

# **THE GARRET FITZGERALD LECTURE**

## **FROM NIGHTMARE AND DREAMS TO REALITIES: CITIZENS,**

## **JUDGES AND DEMOCRACY IN THE NEW EUROPE**

## **THE HONOURABLE MR. JUSTICE JOHN MACMENAMIN**

## **SUPREME COURT OF IRELAND**

### **Introduction**

1. I want to thank the National University of Ireland for giving me the honour of delivering the fourth Garret FitzGerald Memorial lecture.
2. I have to admit that, coming after the three *tours de force* to date from Ronan Fanning, Sean Donlon, and Peter Sutherland, respectively, I approached this task with some trepidation and foreboding. Each previous contributor, of course, has a deep knowledge and expertise in their disciplines. But additionally, each of that triad seems to me to have enjoyed a certain advantage. Historians, diplomats, and (how can I put this?) 'Sutherlands', each can operate in a milieu and language which is relatively comprehensible to a more general audience, as well as specialists.
3. But European law, my subject matter, is not always like that. The words and phrases used sometimes have special meanings; the rules of interpretation differ from our national law, as such. There are terms of art which would have been

utterly unknown when Garret studied law in the King's Inns in the 1940's. Garret made history, engaged in diplomacy and was deeply engaged with many aspects of the European Union. The man we commemorate this evening had a great working knowledge of European Law. But he was not so deeply engaged with the activities of the European Court of Justice.

4. Garret retained a huge affection and knowledge for the Law and lawyers. He had an Antony Trollope-like interest in our doings. Both he and his wife Joan shared a number of characteristics, which in some ways, predetermined their interests in matters beyond our State. Sometimes perspective comes from a sense of 'otherness'. One cannot speak of Garret without Joan. Both were unusual in their generation. Both had experience of being abroad for extended periods when they were young. Both were eloquent in French as well as English.

5. In his autobiography, Garret described Michel Jobert, the French Foreign Minister, talking to him on behalf of another minister at a meeting of the Council of Ministers in the 1970s. On behalf of the other minister Jobert urged that those present would speak slowly in French and English because "*one of the speakers*" was talking too quickly. Jobert observed magisterially:

*"C'est de vous qu'il parlet Garret – et en Angalis et en Francais."*

While both Garret and Joan were at home in France, everyone has an Achilles' Heel or feet of clay. Garret was truly 'insular' in his detestation of garlic in food. He had a radar-like ability to detect it even minute quantities.

6. As students, both Garret and Joan lived through an era, where, events in the world outside impressed themselves inexorably on the people of the island of Ireland.
7. The Second World War and its horrors was something Garret never forgot. It was a concern which formed part of his mindset.
8. When we speak: of 'European citizens', and 'European citizenship' then, we are commemorating two formidable 'European' citizens, both Garret and Joan, who in justice we should both remember.

### **Historical Context**

9. I want to start with two images. The first set is very chilling. It may be familiar to some of you. It illustrates the nightmare from which Europe emerged in 1945.
10. The next is an article from the '*Financial Times*' of 7<sup>th</sup> August 2014. We will come back to it. It talks of the "politicisation" of the bench in some parts of the United States.
11. What I want to do is to show a *possible*, a potential, connection between these two apparently unrelated things, using a case study. I want to talk about how the European Court of Justice performs a role in the history of integration which is well known to specialist but not generally recognised, and innovatively, created a reasoning process which, itself, immeasurably increased the "reach" of European Law.

**12.** I will describe the way in which the Court later moved to create an idea of “citizenship” using that same reasoning process. As we will see, and as all European lawyers know, this was a deliberate conscious decision.

**13.** I want to look at some aspects of how the E.C.J. is evolving as a human rights court. In some ways it has become, and is becoming a constitutional court in the “sui generis” political entity we belong to that is the European Union.

**14.** As I hope will become clear, I think the role the Court of Justice has played, is underestimated. It fulfilled a critical part in bringing about changes which have been beneficial, both for Ireland and Irish people on both sides of the Border.

**15.** I want to reflect on how the Court did this, and why. These innovations occurred at times where judges played an unusual role of a time of political stasis or stalemate. Some suggest this resulted in a process of ‘Gouvernement des juges’: however, clearly, without the Court of Justice the European Union as it now exists could never have been attained.

**16.** I want to ask a few questions. Historically, were there decisions which moved beyond the judicial boundaries as we would understand them in our tradition? I think so. Were there judgments in areas which are in some sense “political”? This is generally accepted. Those judgments were highly motivated as to the purpose they achieved. They achieved results which as citizens would now accept as normal. If the same citizen had been had been asked the same question in a referendum they might have said ‘no’.

**17.** Of course we all recognise that the law, the courts, and Constitutions have a fundamental “political” role to play in a state. But in this short, selective, history I want to look at the way in which one court played a crucial role in evolving the polity in which it operated.

**18.** When the law, Constitutions and judges fail, the consequence can be a nightmare, as was true in Weimar Germany. This European Court was determined to succeed in order to achieve a purpose. The elimination of war in Europe and the creation of prosperity.

**19.** What you are looking in these photographs are reconnaissance pictures taken of Auschwitz-Birkenau Concentration Camp in 1944. Millions died there because of their Jewish identities or their beliefs.

### **The Nightmare**

**20.** 61 years, after these photographs were taken, I stood in exactly that spot when my mobile telephone rang. It was Garret. When I told him where I was I could hear the reaction in his voice, even though he was speaking from Ireland. It brought home for me the continuing impact which these dreadful events had on him and his generation. I begin with these grim photographs because they provide context for what follows. The idea of a united Europe for Garret, for the founders of Europe, was based, on the simple proposition "never again". Never again would

something like the Holocaust be permitted. Never again would a world war be possible, which, killed literally millions people worldwide.

**21.** What you are looking now are photographs of various bombed cities. The images are our symbols of the immense toll of human suffering caused by that war. As Tony Judt has pointed out, the ‘nightmare’ was central to the vision, the “*dream of a new Europe*”.

### **The Dream and the Dreamers**

**22.** The proximate idea for a United Europe, then emerged from the ashes of World War II. Churchill advocated the idea of a united Europe, even as the war continued. Of course, it did not become entirely clear then, that the United Kingdom would not figure as one of the members in this intended union. That became more clear in the later 1940s when negotiations for the formation of the Council of Europe began.

