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"Judges preserving democracy through the protection of human rights"

Freedom of expression and democracy

Speech by Susanne Baer

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To open the judicial year at the European Court of Human Rights in 2023 with a conversation about judges preserving democracy through the protection of human rights is wise, and needed. It is also an honour for those tasked to provide an impulse to start this conversation, and I am grateful to Judge Jelić and her colleagues for inviting me.

On a broader scale, this is a timely call to reconsider the basics of what this is all about – courts protecting fundamental human rights as an indispensable ingredient of democracy. This is because there are challenges out there to be taken into account, and because these challenges have an often subtle and sometimes overt impact on this Court's intensity of review – and that of other courts with the mandate to protect democracy through the protection of human rights – and on our understanding of subsidiarity, margins of appreciation, and deference.

Therefore I will address some challenges that affect freedom of expression as a specific – yet not the only – fundamental human right. I will also suggest revisiting the task this Court has been charged with, in answering the call from people who need help, because this is who we work for. And I will suggest that this is not a time for deference, but a time for courage in the light of the pressure, attacks and destruction we face, with their underlying intention of in fact destroying any democracy worthy of that label. First, then, what are the challenges to freedom of expression, to courts, and to democracy? Second, and as illustrated by a particular case, how should we respond?

Challenges to freedom of expression

Freedom of expression is a classic yet complicated fundamental human right. The classic constellation is where authorities censor private contributions to a public discussion; as when States censor popstars discussing the Bible (see *Rabczewska [Doda] v. Poland*[1]). This is not something of the past but is becoming more

[1] ECHR, 15 September 2022, *Rabczewska [Doda] v Poland*, 8257/13.

complicated by the minute. If there is a right that most needs evolutive interpretation, it may well be this one, for several reasons.

First, expression is highly dependent upon the means of communication, and that is, today, rapidly changing hardware and software. In the past, expression may have meant shouting "fire" in a crowded theatre, or a bumper sticker with a famous author's quote that "soldiers are murderers"[2]. But today, expression is digital, global, fast. In addition, there are scary options to manipulate, falsify, lie and misrepresent. And maybe the most dangerous thing of all for democracy: the context has changed. We have lost a shared public space to fractions and bubbles, with less and less quality media. There are challenges all over.

Then, and intensified as it is by the technology, we see hate speech: fast, global, widespread. It may be directed against Muslims by former journalists who are now prominent politicians (*Zemmour v. France*[3]), or may target homosexuals (*Valaitis v. Lithuania*[4]), or mobilise conflicts over history, including the question that Germans are quite familiar with: the denial of genocide. It is particularly complicated, and rightly controversial (*Perinçek v. Switzerland*[5]). This is already challenging indeed.

Clearly, every ruling in such cases contributes to our ability to live together peacefully, in mutual respect. As such, freedom of expression rulings are democracy rulings *per se*. This is the Republican function of freedom of expression, including speech, the press and media. It has been emphasised by many courts around the world, and has become widely accepted. Freedom of expression and democracy are inextricably bound together.

But that is not all there is. I am afraid that in the judicial years to come, even more effort will be needed to properly address these challenges, and to clearly communicate the scope and the limits of free speech and the other fundamental human rights, to strengthen and defend democracy. This is because there are additional and even more fundamental challenges out there.

Challenges to courts

In 2023 one more fundamental challenge to human rights, and to democracy, is the pressure, attacks and destruction of courts as institutions, and of judges as individuals, and thus, of meaningful human rights protection as such. This is nothing new, but it is intensifying, there is now a lot of power, as in money, organisation and influence, behind it, and there is a strategy. Thus we have to react now. Such pressure also comes in many forms, with varying effects. In fact, it often starts with formal and rather boring details, but eventually undermines it all. This is now a key concern of the Venice Commission. And it is the original task of this Court.

[2] This refers to canonical decisions in the U.S. (*Schenck v. United States*, 249 U.S. 47 <1919>) and Germany, regarding Kurt Tucholsky´s phrase from 1931, in 1995 (BVerfGE 93, 266).

