

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 29)

EXPLANATORY MEMORANDUM

1. General

In Chapter 8 of the draft Constitution, the Constitutional Court is instituted and is regulated in outline. The task of the Court is to assess legal regulations that have been adopted but have not yet entered into force in terms of the Constitution, at the instigation of the Ombudsman. This concerns the 'abstract' constitutional assessment, in addition to the assessment by the ordinary courts on the grounds of Article 119 of the draft Constitution, in connection with a concrete dispute, as also proposed in the draft Constitution. The Ombudsman is authorised to submit a petition to the Constitutional Court within six weeks of the adoption, but before the regulation enters into force, except in the case of an urgent interest.

The added value of the proposed constitutional assessment by the Constitutional Court in relation to the proposed constitutional assessment by the ordinary courts is dual. Firstly, the Constitutional Court is competent following a petition from the Ombudsman, even if no concrete dispute has been submitted to it. After all, constitutional assessment of a legal regulation by the ordinary courts requires a sufficient interest (Article 119(1)). Secondly, unlike the ordinary courts, the Constitutional Court can also assess the method of realisation of a legal regulation in terms of the Constitution. This means that the Court is competent to decide on procedural errors.

Article 127(3) of the draft Constitution provides that further rules on an urgent interest may be laid down by or pursuant to national ordinance. According to Article 128(3), the appointment requirements for members and deputy members of the Constitutional Court shall be laid down by or pursuant to national ordinance. According to Article 128(8) of the draft Constitution, the membership, design, working methods and decisions of the Constitutional Court, as well as the legal position of the members, deputy members and the clerk of the Court shall be laid down by national ordinance. This draft serves to implement those provisions.

The draft is based partly on the Uniform national ordinance Constitutional Court of the Netherlands Antilles and Aruba (hereafter to be referred to as 'ELCH'), as an organic regulation from the Cooperative Regulation of the Netherlands Antilles and Aruba (AB 1985, 45). However, that Court existed only on paper and never actually functioned. The principles for the membership of the Court are the assurance of sufficient expertise of the members, assurance of the independence of the Court from the other authorities of state and the assurance of sufficient loyalty to and affinity with the society of Sint Maarten. A number of provisions in Chapter 1 concerning the legal position of the members and deputy members of the Court are derived from the Kingdom Bill on the Common Court of Justice (see the Article by Article section of this memorandum in that regard).

2. Financial paragraph

Abstract assessment of legislation by a Constitutional Court is a new phenomenon within the Kingdom of the Netherlands. Constitutional Courts do exist in many other countries, but those countries, courts, tasks and procedures often differ from Sint Maarten. For that reason, it is difficult to predict how many cases the Court will hear; furthermore, this is entirely dependent of the authority of the Ombudsman to take action. The estimate is that in the initial phase of the country, no more than two cases per year will be involved. In view of this, the demands on the members of the Court and the required capacity of the office of the clerk of the court are limited. Membership of the Constitutional Court is a part-time position. The members and deputy members shall receive remuneration that shall be laid down by national decree, containing general measures (Article 14). On the basis of two cases per year, the costs for the remuneration of the members, the clerk and for temporary renting of accommodation will amount to some ANG 50,000. The costs will become clearer during the preparation of the project proposal. The costs for the first year will be financed from the cooperative funds and thereafter from the regular budget.

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3. Article by Article Section