**23.** Of course, “Post-War”, to use Tony Judt’s term, was not the first time that the idea of unity had occurred to anyone. One can trace origins of a ‘United Europe’ idea back to the 1920s. More distantly, you can find seeds of the idea of “supra nationalism”, that is one political entity ruling across many peoples or tribes, back to the Roman Empire, to Charlemagne, to the later Mediaeval period when people spoke of the idea of ‘Christendom’, to the Renaissance, to the Enlightenment, (in particular, to a man now unknown, called Abbé de Saint Pierre in the 1720s) and throughout the 19<sup>th</sup> century. In Guernsey, in the Channel

Islands, one can find a tree planted by Victor Hugo where he went into exile, having been laughed at out in the 1850s, when he suggested the idea of a Europe united, with a Parliament governing it.

**24.** Who, then, were the "dreamers"? There were many, some more in the background than others. But some of the names we know best are Schumann, Monnet and Spinelli.

**25.** In the late 40s and early 50s, some idealists hoped for a 'Big Bang' whereby political unity could be achieved at a stroke. The idea died in 1954 when the French Assembly vetoed the idea of a European Defence Agreement. Ultimately, from the mid-1950s the dreamers, were constrained to accept that in reality the process would be an oblique one. They conceded it would be necessary to create a customs union, leading to a common market, leading to the breaking down of borders and, thereafter, ultimately, a political union. Those very words were used by a man we will meet later.

### **The Project**

**26.** The process, or 'The Project', moved in such an unpredictable manner it could hardly be seen as a design driven by leadership, or, as some bizarrely suggest, conspiracy. Idealists and visionaries, stood on one side; pragmatists in the middle and on the other side, traditions and ideas of historical national interests. No value judgment is intended in the terms: some of those who believed in nationhood such as De Gaulle were indeed visionary.

27. Europe in that late 1940s was faced with massive internal and external threats. Internally, there was industrial and political strife. There was the perceived *external* threat from the USSR, and its recently acquired new client states. In Eastern Europe the process I describe took place under the shadow of the threat of atomic warfare.

28. From Ireland, a 'balcony on Europe' Garret and his generation could see a Continent suffering after-shocks which threatened consequences as dire, if not more dire as from the war itself.

### **Challenges**

29. I want to say why this excursion in history is relevant to us. At present the Union again faces challenges. Without in any way being controversial, I think one can identify an economic structural challenge in a globalised world; competitiveness; and the Eurozone crisis are the demands to adapt to the discipline of a single currency.

30. But there is also a lack of trust. There are problems of identity, allegiances and attachment and detachment. Extreme nationalism is growing. Some think perception that some European institutions have become dysfunctional.

### **Strengths**

31. Against this, the Union has a highly productive workforce, sophisticated industries, advanced technologies, superb infrastructure and relatively good



governance. The list for candidate nations has not diminished. The EU has brought remarkable prosperity. It has changed and benefited our own State, and our own island, beyond recognition. The environment in which we work then, has challenges and strengths.

**32.** The legal work of at E.U. level is complex. I am not going into questions such as “differentiated integration”, “opt-outs”, “coupling and decoupling”, and the notion of a “two-tier Europe”, all of which form part of the constitutional discourse of the European Union. These are deep and political questions.

**33.** But these matters are not abstract for us. EU law is not abstract for us. The use in EU institutions of an intergovernmental agreement, was accepted by the Court of Justice in judgments of the 1990s. This core principle was reflected in the 2012 *Pringle* judgment, where the European Court of Justice confirmed that those Member States, within the European stability mechanism, could give tasks, both to the Commission and to the European Central Bank. The Court stressed that these tasks should not alter the essential character of the powers conferred on these institutions by the Treaties. What the Court does impacts on Ireland. Underlying all these matters, there are concerns regarding the complex structure of law under which we operate.

### **A Success Story**

**34.** One cannot deny that what emerged from the 1957 Treaty of Rome, has been an extraordinary success. The original Six were joined by Denmark, Ireland

and the United Kingdom in 1973. A few years later, in 1981, Greece became the tenth member. Spain and Portugal followed five years later. In 1987, the Single European Act was signed. In 1990, East Germany was welcomed into the Community. Soon after, Austria, Finland and Sweden, all neutral countries, acceded to the European Union. But, it was in 1990, that we see the beginning of the 'New Europe' which brought about a revolution, both externally and internally in the European Union. Ten nation States joined in the 'Big Bang' on 1<sup>st</sup> May, 2004. Bulgaria and Romania joined in 2007. Finally, Croatia made up the 28 present members in 2013. There are still some six formal applications outstanding. States do not act out of altruism, but out of self-interest - in a cold assessment what is to be gained and lost. The fact that there are so many candidate states speaks for itself.

**35.** All of this has been achieved by a pooling of sovereignty. But this, in turn, was achieved by the acceptance of a novel, even revolutionary, more accurately 'evolutionary' legal order, not mentioned in the Treaties. It started out in the jurisprudence of the European Economic Community established by the Rome Treaty. At one level, the "original intent" was simply to form a customs union. Attempts to create something more sophisticated, a 'proto-State', were stymied by General de Gaulle in the early and mid 1960s. He believed that the Community must remain a trade association of Member States only. He would not countenance the federalist ideals of Walter Hallstein, the man photographed here.

Hallstein is not a name now well known now in Ireland, but he was the first (German) President of the EEC Council.

**36.** He was highly influential in the EEC.'s founding and formation. He conceived the EEC as being something near a sovereign federal state in embryo. Almost approximating to a "United States of Europe" as a Cold War bulwark against the USSR.

**37.** Hallstein is an interesting man. It was he who insisted on a strong European Court of Justice in the negotiations for the Treaty of Paris in 1952 which the European Coal and Steel Community. We will return to him in one moment.

### **The Concept and its Context**

**38.** Everything, ideals, dreams, visions and realities included, must be looked at in context. The Europe of the 1940s was not one homogenised entity waiting for unity to happen.

**39.** In the 1830s De Tocqueville, in 'Democracy in America', commented that:

*"A certain uniformity of civilization is not less necessary to the durability of a confederation than a uniformity of interests in the States which compose it."*

To this he added:

*"One of the circumstances which most powerfully contribute to support the Federal Government in America is that the States have not only similar interests, a common origin, and a common tongue, but that they are also*

*arrived at the same stage of civilization; which almost always renders a union feasible. I do not know of any European nation how small ever it may be, which does not present less uniformity in its different provinces than the American people, which occupies a territory as extensive as one-half of Europe. The distance from the State of Maine to that of Georgia is reckoned at about one thousand miles; but the difference between the civilization of Maine and that of Georgia is slighter than the difference between the habits of Normandy and those of Brittany. Maine and Georgia, which are placed at the opposite extremities of a great empire, are consequently in the natural possession of more real inducements to form a confederation than Normandy and Brittany, which are only separated by a bridge."*

**49.** I should mention here that at the time he wrote that, de Tocqueville had not yet visited Ireland, and had not encountered the difference between Tipperary and Kilkenny, nor yet, Kerry and Donegal.

