

**Good evening, President, Chancellor, Distinguished Guests, Ladies and Gentlemen. It is a very great honour to be invited to respond to this Garrett Fitzgerald Memorial Lecture, given by tonight's most distinguished speaker, a lecture which was rich and redolent of much experience and erudition. I only had the pleasure of meeting Garrett once. It was a glorious sunny day and he was Chancellor, as I received my honorary doctorate here in Maynooth University. It was one of those occasions when, once the work is done, you are at ease with the distinguished guest, and Garrett was that guest. He made it possible, with his gentle manner and his voice, since described as 'a warm burr of sound spiced with the sharp clack of Dublin vowels that spilled out words in an unstoppable cascade.' I remember too the ease with which he rejected the fine dining offered by Maynooth University, calling for a plate of champ which he enjoyed very much. The conversation was good and easy.**

**I had known of him for years, had watched his contribution, and was aware of the extent to which he had fashioned, made Irish politics in those critical years when he was Taoiseach. I came back from three years in Africa with my husband Declan in 1983. We returned to an Ireland suffering significantly under economic problems, to a North which was suffering after so many years of the Troubles, and the problems created by the IRA hunger strike in 1981, when ten men died in circumstances now so much the subject of controversy.**

**They were difficult days. Margaret Thatcher, then UK Prime Minister was adamant that she would never speak to terrorists, was determined to preserve the Union of Northern Ireland and Great Britain. She had survived the Brighton hotel bombing on 12 October 1984 at the Grand Hotel in Brighton, but five people were killed, including**

**Several more, including Margaret Tebbit—the wife of Norman Tebbit, who was then President of the Board of Trade—were left permanently disabled. I see Norman Tebbit very regularly in the House of Lords, a man of huge ability, who carries his suffering with dignity. For thirty years he has watched the pain and difficulties of his terribly disabled, but very brave wife.**

**There were 16,500 British soldiers in Northern Ireland the year before the Anglo Irish Agreement. 64 people died and 866 people were injured. It was a bad time. And yet it was in the context of significant economic and political difficulties in Ireland, and terrible tragedies in Northern Ireland that Garrett Fitzgerald was able to negotiate the Anglo Irish Agreement, an agreement which had the potential to bring to an end our Troubles, which continued for another 13 years and cost 869 more lives. He was in many ways a man ahead of his time. A great man, and it is right that the National University of Ireland honour him at this time with this lecture.**

**We are much privileged tonight to sit and listen to Mr Justice John Mac Menamin, one of only nine judges of the Irish Supreme Court. I have never heard him speak before, though we share many common interests. As a student he was a Council member of Free Legal Advice Centres, and was involved in running a centre in Ballyfermot. More humbly I worked In The Fulham Legal Advice Centre as a Law student at King's College, London. We share an interest in European Law which I taught in the University of Ulster for some 20 years.**

**He is very generous to Maynooth. He spoke here in March in the School of Law as an Honorary Adjunct Professor of Law about the deficiencies of law, national and international on international child abduction. We very much appreciate that connection. His title tonight was very challenging.**

**FROM NIGHTMARES AND DREAMS TO REALITIES: CITIZENS, JUDGES AND DEMOCRACY IN THE NEW EUROPE**

**He comes to this topic from long years of experience. That experience and his capacity for conceptualising and articulating the law has given us a rich evening. People often talk of judges as people who are remote from reality, not acquainted with what motivates and energises 'ordinary people. Yet that really**

is a very uninformed understanding of what it takes to become a judge. In his long and distinguished career Mr Justice Mac Menamin has held many roles, dealing primarily with judicial review matters since his appointment to the bench in 2004. He was appointed a member of the Special Criminal Court in 2009, and to the Supreme Court in 2012. His years as a judge cannot have been easy. He has had to determine matters inter alia relating to asylum seekers, to children in need of special care, to the treatment of prisoners, and the rights of unmarried fathers.

Let me give you a brief glimpse of that experience, which has formed the man and contributes to the lecture which you have heard tonight.

