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Modern constitutionalism and patriotism in the Dutch Constitution of 1798

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Abstract

Since the end of the eighteenth century, many states have adopted a written constitution as the foundation of their political system. Most of these constitutions include mechanisms designed to protect the individual against the state, such as universal rights and the separation of powers. For that reason, this development can rightly be labelled as the 'rise of modern constitutionalism'. Constitutions should not, however, only be associated with the establishment of democracy and limited government. They also have an integrative function, in the sense that they are meant to provide the polity they encompass with an identity. In this way, they also contribute to the process of state and/or nation building. Obviously, there can be some tension between these two aspects of constitutions. In other words, the implementation of the principles of modern constitutionalism might be influenced by the state formative elements of a constitution. The aim of this paper is to explore this tension by describing to what extent the principles of modern constitutionalism were incorporated in Dutch Constitution of 1798. After all, the authors of this Constitution were not only inspired by principles of democracy and limited government, but they were also fierce patriots, determined to restore the Dutch Republic to its former position as a global player.

1. Two aspects of modern constitutions

Modern constitutionalism is usually associated with the establishment of democracy and limited government, and rightly so. Many constitutions that have been adopted in the past two centuries contain devices aimed at assigning political influence to citizens and at curtailing the power of state institutions.[1)] They

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1) Cf. for the term 'constitution': G. Sartori, "Constitutionalism: a preliminary discussion" in: *The American Political Science Review* 56 (1962), 853-864.

proclaim popular sovereignty, universal human rights and several other mechanisms designed to protect the individual against the state, such as the separation of powers. Unsurprisingly, scholars have tried to identify which of these mechanisms are essential to modern constitutionalism. Henkin describes eight elements that are present in most Western constitutions, whereas Dippel provides us with a list of ten principles, or 'essentials' of modern constitutionalism, all related to the goals of democracy and limiting government.[2)]

Modern constitutions are, however, not only about the rise of democracy and limited government. They are also ideological sites, providing a specific structure to society and a justification for this structure.[3)] Such constitutions claim an autonomous and superior political legitimacy and are, therefore, normative.[4)] Baxi is, perhaps, the fiercest supporter of this view.[5)] He is critical of the dominant tradition in which narratives of liberal constitutional progress abound. He emphasises that constitutions often contain elements of state formative practices and that for that reason constitutionalism is also relevant to the exploration of practices of identity and nation building. He points to the foundational violence of an inaugural constitutional text that results from these practices. Constitutionalism inevitably has a propensity for violent exclusion, he argues. This is also true for contemporary constitutionalism, despite the efforts of many scholars to present these as void of ideological content. Baxi concludes that 'comparative constitutionalism needs further anchoring, going beyond prescriptive, admonitory knowledges concerning Habermasian/Rawlsian "constitutional essentials"'.

In the same vein, Arjomand states that the primary purpose of the first written constitutions of the late eighteenth century was the definition of the political community.[6)] The polity they were addressing had to be delineated. They, therefore,

2) L. Henkin, "Elements of constitutionalism" in: *The Review. International Commission of Jurists*, 60 (1998), 11-22. L. Henkin, "A new birth of constitutionalism: genetic influences and genetic defects" in: M. Rosenfeld (ed.), *Constitutionalism, identity, difference and legitimacy. Theoretical perspectives* (Durham/London 1994), 39-53. H. Dippel, "Modern constitutionalism, an introduction to a history in need of writing" in: *The Legal History Review* 73 (2005), 153-169.

3) Cf. J. Tully, *Strange multiplicity. Constitutionalism in an age of diversity* (Cambridge 1995), 7-9, 58-60 and 66-68.

4) P.L. Lindseth, '"Weak" constitutionalism? Reflections on comitology and transnational governance in the European Union' in: *Oxford Journal of Legal Studies* 21/1 (2001), 145-163 (145).

5) U. Baxi, "Constitutionalism as a site of state formative practices" in: *Cardozo Law Review* 21 (2000), 1183-1210 (1192 and 1210).

6) S.A. Arjomand, "Law, political reconstruction and constitutional politics" in: *International*

provided criteria for membership of the nation and, thus, constituted the basis of nation building. In the course of the nineteenth century, constitutions also served as instruments of state building. They were used to centralise the institutions of the state. He subsequently states that in the twentieth century, many – although not all - constitutions were founded on an ideological basis. In that era, they were instruments of social transformation. This is true for the constitutions of many decolonised countries, of which Indonesia may serve as an example. There, the constitutional documents adopted after the declaration of independence in 1945 were all based on the five principles of the *Pancasila*.[7] The constitutions of the former communist countries in Europe belong to that category, too. Finally, since the Second World War, religion has also proved to be an important ideological basis for the constitutions of many new countries. Various Islamic countries, such as Iran and Saudi Arabia, provide obvious examples. Israel should also be counted in that category, having chosen the Jewish religion and identity for its foundation.

