

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 27)

EXPLANATORY MEMORANDUM

National ordinance states of emergency

General

This draft serves to regulate the declaration, maintenance and lifting of a state of emergency, and to establish the powers that can be exercised by the civil authority during a state of emergency. Article 112 of the Constitution of Sint Maarten provides that a state of emergency may be declared to maintain external or internal security and public order. The term 'state of emergency' itself shows that a situation is involved in which normal public life cannot continue. In order to control and normalise this situation, it may be necessary for the civil authority to have powers that it does not possess in normal circumstances. As shown by Article 112, during a state of emergency a number of constitutional rights of citizens may be restricted. In view of the radical nature of such a restriction, the grounds for this are also laid down in the Constitution.

The draft in outline

In the preparation of this draft, a distinction was made between the declaration of a state of emergency and the application of emergency legislation in a particular social sector.

If a state of emergency is declared, the country faces exceptional circumstances that affect public life to an extent that normal processes no longer apply or can no longer apply. In order to control this situation, the government must be able to dispose of powers to address these exceptional circumstances. The backgrounds giving rise to a situation in which it is desirable to declare a state of emergency may vary. There may be a natural disaster, but also social unrest. In the most serious case, a terrorist or military threat is involved, or external action.

A situation in which a certain social sector requires the application of emergency legislation due to exceptional circumstances, should be distinguished from a state of emergency. Examples include controlling hoarding or driving up prices through a temporary stoppage of imports of goods (fuels, food).

Another possibility is the temporary granting of powers to another administrative body (see e.g. Article 15 of the National ordinance concerning the clearance of vessels and wrecks). This is not a matter of the restriction of the constitutional rights of citizens, but of the application of special rules.

The powers included in this national ordinance firstly concern the restriction of the constitutional rights of citizens. The duration of these restrictions, although they apply for the protection of the citizens themselves, should be as short as possible and the restrictions will also be under the continual supervision of Parliament.

The declaration of a state of emergency and the restriction of the constitutional rights of the citizens will take place and continue only in circumstances that justify these restrictions. The response of citizens to the declaration of a state of emergency and the associated degree of action necessary to maintain it must be considered with due care.

The relationship with Saint Martin also requires special attention in this regard. This is partly on the one hand because of a risk that unrest from Saint Martin could influence Sint Maarten, and vice versa. Close cooperation and coordination with the French authorities is therefore necessary.

In this national ordinance, special powers are assigned to the civil authority. This must be distinguished from the situation in which civil powers are assigned to the military authority. Provision is made for the assignation of civil powers to the military authority by Kingdom Act, as provided by Article 34 van the Charter for the Kingdom.

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October 2013

Political context

Pursuant to Article 3(1)(a) of the Charter for the Kingdom, maintaining the independence and the defence of the Kingdom are matters for the Kingdom. With regard to Aruba, Curaçao and Sint Maarten, Articles 30 up to and including 34 of the Charter for the Kingdom are also important. These Articles lay the foundation for the Defence Act of Aruba, Curaçao and Sint Maarten and the accompanying implementing regulations at the national level, and the regulation of the state of emergency.

This draft therefore fits into a wider political context, as a situation that can initially be classed under the heading of civil unrest can develop into a situation that threatens the independence of the Kingdom or harms its interests. A turning point can arise in which the civil authority can no longer control the situation and the military authority should be able to take action. In that case, the Kingdom will be called on to act on the basis of Article 3(1)(a) of the Charter for the Kingdom. Naturally, the position is different if there is a military threat or attack from the start.

Article 34 of the Charter for the Kingdom concerns the powers of the King as the head of the Kingdom. It provides the basis for a Kingdom Act to regulate the declaration of a state of war or martial law in each part of the territory of the Kingdom if there is a threat of material harm to the interests of the Kingdom. This can arise not only as a result of an external military threat, but also through a threat to or disruption of internal order and peace. This Kingdom Act has not yet been realised.

The powers of the countries in relation to civil unrest remain unchanged. The text of Article 34, with amendments, is derived from the comparable regulation in the National regulations of Curaçao and Suriname applying prior to 1954. Article 34(3) also provides that if necessary, the transfer of part or all of the powers of the civil authority to the military authority may be regulated by Kingdom Act. Restrictions may be imposed here on the exercise of constitutional rights by the citizens. The restrictions apply with regard to the freedom of the press, the right to associate and have meetings, the inviolability of the home and the confidentiality of mail.

For Sint Maarten, and equally for Sint Eustatius and Saba, it is desirable for the future that a decision is taken regarding the stationing of part of the armed forces of the Kingdom in the Leeward Islands. Currently there is no presence of Dutch troops. Military support will then have to be provided by the units stationed in Curaçao or Aruba. In view of the civil character of the Coastguard for Aruba, Curaçao and Sint Maarten, as well as the public bodies of Bonaire, Sint Eustatius and Saba, the Coastguard station in Sint Maarten cannot be regarded as a military authority. This does not alter the fact that, as is the case in the Kingdom Bill instituting the coastguard, the Coastguard provides support in the event of a disaster, accident or traffic disruptions.

Article 33 of the Charter for the Kingdom lays down the legal basis for the requisitioning of goods and services for the purpose of defence. General rules will be laid down for such requisitioning by Kingdom Act. This Kingdom Act has not yet been realised.