[3] ECHR, 20 December 2022, *Zemmour v France*, 63539/19.

[4] ECHR, 17 January 2023, *Valaitis v. Lithuania*, 39375/19, following ECHR, 14 January 2020, *Beizaras and Levickas v. Lithuania*, 41288/15, on the right to effective remedies for victims of discrimination.

[5] A Turkish politician denying the Armenian genocide in Switzerland, see ECHR [GC] 15 October 2015, *Perinçek v. Switzerland*, 27510/08.

Pierre-Henri Teitgen addressed the Consultative Assembly of the Council of Europe in 1949 by saying: “Democracies do not become Nazi countries in one day. … It is necessary to intervene before it is too late.”

At the ceremony for the opening of the judicial year in 2022, Dunja Mijatović, the Council of Europe’s Commissioner for Human Rights said: “It is perhaps not an exaggeration to say that the need for this system today is as pressing as it was when it was established more than seventy years ago.”

And former U.S. Foreign Minister Madeleine Albright, born in Prague, fleeing from the Nazis, but with grandparents murdered in the Holocaust, reminded us that Mussolini’s political strategy was to pluck a chicken one feather at a time, so that each squawk will be heard separately “and the whole process is kept as quiet as possible”.[6]

Regarding courts, one feather is funding, another feather procedure, another feather discipline, then the salary, composition, president´s authority, case-load, rules of filing, jurisdiction, and so forth. To destroy independent courts with real power, autocrats thus pluck on funding, in that they cut back or stop funding the court. Or they ignore one ruling, then more, denounce decisions, discredit judges, change the age of retirement[7], the selection process or criteria, the salary, or support and protection for the bench[8]. Or they change the rules of procedure. They modify doctrine, procedural or substantive, or the ethos of the task. Small squeaks, but serious damage.

In Strasbourg, you know what some of this looks like. In the UK, this has informed stiff resistance to “Europe” [9], and it still fuels policy initiatives. In Hungary, Poland and Turkey, people do know what happens when courts are “reformed” into “tribunals” that do not deserve the label any more. In Israel, lawyers and the people take to the streets these days, to prevent that, and defend their court[10]. Now how are we to address these challenges? How should we react to more or less subtle attempts to get us out of the way?

For courts, this is a very specific challenge indeed.

To start with, it is important to note that pressure and attacks on courts as institutions are in fact attacks on democracy. But what makes it complicated these days is that they attack democracy worthy of the label in the very name of democracy, and the rule of law in the name of the rule of law, and freedom of expression in the name of fundamental rights – just their own version thereof, which in fact amounts to none.

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[6] *Fascism: A warning*, with Bill Woodward, 2018.

[7] ECHR, *Baka v Hungary*, 23 June 2016, 20261/12. There, timing was crucial, with a late ruling meaning *fait accompli*.

[8] There is an urgent necessity in the Council of Europe to install solid protection mechanisms for the judges of the ECHR, but this is not yet in place.

[9] The campaign for the UK to leave the EU (Brexit) relied, in part, on criticism of the ECHR, which may signify that one goal was to get rid of human rights judicial review, thus not only the jurisdiction of the CJEU.

[10] Minister of Justice Yariv Levin proposed a reform law to allow a majority in parliament to overrule Supreme Court decisions, which in fact allows government to freely choose whether to accept judicial review or not. See Gross, Aeyal: *The Populist Constitutional Revolution in Israel: Towards A Constitutional Crisis, VerfBlog,* 2023/1/19, https://verfassungsblog.de

Certainly, democracy comes in various forms, with varying systems of elections, distribution of power, and arrangements of checks and balances. But in too many places, things are now called a "democracy" or democratic, or freedom of expression, or free media, when they are not. There is an urgent need these days to clarify that democracy is not unlimited majoritarianism[11], but produces fairly elected and peacefully changing majorities in systems of checks and balances. Also, democracy is no autocratic "illiberalism"[12], but limited power to, as the United Nations put it, respect, protect and fulfil fundamental human rights[13]. Moreover, democracy empowers no parliament fully on its own, but installs independent courts with the fine-tuned power of judicial review, and recognises the "mobile" (as former Justice Renate Jaeger called it) formed by national, transnational and international institutions. And freedom of expression is not a licence to manipulate, or spread hatred, incite intolerance and violence, or privilege powerful speech, but a human right to allow for peoples' voices to be heard.