Finally, the views of Ackerman merit some attention. He argues that a constitution often marks the new beginning of a state which is in need of an identity of its own. In such a state, a constitution can act as a powerful symbol of national identity. It can acquire the status of a culturally significant symbol.[8] The development of the European Union might provide us with an example of this.[9] Having started as an intensive form of regional cooperation, it seems to have turned into something which resembles a process of state formation. Admittedly, it is debated whether this Union can already be considered a 'state'. However, the Draft Treaty establishing a Constitution for Europe, rejected by the electorates of both France and the Netherlands in 2005, clearly contained elements of state formative practices. Art. I-8 of this Draft Treaty lays down the symbols of the Union, such as a hymn, a flag and an anniversary. These are traditional instruments of nation building. The incorporation of a European citizenship might also be seen as a contribution to the concept of a European people.[10]

Sociology 18/1 (2003), 7-32 (16).

7) E. Darmaputera, *Pancasila and the search for identity and modernity in Indonesian society* (Leiden 1988), 155-165.

8) B. Ackerman, "The rise of world constitutionalism" in: *Virginia Law Review* 83 (1997), 771-797 (783).

9) C.N. Shore, *Building Europe: the cultural politics of European integration* (London 2000). A. Hurrelmann, "European Democracy, the 'Permissive Consensus' and the Collapse of the EU Constitution" in: *European Law Journal* 13 (2007), 343-359 (344-345).

10) Art. I-10 Draft Treaty establishing a Constitution for Europe. Cf. Peter A.J. van den Berg, "The integrative function of constitutions: a historical perspective" in: F. Amtenbrink/Peter

Including these elements in the Draft Treaty is not without consequences. The constitutionalisation of the European Union sometimes induces proposals for the introduction of elements designed to support nationhood in constitutions of well established states in which the constitutional principles are fully developed, such as the Netherlands. There, the government has set up a National Convention, charged with the evaluation of the Dutch constitutional order. It is suggested that in view of the developments of the European Union this temporary advisory panel should describe the essential national competences and interests, including aspects such as Dutch language, culture and history.[11] It is argued that some of these aspects of Dutch identity might deserve special attention in the Dutch Constitution, in order to protect them against interference by European institutions.

Obviously, there is some tension between the two aspects of constitutions. Quite rightly, Baxi speaks of the 'troubled relationship between constitutionalism and state formative practices'.[12] The incorporation and implementation of the principles of modern constitutionalism is often influenced by the state formative elements of a constitution. A new state in need of a new identity will not only pay more attention to state building provisions, it will also mitigate the mechanisms that limit government and implement popular sovereignty in so far as they might hamper the development of the nation. If in the course of time, the state becomes more secure, if the process of nation building is well on its way, the mechanisms to limit government might subsequently be augmented and better implemented. Exploring the state formative aspect of constitutions can, therefore, provide an explanation for the development of the mechanisms designed to introduce democracy and limit government.

The aim of this paper is to describe to what extent the principles related to popular sovereignty and limited government were actually implemented in the first national Dutch Constitution of 1798 under the influence of the patriotic impulse. This Constitution provides a good opportunity to study the tension between both aspects of constitutionalism, because the authors of this Constitution were not only inspired by principles of limited government and democracy, but were also fierce patriots, as will be shown shortly. The focus will be on four principles included in

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A.J. van den Berg (eds.), *The constitutional integrity of the European Union* (The Hague 2010), 13-53 (17).

11) A. Pijpers, "Discussie over politiek bestel ook van belang voor Europa" in: *De Volkskrant* (9-2-2006), 10. Pijpers is research fellow of the Clingendael European Studies Programme.

12) Baxi, "Constitutionalism as a site of state formative practices", 1183.

Dippels' decalogue, namely popular government, representative government, the declaration of human rights and the separation of powers. The other principles, such as independent judiciary, limited government, a constitution as a higher set of rules, an orderly procedure for changing the constitution, accountable and responsible government, and finally the foundation of the constitution on general principles, will be dealt with more succinctly. Specific attention will be given to the way in which the implementation of these principles was influenced by the efforts to strengthen the state.

