Ladies and gentlemen, distinguished guests, I'm both pleased and honoured to have been invited to give the 11th Annual Dave Ellis Memorial Lecture. I did not know Mr Ellis personally but I do know from several of my former colleagues who did, of the important role he played in promoting access to justice for ordinary people in Ireland and it is therefore entirely fitting that this annual event should be held in his memory.

Other than being asked to speak on the general theme of “access to justice”, Eilis Barry of FLAC has very generously given me carte blanche in deciding what to cover this evening. This is a vast theme and inevitably, I can touch on only a few aspects.

As European Ombudsman I currently live in the city of Strasbourg, a city where it is impossible to avoid the contemplation of justice. It is there in small things like the plaque on the outside of my apartment building commemorating the liberation of the city from Germany in November 1944. It is there in the memorials to the fallen of the French resistance. It is there in the beautiful arched footbridge across the canal the Passarrelle des Juifs which commemorates the 800 Jewish people murdered in a pogrom on St Valentine’s Day in 1349.

And it is there in the big things, in the Council of Europe building beside the beautiful Orangerie Park, the pathways to it marked in pavement stars imprinted with the hopeful words of the post-war generation of leaders and of dreamers. It is there in vast frame of the European Parliament building and it is there in the building just a stroll away – the home of the European Court of Human Rights.

My own office is tiny by comparison but our formal presence in Strasbourg also reinforces the symbolism of that city for those in search of justice. We have new office space in a renovated building across from the Winston Churchill entrance of the Parliament and earlier this year it was formally dedicated to the memory of the Czech writer and statesman Vaclav Havel, who lead the velvet revolution that led to the fall of communism and the creation of the Czech Republic.

The inspiration for my work necessarily comes from the values enshrined in the treaties, charters and court decisions that have emanated – and continue to do so – from within the walls of those buildings and the spoken words of those who created them. The superficially mundane work of complaint handling is transformed when ‘transparency’ becomes the right to know what is being done in our name in the area of asylum and migration, or the right to
know whether or not a trade deal between the EU and a developing country respects the Charter of Fundamental Rights. Abstract matters of lobbying and access are themselves transformed when it comes to the monitoring of the activities of, for example, tobacco lobbyists.

And the value of non-discrimination is called upon when young people from less well off backgrounds are denied valuable internships in an EU institution because they’re not paid and so their better off peers gain yet another advantage.

But not everyone lives in Strasbourg and not everyone makes their way to work through a sea of visual reminders of high virtue. Justice isn’t as neatly packaged in other places and let’s face it, not really in Strasbourg either, where the once within touching distance memory of the horrors that led to the creation of all of those institutions is dimming with the consequences we have all seen in recent years.

So how do we or can we coalesce around a shared idea of justice? 1976, 41 years ago, Chief Justice Tom O'Higgins stated in his judgment in the ground-breaking legal aid case - *The State (Healy) v Donoghue* - that “no court under the Constitution has the jurisdiction to act contrary to justice” - a recognition both that our laws will not necessarily always deliver justice, and that the work of the courts is to administer justice no matter what the law may say.

Yet with the possible exception of children - who generally have an innate sense of what is just and fair - I am not at all sure that we really do have a shared understanding of what we mean by justice. History suggests that justice is at least as much a political construct as it is a philosophical one. Justice, it is probably fair to say, is a state of mind and just as subject to change, just as subject to the vagaries of timing and context.

I dare say that Donald Trump’s idea of his ideal Supreme Court would differ very much from that of Barack Obama, yet members of both interpret the same constitution, interpret ‘justice’. Justice for black males in the United States can mean very different things under the self same justice system and is very often lethal.

Justice is also in the eye of the beholder. How often do we hear the tearful voices of bereaved families – on the steps of a court in the wake of an impeccably conducted, fully lawful, court case – declare that justice has been denied to them.

