

“The normative commitment is contested ground, and we all have to take care it holds.”
Interview with Susanne Baer

Across Europe, the rise of far-right parties has caused many to take a moment and examine what driving forces cause the citizenries of numerous European states to vote for politicians that employ rhetoric, promulgate policies, and support movements that are contradictory to the European project. On the topic of the rise of the far-right in Europe and its implications on the law, Professor Susanne Baer discusses what she perceives as some of the causes, threats, and solutions to the dismantling of liberal democracy.

Susanne Baer is a former Justice of the German Federal Constitutional Court (2011-2023), a Law Professor at Humboldt University of Berlin, and L. Bates Lea Global Law Professor at the University of Michigan.

Mitchell Rutledge: Looking at Europe today, particularly in Central and Eastern Europe, we have a dangerous development of large percentages in recent elections gained by far-right political parties. They often possess a rhetoric that is anti-immigrant anti-multiculturalist. You have said in some of your work, that when people defend versions of multicultural politics, there might be a risk of groupism. Do you think that is a problem in Europe today?

Susanne Baer: I do. When we look at European societies, and even more so at European political struggles around how we want to live together, there are such challenges. This is more than looking at a society as a social phenomenon. Rather, societies are the site of the political challenge to find every day anew, as Hannah Arendt would have emphasized, in an everyday newly built consensus, how we want to live together. And there are many challenges, but the one that concerns me most at the moment is the dynamics of far-right political parties and movements. These days, they are globally coordinated and globally sponsored, and they are very effective forces, particularly on social – and then antisocial – media. They develop arguments to undermine what one may call the European consensus of how we want to live together – and this would harm all of us.

Authoritarian populists target, and seek to destroy, the consensus based on a post-World War II sense of never again. It is built on the willingness to live in peace as nations who have not been doing that for a long time. And it is particularly, which this may be one of the most interesting questions these days, a consensus built on a respect for difference, in its commitment to equality. For many people, differences have become a key difficulty in multicultural societies. And it is a difficulty insofar as differences are conceived as group differences and the right to equality treated as a group right. As such, groupism carries the danger of informing groupist identity claims, which are necessarily exclusive, and inform intolerance rather than tolerance, and equal respect.

Instead, the commitment to universal human rights, as fundamental rights of dignity, liberty, and equality, that inspired the post-World War II consensus, is built upon a starting point of the individual. There is a challenge as well, in that one may easily fall into that other extreme of conceiving the individual as the autonomous, de facto, and stereotypically male, heterosexual, able-bodied, white subject. But this is not a necessity. In fact, constitutional law and human rights law post-1945 can be read to conceive human fundamental rights as claims of socially embedded individuals. Based on this notion of social embeddedness, rights then serve as keys to open the door toward multicultural societies beyond groupism. This requires us to respect collective identities, not carve them in stone but allow each and every one of us to move in varying contexts, commitments, and identities that matter to us.

That idea of groupism comes from the work of Brubaker who identified it as one key source of military conflicts. Groupism is the dynamics that not only appreciates group identity, but actually positions groups as oppositional and competing with each other. I take it as a rather helpful concept to understand that minority protection as the recognition and proper analytical understanding of collectivities is a wonderful idea. But it also tells us that a normative overload of group claims is a dangerous one. When we look at far-right politics in Europe these days,

we see that they are driven by, and drive such collectivist group claims - the “real” French, “we” the Germans, “true” Swedes. By doing so, they create imaginary collectives that aggressively exclude “the other”. And they want all of us to engage in competing groupist claims, them on the side of the nation, us on the side of minorities. We should avoid that trap. Right-wing populism tells us that groupism is really not a good idea. And I argue that multiculturalism, and tolerant societies committed to equal liberties, do not need the group claim. Instead, and honoring the post-1945 consensus, we need to understand the claim of individuals as socially embedded in varying contexts. You may take this as an intermediate kind of third option. Rights then, are neither only individual nor only group claims but protect individuals embedded in varying contexts. This notion can normatively inform a European politics dealing with today's social makeup. And it does, properly understood. EU law, particularly the Charter of Fundamental Rights, and EU values, including the member states commitments defined in the Treaties, does that. It is a promising way to find consensus based upon that notion.