2. The Dutch Constitution of 1798

At the end of the eighteenth century, the feeling of crisis was widespread in the Republic of the United Netherlands, also referred to as the Dutch Republic.[13] This sentiment was induced by the 4th Anglo-Dutch War (1780-1784), which had ended in a disaster for the Republic. It had become abundantly clear that the Republic was no longer able to defend its maritime empire. A revolutionary movement came into being, demanding a reform of the constitutional structure of the state in order to remedy this military weakness. At first, the revolutionaries, who named themselves 'Patriots', aimed at restoring what they considered the 'old constitution'. The leading principles of this 'old constitution' were to be found in the Treaty of Utrecht (1579), which had been concluded between the Dutch Provinces during their revolt in the sixteenth century against the centralising efforts of the Spanish monarch. It remained in force after the Peace of Westphalia (1648), when the independence of the Dutch Republic was internationally recognised. The Treaty of Utrecht only founded a loose confederation for defensive purposes, in which the seven provinces were considered to remain sovereign entities. Each of these provinces was governed by a body called the Provincial Estates, consisting of representatives of the Three Estates, together with a stadholder who mainly executed military functions. In this Dutch Republic of United Provinces, there was one common political body, called the Estates General, made up of delegates from each of the seven Provinces, dealing with matters of common interest, such as defence and foreign policy. Regardless of the number of its inhabitants, each province had only one vote, and for most of the decisions unanimity was required. In addition, each delegate had a fixed non-negotiable mandate from his Province according to which he had to cast his vote in the Estates General.

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13) Cf. for the history of the Dutch Republic: J.I. Israel, *The Dutch Republic. Its rise, greatness, and fall, 1477-1806* (Oxford 1995).

According to the Patriots, the present crisis was the result of deviating from this 'old constitution'. Since 1747, the position of stadholder in all the seven provinces was held by one person, who was always a member of the House of Orange. In fact, the stadholderate had become a hereditary function. Thus, it was argued, the confederal system of sovereign provinces had been replaced by a quasi-centralised government in the person of the stadholder. Moreover, the Patriots stated that the system of representation in the Provincial Estates had been corrupted. To a certain extent, their criticism was justified. In its early days, the Republic was certainly not a modern democracy. At the end of the eighteenth century, however, all power and wealth were divided among members of aristocratic families and the stadholder. The Republic had developed into an oligarchy. The Patriots were determined to restore the sovereignty of the provinces. They also wished to introduce more democracy, a more transparent government and more legal certainty for the individual citizens. In 1787, their revolution was well under way to being successful, but Prussian forces came to the rescue of the stadholder. The revolution was crushed and many Patriots went into exile.

In 1795, the Patriots were given a second chance. In the wake of a French invasion, the Batavian Revolution of 1795 took place and this time their efforts were not in vain.[14] The Old Regime fell and the stadholder was ousted. It marked the beginning of the Batavian Republic. The term 'Batavian', taken from one of the tribes that lived in the area during Roman times, was used to mark the fundamental break with the Republic of the United Netherlands. There is no doubt that the Revolution of 1795 was inspired by the principles of modern constitutionalism as described by Henkin and Dippel. After all, French revolutionary ideas about popular sovereignty and limited government had exerted a great influence on the Dutch revolutionaries, especially those who had spent their exile in France. As a result, most of the ten principles or 'essentials' as included in the list provided by Dippel, all of them related to the goals of democracy and limiting government, were discussed in the National Assembly, which convened from 1 March 1796 onwards after a year of turmoil, while preparing a draft constitution.

The National Assembly consisted for the most part of Patriots, since many Orangists, supporters of the stadholder, had been excluded from the electoral process. Despite the fact that most Patriots agreed on the importance of democratic principles, it took them more than three years to bring about the first Dutch Constitution. One reason for this delay was the tension between the principles of

14) A. Jourdan, *La Révolution batave entre la France et l'Amérique (1795-1806)* (Rennes 2008).

modern constitutionalism and the anxiousness of the patriots to use the new constitution to strengthen the new Republic's international position as a maritime power, able to defend its trade and its colonies. As mentioned above, the Revolution was also the result of a profound patriotism and it was no coincidence that the revolutionaries named themselves 'Patriots'. As a result, most of the delegates to the National Assembly were convinced that the system of government should not only be based on democratic principles, but also become more effective and, thus, more centralised. However, the Patriots became divided over the necessary degree of centralisation. In the ensuing debate, various options of government and the mechanisms to limit it were discussed in an attempt to reconcile the protection of citizens against excessive state power with the exigencies of effective government.

The resulting compromise, the Draft Constitution (*Ontwerp van Constitutie*), was not received favourably in the media. It was a long, detailed and self-contradictory document in which no clear choice was made for either a unitarist or a (con)federal state structure. In August 1797, it was rejected by the electorate in a referendum. One month later, the discussions on the draft constitution were resumed in a new, second National Assembly. The composition of this second National Assembly resembled that of its predecessor. The different factions remained, therefore, divided over the degree of unity necessary to secure the Republic's international position and over the way in which liberty should be attained. In the end, a few radical supporters of a unitary state lost their patience and staged a *coup d'état* in late January 1798. They managed to present a draft for a constitution to the purged National Assembly as early as March 1798. It consisted of two parts: the Constitutional Principles (*Burgerlijke en Staatkundige Grondregels*, or BSG) and the Constitution proper (*Acte van Staatsregeling*, or AvS).[15] On 23 April 1798, it was accepted by the electorate and entered into force.[16] It remained the constitutional foundation of the Republic until it was replaced by the Constitution of 1801.

