The ESM treaty? But we have already voted on it.

I would like to thank Frank and the People's Movement for the invitation to give this lecture tonight on the ESM Treaty.

To give the Raymond Crotty Memorial Lecture is a great honour, given the title of the lecture and the case that I have been involved in. If it was not for Raymond Crotty's action in 1987 it would not have been possible for me to mount an action in 2012 at all. Throughout the journey this year I have grown to admire Raymond for his vision and the Irish Constitution for the document it is, affirming that the state derives all its power from the people.

Crotty v. An Taoiseach was a landmark decision of the Irish Supreme Court which found that Ireland could not ratify the Single European Act unless the Irish Constitution was first changed to permit its ratification. The case directly led to the referendum on the Single European Act and established that significant changes to European Union treaties required an amendment to the Irish constitution – always done by means of a referendum – before they could be ratified by Ireland.

As Justice Walsh said: The question therefore is whether the State in attempting to ratify this Treaty is endeavoring to act free from the restraints of the Constitution.

Elsewhere, Crotty maintained that Ireland's status as an ex-colony made it unsuited for membership of a bloc of nations that included former colonial power. In 1962, in the early stages of the public debate on whether Ireland should join the EEC, Crotty expressed his concerns about the possible loss of Ireland's national identity within what he termed a "European super state". In a reference to the country's troubled history, he suggested that it was: "all the more remarkable that a people renowned for their centuries-long struggle for independence should be now ready to surrender a large measure of this independence".

In 1974 Crotty wrote: "Recent developments highlight the remarkable contrast which has existed for almost a century-and-a-half between the fortunes of the Irish banking system and of Irish society. Few banking systems *in the world have enjoyed such protracted, unbroken prosperity as the Irish banking system. By contrast no country in the world can match Ireland's record of political and social decay-with its population less than half what it was 130 years ago, and its workforce 30% less than it was when the State was founded fifty years ago. The Irish banking system has grown rich and powerful as Irish society has shrunk and decayed"*.

He went on to say "*that is of less consequence to the poweraholic establishment than that they should remain in charge. Hence their insistence that there is no alternative to the present course though it must end in disaster."* Those were prophetic words indeed and are totally relevant today on a European scale.

The title of tonight's lecture comes from an interview I did on Morning Ireland on RTE Radio One on the morning of the oral hearing in my case at the ECJ on October 23rd. I was astounded at the start of the interview to be asked 'we have already voted on this treaty why are you challenging it in the courts'. I think it shows how little is known about EU matters and how little engagement there is with the EU at all in Ireland. You would think that our national broadcaster would be fully briefed on the issues involved in the case and

particularly when I spoke to a researcher for the programme for half an hour the night before. But maybe I did not explain myself properly.

People could be forgiven for not knowing anything about the case I suppose given the almost complete lack of coverage here in Ireland on it. As a politician that is really bad for me that there has been no real coverage of the case here. I have always wanted to maximise the publicity… I think I could have taken different routes to get publicity if that is what I wanted.

I certainly could have engaged in any amount of antics in the Dail chamber that would have given me plenty of exposure and would not have exposed me to the risks involved in taking this case.

As you know the Supreme Court ruled that the ESM did not breach the Crotty principals, impacting on sovereignty and referred three questions to the ECJ for preliminary ruling. The three questions were a great victory in themselves because they meant that the ESM would be tested in the highest court in the EU.

Most of you here are familiar with the questions but still I would like to take some of my time talking about the impact of the ESM and the questions. They are:

- Is the ESM Treaty compatible with the EU Treaties?
- Is the amendment of Article 136 of the TFEU, intended to facilitate the ESM, lawful?
- Can Eurozone member states join the ESM before the Article 136 amendment is in force?

The first question is the really important one in the case of the ESM and what it means for the EU and Ireland.

