

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 28)

EXPLANATORY MEMORANDUM

1. General Section

The Constitution contains a developed system to support the integrity of political authorities, i.e. ministers and Members of Parliament. The consequences of criminal prosecution of a minister or Member of Parliament for certain crimes are substantial. Not only is the minister or Member of Parliament suspended on being taken into pre-trial detention or after conviction of an offence, but in the event of a final conviction, the person concerned is dismissed from his post by law (Articles 36 and 50 of the Constitution).

Before these measures are applied, it is essential that the decision to prosecute be taken with due care. To this end, the system already applied for official crimes included in the Code of Criminal Procedure of the Netherlands Antilles is followed, namely that prosecution can be instituted only by the Attorney-General or a person especially designated by the Attorney-General (Article 476 of the Netherlands Antillean Code of Criminal Procedure). This is laid down in Article 123 of the Constitution and Article 12 of this draft.

As a further assurance, Article 123(2) of the Constitution provides that the Attorney-General's decision to prosecute can only be taken with an order from the Court, on a requisition by the Attorney-General. This means that the decision to prosecute is also assessed by a bench of two or more judges, the Court in council chamber. The procedure for a prosecution order of the Court is regulated in this draft of the national ordinance.

A prosecution order represents a significant restriction of the prosecution monopoly assigned to the Department of Public Prosecutions and the opportunity principle. The prosecution monopoly means that the Department of Public Prosecutions decides whether to institute criminal proceedings: the opportunity principle means that the Department of Public Prosecutions can decide not to institute proceedings on grounds based on the general interest. The restriction lies in the fact that the Department of Public Prosecutions becomes dependent on a prosecution order from the Court for a decision to prosecute Ministers or Members of Parliament. The reason for this, as already mentioned, is to avoid the possibility of prosecution decisions being taken too lightly, because of the far-reaching legal consequences that the Constitution attaches to the prosecution of a holder of political authority.

Article 16(3) of the Kingdom Act on the Common Court of Justice provides for the possibility of assigning additional tasks to the Court by national ordinance. The prosecution order on the basis of this draft national ordinance constitutes such an assignment. According to Article 123(2), the procedure will be developed in more detail in a national ordinance.

The expectation is that a requisition of Attorney-General to the Court for the acquisition of a prosecution order to institute proceedings against a holder of political office will only be made in highly exceptional cases. Proceedings will not usually require much time in Court or, thereby, judicial capacity. The implementation of the statutory regulation will thus be absorbed within the existing judicial capacity.

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2. Article by Article Section

Article 2

It is provided that criminal prosecution of a political authority can only take place with a prosecution order of the Court, in response to a requisition from the Attorney-General.

'Prosecution' refers to the involvement of a judge in the case by the Department of Public Prosecutions. Well-known prosecution 'actions' include a requisition for pre-trial detention; summoning the accused and applying for a preliminary court investigation. *A contrario*, this means that no prosecution order is required for the investigation in connection with suspicions of a criminal offence by a holder of political authority. The Constitution does not attach suspension or dismissal from office to such an investigation by law.

If, in cases arising, the Attorney-General has no prosecution order available on summoning the defendant, it is a matter of a legal restriction of prosecution. The consequence is that the judge hearing the case will declare the criminal prosecution brought by the Department of Public Prosecutions to be inadmissible. If the public prosecutor submits an application to the examining judge for custody of a minister or Member of Parliament without being able to submit a prosecution order from the Court, the public prosecutor's application for custody is inadmissible. Furthermore, the fact that a prosecution order has been issued does not automatically mean that the examining judge will grant an application for custody. After all, the examining judge must independently assess whether all (further) legal and extra-legal conditions for provisional custody have been met.