**50.** De Tocqueville recognised the extraordinary unifying effect of the law, courts, and in particular the Supreme Court in this “uniformly civilised” federation made up of states. In unity in the 1940s in a Europe where there was no unity of civilisation or culture or common tongue.

### **Walter Hallstein**

**51.** I want to look at one man in a little more detail. Walter Hallstein was a Law Professor in pre-war Germany. He fought in World War II and was made prisoner

in the United States. Germany was partitioned between east and west. In 1945 he was placed in a prisoner of War camp called Fort Getty. This was a form of “re-education camp” for non-nazi prisoners of war intended to lead West-Germany from its past.. There, his study of the United States constitution led him to conceive views, which were profoundly influential down to today. He recognised the importance, of a strong Supreme Court to confederations or federations. From the acorn of the discussions that Hallstein had there, a very great tree grew.

**52.** As we will see, “judge- made law” on economic and “customs issues”, gradually migrated and metamorphosed into a jurisprudence that consciously forwarded European political integration.

### **The legitimacy of law and courts.**

**53.** This process, I think, gained widespread acceptance, owing, first, to a relationship of trust created between the European Court and national courts, and second, because of the perceived neutral status of the law and legal decision-making as being a disinterested determination of the rights and wrongs of an issue, be it of private law or public law. Granted there were tensions between politicians and judges and between the supranational court and national courts. These tensions exist to the present day. However, by careful navigation, and what has been

termed, "*the force of logic*", the Court of Justice has maintained its legal legitimacy.

### **The Court's Reasoning and Interpretation Process**

**54.** While maintaining legitimacy the Court nonetheless adopted a 'teleological' or purposive analysis of the spirit and intent of European Treaties and European Instruments.

**55.** What does this mean? One can briefly summarise the interpretive process as being one where the Court was guided by what is termed textual and historical arguments. It looked at the system of which the law in question was a part. It looked at its purpose. It considered tradition, case law and literature. It assessed the cohesion of the legal system. It made choices under the heading of 'judicial discretion, evaluation and balancing'. It gave consideration to the choices practical and moral results. Issues such as economics and politics, ethics, sociology and psychology form part of the framework of reference.

### **Rationale for the Process**

**56.** The rationale for adopting this process was that the role of law and government in modern welfare societies had altered fundamentally. The State intervened in fields previously left to private self-regulation, with a corresponding need for increasing judicial activity. There was a belief that the Welfare State, by its nature, could not simply exercise a traditional 'libertarian' function; but, on the

contrary, had to ensure “active protection” for citizens. Such a policy involved planning for future development and affirming broadly formulated, social aims and principles, leaving the courts with the task of making these principles concrete, in real life cases. Self-evidently then, such legislation allowed for judicial creativity and a certain freedom of choice. In short, then, sometimes matters are “left to the judges”. In the Common Law tradition by contrast, in the eyes of the law, it is the function of the legislature to stipulate where there are exclusions and inclusions. Matters are not left to the judges in the same way.

**57.** On occasion, then, the Court of Justice moved from being what might be called in soccer terms a “sweeper”, to being an active “striker”. In so doing, the Court has developed an autonomous approach to Law so as to avoid the perception that it favours stronger Member States against weaker, or the financially powerful against those who are less powerful.

### **The Composition of the Union**

**58.** I want to talk a little about the present day E.U.

**59.** Membership of the Union now comprises unitary States, full Federations, Federacies, and States where there is a mixture of federacy and devolution. There are a number of overseas territories. Under Article 50 of the Treaty of the European Union, any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. There is an open question as to what happens when part of a territory of a Member State secedes. Some suggest

that internal enlargement is legally viable in the case of a Member State's, or dissolution or cessation, on occasion resulting States might be considered to be "successor States".

### **Connections**

**60.** If we look at the European Union website, there is a fascinating 'Venn Diagram', identifying the areas of total overlap, intersection and interconnection involving the Eurozone, the European Union Schengen Area, the European Economic Area, the EU Customs Union, the Council of Europe, as well as links with other free trade areas which have been created in imitation of the European Union. These can be found both to the east, and to the south in the African continent.

### **The Attributes of Sovereignty**

**61.** The economy of the European Union generates a GDP of between 13 and 14 trillion Euros or 18 trillion Dollars, just after the United States.

**62.** The European Union has its own flag, its own national anthem, its own National Day. It is a member of the World Trade Organisation and, relevantly for this paper is on the point of becoming a Member State of the Council of Europe. Yet it is not a state.

### **Competences**



63. It is now time to say a little about EU competences.

64. These are areas where, as a result of the successive Treaties, the Member States have given legislative competence to the EU. They can be divided into areas of exclusive competence, shared competence and supporting competence.

### **Exclusive Competence**

65. The *exclusive competence* area is governed by the EU and deals with free trade, competition, monetary policy and the conservation of marine and biological resources and common commercial policies. These are core, *economic* concerns.

### **Shared competence**

66. *Shared competence* is an area where Member States cannot exercise their competence where the Union has done so. This relates to the internal market, social policy in aspects defined in the Treaty, economic, social and territorial cohesion, agriculture and fisheries, generally, environment and consumer protection, transport, trans-European networks, energy, the area of freedom, security and justice, and common safety concerns in public health.

### **Co-ordinating Competence**

67. Then there are areas when the Union exercise of competence *shall not result in Member States being prevented from exercising their national powers*. These

include research, development cooperation and humanitarian aid. Here, the Union coordinates Member States' policies.

### **Supporting Competence**

68. Finally, there are areas of “*supporting competence*” where the Union carries out actions in support of or supplementing Member States' actions, such as in “human health, industry, culture, tourism, education, civil protection and administrative cooperation”.

69. You will see, then, that the areas of EU competence involve economic and financial matters which are perceived as the “hub”.

### **The Judges**

70. I want, now, to say a word about the jurisprudence of the Court of Justice. Because the Judges of the Court of Justice does not pronounce individual judgments, there is no “cult of personality”. Thus, the name of judges Delvaux, Rossi, Riese, Trabucchi, Lecourt and Donner do not receive the same recognition as justices of the United States Supreme Courts, whose names Law students love to conjure with. But the effect of the former has been far more radical on *our* lives.