The ESM has been established as a new international institution outside the EU but with the express aim of 'providing financial assistance to safeguard the stability of the Eurozone as a whole'. It will do this through a number of measures from lending money directly to member state governments to recapitalise banks, buying bonds in the secondary market and or guarantee loans for member states. The main criterion is if funding is 'necessary for the stability of the Eurozone as a whole'. This is introducing a new concept into Irish law as it applies in the EU.

Justice Hardiman in his dissenting judgement from the Supreme Court summed it up well when he said 'it is perfectly clear to me that this new criterion under the guidance of which Ireland commits itself to act is quite different from either of the existing criteria - the common good of the Irish people or the aims of the European Union. In constitutional terms it is a *tertium quid*, a hitherto unknown third criterion. It may be worth changing from the existing criteria for the exercise of governmental power to the new one, which envisages the interests of a part only and by no means the whole of the European Union', for this reason in his view we should have been asked in a referendum to ratify this treaty.

I don't think that a referendum here would have corrected the faults in the ESM, it may have corrected Irish law but not union law.

I believe that the ESM Treaty constitutes a fundamental alteration and subversion of the architecture governing Economic and Monetary Union. Such a fundamental alteration could only be carried out *following* an appropriate amendment to the Union Treaties. Seeking to effect a fundamental treaty amendment using a simplified revision procedure, and then

seeking to rely on that amendment even prior to its entry into force, is inconsistent with a Union that claims to be founded on the Rule of Law.

The ESM Treaty entails the assumption by certain Member States of obligations that are incompatible with the Union Treaties and that no Member State can give effect to the ESM Treaty without breaching its obligations under the Union Treaties. I believe that Union law precludes Member States from collectively stepping outside the Union legal order in order to carry out tasks that fall within the scope of Union law and *which are expressly prohibited by the Union Treaties*.

In establishing the ESM the Eurozone has set a dangerous precedent that is harmful to the integrity of the Union legal order.

In particular, they:

- undermine the constitutional framework of the European Union and introduce uncertainty into the conceptual boundaries of the Union legal order and that of its Member States;
- encroach upon the competences of Union institutions, in particular upon the exclusive role of the European Central Bank in the definition and implementation of monetary policy and upon the Union's competence in the field of economic policy;
- undermine the principle of equality by bringing about an inconsistent application of Union law as the Treaty prohibition on bail-outs would only apply to Member States outside the euro zone;
- result in the establishment of an international autonomous body that is not accountable in the manner it would be if it were established lawfully within the Union legal order. The ESM Treaty creates an entity conferred with powers which would affect matters regulated by the Union Treaties, but which would largely be beyond the reach of Union law including the Charter of Fundamental Rights.

It appears that the European Council and the Member States appreciated that the ESM would entail the assumption of obligations in fundamental conflict with Economic and Monetary Union as enshrined in the Treaties. The Council and the Member States, it appears, considered that the ESM could not therefore be established within the EU under the current Treaty framework. Instead of making an appropriate amendment to the Union Treaties, the European Council Decision was adopted and it was decided to establish the ESM as a new international financial institution outside the Union and under a new international treaty.

The European Parliament appears to have had concerns that a permanent stability mechanism ought to have been established within the framework of the European Union. In a resolution in the parliament on March 23rd 2011 they expressed regret that the Council did not explore all the possibilities contained in the Treaties to establish a stability mechanism. This approach was also favoured by the ECB, they noted that they had decided on an intergovernmental rather than a union mechanism and concluded that it should be brought into the union as soon as possible.

The ESM financial institution should be established as a Union institution, serving the eurozone States only (like the ECB). The institution should be accountable to the Court of Justice, to the ECB and to the European Parliament. The institution should be subject to the

oversight of the Commission in its role as guardian of the Treaties. This is not what has happened.

It seems that the end justifies the means because the supposed urgency of the challenges facing the eurozone warranted or justified a violation of Union law, or the fundamental revision of a Union Treaty using an inappropriate simplified revision procedure. Any such argument is unconvincing in light of the fact that an amendment to the TFEU was proposed as far back as October 2010. There would have been sufficient and indeed ample time to effect an appropriate Treaty amendment using the correct revision procedure, in a manner that conformed to the constitutional principles underpinning the Union legal order and that was consistent with respect for democracy and the Rule of Law.