In one academic paper he told the story of a boy called Shay (not his real name) at 15 Shay found himself before the court – he had no contact with his father, he had been the victim of sexual abuse within the family, he had been assaulted by a neighbour, he suffered from an attachment disorder and had psychological and drug-related problems but he had never been convicted of an offence. He was placed in the centre in Finglas where he did well but once he left Finglas there was a difficulty as to where he could go. The right to liberty militated against him being detained - he could be placed in a unit with youths who had committed offences, but he had not been convicted of any offences; he could have been left free but there was a high risk of suicide; he could be placed in a

low security unit but there was a risk he would abscond. Thus the High Court had to come up with some kind of solution that would respect both Shay's right to liberty and his right to life

Ultimately Justice Mac Menamin took the unprecedented step of bringing all parties and agencies together to sit down and examine the problems faced in practice and the shortcomings in the system. There was an attempt to work through the issues. Ultimately, after balancing out all the issues, a decision was made to detain Shay in a high security unit under review. A pragmatic and realistic response to a situation faced by a boy who has suffered so much and who was in significant danger of falling through the cracks of the provision for children by Ireland.

Let me give you two more examples. One involves an 80-year-old who was convicted of multiple charges of rape and abuse of a young girl over many years. He was sentenced to serve one year of a six year sentence, the remaining five years being suspended, a sentence which the Court of Criminal Appeal, led by Mr justice Mac Menamin, upheld, finding that "the circumstances of this case have a number of very unattractive features'. He noted the accused man 'exercised a position of dominion over the complainant from a time she was at a very young age up to the time of majority'.

**However he said that there was no error of principle in the ‘carefully crafted’ decision of the sentencing judge, and that it is not the role of the court to assess whether it would have imposed the same sentence.**

**Other, matters involved the issue of forced marriages where young girls over the age of 16 can be forced by their families to marry someone whom they neither know nor love, and a challenge by a father to the legality of the removal of his three children to the UK by his former partner, which was rejected following the decision of the Supreme Court that there was no institution in Ireland of a “de facto family” and did not have guardianship status over the child.**

**Not easy issues.**

**It is in dealing in a fair and just way with such cases, applying the law as passed by the Dail, and as it has evolved over the centuries, interpreting and developing it where there are gaps left by the established law, that judges come to a very special understanding of society and of the operation of the Rule of Law in a way which can enable democracy.**

**And it was of CITIZENS, JUDGES AND DEMOCRACY IN THE NEW EUROPE that Mr Justice Mac Menamin spoke tonight.**

**It was an elegant, fascinating analysis of the development of European Law, of its role in the emergence not just of the application of workers' rights across the countries of the European Union, but also of the emergence of new concepts of citizenship and the wider social and political rights which have been agreed. It incorporated discussion of citizenship, the role of judges, both in Ireland and in the EU, and of the operation and challenges of democracy.**

**He talked with eloquence of the things which happened in Europe between 1939 and 1945, which gave rise to the creation of the three European Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom), which merged to form the European Communities under the Treaty of Maastricht in 1993.**

**He talked of his visit to Auschwitz-Birkenau in 2005, 61 years after the war, when by chance his mobile phone rang and answering it he found himself speaking again to Garrett Fitzgerald. "I could hear the reaction in his voice even though he was speaking from Ireland a thousand miles away." It was with photographs of Auschwitz that Mr Justice Mac Menamin started his lecture. They provided, he said, the context for what followed. It seems to me that as we**

**contemplate the situation in the Middle East today we should remember those pictures.**

**I visited Auschwitz a few years ago. It is in two parts, Auschwitz and Birkenau. I walked around Auschwitz and experienced the horror of the holocaust, of the cruel loss of so many men, women and children, killed because of their race, ethnicity, religion, but most of all because they were Jews. It was terrible. There were the hordes of visitors, some chattering heedlessly as they walked the corridors, walls lined with the photographs of the men who died and saw the braids, the hair, the spectacles, the little suitcases, stolen from those who suffered as a consequence of the Second World War. I could not visit Birkenau. It was just too terrible.**

**And yet it was the suffering of these people which gave rise to the creation of the European communities and of all that Mr Justice Mac Menamin has described in his powerful lecture. It has undoubtedly created a very different Europe, and as he said has brought us to a place where we must stop, contemplate where we are, and 'work out how the appropriate separation of powers and competences can be achieved in a way that the peoples of Europe can intuitively understand and trust.'**



**There is no doubt that trust and understanding are critical foundations to the operation of the Rule of Law in any place. Building that trust and understanding in the law, the judiciary, its enforcement is never an easy task, and trust, as we have seen here in Ireland and elsewhere is easily lost and much harder to re-establish.**