Instead, democracy worthy of the label then needs freedom of expression, as an equal right, in respect of dignity. And it needs courts to protect that. This is why courts are, for autocrats, not a good idea. For unlimited majoritarians, respect for minorities is nice, but not necessary. For illiberals, some may speak, but not all equally. And in fake democracies, independent courts are simply in the way. The task then is to distinguish the fake from the real, and to protect the latter. But the challenge is to counter the pressure, attacks and destruction.

A paradox

However, this situation amounts to a paradox. On the one hand, the cases are very many and very complicated, and it may be wise for courts to hold back, wait, abstain from intervention. Even more so, for courts under pressure, and specifically for human rights courts, it may seem plausible to withdraw, leave wider margins of appreciation, emphasise limited supervisory power, and subsidiarity, defer on principle. And when struggles around democracy heighten the risk that courts might lose their standing, it may also seem wise to stand back.

Yet on the other hand, it is exactly now, exactly in this situation, that courts are needed. They are needed because the world is getting more complicated by the minute, and specifically, the public, speech, expression. Courts are needed precisely because they are under pressure and face attacks. And courts are needed because there is a script out there for their destruction – people are plucking the feathers. It is the independent courts with the power of judicial review that are the only ones with the formal mandate to stop autocrats, empower the opposition, save individuals, open public space, and thus save democracy. Therefore, courts must take a stand – said Teitgen, said Albright – before it is too late. Courts are, specifically regarding freedom of expression, the institutional device to make sure democracy works. And

[11] For further discussion, see Sajó, András, and Renáta Uitz. *The Constitution of Freedom: an introduction to legal constitutionalism*. OUP 2017.

[12] The proposal of an "illiberal democracy" is attributed to Hungarian President Orban. Conceptually, this is a contradiction in terms. This is illustrated by the work of the [Venice] European Commission for Democracy Through Law, following a substantive notion of the rule of law, including the protection of fundamental human rights.

[13] The framework is designed to extend the reach of human rights to private entities, in that States are not only bound by human rights themselves, but are also obliged to ensure the private actor's respect for human rights.

yes it is a paradox: tempting to defer – but high time to intervene, to act. But I am sure this Court is well equipped to handle that.

Case by way of illustration

There may be many cases to illustrate the point. I have picked a recent German one.[14] Some may think it is about the right to privacy, or reputational interests. But in fact it is a case about democracy, via human rights, as freedom of expression. However, it is somewhat exceptional, because German courts regularly take the value of free speech for a functioning democracy into account, as well as the personal interests in privacy and reputation. It also exemplifies some of the newer questions that arise in the area.

This case started in 2016, when a blog published a picture and a quote of a prominent female politician with the heading: "K thinks sex with children is ok, if there is no violence involved." In fact, she never said that. But some words were taken from a debate in parliament, when the politician insisted on violence as the key factor of abuse. And she is a prominent member of a party committed to fundamental human rights. The politician sued for omission and non-pecuniary damage. The owner of the blog posted this and the original quote again, and got even more attention – which is the whole point in the blogosphere. Posts are more likely to trend if they are aggressive – and even better if they sexualise women. This is what happened here.

The politician now also sued the provider for subscriber data – unsuccessfully, because the Civil Court dismissed her case: Yes, the post was polemical, exaggerated and sexist. But she had provoked it with her statements in parliament, and the comments all related to this. The court implied that someone who stepped into the public light knew what they were doing. Now, the politician lodged an appeal, and was mostly unsuccessful again. The Higher Court said that these were libellous comments, yet not insults, rather a discussion. Again, as the ruling implied, she had participated in public debate and was a politician after all.

She lodged a fundamental rights complaint.