It is in times of crisis that the Union's commitment to its founding values is tested and it is in these times that such commitment is needed most. The European Union derives its political legitimacy from its commitment and adherence to its founding values. It is these values that are at issue in my case.

It was very interesting to see member states and the institutions twist and turn on this point with differing interpretations of what the 'no bailout clause' means with some of them saying it actually means that states cannot guarantee others liabilities but this is not the same as taking them on. In the various submissions in support of the ESM made by ten member states, the commission, council and the parliament they engaged in any amount of wiggling to show how the ESM is ok, they ranged from:

- That the so-called 'no bail-out provision' does not preclude bail-outs;
- That the ESM 'bail-out fund' is not a 'bail-out fund' at all;
- That Member States can hide behind the ESM as it is an independent entity – though it is entirely controlled by the Member States;
- That the ESM is regulated by public international law – yet they claim it forms part of the subject matter of the Union Treaties;
- That the ESM is not concerned with monetary policy – yet its task is to save the euro;
- That the ESM falls outside the economic competence of the Union – yet it is directly concerned with the single currency and the coordination of economic policy;
- That there is no requirement to co-ordinate financial assistance within the Union – yet that is precisely what is required under Article 5(1) TFEU;
- That the establishment of a bail-out fund 'requires' a Treaty amendment – yet the ESM may operate before the amendment takes effect.

These contortions led John Rogers in the ECJ to observe that 'we cannot help but empathise with Alice in her Wonderland when she was told by Humpty Dumpty that '*when I use a word it means just what I choose it to mean – neither more nor less*''.

Germany suggested the prohibition on bail-outs may be interpreted *narrowly* in '*certain exceptional cases which were not foreseeable when the provision was adopted*.'

However, if the Union respects the Rule of law, it cannot interpret a prohibition to mean one thing one day and it's opposite the next. EMU is enshrined in the Treaties in specific terms adopted by the Peoples of Europe and by referendum in Ireland and Denmark specifically. It is very interesting to sit and see so called democratic states with constitutions say that because we did not foresee this eventuality when we drafted the treaty we should now be able to bend or break the treaty to mean what we now want it to mean.

Article 119 TFEU concerns coordination of economic policy within EMU, and repeatedly and expressly refers to the Member States and the Union. It does not envisage Member States acting inter-governmentally outside the Union. It provides that 'the activities of the Member States and the Union shall include … the adoption of an economic policy which is based on the close coordination of Member States' economic policies …' These activities – of the Member States *and* the Union – shall include the single currency, and the definition and conduct of a single monetary policy.

It was never envisaged that measures to safeguard the euro should operate outside the Union or involve institutions set up by the Member States in parallel to the ECB. The requirement in Article 13(3) of the ESM Treaty that there be compliance with EU economic policy cannot change the legal reality that to operate a stability mechanism outside the Union would be contrary to the economic coordinating competences of the Union.

The ESM Treaty entails certain EU Member States circumventing prohibitions contained in the EU Treaties by using an Institution over which they exercise decisive control in a manner incompatible with the Union Treaties and in breach of the duty of sincere cooperation enshrined in Article 4(3) TEU. It is settled case-law that Member States may not "either directly or through the intermediary of organizations set up or recognized by them, authorize or tolerate any exemption from Union law".

The ESM Treaty confers new competences on Union Institutions and entails performance by them of tasks that are incompatible with their functions as defined in the EU Treaties and exceed the limits provided for in Article 13 TEU. Union Institutions may not be co-opted to perform tasks outside the Union legal order which are incompatible with the EU Treaties. Given that the Treaties now provide special procedures for the use of enhanced co-operation and the associated use of Union Institutions, it is clear that it is these procedures which must be followed if Member States are to use Union Institutions in furtherance of the objectives enshrined in the Union Treaties.