### **How the Court helps shape the E.U.**

#### **a) Van Gend En Loos**

71. One would not think that a tariff imposed on the importation of urea-formaldehyde from West Germany to the Netherlands could be the beginning of a constitutional revolution. Yet it was.

72. The Treaty of Rome prohibited the imposition of new customs duties on imports and exports or any charges having equivalent effect. A company called Van Gend en Loos paid the tariff and then sought to retrieve the money in a national Court. That Court made a request for a preliminary ruling to the European Court of Justice, asking whether Article 12 of the Treaty of Rome conferred rights on the nationals of a Member State that could be enforced in national courts.

73. In its judgment, the Court of Justice gave expression to a wide and purposive interpretation of the Treaty of Rome. It will be remembered that we are dealing, here, with a prohibition on a new customs duty on urea formaldehyde. But the Court took the opportunity of identifying an entirely new internal legal order for the EEC. It pronounced:

*"The Community constitutes a new legal order of international law for the benefit a/which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore, not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty*

*imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community."*

(emphasis added)

**74.** What was happening here? The Court was effectively treating the international Treaty of Rome which created a relationship between Member States as conferring rights *on individuals* which could be obtained and vindicated in national courts. What was in contemplation then was not a club with rules about free trade, but a ‘moving vehicle’.

#### **b) Costa**

**75.** Van Gend en Loos was about customs tariffs. The next case was about an Italian citizen who objected to paying his electricity bill because he considered the electricity company had been nationalised, he said; contrary to European Law.

**76.** In *Costa v. Enel* {E.N.E.L.} in 1964, the Court went on to state:

*“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves. The transfer by the States from their domestic legal system to the Community legal system of the rights and*

*obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights."*

So we have, in summary, a new legal order of international law. Applied to individuals in order to create rights. This was done by this economic community with "legal personality", a capacity to be recognised on the international plane achieved by "limiting sovereignty" and transferring power. As we will see, there are processes of identification and definition we often find in national constitutions. Words count a lot in diplomacy. It is interesting that many British diplomats in the late 1960s spoke of "joining the Common Market". But the French spoke of "acceding to the Treaties". The difference is between joining a club and stepping onto a moving train or boat.

c) **Simmenthal**

77. Later, in *Simmenthal* [1978], the CCJ held that *a national Court must not apply conflicting national legislation*, even where that national law was adopted after joining the European Community.

d) **Von Colson**

78. In *Von Colson* [1984], the Court held that, *national legislation must be interpreted in the light of the wording and purpose of the Directive*.

e) **Factortame**

79. In *Factortame* [1990], the Court held that *national law should be set aside where it prevents the granting of interim relief in a dispute governed by EC law*.

f) **Marleasing**

**80.** In *Marleasing* [1990], the Court held *that national provisions must not make it practically impossible, or excessively difficult to exercise rights conferred by EC law.*

**81.** This sextet of judgments come from a time span where the Court adopted an extraordinarily dynamic approach in order to enhance the "reach" and "depth" of European Community law. It was achieved at a time of great prosperity.

**82.** What has all this to do with citizenship? Well, in fact, a lot. Citizens, citizenship and states, are connected, inextricably and not just by passports.

### **Citizenship Rights**

**83.** As history has evolved, citizenship now involves much more than simply a right to vote or a right to travel or a right to vote and thereby participate in the decision making of the State. Other rights, identified in our own Irish Constitution include Liberty, Equality, Freedom of Association, Free Expression, Freedom to practice Religion. These are Libertarian individualistic values.

**84.** Included in the Constitution are also other rights, no less important; the rights of the family, rights to education and rights to property. These have a more explicitly "social" dimension. Plus, there are socio-economic rights, although not cognisable directly in our courts. Our Constitution is, of course, a product of its time, but is interpreted as a living instrument. There is, of course, a huge range of other rights which citizens enjoy which are defined in law.

## **Citizenship in History; Greece and Rome – from politics to economics**

85. Where do we get the concept of citizenship from? The history of citizenship can be traced back to Greece, where, in the ancient Greek States, it was an honour, involving the right to vote and decision making. Thereafter, the concept developed significantly in the Roman Republic because it involved legal consequences, including judicial safeguards, and the ideal that no one person should remain in power for too long.

### **Cicero and Saint Paul**

86. Cicero first coined the phrase “*Civis Romanus Sum*” as an expressed form of legal entitlement. St. Paul relied on the same principle, demanding his right to be tried in Rome before Caesar rather than in Palestine.

### **Work and Trade**

87. Importantly, for our purposes, in the Middle Ages, the idea of citizenship developed and not only involved liberties, but other privileges. Certain commercial aspects came into understanding. Historically, the process evolved then, from the ‘political’ citizen to the economic citizen as a worker, maker or seller of goods or services. Interestingly centuries later, within the EEC, the process worked in reverse order. The rights of “workers” in the European Economic Community evolved into *citizens* of the European Union. This evolution took place between 1989 and 2010.

### **The New Europe**

88. Let us look at another image, that of the “new Europe”. The “new Europe” came into being in 1989. The fall of the Berlin Wall involved a re-conceptualisation of what “Europe” was about. It also involved the emergence of States, which had been subject to totalitarian government, and to totalitarian thinking, for a period of almost half a century. I pause here to observe, such habits of mind do not always disappear overnight. We can see evidence of this, even within the European Union to this day. Threats to judicial independence as exist in Hungary, Slovakia, and Romania. The nature of these threats shows that democratic rights may be under threat. It is for this reason that Judges internationally guard independence so carefully.

### **A New Approach - ‘The Constitution of Europe’**

89. What is important, from our point of view, however, is that the two decades following the fall of the Wall saw the commencement of a *direct* rather than oblique process. Citizen, became defined directly as being a *constitutional* entity. We see here the evolving idea of the EU *citizen*, much more than “*worker*” or “*consumer*”. The Treaty of Rome in 1957 dealt with the rights and duties of individuals as economic characters, or as “*workers*”, those involved in economic



activity. The right to freedom of movement and residence within Member States was introduced, first, in the context of "*workers rights*".

### **Citizenship and Sovereignty**

**90.** Recognising citizenship whether by birth or ethnicity, blood or marriage is historically a function of a state, zealously guarded. Defining and identifying citizenship right issues can be divisive. Why? Because the process goes directly to the question of state sovereignty. States, obviously, are composed of citizens. I want to preface my consideration of the concept of "citizenship" by a contrast between the jurisprudence of the Court of Justice and what is regarded as the most fateful decision of the United States Supreme Court, that is *Dred Scott v. Sandford* [1857J]. First Dred Scott.