It is a case brought by a politician – not the classic private individual against the State. Does she have standing to start with? A suit brought against a private company – not classic State censorship. Is this a human rights case at all? A world of heated and polarising discussions around cancelling, political correctness and the like. Is it not wise then, for a court, to stay out of it, to leave wide margins of appreciation and leeway on various levels of proportionality, if all doctrinally fine? And maybe most important, finally, we, as human and fundamental rights courts, do only supervise. There are decisions from civil courts well versed in such matters which discuss fundamental rights. Why intervene? Do we know better? Or should we – in line with the ongoing criticism of courts interfering with politics, courts going too far, being overly activist, possibly acting *ultra vires* – leave it to the locals, to them?

[14] German Federal Constitutional Court, Order of the Second Chamber of the First Senate, 19 December 2021 - 1 BvR 1073/20 - (Künast ruling). The Chamber applies established standards developed by the First Senate of the Court.

Now what?

Confronted with such a case, there seem to be so many reasons for a court not to intervene. But taking our task seriously, and taking the challenges to freedom of expression and democracy into account, there are better and more reasons to act.

Marketplaces of ideas need rules

First, there is a prominent theory as to the prioritising of deference. It is not the only theory out there, but it is a prominent and influential one, associated with John Milton, John Stuart Mill, Thomas Jefferson, as well as a famous dissent by Justice Holmes in Abrams, a SCOTUS decision in 1919[15], one that gained the majority in the case of *Brandenburg v Ohio* in 1969[16]. But in fact, the theory combines a specific image of the private individual with an analogy relating to the economic idea of a free market, to create a marketplace of ideas. But today, we know better.

We know that the individual is not purely rational, or interested in profit, so he or she moves in much more than markets. We know that people oscillate between private and public roles. We also know that the praise of a totally unregulated "free" market is left for a radical few, while regulation is now the accepted necessity to make markets work. There is also no one marketplace, but many arenas, spheres, levels, means, forms and effects of communication. And market actors are clearly not equal, and law is needed to take power into proper account. So what does that mean?

In the blogosphere case, the ruling explains that there is an original meaning of freedom of expression, to protect criticism of persons in power, that still matters. Yet the ruling also emphasises that the world has changed. Therefore, one cannot accept verbal abuse or hate speech, neither *vis-à-vis* private individuals nor *vis-à-vis* officials or politicians. Thus, limits to expression also apply to statements concerning public figures and officials. Otherwise, democracy suffers. So the Court added: "In particular when information is disseminated via social media, the effective protection of the personality rights of politicians and officials is also in the public interest, which can reinforce the weight of these rights in the balancing of interests. People will only be willing to engage in public life and participate in State and society if sufficient protection of their personality rights is guaranteed."

Here, the civil courts were corrected, relief was granted. And this is just one case, while the Strasbourg jurisprudence offers many more, like *000 Memo v Russia*[17]. Despite some challenges in legal opinion, it illustrates why there is, more often than not, no reason to defer, but a good reason to step in.

Courts and complexity

Second, there is a general, albeit weak, point sometimes made to motivate a court to defer on principle: that things are simply too complex. Specifically, the law of

[15] *Abrams v US*, 50 U.S. 616, 630 (1919).

[16] 395 U.S. 444 (1969). Brandenburg was a Ku Klux Klan Leader, engaged in racist and antisemitic terrorism in the 1960s, now protected by a law limited to punishing "imminent lawless action".

[17] The case (2840/10) decided in 2022 is important because it addresses a SLAPP constellation (Strategic Litigation Against Public Participation), in which rights are abused, in litigation to silence critics, to destroy rights.

freedom of expression has been refined over a long period, with the complex media law we have today, and all kinds of difficult distinctions – this is all very demanding, and a lot of work.

But this is also no reason to abstain.

Law is the tool for handling complexity, by reducing it. Judges and court chambers or offices are professionals, trained for complicated cases. More importantly, they have been elected and sworn in to perform the task, with rules to protect independence, because so much power is entrusted to a judge. With this in mind, the job is designed not to defer, but to act.