MR: One follow-up question from that. How do you see the move away from groupism in relation to the nation-state and our identity as German or identity as French? Would you take it even that far and say, maybe nationality doesn't matter? Except for administrative reasons? How far would you take this idea of diversity in the European context?

SB: Identities matter to people. But most identity notions are given to people by birth, and things change over the course of a lifetime. People change beliefs and commitments, coalitions and conventions, nationality, and even aspects that were deemed fixed over centuries, like gender. And we have to account for that. So first, identities are not fixed.

Second, nationality is an aspect of people's identity, but even more of a resource today. Your passport signals an asset, a property claim. It means access to things, to a right to stay, to protection. As such, nationality is the basis of what Arendt named the right to have rights. Most certainly, it is also bound to those big stories we tell each other about what America is, or Germany, or France, etc. Benedict Anderson's work illustrates that beautifully: these are imagined communities. But these stories change as well. Note that many people when asked where they are from would name a city, or a continent, or a region, not a nation-state. And nationality is, last but not least, a prime site of manipulation.

It may well be that my skepticism also springs from a rather personal particular source, in that a German of my generation tends to grow up not being proud of being German, of not talking German in the New York subway, of having trouble to respond to the German question. Yet I do understand, and do experience it myself, that the nation matters. There are “German” things I take for granted, conceive as “normal”, because I think they are clearly bound to where I grew up. However, the more you travel, the more you learn this is not always the case. In addition, what should nationality mean politically, and in law? There is a need to recognize that there are many versions of being German, to do justice to the people. It is not fixed in time, but an ever-changing space that can be filled in many ways. And we need to fairly deal with national identity and nationality as resources, because these matter tremendously in this world. Yet they must not amount to exclusive groupist claims, to not inform aggressive competition against each other. Not only Europe is based on a more inclusive idea, which is the idea of open borders, of a strong commitment to multilateralism, in a global consensus, and last but not least on the idea, and the practice, of human rights. The Kantian dream of cosmopolitanism may be somewhat unrealistic. But it is a guiding light. And we need to acknowledge the broad spectrum of experience.

MR: Earlier, you talked about, this idea of exclusion... [and] one of the interesting arguments progressed by you is that religion is a shortcut to culture, which invites groupism and threatens human rights and equality. In the European context, it seems as though in fact, secularism—specifically certain secularized forms of Christianity – informs nation-state identities as well as policy. I'm curious, does groupism go beyond religion and encompass, other beliefs and ideologies, such as alternative forms of secularism (e.g. French secularism), which then allows for exclusion rather than inclusion?

SB: That is a great and very complicated question. First, groupism as a theoretical and analytical concept applies to all kinds of collective activities and modes – be they ideological, be they religious, be they social, be they cultural. However, I hesitate to apply it to secularism as such. This is because there are many versions of secularism out there, and the French one is a particular one, different from, i.e., the German variety of church-state-relations, or the English version, or the American one. In France, as in other places, there is indeed a certain risk to turn secularism into an exclusive ideology of la Grande Nation, a core definition of being French, and to hide that this being French is loaded with additional characteristics that are, however, not necessarily elements of secularism. So the more the French version of secularism is ‘French-ness’, the more it runs the risk of groupism and a rather classic nationalist, as well as colonial and overall hegemonic stance. Thus, the more I dissociate secularism from components that are loaded onto it, the more we are able to differentiate secularism from other sociocultural claims.

Often, secularism is in fact not so secular, but a cover-up of rather worldly notions of what the world should look like, for those allowed to join. Then, secularism is a label attached to systems that are in fact heavily Christian, or else. Then, it is a cover-up for something that is de facto more groupist than it presents itself.

So the key task is to analyze what is happening beyond the label. Then, a secular state may be a groupist arrangement, or not, because it all depends on how that secularism is organized, and implemented, and what it means to those who are different in a given society.

MR: One tension I feel from that answer a little bit is even if it is a version of secularism, a variety of secularism, which is not coding any other form of religion, it's purely secularism – separation of church and state, we have zero beliefs, and in fact, our state is run without any religious influence – this ideology of secularism could still inform groupism. Would you say, or no?