**It is regrettable that in the UK there has been a significant loss of trust in the European Union and in the European Court of Human Rights. There are calls for us to repeal our Human Rights Act, to refuse to be bound by the convention or its court and to have our own Bill of Rights. Those arguments are causing ongoing serious political difficulties. One after another leading judges have spoken on the issues, asking what should be the balance between Common Law and European Human Rights Law? Government is struggling with the political management of the issues and yet if we do not abide by the ECHR we cannot continue in our membership of the EU.**

**I sit on the House of Lords EU Sub-Committees for Justice, Institutions and Consumer Protection which co-produced a report to inform the UK's decision as to whether to Opt out under Protocol 36 of the Treaty of Lisbon which allowed the UK Government to decide, by 31 May 2014, whether the UK should continue to be bound by approximately 130 police and criminal justice (PCJ) measures, which would all become subject to the jurisdiction of the Court of**

**Justice of the European Union and the European Commission's enforcement powers, or if it should exercise its right to opt-out of them all.**

**We took a wide range of evidence and there was very little support for the UK exercising its opt-out. The opt out had ramifications for other States of the Union, including Ireland where, as you all know we share a common land border. Modern techniques and strategies to fight international crime and terrorism in Europe are rooted in the 130 Policing and criminal justice measures.**

**The evidence was very clear that if, now when, the UK's opt out becomes effective the ability to exercise European Arrest Warrants, to avail of the services of Europol and Eurojust and all the other measures will be lost. The UK government was resolute that it would abandon all but 35 of the 130 measures, seeking only to gain re-admission to the 35.**

**Across our common border, we know that there is a level of international serious crime. We know also that much of that crime has its roots in other EU nations. We know that the services of Europol as a pan European intelligence resource are vital. The UK government gave evidence to us that "Europol currently provides support in over 280 operations involving UK law enforcement". Eurojust provides judicial co-ordination meetings, judicial co-**

**operation agreements with third countries, office facilities, the facilitation of mutual legal assistance agreements, the acceleration and execution of European arrest warrants and the funding of joint investigation teams with the accompanying translation costs. As the Government have recognised, all of these are of considerable value to the United Kingdom. They cost the UK only £360,000 a year and they mean that states can act simultaneously across borders to effect arrests, search and seizure when their authorities are conducting major criminal investigations.**

**As we contemplate the fight against crime and terrorism across borders, we have good cause to ensure that co-operative arrangements are as comprehensive as possible, while still retaining and maintaining our national independence. In Ireland not very long ago, a massive bomb was intercepted by the Irish police. It was destined for the north. It would have caused carnage. We have increasing levels of evidence of more militant views in many communities, with the creation of many murals glorifying what they called the armed struggle. We have to consider the concerns we know exist north and South about the possible effects of the current opt-out proposals on the protection of security in these islands. We have also to consider the ramifications of the interdependence between organised crime and terrorism in the context of all this.**

**Without that law the UK will have to enter into bilateral arrangements with each state, including Ireland, to exercise for example an international arrest warrant. Ireland, I think, repealed its legislation on international arrests, so new legislation will have to be passed unless the capacity to make arrests across our common border is not be lost.**

**And all that because the UK does not want these policing and criminal justice measures to be subject to the jurisdiction of the Court of Justice of the European Union. And why the fear of the judges of the European Court. The arguments are that there has been too much judicial activism, and that the court has extended the reach of its competences and developed citizen rights in a way which is indigestible.**

**It is the fear of how judges will exercise their powers and the new nightmares in relation to loss of sovereignty which have informed this debate. There has been an erosion of trust in the European Union, and there has built a momentum for significant change. It remains to be seen how this situation will play itself out. For the present the UK must seek read mission to the 35 areas in which it wishes to remain active and is prepared to be subject to the Court of Justice.**

**This is just one of the realities of one series of political and constitutional issues in the European Union today, and it is to the issue of the role of the judge, and**

**the interface between the activities of legislators and those of the judiciary, the lacunae which may exist between them in a democracy, that Mr Justice Mac Menamin addressed his arguments tonight.**

**In a powerful series of photographs Mr Justice Mac Menamin took us on a journey from the nightmares of WW 11 to present day Europe, present day Ireland. A journey through the development of the EU as a consequence of the jurisprudence of the European Court. It was a journey in which he provided rich evidence of the scope of the competences of the EU, and of the sometimes difficult relationship between EU Law, the jurisprudence of the European Court of Human Rights and national Law**