Slippery slopes

Third, and more dangerous still, there is the argument that human rights are very demanding already so one should not go too far. Not every concern is a human right, you know! Do not get on a slippery slope, and do not feed a rights inflation! And there are many versions of this warning. Opposition to "activists" going too far has played a role in British criticism of the ECHR as well as in the context of Russia´s withdrawal, and it informs governments who oppose rulings in areas labelled "culturally specific", "tradition" or "identity", typically to the detriment of women, and all sexualised and racialised others.

The baseline is to suggest that courageous rulings – prominently rulings based on the evolutive approach that sees the Convention as a living instrument[18] – put human rights as such, and put this Court, at risk.

The assumption is that if courts ask too much from governments, from legislatures, or from regular courts, they may not comply. And this concern is in fact a classic one, since courts have "neither the purse not the sword". But a concern is a reason to act wisely, not a reason to shy away. The word is power. It has, even without formal implementation significant effect on the ground. The recent report on rulings on Russia are impressive proof: they matter, to people.

Then there is the distinction between law in the books and law in action (to use the realist´s distinction – Roscoe Pound in 1910 and Karl Llewellyn in 1930). There are, on the books, indeed a lot of fundamental human rights these days. But is this a rights inflation? Certainly not. What really matters is the difference between the promise and its delivery, between the moral idea and even political commitment and the adjudicated reality. In Strasbourg, this is the difference between 1950, when the Convention was passed, the book, and 1959 and 1998, when the Court was installed and access granted, the action.

Protecting human rights in democracies, this action is called constitutionalism. It is not limited to nation-states, but, in post-Westphalian arrangements of legal pluralism, it is a name for the institutionalised protection of fundamental human rights[19]. The key institutions are courts. It is courts that make the difference between book and action. Because of this central function, there is no general reason to defer. Indeed, and facing the challenges today, it is quite the

[18] Since ECHR, 25 April 1978, *Tyrer v the United Kingdom* 5856/72.

[19] For comparative analyses and cases see Norman Dorsen et al. *Comparative constitutionalism: cases and materials*. 4th ed. West 2021.

contrary. To make human rights a reality on the ground, for people who need them, courts need to step in. And specifically, as an international human rights court, Strasbourg has been, and needs to remain, right there.

Put differently, human rights are no reality without courageous courts. On the books, human rights are nice, value statements, rhetorical concessions, grand aspirations. But anyone in power, getting there by more or less democratic means, and performing a fake democracy, with a meaningless rule of law, and captured courts, may choose what to do with them. It is only with independent courts that human rights become real for people not in power, as law. When courts defer, *in dubio* on principle, there is thus too much to lose.

Act wisely

Fourth, there is another general point that is often made to make courts defer. It says: "Be wise – do not provoke your critics any further!" [20] And indeed, when courts face pressure, attacks and varying methods of destruction, is it not wise to step back a bit? Or in the case of politicians, political speech, the blogosphere, as this is messy, and courts do have problems already, should they not stay out? Or in cases around media regulation: should there be wide margins to deal with pluralism?

I urge you to answer no. Because this is the paradox again: the more pressure there is on the courts, the more the courts are needed by the people. The attacks – powerful, strategised[21], one feather at a time – are meant to weaken, erode, and destroy. For humans, it is then wise to run. But for courts, it is a call to action. Remember Teitgen: before it is too late, and Albright: the feather plucked from the chicken, so the squeak is not too loud, but disastrous in the end.

In fact, the pressure and the attacks are exactly meant to make you, as judges, withdraw, stand back, leave room. Yet that room is the space of unlimited power, without judicial review. And that power is, in Europe today, too often an autocratic power of a few greedy populists[22] performing as "us", as "the people", exclusive, elitist, unequal, unfair. You are in their way. And people will suffer when you get out of it. Whenever we defer, people who really need human rights may lose the address they can turn to. It is people who are left without protection[23]. Or, as Commissioner Mijatovic said, the Convention is, often, a "life-saving instrument". Thus the paradox: when under pressure, it is then you are needed most.