If the provision of financial assistance is considered compatible with the Treaties, then it must take place within the Union.

Placing the proposed ESM outside the Union subverts the very quality of the Union. I am concerned that a body outside the Union, and not subject to Union law, could take measures in connection with the Union, and dictate conditions that will be imposed on Member States, in matters so fundamental and integral to the Union as its economy and its currency.

The ESM would operate outside the reach of the democratic and constitutional limitations imposed by EU law. It would be beyond the Union and its Citizens, beyond the Charter of Fundamental Rights, and beyond full judicial scrutiny. It would be neither transparent nor accountable.

Surely for a union built on democracy, the rule of law should be paramount?

The amendment of article 136 of the TFEU is the legal basis of the ESM treaty although there is varying argument on that in the ECJ as well.

The European Council in its Decision of 25 March 2011 considered the establishment of a permanent stability mechanism to require a Treaty change.

The ESM Institution itself claimed to be founded on Article 136(3). The second recital of the ESM Treaty refers to Article 136(3) TFEU. From the 'Frequently Asked Questions' section of the ESM's own website, we learn that the legal basis of the ESM is that:

> *the European Council agreed that the Treaty on the Functioning of the European Union (TFEU) should be amended in order for a permanent mechanism - the European Stability Mechanism - to be established by the Member States whose currency is the euro to safeguard the financial stability of the euro area as a whole. The amendment (in Article 136 of the Treaty) was adopted by the European Council on 25 March 2011.*

Thus on its own explanation, the ESM plainly has no legal basis until the Council Decision of 25 March 2011 crystallises as a Treaty amendment and enters into force. Currently, therefore, there is no legal basis for the ESM.

Reliance on a legislative provision before it has entered into force is not compatible with a Union based on the Rule of Law.

The TFEU sets out two procedures to affect Treaty change – an ordinary procedure and a simplified procedure. The ordinary procedure should be the primary means of Treaty change – the use of a simplified procedure is a derogation from the general rule, and its scope should be interpreted strictly.

Our shared history reveals good reasons to prevent over-reliance on simplified procedures for amending laws of a constitutional character. In Ireland, political office-holders routinely over-rode our first Constitution between 1922 and 1937, as they could change its provisions at will. Ireland's experience is by no means unique. In Hungary at the minute the government routinely amends the constitution by using the 65% majority that it holds in parliament.

The submissions of the member states and institutions shared common characteristics: a consistent and concerted attempt to stretch language and reason well beyond their comfortable limits, to reinterpret and subvert obvious truths, to use form as a shelter against substance, and to engage in legal and conceptual contradictions.

In urging the Court to endorse these distortions and contradictions, the Member States invoked considerations that are essentially political in character.

However, such an approach would be at odds with the role of the ECJ, as a Court of Law.

The Court is mandated to ensure the integrity of the constitutional order of the European Union. Market and political exigencies should not impede the Court's proper interpretation of the Treaties, and the preservation of the rule of law under the Treaties.

It is my case that the objective of saving the euro can be secured without violating the constitutional foundations of the Union – particularly the allocation of competences.

If, on the one hand, bail-outs are found to be incompatible with the Union legal order, then there should be an appropriate amendment of the Treaties – carried out using an appropriate procedure.

If, on the other hand, bail-outs are found to be compatible with Union law, then they should take place *within* the Union. In this event, the Court could consider delaying the temporal effect of its ruling to permit Member States to provide a financial assistance mechanism

fully integrated in the Union legal order. This action would remedy concerns expressed by the European Parliament; it would advance an objective identified by the European Central Bank; and it would ensure that the integrity of the Union legal order is preserved.

It would also preserve the constitutional nature of the treaties of the European Union.

In Ireland, our constitution sets clearly the boundaries on what action can be taken.

How often have we heard the government say that they are restricted by what they can do because the constitution prohibits it?