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15) See for the (Dutch) text of this Constitution: Peter A.J. van den Berg, "Constitutional Documents of the Netherlands, 1795-1848" in: F. Stevens/P. Poirier/P.A.J. van den Berg (eds.), *Constitutional Documents of Belgium, Luxembourg and the Netherlands, 1789-1848* (Munich 2008), 417-469.

16) S. Schama, *Patriots and liberators: Revolution in the Netherlands, 1780-1813* (London 1977), 321.

3. Ten principles of modern constitutionalism and the patriotic impulse

The authors of the Constitution of 1798 remained faithful to their goal of introducing democracy and limited government. They included several mechanisms in order to assign political influence to individual citizens and to protect them against an excess of state power. However, not all of the ten principles or elements of constitutionalism as distinguished by Dippel were built into the Constitution. Moreover, it has already been stated that this Constitution was not only an effort at democratisation, but also an attempt at bringing about a fundamental reform of the Republic by creating a unitary and undivided nation state.[17] Consequently, unitarist ideas found their way into it as well. Various provisions proclaimed financial unity, economic unity, including unity of measures, weights and currency, administrative unity and legal unity. In addition, the Constitution introduced national celebrations and a minister for national education, hoping that these elements would foster fraternity among the citizens and create attachment to laws, the fatherland and freedom. This resulted often in an uneasy ensemble: some of the constitutionalist mechanisms were only implemented to a certain extent so that they did not hamper the construction of the state and the introduction of effective government.

3.1. Popular sovereignty and representative government

There is no doubt that popular sovereignty and representative government, arguably the two most fundamental principles, constituted the foundation of the Constitution of 1798. In the Constitutional Principles (BSG) it was stated that the supreme power in the new Republic rested with the citizens of the Batavian nation.[18] In the second article of the Constitution proper (AvS) this principle was re-echoed. The representatives derived their power from a mandate granted to them by the nation. This power was considered inalienable: no individual member or part of the nation could assume it. According to Article 31 AvS, every member of the National Assembly was considered to represent the whole Batavian nation, and not a part thereof. In addition, it was specifically mentioned that the delegates could not carry a fixed mandate of the province where they had been elected, as had been customary in the old Republic.

The Constitution proper (AvS) comprised many provisions on how these representatives were elected.[19] There, the limiting effects of the patriotic impulse

17) Cf. also Van den Berg, "The integrative function of constitutions: a historical perspective", 13-18.

18) Arts. 9 and 13-14 BSG.

19) Arts. 9-39 AvS.

could be felt. In line with the principle of popular sovereignty, it was an axiom that all members of the political community, or citizens, should have the right to vote, provided they were male and met certain criteria with regard to age. The authors of the Constitution realised, however, that having large parts of the population involved in the political process also raised the issue of loyalty to the Batavian state, for example of immigrants.[20] At first, they addressed this problem by trying to define the political community at large in legal terms. Only those inhabitants who had been granted citizenship of the Batavian Republic would have access to the political process. Consequently, the presence of a considerable Jewish minority caused a rather fierce debate in the National Assembly on the delineation of membership of the Batavian nation in the new constitution. Some delegates argued that the Jewish population had always lived according to its own laws and traditions and should, therefore, be regarded as a separate nation. Jews were, thus, not a part of the Batavian nation and should for that reason be barred from citizenship, despite the fact that their families often had lived in the Netherlands for centuries. Other delegates, too, initially tried to link citizenship and political participation, but stated that those Jews who explicitly chose to become a member of the Batavian nation should be granted citizenship. This would automatically allow them to vote.

In the end, the Constitution solved the problem of securing the loyalty of those participating in the political process in a more old-fashioned way. This is hardly surprising, as the idea of limiting access to the political arena by defining citizenship in legal terms was new. It was a corollary of the proclamation of the sovereignty of the nation during the Batavian Revolution. In the *Ancien Régime*, the issue of loyalty to the political system had not been a key issue, since only members of the elite were involved in politics. Moreover, politicians were not elected by popular vote. There was no need, therefore, to focus on limiting the grant of citizenship in order to restrict political participation. It was achieved by reserving the more important public offices for those who had been born on the territory of the Dutch Republic, or who had at least lived there for a certain number of years. In addition, candidates had to profess Calvinism, which excluded Roman Catholics, Jews and Dissenters. The authors of the Constitution of 1798 dropped the religious requirements as contrary to the principle of equality, but otherwise decided to continue on the path of their ancestors. Article 11 AvS limited the right to vote to those who were natives of the Batavian Republic. Immigrants acquired this right

20) Cf. Peter A.J. van den Berg, "*We, the people*! Democratisation and the delineation of citizenship in the Netherlands, 1795-1922" in: *Osaka University Law Review* 58 (2011), 73-92 (79-80).

only after having had their domicile in the Republic for at least ten years. Interestingly, these restrictions were not considered sufficient to secure loyalty to the nation. In addition, every voter had to sign a declaration, stating his allegiance to the free and independent Batavian nation. In this way, the Constitution realised representative popular government, but at the same time limited participation to those considered loyal members of the nation.