People, let’s face it, rarely ask for the ‘law’. It’s rare to hear a victim or a victimised group call for a brace of barristers, two legal teams, a warm courtroom and a smart judge, rather they voice their need in just a single word – Justice. The shock is finding the – at times – disconnect between the two words – law and justice.

Yet we continue to refer to justice as if we all agree on what it means. The Treaty on European Union asserts that that “justice” is one of the values which prevails in each of the EU Member States and this is reflected also in the Charter of Fundamental Rights of the European Union. The US Constitution mentions that one of its purposes is to “establish Justice”; and our own Irish Constitution in its Preamble speaks of seeking “to promote the
common good with due observance of Prudence, Justice and Charity”.

Our Constitution, rather indirectly perhaps, also recognises that justice can mean different things, to different people, at different times. Where the English version of the Irish Constitution uses one single term - “justice” - Bunreacht na hÉireann has at least four different terms for the same concept.

In the Irish language version, which takes precedence over the English in the event of any divergence of meaning, the terms “ionracas” “ceart”, “ceartas” and “cothrom” are variously used to represent what in English is rendered as “justice”. Bunreacht na hÉireann conveys shades of meaning which in English are not really conveyed

It is also worth noting that while in English we have a “Department of Justice and Equality”, in Irish we have “An Roinn Dlí agus Cirt and Comhionannais” - the Department of Law and of Justice, or perhaps rights – and equality - three words instead of two and a distinction which acknowledges that law and justice are not synonymous. We can only wonder why the Irish title makes a distinction which is apparently unnecessary in English.

It has probably always been the case that states and societies have fallen short in their actual respect for justice. Greed, self-interest, intolerance, arrogance, fear and sometimes a genuine uncertainty about how to correct mistakes have sometimes undermined the achievement of justice. It strikes me that while the law can be administered fairly rapidly, justice frequently operates on time delay.

We all know now of the injustices suffered by those in Industrial Schools, in Magdalen Laundries and in Mother and Baby Homes. Work continues for recognition and retrospective justice for these people and I note the very valuable report just published by my Ombudsman successor Peter Tyndall on those refused access to the compensation scheme for women incarcerated in the laundries often for decades.

As an aside, I continue to find it remarkable that not a single man – not a single father of the children of the Magdalens ever as much as ironed a handkerchief in ‘atonement’ or spent a single day, dressed in penitent clothes, deprived of his autonomy and freedom.

We have current examples of injustice including in the area of housing/homelessness and in the treatment by the Banks of their customers on tracker mortgages. Many of us will remember the ad some years ago – devised, with wonderfully ironic timing, by the Financial Regulator exactly one year before the crash - where commuters on a bus confessed that they had no idea what a tracker mortgage was.

In fact all sorts of ignorance about other financial instruments were confessed to on the same bus and the ad today serves as a reminder of how shockingly easy it was for the financial institutions to exploit that ignorance and for the financial regulator of the time not to protect us from it. The last nine years has been the story of the search for justice by so many innocent victims both of corporate manipulation and of shoddy or absent regulation. We cannot yet say their quest is at an end.
And the marginalised of an older time still remain. While Travellers make up just 0.6 per cent of the total Irish population, Traveller children make up 23 per cent of those children (aged 13 - 17 years) detained at the Oberstown Detention Centre. Traveller women make up 22 per cent of the female prison population while Traveller men make up ten per cent of the male prison population.

The situation of Roma people across the EU is another case in point. Roma constitute the largest ethnic minority within the EU. Research published recently by the EU's Fundamental Rights Agency found that eight out of ten Roma people (in the nine member states surveyed) were exposed to the risk of poverty; and four out of ten were living in dwellings with neither toilets, showers nor bathrooms.

In Ireland we continue to debate the so-called Direct Provision arrangements for asylum seekers and I greatly welcome the fact that both the Ombudsman and the Ombudsman for Children have this year been given the right to investigate complaints from people living in Direct provision centres and I have no doubt but that the engaged work of both Peter Tyndall and Niall Muldoon in this area should improve the quality of life of the residents.