Just look at the debate in recent weeks around the exorbitant pensions of the bankers, how often have we heard government representatives say that the pensions are property rights and it would be unconstitutional to try and cut them. They never say that the constitution is a barrier to cutting them but we will examine how on this issue the constitution can be amended to ensure that the will of the people will be met.

If the government attempted what the European Council are attempting with the ESM the courts could vindicate the rights of people and make sure that the constitution is respected. That is exactly what I am trying to achieve on a European level and the ECJ is the equivalent of the Supreme Court here. In many ways we are in the position of trying to save the union and protect the very treaties that I would have campaigned against at every opportunity.

It is an interesting aside when we have a constitutional convention about to start deliberations here that it is exactly the constitution and the actions of Raymond Crotty in 1986 that has meant that me, a citizen can challenge the EU. This is the only country in the EU that it could happen. Could we lose that essential value out of our constitution in this convention?

It is really only someone that is Euro critical that could have taken this case, someone whose first inclination is to say that what they are doing here is not for the good of the people. Europhiles have been saying 'get this done' saving the Euro is the priority, nothing else matters. This is the attitude that leads to disaster and will ultimately lead to the break-up of the Union.

Already there is discussion of a 'parliament within a parliament'. There are calls for the Eurozone MEPs to sit separately within the parliament and talk about issues that apply to the Eurozone. As the ESM beds in, if the ECJ rules in its favour, there is envisaged a deeper and deeper co-ordination of economic and monetary policy within the Eurozone and the founding reasons of the EU that we have all been force fed will be undermined. Although the question is whether these have been the founding reasons or was a federal super state the real agenda all along. Was Claude Monet's comment on the creation of the coal and steel association in 1956 that 'the first steps to a federal Europe' have been taken going to come true?

It seems to me that this is the outcome that is desired by those in charge and calling the shots in Europe. Despite Enda Kenny expressly ruling out a Federal Europe in the Dail during Leaders Questions a few months ago it is still very much the agenda. But surely we can all believe Enda when he says it won't happen on his watch … can't we?

I mentioned earlier about the lack of coverage on this case in the Irish media. It is an interesting phenomenon that they do not appear to want to consider the implications and maybe by not talking about it, it will go away. There was a definite collective decision to

ignore the case and not rock the boat. Perhaps this ties in with the apparent decision of the media to give the government an easy ride. Not covering something like the ESM makes sure that there is no real scrutiny of the issues involved and the attack on democracy within the EU that the ESM represents.

Or is there a collective decision that because we depend on them for our bailout that we should not dare to ask any questions?

The Labour Party finally came out from under cover on October 23rd the day of the oral hearing and attacked me for daring to raise questions about the ESM and declared me unpatriotic in doing so.

Derek Nolan stated that my 'constant attempts to undermine the European Stability Mechanism beggars belief when the potential disastrous implications are considered. Compared to the intense negotiating on Ireland's behalf by the highest levels of Government, his concerted efforts to derail Ireland's access to the ESM is akin to national sabotage'.

This shows that the Europhiles would be incapable of asking any questions about the impact that the ESM could have. Could it be after next Tuesday that the government's pursuit of the ESM at all costs could be 'akin to national sabotage'? I suppose we don't have long to wait and see.

I would like to conclude by using this opportunity to pay tribute to my legal team. Joe Noonan and Mary Linehan of Noonan Linehan Carroll Coffey in Cork have been totally committed to the case and have done trojan work to bring it on. The senior counsel of John Rogers and Paul Callan and juniors Roland Budd and Jonathan Tompkin, it has been a pleasure to sit with them and witness the amount of time and energy they have given to the case and the level of preparation they put into the arguments.

I would also like to thank Kevin McCorry, Frank Keoghan, Mary Crotty, Tony Coughlan and Muriel Sadlier for all their support and encouragement and those that came and sat through the days in the High and Supreme court and also Paul Murphy MEP who got us access to EU documents that were a great help.

Thanks again for the invitation and I hope you found this interesting.