SB: Such claims of total exclusion of religious belief from what is then deemed to be purely secular public life strike me as doubtful to start with. And yes, such a claim tends to turn into an ideology and inform exclusive groupism as such. But then, it may not deserve the label of secularism anymore. Similar to democracies that are none, or to states governed by the rule of law that in fact abuse it, the label secular must be applied carefully. Then, secularism requires equal treatment of all religious and spiritual habits. Is that the case? There are many components of secularism that must be tested, to apply the label. As such, then, it is not an ideology. If it is used as an ideology, it is groupist, and not to be applied.

MR: Transitioning to look at this concept of tolerant law that you use in your writing. You mentioned the concept in “A Closer Look at Law: Human Rights as Multi-Level Sites of Struggles Over Multi-Dimensional Equality.” To me, it seems that it has a neocolonial element. I am curious, as populist leaders across Europe claim the Union to be neo-colonialist – with its conditions tied to the aid such as the Next Generation EU Aid Package emerging from COVID – do you perceive the EU’s reactions to the rise of illiberalism in Poland and Hungary in particular as tactics of tolerant law?

SB: Law as such sets clear limits, but also allows for leeway. In rather complicated governance schemes like the EU, law is fundamental, as normatively binding, with clear limits to what member states can do. And yet at the same time, EU law must tolerate many variations and leeway. Tolerant law may seem like a weird notion to many lawyers, because law is coded as either-or, and tolerant law implies that there is more than that. But to understand EU law, it is helpful to take a public law perspective and see law to define the outer limits, in its either-or code, and leave, or even create a lot of space in between. Then, you may describe the struggle of the European Union to keep Hungary and Poland within the Union, yet implement the binding basic rules, as a combination of either-or decisions on the limits, eventually by the Court of Justice, and regulatory mechanisms that allow for some variety within these limits. In the beginning, the EU’s reaction to Hungary and then Poland

was moving along these lines. But when both governments did not react but kept installing more and more authoritarian structures, the EU must become less and less tolerant, and implement more rigid limits, i.e. conditioning financial aid, because economics are the working mechanism.

Note that populist leaders in Europe then claim the European Union to be neocolonial. They align themselves in their savvy rhetoric with the critique of hegemonic colonial politics, including the recent colonial forms of friendly manners to lead to exploitation in the end. But they abuse the concept, to put it to their own rather different political agenda. And authoritarian populists do that on many fronts: abuse established critical concepts to undermine, i.e., the rule of law, and democracy.

MR: How do you envision the court ruling on matters in a certain way when the court sees that there has been a shift in social opinions despite the parliament having not legislated on the matter in the EU in which you have multiple polities (the Polish polity, the German polity, the Dutch polity, etc.) as they haven't really mixed into one, as some envisioned and were hoping in the early mid-20th century? How do you see these spheres [the polities and the EU] developing values and norms legally within the EU, without forcing certain polities to accept such values and maintain the tradition of strong consensus?

SB: This is also a very important question to be discussed these days. However, I do not think it is a question for the EU only. How do we think of the United States with all the states? How can this union survive with all those very different beliefs and mindsets and living conditions? I think that we have to ask ourselves in every larger social setting whether and how we find common ground. In Europe, the strong tradition of the Westphalian nation-state's sovereignty certainly adds to the problem, as does the notion of sovereignty in international organizations, like the UN. Yet the EU is still an inspiring example for other continent-based associations.

So wherever you find a strong tradition of localized identity, as in national pride, there is a challenge to form multiple polities. The EU as such is somewhat of a miracle, and certainly a challenge, yet it is also tremendously successful. It must maintain its ability to adapt to changing conditions, yet may also serve as an interesting way to arrange polities close to each other. The same is true for federal states. The United States, or Belgium with a particular arrangement of two very different parts, or Canada with Quebec and indigenous nations, or other diversified unions have to constantly handle the temptations of centralization or secession. There is no such thing as a natural development out there. Life conditions change, values change, commitments change, beliefs change, and that is part of life. So the challenge is not a surprise, but it is specific to each context.

Back to the EU. It was designed as a smaller union, and it is largely based on the full consensus method.

Politically, a full consensus is a means to integrate. But it gives veto power to one member, and with many such members, it is the subject of intense discussions these days. We already saw during the first financial crisis that nobody is interested in losing a member state, like Greece. We see now that Europe is also not interested in losing Hungary or Poland, for many reasons – including cultural and social solidarity and a feeling that we belong to each other. But we have to ask ourselves, what is the defining bottom line where we will meet, and where is the red line we need to draw where things fall apart?

