**Dr. Martin Meenagh**

**‘Conscience versus Reciprocity in the European Public Sphere since 1989’**

I want today to concentrate for a few moments on what we mean by conscience in the secular sphere. I don’t propose to base my arguments on religion, at least consciously, nor upon a mooted clash between the spiritual and the secular which muddies many debates about conscience. Instead, in looking at the Europe which is now more or less within the bounds of the European Union, I want to explore what we mean by conscience in action. I would like to explore with you the possibility that a workable idea of conscience can inform our assessment of the European landscape that has emerged since 1989. Can a ‘whistle-blower’ in a public or private organisation that is greater than him or herself rely upon conscience as a defence to actions that may see them lose their livelihoods or liberty? Can an individual challenge a government or a law on the basis of conscience? Conscience, it would seem to me, is deeply intertwined with the idea that, in freedom, we are called to listen to our own understanding of what is right, to check it against our culture, and to integrate those two even if the powerful require otherwise. The question for us as citizens of Europe is, can we rely on the recognition and protection of conscience under the law?

Before I can address any of these issues, I must obviously address the issue of what I mean by conscience. I’ve said that I won’t base things on faith, and I mean it, but it is impossible to avoid the observation that the term emerges as a Christian one. It is the New Testament’s *syneidesis* that gives rise to the idea that one might suffer pain if one goes against moral principles, or against the requirements of ‘higher law’. Actually, though, the exposition of conscience through religious exegesis is not much help, because the greatest proponent of the idea—St Thomas Aquinas—is quite clear that people still get things wrong through ignorance or the muddied passions that produce mistakes. This is Copleston’s modern point; that most people act on the basis of a mix of emotion and personal calculation more than reason. In such circumstances, people might well be driven by a feeling of guilt that had more to do with their subconscious desires and fears, or with the assimilated values of their community, than with reasoned points on which we could agree. A conscience which was a guide to a system of morality upon which we could not agree would not be conscience, in the sense that it would be indistinguishable from prejudice. Allowing for conscientious objection to legal or contractual points that had been debated or agreed already could therefore not form a proportionate or rational use of State or Corporate time.

Conscience is probably better seen as something relating to integrity than to morality. It represents the integration of our needs and wants with our reason and our understanding of our behaviour in the group. What follows is simple; the group should not ask people to do things which demand the disintegration of their being. This fits with a psychological view of conscience in which one should not oneself do things that one knows to be a product more of desire than sense, and that one instead should struggle for balance between needs, wants, desires, reason and duty. I of course use the language of ‘should’. All that this usage should be taken to mean is that I think, on intellectual, empirical, utilitarian, and psychological lines, that persons are not monoliths and that it is somehow wrong and demonstrably destructive to treat them as though they were, and to demand that different parts of their being be destroyed or suppressed completely to identify with, or obey, a group.

At this point, some of you might be thinking of the views of Professors Dawkins or Pinker that my depiction of conscience is essentially one rooted in some past scaffolding left over from kinship groups or an elaboration of the selfish gene. Tempting as it might be to take both to task—and to point out how much both of them draw on arguments theologians have already had—I’d just like to remind you of my remit. I don’t want to refer to Catholic views of morality overtly today. Nor will I refer to the argument of Professor Dawkins that a moral gene exists that transcends selfishness, leads to reciprocal altruism, and allows us to act according to our values. I’m not here to argue that we are innately good and that conscience expresses that—I’ll leave that to Dawkins.

However, I would like to make at least one reference to Erich Fromm. Early in his career, Fromm followed Marx and Rousseau in believing that conscience was the situational product of material self-interest, and that it could be discounted if it stood in the way of progress. Like many philosophers, however, he underwent a change of heart as he grew older. Fromm began to embrace conscience at the same time as Marxism underwent its intellectual collapse in the New Left movements of the late 1960s. He saw conscience as integrative—that is, as something that ‘called a human being back’ to himself or herself, and away from the self-alienation that modern society produced. In that context, Fromm tried to recast conscience as a word for that which is ‘love of, and for, life… [characterised by] care, responsibility, respect, and knowledge’. For our practical purposes today, it would therefore matter if we lived in a Europe that allowed us to respect ourselves and the environment, which allowed us to take responsibility for things and protected us when we did, and which did not include areas where knowledge was forbidden or excluded for fear of the consequences.