Direct Provision, as you know, was introduced in 2000 as a short-term measure and 17 years later, is still in place despite many internal and external reports seeking its abandonment or – at least – its humane reform. The treatment of children in Direct Provision has been particularly problematic. I remember the words of Mrs Justice Catherine McGuinness some years ago when she remarked that some children spend their entire childhoods without ever having a meal prepared for them by a parent.

I also remember a distressing case I dealt with where a young child became so traumatised by her experience that her mother was forced to leave direct provision and try to make it on her own in a bid to try to improve her daughter's mental health. I could come to the case only by a roundabout way as I also tried to do with other cases linked to asylum and migration as that area was specifically excluded from the Ombudsman's mandate.

Current limited proposals to allow people in Direct Provision to work, while welcome, have not come about through a change of heart although I know that politicians on all sides of the political divide have been disturbed by elements of the system and indeed the move to allow residents to complain to the Ombudsman is a sign of that. However the changes in relation to work are rather a response to a Supreme Court judgment which found the absolute ban on asylum seekers working to be unconstitutional.

Earlier I used the word ‘retrospective’ in connection with the Magdalen women and justice. It strikes me that Justice is often delivered very retrospectively indeed, when the coast is clear, when old political sensitivities are long forgotten, when the perpetrators are either dead or irrelevant, when we can blame old ghosts, old ‘systems’.

Former British Prime Minister David Cameron apologised for Bloody Sunday 38 years after the event. In 2012, 23 years after the deaths of 96 people at the Hillsborough disaster,
Cameron apologised for that as well. Former Taoiseach Enda Kenny apologised for the state's treatment of the Magdalen women just four years ago, again when many of them had died and some had long since gone to a communal grave adorned with the names made up for them by the nuns. We sanctified the deaths of our young men on the killing fields of Flanders and elsewhere only when we'd calmed down about the North.

Yet nothing had changed in all of those years for those who had suffered, for those for whom justice had never even been considered, some of whom had not even considered it for themselves. The dead were still dead, the circumstances of those deaths had not changed. And as the Magdalen women had frequently been paraded openly on the streets of dozens of Irish towns, we can hardly claim ignorance of that either. Justice was indeed a state of mind.

No doubt our own generation will be given our walk of shame in years or decades to come when a new generation, sanitised from the messy political compromises of our day, will wag their fingers at us and grant retrospective, rhetorical justice to whatever new set of victims is now deemed worthy whether those made mentally fragile and unwell through years of direct provision or the thousands who died attempting to reach our European shores as they fled the sadism of their civil wars.

Elsewhere within the EU, nostalgic throwbacks to authoritarianism and a muscular rekindled assertion of the nation state – from England right through to Poland – poses fresh moral, political and legal dilemmas for EU institutional and member state leaders. The EU is a rules based union, but what are the consequences when rules are broken or bent at a time when that union is struggling across many fronts. A decision to punish might make legal sense, might indeed speak to the high values of the Strasbourg and other institutions, but the politics may not be quite as straightforward.

There is, for example, a continuing stand-off between the EU and the Polish Government led by the Law and Justice (PiS) Party. That Party's understanding of justice has not prevented it from putting public TV and radio broadcasters under direct Government control nor from changing the organisation of the courts, and the appointment of judges, in a way which undermines judicial independence. The situation in Hungary appears to be somewhat similar and the actions of both countries would seem to be a direct rejection of the values - of justice and the rule of law, in particular - on which the EU is founded.

Article 7 of the Treaty on European Union provides a mechanism for dealing with a Member State whose actions constitute “a serious and persistent breach ... of the values” on which the EU is founded. The European Commission has been conducting an investigation into the situation in Poland and the threat of invoking Article 7 is on the table. So far, the Polish Government has shown little willingness to change. Earlier this month in the European Parliament, a Polish MEP of the Law and Justice Party bluntly told her parliamentary colleagues that her Government is simply fulfilling its electoral promises and that “in Poland, it's Poles who decide about Poland”.