Another issue related to the principles of popular and representative government was popular influence at a regional level.[21] It would have been in line with these principles to have the population represented at the local level as well. Most unitarists, however, were not willing to endow local governmental institutions with too many competences and too much authority, because it might harm the unity and effectiveness of national government. They, therefore, opposed too much popular influence on local government. Some of them argued that the nation, being the sole sovereign, was indivisible and could only be represented once, that is at the national level. At that level, the executive power was therefore subordinate to the body representing the nation, as stated in Article 12 AvS. A body only representing the inhabitants of a district, however, should not be able to remove the executive of this district.[22] After all, such a regionally elected body only represented a small segment of the nation, whereas the executive government of a district was part of and subordinate to the national administration. Despite these objections, the Constitution of 1798 allowed for a certain degree of popular influence on local government. Both the regional and the municipal administrators were elected by the people.[23] The national interest should at the regional level be secured by supervisors that were appointed by the national government according to Article 155 AvS.

3.2. Declaration of universal human rights

The third principle, a declaration of universal human rights, was completely lacking. Interestingly, it was left out on purpose. Jacob van Manen (1752-1822), a delegate to the National Assembly and an influential member of the first

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21) Cf. for this discussion: Peter A.J. van den Berg, *The politics of European codification. A history of the unification of law in France, Prussia, the Austrian Monarchy and the Netherlands* (Groningen 2007), 243-244.

22) *Dagverhaal der handelingen van de Nationaale Vergadering representeerende het volk van Nederland* 9 vols. (The Hague 1796-1798; hereinafter *Dagverhaal*), vol. III, 678 and 682, and V, 814.

23) Arts. 162 ff. and 191 AvS.

constitution committee, had articulated the arguments against such a declaration as early as 1796.[24] Human rights, he argued, only existed in the state of nature. As soon as people entered a social contract, they traded these rights in on rights and duties *vis-à-vis* the society as established in that contract. Since the purpose of this society was to provide security of life and property to its members, these rights and duties should be compatible with effective government. Otherwise, the internal and external safety of the Republic could not be guaranteed and, thus, its goal not be achieved. It was, therefore, necessary that the rights of citizens in society were more limited than the rights of men in the state of nature. To be sure, Van Manen favoured popular government and protection of individual citizens. He was convinced, however, that a declaration of human rights would jeopardise the survival of the state. Since the state depended on the obedience of its citizens, it could not be tolerated that citizens had rights which superseded the interest of the state. He clearly saw constitutional rights as a part of popular self-government, not as an external force checking it.[25]

Van Manen managed to convince the other members of the first constitution committee. His ideas also clearly influenced the authors of the Constitution of 1798. As already stated, this Constitution did not include a declaration of universal human rights. Instead, the Constitution focused on rights that were granted to the members of society. Admittedly, Article 2 BSG guaranteed that the natural human rights would not be restricted by the Constitution more than was absolutely necessary in the interest of society. Many of the rights granted to the members of society were, however, subject to substantial limitations. It is to some of these provisions that we turn now.

Article 16 BSG guaranteed freedom of speech, but under the proviso that it was not used in a way that was detrimental to the objectives of society as a whole. Article 17 BSG formulated the right of an individual citizen to address governmental institutions by handing in a petition. At the same time, it was explicitly stated that only individuals and not corporate groups were allowed to present such a petition. Article 18 BSG laid down the right of assembly, but again it was immediately restricted in such a way that the so-called constitutional societies

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24) L. de Gou, *Het Plan van constitutie van 1796: chronologische bewerking van het archief van de Eerste Constitutiecommissie* (The Hague 1975), 15, 105-106 and 109-110. J. van Manen, *Voorstellen, bedenkingen en ontwerpen tot het daar stellen eener constitutie* (The Hague 1797), 91, 274-275 and 278.

25) Cf. on this theme: J. Rubenfeld, "Two conceptions of constitutionalism" in: *Proceedings of the 96th annual meeting of the American Society of International Law* (2002), 394-396.