This view of conscience to which I am stumbling this morning, I think, comes practically close to the ideas which have emerged in different guises in debates on the minimum requirements of the public sphere in recent years. For Jurgen Habermas and Joseph Ratzinger, for instance, public debate in a pluralist society becomes impossible without a courteous attempt to understand, and possibly credit, the views and personal integrity of another. It follows that, if we were asked as citizens to do or to be passive in the face of something that crushed or damaged another, or their views, or which sought in some sense to disintegrate them, we should refuse to do so.

In the French debate on the public display of Islamic clothing, a similar reference was made to the idea of ‘reciprocity’. Reciprocity means a duty to accord to another the minimum elements necessary to allow democratic and pluralistic societies to exist. This means, to link again to Habermas, the minimum which allows a space for communication to exist. If expressions, thoughts, feelings, or responses were in some way forced to be hidden, it may mean that public discussion and debate becomes a complicated shadow-play not of courtesy but of hidden and confused meanings, as people do their best to hide from each other. That seems to me a good way to think at least about East Germany before the fall of the wall; but it would be an indictment of modern Europe if it persisted in some other form.

To those of you who know European and Constitutional law—and I do not propose to invade Dr Beck’s territory, because he has a much more distinguished and informed opinion than I on the matter—there are guiding concepts we use to interpret the applicability of law. We ask, is it rational? Is it a proportionate means of achieving a legitimate end? Is it reasonable? Is it within the powers granted or allowed to the decision maker? We also allow for a second set of questions that have slightly less weight, like ‘does it accord with views of subsidiarity?’ or ‘does it accord with the fundamental charter of European rights?’ I think that it would be possible to use the definition of reciprocity or conscience which I have stumbled towards to briefly, and with aim of inspiring debate, broadly, assess the role of conscience in Europe today.

My first target would be one that you were not perhaps expecting. That would be the one relating to the exact protections of what the British call ‘whistle-blowers’ in Europe after 1989. It would seem to me that the modern iteration of conscience is meaningless if one cannot point to people who were prepared to suffer for objecting to and exposing what they thought was wrong, and the relative value of conscience can of course be gauged by how we treat such people. The record of the modern United States is not good in this regard; Chelsea Manning, Edward Snowden, and Julian Assange are hardly ‘poster children’ for the State Department’s view of conscientious objection. Do we, as Europeans, protect whistleblowers well enough?

In 2013, Transparency International surveyed the then twenty-seven member-states of the European Union, in order to establish whether or not those who felt the need to disclose or report wrongdoing could be said to be encouraged, inhibited, or protected. They defined wrongdoing as a category that included breaches of legal obligations, corruption, criminal activity, miscarriages of justice, dangers to public health or the environment, the abuse of authority, the unauthorised use of public funds or property, gross waste or mismanagement, and conflicts of interest. What they uncovered was very interesting from the point of view of the modern European citizen. Only four EU countries—Luxembourg, Romania, Slovenia, and the United Kingdom—incorporated strong legal frameworks for whistleblower protection into law. 16 had partial legal protection for employees who came forward for reasons of conscience; and 7 had no, or little, protection at all. These last seven were neither small nor concentrated. They included states as far apart as Finland and Greece, Lithuania and Spain, Bulgaria and Portugal, and Slovakia. In addition, all but two of the 27 countries had ratified the UN Convention against corruption, which required whistleblower protection. Although the UK was seen as having the most advanced ‘public interest disclosure protection’, which covered almost all employees and effectively prevented employers from taking overt or connected action against them, I would not, of course, suggest that those who were advanced were in any way paragons. The recent history of the BBC, the NHS, or the City of London, or indeed the entire political establishment in the 1970s and 80s, would perhaps encourage some humility in that regard.