We shall see if the EU has the determination to ensure that its fundamental values are
respected by every Member State or whether it will be possible, politically, to once again compromise on what are supposed to be fundamental values. Ultimately, it will be a matter for the Member States collectively to decide on this and history will be very anxious to see the result.

Justice and politics came face to face also within the EU in the so-called EU-Turkey Statement of 18 March 2016. This is an agreement between the individual EU Member States and Turkey to take measures to stem the flow of so-called “irregular migrants” entering the EU (Greece) from Turkey. The Agreement involved the EU countries providing up to €3 billion to Turkey (as well as an easing of visa restrictions and a revival of the EU accession talks) and, in return, Turkey agreeing to accept that all “new irregular migrants from Turkey into Greek islands as from 26 March 2016 will be returned to Turkey”.

For some, this Agreement is a pragmatic arrangement which serves the interests of the “irregular migrants” by seeking to break the business model of the people smugglers and protecting them from the dangers of sea crossings operated by ruthless criminals. For others, the Agreement is an unacceptable departure from the legally binding regulatory framework for dealing with migrants and asylum seekers and a violation of the principles and values on which the EU is founded.

But, as Garret Fitzgerald once remarked, “Politics is the most ethically challenging of professions” and those of you currently watching the playing out of difficult Government formation in Germany will be aware of how large the issue of migration looms. Chancellor Angela Merkel, deeply affected by the plight of Syrian refugees, opened wide the doors to those fleeing the civil war. Her generosity, while initially lauded, soon became a political liability and the deal with Turkey was to a large degree motivated by that experience. And we once again see being played out that endless push and pull as between the desire to do the right thing and the desire to do the thing that won't disturb the political status quo. As Commission President Jean Claude Juncker once remarked, “We know what the right thing to do is, what we don't know is whether we'll be re-elected if we do it.”

But for most people, this playing out, this dance between the strict rule of law and the more opaque rules of politics is not central to their understanding of how justice can be achieved. It is of course the courts of course that provide the most tangible and important mechanism for ensuring justice, the primary means for citizens, and non-citizens, to protect their fundamental rights.

While I want to focus in particular on the issue of access to the courts, there is the related issue of the accessibility of the law itself. It is difficult to get justice if you do not know what your rights and obligations are. The law in many areas that concern the bread and butter issues that matter to ordinary people is frequently, as I discovered as Irish Ombudsman, a morass of primary and secondary legislation, added to each year with little by way of consolidating legislation and written in language that most definitely could not be described as plain.

Another source of information on the law is the judgments of the higher courts. Here also
there is scope for improvement. You may be familiar with a comment made in 2013 by Lord Neuberger, then President of the UK Supreme Court. He observed, in the UK context, that judges could do better when it comes to writing their judgments. “We are often” he said "pretty prolix”. He continued: "Reading some judgments one rather loses the will to live - and that is particularly disconcerting when it's your own judgment that you are reading”.

I have however noted with interest the experiment that is taking place with TV access to certain sittings of the Supreme Court and with the possibility of this being extended to lower courts. Inevitably this must impact on the way in which judgments are delivered while preserving one assumes the integrity of the judgment itself.

Turning now, however, to the problem of practical access to justice. Chief Justice Frank Clarke drew particular attention to this in his Statement for the New Legal Year 2017. He commented:

“... there is little point in having a good court system, likely to produce fair results in accordance with law, if a great many people find it difficult or even impossible to access that system for practical reasons. [...] it has increasingly become the case that many types of litigation are moving beyond the resources of all but a few.”

Legal costs in Ireland - and that primarily means the fees charged by lawyers – render justice inaccessible to many people who simply cannot afford to roll the judicial dice. I suspect that our legal costs are particularly high in an EU context although I cannot be precise about that. But let me give you an example from my own experience.