Article 1

The Constitutional Court has been instituted by the Constitution and consists of three members and three deputy members. In connection with the task and the powers of the Court to prevent legislation, a multiple composition is desirable. The Constitutional Court of the Netherlands Antilles consisted on paper of five members and two deputy members. In its advisory report, the Common Court of Justice notes that it is not customary to staff a constitutional court with only three members. In the view of the Court, it has little appeal if, after five members of the Council of Advice and then 15 Members of Parliament have considered a matter, an 'appeal' by the Ombudsman is then possible to three members of the Constitutional Court. The Court also notes that the Constitutional Court of the Netherlands Antilles and Aruba also consisted of five members. In response to this, the Administrative Board notes that the Parliament of the Netherlands Antilles and of Aruba consists of 21 members, while that of Sint Maarten consists of 15 members. Partly in view of the scale of the country, the Administrative Board regards a Court consisting of three members and three deputy members as appropriate. They shall be appointed by national decree. One member and one deputy member of the Constitutional Court shall be appointed on the nomination of the Council of State of the Kingdom, from among its members. This is relevant in view of the constitutional developments in the broader context of the Kingdom. Although the regulation in the Constitution is not binding on the Council of State of the Kingdom as a body of the Kingdom, it follows from the fact that the government of the Kingdom must consent to the draft Constitution that the Council of State of the Kingdom will cooperate. However, because the representative of Sint Maarten in the Council of State of the Kingdom is also, pursuant to the draft National ordinance Council of Advice, an associate member of the Council of Advice of Sint Maarten, it cannot concern the member for Sint Maarten in the Council of State of the Kingdom. Article 4(1)(f) of this draft provides that membership of the Constitutional Court is incompatible with membership of the Council of Advice.

One member and one deputy member of the Constitutional Court are also members of the Common Court of Justice and are appointed on the nomination of the Common Court of Justice. This is intended to take account of the Caribbean context. The legal basis for this can be found in Article 17(3) of the Kingdom Bill Common Court of Justice. According to that provision, the Court or members of the Court perform the tasks assigned to them by national ordinance. It is clear that a judge of the Constitutional Court who has ruled on a legal regulation cannot later take part in the concrete assessment pursuant to Article 119. The judge must claim privilege.

One member and one deputy member shall be nominated by the government of Sint Maarten, having heard the Constitutional Court. In contrast to the nominations of the Council of State of the Kingdom and of the Common Court of Justice, the hearing of the Constitutional Court is not binding on the government.

From the point of view of independence, an appointment for life is called for. In order to promote consistency with developments in society, however, a choice has been made for an appointment for ten years. The ELCH is also based on ten years. Provision has been made for the possibility of reappointment.

According to paragraph 3, the nominations must contain the names of two persons if possible. This is adopted from Article 23(2) of the Kingdom Act Court, although the Kingdom Act is based on three persons if possible. In connection with the small scale of Sint Maarten, this was not chosen.

In the island ordinance for the adoption of the draft Constitution, provision shall be made for the initial appointment of the members and deputy members of the Court.

Article 2

This Article provides for the appointment requirements. The appointment requirements in Article 24(1), 24(2) and 24(3) of the Kingdom Bill Common Court of Justice have been followed. Successful completion of a final examination in the field of law at a university designated by national ordinance, or degrees or certificates equated with this by national ordinance, are required. Obviously, candidates must also have provided evidence of

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competence in matters of law, administration and the administration of justice, or of special expertise in matters concerning legislation, administration and the administration of justice. In particular, broad knowledge and experience of constitutional law is relevant.

Furthermore, the members and deputy members of the Constitutional Court must hold Dutch nationality. This requirement also applies for the judges of the Common Court of Justice (Article 24(3) of the Kingdom Bill Common Court of Justice).

Article 3

This Article concerns the oath.

Article 4

The offices and positions that are incompatible with membership of the Constitutional Court are listed in the first paragraph. Paragraphs 2 and 3 prohibit certain kinship relationships. Paragraphs 2 and 3 are drawn from Article 27 of the Kingdom Bill Common Court of Justice.

Article 5

Article 5 provides that suspension or dismissal as a member of the Council of State for the Kingdom or as a member of the Common Court of Justice also entails suspension or dismissal as a member of the Constitutional Court. This provision is adopted from the ELCH.

Articles 6-9

These Articles lay down the grounds for suspension and dismissal. They are based on the grounds for the suspension and dismissal of judges of the Common Court of Justice in the Kingdom Bill Common Court of Justice (Articles 29, 30, 31 and 32).

