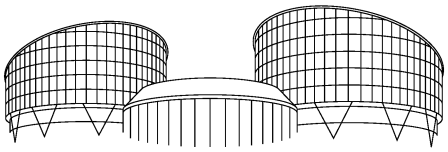

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

HUMAN RIGHTS AND TERRORISM: THE CONCEPT OF MILITANT DEMOCRACY FROM THE NATIONAL TO THE EUROPEAN LEVEL

Judge Iulia Motoc
European Court of Human Rights

Opening of the Judicial Year – Seminar – Friday 29 January 2016

Ladies and Gentlemen,

It is a great privilege and honour to take part in this discussion on the opening of the judicial year, in particular with the eminent president and professor Aharon Barak together with my colleagues and friends Ganna Yudkivska and Robert Spano.

My subject today will consist in trying to see to what extent the concept of militant or defensive democracy – a central concept in the speech and work of Judge Barak today – can also be applied by judges of this Court. In my opinion, the Court is heading in that direction with its recent case-law on the question of mass surveillance in the terrorism context.

The concept of militant democracy was invented by Karl Lowenstein in a series of two articles published in 1937 in the *American Political Science Review*. He attempted to explain the failure of the Weimar Republic, and the fall of other democratic regimes in the period following the First World War. His idea was that those regimes had not been given the instruments to combat anti-democratic movements. In some respects, those problems harked back to similar dilemmas in the nineteen century in the form of Bonapartism and Caesarism, which adopted plebiscitarian methods. In 1949 Germany incorporated some of those defence mechanisms in what became its Constitution.

In my view, the same type of safeguard of militant democracy lies in the European Convention on Human Rights. The Convention was created in the aftermath of the Second World War to give Europe a programme through which the most serious human rights violations committed during that war could be avoided in the future. That explains, in part, the constant references

to values and principles which are "necessary in a democratic society" throughout the Convention, even though those principles are not at all defined in the Convention itself.

The best judicial definition of democracy can be found in our judgment *Refah Partisi (The Welfare Party) and Others v. Turkey*: "In view of the fact that these plans were incompatible with the concept of a 'democratic society' and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a 'pressing social need'".

However, the debate over militant democracy – and the question of how to balance democratic and liberal values against the need to defend democracy from totalitarian movements, on both the right and the left – has taken on a broader meaning at least on two occasions: during the Cold War and in the aftermath of the 11 September 2001 attacks, in view of the need to confront terrorist extremism. The perceived danger comes from amorphous groups and seems to target not direct suspects but also certain fundamental rights.

In judicial terms this dilemma has been addressed as follows by the Supreme Court of Canada in the *Suresh v. Canada* decision of 2002: "it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values", namely, "values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice".

As President Aharon Barak has reminded us: "human rights are not a stage for national destruction" and, according to Judge Kennedy, "The Constitution is not a suicide pact". He points out that the existence of democracy cannot be "taken for granted. We have to fight for it". And he sees judges as being on the front line in that battle.

In his book *The Idea of Europe* the philosopher George Steiner states that there are five axioms about Europe. The fourth is a "tale of two cities", Athens and Jerusalem. "Being European means seeking to negotiate, on a moral, intellectual and existential level, between the contrasting ideals and praxis of the city of Socrates and the city of Isaiah". The ultimate criterion is the consciousness of its own contingency and the possibility of its own downfall. A theme of which Paul Valéry is fond; he wrote of its beauty and the horror of a century that has just recently come to an end. With the memory of evil, which had its roots in Europe and which in Europe has led to the casting of blame. If European identity is the result of a project and a process, if the question of who we are is a question about who we want to be, that means that we are committed to being in and building a future in Europe. This is precisely the reason why the Court has granted a key role to European consensus. This term often appears in our judgments. On occasion we have, like all judges, a different interpretation of the term "European consensus", as shown by the concurring opinion of Judge Ziemele in the *Rohlena v. the Czech Republic* judgment of January 2015, but we are all aware of the fundamental importance of that notion in preserving the unity of Europe.

The European Court of Human Rights has begun to respond to that question in the Grand Chamber's *Zakharov v. Russia* judgment (no. 47143/06), of 4 December 2015 – a judgment which answers common questions: "Having regard to the secret nature of the surveillance measures provided for by the contested legislation [in Russia], the broad scope of their application, affecting all users of mobile telephone communications, and the lack of effective means to challenge the alleged application of secret surveillance measures at domestic level, the Court considers an examination of the relevant legislation in abstracto to be justified". That paragraph of our judgment has been rightly regarded as an expression of the priority given by our Court to human rights. In that connection the Court has examined the principles on which to assess whether the interference was "necessary in a democratic society", emphasising the tension between measures taken to protect safety and their consequences for society. The Court has stressed that it must be satisfied that there are appropriate and effective safeguards against abuse. A limited degree of involvement will not suffice for judicial authorisation to obtain. On the contrary, judges must be sufficiently empowered to verify the existence of a reasonable suspicion against the citizen. In addition, the judiciary must also have the capacity to assess the proportionality and necessity of the surveillance. In that sense, this judgment also mirrors the subject of judicial scrutiny of anti-terrorism measures, as mentioned by Judge Barak.

Isaiah Berlin gave us a good explanation of the question of the immeasurableness of values in the context of the pluralism of values. Ideas about pluralism were well explained by our former President Wildhaber, in his studies on the pluralism of constitutions within our Court. In 1945, Isaiah Berlin, then a diplomatic attaché in Moscow, had a chance encounter with the poet Anna Akhmatova. For her this meeting was an encounter with freedom, and she referred to him as the "Guest from the future". Europe is now confronted with a terrorism which has shaken Israel for over half a century. So, for us too, President Barak is "the guest from the future".