(*constitutionele gezelschappen*), which discussed matters of state, were not granted the right to decide by means of a vote, nor should they perform any public function as a corporation. The purpose of such limitations was, of course, to prevent private bodies from interfering with governmental affairs. There should only be one single sovereign nation and the individual citizens composing it.[26] In Article 19 BSG, freedom of religion was proclaimed. There were limitations to this right as well, however, expressing some anxiety over the political aspirations of church institutions that might compete with those of the sovereign nation.[27] During religious services, the doors of the places of worship, such as churches and synagogues, should remain unlocked. Moreover, it was explicitly prohibited to wear any clerical vestments or insignia outside church buildings. Unsurprisingly, the Dutch Reformed Church lost its privileged position as the established church. The Constitution was also imbued with a spirit of anticlericalism.[28]

The least influenced by considerations of national interest were probably the rights concerning habeas corpus and the protection of individual property. Article 39 BSG clearly stated that authorities could only enter a house if authorised by a proper warrant. In another BSG provision, it was stated that a person could be taken into custody according to rules prescribed by law.[29] Finally, Article 40 BSG ruled out any expropriation of personal property, except in cases where this would be necessary in the public interest and provided that proper compensation be offered.

3.3. Separation of powers

The fourth principle, the separation of powers, was also heavily debated in the National Assembly. For delegates who were of a federalist persuasion, acceptance of this principle did not cause too many problems. The central government was their natural enemy and they could, therefore, support any proposal that would diminish its power.[30] They referred pointedly to the situation in France where, in their opinion, excessive centralisation had resulted in an obvious lack of freedom for individual citizens. Within the unitarist camp, however, intense disagreement

26) Cf. for a critique of using individualism as the sole foundation for a constitutional polity: M.M. Slaughter, "The multicultural self: questions of subjectivity, questions of power" in: Rosenfeld (ed.), *Constitutionalism, identity, difference and legitimacy*, 369-380.

27) Arts. 22 and 23 BSG.

28) Cf. Art. 33, sub b AvS, which excluded those in clerical service from membership of the so-called 'Representative Supreme Power', the legislative body.

29) Art. 29 BSG.

30) *Dagverhaal* vol. III, 715, and vol. V, 753-754.

ensued. Some unitarist delegates argued that a system of separation of powers would in fact introduce another kind of federalism, endangering the unity of government and thus its effectiveness. Such a system would also be injurious to liberty, particularly if authority was granted to bodies that were not elected, such as the judiciary and the executive. In their view, a unitary constitution without separation of powers did not necessarily result in a lack of freedom, as long as citizens were able to control and influence government. This was partly due to the fact that their constitutional ideas were a reaction to the political system of the *Ancien Régime*, which was characterised by a complete lack of popular influence. In this respect, their situation resembled that of the French revolutionaries. As in France, the emphasis was, therefore, on implementing popular sovereignty.[31] It was argued that popular influence was the best way to prevent despotism. To some other unitarists, such as Van Manen, the idea of separation of powers was less abhorrent. They did not, however, embrace the principle wholeheartedly. It was accepted that the various functions of government should be exercised by different bodies, but these bodies would not be of equal importance. Van Manen, for example, argued that the sovereignty of the nation should rest exclusively in a legislative body.[32] The two other bodies, the executive and the judiciary, were to be subordinate to it. He explicitly rejected the idea of a supreme court that was able to pursue its own policies. For that reason, he opposed the suggestion that members of this court be directly elected by the people. He also emphasised that the supreme court would exercise its power in the name of the legislative body, not in the name of the people. To counter the argument that the supremacy of the legislative body would jeopardise liberty, Van Manen stated that 'all calamities and catastrophes of oppression and usurpation that had happened to the Dutch state resulted from an unlimited *executive* power, not from an unlimited *legislative* power'.[33]

The latter view with respect to the separation of powers prevailed in the Constitution of 1798: the principle was implemented, but only to a certain extent. As is clear from the opening paragraph of the third title of the AvS, three powers were distinguished, the Representative Supreme Power (*Vertegenwoordigende Hoogste Macht*), endowed with legislative competences, the Executive Power (*Uitvoerende Macht*), charged with supervising the execution of the law, and the

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31) Cf. H. Dippel, "Popular sovereignty and the separation of powers in American and French revolutionary constitutionalism" in: *Amerikastudien* 34 (1989), 21-31.

32) Van Manen, *Voorstellen*, 288. De Gou, *Het Plan van constitutie van 1796*, 14-115, 123, 137 and 328.

33) *Dagverhaal* vol. III, 678.

