

How do we protect values?

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The defenceless nature of values

The Dutch poet Lucebert wrote in 1953: "Everything of value is defenceless." However, no matter how defenceless something of value is, people still want to keep them as good as possible: photos of our parents in an album, jewellery in a safe, money in the bank, fresh milk in the fridge, a baby in a safe cradle. We are always looking for a good place to protect the defenceless and vulnerable nature of valuable things as well as possible.

In this article I focus on

- ❑ the protection of values,
- ❑ within the perspective of popular sovereignty in the sense of: 'All sovereignty rests with the people',
- ❑ which must be organised by representing the people because the people cannot meet every day to make decisions about their own affairs,
- ❑ which makes it necessary to make a constitution that contains the rules by which the administrators (executive power) are accountable to the representatives of the people (legislative power), while those representatives of the people in turn are accountable to the citizens (elections),
- ❑ which means that the protection of values must have a clearly unique place within that constitution.

As a federalist, I am working with many others to establish a federal Europe. So, of course, I am thinking of a federal constitution. But that is not relevant here. For everything that I say in this article about the protection of values, it makes no difference whether we are talking about a unitary state or a federal state.

The need to protect values

Values such as - for example - people's free development in search of a happy life in solidarity, security and prosperity are vulnerable and defenceless against the autocracy that is emerging in many parts of the world. Fed and supported by populist nationalism, with contempt for the rule of law, autocrats manipulate the procedures of their democracy, thereby undermining the inalienable sovereignty of the people.

Every people has autocrats. They usually lie in the caverns of a poorly formulated and poorly organised democratic system. They only emerge when defence mechanisms against their manipulation and deception are absent or so weakened that, with the concept of 'democracy' as a weapon, they can destroy this same democracy.

Autocracy is the ultimate oligarchy, revealing itself by governing from above by means of decrees. Without respect for representing the people from the bottom up. Let alone accounting for administering from the top down to a people's representation.

Europe, too, has a few such people. But let us not mention names now. It is more important to point out the contagious nature of autocracy. It also affects leading European politicians who certainly cannot yet be called autocrats. But they do show clearly that they like to govern from the top down much better than to look for their strength in constitutions and institutions that preserve and guard the values of 'popular sovereignty' from the bottom up.

They are not interested in offering a safe place for such values. Partly because they lack sufficient knowledge, partly because it restricts their free room for manoeuvre and partly because they are given too much room by the people to indulge themselves - without an understanding of the true constitutional and institutional building blocks of democracy - in ever more fierce government from above. And then - fed by the aftermath of the extreme economic neo-liberal thinking - they think they are doing a good job of it.

In another publication, entitled ['People's Sovereignty: the basis for circular policy making and federalisation'](#) (August 2019), I concluded with a refutation of a statement by Bill Clinton as President of the United States: "It is the economy, stupid. That may have been a valid adage in his day, but now it is no longer true. Under the threat of increasing autocracy, including in Europe, I think the adage should read now:

"It is NOT the economy, stupid. It is the sovereignty of the people,
organized within a true democracy,
based on a federal constitution,
under the rule of law."

Where do we guard the value of 'popular sovereignty'?

It is a common way of thinking that value judgments in the context of popular sovereignty and democracy can best be included in a charter. I do not deny that a charter is a good place, but it is not the best place. With the adage written above, I take the view that the best place to protect the fundamental values, seen from the point of view of 'popular sovereignty', lies within a constitution.

With the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Council of Europe, Rome 1950) we already have such a charter. But after a de facto autocratic violation, the distance to the charter's protection against the violated values is too great and too uncertain. Let me try to make this clear with a metaphor.

Suppose you have valuable things in your home. In order to protect them, you have installed an alarm system. In the event of a burglary, the police are automatically warned, but they are only there after 15 minutes. Then, the thief is long gone. Whether he will ever be caught is the question. The same goes for whether you will ever see those jewels again. An alarm system, connected to the police, is only a second-best option. The best option is to use day and night security in the house itself to immediately catch the thief before he can reach the value.

The meaning of this metaphor is: build in a defence mechanism that prevents damage to values from occurring. It is more effective to cut off autocrats who want to violate the values of popular sovereignty - and of the system of democratic accountability based on it - with an inbuilt defence mechanism, rather than trying to bring them to order after the violation by means of long-term and uncertain procedures of a charter. Without denying the usefulness of a treaty as a protection of values in the context of popular sovereignty, I would argue that this protection should first and foremost take place within a constitution.

In order to strengthen the in-built first defence mechanism, the second best option should be applied as well by a constitutional provision that the state in question will be a party to the ECHR, with so-called direct effect. This means that the judicial authorities of the states that are members of the ECHR must examine all legislation and administration in the light of the ECHR. As an aside, all EU Member States are currently parties to the ECHR, but the EU itself is not.

With regard to the need to build in better defence mechanisms within democracies, I refer to an excellent article by Matteo Laruffa entitled ['The institutional defences of democracy'](#).

Where in the constitution should the protection take place?

By taking the view that a constitution is the first and best place for the protection of the values of 'popular sovereignty', we enter the domain of legislation. This is not an area familiar to everyone. Without a little explanation of legislative technique, my position may not be sufficiently convincing.