The counter-authoritarian difficulty

Now finally, what about the "counter-majoritarian difficulty" (using the phrase from US theorist Alexander Bickel)? In the past, that was the difficulty of

[20] Note that some human rights are subject to protest, refusal or change themselves, namely substantive equality, specifically for women, homo-, trans- and intersexual individuals, as well as for religious and racialised minorities, and as fundamental rights for foreigners, specifically for refugees, as well as, in some contexts, people in prison.

[21] In Europe, Hungary serves as the blueprint of this transition to autocracy. See Sajó, András. *Ruling by Cheating: Governance in Illiberal Democracy*. CUP 2021.

[22] Scheppele, Kim Lane. "The opportunism of populists and the defense of constitutional liberalism." *German Law Journal* 20.3 (2019) 314.

[23] Baer, Susanne. "Who cares? A defence of judicial review." *Journal of the British Academy* 8 (2020): 75-104.

courts that disagreed with a democratic majority. And indeed, this is a challenge. But the context has changed.

In working democracies, when courts supervise and eventually stop majorities that are elected freely and equally, thus fully legitimate, review should be handled with great care. Critics should be taken seriously. But when democracies are not well, or have already become legalistic autocracies, whose leaders pose as majority, fake democratic procedures, and skilfully manipulate the public, there is no counter-majoritarian difficulty, but a counter-authoritarian task. In such fake democracies, parliament and regular courts do actually address human rights, in rhetoric, but they abuse the very idea. It is precisely then that independent courts, and often human rights courts, are the last resort to stop such authorities willing to use all means to get rid of anyone in their way. And courts are needed, early on.

This is what courts have been entrusted with, to move from promises in books to action that people need, in a democracy. In a complicated freedom of expression case: apply established doctrine, recognise margins of appreciation and leeway for competent actors, if they are really legitimate. But this is no time for non-intervention. Certainly, such cases raise complex questions, charged with intense emotions, of high symbolic significance, and are very contextual. But that is no reason to defer, rather to provide guidance. And yes, many regular courts and legislatures and governments know there is a right to freedom of expression and do consider it. But this is not enough. It is not rhetoric and certainly not fake performance that counts, but the substance that matters.

In the blogosphere case, the court clarified that politicians have standing, and may claim individual human rights even when acting in politics. It stated that fundamental human rights affect private companies, since courts of law allow or limit their doings – which is called, in German, "Drittwirkung". And it is well known in Strasbourg that rights guaranteed against State power have an effect on private actors too[24]. And no doubt civil courts are well versed in such matters, but fundamental rights supervision must control their decisions in substance nonetheless. Because what a constitutional court, or a human rights court, knows better is fundamental human rights. Thus more than procedural review, but rather substantive supervision. Because the people need you.

These days, the use of rights may turn into abuse, and the pretence of democracy may in fact destroy it. This means that narrowing the scope of protection may take protection away, and expansive tolerance of limitations leaves power unchecked. Therefore, government speech needs to be checked carefully, and public State-sponsored media may open space for informed debate, or reduce that space to one voice only. In some countries, as the Venice Commission notes with growing concern, even courts have been turned into devices to shed a legitimating light on autocratic government,[25] so that merely procedural review would in fact be complicit in its denial. Thus it is for the court to provide guidance, and define what needs to be taken into account or does not matter. This Court is the address people turn to,

[24] ECHR, *X and Y v. The* Netherlands*, 8978/80, 1985*-

[25] The Venice Commission reported on Kirgizstan CDL-AD(2007)045, Ukraine CDL-AD(2010)044, (2020)038 und (2021)028, Moldavia CDL-AD(2019)012, and Romania CDL-AD(2018)017 and 021.

asking for help, even in countries where no formal implementation is in sight[26]. It is the institution to provide that guidance, so that regular courts can do their job, and so that legislatures can turn their human rights commitments into realities. People need you. Democracy does, too.

[26] I.e., thousands of Russians sought justice, with around 17,000 cases still pending when Russia was expelled from/left the Strasbourg system. Even without formal implementation, citizens perceive ECHR rulings as symbolic support, thus having a significant effect on the ground. See OSCE Report on Russia's Legal and Administrative Practice in Light of its OSCE Human Dimension Commitments, 22 September 2022, ODIHR.GAL/58/22 Rev.1.