Nevertheless, it is of interest to a seminar like this that basic legal protections for those who believe that a company, government or individual is doing something unconscionable are not in place in the majority of European States. Quite apart from anything else, such a lack of protection for the interposition of common values and individually perceived morality between the individual and the state is troubling. As Laura Underkuffler noted in the DePaul Law Review when writing of the situation in the United States, conscience is surely something which the law should at least allow a legal avenue for. It is, in essence, a compulsion that defies the State’s power. It leaves moral norms to the consent of the individual, and in doing so, bizarrely, upholds our social capital and common bond.

This is of course where reciprocity comes in. Democracy is not some sort of replaceable administrative set of procedures, nor is it some Marvel Comics style adherence to an ideal. To work, it must surely be based on trust; and part of the definition of trust is that we understand what is right and that if we do what is right in the face of what is wrong, the wrong will stop. The reciprocity of social relations, in which I trust that you will not do something bad to me alone or in a group, and that I will not therefore act against you, is essential to my consent to our society. If there is nothing between us, if neither I nor you were protected in our expression of views and interpretation of circumstances, everything would become politics. It wouldn’t be a happy politics either; it would be a nasty, self-protecting, and brutish social competition that we would be giving ourselves over to.

It wouldn’t be very efficient either. As Torche and Valenzuela noted in the European Journal of Social Theory in 2011, social capital is a public good. Its benefits are appropriated by all and distributed to all within the social structure. For this to work, they took Coleman’s insight that communities had in some way to be ‘closed’ and elaborated it. A closed social community is one in which there is close observation and monitoring of social and moral norms between individuals, through the use of sanctions and rewards. What is this if not a clearly embedded nod to the idea that, in a more complex society, we can still have social capital, but only if those who know of wrongdoing can communicate it to media and social networks despite the fear of retaliation and outside of the fear of punishment? And why would they communicate it, ultimately, if not for conscience?

I think that this view of things connects reasonably well with Hannah Arendt’s idea that citizenship, to be meaningful, must be based on two separate but interlinked structures. One is the idea of a space of appearance, which corresponds to Habermas’ communicative space or to the public sphere. This is a place where opinions can be shared and where the expectation is that people will be persuaded and not coerced insofar as a modern crowded society can do so. The other structure is the idea of a relatively permanent world of social structures which produce stability and which protect values. Conscience might be seen as the bridge between the two.

This is broadly the basis, one assumes, for the recent activity of the European Commission in seeking to secure a Europe-wide protection for whistleblowing. Like many organisations, the Commission has had its encounters with the conscientious; no organisation which had failed to submit proper accounts for most of my adult lifetime should expect otherwise. In July last year, however, Emily O’Reilly, the EU Ombudsman, opened investigations into nine European institutions that had not created a regime of protection for those who were troubled by what they were asked to do. Re-elected in December 2014, Ms O’Reilly’s investigation is ongoing. However, if her distinguished career as Ombudsman in Ireland is anything to go by, it would seem to me that she would seek to place the protection of the whistleblower alongside the principle of the freedom of information at the heart of the EU.

All of which gives rise to another question for us this morning. If a society is committed to democracy, and enjoys substantial freedom of information, is there still a need for the protection of whistleblowers over and above the efficiency of public institutions? I think that this sort of problem becomes very evident when the conscience leads professionals and officeholders into positions where they cannot do their jobs, or where it encourages a breach of contract in the cut-and-thrust of commercial life.