Judicial Power (*Rechterlijke Macht*), competent to settle disputes.[34] In addition, Art. 33, sub a AvS ruled out simultaneous membership of the Executive Power and the Representative Supreme Power. This provision even barred admission of former members of the Executive to the Representative Power within three years after their discharge. The three powers were, however, not of equal standing. The Representative Supreme Power was clearly the most important organ of the Republic. The superiority of this elected body over the Executive Power follows from Articles 50, sub l and 84 AvS, which stated that it could appoint the members of the latter institution. In addition, some important executive competences were granted to the Representative Supreme Power. It could not only determine the size of the army and the navy, but it also had the prerogative of mercy.[35] The Executive Power was, thus, subordinate to the Representative Supreme Power, but it was considered more important than the Judicial Power. In view of the necessity of effective governance, the authors of the Constitution had obviously no intention to have these two powers weakened by the Judiciary too much. Article 260 AvS explicitly forbade judges to interfere with either the Executive Power or the Legislative Body. At the same time, the Executive Power was granted supervision over the courts. It was authorised to stay the execution of its sentences and suspend or even remove its members in case the law was violated.[36] In addition, the Executive Power could appoint a superintendent at every court of law, charged with supervising the application of law.[37] Any breach of law by a judge had to be reported by these superintendents to the Minister of Justice (*Agent van Justitie*), who was a member of the Executive Power charged with the administration of justice. If this breach constituted a criminal offence, this Minister could bring a case against the judge before a specialised court. It should be noted, however, that this court consisted of judges of the ordinary courts. In the end, the case was thus decided by the judiciary itself and not by the Minister of Justice.

3.4. Independent judiciary, limited government and the pre-eminent status of the Constitution

The authors of the Constitution also had difficulties implementing a fifth principle, an independent judiciary. This is hardly surprising since this principle is closely related to the principle of separation of powers, which had already caused

34) Arts. 50 sub a, 105-107, 272, 276-277 and 279 ff. AvS.
35) Arts. 50, sub d and q AvS.
36) Arts. 107 AvS.
37) Arts. 281 and 288-293 AvS.

them so many problems. Article 259 AvS stated that no member of the judiciary could be removed from office except when he had committed a crime while in office. Moreover, most judges were appointed through an electoral procedure which resembled the selection of the delegates to the Representative Supreme Power.[38] This limited the influence of the other Powers over the Judiciary. The judges were, however, not completely free from interference by the Executive Power. As mentioned above, the courts were controlled by a superintendent appointed by the latter institution. In addition, the Constitution did not declare that they were appointed for life. On the contrary, they were obviously appointed for a limited period since Article 258 AvS stated that judges were eligible for reappointment after they had stepped down. It is hardly surprising that the principle of an independent judiciary was implemented somewhat half-heartedly. After all, it was felt that the exigencies of efficient government called for some control by the Executive Power over the judiciary.

There is also no doubt that the Patriots were committed to the sixth principle, which was limited government. Again, the main problem of the authors of the Constitution was to reconcile this principle with the exigencies of effective government in view of the international position of the new Republic. The discussion in the National Assembly on the structure of the Representative Supreme Power provides a good example. Most of the delegates voted in favour of bicameralism, in order to prevent the legislative body from becoming despotic. They explicitly referred to the situation in France, where an undivided Convention had resulted in chaos and oppression. Some unitarists, however, argued against a division of this body into two chambers, because it would paralyse the force of government and legislation.[39] In the end, the view of the majority prevailed: Articles 51 ff. AvS introduced a system of bicameralism. Another mechanism designed to realise the principle of limited government was restricting the term of office of the members of the Executive Power and the Representative Supreme Power to five and three years respectively.[40] Members of the Executive Power could only be reappointed five years after their resignation. Members of the Representative Supreme Power could only be re-elected for one other term of three

38) Arts. 265-267 and 277 AvS.

39) L. de Gou, *Het Ontwerp van Constitutie van 1797. De behandeling van het plan van constitutie in de Nationale Vergadering* 3 vols. (The Hague 1983-1985), vol. I, 18, 39 and 39. L. de Gou, *De Staatregeling van 1798. Bronnen voor de totstandkoming* 2 vols. (The Hague 1987-1990), vol. I, 164.

40) Arts. 37-39 and 86 AvS. Art. 6 Reglement C.

years. In addition, Article 87 AvS ruled out that members of the Executive Power were related to each other by family ties. However, realising that frequent renewal of all the members of these institutions at the same time would be detrimental to their expertise and thus jeopardise their efficiency, a complex system of rotation was created. Each year, a third of the members of the Representative Supreme Power and one member of the Executive Power had to step down.

The seventh principle concerns the pre-eminent status of the Constitution. It should be considered a higher set of rules, surpassing ordinary legislation. The Constitution of 1798 does not have any specific provisions in which this principle is stated. It does contain, however, a few articles limiting the possibilities to revise it. Article 304 AvS states that the new Constitution could not be amended before 1803, so not within five years after it went into force. It was also laid down that the Constitution could only be changed after a popular vote on the proposed modifications.[41] This prevented the Representative Supreme Power from being able to amend it independently. Since the amendment procedure was more difficult for the Constitution than for ordinary legislation, one could conclude that it was considered superior to ordinary laws. It should be noted, however, that this was probably not the only purpose of these rules. They might also have been designed to stabilise the new regime in order to secure the achievements of a revolution.[42] The new political order created by the Constitution should end the revolutionary turmoil, so that a normal course of government action could be followed. The Constitution was, therefore, presented as a semi-permanent legal document. Unlike the principles discussed above, the constitutional principle of a constitution as a higher set of rules was not at odds with the necessity of efficient government. On the contrary, both pointed in the direction of including provisions that made it more difficult to alter the Constitution.