### **Dred Scott**

**91.** Dred Scott, a former slave, lived at liberty for a number of years. Sanford, claiming to be his "owner", sought to bring him back into his custody. Dred Scott said he was a citizen of the state of Missouri, founded in 1821, and entitled, under the U.S. Constitution, to resort to a Federal Court to protect his right to liberty.

**92.** Sandford claimed that, as a descendant of an imported African slave, and by reason of that fact alone, Dred Scott could not be a citizen of any State. The United States Supreme Court held that neither Scott, nor any other person of African

descent, whether or not emancipated from slavery, could be a citizen of a State within the Union.

**93.** The grant of right of citizenship the Court pronounced would be to "*give to persons of the Negro race the right to enter every other state whenever they pleased .... to sojourn there as long as they pleased ... to go where they pleased . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon public affairs and to keep and carry arms wherever they went*". Even the fact that Dred Scott was residing in the free territory of what is now modern day Minnesota was not enough to make him a free man.

### **Consequences of limiting Federal Sovereignty**

**94.** Thus, on the basis of that decision the Federal Government was debarred from prohibiting slavery in the new territories on the Frontier. The judgment triggered an economic panic as to whether the entire West would suddenly become "slave territory". The East-West railroads collapsed. Several large banks failed. The decision was hailed only in the southern, slave owning states as a proper interpretation of "*states rights*" under the United States Constitution. The judgment was impugned everywhere else. It was seen as having triggered a series of events in the North that caused Civil War. Yet, Chief Justice Roger Taney believed he had done the "right thing" by disavowing federal jurisdiction on what he defended was a "state issue". This was a classical example of the law of

unforeseen consequences, where a court got the balance between form and substance wrong. In Europe, things turned out differently.

### **Citizen Christos Constantinides – from “worker” to “citizen”?**

**95.** I want to turn, now, to a Greek self-employed masseur and assistant hydro-therapist named Christos Constantinides. Under the Treaty of Rome, *workers* from one Member State were entitled to establish themselves, without discrimination to work, in another Member State. Mr. Constantinides lived and worked in Germany.

**96.** In July 1983, he married a German woman. He wanted to register his name on the marriage. The Registry Office adopted a series of different versions of his name. None met with his satisfaction. His surname was entered as Konstadinids. The registry office had obtained “translations” of his Greek Birth Certificate from a qualified translator applying a system of transliteration adopted by the International Organisation for Standardisation. Thus, Christos became Hrēstos Kōnstantinidēs with a horizontal bar written above the letter e in his first name and above the ‘o’ and the é in his surname. He objected.

**97.** The local German Court in Tübingen considered that, as a matter of German law the name had to be recorded as Hrēstos Kōnstantinidēs even though that spelling was intensely distasteful to him and did not even convey an accurate impression of the way his name was pronounced in Greek. The Court in Tübingen, however, decided to refer the matter to the Court of Justice.

**98.** The issue then was as to whether Christos, as a self-employed person, was permitted under the Treaty of Rome to allow his name to be registered contrary to his express wishes. Christos conducted his own case in Luxembourg, and I am pleased to say he won. *Constantinides v Stadt Altensteig* [1993] ECR I-01191.

**99.** The Court of Justice held that Article 52 of the Treaty was to be interpreted as meaning that it was contrary to that provision for him to be obliged, under the applicable national legislation to use, in pursuit of his occupation, a spelling of his name, whereby its pronunciation was modified and the resulting distortion exposed him to the risk that potential clients might confuse him with other persons.

**100.** You will notice, therefore, that this was, on its face a "worker" and "market" oriented decision. But this judgment came in 1992, after, but in the same year as the Treaty of Maastricht. That Treaty, for the first time, recognised the concept of "citizens" of the European Union, although the rights and duties of such citizens were not well defined there. In fact, the leading scholar Joseph Weiler commented that the provision at first, caused some "bemusement". But it soon got legs.

**101.** In *Constantinides*, Advocate General Francis Jacobs, in his opinion for the ECJ, expressed the view that a worker pursuing his trade or profession was entitled to the same living and working conditions of nationals of a host State and was:

*"In addition entitled to assume that, wherever he goes to earn his living in the European Community he will be treated in accordance with the common code of fundamental values in particular those laid down in the European Convention on Human Rights. In other words he is entitled to*

say '*Civis Europeus sum*' and to invoke that status in order to oppose any violation of his fundamental rights."

**102.** Here, he was echoing Cicero and then St. Paul, who both insisted on the same principle, the first as an advocate, the second as an accused.

**103.** Of course I am being selective in choosing this one case as a starting point in a very complex process. But you will notice two things immediately. Francis Jacobs couched his opinion in terms of *fundamental* values rather than *workers'* rights and he spoke of citizenship. To again use a Biblical metaphor, this was a classical example of "*casting one's bread upon the waters*" because, this was, I think, one of the first harbringers of the introduction of a human rights jurisprudence now to be found embodied in the Charter of Fundamental Rights and Freedoms adopted with Lisbon, and expressed in the jurisprudence of the Court of Justice. These together form part of our constitutional order. This connection of rights is of course clearly based on the relationship between *citizen* and the *state*.

**104.** What took shape was in many senses, a "Constitutionalisation of Europe". In general principles developed by the Court of Justice and in the European Court of Human Rights are now expressed in the Charter of Fundamental Rights and Freedoms. The Charter was as I say, adopted as a concomitant of Lisbon in 2009. The Charter contains a substantial range of guarantees for citizens, including values, sometimes expressed as "principles" which contain strong a social and economic dimension.

**105.** What we will see from 1992 onwards then is citizenship shaping “in reverse”. The concept evolves from an *economic* definition to a *political* definition. In many senses, Constantinides may be seen as the beginning of a second dynamic process where, again, the Court of Justice operated as an "engine" of European integration. On this occasion, this was done by broad interpretation of rights previously applicable to “*workers*” so as to effectively expand those rights and apply them to “*citizens*” without the need for economic activity as a prerequisite.

### **Martinez Sala**

**106.** Later, *Martinez Sala* [1997] the Court itself began to move from the economically derived definition of 'worker' first to the concept of strengthening the protection of "rights and interests of nationals" of Member States through the recognition of a 'citizenship' of the Union. This, of course, again reflected what was contained in Maastricht. Again, the process was gradual, recognizing, first, an economic right, that is, that the right of free movement but adding that “residence” within the European Community would mean little if immigrants to a new Member State faced discrimination.