There is then an additional challenge to confront. It is well known to people working for human rights, amounting to the question of who pays the price when lines are crossed. Historically, it has been Black people and women, and now it is LGBTIQ+ people who are made to pay the price when democracies die, and when fundamental human rights are not protected. Their concerns are eventually defined as property interest, and as private matters, thus not subject to strict legal review, and up for grabs for traditionalists, nationalists, and the like. This can be observed in many settings, and now it happens again. Religion, marriage, family matters, or sexual identity are then treated as particular, domestic, and out of reach of universal claims. Thus, they are at the top of the agenda of legalistic autocrats, whose populism deviates from the European Union consensus. But this is where the European Union has to recommit itself to its starting points.

MR: You mentioned in a few of your writings, multi-level regulations, and you specifically referred to EU regulation. You also mentioned the embeddedness of nation-states, constitutionalism, and international legal order in your thoughts on “The Final Call” where you discuss the climate crisis as the potential end of state sovereignty. How do you envision these multi-level laws in a world in which nation-states can and do shift legal realms, such as via Brexit? How do you see this affecting the idea of universal human rights – rights that the individual has at birth and is supposed to be recognized in every environment, on every level?

SB: Your question makes me think of whether the notion of level is indeed the best notion to describe that. The concept is very well established in political science to capture the structure of the European Union as multi-level governance because it is neither national nor international. “Multi-level” seemed to capture the arrangement of units ranging from municipality to state to EU institutions. However, it seems somewhat strange to talk about somebody leaving a level, like Britain. However, Britain is still a nation-state in the context of multi-level governance and, which might be more interesting, subject to multilevel constitutionalism, in that Britain, even when not a member of the EU, has ratified United Nations law, entered regional agreements, and the like. Most nation-states are, today, entangled in international trade organizations' law, as well as other international norms often are not at the forefront of discussions around fundamental rights, but are nonetheless important to people in this world today.

The notion of embedded constitutionalism does result in a starting point not limited to domestic law. For a non-EU member, as for the United States, as well as for states that join a regional arrangement, the starting point of regulation, and of peaceful solutions to conflict, is not their law in isolation. Rather, the starting point is that nation-states with their domestic laws are but one level that is closely connected to and often even inextricably linked with other levels of normative commitments and institutional governance schemes. They are embedded. This modifies normative commitments and claims as well as institutional structures.

Note that such developments do not endanger the notion of universal human rights as such. The normative commitment to universal human rights informs all levels. These are not exclusive of each other, or closed, but may be understood as entangled modes of law that encompass, contextualize, and eventually broaden the reach of human rights. They anchor the idea anew. And again, those claims to law that do not do that may not deserve the label.

MR: Allow me to dig deeper. Indeed, each level has this idea of universal human rights embedded in it, because of the way in which the systems are interconnected. I guess that every single EU member state's constitution does indeed recognize universal human rights. However, if we look at the Kadi case¹ in the European Court of Justice, not all the same elements of universal human rights are employed at each level. What does that do to the system?

SB: The short answer would be that universal human rights are not a religion. They are a normative commitment, in the form of law, which is a very specific form that comes with hopefully solid institutional arrangements and sound theoretical concepts, yet it is still politically controversial. While we develop new governance schemes, that commitment will thus always be a site of contestation. The Kadi case is such a moment of contestation,

¹ Yassin Abdullah Kadi's assets were frozen as part of a United Nations Security Council Resolution that the EU Member States adopted and applied. Kadi challenged the freezing of his assets claiming violation of property rights, right to defense, and right to effective remedy. The European Court of Justice ruled that the EU has an obligation to protect fundamental rights and therefore, cannot enter agreements that violate such rights. The Court found the application of the UNSC Resolution violated Kadi's right to defense and efficient remedy. The case elevated EU constitutional norms above international law provisions allowing the EU to review and challenge international laws promulgated by institutions such as the UN. ECJ, Joined Cases C-402/05P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351.

evoking a specific response by one of the bodies charged with navigating the course, a court. And such moments are truly challenging. Whenever confronted with such a paradigmatic case, the ruling needs to be very specific and yet live up to the general quest, a decision on one case only yet a very forceful intervention. To make such a point as a court is pretty different from doing it as a politician, saying this or the other, and even different from a legislature, taking a majoritarian vote. Courts are not free to revisit an issue. Yet their rulings do also not end the conversation. A decision needs to be respected as final, but it is not the final word on the issue.