The core of legislative technique

Laws have three essential parts. The quality of each part determines the strength of a law. The first part is usually quite short, only a few sentences, and contains the consideration of why that law is made. So that is a description of the goal. Goal equals value. That value must be protected by norms. With its articles 1 to X, the norms are the second indispensable part of the law. The third part is called the explanatory memorandum. It explains the background, intention and argumentation of the law. Without that part, a judge is in the dark when interpreting a court case.

Well, when it comes to an ordinary law, we simply call the consideration: consideration. On the understanding that we in the Netherlands use a Latin word for this: Considerans. But when it comes to the consideration of a constitution (the mother of the laws) we call it: Preamble.

I ignore discussions among legislative lawyers about whether or not a constitution needs a preamble. For me, that is not a question. As a public administration expert with a constitutional background, it is unthinkable that you should be allowed to make binding rules for citizens without describing their goal, the value. Then, with the instrumental norms, i.e. the articles of the constitution, to indicate how you think you can protect that value. I therefore see the fact that the Dutch constitution does not have a preamble as a shortcoming of the Dutch constitutional system. I also

ignore the question of whether a preamble should be short and powerful, or thorough, embedded in a well-considered motivation and argumentation. I opt for the second option.

The preamble as the soul of the constitution

The view that the protection of values should be regulated primarily within the domain of constitutional law itself - as the best defence mechanism against autocratic seizures of power - forces me to indicate where the right place is. Well, that is the Preamble, the consideration of why the constitution is made.

Values in the context of popular sovereignty and so on are the soul of inalienable rights of citizens. The text of this - part legal text, part explanatory text – should be extremely precise. And it requires the utmost skill on at least two points: knowing what the content should be and knowing how it should be formulated. The content is a matter best expressed by the citizens themselves in accordance with 'the wisdom of the crowds'. Whereas form is a task and a matter for professionals who know how to design a correct constitution for that content. Metaphor: the customer explains what he wants on the pizza and the pizza chef makes something tasty out of it, while the pizza chef, as a professional, refuses to make a pizza if the customer says that he would like to have a whipped cream pastry on top of the salami and anchovies. That's not appropriate on a pizza.

Both aspects - the methodologically correct deployment of citizens and professionals - were trampled in the process of drafting a European constitution led by Valérie Giscard d'Estaing (2003 to 2005). The result was the Treaty of Lisbon, the worst conceivable legal document ever written in Europe. For more information on the role of citizens and professionals in the design of a federal constitution for Europe, I refer to my book ['Sovereignty, Security and Solidarity'](#).

The seriousness of the case considered in more detail

In recent years, there has been so much rebellion in the world against authorities that we have to ask ourselves: what is going on here? Democracies seem to be eroding, autocracies seem to be exploding, citizens are desperately and fruitlessly searching for their role and position in these processes of democratic breakdown. For this seriously increasing problem, I refer to an excellent article by Shany Mor: ['Nobody understands democracy anymore'](#).

Whether it concerns the yellow shirts in France, the demonstrations in Hong Kong, in England the resistance against Brexit and the suspension of parliament, in Russia the demonstrations against Putin, in South-East Indonesia in the Moluccas and in West Papua the ever-increasing resistance against Indonesia, the relentless struggle between Israel and the Palestinians, the aspirations of regions such as Catalonia, the Basque Country, Scotland, Wales to break away from the motherland, the tensions in Cyprus between the Greek and Turkish parts, the division in Ukraine between the East, the West and the Crimea and how the Lisbon Treaty works as a split within the EU on issues such as immigration and the euro.

This list of rebellion and resistance versus autocracy is longer, but I will leave it at that. It is not a question of whether we should support Scotland's quest for independence or not. It is not a question of taking sides. The question is: do we or do we not want to give every people in the world - and hence the people of Europe - constitutions with a preamble based on the values of popular sovereignty and all that goes with it?

If European Heads of Government think that the next decade will be a period of calm and tranquillity, they are probably making one of the most important mistakes of their lives. They will be thrown back, with or without force, to the need to reinvent the links that make up the chain of 'popular sovereignty':

- ❑ representation of the people,
- ❑ based on a full-fledged Constitution,
- ❑ with a Preamble that is the first and most important defence mechanism that expresses the values of humanity,
- ❑ which then contain in the articles of the Constitution the first line of defence for the effective protection of the Preamble-values,
- ❑ supported remotely by the second line of defence in the form of a charter, for example the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Conclusion

What I have said so far applies both to unitary states and to federal states. As a federalist, I designed together with Herbert Tombeur in the [European Federalist Papers](#) (2012-2013), a federal constitution with a Preamble for a federal Europe. In the context of the Federal Alliance of European Federalists (FAEF), we are working on an improvement of this Preamble because the seriousness of the erosion of democracy within Europe forces us to be extremely alert. Because everything can always be improved, a working group of the World Federalist Movement Netherlands (WFBN) has set itself the task of improving our existing version in the course of this autumn 2019. This will then be the subject of consultation with the citizens of Europe.