As Information Commissioner in Ireland I was regularly involved in litigation. In 2011, in my capacity as Commissioner for Environmental Information, I gave a decision that, for the purposes of the Regulations on Access to Information on the Environment (AIE), the National Assets Management Agency (NAMA) was a public authority.

This meant that any environmental information held by NAMA was, in principle, available to any person requesting it. NAMA appealed on a point of law to the High Court. In February 2013 the High Court ruled that the office had correctly interpreted the definition of “public authority”. NAMA then appealed to the Supreme Court. In June 2015 the Supreme Court dismissed NAMA's appeal, meaning that NAMA is a public authority for the purposes of the AIE Regulations. This case involved just one discrete issue.

The legal bill for the Office - the fees of our own solicitors and barristers - amounted to more than €203,000. NAMA probably incurred roughly similar legal costs – a total of about €400,000 of public money spent on deciding what looked like a straightforward question. That which walked, quacked, and looked like a duck, was - in fact - a duck.

Now, just by way of a rough comparison, in 2011 a complainant took the European Ombudsman to the General Court in Luxembourg for the way in which her complaint against the European Parliament regarding a job selection procedure had been dealt with. The complainant was successful in the General Court and my Office then appealed that judgment
to the Court of Justice.

The outcome was mixed with both parties coming away with a result of sorts. However the legal costs - meaning payments to lawyers - for the European Ombudsman amounted to just €15,000 in total for the two hearings. I know that the two situations are not entirely comparable but neither are they so dissimilar as to explain the huge difference in the costs incurred.

Clearly, Chief Justice Clarke is right: lawyers’ fees are an issue. But the irony may be that the only certain way of dealing with this problem - some form of statutory price control on lawyers’ fees - might itself be found to be unconstitutional.

Returning just for a moment to the NAMA case, there were some unusual comments in the Supreme Court’s single agreed judgment. The opening sentence says: "This is a long drawn out and contentious dispute conducted between two public bodies at public expense, which is one further illustration of the truth that some disputes are so bitter because the stakes are so low."

In fact this was not a dispute between two public bodies; nor was it in any sense bitter. It was a dispute between a citizen, the journalist Gavan Sheridan, and NAMA. The Office of the Commissioner for Environmental Information was involved only because NAMA had appealed: first to the High Court and then to the Supreme Court. If it had decided not to defend the appeals, this would have deprived the individual citizen of his rights. Equally importantly, it would have conveyed the message that a well-resourced public body like NAMA was free to use public money to defend its institutional position while an under-resourced statutory adjudicatory body was unable to do what it was set up to do.

Of course the Court was right to be concerned about the cost to the public purse of these appeals. But the answer surely should not be one which discourages the Information Commissioner from defending legal challenges. The answer, as Chief Justice Clarke appears to acknowledge, has to involve the issue of lawyers’ fees thus ensuring more practical access to justice

In fact in its judgment in the NAMA case the Supreme Court made some comments intended, I think, to reflect concern about the costs of such litigation. Presumably in order to avoid potentially expensive court action, the judgment proposed that the Office of the Environmental Information Commissioner should have sought advice from the Attorney General. The judgment says that “it would have been sensible and perhaps desirable to have sought advice on that issue and perhaps guidance from, the Office of the Attorney General, since two state bodies were involved .. .”.

Yet the Attorney General is the legal adviser to the Government and in practice provides legal advice to certain state agencies, possibly including NAMA. The Attorney General's Office had already represented the Department of the Taoiseach in an earlier decision taken by the office, regarding access to Cabinet records, and was itself the public authority in question in another decision the office had taken under the AIE Regulations. In these particular circumstances, and as an independent, statutory adjudicator, it probably would not have
been wise for the office to have sought the advice of the Attorney General.