This draft therefore does not regulate the requisitioning of property within the meaning of the War Act for the Netherlands, but does grant the power to use or requisition the use of property. Article 17(3) of this draft does contain a regulation for making changes to property used or requisitioned on the basis of these powers.

In addition to conscripts, Sint Maarten can also avail itself of the services of the Sint Maarten Voluntary Corps (VKS). This corps has existed since 1997 and was formed on the basis of the 1997 National ordinance concerning militias (PB 1997, No. 335). This corps currently consists of 95 volunteers who are deployed to support the police in maintaining public order.

The table below presents a list of the statutory regulations concerning the maintenance of public order and national defence.

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Regulations at kingdom level and country level	Civil authority (severe social unrest)	Military authority (war)
Kingdom level		
Article 3(1)(a) and Articles 30 up to and including 34 of the Charter for the Kingdom		X
Rules for the Governor of Sint Maarten	X	
Decree on instructions concerning the deployment of the armed forces in the Netherlands Antilles and Aruba	X	X
Defence Act Aruba, Curaçao and Sint Maarten (Bulletin of Acts and Decrees 1955, 138)		X
Kingdom Act on use of violence by guards of military objects		X
Military penal and disciplinary law		X
Kingdom Act on the Coastguard for Aruba, Curaçao and Sint Maarten and for the public bodies of Bonaire, Sint Eustatius and Saba	X	
Kingdom Act concerning emergency facilities for shipping (Bulletin of Acts and Decrees 1972, 416)		X
Kingdom Act concerning mandatory sailing (Bulletin of Acts and Decrees 1972, 415)		X
Kingdom Act concerning the relocation of the seat of legal persons and institutions by the government (Bulletin of Acts and Decrees 1967, 162)		X
Country level		
Article 112 of the Constitution	X	
National ordinance concerning states of emergency	X	
1961 National ordinance concerning national service		X
National ordinance concerning militias	X	
National ordinance concerning the police	X	
National ordinance concerning disaster control	X	

Financial implications

In principle, this national ordinance has no financial consequences, as it contains no measures that directly influence a budget. Should it be necessary to declare a state of emergency in the future,

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costs will naturally be associated with the actions that must be taken to address the state of emergency. The formation of an emergency fund will receive further consideration.

Article by Article section

Article 1

Paragraph 1

The term 'exceptional circumstances' must be read in conjunction with 'require this in order to protect external or internal security'. In order for a state of emergency to be declared, the said exceptional circumstances must be of such a nature that external or internal security can no longer be maintained without the special powers that become available in a declared state of emergency. The term 'external or internal security' is derived from Article 112(1) of the Constitution and should be broadly interpreted.

The proposal for the national decree declaring a state of emergency is made by the Prime Minister. This reflects the fact that the declaration of a state of emergency is a matter of general government policy.

Paragraphs 2 and 3

Because fast action is necessary in emergencies, paragraph 2 provides that the national decree itself will determine how it will be publicised. This could include announcements on radio and television. For the purpose of legal security, a state of emergency may not commence before the moment at which it is announced.

Paragraph 3 provides that, regardless of the publication method referred to in paragraph 2, the national decree will in any event be recorded in the Official Publication. This emphasises the radical character of a state of emergency.

The declaration of a state of emergency has two legal consequences. Firstly, Article 112(3) of the Constitution comes into force. This states that immediately after the declaration of a state of emergency and further, until this has been terminated by national decree, Parliament shall decide on its continuation whenever it regards this as necessary. Secondly, the government is granted the authorisation to take the measures described in Article 5 *et seq.* of this national ordinance.

Article 3

It is important that there are assurances for the exercise of parliamentary powers. This Article provides such an assurance.

Pursuant to Article 112(3) of the Constitution, as soon as a state of emergency is declared, Parliament has the power to decide whether it continues. Parliament may also set a maximum term for the duration of a state of emergency.

Apart from Parliament, the government may also lift a state of emergency, by national decree. The phrase in sub-paragraph b 'as soon as circumstances permit, in the view of the government' reflects the fact that the government, on the basis of its own responsibility, should lift the state of emergency as soon as circumstances permit this.

Article 4

This Article makes provision for the announcement and entry into force of a resolution to lift the state of emergency, by Parliament or the government.

Paragraph 1 provides that this order shall be announced on the instructions of the President of Parliament, in the manner provided for in that resolution. The Minister of General Affairs will provide for the inclusion of a government order in the Official Publication. An order enters into force immediately on its announcement.

Article 5

This provision states beyond doubt that the end of the state of emergency also means that the restrictive measures taken pursuant to Articles 7 up to and including 16 immediately lose their effect.

Articles 7 up to and including 16

These provisions contain measures that the government can take during a state of emergency. In many cases, this involves matters that infringe constitutional freedoms, such as the freedom of

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expression, freedom of assembly, the confidentiality of the mail, etc. Obviously, such an infringement must not be applied too lightly. The government must be guided in this by the principles of proportionality and subsidiarity. The principle of proportionality means that the degree, frequency and duration of the measures to be taken must be tailored to the seriousness of the situation. The application of the subsidiarity principle means that the government must ascertain for each individual measure whether its continuation is necessary and if this cannot be replaced by a less drastic measure.