**He talked of the case of Van Gend en Loos, the tariff on formaldehyde paid and then reclaimed by a company on the grounds that it was in breach of the Treaty of Rome which prohibited new customs duties, which led the Court of Justice to state that the Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights. thus construing the Treaty as conferring rights on individuals, rather than just relationships between and obligations on Member States, and of the dramatic series of judgments which followed.**

**He talked of the Irish Constitution which identifies the sovereign democratic nature of the state, guarantees judicial independence and deals with the rights and duties of citizens: Liberty, equality, freedom of association. The rights of the family, to education, to property.**

**He took us on a journey through other national constitutions, to South Africa and its socioeconomic rights giving rise to cases about shelter for children and anti retro viral drugs. To the U.S. and the famous Dredd Scott case in 1857 in which the U.S. Supreme Court ruled that no African could be a citizen of a State within the union, and then back to the Treaty of Rome and its development from a recognition of workers' rights, deriving from the EEC Treaty to fundamental rights 'Civis Europeus sum.'**

**European Law now covers a vast range of matters: welfare benefits, student fees, European Arrest Warrants, data protection, electoral rights and so the list goes on and there are continual suggestions as to how it should be extended emanating from the European Commission.**

**There has been another important change which has the potential significantly to affect the stability of the EU as we know it today. I suspect that most citizens are unaware of it. It is the adoption of the Charter of Fundamental Rights of the EU, Yet another Charter of Rights to join the European Convention on**

**Human Rights, the International Covenant on Human Rights, the various Conventions on Civil and Political Rights.**

**In typical political negotiations, as Mr Justice Mac Menamin told us, the issue of whether the socio-economic principles enshrined in the Fundamental Charter, such as the rights of the elderly, of social integration of those with disabilities, social security, are to be justiciable, enforceable through the courts, was left to the Court of Justice.**

**Socio economic rights by their very nature give rise to significant costs to governments, there will inevitably be a further diminution of national sovereignty as these issues are presented to the European Court. At a time of economic difficulty across the world there may be a reluctance to engage in more libertarian social laws, particularly when those laws apply across so many countries.**

**And all this gives rise to three questions Mr Justice Mac Menamin told us,**

**Who is competent to define EU competence?**

**What is the dividing line between rights, duties and principles?**

**How will these rights be made justiciable?**

**What will be the unforeseen consequences? Etc**

**We have moved from the European Community dreamt of and formed by Schumann, Monet and Spinelli to something which is so totally different that its impact, reach and significance have now assumed characteristics way beyond anything of which those men talked in the 1940s.**

**What will be the consequences of the tensions between the national and supranational interest to which Mr Justice Mac Menamin refers? How can the European Court continue to develop its role?**

**How will the judges of the Court of Justice of the European Union, formed in such different jurisdictions, skilled in different legal systems, the product of very different political regimes which have a significant impact on their capacity to function, respond? Our judges emerge through a common law system, spending years at the bar, before moving to the bench and maybe then to the European Court, but in some countries being a judge is a career choice made at the beginning of a career, meaning that the judge may have no experience of the complexities and intricacies of litigation, particularly litigation across borders.**

**Mr Justice Mac Menamin has again raised very important questions about relationships and processes of law which will impact on governments for decades to come. The potential is enormous. The challenges are significant.**



**And at the root of it all is that complex relationship between legislators and the judiciary, where legislators pass laws through a process of accommodation of differing viewpoints, often leaving the most difficult questions, which may well have been debated as the legislation went through whatever parliamentary process was involved, to be determined by judges who have to deal with the set of facts and the law as it is presented to them and must make difficult decisions where there are gaps between the dictates of the law and the need for justice.**

**As he said both the Court of Justice and national courts will continue to seek to span the reach between national and supranational interests. The challenge for the judiciary is to maintain the current high level of trust, but as he concluded, the price for that is eternal vigilance and self-scrutiny. And the institutions of Europe must reengage with the peoples of Europe.**

**I think we are much indebted to Mr Justice Mac Menamin for his scholarly and erudite articulation of these complex issues. He has again presented many challenges. What will be the wider response?**

**Thank you for listening to me.**

**Baroness Nuala O'Loan DBE MRJA**