open the way for a shared sense of a new identity to develop and with it a sufficient sense of the common good and commitment by officials and politicians to the service of the general population. In the long run the emergence of a sense of European identity, a psychological *demos*, among the population might make the conflicts between the two community identities much less important. But that "solution" is nowhere in sight. Ethnic pluralism, advocated for instance by O'Leary and McGarry[123], would still, in EP terms, mean that a sense of community would have to develop if members of the population were to be able to believe that government was indeed promoting the public interests of the area and that the principle of altruistic public service prevailed over partisanship.

To summarise, an evolutionary psychology interpretation shows how Northern Ireland illustrates the difficulties that arise in a population in which separate, conflicting identities and communities exist, with the result that there is no concept of or commitment to government in the general interest of the whole community, or to altruistic

[122] McCrudden, note **98** above, at page 230.
[123] Note **98** above, chapter 3.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

service of the whole population. The techniques of trade, negotiation and exchange can only provide substitutes for public service, public interest and shared identities, but only for as long as trust exists between the communities and their leaders.

IV. Reflections and Conclusions

I am acutely aware that the literature in these evolutionary disciplines raises important questions for moral and political philosophers which I have not attempted to explore here.[124] Those issues are for other scholars. Much of the literature reviewed in the second part of this article may have struck the reader as "common sense". And that is the point: it is about the common evolved psychological predispositions of humans. It is not always recognised that common sense has some *genetic* foundations: it should be. Recognition of this opens up understandings of much political behaviour which in turn is reflected in public law. The public interest and public service principles, both of which are underpinned by hard law in most liberal democracies, and by soft law in the UK, have some, at least, of their roots in the innate human psychological predispositions of individuals to expect members of "their" groups to conform to social norms which include sociability, sociality, cooperativeness and altruism and respond to disloyalty and defection with anger, ostracism, withdrawal of trust and cooperation, and punishment.

The point I am trying to make is that there may be some more basic, but not often articulated "essentials" in successful democratic systems than those that are commonly discussed by political scientists and constitutional lawyers as "fundamental", such as parliamentary sovereignty, the rule of law and respect for human rights. In my view without the emphasis on the undesirability of short term selfishness in certain circumstances related to the actual operation of a liberal democratic system of government, the system would break down. If the ability of sub-groups within a population (e.g. political parties, some religious groups, some racial groups) to coexist without violence with what they perceive – perhaps through tradition and culture – to be groups with differing interests were to be destroyed or undermined, the traditions or cultures of reciprocity, trust and trustworthiness which provide the social capital of such constitutions would be destroyed. The

[124] But see, for instance, M. Hauser, *Moral Minds* (London 2006), for discussion of the work of J. Rawls and David Hume in relation to neuroscience; R. Layton *Order and Anarchy*, note **64** above, on Hobbes, Locke; S. Pinker in *The Blank Slate*, note **47** above on evolutionary psychology and John Locke, Rousseau, Hobbes, I. Kant; D.C. Dennett in *Darwin's Dangerous Idea. Evolution and the Meaning of Life* (London 1995) on Locke, Hume and Hobbes; M. Ridley, *The Origins of Virtue*, note **38** above, chapter 13 for discussion of the relationship between evolutionary psychology and the work of Hobbes, Adam Smith, Rousseau, David Hume.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press

cultures rest on senses of wide ranging shared interests that operate in parallel with sub group identities. In the absence of these senses a liberal constitution would rapidly decline into open, often violent conflict between groups and disinclination to compromise – as the history of Northern Ireland during the troubles over the last fifty years shows. In such a situation the realisation of legal and social respect for human rights can become a wild fancy, an unattainable dream. And a formal commitment to the legal protection of human rights cannot, alone, solve such problems. The public interest principle and the promotion of senses of belonging to the group that is the whole population, and the public service principle and its ethos and implementation, are thus even more fundamental, in my view, than democracy and human rights could ever be. *They are foundational*. But they depend for their existence and continuance upon the states of minds of parliamentarians, government, public servants, and the wider population. Without them respect for human rights can never be real, the legitimacy of government will be destroyed and intergroup conflict, nepotism and corrupt patronage will take hold. We need to recognise, alongside theories of legal and political constitutionalism in the UK and other liberal democracies, the existence of *psychological constitutionalism*. Public attitudes and psychology can be manipulated by governments, through education, propaganda and laws, for good or ill. Courts, when issues about these matters are taken to them, may not always expressly acknowledge or articulate the significance of their decisions for foundational principles. Examples of the case law on these issues referred to earlier, and hard and soft law constitutional provisions in various states suggest however that public actors – courts and public bodies – may subconsciously realise what the public interest and public service expectations of citizens are, give expression to them in the texts that they produce and reflect them in their decisions and the ways in which they present them.

https://doi.org/10.1017/S0008197310000838 Published online by Cambridge University Press