### **Baumbast**

**107.** Five years later, in *Baumbast* [2002] the Court held that Article 18(1) EC was directly effective in holding that an EU citizen, who no longer enjoyed a right

of residence in a host Member State by reason of a status as a migrant worker, could, nonetheless, as a citizen of the EU, enjoy a *right of residence* by direct application of Article 18(1)EC. But the Court went further, holding in this judgment that European citizenship was the "*fundamental status*" of European nationals. I reiterate that phrase. The status was "'fundamental". It derived from citizenship of the European Union and not a Member State. Again, the Court's reasoning was based on the application of principles which had previously applied to the rights of *workers* and then applying these rights to *citizens*.

### **Chen**

**108.** In 2004, human rights law expressly entered the Court's jurisprudence in the case of Chen. Mr. and Mrs. Chen were "well advised" Chinese nationals, who so arranged their affairs so as to cause their daughter to be born in Belfast, therefore acquiring Irish nationality. On foot of this, the question arose whether, as a citizen of the European Union, not only the child, but the mother, be entitled to reside in the United Kingdom under Community law. The right of the child was based on Irish citizenship, that of the mother who remained a third country national, based on her status as her child's "primary carer". You will notice that the question of economic activity did not arise in that case at all.

**109.** For the next judgment, I ask you to remember Dred Scott, where it was held that an African American could not become an American citizen because his status was governed by State law. The whole decision rested on the United States

Supreme Court's preferment of 'States rights' over the reach of Federal law in the United States.

**Rottman: E.U. plus member state engagement.**

**110.** By contrast, in *Rottman*, (2010) the European Court of Justice specified that, in a situation where a citizen of the Union became stateless as a result of the withdrawal of his nationality by reason of fraud in his application, that citizen, nonetheless, came within the ambit of European Union law. Here EU law moved beyond national law in determining the question of citizenship. Why? Because the Court held that the person who lost citizenship *also* lost his status as a citizen of the Union as conferred by Article 20 of the Treaty of the Functioning of the European Union, which the Court held was intended to be the fundamental status of members of nationals of the Member States.

**111.** The court held that as a result of Germany's decision to withdraw nationality, the decision was amenable to judicial review to be carried out in the light of European Union law. Thus, a decision of this type was to be assessed by reference to whether the *public interest* was served, and whether the decision respected the principle of *proportionality*.

**112.** But by contrast to *Dred Scott*, the Court carefully avoided a direct challenge to member states' rights. It held that, in assessing the criteria, and applying the principle of proportionality, it would be for the national, German, court to take into consideration the potential consequences that such a decision might entail for the



person concerned, for his family, if any, and for the loss of rights inherent in citizenship of the Union. It was also for the *national* Court to establish whether the decision was justified in relation to the gravity of the offence committed, with regard to the elapse of time between naturalisation and the withdrawal decision, and whether it was possible for that person to recover his original (Austrian) nationality.

**113.** *Rottman* was the subject of very considerable scholarly controversy. Some critics suggested that the Court of Justice had trespassed on matters which previously lay entirely within the domain of Member States law, that is the power to determine who should, or should not be, a citizen of a Member State.

**114.** Other scholars suggested that the Court had lost an opportunity to pronounce, on an even more robust expression of the autonomous character of EU citizenship, thus halting the progress of “EU citizenship”.

**115.** The contrast with the *Dred Scott* case is, I think, very illuminating, even in light of the fact that Article 20 of the Treaty on the Functioning of the European Union stipulates that EU citizenship depends on national membership of an EU Member State.

**116.** *Dred Scott*, and the American Civil War was followed by the 14<sup>th</sup> Amendment to the U.S. Constitution which in 1868 provided that:

*"All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall*

*abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. "*

**117.** As we can see, therefore, *Rottman* carefully steered a middle course, avoiding the pitfalls of the *Dred Scott* decision. In *Dred Scott*, the U.S. Supreme Court held that states' rights could deprive a person of any right to United States citizenship.

**118.** By contrast in *Rottman*, the Court of Justice held that while a decision to withdraw nationality was amenable to judicial review, it was for the *national* Court to take into account and balance various factors relating to the proportionality and effect.

**119.** A very notable aspect of the judgment is that the Court's reference to the "responsibility of Member States". This effectively placed confidence in the Supreme Courts of Member States so that they would embrace their roles, not only as national courts, but as European courts, and balancing their roles as arbiters of national citizenship governed by national law, and, if appropriate, as arbiters of European citizenship to be determined by European law.

### **How Citizenship Has Further Evolved.**

**120.** Now, the vast majority of Member States nationals enjoy rights, not simply on the basis of their nationality, but on the basis of their status as Union citizens.

Many of these rights derive from rights, to be found under the Treaties to be treated equally, (echoes of competences here), "*in situations coming within the scope of EU law*"

**121.** Garret would have been especially pleased that there are now so many Irish EU legal scholars, many of them women; I will not name them all but it is quite a list. Many have won international recognition and are acknowledged as pre eminent in this field.

**122.** One, Dr. Siofra O'Leary, had pointed out that EU citizenship now involves much more than '*passports*', or the '*right to vote*' or the right of free movement from one member state to another and work there. She observes that, in order to understand the way in which EU citizenship has now evolved, it is necessary to look at the entire range of ECJ case law.

### **Citizenship Rights achieved by the Treaties and Case Law**

**123.** This law relates to *immigration* and *asylum*, the rights under *the European Arrest Warrant*, the *Fundamental European Freedoms*, *Taxation*, *Social Security*, *Data Protection*, *Electoral Rights*, *Vehicle registration*, *compensation for prisoners of war*, *student grants*, *welfare benefits*, *copyright*, *national rules of the registration of names*, *compensation for airline passengers* and *access to justice*, to name but a few.

**124.** Dr. O'Leary points out that following Lisbon and successive treaty amendments expanding the EU's powers, it is becoming more difficult to identify precisely where EU law now begins and ends, and consequently, where the

jurisdiction of the Court of Justice to examine fundamental rights issues starts and finishes.

### **Workers to Citizens: a paradigm shift.**

**125.** Clearly, then, we have travelled a long way from workers rights to citizens rights. The Court of Justice has played a more than significant role in this. The discussion also raises another very interesting point. Yet again, I think it is an indication of the Court of Justice engaging in subtle "paradigm shifting", because if you identify a range of *rights* for citizens, it follows that you are creating a series of relationships between those citizens as part of what the Greeks called a "demos" and in the process shaping a "telos", that is, a purpose or objective. In this case, the telos is the polity to which those citizens relate – in other words the E.U. itself.