Again, I feel the need this morning to avoid the obvious clash of religion and public law. The growing troubles of the two in our modern Europe have been illuminated far better than I ever could, anyway, by Lady Hale, in her 2014 Lecture on Human Rights for the Law Society of Ireland, which is easy to find online. One thing which does trouble me, however, is the way in which conscience is more or less forced into a religious form when complaints arise under the Human Rights Convention or the Human Rights Acts which elaborate it in member states. For instance, suppose that I genuinely had an objection to abortion, or to the provision of divorce, or to promoting a particular company line which was one amongst others in a marketing strategy. If I went to the newspapers, or refused to carry out or facilitate an activity to which I objected, would I argue the qualified right of freedom of expression—and lose—or attempt to argue on the basis of an outraged religious conscience, even if my argument could be a secular one? It sometimes seems as though secular liberalism of the sort which prevails in the societies around the Atlantic can’t accommodate the idea of a secular conscience when it comes to anything social or reproductive. Ironically, my Article 9 right might therefore be limited by my Article 9.2 duty to accept the limitation of laws based on public safety, order, health and morals, and my conscience might be over-ridden by the State’s Article 14 duty to prevent discrimination.

European law is a complex beast. I could at this point go into the distinction between direct discrimination, and indirect discrimination. If you will forgive me, and I think you will, I won’t except briefly. I think that I just need to explain that, in the case of indirect discrimination, a criterion is applied which is apparently neutral but which effectively excludes a group or individual. This is acceptable if accompanied by the State’s express exemption, or because it does not materially damage an individual or community, or because a legitimate aim is being pursued in a proportionate way. The clash of these ideas has given rise to a complex and complicated number of cases in modern Europe, but the thing that I want to note today is the identification by the Judges in Strasbourg of a possible extreme case in which they posited a positive duty to respect the compulsion to counter evil with conscience. These are not the terms in which the sleepy world of the European Court of Human Rights normally expresses itself, but they seem clear enough; the key section is paragraph 2 of the dissents of Judges Vucinic and De Gaetano in *Eweida and Others v UK* (2013) 57 EHRR, and it first came to my attention via Lady Hale’s talk. It reads;

Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives.

The learned Judges here explicitly differentiate between religion and conscience, and suggest that where what they call a genuine issue of conscience emerges, even where the person involved is an employee who provides a service and who is under a duty to do so, and where the service could be provided without the employee, then the State is obliged to protect the employee.

The ECHR is not, of course, an EU institution though the effects of the European Union Court’s accession to the Convention in 2013 are still being worked out. If, however, the dissent in Eweida is persuasive, then we do live in a Europe where those who have secular objections must be protected by states; where whistleblowing is known about, and increasingly defended; and where the European Institutions may soon be under a duty to protect conscience.

Conscience, therefore, balances the public commons against the requirements of private contract, either with the state or a private corporate body. It also manifests itself in the behaviour of physicians, and healthcare providers, who are asked to do things which strike at the heart of their beliefs. It affects public notaries and registrars, employees, the self-employed, and volunteers. It builds social capital. It makes democracy possible.

It is in the nature of the thing to be intensely irritating however—a grit in the machine which, almost by definition, runs up against any form of ideology, and without which we live in the politics of self-accumulation and perpetual competition. Dr Beck will talk to you later about the tolerance and intolerance of dissent in Europe—from the moral authoritarianism of corporate ideologies, institutions and the welfare state down to the sensationalist and chilling effect of the media and the modern political operative. I won’t intrude into his sphere. I’d like just to tell you finally what I think. I think that conscience is about courtesy, in the proper sense of the word. If we have no respect for each other, we can have no respect for what we do together. There can be no space for reason and debate if we operate in contempt of what we each might say or think. Conscience, in that sense, encourages engagement without personal confrontation. It makes us Shakespeare’s cowards. But it also calls us to be citizens and persons of courage. It requires us to do what is just and right, and provides a foundation for the sort of courage that comes from reflection, self-examination and introspection. It is appropriately despised in the run of things as an impediment to solutions and an argument against reflexive violence and crushing threats. Yet this most personal of sanctuaries, bizarrely, allows us to integrate ourselves with others in dignity, and in the security if not of peace, then of truth. That’s the sort of thing that Europe should aspire to, and it ought to be one of the fundamental goals of what the Judges in the case of Van Gen den Loos famously called our new legal order.