One of the fundamentals of the rule of law is an acceptance of the judgments of the superior courts. The need to show respect for the courts is absolute. However, showing respect does not preclude commenting on court judgments provided those comments are appropriate and reasonable and reflect a genuine respect for the authority invested in the courts. Fortunately, in Ireland public commentary on court judgments has, by and large, been appropriate and respectful.

I suspect that this is because, as it is in most democracies, not because everyone necessarily agrees with the judgments or views the judges as omniscient but because of respect for the rule of law, and a sort of unspoken agreement, a trust between the people and the judges that the latter will make reasonable and independent rulings. I also think that in Ireland there is a widely held views that the Judges, no matter by whom they were appointed, have served the state well and diligently.

But that doesn't mean that as times and mores change, that an uncomfortable light can't be shone on some judgments made undoubtedly in good faith in the past, yet which now run up against a more modern interpretation of what we mean by 'justice'.

Mr. Justice Gerard Hogan at a recent conference in Limerick made some comments critical of some aspects of the overall performance of the Supreme Court over the last 30 years. The Court, in his view, has been too slow to make findings of unconstitutionality. He is reported as saying that some of the judgments of the Court can "only be regarded as surprising and, in some instances, baffling". He referred in particular to a 2003 Supreme Court judgment as "sanctioning de facto deportation of Irish citizen children of foreign asylum seekers", something which he said was "flatly contradicted" by the European Court of Justice.

Judges sitting in a panel with colleagues frequently disagree with one another and these disagreements are sometimes expressed in their individual judgments in quite strong terms. In the US Supreme Court, these public disagreements have become something of a spectator sport. And this brings us back to the difficult reality that, despite the message conveyed by the statue of Blind Justice presiding outside many court buildings, justice is not blind.

Seven years after his admirable statement of the claims of justice in the 1976 legal aid case - "[n]o court under the Constitution has the jurisdiction to act contrary to justice" - then Chief Justice O'Higgins delivered a judgment which Ruadhán Mac Cormaic (in his book The Supreme Court) argues "has a strong claim to be one of the worst the Supreme Court has produced". This was the judgment in the Norris case in which David Norris challenged the constitutionality of laws which criminalised homosexual practices. As I'm sure you all know, Norris lost in the High Court, and again in the Supreme Court in 1985, but ultimately won in the European Court of Human Rights in 1988.
Today, the overwhelming majority of the Irish public support equality for gay people and would struggle to understand why homosexual activity was ever regarded as criminal. In his majority judgment in 1983, Chief Justice O'Higgins referred to the fact that “the conduct in question has been condemned consistently in the name of Christ for almost two thousand years” and, later in the judgment, concluded that “[s]uch conduct is, of course, morally wrong, and has been so regarded by mankind through the centuries.”

I’m not suggesting that Chief Justice O'Higgins had anti-gay prejudices. In fact, his overall reputation both as a politician and as a judge is very positive indeed. What the case illustrates is that the requirements of justice, in any given case, are not fixed and self-evident. Rather, it depends on what an individual judge, or the majority of the judges, decides on the day. And what the judges decide will, inevitably, be influenced at least to some extent by the prevailing social and political views in the wider society. Personal views - may also sometimes be a factor. As I said earlier, Justice is a frequently shifting state of mind.

The Norris Supreme Court judgment also illustrates how stark the disagreements can be between judges. In the Norris case, Judge Henchy gave a strong dissenting judgment which was very critical of the majority judgment. Henchy’s conclusion was that “a finding of unconstitutionality was inescapable on the evidence.”

Henchy, himself from a conservative rural background, took the view that Christian morality by itself was not a sufficient basis on which to criminalise actions which offended against that morality. He took the view that such actions should be criminalised only where the “common good requires their proscription as crimes” - something he found did not apply in this case.