Also, and I kept telling people that as a Constitutional Court Justice, the courts are certainly in charge of the Constitution, but it is yours, the citizens' Constitution by the way. It is in your hands, and it is on you to figure out, daily, what you agree on to mean by human rights, dignity, liberty, and equality. Because if the people do not agree on the basics, a court can only do so much. The normative commitment is contested ground, and we all have to take care it holds.

MR: That is exactly what you write on in "Democracy in Peril." You say the court needs you, as all citizens, to be friends of the court, and one should not fetishize the law and the court. How do you envision these friends of the court, in civil society, taking root – in Germany, Eastern Europe, and the EU as a whole?

SB: Indeed, it seems to me that all courts with the exceptional power of judicial review – and this is what we are talking about constitutional courts, supreme courts, human rights courts – do need those specific friends. They are not fans – that is important – nor subtle attackers. But friends as critical companions that stand by you. They thus also, as Germans would say, wash your head, in that they criticize and correct, and you do not always like that. Also, you have to invest in friendship, because it is not falling from heaven, and it may break. Friendship indeed carries the notion that both sides matter, and need to invest, so that a court interested in having friends must communicate properly, shall not be arrogant, abides by ethical standards and does everything to deserve the recognition and respect that you charge a court with. And that is a lot on a plate.

The notion of friendship may allow us to better conceptualize the relationship between courts and society. Friends, interestingly, do not need to like each other, and they also often do not know each other, and do not have to get along, but they eventually meet at my place, knowing me. And that is very similar to parties meeting at the European Court in relation to the attacks on the rule of law in, say, Hungary. The Hungarians do not have to agree with the Germans or anybody else, but they are invited to the Court together, and they engage in a friendly conversation about European standards.

For sure, there are other notions, or metaphors, out there to describe this. Often, the relationship between people and the highest courts is labeled as trust. You need to trust the court. Yet trust is a tricky notion. It may be blind. Therefore, it is better to watch each other carefully, and, again, invest in friendship.

On the side of courts, the institutional design also matters tremendously. It informs the standing of courts, the ability to deliver what they are supposed to deliver (that is rulings and not political opinions), and to justify the respect they need. If they are designed as rather shaky and unreliable, you maybe do not want to be friends. If they cannot prioritize cases that really matter, because harm is done, you may not like that either. And if they do not give plausible reasons to decisions you disagree with, your friendship may end. In some EU member states, autocratic governments used court reform to destroy the court, while the debate in the United States seeks ways to make the courts better, and truly legal, institutions, thus save the courts. So very much depends on this. Institutional design matters.

MR: In your paper "Democracy in Peril," you say, "It was not for money alone that moved young democracies to fascist dictatorships." In the European context, being critical in our analysis of the courts, what do you perceive to be the driving forces that moved young democracies of Europe to autocratic governance after the 1990s?

SB: There are many factors at play. However, what worries me is the use and abuse of the rather well-established critique of judicial review, with a particularly well-known yet in many ways peculiar American version. Autocratic

populists try to capture that critique. They claim that there has always been a problem with those courts going too far. But they do so not to criticize, and in fact, enhance the court's performance, but to do away with independent judicial review as such. Independent courts committed to universal human rights and democracy that deserve the label are in their way. Thus, one needs to be careful in joining a chorus that may well lead to destruction. We need to be very self-conscious about what kind of terms, concepts, and critiques we ourselves use, and we need to make sure they are not abused and appropriated by the enemies of democracy. As mentioned before, these people are rather organized, well-funded, and savvy. They also appropriate all forms of formerly left-wing protest and activism. They appropriate the terms of liberal theories and philosophy. Therefore, I think there is an intensified need to pay attention to this risk of abuse. And to be sure: This does not call for silence or self-censorship, but it is a call to pay attention and call abuse what it is. That seems important to me. Because we all need independent courts that live up to the tricky task in today's environments.

Interview conducted by Mitchell Rutledge, student in the MA program in European History, Politics, and Society at the European Institute, Columbia University.

June 8, 2023