Article 6, paragraphs 1 and 2, concern dismissal by national decree, at the member's request or on the member reaching the age of 70. Paragraph 3 concerns dismissal by the Common Court of Justice at the requisition of the Attorney-General. Articles 7 and 8 concern the optional grounds for dismissal, while Article 9 provides for mandatory suspension. There is no reason for optional suspension.

Articles 10 and 11

These provisions regulate the procedure for the Common Court of Justice with regard to the suspension and dismissal of a member or deputy member of the Constitutional Court and are derived from the Kingdom Bill Common Court of Justice. In contrast to the Kingdom Bill, the procedure does not take place on the requisition of the Attorney-General before the Supreme Court, but on the requisition of the Attorney-General before the Common Court of Justice.

Articles 12 and 13

These provisions are drawn from the ELCH.

Article 14

Membership of the Constitutional Court is a part-time position. The members and deputy members receive remuneration that is laid down by national decree.

Article 15

Paragraph 1 provides that a clerk shall be assigned to the Court, to be appointed by national decree on the nomination of the Constitutional Court and to be suspended or dismissed by national decree, having heard the Court. Provision for the first appointment of the clerk will be made in the island ordinance adoption of the national ordinance Constitutional Court. A clerk is desirable in order to assure sufficient support.

Articles 16 and 17

Article 16 describes the task of the Court: deciding on the compatibility with the Constitution of a legal regulation, as referred to in Article 81(g), with the exception of uniform national ordinances, 81(h), 81(i) and 81(j) of the Constitution. This task is also included in the Constitution.

Article 17 provides for the commencement of action before the Court. In accordance with Article 127 of the draft Constitution, only the Ombudsman may file a case with the Court.

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An important reason for assigning the authorisation to instigate action to the Ombudsman is that this authority stands above the parties. Another reason is that it is not practical to create yet another new institution, in view of the limited scale of the country. In connection with the avoidance of unnecessary delays in the legislative procedure, the authorisation is limited to six weeks following the adoption of a legal regulation and before it enters into force, except in the event of an urgent interest. In that case, the Ombudsman's petition is inadmissible. According to paragraph 2, this is only the case in the following four circumstances¹: firstly, in the case of serious private or public damage. This means that delays will lead to disproportionate damage for target groups. Secondly, in the case of urgent or emergency regulation, in the event of incidents and crises. Thirdly, in the case of corrective legislation, if, for example, court decisions call for the adjustment of regulations. The fourth ground for an exception concerns international regulations.² The explanatory memorandum to a legal regulation must provide sound justification for the existence of an urgent interest. If, in the view of the Ombudsman, that justification is not convincing, the Ombudsman's petition may be admissible, despite the fact that, according to the legislator, there is an urgent interest.

Naturally, it is not acceptable that the Ombudsman should make use of the authority to take action 'arbitrarily'. In a petition to the Court, the Ombudsman must state and explain the grounds for his view that a legal regulation is incompatible with the Constitution. Otherwise, the Court will rule that the petition is inadmissible or unfounded.

The Ombudsman must also state in his petition which decision he requires of the Court. This may be full or partial overturning of the legal regulation. As this always concerns a legal regulated that has not yet entered into force, the legal and practical consequences of overturning it will not usually be substantial.

Articles 18-34

These Articles regulate the procedure for the Constitutional Court and are derived from the ELCH. Depending on the violation of the Constitution claimed by the Ombudsman, the President of Parliament or of the Council of Ministers will act as the other party.

Article 35

It is consistent with the task of the Court, the abstract assessment of legislation, that the Court should be able to overturn a legal regulation. This is laid down in Article 35. The actual and legal consequences of overturning a regulation will be limited, since the regulation has not yet entered into force. The consequence may be that the legislative process must recommence, this time in observance of the decision of the Court. The Court's decision is binding; it is not open to appeal. This, too, is consistent with the task and position of the Court.

¹ See Parliamentary Documents II 2009/10, 29 515, 309.

² Parliamentary Documents II 2009/10, 29515, 309.