In the Strasbourg Court of Human Rights, we find the same disagreements. Most of you will be familiar with the case of Louise O’Keeffe who, as a child, was sexually assaulted by her national school teacher. In its 2014 judgment in O’Keeffe v Ireland, the Court of Human Rights divided by 11 judges to six on most of the individual substantive issues to be decided, with the majority deciding in favour of Ms. O’Keeffe.

I'd like to say something now about public service ombudsmen and the role they can play in ensuring justice. Ombudsmen, in this context, deal with justice in public administration but this in fact can be a surprisingly wide arena.

While public service ombudsmen deal mostly with the problems of individual complainants, sometimes a number of complainants presenting with the same problem, or the same alleged maladministration or injustice, can cause the ombudsman to identify and tackle what is a systemic, ingrained malpractice. In some ways, this can be like a class action.

In the UK, perhaps the most celebrated example is the case of Equitable Life, which was one of the oldest and most respected life assurance and pension societies in the UK. Equitable Life's luck ran out in 2000 when it closed to new business and announced that previously guaranteed returns for existing investors and pensioners were being slashed significantly. The UK Ombudsman at the time, Ann Abraham, received more than 800 complaints from
very unhappy Equitable Life customers. She looked at the role played in the fiasco by the statutory regulatory authorities – the Financial Services Authority and the Department of Trade and Industry.

In 2008 – and it inevitably took her a long time to get to the bottom of things – she published her report “Equitable Life – A Decade of Regulatory Failure” which found very poor prudential regulation by the authorities during the 1990s. She reported that the authorities had let Equitable Life continue trading "on an unsound basis" since 1990, thus letting the public be misled into thinking the society was solvent when it was not. She recommended that the UK Government should set up a fund to compensate those customers who had suffered injustice as a result of the maladministration of the public authorities which had allowed Equitable Life to mislead its clients for years. Of course there was huge resistance from the UK Government given the enormous financial costs of compensating the customers concerned. In fact, three years went by before, eventually, in 2010 the UK Government set up a compensation scheme which has since paid out several billion pounds to 900,000 Equitable Life policy holders.

Incidentally, a similar type of investigation could not have been conducted by the Irish national Ombudsman as neither the Central Bank nor the Financial Regulator come within the Ombudsman's jurisdiction.

The Irish Ombudsman’s Office has also been responsible for systemic improvements benefitting many thousands of people work that the now 4th Ombudsman Peter Tyndall continues.

Many of you will remember the lengthy saga over nursing home fees, the charging of elderly people, who had medical cards, for long-stay nursing home care. Between 1985 and 2011 the Office received about 1,000 individual complaints on nursing home charges. In 2004 the Department of Health was told by the Attorney General that the charging of medical card holders for long-stay care was illegal and the practice was discontinued. The Ombudsman – and mainly my predecessor the late Kevin Murphy – had been telling the Department the self same thing for many, many years. But an ostrich position was adopted presumably from fear of the ‘appalling vista’ of the consequences of any other one.

The Travers Report in 2005, found that for three decades the Department of Health had condoned the charging of medical card holders for long-stay care despite knowing such charges were illegal. This led to the setting up of the Health Repayment Scheme and which ultimately paid out about €500 million.

The Minister for Health commented: “Over 300,000 people were charged illegally during 28 years. This was entirely wrong. They were old, they were poor, they suffered from mental illness, they had intellectual disabilities, they were physically disabled. As vulnerable people, they were especially entitled to the protection of the law and to legal clarity about their situation.”

Of course much of this €500 million repayment could have been avoided if the Ombudsman had been heeded, if attention had shifted from the narrow political and financial imperatives
of the day that overshot not alone justice but the actual law itself.

As European Ombudsman there is also scope for dealing with systemic injustices. I mentioned earlier the situation of hundreds of interns taken on – without pay - by the European External Action Service – essentially the foreign ministry and diplomatic corps of the EU – to for its various missions around the world. This was not against the law but it meant that such posts were effectively restricted to privileged young people who could afford to pay for their travel, accommodation and upkeep.