**126.** In our common law tradition the identification and determination, and balancing of rights under law is, however, subject to *identified definite* functions, that is to say, in general, Justice powers reside with the judiciary, and economic and social powers lie with the Executive and the Oireachtas, although, on occasion, such as education, and perhaps, in other areas there is an overlap, requiring balancing, when fundamental constitutional rights have a financial consequence to the State. The Montesquieuian concept of separation of powers is well-entrenched within the Anglo-American tradition. Our courts reconcile these traditions, but with regard to our duties in European Law.

**127.** As I have described earlier, the Court of Justice itself moved to a situation where Union citizens were entitled to the same treatment, irrespective of their nationality, regardless of where they resided, insofar as the subject matter of their activity was within the scope of the Treaties, and insofar as it applied to the person and to the circumstances. This arose, notwithstanding that an applicant did not satisfy the conditions laid down by other Treaty Articles or Community legislation and could not, therefore, rely on Article 18 EC. I could describe other judgment such as Mangold where the Court was heavily criticised for finding German laws protecting the rights of older people to be discriminatory.

### **Citizenship can have Consequences**

**128.** To take one example, not one I think very well known in this country. In 2005, the Spanish Government decided to grant an amnesty for as many as 800,000 people residing in that State. This massive naturalisation for many South Americans of Spanish descent was arrived at in the realisation that many of the persons who were in a position to benefit from this procedure would not stay in Spain, but go to other Member States. Thus, Spain was criticised for having created Union citizens in the knowledge that many of them would become residents of other Union States. This caused some controversy.

### **A “separation of powers” under challenge?**

**129.** Having explored citizenship rights as a case study, I want to move now to two streams of thought discernable in the E.U. constitutional process over the last two decades. The first is the concept of the “European Model” differs somewhat from a traditional concept of individual liberty. We find ideas in the writing of Habermass and others evolving into the E.U. legal order. This involves treating the state or the EU as a protector of *social* rights.

**130.** One can also see a second aspect in the effort to further enhance democracy and human rights within the European Community and Union. These other concepts are to be found notably, I think, in Joseph Weiler’s writings. We find concrete expressions of these aims in the Treaties from 1992 onwards, in the Lisbon Treaty and the Charter of Fundamental Rights adopted in 2009.

**131.** Many thinkers in the 1990s wrote that it was necessary to go beyond a single market and for the EC to create an *ethos*, *ideology* and *political* culture for the EU. With that aim in mind, therefore, in the Treaties of Maastricht and Amsterdam the political leaders, especially Jacques Delors, perceived the need to increase the social policy balance so as to retain the support of workers.

**132.** This was to be achieved by the modernisation of the European social model through the building of an active welfare State to counteract unemployment, social exclusion and poverty. These noble aspirations inspired the delegates who were assembled from the Parliament, the Commission and other sources to draft the Charter. But, as a corollary of these “output legitimacy” concepts , they had to ask

the question: how was *input* legitimacy to be achieved, that is, a validation of decision making by participation and deliberation in decision making.

### **Steps to Enhance Democracy**

**133.** To achieve the latter in the Charter adopted in 2009 we find in the idea of the 'citizens initiative', an imaginative, part of that democratising process. Its potential use lies outside the scope this paper. Suffice it to say that it allows for issues to be brought before the European Parliament on the signature of one million citizens, drawn across a range of Member States. It would be an understatement to say that this proposal has huge potential.

**134.** The Charter gaurantess that the EU institutions, should, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. E.U. Institutions are to maintain an open, transparent and regular dialogue with representative associations in civil society. They are to carry out broad consultation with the parties concerned in order to ensure the Union's actions are coherent and transparent.

### **The Social Rights**

**135.** In addition to these new, essentially libertarian democratic rights, the Charter contained a number of social rights which are broadly framed. It is interesting for others, to speculate how these rights will be recognised, I will not.

To what extent will the Charter be construed as creating horizontal effects as well as vertical? Ultimately, will a person be able to sue another person or institution to enforce that right?

**136.** Here, there is a further issue. Because the negotiators from the United Kingdom, on the one hand, and predominantly France and Spain, on the other, could not agree how socio-economic values should be classed, many of these were therefore characterised to as "principles". The extent to which these principles are to be justiciable, that is enforceable through courts, was left to the Court of Justice.

**137.** Among these principles are the rights of the elderly (Article 25); the right to social integration of those with disabilities (Article 26); and environmental protection (Article 37). When one goes to the explanatory memorandum at the back of the Charter it is stated that some of these principles may contain elements of a right and of a principle. Thus, for example, gender equality (Article 23); family and professional life (Article 33); social security and social assistance (Article 34); all contain both elements.

**138.** If a Member State agency is implementing Union law, the principle will generally be cognoscible by a Court, and it may well be that the identification of principles will be followed to act as a positive encouragement or as a mode of interpreting equality rights. However whether an individual could take action in the absence of Union legislation or executive action is something that will evolve. This would appear to follow from the wording of Article 52 (5) of the Charter,



which is to the effect that legislative and Executive actions are cognisable only when the Union courts are interpreting such acts and ruling on their legality.

These issues are highly technical and complex. Yet what we are witnessing is undoubtedly a full expression of citizens rights.

### **Competence**

**139.** Many other issues have yet to be determined. There is, generally, the question as to who is competent to define EU competence. What will be the dividing line between rights, duties and principles? In what manner these will be made justiciable? Will these rights be given horizontal effect in the future? Will the rights, duties and principles so far as identified by the Court of Justice be given an autonomous meaning, that is, a meaning applicable throughout the European Union?

**140.** Some of these are difficult questions. What I am suggesting, in effect, is that, some very significant issues have been "left to the judges". There is of course the assumption that the rights, duties and principles will be adjudicated and determined in accordance with the treaties. But we are now dealing with a new environment where a context for such a decision making process is, I think, rather more difficult. Questions which touch on national resources are sensitive.

**141.** As Grainne de Burca has observed, the EU has not yet developed a 'thick' effective, democratic process. Social rights cases hinge on detail. The values which Member States would bring to bear on these issues could differ widely. The

financial effect on member states could be considerable. In *Defrenne v Sabena*, a case brought by Gabrielle Defreene, an air stewardess against Sabena, a Belgium airline, the Court of Justice held that the principle of equal pay embodied in the Treaty was to have horizontal effect.

**142.** Perhaps can envisage a time when possibly judges, perhaps ten or fifteen years away, may be asked to make determinations on cases such as those in South Africa, of a nature which, some now say courts are not always well placed to make. If this happens, questions may arise as to whether courts should make such decisions, as opposed to politicians. I do not say this will happen. But if it does some possible consequences might *possibly* follow. In the United States, the birthplace of so many of the values which are now part of our common law tradition, the judiciary are becoming increasingly “politicised” not by their own actions but by how they are identified by others.