3.5. Revision of the Constitution, responsible government and general principles

The remaining three principles do not seem to have been affected by the need for effective government. The preceding paragraph shows that the requirements of the eighth principle, namely that a constitution provides an orderly procedure for its revision, are fully met. The ninth principle, an accountable and responsible

41) Arts. 304-308 AvS. Art. 70 BSG.

42) U.K. Preuss, "Constitutional powermaking for the new polity: some deliberations on the relation between constituent power and the constitution" in: Rosenfeld (ed.), *Constitutionalism, identity, difference and legitimacy,* 143-164 (144).

government, can also be found in the Constitution of 1798. Article 12 BSG clearly stated that all executive bodies were not only subordinate, but also answerable to the Representative Supreme Power. The Constitution also included some specific provisions on the accountability of the Executive Power *vis-à-vis* the Representative Supreme Power.[43] Finally, the Preamble of the 1798 Constitution stated that it was based on several general principles which were subsequently elaborated in the Constitutional Principles preceding the Constitution proper. Thus, the tenth principle, too, was implemented.

4. Concluding remarks

The purpose of this paper was to describe to what extent the principles of modern constitutionalism were incorporated in the first national Dutch Constitution of 1798. The survey clearly shows that the authors of the Constitution of 1798 tried to remain faithful to their ideal of popular sovereignty and limited government. Individual citizens were granted political influence and mechanisms were introduced designed to protect them against excessive state power. Most principles or elements of constitutionalism described by Henkin and Dippel were included in the new Constitution. Many of these principles, however, were incorporated in a way that facilitated the construction of the nation state and secured effective government. This is hardly surprising, since this Constitution resulted from a Revolution that was both democratic and patriotic. Its protagonists not only wished the new state to be based on principles of popular sovereignty and limited government, but also aimed at creating a nation state that was strong enough to restore the Republic to its former glory. In accordance with the principles of popular sovereignty and representative government, for example, a system of elections was introduced, but there were considerable restrictions. The right to vote was only granted to those citizens who were considered loyal to the nation: only natives of the Republic or inhabitants who had been domiciled there for at least ten years belonged to the electorate. In addition, citizens could only exercise this right under the proviso that they signed a declaration, stating their allegiance to the free and independent Batavian nation.

Neither was the principle of separation of powers fully incorporated: the Representative Supreme Power was clearly established as the most important organ of the Republic. It is particularly noteworthy that the authors of the Constitution did not wish the Judicial Power to be able to weaken the Representative Supreme

43) Arts. 124-125 and 134-135 AvS.

Power or the Executive Power too much. This might explain why the judges were not completely free from interference by the latter institution. The authors of the Constitution also tried to reconcile the principle of limited government with the exigencies of effective government, particularly in view of the international position of the Republic as a maritime power. To that end, an intricate system of rotation of the members of the Representative Supreme Power and the Executive Power was created. The principle that a constitution should have a higher status than ordinary legislation was also adhered to. This principle might also have been affected by the necessity for a stable and effective government, but interestingly this necessity and the constitutional principle pointed in the same direction: a constitution that was difficult to change.

A striking omission was a declaration of universal human rights, left out because it was thought that such unrestricted rights might jeopardise the internal and external safety of the Republic. Instead, the Constitution focused on rights that were granted to the members of society. Unsurprisingly, many of these rights, such as the right to petition the government and freedom of religion, were subject to substantial limitations considered necessary in view of the process of nation building. The authors of the Constitution were particularly keen on suppressing religious organisations and secular intermediary groups, such as guilds, that might rival the nation as the main political and social organisation. This might explain the dominance of the individualistic and anticlerical ideology in the Constitution.

Finally, the incorporation of the remaining three principles does not seem to have been affected by the patriotic sentiment. The Constitution provided an orderly procedure for being amended, embraced accountable and responsible government, and stated several general principles that were considered its foundation.

It can be concluded that during the Batavian Revolution, the majority of the principles of modern constitutionalism as formulated by Henkin and Dippel found their way into the first Dutch Constitution of 1798, but sometimes only to a certain extent. The way they were incorporated was often influenced by the necessity to reconstruct the Dutch nation state. We should realise that such influence of state formative practices on the mechanisms designed to limit government may decrease when the process of nation building is well advanced. This might result in a better and more complete implementation of the principles of modern constitutionalism. To establish this, further research into the subsequent Dutch constitutions of the nineteenth and twentieth century is needed. We should keep in mind, however, that such a development is not irreversible. Moreover, it should be noted that more recently established states might still need elements of state formative practices in

their constitutions. Obviously, nation building is not only a phenomenon of the past.