According to the criminal procedure regulated in Articles 15 up to and including 29 of the Netherlands Antillean Code of Criminal Procedure, a party with a direct interest, such as the victim of a crime, can submit a complaint to the Court regarding the failure to prosecute the perpetrator of a crime, which can lead to a Court order to institute proceedings. The question is how the two procedures relate to each other. It could be said that a Court order following a complaint regarding failure to prosecute also involves a Court order for prosecution, within the meaning of this national ordinance. But it should be borne in mind here that Article 123 of the Constitution refers to a Court order in response to a requisition from the Attorney-General. The latter is precisely not the case in a complaint by an interested party regarding the failure to prosecute. Furthermore, the two procedures have a different purport. The complaint procedure serves as a correction of the prosecution monopoly, in the sense that interested parties can complain to the courts if the Department of Public Prosecutions decides not to prosecute a case (further) or takes no action. The proposed procedure, on the other hand, constitutes a correction precisely if a Department of Public Prosecutions threatens to institute proceedings too lightly. In view of the different purport of the two procedures and the different initiators (the interested party or the Attorney-General), the procedures can exist alongside each other. If the Court has issued an order to prosecute a Minister for a crime following a complaint from an interested party, the Attorney-General must then requisition the Court for a prosecution order after all. Obviously, the Court will base its decision on this on the order issued earlier, unless the circumstances have changed.

Articles 3 and 4

These Articles regulate preliminary questioning and are adopted from Articles 12b and 12c of the Dutch Code of Criminal Procedure, which relates to the complaint regarding the failure to prosecute criminal offences. For example, the Attorney-General's claim is inadmissible if it concerns a political authority who is suspected of a misdemeanour rather than a crime, or if the suspect is no longer a Minister.

Article 5

This Article regulates an elementary part of the right to a fair trial, namely that of the right of the accused to attend this prosecution decision.

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Article 6

This provision contains a number of fundamental rights of a suspect: the right to remain silent and the right to counsel. The suspect is informed of the right to remain silent before the hearing. This is the caution. The Article is based on Article 21 of the Netherlands Antillean Code of Criminal Procedure.

Article 7

This Article regulates the right of the accused to take cognizance of the documents. For reasons mentioned in the Article, documents can be exempted from inspection. The Article is derived from Article 20 of the Netherlands Antillean Code of Criminal Procedure.

Article 8

This Article is derived from Article 23 of the Netherlands Antillean Code of Criminal Procedure and is self-explanatory.

Article 9

This Article is based on Article 25 of the Netherlands Antillean Code of Criminal Procedure, which concerns the prosecution order in response to a complaint regarding failure to prosecute. The criteria are also drawn from that procedure. It is of great importance that the Court can not only assess the feasibility of criminal prosecution, but also whether this is opportune. This follows from the second paragraph. It is conceivable, for example, that a relatively minor crime is involved and the accused political authority has announced his or her resignation.

The fourth paragraph affords the Court the possibility of providing for further investigation through an order to the examining judge.

Article 10

These Articles contain a number of general regulations on the proceedings in chambers. The Article is drawn from Article 24 of the Netherlands Antillean Code of Criminal Procedure.

Article 11

No ordinary legal recourse is open against the decision of the Court. This is in line with the judicial order to prosecute or take further legal action in response to a complaint from a party with a direct interest, pursuant to Article 15 *et seq.* of the Netherlands Antillean Code of Criminal Procedure.

.Article 12

This Article provides that the prosecution of a political authority for a crime must be instituted by the Attorney-General or by a member of the Department of Public Prosecutions to be designated by the Attorney-General. This places the prosecution of a political authority in the hands of the most senior member of the Department of Public Prosecutions. This is desirable in connection with the far-reaching legal consequences that the Constitution attaches to such criminal prosecution. The provision is based on Article 123(1) of the Constitution and Article 476 of the Netherlands Antillean Code of Criminal Procedure. One difference with Article 476 is that the Article relates only to a Minister accused of a serious offence committed while in office, while the Article proposed here also provides for Members of Parliament and for prosecution for crimes under ordinary law.

Article 13

This provision is taken over from Article 27 of the Netherlands Antillean Code of Criminal Procedure, which relates to an order to prosecute or take further legal action. The provision is an application of the principle that a suspect has the right to the hearing of his case by an unbiased judge, as laid down in Article 26 of the Constitution and Article 6 of the ECHR.

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Article 14

On the basis of the *nulla poena* principle, as regulated in Article 28 of the Constitution, Article 7 of the ECHR, any penalty imposed may not be more severe than that which applied at the time when the crime was committed. In connection with this, the proposed Article 14 clarifies that the procedure referred to in Article 123 of the Constitution relates only to the prosecution of a holder of political authority for a crime committed after the Constitution takes effect.

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