**143.** Here, I am not simply speaking of the fact that the United States Supreme Court sometimes divides on “5 to 4” majorities, nor simply of the Congressional hearings where every past utterance of a candidate for a federal judgeship is parsed and analysed, lest he or she committed sins of *originalism* or *activism*, but of the corrosive effect of judges being “labelled”. The consequence is that some judges are now portrayed as political surrogates. This arises particularly at state level where judges frequently must stand for re-election.

**144.** I return to the article in the ‘*Financial Times*’ of the 7<sup>th</sup> August last. It is headed ‘Campaign Cash starting to count in Election of U.S. Judges’ and describes

the “*money fuelled partisan divide in U.S. politics spreading into battles to control the selection of judges for state courts in a development with potential to undermine trust in the legal system*”. This process is said to be now affecting even the 20 States where judges are picked by expert legal panels and later face a public vote.

**145.** In Tennessee, right-wing Conservatives were reported as trying to remove three of the five justices from the State's top Court because of their alleged liberal leanings. The newspaper report, \$2 million had already been spent in the Tennessee race, which had split the State's dominant Republican Party between supporters of the judges and the current system, and Conservatives who “want them gone”. The Tennessee removal campaign is being led by the Lieutenant Governor who has donated \$425,000 from his own campaign funds to oust the judges.

**146.** A spokesman for a Washington lobby group, not perhaps a supporter of the Governor is quoted as commenting; “*once you turn judges into politicians in black robes you are very rapidly moving away from having any justice system at all*”. The Tennessee Forum has also received outside donations by two billionaire industrialist brother, it was said, something “*rarely seen*” in judicial races until recently.

**147.** This process is not one-sided. The judges have raised \$1 million between them, most of their money coming from trial attorneys, leading to a spokeswoman for the radical conservative group to claim that “*this gives rise to a clear conflict of*

*interest*". I do not say that this process will happen in Ireland or Europe. I believe it will not. But it is a consequence we must guard against. I turn now to another interesting development.

### **The accession to the Council of Europe**

**148.** As the ECJ has become more "constitutionalised" in its deliberations, it has frequently but not always, referred to the ECt HR jurisprudence from the Strasbourg Court.

### **Accession**

**149.** The European Court of Justice presently is considering the legality of the Treaty of accession of the European Union to the Council of Europe. Part of this is an extremely complex draft "agreement" as to the manner in which the Luxembourg and Strasbourg Courts will operate in tandem, and respect each others' jurisprudence on human rights issues. The issue is still under consideration and I will not go into the merits of the question. But the long term consequences could be significant.

**150.** On occasion, judges from Member States of the Council of Europe, who are not in the EU, will have an input into judgments in their court which, in turn may become regarded as values which the ECJ will regard as a guide. Two legal concepts are relevant here. The judgments of the ECt HR (the Strasbourg Court)

refer on occasion to “*consensus among member states of the Council of Europe*,” and, what is termed the “*margin of appreciation*” as doctrines of interpretation.

**151.** The first, the consensus doctrine, operates on the premise that, as the Convention is a living document, interpretation must hinge on present day conditions by reference to a “European consensus” on the issue.

**152.** The second, the “margin of appreciation”, hinges on the idea that by reason of their contact with the “vital forces” of their own countries, domestic authorities are often better placed to interpret domestic law, and the ECt HR will thus accord a degree of latitude to domestic courts in balancing rights and interests. But the application of these doctrines can vary in intensity. I will not go into this in any great detail. But questions may arise such as: will human rights judgments by the ECJ which respect or recognise ECHR jurisprudence also apply the European law concepts of “autonomy binding on the entire Union”. Will the ECJ rely on the two doctrines of consensus and margin of appreciation?

### **Unforeseen Consequences of a Democracy**

**153.** Let me give one example as to why this may very interesting consequences. I suspect that some people in this audience would regard political advertising on television with ambivalence. The need to advertise means that politicians, and as we have just seen, judges, devote significant portions of their time to fundraising. There is the potential for political decision-making to become influenced by powerful economic interests at the expense of the demos.

**154.** And yet, as recently as last year, in a judgment called *ADI v. United Kindgom*, the United Kingdom, as defendants, barely defended an action brought by the ADI, an animals' defence organisation, challenging a ban. That on its face, might appear quite innocuous advertising. The slogan was "my mate's a primate"

**155.** The ECtHR has previously held such bans contrary to the convention provision of free speech. The Strasbourg Court previously also upheld a ban on TV advertisements in Ireland. But there may have been potential consequences and knock-on effects if the case had succeeded. Those knock-on effects might not just have been felt in the United Kingdom, but if 'Europeanised', and rendered part of the Union's constitutional order, might have changed the way in which democracy operates within the few Member States which do not allow such advertising (Ireland, Denmark and Sweden). I do not express any view on the question. I merely give this as an example of the interesting way matters can develop.

**156.** Perhaps the reasons for my concerns are now clearer. I am not arguing from a 'Conservative' or a 'Liberal' position, but rather, what I conceive as the necessity of maintaining the integrity and independence of judicial systems, and judicial process.

**157.** I want, now, to draw the threads together.

**158.** The Union was born in crisis. This had consequences for how it was created, expanded and how it evolved. The Court of Justice was a critical element in that process. It is not an exaggeration to say that without the Court the Union as we know it would not have occurred. The remarkable achievement of that Court was

brought about by the creation of an innovative form of jurisprudence and teleological judicial reasoning. The "telos" in question was the realisation of a certain idea of a European polity capable of flexibility, adaptation and expansion. We, in Ireland, have every reason to believe that we have been substantial net beneficiaries of membership. However, the constitutionalisation of Europe poses challenges as well as hopes of continues innovation. Among the challenges are these: how will the judges' role, evolve in the context of the E.U.

**159.** For the future, one can envisage that the interpretation and application of the Treaties and the Charter and constitution will raise issue of some complexity. Both the Court of Justice and national courts will continue to seek to span the reach between national and supranational interests.

**160.** I want, however, to finish with this general observations. Complexity is the enemy of understanding. Understanding is fundamental so that the demos, that is the people, are able sufficiently to engage with the institutions which govern them and adjudicate on questions for them. This is, I think, all the more important when some say national interests and national viewpoints have again become major determinants in EU decision-making, and where there is a perception, that political decision making and economic decisions do not always march hand-in-hand.

**161.** For judges and judiciaries the task is to serve the public; to decide cases without fear or favour and to interpret and explain the law and the values which underlie it. The complexities will be simplified, the difficulties overcome. That is the way law works.