This was an issue not of law – as there was no law that specifically obliged the Service to pay its interns – but of justice as the practice offended against the founding values of the EU which include equality and non-discrimination. It meant that privilege was following privilege, that those young people who could afford the internships had a better chance of future employment than those who could not, and a familiar cycle was being perpetuated.

Happily, the EEAS responded well and has made a case to the EU Council for additional budget to pay future interns and we now expect a positive outcome which will mean the removal of this particular administrative injustice.

Public service ombudsmen are generally free to promote justice in ways that are not usually open to a court. In particular, they are usually free to act on their own initiative and to report on situations in which they find that injustice is occurring, or is likely to occur.

A case in point is the treatment of “irregular migrants” or asylum seekers in Europe. In late 2015 the French Ombudsman (Defender of Rights) reported on the human rights situation in the so-called “jungle” camp near Calais. He observed that it was his duty, and the duty of his counterparts across Europe, “to recall the lines that can't be crossed”, those which represent fundamental values and the fundamental rights of each human being. He reported quite bluntly that the self-interest of EU countries was trumping the obligation to respect the human rights of the migrants.

More recently, the Greek national Ombudsman has reported on the treatment of “irregular migrants” or asylum seekers arriving into Greece and especially into the Greek islands. His assessment is also quite negative. He asks whether “human rights are simply theoretical constructions, and do not create corresponding obligations for the state”; and the several examples he cites support his conclusion that human rights are not being taken seriously. He says that the significant failings are not the result of inadequate financial resources nor of any lack of compassion and empathy from the local population. Rather, he says, the failings are primarily political failings, both at national and EU level. He criticises, in particular, the use of detention as a deterrent rather than as a last resort. To quote the Greek Ombudsman:

“ As regards detention, there is none more cynical admission of the disregard of fundamental rights than the belief that the ‘construction of detention facilities will serve as a deterrent to the creation of new migrant flows’. Thus, the deprivation of personal liberty is no longer an exceptional and necessary measure to achieve the purpose of forced removal, as imposed by domestic law and the Return Directive, but a policy instrument.”
Their reports at least remind us of the values and principles we are supposed to espouse, and do have the effect of tempering what might otherwise be an even less welcoming reception for migrants.

And such work, such reports, whether on direct provision in Ireland, or migrant camps in Greece, or on the opening up to public view of the way in which member states of the EU do their deals on everything from pesticide control to the protection of fundamental rights - work that I am currently engaged in – is not always easily done. Even if, by definition, an Ombudsman's recommendation legally has no binding force, they do put pressure on Governments and institutions and that pressure is not always comfortable either for those who govern or for their so-called watchdogs.

But reminding those who govern – while still being aware of, and understanding of, the challenging, messy, compromising world of politics – of what they're supposed to do, reminding them of the fundamental values of the state or of the Union created to serve the people of those states and of that Union - is a necessary part of the maintenance of a just state, of a just society. Perhaps it's really a form of whistleblowing.

But despite some challenges, I have found in my work in Ireland and in my work now in the EU a willingness by the institutions to respect the role and accept the recommendations. And they do that because no matter how incompletely understood or shared a common idea of justice is, the vast majority of people who work in those institutions do understand that no government, no state and no union will ultimately survive if the people they serve do not believe that what they do is – as a child might say - fair.

So, to conclude, it strikes me that we should not be naive about justice and about the institutions which are there to serve justice. We need to have a realistic understanding of the context - political, social and global - in which these institutions operate. We need to be vigilant to ensure - in order to avoid what is happening elsewhere - that these institutions retain their independence and their high standards. We need to support these institutions, not in any obsequious way, but critically and respectfully.

While we may not be able to articulate a fully-fledged statement of what we mean by justice, maybe we can be content to see it - to borrow and adapt a phrase used by Professor Conor Gearty - as offering all of us the chance to flourish, “regardless of our ethnicity, our gender, or how deep our pockets happen to be”.

Thank you.